

No. N/15/2022

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

Dated: 07.07.2022

Shri H.M. Manjunatha : Member

Shri M.D. Ravi : Member

O.P. No. 02/2022

BETWEEN:

1. Sri H. Ramanjenaya,
S/o. Late Sri. Hanumantharayappa,
Aged 68 years,
R/at Doddahalli Village,
Y N Hoskotehobli,
Pavgada Taluk,
Tumkuru District.

2. M/s. Sanvi Power Private Limited,
A Company incorporated under
the Companies Act 2013,
Having its registered Office at
G 5, Sai Kutir, Vidyanagar, Thanisandra
Bangalore-56007.
[Represented by its Director]

...PETITIONERS

[Represented by Sri Manmohan P.N., Sri Vinay N, Nithyananda M Bhat & Sri Datta prasad, Advocates for Manmohan P.N. Associates]

AND:

1. Bangalore Electricity Supply
Company Limited (BESCOM),
A Government of Karnataka undertaking
Having its registered office at
Corporate Office,
K.R. Circle,
Bengaluru – 560 001.
[Represented by its Managing Director]

...RESPONDENT

[Represented by Sri Shahbaaz Husain, Miss Stephania Pinto & Sri Yeshwanth M.C, Advocates for Precinct Legal]

ORDERS

- 1) The Petition is filed under Section 86(1)(f) of the Electricity Act, 2003 by the Petitioner praying for the following reliefs to: -
 - ii) Declare that the delay caused in Commissioning the project was due to Force Majeure events as per Article 8.3 of the PPA.
 - iii) Approve extension of time in commissioning the project by 6 months from the date of original Scheduled Commissioning Date under the PPA i.e., until 22.07.2017.
 - iv) Direct the Respondent to pay a tariff of Rs. 8.40/KWh as per Article 5.1 of the PPA from the date of initial supply of power i.e., 21.07.2017 till the expiry of the PPA.
 - v) Direct the Respondent to pay late payment surcharge at the rate of 1% per month on the arrears of tariff from the date of initial power supply i.e., 21.07.2017 till the date of realisation of the arrears.
 - vi) Direct the Respondent to refund the sum of Rs. 3,60,000/- which is illegally deducted by the Respondent as penalty.
 - vii) Direct the Respondent to refund a sum of Rs. 30,00,000/- which is illegally deducted by the Respondent as damages.
 - viii) Direct the Respondent to refund a sum of Rs. 6,04,980/- which is illegally deducted by the Respondent as GST.
 - ix) Grant such other reliefs to meet the ends of justice and equity.
- 2) The brief facts set out in this Petition are as under: -
 - a) The Petitioner No. 1 is the owner of land bearing Survey No. 81 measuring 21 Acres 31 Guntas situated at Chikkahalli Village,

Pavgada Taluk, Tumkuru District. The Petitioner No. 2 is a company registered under the Companies Act, 2013, and is engaged in the business of solar power generation. The Petitioner No. 1 was unable to make huge investments towards establishing the Solar power plant and hence Petitioner No. 2 Company was incorporated with Petitioner No. 1 as one of the promoters of the Company.

- b) The Government of Karnataka (GoK) amended the earlier Solar Policy and introduced the Solar Policy 2014-21 by Notification dated 22.05.2014 with the object inter-alia of harnessing the potential of solar resources in the State. With the change in technology solar power which is a green source of energy is being considered as one of the alternatives to augment the current sources. Pursuant there to Government of Karnataka passed order dated 26.08.2014 issuing guidelines to ESCOMS and Karnataka Renewable Energy Development Limited (KREDL) for implementation of the said solar policy.
- c) Pursuant to the solar policy and guidelines, KREDL issued notifications dated 19.09.2014 & 01.10.2014 inviting online applications from land owners to set up 1 to 3 MWs solar power plants in Karnataka. The Petitioner No. 1 submitted his application and after evaluation of the application the Committee concerned accepted the proposal of Petitioner No. 1 for allotment of solar power project. Thereafter, KREDL issued a letter of award dated 17.03.2015 (Annexure-A) for generation of 3 MWs.

- d) The Petitioner No. 1 and the Respondent executed PPA on 22.07.2015 (Annexure-B), the Board of Directors of the Respondent in their meeting held on 25.07.2015 consented for the purchase of solar power from the project developed by Petitioner No. 1. The PPA was thereafter approved by the Commission on 01.09.2015.
- i) DELAY IN ISSUANCE OF LAND CONVERSION ORDER AND REQUISITE NOCs:
- e) Upon execution of the PPA, the Petitioner No. 1 began taking steps for timely implementation of the project and applied for alienation sketch/11E sketch in respect of Survey No. 81 on 26.08.2015 (Annexure-C). In the mean while the Karnataka Land Revenue (Amendment) Act, 2015, was passed by inserting Section 95(10) which provided for deemed conversion of land for setting up solar power generation subject to payment of conversion fine and other fees. The Petitioner No. 1 submitted application dated 20.10.2015 (Annexure-D) to the Deputy Commissioner, Tumkuru District to grant conversion of the project land in Survey No. 81 measuring 21 Acres 31 Guntas situated at Chikkahalli Village, Y.N. Hosakote Hobli, Pavagada Taluk for the purpose of establishing the solar power project. The Revenue Department issued circular dated 01.12.2015 (Annexure-E) inter-alia pointing out that for the purpose of obtaining deemed conversion order for solar power project, the applicant has to furnish a copy of the letter of award issued by KREDL, RTC, NOC regarding proceedings under the PTCL Act and NOC regarding

acquisition of the property and that there is no violation of the grant conditions.

- f) The 11E sketch was not yet issued to the Petitioner No. 1 by the Revenue Department despite lapse of over 3 months from the date of application. In the meanwhile, the Petitioners came to know that the Railways proposed to lay a new railway line from Tumkur to Rayadurga and proposed the acquisition of a part of land belonging to the Petitioner No. 1. In view of the above the Petitioner No. 1 submitted another representation dated 10.12.2015 (Annexure-F) requesting the Tahsildar, Pavagada Taluk to provide 11E sketch by leaving out a portion of land for the railway line.
- g) The Petitioner No. 1 submitted representations dated 18.01.2016 to the Tahsildar, Pavagada Taluk for issuance of NOC regarding violation of land grant conditions, NOC regarding land acquisition and NOC regarding pendency of PTCL proceedings (Annexures-G to J). Thereafter, the Petitioner No. 1 gave another representation on 25.01.2016 (Annexure-K) to the Tahsildar Pavagada Taluk to issue 11E sketch leaving out the portion of land required for railways.
- h) In the month of February 2016, the Petitioner No. 1 was informed by the Revenue Department that the 11E sketch cannot be issued as the Railways Department has proposed to acquire part of the 1st Petitioner's land. Upon further enquiry the Petitioner No. 1 was informed that the Railways Department was yet to submit concrete

proposals for the railway line and consequent acquisition of land. In view of the lack of clarity on the matter, the Petitioner No. 1 issued a letter dated 11.03.2016 (Annexure-L) to the CAO, South Western Railway, Bengaluru requesting for information on the extent of land required by the Railways Department along with alignment details. In fact, the draft layout drawing for the subject which was submitted on 11.11.2015 was ordered to be revised by leaving out some space for the railway line and the revised layout drawing was already as early as 25.03.2016. The copies of the draft layout drawing and the revised drawing are produced as Annexure-M & N respectively. In spite of the prompt efforts of Petitioner No. 1 to ensure that the project is completed in a timely manner, the implementation of the project was delayed due to delay in obtaining conversion order and NOCs on account of the proposed acquisition.

- i) The Petitioner issued a letter dated 19.07.2016 to the Special Land Acquisition Officer requesting for detailed information as regards the acquisition in the project land. The Land Acquisition Officer issued endorsement dated 22.07.2016 (Annexure-P) stating that the land in Survey No. 81 is to be acquired for the purpose of Tumkur-Rayadurga Railway Scheme. However, no details of the acquisition such as extent and alignment were given in the said endorsement. A representation dated 25.07.2016 (Annexure-Q & R) was submitted informing the MD, BESCO and KREDL to permit the Petitioners to setup the plant at an alternative location and again requested vide

letter dated 21.09.2016 (Annexure-S), 27.10.2016 (Annexure-T) for change of location and for extension of scheduled commissioning date by 3 months and also for relaxing the conditions precedent as the reasons for delay were beyond the control of the Petitioners. Thereafter, KREDL vide communication dated 14.11.2016 (Annexure-W) informed the Petitioner No. 1 that there is no scope for shifting of the project to an alternative location.

- j) Petitioner No. 1 again issued letter dated 30.12.2016 (Annexure-X) to SLAO requesting for details regarding the acquisition for railway line. Subsequently, requested vide letter dated 05.01.2017 (Annexure-Y) to the Chief Engineer, Construction South Western Railway, Bengaluru for finalization of design to be expedited at the project location so that the Petitioner No. 1 could establish the project in the land leaving out the portion required for the proposed railway line. The Petitioner No. 1 issued letter dated 18.02.2017 (Annexure-Z) to the SLAO stating that only 16 Acres of land was required for the project and requested the details regarding area location of the land proposed to be acquired in Survey No. 81. The Special Land Acquisition Officer vide endorsement dated 21.02.2017 (Annexure-AA) replied stating that the land in Survey No. 81 is proposed to be acquired for the formation of the railway line but failed to point out the alignment and the extent of land required for the said purpose. Thereafter, by endorsement dated 06.03.2017 (Annexure-AE) SLAO informed the Petitioner No. 1

that an estimated extent of 1 Acre 30 Guntas would be required for the purpose of formation of railway line.

- k) Even after lapse of more than 1 year and one month from the date of application the requisite NOCs in respect of land acquisition PTCL and land grant conditions were not issued by the concerned Authorities and then the Petitioner No. 1 again made representations dated 03.03.2017 (Annexure-AB to AD) for issuance of the said NOCs. Thereafter, Tahsildar issued alienation sketch/11E sketch on 08.03.2017 (Annexure-AG) and the Assistant Commissioner, Madhugiri issued NOCs dated 08.03.2017 (Annexure-AH, AJ & AK) in respect of land grant conditions, PTCL and land acquisition (excluding 1 Acre 30 Guntas) sought to be acquired for the railway line.
- l) The Petitioner No. 1 issued letter dated 09.03.2017 (Annexure-AL) to the Deputy Commissioner, Tumkuru seeking for conversion of land along with requisite NOCs and documents. The Deputy Commissioner, Tumkuru issued the land conversion order vide order dated 14.07.2017 (Annexure-AM).
- m) The details of delay in obtaining land conversion order and requisite NOCs from various Government Departments are as follows: -

Sl. No.	Description	Date of application	Date of issuance	Time taken by Authority for issuance
1.	11E sketch	26.08.2015	08.03.2017	560 days

2.	Land acquisition NOC	18.01.2016	08.03.2017	415 days
3.	Land grant conditions NOC	18.01.2016	08.03.2017	415 days
4.	PTCL NOC	18.01.2016	08.03.2017	415 days
5.	Land conversion order	20.10.2015 (without 11E sketch)	14.07.2017	633 days
6.	Land conversion order	10.03.2017 (with 11E sketch)	14.07.2017	126 days

ii) DELAY IN ISSUANCE OF EVACUATION APPROVAL BY KPTCL: -

- n) The Petitioner No. 1 submitted application dated 13.01.2017 (Annexure-AN) to Chief Engineer (Ele), Transmission Zone, KPTCL along with documents and fees for approval of the evacuation scheme to the nearest sub-station at Y.N. Hosakote. Although the Petitioners submitted the application for evacuation approval along with the DD in accordance with the circular dated 26.09.2016 the office of Chief Engineer KPTCL refused to accept the DD and the Petitioner was asked to submit the same in the office of EE (Ele), TL & SS, KPTCL. Since, EE (Ele), TL & SS, KPTCL has not accepted the DD for processing fees without intimation letter the Petitioner No. 1 issued letter dated 27.01.2017 (Annexure-AP) to Chief Engineer (Ele), Transmission Zone, KPTCL for issuance of letter of intimation for acceptance of the fees. Thereafter, KPTCL issued communication/ letter of intimation dated 02.02.2017 (Annexure-AQ) directing the Petitioner No. 1 to pay a sum of Rs. 57,500/- towards processing fee for evacuation of power from the project site of the Petitioners. The

Petitioners made payments to KPTCL and KPTCL issued receipts dated 07.02.2017 acknowledging the same. After a lapse of over 3 months KPTCL issued Tentative evacuation scheme approval through through communication dated 16.05.2017 (Annexure-AR) and issued regular evacuation scheme approval dated 23.05.2017 (Annexure-AS).

- o) The Petitioner No. 1 issued letter dated 29.05.2017 (Annexure-AT) requesting KPTCL to spare land at the station for the terminal bay and to extend the validity of approval upto 22.07.2017. The Petitioner No. 1 also issued letter dated 29.05.2017 (Annexure-AT & AV) to the Executive Engineer (Ele), O & M Madugiri Division stating that the evacuation line would be done on self-execution basis and requested for an estimation for evacuation line. The Respondent vide communication dated 18.07.2017 (Annexure-AW) granted approval for construction of new 11 KV line along with supervision charges and the KPTCL issued intimation for payment of necessary charges for the same vide communication dated 19.07.2017 (Annexure-AX). Accordingly, the Petitioner No. 1 paid the charges to the Respondent and KPTCL on 20.07.2017.
- p) The delay in issuance of Evacuation approval by KPTCL is as follows:

Sl. No.	Description	Date of application	Date of issuance	Time taken by Authority for issuance
1.	Evacuation approval	13.01.2017	23.05.2017	130 days

iii) EXTENSION OF TIME AND COMMISSIONING OF THE PROJECT: -

- q) The Petitioner No. 1 issued letter dated 22.12.2016 (Annexure-AY) (the Petitioner No. 1 said it is wrongly mentioned as 27.10.2016 in the letter) to the Respondent for grant of extension of time for commissioning the project by 6 months retaining the tariff of 8.40/ unit. Again, he submitted representation dated 18.01.2017 (Annexure-AZ) (the Petitioner No. 1 said it is wrongly mentioned as 17.12.2017 in the letter) requesting the Respondent to grant extension of SCOD upto 6 months from the date of the approval. Another such representation was issued by the Petitioner No. 1 to the Respondent vide letter dated 01.02.2017 (Annexure-AAA). The Respondent vide communication dated 02.03.2017 (Annexure-AAB) informed the Petitioners that the extension of time for Scheduled Commissioning date has been approved for 6 months from the Scheduled Commissioning Date as per Clause 2.5 and Article 8 of PPA.
- r) The Commission vide communication dated 16.03.2017 (Annexure-AAC) informed the ESCOMs that the extension of time should not be considered as a routine exercise except under extraordinary conditions to be proved by project developer within the scope of the original PPA and directed the ESCOMs not to issue any extension of time beyond the Scheduled Commissioning date as per the PPA without obtaining prior opinion of the Commission. Though the extension of time was granted by the Respondent, the Commission issued communication dated 05.04.2017

(Annexure-AAD) directing the Respondent to advise SPD to file a Petition before the Commission with all necessary documents seeking approval for extension of time. In the light of the said communication dated 05.04.2017, the Respondent issued communication dated 15.04.2017 (Annexure-AAE) to Petitioner No. 1 directing the Petitioners to file a Petition before the Commission and to seek for an approval of extension of the commissioning date. The Managing Director of the Respondent issued communication dated 05.04.2017 (Annexure-AAF) to ACS to Government, Energy Department stating that ESCOMs have power to extend the SCOD for a 6 months as per the PPA and sought directions as to whether to consider extension of SCOD upto 6 months by considering delay as per Clause 2.5 of PPA and Article 8 as there is delay in issue of approvals by various Government entities without levy of penalty and applicable tariff. Similar communications dated 18.04.2017 (Annexure-AAG) and 22.04.2017 (Annexure-AAH) were issued by the Respondent to the State Government requesting to recommend the Commission regarding the action taken by BESCO in giving extension of SCOD upto 6 months by considering the delay as per PPA Clause 2.5 and Article 8.

- s) The Government of Karnataka requested vide letter dated 25.04.2017 (Annexure-AAJ) for approval for extension of COD of solar power projects as there are delay in approvals from various Government entities. The minutes of meeting dated 11.05.2017

(Annexure-AAK) of the Respondent would reveal that the Board of Directors of the Respondent ratified the action of the MD, BESCO in extending SCOD by 6 months. The Commission vide letter dated 07.07.2017 (Annexure-AAL) stated that it has received letter dated 23.06.2017 (Annexure-AAM) from the State of Karnataka wherein the Government has accepted the plea of the ESCOMs in the matter of extension of time to achieve COD of the solar project under Farmers Scheme invoking the Force Majeure conditions of the PPA. Hence, requested the Commission to approve such extension of time. In the light of the said letter the Commission directed the ESCOMs to permit the developer to commission the project beyond the original Scheduled COD but the Commission decided to examine the merits of each individual case and directed the ESCOMs to advise the Developers to file a Petition before the Commission. Pursuant there to the Respondent issued communication dated 01.08.2017 (Annexure-AAN) directing the Petitioners to approach the Commission.

- t) Petitioner stated that the Respondent has erroneously deducted a sum of Rs. 3,60,000/- from the bills (Annexure-AAP) of the Petitioners as penalty for not achieving the Conditions Precedent as stipulated in the PPA and also has recovered a sum of Rs. 30,00,000/- towards damages and also deducted Rs. 6,04,980/- as GST at the rate of 18% on the LD and penalty. On 21.07.2017 (Annexure-AAQ) Chief Electrical Inspector to Government (CEIG) issued approval to the

electrical installation pertaining to 3 MW solar power plant of the Petitioner No. 1. The KPTCL granted provisional interconnection approval vide communication dated 21.07.2017 (Annexure-AAR), the project was commissioned on 21.07.2017 and the same was recorded in the minutes of meeting of the Respondent (Annexure-AAS).

iv) FINANCIAL HARDSHIP AND FILING OF WRIT PETITION: -

- u) The Petitioner No. 1 mortgaged the land in Survey No. 81 in favour of State Bank of India for the purpose of obtaining the loan to the tune of Rs. 13 Crores for the power project. The copy of the arrangement letter dated 30.07.2017 is produced as (Annexure-AAT). The mortgage deed was executed on 24.01.2018 (Annexure-AAV). The Bank has released only 8 Crores in as much as the Respondent is releasing the payments at the rate of Rs. 4.36/KWh instead of Rs. 4.84/KWh as agreed in the PPA. The Respondent is liable to pay at the agreed rate of Rs. 8.40/unit as per Article 5.1 of the PPA from the date of initial power supply till date along with late payment surcharge. The payment of reduced tariff is without any basis and is contrary to the PPA. Because of the railway line and consequent change to the layout, the Petitioners had to invest in additional equipments and control room resulting in increased capital costs.
- v) In the meanwhile, the Petitioners have filed WP No. 8672/2018 (Annexure-AAW) before the Hon'ble High Court of Karnataka, Bengaluru seeking for a writ of mandamus against the Respondent to

pay the tariff of Rs. 8.40/KWh as per the PPA. Subsequently, the Writ Petition was dismissed as withdrawn with liberty to approach the Commission vide order dated 01.04.2021 (Annexure-AAX). In the said order the Hon'ble High Court also observed that the delay in filing the instant Petition would be construed liberally taking note of the fact of pandemic situation as well as the Petitioners were before Hon'ble High Court since 2018 prosecuting their grievance. The Ministry of New and Renewable Energy, GOI has issued communication dated 09.04.2018 (Annexure-AAY) to the Additional Chief Secretary, Government of Karnataka directing the State Government to take up the matter as regards restoring the original tariff.

w) The Petitioners have raised the bills in March 2018 but the Respondent has been paying at Rs. 4.36/KWh even as on date without any justification. The payment of reduced tariff is without any basis and is contrary to the PPA. Hence, the Petition is filed which is in time, further, the order of Hon'ble Supreme Court in extending the limitation in *Suo Moto WP (Civil) No. 3/2020* is in force as on the date of filing of the Petition. The Petitioners being highly aggrieved by the acts of the Respondent are constrained to file this petition inter alia seeking for extension of time and for direction to the Respondent to pay tariff at the rate of Rs. 8.40/KWh as per the PPA and for such other reliefs on the following grounds: -

i) The delay in commissioning the project is due to force majeure events which are beyond the control of the petitioners and as

such the petitioners are not responsible for the delay caused in commissioning the project.

- ii) The Petitioners were prevented from implementing the project for most of the 18 months provided under the PPA for commissioning the project in as much as the petitioners were not issued requisite NOCs and land conversion order. Without the above approvals the Petitioners could not have set up the solar power plant and the delay in grant of such approvals is not within the reasonable control of the Petitioners. Hence the delay in commissioning the project is due to Force Majeure Events.
- iii) Another aspect that contributed to the delay was the delay in issuance of evacuation approval by KPTCL. The KPTCL has issued regular evacuation approval on 23.05.2017 i.e., after a lapse of 130 days from the date of filing of the application. Without the said approval the Petitioners could not commission the project.
- iv) The delay in obtaining the land conversion order, 11E sketch and the requisite NOCs was due to the acquisition of part of the project land by railways to widen the railway line from Tumkuru to Rayadurga. The delay on part of the railways department in finalizing the acquisition and the consequent delay in issuance of approvals can by no stretch of imagination be attributed to the Petitioners. The same was totally beyond their control.
- v) The Petitioner have also complied with all requirements under Article 8.3(b) of the PPA. The Petitioners informed the

Respondent of the Force majeure event of acquisition vide letter dated 25.07.2016. The successive and inordinate delay on the part of the Authorities in responding to the requests of the Petitioners has resulted in delay in commissioning the project.

- vi) In the light of the Articles 2.5.1 & 2.5.2 the Petitioners are entitled for extension of time. The Respondent vide communication dated 02.03.2017 has already granted extension of time by 6 months from the Scheduled Commissioning Date i.e., upto 22.07.2017 and the Petitioners commissioned the project on 21.07.2017 therefore, the Petitioners have commissioned the project within the Scheduled Commissioning Date and are entitled for payment at the rate of Rs. 8.40/KWh.
- vii) Further Article 8.3(a) of the PPA categorically spells out the intention of the parties to the agreement, therefore, the Petitioners ought not to be burdened with reduced tariff and damages for no fault of theirs.
- viii) The delay in fulfilling the conditions precedent squarely falls within force majeure events as explained above. Hence, no penalty could have been levied by the respondent for the same. Consequently, the petitioners are entitled for refund of the said amount.
- ix) The Respondent has failed to notice that the project was commissioned within the SCOD as extended by the respondent i.e., 22.07.2017. Having granted extension of time for SCOD by 6

months on account of force majeure events, the question of imposing penalty does not arise. Therefore, the imposition of the above penalties is contrary to the PPA and the respondent is liable to refund the same to the petitioners.

- x) The payment of reduced tariff by the Respondent is bad in law. Hence, the respondent is liable to pay the entire amount of balance tariff from date of commissioning of the project till date along with late payment surcharge as per Article 6.4 of the PPA at the rate of 1% per month on the bill amount.
 - xi) The amount of Rs. 6,04,980/- deducted by the Respondent as GST on the penalty and liquidated damages is also liable to be refunded to the Petitioners.
 - xii) The Petitioners have obtained loan of large amounts to implement the project in question and to perform their obligations under the PPA. The acts of the respondent in imposing penalty and paying a tariff of Rs. 4.36/- per unit which are illegal and contrary to the PPA. Hence, it is just and necessary to allow the present Petition as prayed for in the interest of justice and equity.
- 3) Upon notice, the Respondent appeared through his counsel, and filed statement of objections to the Petition stating that the Petition filed by the Petitioners is devoid of merits and the same needs to be dismissed in limine.
- 4) Further stated that the Effective Date as per Article 1 of the PPA is the date of signing i.e., 22.07.2015. As per the Article 2.1 of the PPA, the Petitioner

was granted 365 days to achieve the Conditions Precedent (21.07.2016) and as per Article 4.1 (c) of the PPA, 18 months are granted to commission the project (21.01.2017). The Petitioner was unable to commission the Project within the time limit specified in the PPA and the Project was commissioned only on 21.07.2017.

- 5) The Petitioners have attributed the delay in commissioning the project to delay in obtaining the land conversion order and in obtaining evacuation approval. The Petitioners sought for an extension of six months to commission the project due to the alleged delays vide its letter dated 27.10.2016 to the Respondent relying on Article 8 of the PPA, i.e., the Force Majeure clause. The Respondent granted the said extension was limited to the extension of SCOD for commissioning the project only and not extension of conditions precedent and the Respondent has specifically stated that the terms of the PPA would remain unaltered even after grant of the extension of 6 months to commission the project. Further, the Respondent vide letter dated 31.03.2017 had communicated that extension of SCOD was subject to condition and extension was purely based on request of solar power developer for purpose of commissioning the power plant. Furthermore, it is pertinent to note that the Petitioner had not sought for extension of conditions precedent and an extension to fulfil conditions precedent was accordingly never granted.
- 6) Further, the Commission vide its letter dated 16.03.2017 directed the ESCOMs to inform the Generators to file a Petition before KERC to seek extension to commission the project. The Respondent vide its letter dated

15.04.2017 (Annexure AAE to the Petition) in compliance with the letter dated 16.03.2017, intimated the Petitioner to approach the Commission by filing an Original Petition. The Petitioner has miserably failed in complying with the direction the Commission and has filed the Original Petition only on 03.01.2022 after a delay of around 5 years and this delay of 5 years has been remained as unexplained. On that ground alone, the instant Petition ought to be dismissed at the very outset. Section 3(1) of the Limitation Act, 1963 clearly states that any suit instituted, appeal preferred, and application made after the prescribed period is liable to be dismissed even where limitation has not been set up as a defence.

- 7) The Petitioner had approached the Hon'ble High Court vide WP No. 8672/2018 seeking to quash the Commission letter dated 16.03.2017 directing the Petitioner to approach the Commission. The Hon'ble High Court has remanded the matter to the Commission. Despite the clear instructions of the Commission and the Respondent, the Petitioner had delayed in filing the Original Petition inordinately to the detriment of the Respondent. The Petitioner has further claimed LPS on delay payments despite its own delay in filing the Original Petition before the Commission. The Petitioner cannot be permitted to take advantage of its improper decisions.
- 8) The Petitioner has alleged a delay of 130 days on the part of the KPTCL in obtaining evacuation approval. The Petitioner has alleged that the KPTCL refused to process the application for evacuation approval in the absence of the requisite documents such as intimation letter. However,

the Petitioners have failed to implead KPTCL as a party to the instant Petition. The Commission cannot pass an effective order in respect to the instant Petition in the absence of KPTCL as it cannot otherwise be determined if the delay was solely attributable to the governmental authorities which is sine qua non for the Petitioners to avail the benefit of the Force Majeure Clause under Article 8 of the Power Purchase Agreement dated 22.07.2015 ("PPA").

- 9) It is further submitted that, as per Order 1 Rule 9 of the Code of Civil Procedure, 1908 ("CPC"), a suit may not be defeated by reason of the misjoinder or non-joinder of parties, and every suit may be dealt with respect to the controversy so far as regards the rights and interests of the parties to the dispute provided that nothing in Rule 9 shall apply to non-joinder of a necessary party. Therefore, the instant Petition is liable to be dismissed on the ground of non-joinder of necessary party.
- 10) The Petitioner has averred that an application for land conversion was made on 10.03.2017 and 07.07.2017 and was granted only on 14.07.2017. Such averment is denied by the Respondent. The application for land conversion dated 10.03.2017 and 07.07.2017 was not a complete application as the 11E sketch, NOC was not made available to the concerned authorities processing the land conversion application. The NOC, 11 E sketch was made available only on 09.03.2017 to the Deputy Commissioner. Wherefore, due to the delay of the Petitioner in providing a complete application to the government authorities, the land conversion order was granted on 14.07.2017. The application for land

conversion was made only on 10.03.2017 and 07.07.2017 after a delay of almost 20 months and the said application was incomplete for want of NOC from Tahsildar. The Petitioner has not provided any explanation for such inordinate delay in applying for approvals.

- 11) The Petitioner has averred that Railways proposed to lay a new railway line from Tumkuru to Raidurga and proposed acquisition of the land belonging to the Petitioner. An NOC was required from the Tahsildar to proceed with the land conversion process. An application to Tahsildar for NOC was made only on 10.12.2015 after a delay of 5 months from the effective date of the PPA. The NOC was received on 08.03.2017 and sent to the deputy commissioner only on 09.03.2017. Wherefore, the complete application was made only on 09.03.2017.
- 12) For any party claiming force majeure, it is incumbent on the said party to prove that all necessary possible measures were taken in a timely manner to carry out the contractual obligation. However, it is unequivocally clear that the Petitioner has had a negligent approach towards commissioning the project.
- 13) In respect of the evacuation approval, the Petitioners allege that the evacuation application was submitted on 13.01.2017 and was granted only on 23.05.2017. The Petitioner has applied for evacuation approval after a delay of about 1 year 5 months. The Petitioner has stated that in view of the issues in land conversion process, the application for evacuation of power has delayed. However, land conversion process does not hinder the process of evacuation approval and KPTCL has

previously clarified on the said point. It is pertinent to note that the petitioner had not acquired land conversion even when final evacuation approval was issued.

- 14) The Petitioners have alleged that KPTCL has refused to process the application of the Petitioners in the absence of the requisite documents. It is submitted that the application of the Petitioner was incomplete. The Petitioner had requested KPTCL to accept the DD for processing fee, however, the said DD was not submitted along with an intimation letter and the KPTCL had denied accepting the same. KPTCL has passed Circulars elaborating the procedure for Evacuation Approval. The Petitioners wrote to KPTCL on 27.01.2017 for issuance of letter of intimation for payment of fees. The same was issued immediately by KPTCL vide its letter dated 02.02.2017. Accordingly, the Petitioner made payments to KPTCL and KPTCL issued receipts on 07.02.2017. Wherefore, it is false to state that KPTCL has delayed in providing evacuation approval.
- 15) According to the Petitioner, the KPTCL issued the tentative evacuation approval on 16.05.2017 and the regular evacuation approval was issued on 23.05.2017. The date of acceptance of the evacuation approvals by the Petitioner is unknown to the instant Respondent. As KPTCL has not been impleaded as a party to the instant Petition, it cannot be said definitively that the delay is solely attributable to the governmental authorities and hence, the Petitioner cannot rely upon the Force Majeure Clause of the PPA.

- 16) It is respectfully submitted that the terms of the PPA clearly state that the occurrence of a Force Majeure Event does not excuse the non-performing Party's (in this case, the Petitioners') obligations that were to be performed prior to the occurrence of the Event as per Article 8.3(b)(v) of the PPA.
- 17) It is further contended that the applicability of the Force Majeure Clause to the Petitioners is subject to the condition that the Petitioners have not been negligent in the performance of their obligations as per Article 8(b)(iv) of the PPA.
- 18) The application for Evacuation Approval was submitted after more than a year long delay. It is submitted herein that the Petitioners were well aware that the Project was to be commissioned in a time-bound manner and the consequences in delaying the project. Accordingly, the time taken by the Petition to commission the project can only be termed as negligent.
- 19) A table demonstrating the delay by the Petitioners is elaborated below: -

Sl. No.	Particulars	Effective Date	Date Applied for	Delay
1	Land Conversion Order	22.07.2015	10.03.2017 and 07.07.2017	20 months
2	Power Evacuation Approval	22.07.2015	13.01.2017	1 year 5 months

- 20) It is submitted that the Force Majeure Clause covers only unforeseen events and time taken by governmental authorities cannot be said to fall under this category. The Hon'ble High Court of Delhi in Sunborne Energy Rajasthan Vs NTPC Vidyut Vyapar Nigam Ltd [(2019) SCC Online Del 8079] held that the time required for obtaining permits and approvals from

governmental and public sector authorities are not unforeseeable and consequently, could not be taken to amount to a Force Majeure Event.

The relevant portion of the judgement is extracted below:

“32. In NTPC Vidvut Vyapar Nigam Ltd. v. Precision Technik Pvt. Ltd. 2018 SCC OnLine Del 13102, this Court noted that in view of Article 3.1 and 4.1.1 of the PPA, the Solar Power Developer (SPD) should be well aware of all the permissions that would be required to be taken for ensuring commencement of supply of power by the Scheduled Commissioning Date and that it could not pass off its burden to NVVN due to mismanagement of its own affairs. The Court held that such delays arising while dealing with governmental and public sector authorities being normal and foreseeable, cannot amount to a Force Majeure Event.

30. In Pasithea Infrastructure Ltd. v. Solar Energy Corporation of India 2017 SCC OnLine Del 12562, this Court held as under:

“24. I am afraid that the above submission of learned counsel for the petitioner cannot be accepted. As noted above, the RFS and the Letter (s) of Allocation clearly cast an obligation on the bidder, the petitioner herein, to identify the roof tops and also obtain the necessary clearances/permissions etc. for the execution of the work. The force majeure event is one which is beyond the control of the contractor and is “not foreseeable.” Before invoking the doctrine of Frustration/Force Majeure, it must be shown that the event, which has produced the frustration was one which the party to the contract did not foresee and could not, with the reasonable diligence, have foreseen. In the present case, the respondent had taken upon itself the obligation for not only identifying the roof tops but also to obtain permissions. It could have certainly foreseen that some permission may get delayed or even rejected by the Government Departments. It cannot, therefore, plead force majeure to justifying its failure.”

34. Force Majeure clauses are to be constructed strictly. The Arbitral Tribunal having rightly come to a finding that the delay was caused due to lack of reasonable care by the petitioner, the same does

not constitute a Force Majeure Event justifying grant of extension of time to the petitioner.” (emphasis applied)

- 21) It is submitted herein that the Petitioners were required by the terms of the PPA to notify the occurrence of the aforesaid delays to the Respondent herein in the manner prescribed by the PPA as per Article 8.3(b)(i). The Petitioners did not comply with the aforesaid clause in the PPA and are accordingly not entitled to the benefits of the Force Majeure Clause.
- 22) In *Himachal Sorang Power Ltd v. Central Electricity Regulatory Commission* [2015 SCC Online APTEL 148], it was held that there are specific provisions to be complied with for the applicability of force majeure events, the same cannot be exempted. The relevant paragraph reads as follows: -

*“22. As mentioned above, the appellant did not give the required notice under clause 13 regarding force majeure event fulfilling the requirements of the said clause, within a reasonable time and the appellant did not satisfy the respondent no. 2- Power Grid about the existence of the alleged force majeure event. The notice/communication dated 07.07.2011 sent by the appellant to the Respondent no. 2- Power Grid simply states that the open access is to commence from the date when Karcham Wangtoo-abdullapur Line (KWA) is ready and commissioned. The said communication cannot be said to be a notice in sufficient compliance of the provisions of clause 13 dealing with force majeure provided under the BTPA. When there are specific provisions to be complied with for the applicability of force majeure events, the said requirements cannot be legally ignored or exempted on the strength of some case law. The Hon’ble Supreme Court in *Dhanraj Govindram’s case (supra)* observed that force majeure includes any event over which the performing party has no control. In the case in hand, no legal notice fulfilling the requirements of clause 13 had been given by the appellant to the Respondent no.2 in order to get*

the benefit of such force majeure and it failed to satisfy the Respondent no.2 about the existence of such force majeure event. If the grounds leading to the delay in commissioning of the appellant's power plant are to be considered, no material to substantiate the said grounds has been placed by the appellant on record either before the Central Commission or before this Appellant Tribunal. The only ground pressed during arguments in the Appeal by the appellant is regarding sufficient geological surprises affecting major works, for which no notice fulfilling the requirements provided under clause 13 of the BTPA had been given. The learned Central Commission, in the impugned order, has given detailed and cogent reasons for not agreeing to the report prepared by Lahmeyer International Private Limited (Expert). We have quoted the said reasons in para 15.1 of this judgement. We find no force in the appellant's contention that the learned Central Commission did not cite sufficient or material reasons for disagreeing with the expert's report. We are further unable to agree to the contention of the appellant that the learned Central Commission failed to consider that the effects of the force majeure events, that occurred before 01.04.2012, had not ceased to operate. We agree to the finding recorded by the Central Commission in the impugned order because clause 13 dealing with force majeure clearly provides that the transmission/drawl of power shall be started as soon as practicable by the parties concerned after such eventuality has come to an end or ceased to exist. The said clause does not provide that the effect of force majeure to continue till the appellant is restored to its original position if there was no force majeure. If the appellant fails to restore or recover from the alleged force majeure for unreasonably long time, it cannot be held entitled to any benefit on that score."

- 23) The requirement to notify the existence of Force Majeure as held is Sorang was reiterated in Maruthi Clen Coal and Power Ltd Vs Power Grid Corporation of India [APL No. 212 of 2016 dated 07.11.2017]. The relevant part of the judgement reads: -

“12. ...Assuming that the provisions of the BTPA are applicable to the present case, the Appellant has not even abided by the timeline of 30 days prescribed in the BTPA. It is not possible to accept the submission that the CERC should not have adopted a technical approach and should have condoned the delay in sending notice. When the contract between the parties provide for a notice period, the said provision cannot be overlooked or diluted. Proviso to Clause 14.4 of the TSA makes such a notice a pre-condition for claiming relief. The said provision cannot be reduced to a dead letter. Notice is not an idle formality. The claim of party tests on it. It sets the claim of the party in motion. Any clause pertaining to notice has to be construed strictly. On this ground also the Appellant's claim is liable to be rejected. It must also be noted here that the notice is bereft of material particulars. It does not even mention the date when the accident is question occurred.

13. In this connection we may usefully refer to the judgement of this Tribunal in Himachal Sorang, where the Appellant therein had no given the required notice contemplated under Clause 13 of the BPTA regarding occurrence of Force Majeure event. This Tribunal observed that where there are specific provisions to be complied with for the applicability of Force Majeure events, the said requirement cannot be ignored. The appeal was in the circumstances dismissed...”

- 24) With regard to the contentions of the Petitioner that it was affected by force majeure events, it is submitted that invocation of Force Majeure clause under Article 8 of the PPA has to be done strictly in the manner stipulated. Due notice of occurrence of Force Majeure Event had to be given within reasonable time. Admittedly, the Petitioner has not issued Force Majeure notice as required under the PPA.
- 25) It is submitted that Article 8.3 of the PPA clearly states that an event caused on account of negligent act, intentional omission or errors cannot

be considered as a force majeure event. Accordingly, it is submitted that the Petitioners herein cannot be permitted to avail the benefits of the Force Majeure Clause contained in Article 8.3 of the PPA.

- 26) It is submitted that on account of delayed commissioning, the Petitioners project has incurred a lower capital cost than what was anticipated at the time of deciding upon the tariff. Such benefit ought to be passed onto the consumers in the form of a lower tariff. The Petitioner has not produced any documents to prove that lower capital costs were incurred. Not having placed sufficient documents before this Commission proving the date of investments, the Petitioner cannot seek the benefit of the tariff of Rs. 8.40/-.
- 27) The tariff of Rs. 4.36/- is applicable to the Petitioners project for the following reasons: -
- a) Delay in commissioning of the project has an impact on the tariff applicable on the supply of power from the power plant and this Commission has the exclusive jurisdiction to determine the tariff for supply of electricity to a distribution licensee. The extension of time for commissioning of the project if allowed would entitle the Petitioner to a higher tariff, which would not be justified or fair. The payment of a higher tariff would result in a higher tariff to the consumer, thereby adversely affecting the public interest.
 - b) The date of commissioning of the Project is 21.07.2017 which is well beyond the SCOD. The Petitioner has accordingly incurred much lesser capital cost than what was anticipated in the 2013 tariff order

of KERC providing tariff of RS. 8.40/- per unit. Wherefore, such reduction of cost shall in all fairness be passed on to the consumers by reducing the tariff under Article 5.1 of the PPA.

- 28) Wherefore, in view of the aforementioned grounds, the arguments that the varied tariff of INR 4.36/- per unit is bad in law and accordingly, that the answering Respondent herein is obliged to pay the original tariff amount of INR 8.40/- is untenable, baseless and is liable to be dismissed.
- 29) The Petitioners have further argued that the deduction of damages, penalty and GST on the same is liable to be refunded. Additionally, the Petitioners have prayed for late payment surcharge ("LPS") at 1% of the total bill amount. However, such prayer for LPS on delayed payments is baseless as the Petitioner has not showcased any provision of the PPA that entitles the Petitioner to LPS. Moreover, the Petitioner has delayed in filing the Original Petition before this Commission for over 5 years and the Respondent cannot be penalized for lackadaisical and negligent approach of the Petitioner.
- 30) Furthermore, the Respondent is entitled to claim damages for delayed commissioning and more so in delayed fulfilment of conditions precedent as per the mandate of the PPA. The Petitioner has deprived the Respondent of its legitimate expectation of power as mandated under the PPA and has forced the Respondent to look for expensive power elsewhere to fulfil its requirement on account of delayed commissioning. No extension was granted for delay in conditions precedent. The Petitioner has attempted to achieve finance the project only on 24.01.2018 to avail

a loan from State Bank of India which has delayed in attaining financial closure of the project. Such inordinate delay cannot be excused and the Petitioner cannot seek advantage of the same.

- 31) It is further submitted that the Respondent has been paying the Petitioners the lower tariff pursuant to the terms of the PPA as mutually agreed upon by the Parties. Hence, the Respondent is not liable to pay Late Payment Surcharge to the Petitioners as per the terms of Article 6 of the PPA. Wherefore, in light of the aforementioned facts and circumstances, it is prayed before this Commission to dismiss the present Petition with no costs.
- 32) Heard the arguments on both sides and perused the records.
- 33) At this stage the below mentioned issues arise for our consideration.

1. **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?
2. **Issue No. 2:** Whether the Petition filed by the Petitioner is within the period of limitation?
3. **Issue No. 3:** Whether the Respondent proves that the Petition is not maintainable for want of non-joinder of necessary parties?
4. **Issue No. 4:** For what relief the Petitioner is entitled to?
5. **Issue No. 5:** What Order?

The issue No. 2 is treated as preliminary issue.

- 34) **Issue No. 2:** Whether the Petition filed by the Petitioner is within the

period of limitation?

- 35) During the course of arguments, the Learned Counsel for the Petitioners submitted that the Petitioners have raised the bills in the month of March 2018. The Respondent has been paying at Rs. 4.36/KWh even as on the date without any justification. Hence the Petition filed is within time because the cause of action is continuing. The Petitioners were bonafidely prosecuting the Petition before the Hon'ble High Court in WP No. 8672/2018 and the said period may kindly be excluded for the purpose of limitation as per Section 14 of the Limitation Act. The order of the Hon'ble Supreme Court in extending the limitation in Suo Moto Writ Petition (C) No. 3/2020, dated 10.01.2022 was in force as on the date of the filing of the Petition. In view of the orders passed by the Hon'ble Supreme Court and observations made by the Hon'ble High Court of Karnataka, the delay in filing the present Petition has to be condoned.
- 36) By way of reply the Respondent Counsel has submitted that, as per Section 3(1) of the Limitation Act 1963, any suit instituted, appeal preferred and application made after the prescribed period is liable to be dismissed even where limitation has not been set up as a defence. Further stated, that the cause of action in the instant case arose in the month of July 2017 i.e., when the Petitioners raised bills at the rate of Rs. 8.40/- and the Respondent herein paid the tariff at the rate of Rs. 4.36/unit. The instant Petition has been filed on 03.01.2022, accordingly, there has been an unexplained delay of nearly 5 years in filing the instant Petition.

- 37) It is true that, the Petitioner had approached Hon'ble High Court of Karnataka in WP No. 8672/2018 seeking to quash the letter issued by the Commission dated 16.03.2017 directing the Petitioner to approach the Commission. The Hon'ble High Court was pleased to remand the matter to the Commission, despite, the clear instructions of the Commission and the Respondent, the Petitioner had delayed in filing the original Petition which is detrimental to the interest of the Respondent. Hence, the instant Petition has to be dismissed as being barred by limitations.
- 38) According to the Petition averments the cause of action in the instant dispute arose in March 2018 i.e., when the Petitioners raised bills at the rate of INR 8.40/unit of energy and the Respondent paid the varied tariff of INR 4.36/unit. The instant Petition was filed on 03.01.2022 and there has been an unexplained delay of nearly 4 years in filing of the present Petition whereas, other developers in the same category of 1-3 MW under Farmers category had filed Petitions before the Commission as per the directions of the Respondent based on the instructions given by the KERC. But the present Petitioner disobeyed the said directions and had not filed any Petition before the Commission within the period of limitation.
- 39) As per the directions of the Commission vide its letter dated 16.03.2017 directing the ESCOMs to inform the generators to file a Petition before KERC to seek extension to commission the project. The Respondent herein in compliance with the letter dated 16.03.2017 intimated the Petitioner to approach the Commission by filing an original Petition. But the Petitioner

miserably failed to comply with a direction of the Commission and has filed the present Petition only on 03.01.2022 with a delay of nearly 4 years.

- 40) On perusal of the records available it is noted that, the PPA was executed between the parties on 22.07.2015. As per Article 4.1(c) 'the SPD shall achieve scheduled date of completion and the commercial operation within 18 months from the effective date'. As per Article 1.1(xii) 'Effective date shall mean date of signing of the agreement by the parties'. Hence, SCOD is 21.01.2017. The Petitioner commissioned the project on 21.07.2017.
- 41) Due to the reasons of Force Majeure as assigned by the Petitioner in the Petition he could not achieve the SCOD on or before 21.01.2017 as per terms and conditions of PPA. Thereby, he made requests to the Respondent for extension of time of 6 months from the date of SCOD under Force Majeure events as per the letters (Annexure-AY, AZ & AAA). As per Annexure-AAB the BESCO has communicated the Petitioner No. 1 through a letter dated 02.03.2017 approving extension of time for Scheduled Commissioning Date for 6 months from the date of SCOD as per PPA Clause 2.5 & Article 8. As per Annexure-AAC the Commission has written a letter to the Managing Directors of all the ESCOMs dated 16.03.2017 stating that extension of time should not be considered as a routine exercise except under extraordinary conditions to be proved by the project developer, within the scope of the original PPA.
- 42) As per Annexure-AAJ, the Additional Chief Secretary to Government, Energy department, Bangalore has directed the Secretary, KERC through a letter dated 25.04.2017 to request the Commission to consider approval

to the extension of COD of solar power projects of capacity 1-3MW under Land Owning Farmers Category. Thereafter, the KERC has communicated the Managing Directors of all the ESCOMs through a letter dated 07.07.2017 (Annexure-AAL) to advise the concerned SPD/SPVs under land owners/farmers scheme to file a Petition, before the Commission with all the relevant grounds/documents for justifying their claims for extension of time under Force Majeure conditions of the PPA. As per Annexure-AAS, the solar power project has been commissioned on 21.07.2017.

- 43) As per above discussions, the cause of action arose to file the present Petition was on 07.07.2017 and subsequently during the month of March 2018. The relief sought by the Petitioners in the present Petition is to declare the delay caused in commissioning the project was due to Force Majeure events and also to direct the Respondent to refund certain amounts to the Petitioners and other such reliefs. Hence, this Petition is civil in nature. Neither in PPA (Annexure-B) nor in letter dated 07.07.2017 (Annexure-AAL) no specific period is prescribed to file the Petition of this nature before the Commission. Hence, we have to rely upon the provisions laid down under Article 113 of Limitation Act, 1963, which reads as follows: -

“113. Any suit for which no period of limitation is provided elsewhere in this Schedule” *“Three years”* *When the right to sue accrues.*

According to Article 113 of Limitation Act, in any suit where no period of limitation is provided in the Schedule, the prescribed period is 3 years from the date when the cause of action accrues. In the present case on hand

according to the averments made in the Petition the cause of action arose on 07.07.2017 and subsequently in the month of March 2018, when the Petitioners submitted bills to the Respondent for payment of tariff. Thereby, the period of limitation of 3 years to file the present Petition comes to an end somewhere in the month of March 2021. This contention of the Petitioner is not disputed by the Respondent.

- 44) The Petitioners have also taken another ground for condonation of delay, if any, in filing the Petition before the Commission i.e., they have filed WP No. 8672/2018 before the Hon'ble High Court of Karnataka, Bengaluru seeking for a writ of mandamus against the Respondent to pay the tariff of Rs. 8.40/KWh to the Petitioners as per the Power Purchase Agreement. Subsequently the Writ Petition was dismissed as withdrawn by the Petitioners with liberty to approach the Commission as per order dated 01.04.2021 (Annexure-AAX in the Petitioner but shown as Annexure-AAY in the documents).
- 45) On perusal of the orders of the Hon'ble High Court it appears that the Hon'ble High Court was pleased to permit the Petitioners to withdraw the Writ Petition with liberty to approach the KERC. Further, the Hon'ble High Court was also pleased to observe that the delay in filing the Petition before the KERC would be construed liberally taking note of the fact of pandemic situation as well as the Petitioners were before the Court since 2018, prosecuting their grievance.
- 46) The Petitioners have also taken one more ground for condonation of delay, if any, because they could not proceed further due to Covid-19

Pandemic during the year 2020-21. It is settled position of law that the principles laid down under the Section 5 of Limitation Act is not applicable to condone the delay if any, in filing original Petitions/Suits. But the Petitioners have relied upon the orders passed by the Hon'ble Supreme Court in *Suo Moto Writ Petition (C) No. 3/2020*, dated 10.01.2022.

47) We have perused the orders passed by the Hon'ble Supreme Court in *Suo Moto Writ Petition (C) No. 3/2020*, dated 10.01.2022. In which the Hon'ble Supreme Court has given findings as: -

1. *"In March, 2020, this Court took Suo Motu cognizance of the difficulties that might be faced by the litigants in filing petitions/applications/suits/appeals/ all other quasi proceedings within the period of limitation prescribed under the general law of limitation or under any special laws (both Central and/or State due to the outbreak of the COVID-19 pandemic.)"*
2. *"On 23.03.2020, this Court directed extension of the period of limitation in all proceedings before Courts/Tribunals including this Court w.e.f. 15.03.2020 till further orders. On 08.03.2021, the order dated 23.03.2020 was brought to an end, permitting the relaxation of period of limitation between 15.03.2020 and 14.03.2021. While doing so, it was made clear that the period of limitation would start from 15.03.2021."*
3. *"Thereafter, due to a second surge in COVID-19 cases, the Supreme Court Advocates on Record Association (SCAORA) intervened in the Suo Motu proceedings by filing Miscellaneous Application No. 665 of 2021 seeking restoration of the order dated 23.03.2020 relaxing limitation. The aforesaid Miscellaneous Application No. 665 of 2021 was disposed of by this Court vide Order dated 23.09.2021, wherein this Court extended the period limitation in all proceedings before the Courts/Tribunals including this Court w.e.f. 15.03.2020 till 02.10.2021."*

5. *“Taking into consideration the arguments advanced by learned counsel and the impact of the surge of the virus on public health and adversities faced by litigants in the prevailing conditions, we deem it appropriate to dispose of the M.A. No. 21 of 2022 with the following directions:*
 - I. *“It is directed that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings”.*
 - IV. *“It is further clarified that the period from 15.03.2020 till 28.02.2022 shall also stand excluded in computing the periods prescribed under Sections 23 (4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court of tribunals can condone delay) and termination of proceedings.”*

48) In the present Petition the cause of action allegedly arose on 07.07.2017 and subsequently in the month of March 2018. The period of limitation of 3 years to file the Petition starts somewhere in the month of March 2018 and comes to an end in the month of March 2021, but as per the directions of Hon'ble Supreme Court the period from 15.03.2020 to 28.02.2022 shall be excluded in computing the limitation. If it does so, the limitation to file the present Petition will be extended till March 2023. The Petitioners have filed the Petition on 03.01.2022, which is within the period of limitation. Hence, we are of firm opinion that the instant Petition is filed within the period of limitation. Hence, the Issue No. 2 is answered in affirmative.

49) **Issue No. 3:** Whether the Respondent proves that the Petition is not

maintainable for want of non-joinder of necessary parties?

- 50) During the course of arguments, the Counsel for the Respondent has submitted that, the Petitioners have alleged a delay of 130 days on the part of the KPTCL in obtaining evacuation approval. Inter alia, the Petitioners have alleged that the KPTCL refused to process the application for evacuation approval in the absence of the requisite documents such as intimation letter. However, the Petitioners have failed to implead KPTCL as a party to the instant Petition. Further he argued in the absence of necessary parties i.e., KPTCL to the Petition, the Commission cannot pass an effective order in accordance with law.
- 51) It is further submitted that, as per Order 1 Rule 9 of the Code of Civil Procedure, 1908 ("CPC"), a suit may not be defeated by reason of the misjoinder or nonjoinder of parties, and every suit may be dealt with respect to the controversy so far as regards the rights and interests of the parties to the dispute provided that nothing in Rule 9 shall apply to nonjoinder of a necessary party. Accordingly, it is submitted that the instant Petition is liable to be dismissed on the ground of non-joinder of necessary party.
- 52) The Counsel for the Petitioners by way of reply has submitted that the Power Purchase Agreement has been made only between the SPD and the BESCO. Hence, the terms and conditions laid down in the PPA are to be followed by the parties who signed on it. The KPTCL is not a party to the PPA, hence, it is not a necessary party to file Petition. Further submitted

that no remedy is claimed against KPTCL, thereby, on this ground the Petition cannot be dismissed.

53) The Power Purchase Agreement (Annexure-B) is executed by the SPD/1st Petitioner and the BESCO/the Respondent. In the Petition the Petitioners made all the claims only against the Respondent. As per Article 4.2 of the PPA, the BESCO agrees to provide support to the SPD and undertake to observe, comply with and perform subject to and in accordance the provisions of the PPA and also the applicable laws. Article 4.2 reads as follows: -

**4.2 Obligation of BESCO:
BESCO agrees:**

- a. *To allow SPD to the extent possible to operate the Project as a must run generating station subject to system constraints.*
- b. *Subject to system constraints to off-take and purchase the Electricity generated by the SPD at the Delivery Point as per Clause 3.4 and Clause 3.5 to this agreement.*
- c. *To make tariff payments to the SPD as set out in Clause 5.1*
- d. *BESCO agrees to provide support to the SPD and undertake to observe, comply with and perform, subject to and in accordance with the provisions of this Agreement and the Applicable Laws, the following:*
 - (i) *support, cooperate with the facilitate the SPD in the implementation and operation of the Project in accordance with the provisions of this Agreement:*
 - (ii) *not do or omit to do any act, deed or thing which may in any manner be volatile of any of the provisions of this Agreement;*

(iii) *act reasonably, while exercising its discretionary power under this Agreement.*

54) We have perused the provisions under Order 1 Rule 9 of CPC which reads as follows: -

"9. Mis-joinder and non-joinder: - No suit shall be defeated by reason of the mis-joinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the right and interests of the parties actually before it.

Provided that nothing in this Rule shall apply to non-joinder of a necessary party."

As per the above provisions no suit shall be defeated only on the ground of mis-joinder or non-joinder of the parties. But this general rule does not apply to non-joinder of a necessary party.

Further the meaning of a "Necessary Party" to the suit is, those parties whose presence is essential and, in whose absence, no effective decree can be passed by the court have not been impleaded. They are those parties who should have been joined under Order 1, Rule 10 (2) of the Code. In the present case on hand the PPA has been made between the 1st Petitioner/SPD and Respondent/BESCOM. Of course, the Petitioners had to approach many of the Authorities, Officers, Government Offices like Deputy Commissioner, Tahsildar, Executive Engineer (Ele), KPTCL etc., under various stages to achieve SCOD as per PPA. All these Authorities or Officers cannot be termed as necessary parties as narrated under Order 1 Rule 9 of CPC, because it cannot be said that without making them as parties, the instant Petition cannot be disposed off. Apart from that as per Article 4.2 of the PPA the BESCOM, is under obligation to provide support

to the SPD and undertaken to observe, comply with and perform subject to and in accordance the provisions of the PPA and also the applicable laws. When such is the situation, the arguments addressed by the Learned Counsel for the Respondent cannot be accepted and the Petition cannot be dismissed on this ground. With this we answer Issue No. 3 in Negative.

- 55) **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?
- 56) The present Petition is filed seeking for a declaration that the delay in commissioning the project was due to reason outside the control of the Petitioner and therefore amount to Force Majeure as per Article 8.3 of PPA and also to declare that the KERC applicable tariff is as stated in Article 5.1 of the PPA dated 22.07.2015 and with other reliefs. The present Petition arises in the context of the delay of 180 days in commissioning the Petitioner's project at Chikkahalli Village, Pavagada Taluk, Tumkuru District under 1-3MW Farmers Scheme. The SCOD as per Clause 1.1 (xii) of the PPA was 21.01.2017 i.e., 18 months from the effective date i.e., from 22.07.2015 on which date both parties have signed the PPA. The actual commissioning of the project was on 21.07.2017.
- 57) The Petitioner has taken two major grounds under the head of Force Majeure Events for extension of time in commissioning the power project, which are detailed as below: -
- a) Delay in issuance of Land conversion order from DC and requisite NOCs.
 - b) Delay in issuing Evacuation approval.

a) Delay in issuance of Land conversion order from DC and requisite NOCs: -

- i) The Counsel for the Petitioner has submitted that, upon execution of the PPA, the Petitioner No. 1 began taking steps for timely implementation of the project, he applied for alienation sketch/11E sketch in respect of Survey No. 81 on 26.08.2015. In the mean while the Karnataka Land Revenue (Amendment) Act, 2015, was passed whereby, Section 95(10) was inserted. Section 95(10) of the Act provided for deemed conversion of land for setting up solar power generation subject to payment of conversion fine and other fees. The Petitioner No. 1 submitted application dated 20.10.2015 to the Deputy Commissioner, Tumkuru District to grant conversion of the project land in Survey No. 81 measuring 21 Acres 31 Guntas situated at Chikkahalli Village, Y.N. Hosakote Hobli, Pavagada Taluk for the purpose of establishing the solar power project. The Revenue Department issued circular dated 01.12.2015 inter-alia pointing out that for the purpose of obtaining deemed conversion order for solar power project, the applicant has to furnish a copy of the letter of award issued by KREDL, RTC, NOC regarding proceedings under the PTCL Act and NOC regarding acquisition of the property and that there is no violation of the grant conditions.
- ii) The 11E sketch was not yet issued to the Petitioner No. 1 by the Revenue Department despite lapse of over 3 months from the

date of application. In the meanwhile, the Petitioners came to know that the Railways proposed to lay a new railway line from Tumkur to Rayadurga and proposed the acquisition of a part of land belonging to the Petitioner No. 1. In view of the above the Petitioner No. 1 submitted another representation dated 10.12.2015 requesting the Tahsildar, Pavagada Taluk to provide 11E sketch by leaving out a portion of land for the railway line.

- iii) The Petitioner No. 1 submitted representations dated 18.01.2016 to the Tahsildar, Pavagada Taluk for issuance of NOC regarding violation of land grant conditions, NOC regarding land acquisition and NOC regarding pendency of PTCL proceedings. Thereafter, the Petitioner No. 1 gave another representation on 25.01.2016 to the Tahsildar, Pavagada Taluk to issue 11E sketch leaving out the portion of land required for railways.
- iv) In the month of February 2016, the Petitioner No. 1 was informed by the Revenue Department that the 11E sketch cannot be issued as the Railways Department has proposed to acquire part of the 1st Petitioner's land. Upon further enquiry the Petitioner No. 1 was informed that the Railways Department was yet to submit concrete proposals for the railway line and consequent acquisition of land. In view of the lack of clarity in the matter, the Petitioner No. 1 issued a letter dated 11.03.2016 to the CAO, South Western Railway, Bengaluru requesting for information on the extent of land required by the Railways Department along

with alignment details. In fact, the draft layout drawing for the subject which was submitted on 11.11.2015 was ordered by Petitioner to be revised by leaving out some space for the railway line and the revised layout drawing was already as early as 25.03.2016. In spite of the prompt efforts of Petitioner No. 1 to ensure that the project is completed in a timely manner, the implementation of the project was at a standstill due to the delay in obtaining conversion order and NOCs on account of the proposed acquisition.

- v) Despite repeated requests there was no clarity from the Revenue Department and the Railways Department regarding the acquisition, then the Petitioner had issued a letter dated 19.07.2016 to the Special Land Acquisition Officer requesting for detailed information as regards the acquisition in the project land. The Land Acquisition Officer issued endorsement dated 22.07.2016 stating that the land in Survey No. 81 is to be acquired for the purpose of Tumkur-Rayadurga Railway Scheme. However, no details of the acquisition such as extent and alignment were given in the said endorsement. Thereafter, the Petitioner No. 1 submitted representations dated 25.07.2016 informing the MD of the Respondent and KREDL to permit the Petitioners to setup the plant at an alternative location. Since there was no reply from the KREDL and the Respondent to the request for alternative location, the Petitioner No. 1 again by

letter dated 21.09.2016 requested the KREDL to shift the solar project to an alternative location due to the proposed acquisition of the project land. Again Petitioner No. 1 submitted representations dated 27.10.2016 requesting the Respondent and KREDL to grant permission to set up the project in an alternative location and for extension of initially scheduled commissioning date by 3 months and also for relaxing the conditions precedent as the reasons for delay were beyond the control of the Petitioners. Thereafter, KREDL vide communication dated 14.11.2016 informed the Petitioner No. 1 that there is no scope for shifting of the project to an alternative location.

- vi) Petitioner No. 1 again issued letter dated 30.12.2016 to SLAO requesting for details regarding the acquisition for railway line. Subsequently, issued representation dated 05.01.2017 to the Chief Engineer, Construction South Western Railway, Bengaluru requesting for finalization of design to the Railway line/track at the project location so that the Petitioner No. 1 could erect the project in the land leaving out the portion required for the proposed railway line. The Petitioner No. 1 issued letter dated 18.02.2017 to the SLAO stating that only 16 Acres of land was required for the project and requested the details regarding area location of the land proposed to be acquired in Survey No. 81. The Special Land Acquisition Officer vide endorsement dated 21.02.2017 replied stating that the land in Survey No. 81 is

proposed to be acquired for the formation of the railway line but failed to point out the alignment and the extent of land required for the said purpose. Thereafter, by endorsement dated 06.03.2017 SLAO informed the Petitioner No. 1 that an estimated extent of 1 Acre 30 Guntas would be required for the purpose of formation of railway line.

- vii) Even after lapse of more than 1 year and one month from the date of application the requisite NOCs in respect of land acquisition, PTCL and land grant conditions were yet to be issued by the concerned Authority, then the Petitioner No. 1 again made representations dated 03.03.2017 for issuance of the said NOCs. Thereafter, Tahsildar issued alienation sketch/11E sketch on 08.03.2017 and the Assistant Commissioner, Madugiri issued NOCs dated 08.03.2017 in respect of land grant conditions, PTCL and land acquisition (excluding 1 Acre 30 Guntas) sought to be acquired for the railway line.
- viii) The Petitioner No. 1 issued letter dated 09.03.2017 to the Deputy Commissioner, Tumkuru seeking for conversion of land along with requisite NOCs and documents. The Deputy Commissioner, Tumkuru issued the land conversion order vide order dated 14.07.2017. Hence, there was a delay of 560 days for issuance of 11E sketch, a delay of 415 days to issue land acquisition NOC, land grant conditions NOC and PTCL NOC and a delay of 633 days for issuance of Land conversion order (without 11E sketch)

and a delay of 126 days for issuance of Land conversion order (with 11E sketch) which is beyond the control of the Petitioner and requested to consider the delay as Force Majeure Event.

- ix) By way of reply the Counsel for the Respondent has submitted that, the Petitioner has made an application for conversion of land only on 10.03.2017 and 07.07.2017 after a delay of almost 20 months from the date of PPA and the said application was incomplete for want of NOC from Tahsildar. It is incumbent on the Petitioner to apply before the Authorities in a timely manner to avoid any delays in commissioning of the project, as the Government Authorities have to undertake strict scrutiny and grant approvals at the several stages. The Petitioner has not provided any explanation for such inordinate delay in applying for approvals. He has further failed to provide details on land conversion fee paid to the Deputy Commissioner.
- x) Further submitted on account of proposed acquisition of Petitioners land, a request was made to KREDL for change of location only on 28.10.2016. The Petitioner having the knowledge of difficulty in execution of the project on account of the acquisition process, however, the Petitioner failed to take necessary measures to avoid the same. He could have moved for change of location immediately on knowledge of land acquisition process, however, the Petitioner negligently has written to KREDL after undue delay of a year. The Petitioner was

granted permission to change the location on 04.02.2017, by KREDL. However, the Petitioner choose not to change the location of the project. For any party claiming Force Majeure it is incumbent on the said party to prove all necessary possible measures were taken in a timely manner to carry out the contractual obligation. It is clear that the Petitioner was negligent towards commissioning the project.

- xi) On perusal of the records, it appears that the Petitioner No. 1 has applied on 18.01.2016 before Tahsildar, Pavagada Taluk for issuance of NOC regarding land grant conditions (Annexure-G), on the same day he also applied for issuance of NOC regarding land acquisition (Annexure-H) as well as NOC under PTCL Act (Annexure-J). In turn on 08.03.2017 AC, Madhugiri Subdivision, Madhugiri has issued NOC in respect of Land grant conditions (Annexure-AH), issued NOC under PTCL Act (Annexure-AJ) and issued NOC regarding land acquisition excluding 1 Acres 30 Guntas sought to be acquired for the railway line (Annexure-AK). The Petitioner No. 1 applied for 11E sketch before Tahsildar, Pavagada dated 26.08.2015, in turn the Tahsildar, Pavagada has issued 11E sketch on 08.03.2017 as per Annexure-AG. The Petitioner had applied for conversion of land before Deputy Commission, Tumkuru on 20.10.2015 (without 11E sketch), thereafter, for 2nd time he had applied for conversion order on 10.03.2017 (with 11E sketch). Once again after obtaining NOCs

from concerned Authorities, the Petitioner again applied for conversion of land before Deputy Commissioner, Tumkuru District on 07.07.2017 (As per reference No. 1 to Annexure-AM), the Deputy Commissioner issued land conversion order for establishment of solar power plant vide order dated 14.07.2017 (Annexure-AM). Hence, there was a delay of 633 days delay in getting Land conversion order which is beyond the control of the Petitioner.

- xii) In this regard we would like to rely upon the judgement in the case of Chennammagathihalli Solar Power Project Vs 1st Respondent /CESC in appeal No. 351/2018 dated 14.09.2020, the Hon'ble APTEL has held as: -

"8.10) Regarding force majeure events, Clause 8.3 of PPA, it is noted that under sub-clause (vi), it is provided that "inability despite complying with all legal requirements to obtain, renew or maintain required licenses or legal approvals" will also attribute to force majeure. In view of these provisions under the PPA, we are of the opinion that the delay in receiving various approvals / clearances by the Govt. and its instrumentalities which were beyond the control of the Appellants should also be treated as an event of force majeure under sub-clause (vi) of clause 8.3 which has directly and severely affected the execution of the solar projects. To be more specific, if the approval for land conversion is received on last day of September, 2016, it becomes extremely difficult to achieve COD on 03.01.2017 as envisaged under the PPA. Moreover, the grant of extension of the Scheduled COD was accorded by Govt. of Karnataka and in turn, by first Respondent after complying with due procedures and applying its diligence and

prudence under the four corners of the PPA and not beyond."

"8.15) In view of the above, we are of the considered opinion that considering facts and circumstances of the matter, the 1st Respondent was justified in extending COD up-to 6 months as per the relevant provision (Clause 2.5) of the PPA. Besides, it is also crystal clear that the approvals/clearances from various Government instrumentalities were accorded after considerable delays (of 7-8 months) which in turn attributed to delay in Commissioning of the Solar Projects. As these approvals were beyond the control of the Appellants, the State Government and 1st Respondent have rightly considered them as an event of Force Majeure and accordingly granted approval for COD extension."

- xiii) In another case of M/s Panchakshari Power Projects LL.P Vs KERC & Others in Appeal No. 279/2018 dated 12.08.2021 by Hon'ble APTEL, Delhi has held as:-

"27) ... In almost all the appeals pertaining to these farmers Solar power plants between 1MW to 3MW, the question came up for our consideration is what would be the effective date for implementation of the PPA? In terms of PPA, the effective date is the day on which the parties execute PPA agreeing to the terms and conditions mentioned there under. It is an admitted fact that mere execution of PPA between the parties the developer cannot establish the power plant unless it has to pass through process ultimately resulting in approval or rejection of PPA.'

'28) Therefore the first and primary requirement is to have approval of the PPA. Approval of PPA is required in order to approach several Authorities to secure permission/consent/ approval from the concerned Authorities for the purpose of establishing solar power plant and commissioning the solar power plant. Even to secure finances for development of solar plant either from the Banks

or from any financial institutions, the SPD must have in his hand copy of the approved and signed PPA, since based on such approvals, these Banks/Financial Institutions can decide to sanction/give financial assistance to the Developer.'

- xiv) As per the observations made by the Hon'ble APTEL in the above cases and the facts on hand, the contention taken by the Petitioner, that he had submitted applications for issuance of 11E sketch on 26.08.2015 and issuance of NOCs on 18.01.2016 before the concerned Authorities which were issued only on 08.03.2017 is not denied or disputed by the Respondents. Thereafter, he had applied for conversion order before Deputy Commissioner, Tumkuru on 10.03.2017 with all requisite documents along with 11E sketch and the Deputy Commissioner, Tumkuru had passed land conversion order on 14.07.2017 taking a period of 126 days. Hence, the delay in issuance of 11E sketch for a period of 560 days, and a delay of 415 days each in issuance of land acquisition NOC, land grant conditions NOC & PTCL NOC and also the delay of 126 days in issuance of land conversion is treated as Force Majeure Event.

b) Delay in issuing Evacuation approval: -

- i) It is the case of the Petitioner that, he has applied for power evacuation approval before Chief Engineer (Ele.), Electricity Transmission Zone, KPTCL on 13.01.2017 (Annexure-AN). The KPTCL has issued Tentative evacuation on 16.05.2017

(Annexure-AR). The Petitioner No. 1 has communicated his acceptance through a letter for tentative evacuation approval on 17.05.2017 (Reference No. 11 to the Annexure-AS). The regular evacuation approval was issued on 23.05.2017 (Annexure-AS). There was a delay of nearly 130 days from the KPTCL. Even though solar policy of 2014-21 assured a speedy approval process, consequent to that the Department of Energy and KREDL have facilitated speedy approval keeping the farmers in mind and who are not familiar with the process and despite the same, the KPTCL has delayed by about 130 days for approval of power evacuation which is basis for remaining approvals such as substation works and 11KV line work. Thereafter, the Respondent vide communication dated 18.07.2017 granted approval for construction of new 11KV line along with supervision charges. Therefore, the delay caused has to be treated as Force Majeure under Article 8 of PPA.

- ii) That the Petitioner further submitted that the various sanctions and permissions would reveal that inspite of having applied the requisite permissions and sanctions, the Petitioner suffered on account of inordinate delay in procuring the same. The said delay is beyond the control of the Petitioner. The various sanctions and approvals are pre-requisite in securing the confidence of the financial institutions and Government

Authorities. Hence, she prays to treat the delays caused to be treated as Force Majeure Events.

- iii) By way of reply the Counsel for the Respondent has submitted that, the Petitioner has alleged that there was a delay of 130 days on the part of the KPTCL in approving the power evacuation. This allegation is denied as false. Because PPA was executed on 22.07.2015 the Petitioner No. 1 has made application for evacuation on 13.01.2017 i.e., with a delay of 1 year 5 months. The KPTCL had issued Tentative evacuation approval on 16.05.2014 and Regular Evacuation on 23.05.2017. Thereby, there is no delay in according approval of power evacuation by the KPTCL.

58) We have perused the relevant clauses of the PPA such as: -

“2.1 Conditions Precedent:

The obligations of 1st Respondent/CESC and the SPD under this Agreement are conditional upon the occurrence of the following in full within 365 days from the effective date.

2.1.1 (i) *The SPD shall obtain all permits, clearances and approvals (whether statutory or otherwise) as required to execute and operate the Project (hereinafter referred to as “Approvals”):*

(ii) The Conditions Precedent required to be satisfied by the SPD shall be deemed to have been fulfilled when the SPD shall submit:

- (a) *The DPR to 1st Respondent/CESC and achieve financial closure and provide a certificate to 1ST RESPONDENT/CESC from the lead banker to this effect;*

- (b) All Consents, Clearances and Permits required for supply of power to 1st Respondent/CESC as per the terms of this Agreement; and
- (c) Power evacuation approval from Karnataka Power Transmission Company Limited or 1st Respondent/CESC, as the case may be.

2.1.2 SPD shall make all reasonable endeavors to satisfy the Conditions Precedent within the time stipulated and 1st Respondent/CESC shall provide to the SPD all the reasonable cooperation as may be required to the SPD for satisfying the Conditions Precedent.

2.1.3 The SPD shall notify 1st Respondent/CESC in writing at least once a month on the progress made in satisfying the Conditions Precedent. The date, on which the SPD fulfils any of the Conditions Precedent pursuant to Clause 2.1.1, it shall promptly notify 1st Respondent/CESC of the same.

2.2 Damages for delay by the SPD

2.2.1 In the event that the SPD does not fulfill any or all of the Conditions Precedent set forth in Clause 2.1 within the period of 365 days and the delay has not occurred for any reasons attributable to 1st Respondent/CESC or due to Force Majeure, the SPD shall pay to 1ST RESPONDENT/CESC damages in an amount calculated at the rate of 0.2% (zero point two per cent) of the Performance Security for each day's delay until the fulfilment of such Conditions Precedent, subject to a maximum period of 60 (Sixty) days. On expiry of the said 60 (Sixty) days, 1st Respondent/CESC at its discretion may terminate this Agreement."

"2.5 Extensions of Time

2.5.1 In the event that the SPD is prevented from performing its obligations under Clause 4.1 by the Scheduled Commissioning Date due to:

- (a) Any 1st Respondent/CESC Event of Default; or
- (b) Force Majeure Events affecting 1st Respondent/CESC; or
- (c) Force Majeure Events affecting the SPD.

2.5.2 The Scheduled Commissioning Date and the Expiry Date shall be deferred, subject to the reasons and limits prescribed in Clause 2.5.1 and Clause 2.5.3

for a reasonable period but not less than 'day for day' basis, to permit the SPD or 1st Respondent/CESC through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the SPD or 1st Respondent/CESC, or till such time such Event of Default is rectified by 1st Respondent/CESC.

2.5.3 *In case of extension occurring due to reasons specified in clause 2.5.1(a), any of the dates specified therein can be extended, subject to the condition that the Scheduled Commissioning Date would not be extended by more than 6(six) months.*

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

- 59) We have perused the documents furnished by the parties and on that basis, it is clear that the Petitioner No. 1 and the Respondent have entered into PPA (Annexure-B) on 22.07.2015. The KERC has approved PPA on 01.09.2015. The Revenue Department has issued Circular (Annexure-E) dated 01.12.2015 regarding deemed conversion as per the Section 95 of Karnataka Land Revenue (Amendment) Act, 2015. Thereafter, OM was issued by the Deputy Commissioner, Tumkuru District (Annexure-AM) on 14.07.2017 regarding conversion of land bearing Survey No. 81 for non-agricultural purpose i.e., for establishing Solar Power Project. The Petitioner has written a letter to the Chief Engineer (Ele), Transmission Zone, KPTCL dated 13.01.2017 (Annexure-AN) with a request to issue evacuation approval for Solar Power Plant under Farmers' Scheme. On 23.05.2017 KPTCL has issued regular evacuation approval to the Petitioner (Annexure-AS). The Petitioner has requested for extension of time on 27.10.2016 (Annexure-AY), 18.01.2017 (As per para 23 of the Petition, Annexure-AZ),

01.02.2017 (Annexure-AAA) and extension was allowed (Annexure-AAB) on 02.03.2017 allowing extension of SCOD by six months from the date of approval of revised SCOD for completion of Solar power project. The Petitioner has commissioned the project (Annexure-AAS) on 21.07.2017.

60) The following events would go to show the time taken by the Authorities concerned in granting sanctions, approvals etc., in execution of the project: -

Table 1

Sl. No.	Date	Description of the documents	Annexures
1.	22.07.2015	PPA signed between the Petitioner No. 1 and the Respondent	"B" filed along with Petition
2.	20.10.2015	Application given by the 1 st Petitioner to the Deputy Commissioner, Tumkuru for Conversion of land	"C" filed along with Petition
3.	10.12.2015	Application for issue of 11E sketch to Tahsildar, Pavagada	"F" filed along with Petition
4.	18.01.2016	Application for issuance of NOC under land grant conditions	"G" filed along with Petition
5.	18.01.2016	Application for issuance of No acquisition NOC to Tahsildar, Pavagada	"H" filed along with Petition
6.	18.01.2016	Application to issue PTCL NOC to Tahsildar, Pavagada	"J" filed along with Petition
7.	25.01.2016	Application to issue 11E sketch after leaving the portion of land acquired for railways	"K" filed along with Petition
8.	11.03.2016	Letter written by Petitioner No. 1 to CAO, Construction, South Western Railway request to provide the information an extent of land required for the purpose of Tumkuru-Rayadurga Railway line.	"L" filed along with Petition
9.	25.07.2016	Letter written by Petitioner No. 1 to MD, BESCOM & MD, KREDL requesting to permit to locate	"Q & R" filed along with Petition

		the plant at an alternative location in Pavagada Taluk.	
10.	21.09.2016	Letter written by Petitioner No. 1 to MD, KREDL request for permission to shift the location and also to extend the time limit for complying with the conditions precedent upto 15.11.2016.	"S" filed along with Petition
11.	27.10.2016	Letter written by Petitioner No. 1 to MD, BESCOM & MD, KREDL request for permission to shift the location	"T & V" filed along with Petition
12.	30.12.2016	Letter written by Petitioner No. 1 to Special LAO, Tumkuru requesting to provide information that an extent of land required for the purpose of Tumkuru-Rayadurga Railway line (2 nd Application).	"X" filed along with Petition
13.	05.01.2017	Letter written by Petitioner No. 1 to Chief Engineer (Construction), South Western Railway with a request to expediate the finalization of the designs at the location.	"Y" filed along with Petition
14.	18.02.2017	Letter written by Petitioner No. 1 to Special LAO, Tumkuru request for information regarding probable area and location of the land proposed to be acquired in Survey No. 81.	"Z" filed along with Petition
15.	03.03.2017	Letter written by Petitioner No. 1 to Tahsildar, Pavagada for issuance of NOC under land acquisition act and issuance of NOC regarding violation of land grant conditions (2 nd Application).	"AB & AC" filed along with Petition
16.	04.03.2017	Letter written by Petitioner No. 1 to Tahsildar, Pavagada, for issuance of NOC regarding PTCL (2 nd Application).	"AD" filed along with Petition
17.	06.03.2017	Letter written by Petitioner No. 1 to Special land acquisition Officer requesting to issue NOC for conversion of land use of 18	"AF" filed along with Petition

		Acres out of the total extent of 21 Acres 31 Guntas.	
18.	09.03.2017	Letter from Petitioner No. 1 to Deputy Commissioner, Tumkuru for conversion of land (2nd application).	"AL" filed along with Petition
19.	13.01.2017	Letter written by Petitioner No. 1 to Chief Engineer (Ele), Transmission Zone, KPTCL regarding evacuation approval	"AN" filed along with Petition
20.	27.01.2017	Letter written by Petitioner No. 1 to Chief Engineer (Ele), Transmission Zone, KPTCL regarding evacuation approval (2nd application).	"AP" filed along with Petition
21.	29.05.2017	Letter written by Petitioner No. 1 to Chief Engineer (Ele), Transmission Zone, KPTCL regarding sparing of land 11KV terminal bay.	"AT" filed along with Petition
22.	27.10.2016	Letter written by Petitioner No. 1 to MD, BESCOM request for extension of time for 6 months till 21.07.2017.	"AY" filed along with Petition
23.	18.01.2017	Letter written by Petitioner No. 1 to General Manager, BESCOM regarding extension of time for 6 months from the date of approval of revised SCOD.	"AZ" filed along with Petition
24.	01.02.2017	Letter written by Petitioner No. 1 to General Manager, BESCOM regarding extension of time for 6 months from the date of approval of revised SCOD retaining the tariff of Rs. 8.40/unit.	"AAA" filed along with Petition
25.	21.07.2017	The project was commissioned and the same was recorded in the Minutes of Meeting of the Respondent	"AAS" filed along with Petition

The above tables disclose that the time taken for granting sanctions and approvals by the Government Authorities and other Authorities which were beyond the control of the Petitioner thereby, the prayer

of the Petitioner squarely fall within the parameters under Force Majeure events.

Table 2

Sl. No.	The difference of Period shown from 21.01.2017 (after 18 months period as per Article 1.1 (xii) of the PPA) and Annexure-AAS (filed along with Petition)	Days
1.	22.01.2017 to 31.01.2017	10 days
2.	February 2017	28 days
3.	March 2017	31 days
4.	April 2017	30 days
5.	May 2017	31 days
6.	June 2017	30 days
7.	01.07.2017 to 21.07.2017	20 days
Total		180 days

As can be seen from Table-2, there is a delay of 180 days from original date of SCOD to actual date of commissioning of the plant.

61) In support of the arguments, the Learned Counsel for the Petitioner further relied upon the following judgements: -

- i) In the case of Solantra Private Limited V/s Karnataka Electricity Regulatory Commission & Others in Appeal No. 29/2021 dated 31.03.2022 by Hon'ble APTEL, New Delhi.
- ii) In the case of Basaragi KM Solar Power Project LL.P & Another Vs HESCOM & Another in Appeal No. 328/2018 dated 12.08.2021 by Hon'ble APTEL, New Delhi.
- iii) In the case of Vatsala Ballary Solar Projects Private Limited Vs KERC & Another in Appeal No. 66/2020 dated 06.01.2022 by Hon'ble APTEL, New Delhi.

- iv) Cambria Solar Private Limited Vs GESCOM & Others in OP No. 188/2017 dated 23.03.2021 by KERC, Bengaluru.
- v) M/s Adani Green Energy (UP) Limited Vs HESCOM & Other in OP No. 15/2018 dated 11.11.2020 by KERC, Bengaluru.

62) We have perused the Judgement passed by the Hon'ble APTEL, NewDelhi, in Appeal No. 328/2018 in the matter of Basaragi KM Solar Power Project LL. P & Sri Channaraj Hattiholi Vs HESCOM & KERC dated 12.08.2021 and the Hon'ble Appellate Tribunal for Electricity has held and observed as follows: -

- I. *"Having regard to the fact that securing these approvals from various instrumentalities of the Government/ Government officer, 18 months period was envisaged to complete the project. Having regard to the fact that there could be circumstances or events which could delay the happening of COD within the original time slot, six months' time for extension of commissioning the project at the level of concerned distribution licensee was envisaged. For events beyond that, they had to approach the Respondent Commission.'*
- II. *'The above procedure was envisaged keeping in mind that possibility of delay happening on account of laches on the part of the offices of Governmental Instrumentalities, though Solar Developer or SPV do not contribute to such delay. Unforeseen happening could possibly delay commissioning of the project, therefore force majeure event clauses were introduced in the terms of PPA as stated above. These force majeure clauses definitely take within its fold, the delay caused by offices of the Government or Governmental Instrumentalities.'*
- III. *'Arguments of the Respondent HESCOM that KPTCL is not a party to the PPA, therefore, the delay on their part cannot come to the aid of the*

Appellant cannot be accepted. KPTCL is also a public utility and instrumentality of the Government. Therefore, even if the project is delayed on account of KPTCL, in not issuing approval for evacuation of power and grid connectivity within a reasonable time, it amounts to event of Force majeure.'

- IV. *'The Respondent HESCOM contends that there was delay in submitting applications to various departments by the Appellant. One has to analyze the circumstances in a holistic approach is whether there was negligence on the part of the Developer to approach and obtain these approvals? It cannot be said that the considerable time lapsed in obtaining these approvals from various instrumentalities of the Government was at the instance of the Appellants.'*
- V. *'Having invested huge amounts taking loans from Banks/financial institutions, one cannot even imagine that the Developer will be negligent in pursuing his project.'*
- VI. *'However, the same set of Force Majeure Events could not convince the Respondent Commission. The Respondent Commission being a neutral body is expected to discharge its functions in a judicious manner. If delay has occurred on account of reasons beyond the control of the Appellant, the Appellant cannot be punished. The intention of the Government to assist to the farmers should not become otherwise a weapon to punish them''*

63) In the case of Solantra Private Limited V/s Karnataka Electricity Regulatory Commission & Others in Appeal No. 29/2021 dated 31.03.2022 and in Vatsala Ballary Solar Projects Private Limited Vs KERC & Another in Appeal No. 66/2020 dated 06.01.2022, Hon'ble APTEL, New Delhi has observed the decisions in the case of Basaragi KM Solar Power Project LL. P & Sri Channaraj Hattiholi Vs HESCOM & KERC dated 12.08.2021 and

Chennammagathihalli Solar Power Project Vs 1st Respondent /CESC in appeal No. 351/2018 dated 14.09.2020 and allowed the appeals.

- 64) In OP No. 188/2017 dated 23.03.2021 between Cambria Solar Private Limited Vs GESCOM and in OP No. 15/2018 dated 11.11.2020 between M/s Adani Green Energy (UP) Limited Vs HESCOM & Other, this Commission has held that as under: -

"In view of the principles laid down by the Hon'ble APTEL in a recent judgment cited (in Appeal No. 351/2018 in the matter of Chennammangathihalli Solar Power Project LL. P Vs 1st Respondent/CESC & another case, dated 14.09.2020), above and we are also relying on the above judgement in view of the facts are quite similar to the instant case. In view of the extension of time granted by the 1st Respondent /CESC (Respondent-2), holding that the Petitioner has fulfilled the conditions of PPA and extended time, we are of the opinion that the circumstances and events narrated by the Petitioner in the petition are 'Force Majeure' events and they are not under the reasonable control of the Petitioner. Therefore, the Petitioner has proved that events or circumstances alleged by it amounts to 'Force Majeure' events entitling for extension of time for achieving the Conditions Precedent and Scheduled Commissioning Date."

In this order, the Commission placing reliance on the Hon'ble APTEL's decision in the case of Chennammangathihalli Solar Power Project vs 1st Respondent/BESCOM, has allowed the extension of time on the ground of delays by the Governmental agencies which is also the case in the present Petition.

- 65) Under these circumstances, basing on the observations of Hon'ble APTEL in the cases referred supra as well as the reasons assigned by the

Petitioner, the grounds urged by the Petitioner under the head of Force Majeure Events has to be accepted.

- 66) During the course of arguments, the Learned Counsel for the Petitioners have submitted that, they have placed all the communications sent to the Respondents intimating them on the Force Majeure Events affecting the timely commissioning of the project. In support of his arguments, he has relied upon the letters (Annexure-AY, AZ & AAA) written by the Petitioner No. 1 to the BESCO and thereafter communication of the Respondent according approval for extension of time of 6 months to the Petitioner dated 02.03.2017 (Annexure-AAB) for achieving SCOD. By way of reply the Learned Counsel for the Respondent submitted that the Petitioner has not followed the Article 8.3(b) of the PPA.
- 67) We have perused the Force Majeure Clause of the PPA: -

“8.3 Force Majeure Events:

- (a) *Neither Party shall be responsible or liable for or deemed in breach hereof because of any delay or failure in the performance of its obligations hereunder (except for obligations to pay money due prior to occurrence of Force Majeure events under this Agreement) or failure to meet milestone dates due to any event or circumstance (a "Force Majeure Event") beyond the reasonable control of the Party affected by such delay or failure, including the occurrence of any of the following:*
- (i) *Acts of God;*
 - (ii) *Typhoons, floods, lightning, cyclone, hurricane, drought, famine, epidemic, plague or other natural calamities;*
 - (iii) *Strikes, work stoppages, work slowdowns or other labour dispute which affects a Party's ability to perform under this Agreement;*

- (iv) Acts of war (whether declared or undeclared), invasion or civil unrest;
 - (v) Any requirement, action or omission to act pursuant to any judgment or order of any court or judicial authority in India (provided such requirement, action or omission to act is not due to the breach by the SPD or 1st Respondent /CESC of any Law or any of their respective obligations under this Agreement);
 - (vi) Inability despite complying with all legal requirements to obtain, renew or maintain required licenses or Legal Approvals;
 - (vii) Fire, Earthquakes, explosions, accidents, landslides;
 - (viii) Expropriation and/or compulsory acquisition of the Project in whole or in part;
 - (ix) Chemical or radioactive contamination or ionizing radiation; or
 - (x) Damage to or breakdown of transmission facilities of either Party;
- (b) The availability of the above item (a) to excuse a Party's obligations under this Agreement due to a Force Majeure Event shall be subject to the following limitations and restrictions:
- (i) The non-performing Party gives the other Party written notice describing the particulars of the Force Majeure Event as soon as practicable after its occurrence;
 - (ii) The suspension of performance is of no greater scope and of no longer duration than is required by the Force Majeure Event.
 - (iii) The non-performing Party is able to resume performance of its obligations under this Agreement, it shall give the other Party written notice to that effect;
 - (iv) The Force Majeure Event was not caused by the non-performing Party's negligent or intentional acts, errors or omissions, or by its negligence/failure to comply with any material Law, or by any material breach or default under this Agreement;
 - (v) In no event shall a Force Majeure Event excuse the obligations of a Party that are required to be completely performed prior to the occurrence of a Force Majeure Event."

- 68) On perusal of Annexure-V, it appears that the Petitioner No. 1 has written a letter to Managing Director, KREDL stating that a part of the land in Survey No. 81 was proposed to be acquired by Railway Department, hence, sought for permission to establish the project at an alternate location and also to extend the initial Scheduled Commissioning Date by 3 months. Further, requested for relaxation of the conditions precedent as stipulated in PPA as the reasons for delay are beyond their control. Annexure-AY shows that it is a request letter written by Petitioner No. 1 to MD, BESCO describing status of the project, further, narrated that while collecting the documents required to apply for land use conversion, the Petitioner came to know that the part of land in Survey No. 81 is proposed for acquisition by the railways for laying a new rail track between Tumkur and Rayadurga, thereby, requested to extend the time limit of 6 months for commissioning the project either at a new location or at the initial location. Another letter Annexure-AZ is a request letter written by the Petitioner No. 1 to the General Manager (Ele), BESCO to extend Scheduled Commissioning date upto 6 months from the date of approval of revised SCOD. Annexure-AAA is a letter written by the Petitioner No. 1 to the General Manager (Ele), BESCO to extend Scheduled Commissioning date by 6 months from the date of approval of revised COD retaining the tariff Rs. 8.40/unit. The Petitioner No. 1 has explained in these letters, the reasons for delay in achieving the SCOD as per PPA.
- 69) On perusal of Annexure-AAB it appears that, the Respondent/BESCO has communicated Petitioner No. 1 on 02.03.2017 the approval of

extension of time for Scheduled Commissioning Date by 6 months from the date of original SCOD as per PPA Clause 2.5 and Article 8. The validity of all the Bank guarantees furnished to BESCO shall be extended upto 6 months from the Scheduled Commissioning Date. Annexure-AAC is the letter written by KERC dated 16.03.2017 to the Managing Directors of all the ESCOMs with regard to extension of time to achieve COD of the solar projects by stating that as all ESCOMs to not to allow any extension of time beyond the Scheduled Commissioning Date (COD) if any, as per the original PPA without obtaining prior opinion of the Commission. Annexure-AAE is a letter written by the Respondent/BESCO to the Petitioner No. 1 dated 15.04.2017 regarding extension of time for Scheduled Commissioning Date approved for 6 months from the date of original SCOD as per letters cited under Reference 3 & 4 and further requested to file a Petition before KERC forthwith with all relevant documents for seeking approval for extension of time for Commissioning the project. Annexure-AAF is the DO letter written by MD, BESCO dated 05.04.2017 to the ACS, Energy Department, Bengaluru describing main reasons causing delay in execution of projects as stated by the Farmers, in respect of 1-3 MWs Solar power plants in Karnataka under Farmers category, with a request to issue directions in the matter of extension of SCOD upto 6 months by collecting the necessary documents under Farmers category. Annexure-AAG is a letter written by MD, BESCO dated 18.04.2017 to the ACS, Energy Department, Bengaluru stating that BESCO has accorded approval for extension of SCOD by 6 months

taking into account the delay in getting land conversions, evacuation approval and bay allotments etc., considering in a broader prospective that these delays are attributable to Force Majeure under Clause 8.2(a)(vi) of PPA. The letter written by Additional Chief Secretary to KERC dated 25.04.2017 (Annexure-AAJ) to consider approval for extension of time for commissioning of solar power projects of capacity 1-3 MW under land owning farmers category. Annexure-AAL is a letter written by KERC dated 07.07.2017 to all the MD of ESCOMs informing ESCOMs to allow commissioning of the project and to advise the concerned SPD/SPVs under land owners/farmers scheme to file a Petition, before the Commission with all the relevant grounds/documents for justifying their claims for extension of time under Force Majeure conditions of the PPA. On the direction of the Respondent/BESCOM the Petitioner filed the present Petition challenging the directions issued by the Respondent/BESCOM to file a Petition before the Commission seeking approval for extension of SCOD. Thereby, the allegations of the Respondents that no Force Majeure notice was given by the Petitioner are baseless and false.

- 70) Further the Petitioner has also produced Minutes of Meeting (Annexure-AAS) which shows the 3 MW Solar power project of Sri H Ramanjeneya at Survey No. 81 with 11KV line, was commissioned on 21.07.2017.
- 71) In view of the discussions made as above and also in Page 60 (Para 60 in Table-2), it is clear that the time taken for each event of delay, was due

to delay of more than one year in granting various approvals from Government instrumentalities and therefore the prayer of the Petitioner falls within the parameters Force Majeure events as discussed above and in the present case on hand as the Petitioner has suffered delay in issuing evacuation approval and delay in conversion of land, has commissioned the solar project on 21.07.2017 i.e., within the extended period of SCOD as approved by the Respondent as per Annexure-AAB. As per observations made herein above, the judgements relied by the Counsel for the Petitioners and the grounds urged by the Petitioners in the Petition fall under the Clause of Force Majeure as described in the PPA. The extension of time by 180 days for commissioning of the solar plant is approved under Force Majeure conditions as discussed in above paras. Hence Issue No. 1 is answered in affirmative.

- 72) **Issue No. 4:** For what relief the Petitioner is entitled to?
- 73) As per discussions made herein above paragraphs, and also answering issue No. 1 in affirmative by holding that the Petitioner is entitled for extension of time of 180 days from 22.01.2017 to 21.07.2017, the Petitioner is entitled for the tariff as agreed in PPA. As per the findings given by the Hon'ble APTEL in its judgement dated 28.02.2020 in Appeal No. 340/2016 between Azure Sunrise Private Limited Vs Chamundeshwari Electricity Supply Corporation Limited, that "once extension of Scheduled Commissioning Date is approved by the concerned DISCOM, the question of reduced tariff does not arise". Hence, the Petitioner is entitled for Rs. 8.40/kWh tariff.

- 74) As stated above, once the SCOD is extended by the Respondent the revised SCOD is to be reckoned for determining the Tariff as well as penalties/liquidated damages. Since the time extended upto 21.07.2017, the Petitioner is not liable to pay liquidated damages. This Issue No. 4 is answered accordingly.
- 75) **Issue No. 5:** What Order?
- 76) In view of the foregoing reasons, we pass the following: -

ORDER

- a) The Petition is allowed.
- b) The delay is condoned upto 21.07.2017 in commissioning of Solar Power Project in Chikkahalli/Doddanahalli Village, Y.N. Hosakote, Pavgada Taluk, Tumkuru District and the Petitioner is entitled tariff at Rs. 8.40/- as per PPA.
- c) The Respondent/BESCOM is directed to pay the difference of the Tariff paid per unit from the date of commissioning of the plant along with late payment surcharge in terms of PPA within 2 months.
- d) The Respondent is directed not to levy liquidated damages and also directed if already levied any deductions like penalty, LD etc., the same shall be refunded to the Petitioner within two months.

Sd/-
(H.M. MANJUNATHA)
Member

Sd/-
(M.D. RAVI)
Member