

No. N/104/2018

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

Dated: 11.02.2022

Shri H.M. Manjunatha : **Officiating Chairperson**
Shri M.D. Ravi : **Member**

O.P. No. 43/2018

BETWEEN:

Renew Wind Energy (MP Three) Private Limited,
A Company registered under the provisions of the
Companies Act, 2013
Having its Registered Office at
138, Ansal Chambers II
Bikaji Cama Place,
Delhi – 110066.
(Represented by its Manager Sri Y.S. Nikhil Kumar)
(Represented by Sri Amit Kapoor, Advocate
For Sri. A.M. Shodhan Babu, Advocate
For Law Offices of Panag and Babu)

....PETITIONER.

AND

- 1) Bangalore Electricity Supply Company Ltd.
A Company registered under the provisions of
Companies Act, 1956,
Having its Registered Office at
K.R. Circle,
Bangalore -560 001.
(Represented by its Managing Director)
- 2) Karnataka Power Transmission Corporation Limited,
A Company registered under the provisions of
Companies Act, 1956,
Having its Registered Office at
Kaveri Bhavan, K. G. Road,
Bangalore-560009.
(Represented by its Managing Director)

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

... **RESPONDENTS.**

(Represented by its Managing Director)
(R1 and R2 Represented by Sri. Sriranga. S, Advocate
Ms Medha M Puranik, Advocate For JustLaw Advocates)
(R3 Represented by Sri. Murugesh V Charati, Advocate &
Smt. Latha, Advocate)

ORDERS

- 1) This Petition is filed under Section 86(1)(f) of the Electricity Act, 2003 by the
Petitioner praying for the following reliefs to;
- a) Direct Respondent No. 1 to decide upon the Petitioner's
letter/representation dated 25.09.2017 with respect to Force Majeure.
 - b) Quash the letter dated 17.11.2017 (Annexure-T) issued by the 1st
Respondent pursuant to the letter dated 04.10.2017.
 - c) Recall the letter dated 04.10.2017 issued by this Commission to the 1st
Respondent.
In the alternative
 - d) Declare that the delay in commissioning was due to reasons outside the
control of the Petitioner and therefore amount to Force majeure as
defined in Article 14 of the PPA.
 - e) Declare that the KERC applicable tariff as stated in Article 12 of the PPA
would be as per the Tariff order dated 30.07.2015.

- f) Declare that the revised Tariff order dated 12.04.2017 would not be applicable to the PPA between the Petitioner and the 1st Respondent.
 - g) Direct the 1st Respondent to not levy liquidated damages under the provisions of the PPA under restrain the 1st Respondent from taking any other coercive measures under the terms of the PPA.
 - h) Pass such other order/s including an order as to costs to meet the ends of justice.
- 2) The brief facts set out in this petition are as under: -
- a) The Petitioner Company is a Special Purpose Vehicle of ReNew Solar Power Private Limited, a Solar PV Power Project Developer with extensive experience in developing and operating renewable power projects throughout India. The Petitioner Company is a generator as defined under the Provisions of Electricity Act, 2003.
 - b) The Karnataka Renewable Energy Department/the 3rd Respondent, vide its request for proposals (RfP) (Annexure-A to the Amended Petition) dated 20.11.2015 invited proposals for establishing, operating and maintaining 1200 MW of Solar PV Power Plants in Karnataka. The project was to be implemented in 60 Taluks, with each Taluk being allotted 20 MW power plants. The minimum capacity and maximum capacity for each individual builder per Taluk was set at 3 MW and 20 MW respectively.
 - c) The SPD emerged as the successful bidder in 9 Taluks in Karnataka to establish 9 x 20 MW capacity power plants in the said Taluks. The Honnali Project was awarded to the SPD by the 3rd Respondent vide

letter of award and allotment letter (Annexure-B to the Amended Petition) dated 23.03.2016. As per the terms of allotment letter the SPD was required to enter into a Power Purchase Agreement with BESCOM/1st Respondent within 30 days of the letter of award.

- d) The present Petition pertains to the 20 MW capacity power plant at Honnali Taluk in Davangere District in which the SPD emerged as a successful bidder and is executing the same through its SPV, the Petitioner herein. The SPD vide its letter (Annexure-C to the Amended Petition) dated 29.03.2016 accepted the allotment letter within the prescribed time and sought to implement the project through the Petitioner as permitted under Clause 2.1.2 of the RfP. Pursuant to the allotment letter, the Petitioner entered into PPA (Annexure-D to the Amended Petition) dated 23.05.2016 with the 1st Respondent for a period of 25 years at a Tariff of Rs. 5.05/ per unit. The Scheduled Commercial Operation Date under the PPA was 12 months from the effective date of 14.10.2016 i.e., the date on which the Commission accorded approval to the PPA.
- e) As per Article 4 of PPA, the Petitioner unless affected by Force Majeure events, was required to obtain all consents and permissions required for fulfilling its obligations under the PPA within a period of 8 months from the effective date. The PPA provided for downward revision of tariff and liquidated damages in the event of delay in commissioning the project for reasons other than Force Majeure Events as provided for under PPA. The Commission has approved the PPA vide its letter

(Annexure-E to the Amended Petition) dated 14.10.2016 subject to certain corrections and modifications. The parties were directed to carry out the corrections and modifications through a Supplemental PPA. Accordingly, a Supplemental PPA (Annexure-F to the Amended Petition) dated 06.01.2017, executed incorporating the changes and modifications prescribed by the Commission through its letter dated 14.10.2016.

- f) The Petitioner preferred to set up its generating stations in one location. The Petitioner had conducted its diligence and found that land was also available inside the Kattige Sub-station for the purpose of establishing its termination bay and therefore it was far more efficient for the Petitioner to apply for evacuation from Kattige Sub-station. The Petitioner applied for grant of evacuation approval from Kattige Sub-station in Honnali Taluk vide its letter (Annexure-G to the Amended Petition) dated 21.10.2016 to the KPTCL/2nd Respondent, he applied for evacuation from its 20 MW Solar Power Project at Honnali by constructing 66 KV SC line to Kattige (Geenahalli) 66 KV/11KV Sub-station of KPTCL at a distance of about 5 kms and he provided all required documents.
- g) The Petitioner in the mean while applied for all permissions, approvals and consents required to perform its obligations under the PPA dated 23.05.2016 except for land deeds as the acquisition process was taking time. The Petitioner could not have initiated the land acquisition process without having obtained evacuation approval. The Petitioner

has commenced the land acquisition process immediately after obtaining the evacuation approval. The Petitioner had to purchase agricultural lands and initiate the process of conversion of agricultural land. The Petitioner has made the applications well within time. The delay caused in commissioning of the project was outside the control of the Petitioner. The Petitioner in compliance with in Article 4 of the PPA issued a letter (Annexure-H to the Amended Petition) dated 23.05.2017 to the 1st Respondent keeping it informed of compliance with Article 4 of the PPA. The Petitioner stated that they had identified the land and were about to initiate their procurement process. The Petitioner sought an extension from 14.06.2017 to 15.09.2017 to fully comply with the condition precedents as per Article 4 of the PPA. The Petitioner further stated that other than the land acquisition process all the other Conditions Precedents were fulfilled. The Petitioner thereafter received a tentative evacuation scheme from the 2nd Respondent through a letter (Annexure-J to the Amended Petition) dated 01.06.2017 and in that letter it is stated that as per the feasibility report furnished by KPTCL for Honnali Taluk, Davangere District, the 66/11KV Honnali Sub-station and the 110/11KV Nyamathi Sub-station were studied. It was found that both these sub-stations only had evacuation capacity available for 10MW each. It was further stated that the 1200 MW tenders were not invited based on the feasibility report furnished by KPTCL and therefore evacuation approval is considered for 66/11KV Kattige Sub-station at Honnali Taluk, Davangere District.

- h) After an inordinate delay of 223 days vide letter (Annexure-J to the Amended Petition) dated 01.06.2017 issued by 2nd Respondent, the Petitioner received a tentative evacuation scheme for the Petitioner's proposed 20 MW (AC) Solar Project in Honnali Taluk, Davangere District along with certain terms and conditions for the Petitioner's acceptance and compliance. The Petitioner was inter-alia required to communicate its acceptance/confirmation to the Tentative Evacuation scheme after which the scheme would be regularized and detailed approval evacuation scheme would be given. The Petitioner vide its letter (Annexure-K to the Amended Petition) dated 14.06.2017 to the 2nd Respondent, accepted the provisional evacuation scheme and the general conditions therein, except for the condition that the Petitioner should purchase land adjacent to 66/11KV Kattige Sub-station for construction of 66 KV TB with metering. In this regard, the Petitioner requested 2nd Respondent to permit it to utilize the land already available within Kattige Sub-station for construction of its 66 KV TB. The Petitioner made this request with an intention of saving time as the process for acquisition of land was a time consuming and laborious process.
- i) The 1st Respondent vide its letter (Annexure-L to the Amended Petition) dated 19.06.2017 acknowledged that the Petitioner had submitted all documents required to comply with Article 4 of the PPA with the exception of land acquisition details. The Petitioner was directed to furnish the land acquisition details by 13.06.2017, failing which penalty

would be levied as per the PPA. Thereafter, the 2nd Respondent vide its letter (Annexure-M to the Amended Petition) dated 24.06.2017 granted evacuation approval and issued a regular evacuation scheme to be executed under self-execution by the Petitioner. However, the 2nd Respondent stated that the Petitioner's request for grant of land within the Kattige sub-station, for the purpose of constructing its 66 KV TB, was being considered at the time of the 2nd Respondent issuing its letter dated 24.06.2017.

- j) The Petitioner was also directed to furnish a copy of SPPA approved by the KERC before seeking inter connection approval. The Regular evacuation approval was for the purpose of facilitating putting up of required evacuation line for evacuation of power from the solar project only. The Petitioner was required to seek interconnection/synchronization of the generating plant with the grid separately. The 2nd Respondent vide letter (Annexure-N to the Amended Petition) dated 13.07.2017 informed the Petitioner that the request for the land inside Kattige sub-station for construction of the Petitioner's 66 KV TB was approved on lease basis by the TB committee in its 131st meeting held on 23.06.2017 i.e., before the grant of evacuation approval dated 24.06.2017.
- k) The Ministry of New and Renewable Energy (MNRE) by its letter dated 28.07.2017 taking due recognize of the fact that the delay in connectivity, permissions, land approvals and force majeure events can delay project implementation has informed all the State

Governments that Competent Authorities can allow extension of time duration as per contractual agreement. In the above circumstances the Petitioner vide its letter (Annexure-P to the Amended Petition) dated 25.09.2017 to the 1st Respondent sought an extension of Scheduled Commission Date by 30 days due to various Force majeure reasons completely beyond its control. The reasons for delay were (a) Demonetization (b) Delay in PE Approval. (c) Implementation of GST (d) Delay in obtaining several consents and permits from the appropriate State Government. The Petitioner stated that it had fulfilled all Condition Precedents except for obtaining the NA order which were pending in the office of the relevant Government Authority.

- l) It is pertinent to note that the Petitioner could not have complied with Clause 4 of the PPA with respect to Conditions Precedents since the PE approval has itself taken an unreasonable amount of time i.e., about 7 months. The process of acquisition of land cannot be initiated until PE approval is granted. It is well known that land acquisition is a time-consuming process. In this regard, the Petitioner has executed various projects throughout India and has ordinarily been granted Permanent Evacuation approval within a period of 2 months. Thus, the period of 7 months in the instant case is unforeseeable extraordinary and beyond the Petitioner's control and qualifies as a Force Majeure event as defined under the PPA. The Petitioner vide its letter (Annexure-Q to the Amended Petition) 23.10.2017, upon obtaining the

NA orders issued a CP completion letter to the 1st Respondent enclosing the list of permissions, approvals and consents obtained by the Petitioner.

- m) The Petitioner received the Tentative evacuation scheme on 01.06.2017 and thereafter promptly began acquiring land for the purpose of the project. The Petitioner has commissioned the project on 11.11.2017 within 5 months of receiving the tentative evacuation approval despite demonetization, delay in approval and imposition of GST. It is evident that the Petitioner has acted promptly and with great diligence to perform its obligations within the prescribed time under the PPA. The 1st Respondent did not respond to the Petitioner's letter (Annexure-P to the Amended Petition) dated 25.09.2017 seeking extension of SCOD. It is pertinent to highlight that the PPA signed between the parties envisaged that the existence of Force Majeure conditions and the validity of a claim under the same would be determined by the Petitioner or BESCO as the case may be. In this regard, it has come to the knowledge of the Petitioner that the Commission vide its letter (Annexure-R to the Amended Petition) dated 02.11.2017 in the case of Rishabh Buildwell Private Limited had addressed the issue of extension of SCOD of Solar project in respect of development of the 1200 MW solar power projects. The Commission had directed the developers to approach their respective ESCOMs for extension and not to approach the Commission directly. Since the project was ready in all respects, the project was commissioned on

11.11.2017 as reflected by the Commissioning Certificate (Annexure-S to the Amended Petition) dated 14.11.2017 issued by the 2nd Respondent to the Petitioner's project.

- n) The 1st Respondent vide its letter dated 17.11.2017 has rejected the Petitioner's request for extension of the SCOD and inter-alia directed the Petitioner to approach the Commission for the same. The 1st Respondent instead of applying its mind independently to the reasons for delay cited by the Petitioner, cited a letter dated 04.10.2017 issued by the Commission issuing certain directions to the 1st Respondent and refuse to consider the request of the Petitioner for extension of SCOD.
- o) The 1st Respondent did not consider the Petitioner's reasons for delay in commissioning, the Petitioner has not received copy of the letter dated 04.10.2017 relied upon by the 1st Respondent nor the contents of the letter known to the Petitioner. The Petitioner reserves its right to make submissions on the scope validity and interpretation of the letter dated 04.10.2017. The 1st Respondent without considering whether the delay in execution of the project was a result of Force Majeure or not invoked Article 12 of the PPA and applied the reduced tariff of Rs. 4.36/unit is opposed to the PPA agreed tariff of Rs. 5.05/unit. The 1st Respondent applied the KERC solar tariff for FY 17-18 as per its order dated 12.04.2017. The 1st Respondent further levied liquidated damages as per PPA, Clause 4.3 and 5.8. The contract performance guarantees which were valid upto 31.05.2018 was desired to be

- extended upto 31.06.2018 as per letter issued by the Respondent (Annexure-T to the Amended Petitioner) dated 17.11.2017.
- p) Aggrieved by the letter dated 17.11.2017 the Petitioner preferred Writ Petition in WP No. 3872/2018 (GM-KEB) before the Hon'ble High Court of Karnataka, Bengaluru inter-alia praying for quashing of the letter dated 17.11.2017. In judgement and order dated 19.02.2018 the Hon'ble High Court was pleased to permit the Petitioner to approach the Commission for redressal of its grievances.
- q) It is pertinent to note that at the time of Petitioner submitting the bid, the operative tariff order was the tariff order dated 13.07.2015 which prescribed tariff of Rs. 6.51/unit. The control period in the tariff order dated 13.07.2015 was 01.09.2015 to 31.03.2018, without prejudice to the Petitioner's contention that the minor delay of about one month was due to Force Majeure conditions which was well within the knowledge of the 1st Respondent. The Commission made an order dated 12.06.2014 applicable to projects in respect of which PPA's were entered in to on or after 01.04.2017 but before 01.04.2018 and in respect of projects where PPA's were entered into prior to 01.04.2017 but were commissioned between 01.04.2017 and 31.03.2018.
- r) The Petitioner is highly aggrieved by the imposition of a reduced tariff and liquidated damages for delay in commissioning of the project. The delay is solely due to reasons outside the control of the Petitioner. The delay is due to Force Majeure conditions which have been brought to the notice of the 1st Respondent. Further the reduced tariff as per the

tariff order dated 12.04.2017 is not applicable on the project since the project is own through transparent process of competitive bidding.

s) The Petitioner has approached the Commission under the following grounds: -

- i) The contractual duty under the PPA dated 23.05.2016 to decide upon Force Majeure, it cast upon the 1st Respondent or the Petitioner. The 1st Respondent cannot shy away from its obligations under the PPA. The 1st Respondent must exercise its mind independently on the existence and validity of the Force Majeure events as prayed for by the Petitioner and as provided in PPA without being bound by the letter dated 04.10.2017.
- ii) The 1st Respondent has presumably misinterpreted the letter dated 04.10.2017 issued by the Commission, the contents of said letter are directly contrary to the position taken by the Commission in a separate letter dated 02.11.2017.
- iii) Further MNRE by its letter dated 28.07.2017 taking due cognizance of the fact that the delay in connectivity, permissions, land approvals and Force Majeure events can delay project implementation has informed all the State Governments that Competent Authorities can allow extension of time duration as per contractual agreements.
- iv) The PPA approved by the Commission grants the parties to the PPA the right to determine whether there is Force Majeure events and further provides for the parties agreeing on deferred Scheduled

Commissioning Date or expiry date. The PPA approved by the Commission cannot be unilaterally modified by the Commission through a unilateral letter issued to the 1st Respondent directing its conduct of its contractual obligations vis-à-vis the Petitioner in a certain predetermined manner.

- v) The Scheduled Commercial Operation Date was 13.10.2017, the Petitioner has sought an extension of about one month despite (a) delay of about 8 months in obtaining evacuation approval without which the Petitioner could not acquire land or under take any other developmental activity (b) demonetization (c) imposition of GST.
- vi) The PPA was approved on 14.10.2016 by the Commission the Petitioner applied for evacuation approval on 21.10.2016 a mere one week after having obtained approval of the PPA dated 23.05.2016, the Petitioner provided all the required documents while submitting its evacuation application. The Tentative evacuation approval was granted after a period of about 7 months i.e., on 01.06.2017 and regular evacuation approval was granted on 24.06.2017 more than 8 months after the date of application. As it is evident, the Petitioner has made its application within a reasonable time of the PPA being approved, however the approval has been delayed due to no fault of the Petitioner, admittedly there was no feasibility study conducted on Kattige sub-station by the 2nd Respondent at the time that the Petitioner

submitted the evacuation application. The Honnali and Nyamathi sub-stations did not have the capacity to evacuate 20 MW from a single plant by themselves. Therefore, the delay in grant of approval is due to the 2nd Respondent and is therefore, covered by 14.3.1 (e) of the PPA. The Clauses pertaining to notification of Force majeure under Article 14.5 of the PPA has no application to the facts of this case.

- vii) The project was commissioned within the one-month of extension granted by the 1st Respondent. The conditions imposed for grant of such extension by the 1st Respondent deserve to be set aside. As they suffer from arbitrariness and the vice of non-application of mind. The state Government, KPTCL and KREDL ought to have ascertained the evacuation capacities in the concerned taluks and in the event of delay in granting evacuation approval due to lack of availability of the required capacity ought to have granted extension of time to the Petitioner.
- viii) The Honnali and Nyamathi sub-stations had evacuation capacity of only 10 MW each and were located well apart from each other. The Petitioner cannot be made liable for the delay in granting approvals due to inadequacies in the State infrastructure. The delay in grant of connectivity approval beyond reasonable time, inter-alia is not within reasonable control of the Petitioner and therefore is a Force Majeure event under Article 14 of PPA. Unless and until the regular evacuation scheme approval or atleast the

provisional evacuation scheme approval is granted, the Petitioner could not have had any concrete idea on the final interconnection. It is only thereafter, that the Petitioner could apply for the bay approval on 14.06.2017 this seems to have been placed in the agenda of 131st TB Committee of KPTCL and finally KPTCL granted the bay approval vide its letter dated 13.07.2017.

- ix) The Petitioner is also relying on the MNRE O.M., dated 20.6.2018, bearing number 283/131/2017-GRID SOLAR, which grants a reprieve of 62 days to projects which achieved financial closure prior to 1.7.2017 and SCOD after 31.8.2017. As stated in the Additional Affidavit filed before the Commission, this Petitioner is entitled to the full 62 days of reprieve under the said O.M., dated 20.6.2018, since it has achieved financial closure prior 01.07.2017, and has achieved SCOD after 31.8.2017. The MNRE O.M., dated 20.6.2018 clearly mentions that the extension in Scheduled Commissioning Date of the Solar Power Plants is being suggested based on the representations made by various Solar Power Developers and the solar Energy Corporation of India Limited who have been successful in demonstrating that there have been temporary business disruptions and consequent delays in project commissioning on account of introduction of GST. It is stated that this is an issue that riddles the entire economy and is well beyond the Petitioner's control. The Petitioner could not have taken any steps to mitigate the effect of such an event as it is a policy

decision of the Government. Thus, the imposition of GST must be treated as a Force Majeure condition as per Article 14 of the PPA. (Amended as per order of the Commission, dated 09.04.2019), with all this the Petitioner prays to allow the Petition as prayed for in the interest of justice and equity.

- 3) Further the Petitioner has filed additional affidavit along with documents on 17.07.2018 and stated the Official Memorandum (Annexure-U filed along with Affidavit dated 17.07.2018) dated 20.06.2018 issued by the MNRE whereby it has granted a reprieve of upto 62 days to projects which were affected by the imposition of GST. The said OM applies to projects which have (a) achieved financial closure prior to 01.07.2017 and (b) where the Scheduled commercial Operation date is after 31.08.2018. The actual Commercial Operation Date for the Honnali project was 11.11.2018. The Scheduled Commercial Operation Date under the PPA was 14.10.2018, hence this project fall squarely under the ambit of MNRE OM dated 20.06.2018, there has been a total delay of about 28 days in achieving COD.
- 4) The Petitioner's project at Honnali achieved financial closure on 28.10.2016 i.e., the date on which it executed a Rupee Term Loan Agreement for arranging the necessary debt for establishment of the project. The Petitioner through its parent company ReNew Power Limited entered into a loan agreement (Annexure-V filed along with Affidavit dated 17.07.2018) dated 28.10.2016 with IDFC Bank which acted as the lender and as facility agent. The Petitioner was diligent enough to enter

into the loan agreement immediately after the Commission approved PPA.

- 5) It is stated the Petitioner much prior to the execution of Rupee Term Loan Agreement carried out the following activities towards financing and execution of the project.
 - a. The Petitioner entered into Civil Works Agreement (Annexure-W filed along with Affidavit dated 17.07.2018) dated 09.09.2016 for the purpose of completing the civil works of the Honnali project.
 - b. The Petitioner also entered into a Supply Agreement (Annexure-X filed along with Affidavit dated 17.07.2018) dated 09.09.2016 for the purpose of obtaining supply of solar modules. He simultaneously entered into Service Agreement (Annexure-Y filed along with Affidavit dated 17.07.2018) dated 09.09.2016 for the purpose of ensuring that all services required for the erection, assembling and testing of the power project would be provided.
- 6) Further the Petitioner has filed 2nd Additional Affidavit dated 13.01.2021 along with additional documents stating that he has specifically raised the ground of delay in commissioning caused due to factors outside the control of the Petitioner and thereby amounting to Force Majeure under the terms of PPA between the parties. The 2nd Respondent had delayed grant of project evacuation permissions which had in turn affected the Petitioner's obligation to acquire land as the Petitioner could not decide on the location of the land to be acquired without receiving confirmation

on the sub-station from which project evacuation would be granted. The Petitioner had placed an order for the delivery of a transformer vide purchase order (Annexure-Z filed along with Affidavit dated 13.01.2021) dated 13.10.2016. The purchase order dated 13.10.2016 for a transformer for the Honnali site was placed prior to even the effective date of 14.10.2016. The delivery date under the purchase order was 30.07.2017 which was well within advance of the Scheduled Commissioning Date of 14.11.2017.

- 7) The Petitioner thereafter made an application for project evacuation on 21.10.2016 i.e., a mere one week after the effective date, however, this application was not processed within reasonable time. The Petitioner was granted a tentative evacuation scheme on 01.06.2017 after an inordinate delay of 223 days. The Petitioner was prevented from identifying suitable land for acquisition since the substation from which evacuation would be granted was not clear or known to the Petitioner since Respondent No. 2 had not conducted a feasibility study in respect of the Kattige S/s where the Petitioner had applied, and the substations in respect of which feasibility studies were conducted were not equipped to evacuate 20 MW of electricity which was the capacity of the Petitioner's plant at Honnali. Therefore, he had to place the order for a transformer on hold due to this issue. The Petitioner lost its manufacturing slot and had to pay an additional amount of Rs. 6,50,000/- for the transformer since its land acquisition was delayed due to the delay on the part of Respondent No. 2 in issuing project evacuation. In this regard the email (Annexure-AA filed

along with Affidavit dated 13.01.2021) dated 17.07.2017 issued by Bharat Bijilee, the Petitioner's vendor with respect to the increase in cost of the transformer.

- 8) The Petitioner immediately upon receiving the confirmation on the project evacuation proceeded to revive its purchase order dated 13.10.2016, however due to imposition of GST from 01.07.2017 the Petitioner had to issue a new purchase order with the GST registration and details included. The Petitioner and its vendors faced multiple hurdles in registration of GST, obtaining HSN codes, the reissuance of purchase orders as the entire accounting and billing software had to be revamped to meet the GST requirements despite these hurdles the Petitioner instructed its vendor to go ahead with the manufacturing of the transformer while the terms of the new purchase order were being arrived at between the parties. The Petitioner's vendor Bharat Bhijilee through an email (Annexure-AB filed along with Affidavit dated 13.01.2021) dated 21.07.2017 confirmed the Petitioner's order for the transformer with the increase in price and undertook to deliver the transformer on or before 31.10.2017.
- 9) The Petitioner also issued fresh purchase order dated 22.08.2017 with its GST details to amend the earlier purchase order dated 13.10.2016. The Petitioner in the fresh purchase order (Annexure-AC filed along with Affidavit dated 13.01.2021) dated 22.08.2017 also specified that the delivery date of the transformer would be 15.10.2017. The Petitioner had to reissue multiple purchase orders that were issued earlier after obtaining GST related details. The revised purchase orders (Annexure-AD filed along

with Affidavit dated 13.01.2021) dated 08.09.2017 with GST details included for ETC job switchyard. The revised orders (Annexure-AE filed along with Affidavit dated 13.01.2021) dated 21.08.2017 for purchase of multiple items with GST details included. The revised order (Annexure-AF filed along with Affidavit dated 13.01.2021) dated 14.09.2017 for execution of civil design and construction.

- 10) The Petitioner has filed 3rd Additional affidavit on 15.11.2021 along with certain documents and stated that, he had filed project evacuation application dated 21.10.2016. Again, the Petitioner has reproduced the project evacuation application (Annexure-AG filed along with Affidavit dated 15.11.2021) dated 21.10.2016 for pursual of the Commission. The project evacuation application dated 21.10.2016 filed by ReNew Wind Energy (Rajasthan Four) Private Limited is as per Annexure-AH (filed along with Affidavit dated 15.11.2021) produced for reference.
- 11) The KPTCL in its letter dated 14.11.2016 requested the Petitioner to remit the processing fee, also specifically stated that the processing fee was to be remitted towards the evacuation application for the Honnalli Taluk in Davangere District. The Petitioner vide letter dated 09.12.2016 remitted the processing fee towards the project at Honnalli Taluk. Considering all these grounds the Petitioner prays to pass an order of extension of time on the grounds of Force Majeure and to allow the Petition as prayed for.
- 12) Upon notice, the Respondents appeared through their Learned counsel, and filed statement of objections separately as follows: -

- a. The 1st Respondent has filed objections to the Petition dated 25.09.2018 stating that, on 23.05.2016, the Petitioner executed a PPA with the Respondent No.1 that the Commission vide letter dated 14.10.2016 approved the PPA subject to certain modifications. As per Article 3.1 of the PPA, 'effective date' is the date on which the Commission gives concurrence/approval to the PPA i.e., 14.10.2016. As per the terms of the PPA between the parties, the Petitioner was required to commission the project within 12 months from the effective date as per Article 8.5 of the PPA. Therefore, the Petitioner was required to commission its project on or before 13.10.2017. Further, as per Article 4.1, the Petitioner was required to achieve conditions precedent within 8 months from the effective date i.e., on or before 13.06.2017. On 06.01.2017, a Supplementary PPA was executed between the Petitioner and the Respondent incorporating the modifications suggested by the Commission.
- b. Thereafter, the Petitioner addressed a letter dated 21.10.2016 requesting the KPTCL to grant evacuation approval. Thereafter, on 23.05.2017, the Petitioner furnished certain documents to the Respondent No.1 in order to comply with the Conditions Precedent stipulated in the PPA. However, the Petitioner did not produce any documents showing that Petitioner was in clear possession of land on which it intends to establish the project. On 01.06.2017, the Petitioner was granted tentative evacuation approval. Thereafter, the Respondent vide letter dated 19.06.2017 called upon the Petitioner to

fulfil the Conditions Precedent insofar as furnishing of land acquisition details and land conversion was concerned, failing which the Petitioner was informed that the Respondent would be constrained to levy penalty in terms of the PPA. On 24.06.2017, the Petitioner was granted regular evacuation approval. The Petitioner vide letter dated 25.09.2017 requested the Respondent to grant extension of scheduled commissioning date as it could not commission its plant within the stipulated timeframe due to demonetization, implementation of GST approval and delay in attaining PE approval. Thereafter, on 23.10.2017, the Petitioner furnished a letter to the Respondent enclosing certain documents indicating that Conditions Precedent have been fulfilled.

c. On 17.11.2017, the Respondent addressed a letter to the Petitioner in reply to the request of the Petitioner for extension of time, referring to the instructions issued by the commission in matters where extension of time have been requested for by developers. The Petitioner was informed that the Respondent is granting approval for extension subject to the orders of the Commission. Therefore, the Petitioner was requested to prefer a petition before the Commission and seek for further approval. Hence the present Petition is filed.

d. It is case of the Petitioner that it could not commission the plant within the scheduled commissioning date due to force majeure event i.e., delay in obtaining evacuation approval, demonetization and implementation of GST. Further, it is contended by the Petitioner that Respondent failed in its decision while considering the Petitioner's

request for extension of time. Further, it is also contended by the Petitioner that it is not governed by Generic Tariff Order dated 12.04.2017 as its tariff is discovered through bidding process. Therefore, according to the Petitioner, it is entitled to the tariff determined through the bidding process and not the tariff that was prevalent at the time when its plant was commissioned. In response to the contentions urged by the Petitioner, it is at the very outset submitted that the relationship between the parties hereto is governed strictly by the terms of the contract between the parties. The terms of the PPA spell out the time frame for commissioning, the effective of the PPA, the period within which conditions precedent are to be achieved and the penalty that follows due to non-adherence to the timelines in the PPA.

- e. As per Article 8.5 of the PPA, the Petitioner herein was required to commission its project within 12 months from the date of approval of the PPA by the Commission. Therefore, the Petitioner herein was required to commission its project on or before 13.10.2017. However, the Petitioner has not commissioned the plant within the stipulated timeframe and has commissioned only on 11.11.2017. The reason assigned by the Petitioner for belated commissioning of the project are wholly untenable. The implementation of GST and demonetization can in no manner whatsoever be sufficient reason for delayed implementation of the project. Further, the onus of obtaining all necessary approvals was on the Petitioner herein as per Article 5.1.1 of

the PPA. Therefore, to contend that the non-receipt of evacuation approval is a cause for delayed commissioning is wholly untenable.

- f. With regard to averment that Petitioner could not commission the plant within Scheduled Commercial Operation Date because of Force Majeure events, the PPA clearly sets out the events which are force majeure events, in Article 14 of the PPA. It is submitted that reasons given by the Petitioner for delayed execution of the project do not constitute events of force majeure under Article 14 of the PPA. A perusal of the clause would clearly indicate that none of the reasons cited by the Petitioner herein can be construed to be events of force majeure. Further, Article 14.5 of the PPA clearly sets out the procedure to be followed for notification of an event of force majeure by the Petitioner. The said article requires issuance of a notice of force majeure to the Respondent stating that it is affected by a force majeure event. The said notice is required to be issued within 7 days of occurrence of such event. In the present case, the Petitioner admittedly has not issued notice as contemplated in the PPA. It is settled law that when the terms of a contract contemplate issuance of a notice of force majeure and the same is not allowed, the force majeure clause cannot be deemed to be invoked. Hence, the contentions in this regard are wholly untenable and cannot be sustained.
- g. The Article 5.7 stipulates the circumstances in which the Petitioner can be granted extension to commission the project. In the present case, the delay in commissioning the plant can in no manner be attributed to

the reasons stipulated in Article 5.7 of the PPA. Therefore, the Respondent has rightly not granted the Petitioner any extension of Scheduled Commissioning Date under Article 5.7 of the PPA.

- h. Article 4 of the PPA which requires the Petitioner to satisfy Conditions Precedent within 8 months from Effective Date. Therefore, the Petitioner herein was required to achieve condition precedents on or before 13.6.2017. One of the Conditions Precedent that the Petitioner was required to furnish involves furnishing of documentary evidence of having the clear title and possession of the land required for the Project in the name of the Developer. Further, the Petitioner was also required to obtain all necessary statutory approvals such as conversion order from the District Collector etc. However, the Petitioner has not produced the same within the stipulated time frame. Such being the case, it is submitted that the Petitioner is liable to pay damages for delay in fulfilling conditions precedent in terms of Article 4.3 of the PPA.
- i. In so far as the averments with regard to alleged delay in obtaining permanent evacuation approval is concerned, it is submitted that the Respondent No 2 herein has granted the Tentative Evacuation Approval on 01.06.2017 and Regular Evacuation Approval on 24.06.2017. As per the terms of the PPA, the Petitioner was required to commission the plant by 13.10.2017. Much before the Petitioner actually commissioned its plant on 11.11.2017, the Respondent No. 2 has granted evacuation approval. Hence, the contention in this regard are wholly untenable.

- j. The Government of India had announced demonetization of Bank notes of denominations of Rs 500/- and Rs 2000/- on 08.11.2016. Further GST was implemented in the country on 22.06.2017. Permanent evacuation approval was granted to the Petitioner on 24.06.2017. The Petitioner requested for extension of time vide its letter dated 25.09.2017. Perusal of the said dates would clearly indicate that the events that the Petitioner is attempting to rely on to state that they are force majeure events are wholly untenable. As per Article 14.5.1 of the PPA, the affected party has to give the other party a notice of force majeure no later than 7 days after the date on which such party knew or should reasonably have known about the commencement of the force majeure. In the case on hand, the Petitioner has failed to issue any notice of force majeure within the required time periods. Hence, assuming for the sake of argument that the letter dated 25.09.2017 is to be treated as a force majeure notice, the same is not in consonance with the requirements of the PPA. Therefore, the reasons assigned for seeking for extensions are wholly untenable.
- k. The Petitioner claims that the implementation of GST regime is a force majeure event. The Central Goods and Service Tax Act 2017 was implemented on 22.6.2017. The tax liability on the Petitioner will only accrue, if at all, after the Petitioner commences generation of electricity. The Petitioner's plant was only commissioned on 11.11.2017. Hence, the question of the implementation of GST delaying the commissioning of the plant would not arise at all the alleged.

l. The Petitioner has to pay damages to the Respondent in the event of Petitioner fails to achieve Conditions Precedent and scheduled commissioning date within the stipulated time frame in accordance with the Article 4.3 and 5.8 of the PPA. The same is in keeping with what has been agreed to by the parties. Admittedly, in the present case Petitioner has not achieved condition precedents and scheduled commissioning date within the stipulated timeframe under the PPA. Therefore, the Petitioner herein is required to pay liquidated damages as per terms of PPA. By way of the present petition, the Petitioner is attempting to bypass its obligations under the PPA. It ought to be noted that the Respondent herein is a public utility and non-receipt of electricity within the stipulated time frame comes at a price. The Petitioner ought not to be absolved of its obligations and duties under the PPA on the ground of delay, which is in fact caused wholly and solely by the Petitioner itself.

m. The PPA clearly states that in the event of delayed execution of the project, the Petitioner would only be entitled to tariff of Rs 4.36/- in terms of the Commission's order dated 12.04.2017, which is the order that is applicable at the time when the Petitioner commissioned its plant. Article 12 of the PPA clearly states that in the event of delay in commissioning of the project beyond the Scheduled Commissioning date and during such period if there is variation in the KERC Tariff, then the applicable tariff for the project would be the lower of the rate mentioned in the PPA, namely Rs 5.05 per kwh or the varied tariff

applicable as on the date of commercial operation. There has been no unilateral modification of tariff as contended as the terms of the PPA were known to the Petitioner at the time when the RFP was published by the Respondent No 2 herein itself. Hence, after accepting all the terms of the PPA, it is not open to the Petitioner to now contend that the tariff derived by bid route under Section 63 cannot be modified and that the modification of tariff is unilateral and opposed to the agreed terms. Hence, the averments to the contrary are denied.

n. As per Section 86 of the Electricity Act, the Commission regulates the electricity purchase and procurement process of the answering Respondent. It is pertinent to note that State Commission can interfere in affairs of any licensee in the interest of consumers and same has been affirmed by the Hon'ble Supreme Court in the matter of All India Power Engineers Federation v Sasan Power Ltd, (2017) 1 SCC 487. It is submitted that the Commission has issued the said letter in exercise of its power to regulate the power procurement process of the answering Respondent. Therefore, the contention of the Petitioner that letter (Annexure R1 to the objections of Respondent No. 1 dated 25.09.2018) dated 04.10.2017 is contrary to the terms of the PPA and needs to be set aside as untenable and is denied.

o. The Petitioner's request for extension as per the Official Memorandum dated 20.06.2018 issued by the Ministry of New and Renewable Energy is wholly untenable. It is stated that said Official Memorandum is only advisory in nature. It is pertinent to note that the Petitioner was required

to make a request for extension with the Implementing agencies by producing all documentary evidence in support of its claim. The onus is on the Petitioner herein to satisfactorily explain how the implementation of GST has affected the Petitioner in implementing its project. However, the Petitioner has not produced any material evidence in support of its request. Therefore, it is submitted that Petitioner request for extension is untenable and ought not to be granted. The other averments made in the Petition in the remaining paragraphs are all denied by this Respondent as they do not have valid grounds.

p. Again, he filed statement of objections to the additional affidavit filed by the Petitioner dated 13.01.2021 stating that, the Petitioner has filed additional affidavit on 13.01.2021 to bring certain new additional documents and pleading on record. He has stated that delay in evacuation approval by KPTCL has led to delay in identifying project site and acquisition of land. It is the contention of the Petitioner that despite placing orders for transformers much before the effective date, it had to keep the purchase order for transformers on hold in view of the delay in acquiring land. Further it is the contention of the Petitioner that in view of the imposition of the GST the Petitioner had to comply with various new requirements and the same has led to delay in commissioning of the project. The Petitioner has filed additional affidavit along with additional documents at belated state therefore, the Commission ought not to take the same on record. It is settled law that

amendment of pleadings which are an after thought ought not to be permitted on a mere whim.

- q. The Petitioner had requested for evacuation from Kattige Station and the same was granted to the Petitioner by KPTCL. The 2nd Respondent has granted the tentative evacuation approval on 01.06.2017 and the regular evacuation approval on 24.06.2017. As per the terms of the PPA the Petitioner was required to commission the plant by 13.10.2017, much before the Petitioner actually commissioned its plant on 11.11.2017, the Respondent No. 2 has granted evacuation approval, hence the contentions taken by the Petitioner in this regard are wholly untenable.
- r. The other contention of the Petitioner that purchase orders for transformers were put on hold due to the delay in identification of substation is wholly untenable and not justified. There was no cogent reason for the Petitioner to revise its earlier purchase orders which promised delivery of transformers within the Scheduled Commissioning date. As per Article 14.4 of the PPA clearly states that unavailability, late delivery, change in cost of the plant, machinery equipment cannot be considered as a Force Majeure Event and the same cannot be the ground for extension of time. In so far as contention of the Petitioner that, it faced various hurdles on account of imposition of GST, it is stated that Article 5.1.1(a) of the PPA clearly states that the Petitioner is responsible for complying with applicable law and pay the tax imposed by the Competent Authorities, therefore, imposition of GST cannot be urged as a ground for extension of time. He denied other averments of

the Affidavits and finally submitted that the Petition is bereft of merit and deserves to be rejected.

- s. The 2nd Respondent/KPTCL filed statement of objections stating that, on 27.02.2016, Respondent No. 2 issued substation wise feasibility study to Respondent No.3. It is pertinent to note that the allotments of PPA were done Taluk wise and not substation wise. This created ambiguity in processing the applications for evacuation of power to different substations. Thereafter, on 29.08.2016 (Annexure R-1 to the Statement of objections of R-2 dated 11.11.2019), the Commission accorded all the PPAs in principle approval and clarified that KREDL would co-ordinate with the Respondent herein and the ESCOMs for efficient power evacuation from the solar plants. The Commission also directed that the PPAs must be resubmitted for approval.
- t. That the allegation of delay in granting evacuation approval is misconceived. On 21.10.2016, the Petitioner requested the Respondent No.2 to grant evacuation approval for its plant. In furtherance to the above request of the Petitioner, on 14.11.2016 (Annexure R-2 to the Statement of objections of R-2 dated 11.11.2019), the Respondent No.2 directed the Petitioner to pay processing fee towards evacuation scheme approval. On 9.12.2016 (Annexure R-3 to the Statement of objections of R-2 dated 11.11.2019), the Petitioner paid the processing fee. In the meanwhile, there was some confusion in the name in which application seeking for evacuation approval was made by the Petitioner. In this regard, the Petitioner addressed letter (Annexure R-4

to the Statement of objections of R-2 dated 11.11.2019) dated 18.03.2017 to the Respondent. Thereafter, on 21.03.2017 (Annexure R-5 to the Statement of objections of R-2 dated 11.11.2019), the Respondent herein addressed a communication to the Petitioner bringing to its attention the discrepancy in the name of SPV mentioned in PPA/SPPA as compare to request for evacuation. Due to errors on the part of the Petitioner in its application for evacuation, there was a time lag in granting evacuation approval. The said delay is solely attributable to the Petitioner herein. Thereafter, on 1.06.2017, the Respondent No.2 granted the Petitioner tentative evacuation approval under self-execution basis.

u. The Petitioner vide letter dated 14.06.2017 communicated its acceptance for tentative evacuation scheme and also requested the Respondent to issue Regular Evacuation Approval. The Petitioner vide letter dated 14.06.2017 requested the Respondent No.2 for land in Kattige Sub-Station for construction of 66KV Terminal Bay. The Respondent No.2 vide letter dated 24.06.2016 has granted the Petitioner regular evacuation scheme approval. In the 131st TB Committee meeting held on 23.07.2017, the Respondent No.2 has decided to lease the land at Kattige Sub-Station as per the Petitioner's request.

v. That the Petitioner is not affected by KPTCL not conducting Taluka wise feasibility study. It ought to be noted that the Petitioner had requested for evacuation from Katigge station and same was granted to the

Petitioner by the answering Respondent. It is evident that there is no delay on the part of Respondent No.2 in granting evacuation approval as alleged by the Petitioner. The Respondent No.2 has acted diligently pursuant to the Petitioner's application for evacuation approval and has given evacuation approval within the reasonable time period. It is submitted that the Respondent No. 2 herein has granted the Tentative Evacuation Approval on 01.06.2017 and Regular Evacuation Approval on 24.6.2017. As per the terms of the PPA, the Petitioner was required to commission the plant by 13.10.2017. Much before the Petitioner actually commissioned its plant on 11.11.2017, the Respondent No. 2 herein has granted evacuation approval. Hence, the contentions in this regard are wholly untenable. He denied other averments of the Petition finally submitted that the Petition is bereft of merit and deserves to be rejected.

w. The Third Respondent has filed statement of objections stating that the Petitioner is not entitled for any relief as claimed by him, as the Petitioner was aware of the stipulated time and since he has agreed, there cannot be any further extension of time, thereby, the petition is liable to be dismissed.

x. Further stated that this Respondent being the nodal agency of the Government of Karnataka for facilitating the development of renewable energy in the State of Karnataka had called for the request for proposal for the development of 1200 MW Solar power projects to be implemented in the 60 Taluks vide RfP dated 20.11.2015. However,

this Respondent has issued letter of allotment to the successful bidders and also in favour of the Petitioner.

y. Further stated the Petitioner has entered into a Power Purchase Agreement with the First Respondent therefore, it is for the Respondent No. 1 & 2 herein to counter the Petitioner allegations made against them. This Respondent is not a necessary party to this petition. Thereby, prays to dismiss this petition against Respondent No. 2 in the interest of justice and equity.

- 13) The Petitioner has filed rejoinder to the objections of the Respondents, reiterating the contents of the Petition. Further submitted that the Official Memorandum dated 20.06.2018 and the concession provided in it is in the nature of a benefit, it is settle position of law that beneficial notifications providing exemptions shall be construed liberally in the matter of Commissioner of Customs (Preventive) Mumbai Vs Ambalal And Company (2011) 2 SCC 74, it is held at Para 16 that, the rule regarding exemptions is that "exemptions should generally be strictly interpreted but beneficial exemptions having their purpose as encouragement or promotion of certain activities should be liberally interpreted".
- 14) Further it is stated, the Supreme Court while deciding the matter had reiterated its view in Union of India vs Wood Papers Ltd. (1990) 4 SCC 256 wherein it was held Para 5 that, "When the question is whether a subject falls in the notification or in the exemption clause then it being in nature of exception is to be construed strictly and against the subject but once ambiguity or doubt about applicability is lifted and the subject falls in the

notification then full pay should be given to it and it calls for a wider and liberal construction.”

- 15) Further it is stated, in *Swadeshi Polytex Ltd. vs Collector of Central Excise* (1990) 2 SCC 358 it was held that: “21 It is true that when in a fiscal provision, if benefit of exemption is to be considered, this should be strictly considered. But the strictness of the construction of exemption notification should not be given by any circuitous process of interpretation. After all, exemption notifications are meant to be implemented and trade notices in these matters clarify the stand of the Government for the trade.”
- 16) Further it is stated, the Gauhati High Court in *Tribeni Metalloys Pvt Ltd. vs Commissioner Central Excise and Service Tax, Guwahati Division* (2019) 2 Gau LR 719, after considering number of decisions by the Supreme Court has culled out following propositions for consideration: “25. From aforesaid provisions of law, the following propositions, amongst other can be culled out: (i) If there is question as to whether a beneficiary comes within the purview of an exemption notification, then it being in the nature of an exception has to be strictly construed, but once, it is established that the beneficiary is entitled to the benefit of exemption, then the provision of the exemption notification has to be given wider and liberal construction; (ii) When the exemptions are granted with the object to encourage industrial growth, or to encourage exports, the exemptions provided in the notification be given its full effect and such entitlements should not be constricted by attempting a narrower construction. The Hon’ble High Court, after considering the above propositions in light of decisions by the

Hon'ble Supreme Court in Union of India vs Wood Papers Ltd., Swadeshi Polytex Ltd. Vs Collector of Excise, Indian Farmers Fertiliser Co-operative Ltd. vs Collector of Central Excise (1996) 5 SCC 488, held that the Appellant would be entitled to the benefit of exemption of excise duties for a period of 10 years.

- 17) In view of the above referred decisions by various Courts it is stated that the Petitioner is, on fulfilment of conditions mentioned in the Office Memorandum, dated 20.06.2018, if fully entitled to the extension of 62 days in achieving SCOD.
- 18) The 1st Respondent has imposed the reduced tariff of Rs.4.37/KWh (as against the contractual tariff of Rs.5.05/KWh), and imposed liquidated damages upon the Petitioner for delay in achieving Conditions Precedent and SCOD. The said penalty has been imposed upon the Petitioner without determining the representations made by the Petitioner regarding force majeure events before the 1st Respondent. Assuming without admitting that 1st Respondent imposed the liquidated damages upon the direction by the Commission, it is submitted that it is settled position of law that the party alleging breach of contract and thereby imposing penalty in the nature of liquidated damages has to prove losses. The 1st Respondent, in the present instance, has failed to claim any particular amount of damages, much less prove the damages. The 1st Respondent, without any application of mind, has levied liquidated damages and reduced tariff, contrary to the terms of the PPA, and the settled position of law in this regard. At the stage he relied the decision reported in Kailash

Nath Associates vs Delhi Development Authority & Ors (2015) 4 SCC 136, and stated as per the finding given by the Hon'ble Supreme Court the contention of the 1st Respondent that to levy of damages and deduction of tariff are untenable. With all these the Petitioner finally prays to allow the Petition as prayed for in the interest of justice and equity.

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

20) 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:** For what relief the Petitioner is entitled to?

3. **Issue No. 3:** What Order?

21) **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?

22) The present Petition is filed seeking for a declaration that the delay in commissioning was due to reasons outside the control of the Petitioner and therefore amount to Force Majeure as per Article 14 of PPA and also declare that the KERC applicable tariff as stated in Article 12 of the PPA would be as per the tariff order dated 30.07.2015 and with other reliefs. The present petition arises in context of the delay of 28 days in commissioning the Petitioner's project at Honnalli Taluk Davangere District. The SCOD as per the PPA was 14.10.2017 i.e., one year after the date of

approval of the PPA by the Commission dated 14.10.2016. The actual commissioning of the project was on 11.11.2017.

23) The Petitioner has taken three major grounds under the head of Force Majeure Events for extension of time in commissioning the power project, which are detailed as below: -

- a) Introduction of GST (62 days).
- b) Demonetization.
- c) Delay in issuing Evacuation approval.

a) **Introduction of GST (62 days): -**

i) During the course of arguments, the Learned Counsel for the Petitioner has submitted that, all solar power projects in the State of Karnataka including the Petitioner's project were affected by introduction of the GST. Difficulties caused to developers on account of introduction of the GST has been acknowledged by the MNRE in the Office Memorandum (Annexure-U to the Additional Affidavit of the Petitioner dated 17.07.2018) dated 20.06.2018. The Petitioner achieved financial closure on 01.07.2017 and commissioned the plant on 11.11.2017. The Hon'ble APTEL has upheld GST as Force Majeure Event in Chennammagathihalli Solar Power Project case, thereby prayed to treat the delay caused in this regard as Force Majeure Event.

ii) The Learned Counsel for the Respondents by way of reply has submitted that the Petitioner at the time of filing of the Petition i.e., on 20.04.2018, specifically did not take the contention that the commissioning of the project was delayed due to the introduction

of GST. Only as an afterthought, the Petitioner has taken this contention and got amended the Petition on 12.06.2019. The Petitioner has misled by stating that, the Office Memorandum dated 20.06.2018 issued by the Ministry of New and Renewable Energy (MNRE) would be applicable to the Petitioner. But the MNRE Official Memorandum, requires that the affected party shall provide documentation to show that there was a disruption in the process and therefore, the project could not be commissioned as per the terms of the PPA. But the Petitioner till date, failed to produce any documentary evidence of its claims before this Commission. Without providing cogent documentation the relief sought by the Petitioner cannot be granted. Apart from that as per Article 14.3.1 of the PPA, 'introduction of GST cannot be treated as Force Majeure event'. Again Article 14.5.1 of the PPA states that 'the affected party, allegedly the Petitioner is required to issue a notice to the Respondent within a period of 7 days from the occurrence of the Force Majeure event', but the Petitioner failed to do so. The Commission in various judgements has stated that it is trite law that the Force Majeure Clause in PPA has to be strictly construed and if no notice had been issued as contemplated under the Force Majeure Clause describing the event, the Petitioner cannot seek extension of time under the said clause. With this the Learned Counsel for Respondents submitted, the Petitioner is not entitled for any relief under this ground.

iii) On 01.07.2017 the Government of India introduced the Central Goods and Services Tax Act 2017 (GST Law) which brought about fundamental structural changes in the prevailing tax regime in the country. There was a slowdown from July 2017 to September 2017 in the manufacturing as well as service industry across the country. Consequently, there were certain implications due to the GST Law on the developers of solar projects i.e., (1) Contractors/suppliers were delaying contracts due to lack of clarity on tax structure. (2) Contractors/suppliers had to revamp their systems amend and reissue "purchase orders" to align them as per the GST regime/to make them GST law Complaint (3) Lack of clarity on GST percentage applicable on invertors contributed to delay in supply of material required for setting up of projects (4) and introduction of GST Law resulted in confusion regarding MNRE Certificate for Concession Customs Duty which was kept on hold from June 2017 further resulting in delay in supply of key equipment. The MNRE after examining the impact of GST Law, issued Official Memorandum dated 20.06.2018 wherein, it has extended the SCOD for the solar projects for a period of 62 days, by way of said Official Memorandum (Annexure-U to the Additional Affidavit of the Petitioner dated 17.07.2018) dated 20.06.2018 which reads as follows: -

"All the Project developers who claim to have been affected by GST induced disruptions shall make a formal application to SECI/NTPC/ other

implementing agencies for Extension of Time (EoT) due to GST disruptions giving all documentary evidence in support of their claim. SECI/NTPC/Implementing agencies shall examine the claim objectively and grant EoT based on facts, following above principles. While applying the above principles, SECI/NTPC/any other implementing agency may satisfy itself that the claimants were actually affected due to GST induced disruptions in the period for which extension has been claimed. The implementing agencies shall also ensure that no double relief is granted due to overlapping reasons cited for grant of EoT."

iv) It is specific contention of the Respondent that the Petitioner has not produced any evidence in proof that the project work adversely affected due to introduction of GST which resulted delay in commissioning of the power project. On perusal of the documents produced by the Petitioner along with additional affidavit dated 13.01.2021, it appears that he had placed purchase order to purchase Power Transformer (15/20MVA, 66/11KV) on 13.10.2016 (Annexure-Z filed with additional affidavit dated 13.01.2021). Further the delivery schedule in Colum No. 10 of the purchase order shows that complete power transformers shall be delivered by 30.07.2017 to the Petitioner. The Petitioner has furnished copy of the E-mail dated 17.07.2017 (Annexure-AA filed with additional affidavit dated 13.01.2021) which shows that the Vendor of the Transformer has written a letter to the Petitioner stating that there is considerable increase in the prices of raw material which resulted the increase in the cost of the transformer by around 6.5 Lakhs. Further it is said the transformer

shall be manufactured on priority and dispatched from the factory by 30.10.2017. Another copy of E-mail dated 21.07.2017 (Annexure-AB filed with additional affidavit dated 13.01.2021) shows that the Vendor had discussed with the Petitioner and he is going to manufacture of the transformer on the basis of the acceptance on price implication in the basic price of transformer for Honnali by 6.5 Lakhs. Another document purchase order dated 22.08.2017 (Annexure-AC filed with additional affidavit dated 13.01.2021) shows that the Petitioner has placed revised Power Transformer (15/20MVA, 66/11KV) agreeing to pay State GST and Integrated GST along with Unit price. The Petitioner had produced three revised purchase orders dated 08.09.2017 (Annexure-AD filed with additional affidavit dated 13.01.2021), 21.08.2017 (Annexure-AE filed with additional affidavit dated 13.01.2021) and dated 14.09.2017 (Annexure-AF filed with additional affidavit dated 13.01.2021) respectively, shows that the Petitioner had placed revised orders for purchase of certain materials and these documents shows that the applicable GST shall be paid extra on actual basis on the said total basic contract value. All these documents clearly establish that there had been some delay in purchase of transformer and other materials for the purpose of power project due to introduction of GST. This contention of the Petitioner is not denied by the Respondents and they have not contradicted the contents of Annexure-Z,

Annexure-AA to Annexure-AF by placing any evidence. Hence, this contention taken by the Petitioner has to be accepted and we hold that there was some delay in commissioning of project due to introduction of GST which is beyond the control of the Petitioner.

b) **Demonetization: -**

- i) It is the case of the Petitioner that, after obtaining approval from KERC i.e., dated 14.10.2016 he had to apply for evacuation approval, meanwhile, Government of India by way of notification dated 08.11.2016 withdrew the legal tender status of INR 500/- and INR 1,000/- denominations of Bank notes, this demonetization has had a domino effect from 08.11.2016 to the end of January 2017 on the land acquisition and other project activities thereby, there was a delay in commissioning the SCOD.
- ii) During the course of arguments, the Learned Counsel for the Respondent submitted that the Petitioner has failed to produce documents to explain how demonetisation has caused delay in commissioning of the plant. The Petitioner also has not issued force majeure notice as contemplated under Article 14.5. The contentions regarding demonetisation are only an afterthought which ought not to be considered by the Commission.
- iii) It is stated that the Petitioner has failed to prove that the grounds taken by him are force majeure events which have caused delay in commissioning of the plant. It is stated that reasons given by the

Petitioner for delayed execution of the project do not constitute events of force majeure under Article 14 of the PPA. Further, Article 14.5 of the PPA clearly sets out the procedure to be followed for notification of an event of force majeure. The said article requires issuance of a notice of force majeure to the Respondent stating it is affected by a force majeure event. The said notice is required to be issued within 7 days of occurrence of such event. In the present case, the Petitioner admittedly has not issued notice as contemplated in the PPA. In this regard the Learned Counsel for the Respondent placed reliance on the decision reported in Himachal Sorang Power Ltd v CERC and others, 2015 SCC OnLine APTEL 148 and submitted to reject the prayer of the Petitioner under this ground.

iv) Though the Petitioner has taken the contention that, due to demonetization he suffered delay in commissioning the power project, but not placed any materials in proof of it. Hence, the contentions in this regard taken by the Petitioner cannot be sustained for want of supportive evidence, thereby rejected.

c) **Delay in issuing Evacuation approval: -**

i) During the course of arguments, the Learned Counsel for the Petitioner submitted that, the Petitioner had entered into PPA dated 23.05.2016 with the 1st Respondent. The Scheduled Commercial Operation Date under the PPA was 12 months from the effective date i.e., 14.10.2016, the date on which the Commission had

accorded the approval to the PPA. The Commission also written a letter dated 14.10.2016 approving the PPA entered into between the Petitioner and 1st Respondent for development a 20 MW capacity Solar PV Power Plant at Honnalli Taluk, Davangere District subject to certain corrections and modifications. Thereafter, on 06.01.2017 a Supplemental PPA also executed between them. The Petitioner had conducted with due diligence and found that land was also available inside the Kattige Substation for the purpose of establishing its terminal bay. He had applied for grant of evacuation approval from Kattige Substation in Honnalli Taluk through a letter dated 21.10.2016 along with all required documents before 2nd Respondent. In the meanwhile, he had applied for all permissions approvals and consents required to perform its obligations under the PPA except land deeds as the acquisition process was taking time. Even he could not have initiated the land acquisition process without having obtained evacuation approval. The Petitioner had to purchase agricultural land and initiate the process of conversion of agricultural land and he made necessary applications well in time. Further the Petitioner in compliance with Article 4 of PPA issued a letter dated 23.05.2017 to the 1st Respondent and further he stated that he had identified the land and were about to initiate their procurement process, hence he sought an extension of time from 14.06.2017 to 15.09.2017 to fully comply with the Conditions Precedents as per Article 4 of the PPA.

ii) Further he submitted that the Petitioner has received tentative evacuation scheme from the 2nd Respondent through a letter dated 01.06.2017. In that letter it is stated as per the feasibility report furnished by KPTCL for Honnalli Taluk, Davangere District the 66/11KV Honnalli Substation and the 110/11KV Nyamathi Substation were studied. It was found that both substations only had evacuation capacity available for 10MW each. It was further stated that the 1200MW tenders were not invited based on the feasibility report furnished by KPTCL, therefore, evacuation approval would be considered at 66/11KV Kattige substation at Honnalli Taluk, Davangere District. In this way after an inordinate delay of 223 days, the 2nd Respondent vide letter dated 01.06.2017 issued tentative evacuation scheme for the Petitioner's proposed 20MW (AC) Solar project in Honnalli Taluk with certain terms and conditions for the acceptance and compliance of the Petitioner. Thereafter, it is stated that the Petitioner was inter-alia required to communicate its acceptance/confirmation to the tentative evacuation scheme after which the scheme would be regularized. Soon after the Petitioner vide its letter 14.06.2017 to the 2nd Respondent accepted the provisional evacuation scheme and general conditions therein except for the condition that the Petitioner should purchase land adjacent to 66/11KV Kattige Substation for construction of 66KV TB with metering. In this regard the Petitioner requested the 2nd Respondent to permit to utilize the land already available within

Kattige substation for construction of 66KV TB. This request made by the Petitioner with intention of saving time as the process of acquisition land was a time consuming and laborious process. Thereafter, the 2nd Respondent vide its letter dated 24.06.2017 granted evacuation approval and issued regular evacuation scheme to be executed under self-execution by the Petitioner. Further he stated that the 2nd Respondent has taken 223 days in granting Tentative evacuation approval, thereby the Petitioner was made to suffer delay in commissioning of the plant within SCOD which is out of his control. As per PPA the SCOD was 14.10.2017, inspite of all the difficulties the Petitioner had commissioned the plant on 11.11.2017 i.e., only a small delay of 28 days, thereby, submitted to treat this as Force Majeure and grant extension of time.

iii) By way of reply the Learned Counsel for the Respondent has submitted that, this allegation of delay in granting evacuation approval is wholly misconceived. On 21.10.2016 the Petitioner had requested the Respondent No. 2 to grant evacuation approval for its plant. In furtherance to the above request of the Petitioner on 14.11.2016 the 2nd Respondent directed the Petitioner to pay processing fee towards evacuation scheme approval. On 09.12.2016 the Petitioner paid the processing fee. In the meanwhile, there was some confusion in the name in which an application seeking for evacuation approval was made by the Petitioner, in this regard, the Petitioner had written a letter dated 18.03.2017 to the

2nd Respondent. Again on 21.03.2017 bringing to its attention the discrepancy in the name of the SPV mentioned in PPA/SPPA as compared to request of evacuation. Thereby, the error was attributed on the part of the Petitioner in its application for evacuation. On 01.06.2017 the Respondent No. 2 granted the Petitioner tentative evacuation approval under self-execution basis. The Petitioner vide its letter dated 14.06.2017 communicated acceptance for tentative evacuation scheme and also requested to issue regular evacuation approval and also land in Kattige substation for construction of 66KV terminal bay. The 2nd Respondent on 24.06.2016 has granted the Petitioner regular evacuation scheme approval and in 131st TB Committee meeting held on 23.07.2017 and 2nd Respondent has decided to lease the land at Kattige substation as per the Petitioner's request. All these events are evident that there was no delay on the part of the 2nd Respondent in granting evacuation approval as alleged by the Petitioner. As per terms of PPA the Petitioner was required to achieve Conditions Precedent on or before 13.06.2017. Hence, the contentions in this regard are wholly untenable. It is pertinent to note that Article 14.4 of PPA clearly states that unavailability, late delivery or change in cost of the plant machinery equipment cannot be consider as a Force Majeure Event and the same cannot be the ground for extension of time. With this he prays to reject the prayer of the Petitioner.

iv) On perusal of the records, it appears that, the Petitioner has applied for Project Evacuation Approval of its full capacity of 20 MW from 66/11 KV Kattige substation on 21.10.2016 [Annexure-G to the Amended Petition] i.e., a mere one week from the effective date of 14.10.2016 with all the required documents. On 14.11.2016, KPTCL responded to Petitioner's letter, dated 21.10.2016, requesting the Petitioner to deposit the processing fee (Annexure-R2 furnished by the 2nd Respondent). On 09.12.2016, in response to KPTCL's letter, dated 14.11.2016, the Petitioner paid the Evacuation Processing Fee, KREDL Facilitation Fee, and submitted the KERC letter, dtd.14.10.2016, through which KERC instructed the parties to enter into a supplemental PPA with the correct Taluk name. (Annexure-R3 furnished by the 2nd Respondent). The Petitioner thereafter on its own diligence brought to the notice of KPTCL that it had wrongly mentioned the name of its SPV while applying for project evacuation vide letter, dated 17.03.2017 (Annexure-R4 furnished by the 2nd Respondent), and submitted the correct details to the KPTCL/2nd Respondent. The Petitioner was thereafter granted tentative evacuation approval by a letter, dated 01.06.2017 (Annexure-J to the Amended Petition). Therefore, that KPTCL/2nd Respondent took time of eight months to respond to the Petitioner's application for Project Evacuation even though the Petitioner had provided all required documents and data to KPTCL/2nd Respondent in its application.

v) In the letter, dated 01.06.2017 (Annexure-J to the Amended Petition), KPTCL/2nd Respondent stated that the sub-stations studied for feasibility in Honnalli Taluk, Davanagere were 66/11 kV Honnalli s/s for 10 MW and 110/11 kV Nyamathi S/s for 10 MW. It was also stated that the 1200 MW tenders were not called based on the feasibility report furnished by KPTCL. Then it is clear from the letter, dated 01.06.2017, that the Petitioner had provided all required information in its application, dated 21.10.2016. The delay was due to the lack of a feasibility study to ensure availability of evacuation facilities for 20 MW projects in all Honnalli Taluk, Davanagere district. As per Annexure-K (filed along with Amended Petition) the Petitioner has sought for land inside the substation for construction of the terminal bay and sought regular evacuation approval and spare space inside the substation to terminate the power generated from the proposed Project. The Petitioner was granted the regular evacuation scheme on 24.06.2017 (Annexure-M filed along with Amended Petition) by KPTCL/2nd Respondent. The document furnished in Annexure-N (filed along with Amended Petition), the Petitioner was granted land inside the Kattige S/s along with the Regular Evacuation Approval on 13.07.2017 (Annexure-N to the Amended Petition), in that letter it is stated that as per proceedings of 131st TB Committee meeting held on 23.06.2017, the KPTCL land for construction of 66 KV bay on lease basis is approved. The Petitioner completed the land acquisition process, and obtained

the various consents required within a period of about three months from the date of the Regular Evacuation Approval i.e., 13.07.2017.

- vi) The Petitioner in its Additional Affidavit has stated that, it lost its slot for manufacturing of the Transformer directly due to the delay in PE Approvals, and the consequent delay in land acquisition. The Petitioner's vendor agreed to manufacture the transformer on priority and dispatch it from their factory on or before 30.10.2017. The Petitioner requested that the delivery of the transformer be completed on or before 15.10.2017.
- vii) The Petitioner made all efforts to obtain connectivity in a time bound manner. The Petitioner provided all required documents along with its application, dated 20.10.2016, i.e., within one week after Effective Date on 14.10.2016. Further, even KPTCL vide letter dated 01.07.2017 (Annexure-J filed with the Amended Petition) acknowledged that the Petitioner had approached KPTCL seeking evacuation for the present project. Accordingly, the Petitioner had achieved all Condition Precedents as on 23.05.2017 (Annexure-H filed with the Amended Petition). The KPTCL/2nd Respondent caused inordinate delay in grant of project evacuation approval on account of lack of a feasibility study being conducted by itself.
- viii) The following events would go to show the enormous delay in execution of the project: -

Table 1

Sl. No.	Date	Description of the documents	Annexures
1.	23.05.2016	PPA signed between the Petitioner and the 1 st Respondent	"D" filed along with Amended Petition
2.	21.10.2016	Application given by the Petitioner to KPTCL for Regular evacuation approval at Honnali Taluk, Davangere District	"G" filed along with Amended Petition and "AH" filed along with Additional Affidavit dated 15.11.2021
3.	14.11.2016	Letter written by KPTCL to the Petitioner regarding remittance of processing fee and furnishing documents	"R2" filed along with Objections of the 2 nd Respondent
4.	09.12.2016	Letter written by Petitioner to the KPTCL for having made processing fee along with required documents with a request to issue Regular Evacuation Approval	"R3" filed along with Objections of the 2 nd Respondent
5.	01.06.2017	Tentative evacuation approval was granted	"J" filed along with Amended Petition
6.	14.06.2017	Letter written by Petitioner to the KPTCL accepting Tentative Evacuation Scheme and further requesting to give final evacuation approval and also spare space inside 66/11 KV Kattige KPTCL Substation	"K" filed along with Amended Petition
7.	24.06.2017	Letter written by KPTCL to the Petitioner regarding approval of regular evacuation scheme for proposed 20 MW (AC) solar project in Honnali Taluk, Davangere District	"M" filed along with Amended Petition
8.	23.06.2017	131 st Land Sparing Committee decided to spare land for construction of 66 KV bay on lease basis	2 nd Para in "N" filed along with Amended Petition
9.	14.11.2017	Commissioning Certificate issued by Executive Engineer, TL & SS Division, KPTCL, Davangere certifying that the project was commissioned on 11.11.2017	"S" filed along with Amended Petition

Table 2

Sl. No.	The difference of Period shown in Annexure-G (filed with Amended Petition) and Annexure-J (filed with Amended Petition)	Days
1.	21.10.2016 to 31.10.2016	10 days
2.	November 2016	30 days
3.	December 2016	31 days
4.	January 2017	31 days
5.	February 2017	28 days
6.	March 2017	31 days
7.	April 2017	30 days
8.	May 2017	31 days
9.	01.06.2017 to 01.06.2017	01 day
Total		223 days

The above events would show that though the evacuation approval was granted after 223 days of the effective date, the Petitioner could not go ahead with the execution of the project as planned because of delays in granting evacuation approval and sparing land by the 2nd Respondent within time which led to delay in the commissioning the plant.

- 24) During the course of arguments, the Learned Counsel for the Petitioner in support of his arguments, relied upon the judgement rendered by Hon'ble APTEL in the case of Chennammagathihalli Solar Power Project Vs BESCOM in appeal No. 351/2018 dated 14.09.2020 and Sirwar Renewable Energy Private Limited Vs KERC & Others in appeal No. 245/2019 dated 12.08.2021.
- 25) We have perused the above judgements, in the case of Chennammagathihalli Solar Power Project Vs BESCOM 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."

"9.1) Having regard to the deliberations and our analysis, as stated supra, we are of the opinion that there was nothing wrong on the part of KERC to Suo motto interfere in the matter. As being a State Regulator, it has jurisdiction to look into affairs of ESCOMS in purchase and supply of powers in the larger interest of Consumers. However, as the COD extension was granted under the signed PPA between the parties and after applying, due diligence in the matter considering all prevailing facts and matrix of events, the State Commission ought to have considered the same and approved so as to meet the ends of justice. Needless to mention that the PPA' Terms & Conditions were duly approved by the State Commission which crystallized the rights of the parties."

- 26) We have also perused the judgement, in the case of Sirwar Renewable Energy Private Limited Vs KERC & Others in appeal No. 245/2019 dated

12.08.2021, in which the Hon'ble APTEL has relied the judgement of Channammagathi Solar Power Project Vs BESCO in appeal No. 351/2018 and also held as: -

"93) What we note from the above dates is that the delay in obtaining evacuation approval, delay in obtaining the equipment from MEIL, the sole approved seller of the equipment by KPTCL, delay in approval of the diagrams have caused delay to commission the project. None of these delays are attributable to the negligence to the Appellant. On the other hand, the list of dates mentioned above clearly indicates that the Appellants were exercising due care and diligence to pursue various authorities to secure the approvals/sanctions in time. For no fault of the Appellants, the approvals by one authority or the other got delayed, which is beyond the control of the Appellants. The scheme which was envisaged to benefit the farmers turned out to be a curse, since the Appellants were compelled to run from pillar to post to obtain these approvals apart from entering in to several litigations to get their rights resolved."

"94) We are of the opinion that none of the delays was at the instance of Appellants and it was only on account of delay in securing these approvals from Governmental Instrumentalities. Therefore, in accordance with PPA terms and conditions, the Appellants are entitled for extension of time for commissioning of the project and since the commissioning of the project is extended, they are entitled for tariff at agreed rate i.e., Rs.8.40 per unit, so also they are not liable to pay any damages. They are not liable to pay other liquidated Damages. Over and above this, they were constrained to commission the project and receive reduced tariff. The Appellants are also entitled for late payment surcharge in terms of PPA."

"95) In terms of the Articles and various Clauses especially Clause 6.4 of the PPA, if the amounts are due, not paid in time, the Solar Developer is entitled for late payment surcharge. Since the delay was not an account of the Appellants and they did commission the solar plant within the extended SCOD, we are of the opinion that they are entitled for late payment surcharge. Similarly, since there was no deficit on the part of the Appellants in any manner, they are not liable to pay Liquidated Damages or any other damages."

"96) We are aware that number of appeals are filled pertaining to solar projects in Karnataka under Farmers Scheme. We also note that in some cases, the Application for conversion of agriculture land was submitted two or three months or may be six months after approval of PPA. We take judicial notice as discussed in Appeal No 160 of 2020 (Clearsky matter) that having regard to the nature of the solar plants to be developed by the farmers between 1 MW to 3 MWs, which required land conversion orders from revenue authorities, which has elaborate process consuming lot of time, the State Government in fact opined that there would be deemed conversion for such solar projects. However, in spite of such expression, the guidelines to be followed by the revenue authorities for granting deemed conversion orders in favour of the solar plant developers were not clear and though the farmers approached revenue department, the concerned officers seem to have replied that they have not received guidelines in that regard. We also notice that even the guidelines came to be issued much later. Though this fact was not pleaded in all the appeals, but the guidelines in this regard issued by the State Government is common which was delayed and not intimated to the concerned authorities, we are of the opinion that such confusion pertaining to deemed conversion procedure has also led to delay in either approaching the concerned revenue authority for conversion of agriculture land or even if they had approached, the conversion order was granted with much delay."

"97) Apparently, the scheme was meant to benefit small and holding farmers, who could establish solar plants between 1 MW to 3 MWs. This also definitely requires business prudence apart from minimum knowledge in the field concerned. As per the policy, the establishment of solar plant was to be in the agricultural land. On account of restrictions to use agricultural land for non-agricultural purpose, conversion of agricultural land use is a must. In terms of Karnataka Revenue Act, it has laborious process to get conversion of agricultural land into non-agricultural one. To establish solar power plant, it is not just conversion of agricultural land permission, but several other approvals/consent/permissions were required."

"98) Till SPV was established, it was the individual Appellant i.e., SPD who had to run from office to office to secure required approvals/consents. Having regard to

laborious process to secure these permissions from various Government instrumentalities, it would have been a wise decision to have infrastructure under one roof (like single window agency) to get all these clearances which would have saved lot of time for the establishment of these small solar power plants in question. Since either the SPD or SPV had to run from office to office situated at different places to secure approval and permission which would have not have been possible to secure on any one particular day also seems to have caused hardship and delay in procuring the approvals, be it and conversion or power evacuation and grid connectivity or safety certificate from CEIF etc. To apply for conversion of land to non-agriculture purpose itself, more than 13 documents are required, which have to be secured not from single place but various departments of Government. The scheme which was expected to be a boon to the farmers seems to have become a bane."

The findings given by the Hon'ble APTEL in the above judgements are aptly applicable to the case on hand and therefore the Petitioner is entitled for extension of time on the ground that the delay caused in granting evacuation approval, GST and demonetization induced delay under Force Majeure Event.

- 27) During the course of arguments, the Learned Counsel for the Petitioner has submitted that, he has placed all the communications sent to the Respondents intimating them on the Force Majeure Events affecting the timely commissioning of the project. The 1st Respondent has issued a letter to the Petitioner dated 17.11.2017 communicating the approval of BESCO to commission the project on or before 13.11.2017 subject to certain conditions. Thereby, the allegations of the Respondents that no Force Majeure notice was given by the Petitioner are baseless and false.
- 28) As per Clause 14 'Force Majeure' of the PPA (Annexure-R to the main Petition) is described as under: -

“ARTICLE 14: FORCE MAJEURE

14.3 Force Majeure

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

- a) act of God, epidemic, extremely adverse weather conditions, lightning, earthquake, landslide, cyclone, flood, volcanic eruption, chemical or radioactive contamination or ionizing radiation, fire or explosion (to the extent of contamination or radiation or fire or explosion originating from a source external to the Site);*
- b) an act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, riot, insurrection, terrorist or military action, civil commotion or politically motivated sabotage;*
- c) compulsory acquisition in national interest or expropriation of any Project Assets or rights of the Developer or of the Contractors;*
- d) any judgement or order of any court of competent jurisdiction or statutory authority made against the Developer in any proceedings for reasons other than (i) failure of the Developer to comply with any Applicable Law or Applicable Permit, or (ii) on account of breach of any Applicable Law or Applicable Permit or of any contract, or (iii) enforcement of this Agreement, or (iv) exercise of any of its rights under this Agreement by the Government or*
- e) unlawful or unauthorized or without jurisdiction revocation of, or refusal to renew or grant without valid cause, any clearance, license, permit, authorization, no objection certificate, consent,*

approval or exemption required by the Developer or any of the Contractors to perform their respective obligations under this Agreement and the Project Agreements; provided that such delay, modification, denial, refusal or revocation did not result from that Developer's or any Contractor's inability or failure to comply with any condition relating to grant, maintenance or renewal of such clearance, license, authorization, no objection certificate, exemption, consent, approval or permit.

14.4 Force Majeure Exclusions

14.4.1 Force Majeure shall not include (i) any event or circumstance which is within the reasonable control of the Parties and (ii) the following conditions, except to the extent that they are consequences of an event of Force majeure:

- a) Unavailability, late delivery, or changes in cost of the plant, machinery, equipment, materials, spare parts or consumables for the Power Project;
- b) Delay in the performance of any Contractor, sub-Contractor or their agents;
- c) Non-performance resulting from normal wear and tear typically experienced in power generation materials and equipment;
- d) Strikes at the facilities of the Affected Party;
- e) Insufficiency of finances or funds or the agreement becoming onerous to perform and
- f) Non-performance caused by, or connected with, the Affected Party's:
 - I. Negligent or intentional acts, errors or omissions;
 - II. Failure to comply with an Indian Law; or
 - III. Breach of, or default under this Agreement.

14.5 Notification of Force Majeure Event

14.5.1 The Affected Party shall give notice to the other Party of any event of Force Majeure as soon as reasonably practicable, but not later than seven (7) days after the date on which such Party knew or should reasonably have known of the commencement of the event of Force Majeure. If an event of Force Majeure results in a breakdown of communications rendering it unreasonable to give notice within the applicable time limit specified herein, then the Party claiming Force Majeure shall give such notice as soon as reasonably practicable

after reinstatement of communications, but not later than one (1) day after such reinstatement.

Provided that such notice shall be a pre-condition to the Affected Party's entitlement to claim relief under this Agreement. Such notice shall include full particulars of the event of Force Majeure, its effects on the Party claiming relief and remedial measures proposed. The Affected Party shall give the other Party regular (and not less than monthly) reports on the progress of those remedial measures and such other information as the other Party may reasonably request about the Force Majeure Event.

- 14.5.2 The Affected Party shall give notice to the other Party of (i) the cessation of the relevant event of Force Majeure; and (ii) the cessation of the effects of such event of Force Majeure on the performance of its rights or obligations under this Agreement, as soon as practicable after becoming aware of each of these cessations.

As per the above provisions the affected party shall give notice to the other party of any event of Force Majeure as soon as reasonably practicable, but not later than 7 days after the date on such party knew or should reasonably have known of the commencement of event of Force Majeure.

- 29) In the case on hand on perusal of the letter written by the Petitioner to the BESCOM dated 25.09.2017 (Annexure-P to the Amended Petition) shows that the Petitioner has requested for extension of the Scheduled Commissioning Date for 20 MW (AC) Solar Power Project in Honnalli Taluk narrating several factors resulting in a delay longer than that factored by him which included demonetization, PE approval, GST and also there had been inordinate delay in obtaining several consents and permits from the Government Authorities, Departments and harsh weather conditions etc., further requested to extend time line for SCOD by a period of 30 days.

- 30) On perusal of the letter written by KERC to the BESCO dated 04.10.2017 (Annexure-R1 filed by the 1st Respondent along with objections) states that, the developer of the projects to file a Petition before the Commission after successful commissioning of the project with all the relevant grounds/documents justifying their claims for extension of time under Force Majeure conditions of the PPA if so advised. Further the Commission has also directed the BESCO to take similar action instead of individually writing to the Commission for clarification in similar cases, in respect of development of 1200 MW Solar Power Project in 60 Taluks. On perusal of Annexure-T (filed along with Amended Petition) a letter written by BESCO to the Petitioner dated 17.11.2017 has approved to commissioning of the project on or before 13.11.2017 subject to certain conditions. In this letter (in reference No. 4) the 1st Respondent has based reliance on the guidelines given by the KERC through a letter dated 04.10.2017 (Annexure-R1 filed by the 1st Respondent along with objections). However, the Petitioner has commissioned the project on 11.11.2017 i.e., prior to 13.11.2017 as per Annexure-T (filed along with Amended Petition) and also approached the KERC for an order of extension of time as per conditions mentioned in it.
- 31) All these documents established that the Petitioner had complied with the provisions under Clause 14.5.1 of PPA. Though the Respondents have taken contention that the Petitioner has not followed strictly the Clauses of Force Majeure as per PPA, nothing is placed on record in support of

their contention. Therefore, to this extent of the arguments addressed by the Learned Counsel for the Respondents holds no water.

- 32) In this regard we rely upon the judgement passed by the Hon'ble APTEL, New Delhi in Appeal No. 38/2019 dated 12.08.2021 between Hirehalli Solar Power Project LL.P & Another Vs BESCO & Another, in which the Hon'ble APTEL has held in para 50 as: -

"It is also submitted that, this Tribunal in "Chamundeshwari Electricity Supply Company Ltd. Vs Saisudhir Energy (Chitradurga) Pvt. Ltd" reported in 2018 SCC On Line APTEL 65 had held that no formal issuance of Notice is required in cases of force majeure events."

Further the Petitioner has also produced Commissioning certificate (Annexure-S to the Amended Petition) dated 14.11.2017 which shows he had commissioned the project on 11.11.2017.

- 33) In view of the discussions made above and also in Para 23 (c) (viii) (at Page No. 54, Table-2) the tables disclose the time taken for granting approval by Government Authorities and also GST and demonetization induced delay, the prayer of the Petitioner squarely falls within the parameters as discussed under Force Majeure events and in the present case on hand though the Petitioner has suffered delay in issuing evacuation approval, demonetization and introduction of GST Law has commissioned the project on 11.11.2017. As per observations made herein above the judgements relied by the Counsel for the Petitioner and the grounds urged by the Petitioner in the Petition fall under the Clause of Force Majeure as described in the PPA. With this we answer Issue No. 1 in

affirmative by holding that the Petitioner is entitled for extension of 28 days from 14.10.2017.

- 34) **Issue No. 2:** For what relief the Petitioner is entitled to?
- 35) 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 30 days from 14.10.2017, he is entitled for the tariff as per Clause 12.1 of 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, the tribunal has held that "once extension of Scheduled Commissioning Date is approved, the question of reduced tariff does not arise". Hence, the Petitioner is entitled for Rs. 5.05/kWh tariff.
- 36) 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 liquidated damages. Since the time extended by 28 days, the Petitioner is not liable to pay liquidated damages. Hence, this Issue No. 2 is answered accordingly.
- 37) **Issue No. 3:** What Order?
- 38) In view of the foregoing reasons, we pass the following: -

ORDER

- a) The Petition is allowed.
- b) The delay is condoned in commissioning of Solar Power Project in Honnali Taluk, Davangere District and the Petitioner is entitled tariff at Rs. 5.05/- as per PPA.

- c) The 1st Respondent is directed not to levy liquidated damages and if already levied the same may be refunded to the Petitioner within two months.

Sd/-

(H.M. MANJUNATHA)
Officiating Chairperson

Sd/-

(M.D. RAVI)
Member