

No. N/103/2018

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**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. 44/2018**

**BETWEEN:**

Renew Wind Energy (Rajasthan Four)

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

Shri 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, Gandhinagar,  
Bengaluru-560 001.  
(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)

... **RESPONDENTS.**

### **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 (Annexure-N) with respect to  
Force Majeure.
- b) Quash the letter dated 17.11.2017 (Annexure-S) issued by the 1<sup>st</sup>  
Respondent pursuant to the letter dated 04.10.2017.
- c) Recall the letter dated 04.10.2017 issued by this Commission to the 1<sup>st</sup>  
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 1<sup>st</sup> Respondent.
  - g) Direct the 1<sup>st</sup> Respondent to return the levy of liquidated damages under the provisions of the PPA under restrain the 1<sup>st</sup> Respondent from taking any other coercive measures under the terms of the PPA.
  - h) Direct the 1<sup>st</sup> Respondent to pay the difference in Tariff from the date of commissioning to the date of disposal of this Petition.
  - i) 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 3<sup>rd</sup> 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 Turuvekere Project was awarded to the SPD by the 3<sup>rd</sup> 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/1<sup>st</sup> Respondent within 30 days of the letter of award.
- d) The present Petition pertains to the 20 MW capacity power plant at Turuvekere Taluk in Tumkuru District in which the SPD emerged as a successful bidder and has executed 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 1<sup>st</sup> Respondent for a period of 25 years at a Tariff of 4.84/ per unit. The Schedule 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 Sampige substation for the purpose of establishing its termination bay and therefore it was far more efficient for the Petitioner to apply for evacuation from Sampige Sub-station. The Petitioner applied for grant of evacuation approval for Sampige Sub-station in Turuvekere Taluk vide its letter (Annexure-G to the Amended Petition) dated 21.10.2016 to the KPTCL/2<sup>nd</sup> Respondent, the petitioner applied for evacuation from its 20 MW Solar Power Project at Turuvekere by constructing 110 KVSC line to Sampige 110 KV/11KV Sub-station of KPTCL at a distance of about 4 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. The Petitioner had made the applications well within time after the PPA dated 23.05.2016 was entered into. The Petitioner has made the applications well within time the delay caused in commissioning of the project was outside the control of the Petitioner.

- h) After an inordinate delay of 173 days vide letter (Annexure-H to the Amended Petition) dated 11.04.2017 issued by 2<sup>nd</sup> Respondent, the Petitioner received a tentative evacuation scheme from the 2<sup>nd</sup> Respondent KPTCL. The 2<sup>nd</sup> Respondent in its letter dated 11.04.2017 has stated that as per the feasibility report furnished by the KPTCL for Turuvekere Taluk the 110/11KV Mayasandra substation and 110/11KV Nonavinakere substation were studied for the purposes of feasibility. It was found that both these substations only had evacuation capacity available for 10 MW each. The 1200 MW tenders were not invited based on the feasibility report furnished by the KPTCL and therefore evacuation approval would be considered at 110/11KV Sampige substation at Turuvekere Taluk, Tumkuru District.
- i) The Petitioner through its letter (Annexure-J to the Amended Petition) dated 27.04.2017 accepted the Provisional Evacuation Scheme and the general conditions that were prescribed barring the condition that the Petitioner should purchase land adjacent 110/11KV Sampige substation for construction of 110 KV TB with metering. The Petitioner requested the 2<sup>nd</sup> Respondent to permit it to utilize the land already available within Sampige substation for construction of its 110 KV TB.

This request is made with an intention of saving time as the process of acquisition of land was time consuming and laborious process.

- j) The 2<sup>nd</sup> Respondent through a letter (Annexure-K to the Amended Petition) dated 11.05.2017, granted regular evacuation approval and issued a Regular Evacuation Scheme to be executed under self-execution by the Petitioner. The Petitioner's request for land available within Sampige Substation for the purpose of constructing 110 KV TB was being considered at the time of the 2<sup>nd</sup> Respondent issuing its letter dated 11.05.2017. In the said letter the Petitioner was also directed to furnish a copy of the Supplemental PPA approved by the Commission before seeking interconnection approval. The Petitioner issued a Condition Precedent completion letter (Annexure-L to the Amended Petition) dated 02.06.2017 to the 1<sup>st</sup> Respondent enclosing the list of permissions, approvals and consents obtained by the Petitioner. The Petitioner has received the Tentative Evacuation Scheme on 11.04.2017 and thereafter promptly began acquiring land for the purposes of the project and fulfilling all other Conditions Precedent requirements under Article 4 of the PPA entered into between the parties. The Petitioner had completed land acquisition and other all related formalities by 02.06.2017.
- k) The Petitioner commenced setting up the Turuvekere project on 16.08.2017 a mere two months after the land acquisition process was completed. The project was commissioned on 13.12.2017 within about five months of completing the land acquisition process despite (a)

Demonetization (b) Delay in approvals and (c) Imposition of GST. The 2<sup>nd</sup> Respondent through its letter (Annexure-M to the Amended Petition) dated 23.06.2017 approved that Single Line Diagram furnished by the Petitioner in pursuance of its PE approval application subject to modifications.

- l) 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 agreements. In the above circumstances the Petitioner vide its letter (Annexure-N to the Amended Petition) dated 25.09.2017 to the 1<sup>st</sup> Respondent sought an extension of Scheduled commissioning 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.
- m) That the Petitioner could not comply with Clause 4 of the PPA with respect to Conditions Precedents since the PE approval itself has taken an unreasonable amount of time of about 6 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 1<sup>st</sup> Respondent did not respond to the Petitioner's letter 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 the claim under the same would be determined by the Petitioner or BESCO as the case may be.

- n) In this regard, it has come to the knowledge of the Petitioner that the Commission vide its letter (Annexure-P 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 13.11.2017 as reflected by the Commissioning Certificate (Annexure-Q to the Amended Petition) dated 08.12.2017 issued by the 2<sup>nd</sup> Respondent to the Petitioner's project.

- o) The 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> Respondent and refuse to consider the request of the Petitioner for extension of SCOD.
- p) The 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> Respondent without considering whether the delay in the project was a result of Force Majeure or not invoked Article 12 of the PPA and applied the reduced tariff of 4.36 unit which is opposed to the PPA agreed tariff of 4.84/unit. The 1<sup>st</sup> Respondent applied the KERC solar tariff for FY 17-18 as per its order dated 12.04.2017. The 1<sup>st</sup> 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 were upto 31.06.2018 and the extended the contract performance guarantees were to be furnished within 15 days of the date of the letter issued by the Respondent (Annexure-R to the Amended Petitioner) dated 17.11.2017.

- q) 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.
- r) It is pertinent to note that at the time of Petitioner submitting the bid the operative tariff order was the tariff order dated 30.07.2015 which prescribed tariff of Rs. 6.51/unit. The control period in the tariff order dated 30.07.2015 was 01.07.2015 to 31.03.2018, without prejudiced to the Petitioner's contention that the minor delay of about two months was due to Force Majeure conditions which was well within the knowledge of the 1<sup>st</sup> Respondent. The Commission issued an order dated 12.04.2017 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.
- s) 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 1<sup>st</sup> 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.

- t) 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, is cast upon the 1<sup>st</sup> Respondent or the Petitioner. The 1<sup>st</sup> Respondent cannot shy away from its obligations under the PPA. The 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 two months despite (a) delay of about 7 months in obtaining evacuation approval without which the Petitioner could not acquire land or undertake any other developmental activity (b) demonetization (c) and 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 6 months i.e., on 11.04.2017 and regular evacuation approval was granted on 11.05.2017 more than 7 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 Sampige sub-station by the 2<sup>nd</sup> Respondent at the time that the Petitioner submitted the evacuation application. The Mayasandra and Nnonavinakere 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 2<sup>nd</sup> 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 with a delay of about one month in addition to the one-month extension granted by the 1<sup>st</sup> Respondent. The conditions imposed for grant of such extension by the 1<sup>st</sup> 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 Mayasandra and Nnonavinakere 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.

ix) The Petitioner is also relying on the MNRE O.M., dated 20.06.2018, bearing number 283/131/2017-GRID SOLAR, which grants a reprieve of 62 days due to GST induced delay or which are affected by implementation of GST to projects which achieved financial closure prior to 01.07.2017 and SCOD was after 31.08.2017. 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 the SCOD was after 31.08.2017. The MNRE O.M., dated 20.06.2018 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, 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-S 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 31.08.2017. The actual Commercial Operation Date for the Turuvekere project was 13.11.2017. The Scheduled Commercial Operation Date under the PPA was 14.10.2017, hence this project falls squarely under the ambit of MNRE OM dated 20.06.2018, there has been a total delay of about 30 days in achieving COD.
- 4) The Petitioner's project at Turuvekere achieved financial closure on 28.10.2016 i.e., the date on which it executed a Rupee Term Loan 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-T 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 that 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-U filed along with Affidavit dated 17.07.2018) dated 09.09.2016 for the purpose of completing the civil works of the Turuvekere project.
  - b. The Petitioner also entered into a Supply Agreement (Annexure-V 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-W 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 2<sup>nd</sup> Additional Affidavit dated 10.02.2021 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 Petitioner had placed an order for the delivery of a transformer vide Purchase order (Annexure-Z filed along with Affidavit dated 10.02.2021) dated 02.09.2016 for the Turuvekere Site. It was placed prior to even the effective date of 13.10.2016 under the terms of the PPA. The delivery date under the purchase order dated 02.09.2016 was 15.01.2017 which was well in advance of the Scheduled Commissioning Date of 13.10.2017.
- 7) Due to imposition of GST the Petitioner had to issue new purchase order with the GST registration and other related details. 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. Thereafter the Petitioner re issued the order for transformer with its purchase order (Annexure-AA filed along with Affidavit dated 10.02.2021) dated 04.08.2017 which included GST registration details and amounts. The Petitioner's Vendor Voltamp transformers Limited confirmed the Petitioner's order for the transformer and under took to deliver the transformer on 20.09.2017.

- 8) After GST was introduced, it was contrary to law to transport good and materials without the requisite GST invoices and documents. Therefore, the parties could not have effected or received delivery of these items without first obtaining GST registration, overhauling their billings, accounting and ERP software and hence the delay was due to imposition of GST and due to the delay in grant of project evacuation by 2<sup>nd</sup> Respondent. The revised purchase orders dated 08.07.2017 with GST details included for ETC jobs and switchyard are produced in Annexure-AB (filed along with Affidavit dated 10.02.2021), the revised orders for purchase of multiple items with GST details dated 22.08.2017 are produced as Annexure-AC (filed along with Affidavit dated 10.02.2021), the revised orders for execution of civil design and construction with GST details dated 14.09.2017 are produced in Annexure-AD (filed along with Affidavit dated 10.02.2021). 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.

9) Upon notice, the Respondents appeared through their Learned counsel, and filed statement of objections separately as follows: -

a. The 1<sup>st</sup> Respondent has filed objections to the Petition stating that, on 23.05.2016, the Petitioner executed a PPA with the Respondent No.1. 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. 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, GST induced delay in obtaining PE approval. On 17.11.2017, the Respondent herein addressed a letter to the Petitioner

in reply to the request of the Petitioner for extension of time, referring to the instructions issued by this 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 this Commission and seek for further approval.

- c. 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 attaining evacuation approval and demonetization and GST induced delay. It is contended by the Petitioner that Respondent did not apply its mind while considering the Petitioner's request for extension of time and also informed Respondent that it is not governed by Generic Tariff Order dated 12.04.2017 as its tariff is discovered through bidding process.
- d. It is stated that, 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. The Respondent contented that 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 this Commission and 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 13.11.2017. The reason assigned by the Petitioner for belated commissioning of the project are wholly untenable. The reason assigned for the delay in commissioning of the project cannot be attributed to the Respondent herein. 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.

- e. The PPA clearly sets out the events which are force majeure events, in Article 14 of the PPA. 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. 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 within seven (7) days of occurrence of a force majeure 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 followed, the force majeure clause

cannot be deemed to be invoked. Hence, the contentions in this regard are wholly untenable and cannot be sustained.

- f. The Article 5.7 stipulates the circumstances in which the Petitioner can be granted extension to commission the project. The Petitioner is entitled to extension of Scheduled Commissioning Date in cases of default by the Respondent, Force Majeure events affecting the Petitioner and the Respondents. In the case herein, 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. The Commission is also drawn to 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. 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, the Petitioner is liable to pay damages for delay in fulfilling conditions precedent in terms of Article 4.3 of the PPA.
- g. It is relevant to note that the Petitioner herein can be absolved of the obligation to achieve condition precedent only when it is affected by the Force Majeure Event or if any of the activities is specifically

waived in writing by the Respondent. The PPA clearly sets out the events which are force majeure events in Article 14 of the PPA. Perusal of the said clause would make it evident that the events sought to be termed as events of Force Majeure are not in fact events that come under the purview of the said provision. Alleged delay in obtaining evacuation approvals, demonetization and implementation of GST cannot be considered to be events of force majeure.

- h. The averments with regard to alleged delay in obtaining permanent evacuation approval is concerned, it is stated that the Respondent No 2 herein has granted the Tentative Evacuation Approval on 11.4.2017 and Regular Evacuation Approval on 11.5.2017. 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 13.11.2017, the Respondent No 2 herein has granted evacuation approval. Hence, the contention in this regard are wholly untenable.
- i. The Government of India has announced demonetization of bank notes of denominations of Rs. 500/- and Rs. 2000/- on 08.11.2016. Further GST was implemented in the country from 01.07.2017. Regular evacuation approval was granted to the Petitioner on 11.05.2017. 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 25.9.2017 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.

- j. The Petitioner claims that the implementation of GST regime is a force majeure event. The Central Goods and Service Tax Act 2017 was implemented from 01.07.2017. 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 13.11.2017. Hence, the question of the implementation of GST delaying the commissioning of the plant would not arise at all as alleged. Further, Article 5.1 clearly sets out the Obligations of the Developer. It clearly states that it is the responsibility of the Developer to obtain all clearances, consents etc. Hence, knowing fully well what its obligations under the contract are, the Petitioner is now attempting to take advantage of its own wrong, the same is impermissible in law and ought not to be permitted.

- k. It is pertinent to note that the Petitioner herein 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.
- l. 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 this Hon'ble 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 4.84 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 in total, 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.

m. Article 12 of the PPA clearly states that the Petitioner will be entitled to the lower tariff prevailing on the date of commissioning plant, in the event Petitioner has failed to commission the Plant within the stipulated timeframe. Therefore, the contention of the Petitioner that its tariff cannot be altered as same was discovered through bidding process is untenable. It ought to be noted that if the contention advanced by the Petitioner is to be accepted, then it would lead to a situation wherein, there would be absolutely no adverse consequences for delayed execution of a project. It ought to be noted that there is no bar on modifying the tariff as contended by the Petitioner herein. Even otherwise, the tariff payable for power ought to be commensurate with the rates payable at the time of commissioning. The interpretation sought to be applied herein would result in a peculiar situation wherein for eternity, the tariff determined through the bid route only would be Payable. Such an interpretation would be illogical and therefore ought not be considered.

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. 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) dated 04.10.2017 is contrary to the terms of the PPA and needs to be set aside is untenable and 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. The said Official Memorandum is only advisory in nature. It is pertinent to note that the Petitioner herein 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 herein 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 10.02.2021 to bring certain new additional documents and pleading on record. The Petitioner has filed the

present Petition seeking the Commission to direct Respondent No. 1 to decide upon the Petitioner's representation dated 25.09.2017 extension of time due to Force Majeure and quash the letter dated 17.11.2017 issued by the Respondent No. 1 and recall the letter dated 04.10.2017 and also prayed for alternative relief.

- q. The Petitioner has filed additional affidavit to bring certain new additional documents on record that it is contended by him 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. In the original Petition the Petitioner had not sought this ground. After filing of the original Petition, he filed an additional affidavit regarding Official Memorandum of MNRE, regarding extension of time, loan agreement, civil work agreement, supply agreement on 17.07.2018. Now he filed another additional affidavit along with additional documents which are belated and therefore it cannot be taken on record. The contention of the Petitioner that it had to reissue purchase orders on account of imposition of the GST and the same affected delivery equipment within Scheduled time is untenable. As per Article 14.4 unavailability, late delivery or 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. As per Article 5.1.1(a) of the PPA 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. The Petitioner has not produced any evidence that it was affected by the imposition of GST. He denied other averments of the Affidavits finally submitted that the Petition is bereft of merit and deserves to be rejected.

- r. The 2<sup>nd</sup> Respondent has filed statement of objections stating that, on 23.05.2016, the Petitioner executed a PPA with the Respondent No.1. 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 herein was required to commission the project within 12 months from the effective date as per Article 8.5 of the PPA. Therefore, the Petitioner herein 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.
- s. 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 projects 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 30.09.2020), 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 30.09.2020), the Respondent No. 2 directed the Petitioner to pay processing fee towards evacuation scheme approval. On 09.12.2016 (Annexure R-3 to the Statement of objections of R-2 dated 30.09.2020), 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 30.09.2020) dated 18.03.2017 and on 21.03.2017 to the petitioner seeking clarification (Annexure R-5 to the Statement of objections of R-2 dated 30.09.2020).
- u. The Petitioner vide letter (Annexure R-6 to the Statement of objections of R-2 dated 30.09.2020) dated 27.04.2017 communicated its acceptance for tentative evacuation scheme dated 11.04.2017 and also requested the Respondent to issue Regular Evacuation

Approval. The Petitioner vide letter dated 11.05.2017 requested the Respondent No.2 for land in 110KV Sampige Sub-Station for construction of 110KV Terminal Bay. The Respondent No. 2 vide letter dated 11.05.2016 has granted the Petitioner regular evacuation scheme approval. In the 117<sup>th</sup> TB Committee meeting held on 04.05.2017, the Respondent No. 2 has decided to lease the land at 110/11 KV Sampige 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 Sampige 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 11.04.2017 and Regular Evacuation Approval on 11.05.2017. 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 13.11.2017, 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 and

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 and 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 this Respondent in the interest of justice and equity.
- 10) 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".

- 11) 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 at 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 play should be given to it and it calls for a wider and liberal construction."
- 12) 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."
- 13) 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.

- 14) 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.
- 15) The 1<sup>st</sup> Respondent has imposed the reduced tariff of Rs. 4.37/KWh (as against the contractual tariff of Rs. 4.84/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 considering the representations made by the Petitioner regarding force majeure events before the 1<sup>st</sup> Respondent. Assuming without admitting that 1<sup>st</sup> 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 1<sup>st</sup> Respondent, in the present instance, has failed to claim any particular amount of damages, much less prove the damages. The 1<sup>st</sup> 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 1<sup>st</sup> 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.

- 16) Heard the arguments, perused the written submissions on both sides and the records.
- 17) 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?**

18) **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?

19) The present Petition is filed seeking for a declaration that the delay in commissioning the project was due to reason outside the control of the Petitioner and therefore amount to Force Majeure as per Article 14 of PPA and also to 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 30 days in commissioning the Petitioner's project at Turuvekere Taluk Tumkuru District. The SCOD as per the PPA was 13.10.2017 i.e., one year after the date of approval of the PPA by the Commission on 14.10.2016.

20) 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-S filed along with Affidavit dated 17.07.2018) dated 20.06.2018. The Petitioner having achieved financial closure on 01.07.2017, commissioned the plant on 13.10.2017. The Hon'ble APTEL has upheld GST induced delay 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 25.04.2018, specifically did not take the contention that the commissioning of the project was delayed due to the introduction of GST. Only after thought, the Petitioner has taken this contention and got amended the Petition on 09.04.2019. 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 Compliant (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-S to the Additional Affidavit of the Petitioner dated 17.07.2018) dated 20.06.2018 in 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 10.02.2021, it appears that he had placed purchase order to purchase Power Transformer (15/20MVA, 11/110KV) on 02.09.2016 (Annexure-Z filed with additional affidavit dated 10.02.2021). The Petitioner has furnished copy of the Purchase order dated 04.08.2017 (Annexure-AA filed with additional affidavit dated 10.02.2021) which shows that the Petitioner has placed order of the material i.e., Power Transformer (15/20MVA, 11/110KV) along with GST. Another purchase order dated 08.09.2017 (Annexure-AB filed with additional affidavit dated 10.02.2021) shows that the Petitioner has placed orders for purchase of certain materials amounting to Rs. 29,50,000/- along with GST. He had produced other two documents which are purchase orders dated 22.08.2017 (Annexure-AC filed with additional affidavit dated 10.02.2021) and 14.09.2017 (Annexure-AD filed with additional affidavit dated 10.02.2021) 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 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-AD by placing any evidence. Hence, this contention taken by the Petitioner has to be accepted and we hold that there was 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 and had to initiate action for implementation of project. 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 demonetization 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 demonetization 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 Vs 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 1<sup>st</sup> 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 1<sup>st</sup> Respondent for development a 20 MW capacity Solar PV Power Plant at Turuvekere Taluk, Tumkuru 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 Sampige Substation for the purpose of establishing its terminal bay. He had applied for grant of evacuation approval from Sampige Substation in Turuvekere Taluk through a letter dated 21.10.2016 along with all required documents before 2<sup>nd</sup> 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 Conditions Precedent completion letter dated 02.06.2017 to the 1<sup>st</sup> Respondent enclosing the list of permissions, approvals and consents obtained by the Petitioner.

- ii) Further he submitted that the Petitioner has received tentative evacuation scheme from the 2<sup>nd</sup> Respondent through a letter dated

11.04.2017 and has thereafter promptly began acquiring land for the purpose of project and fulfilling all other Conditions Precedent requirements under Article 4 of the PPA entered into between the parties. The Petitioner had completed the land acquisition and all related formalities by 02.06.2017 the date on which CP letter was issued.

- iii) Further he submitted the Petitioner commenced setting up the Turuvekere project on 16.08.2017 a mere two months after the land acquisition process was completed. The project was commissioned on 13.11.2017 within about six months of completing the land acquisition process despite (a) demonetization (b) delay in approvals and (c) imposition of GST.
- iv) Further he submitted that the Petitioner through a letter dated 25.09.2017 informed the 1<sup>st</sup> Respondent of the issues faced by the Petitioner's due to Force Majeure conditions and sought extension of Scheduled Commissioning Date for its Turuvekere project by 30 days. He stated that it had fulfilled all Conditions Precedents except for obtaining the NA orders which are pending in the office of the relevant Government Authority. He sought for extension of 30 days due to various Force Majeure reasons which completely beyond its control.
- v) The 1<sup>st</sup> Respondent did not respond to the Petitioner's letter dated 25.09.2017 seeking extension of Scheduled Commercial Operation Date. It is highlighted in 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 BESCOM as the case may be.

- vi) Further the petitioner submitted that, the Commission vide letter dated 02.11.2017 in the case of Rishab 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 i.e., the project under which the Petitioner's project has been executed. Further the Commission had directed developers to approach their respective ESCOMs for extension and not approach the Commission directly. The project was commissioned on 13.11.2017, the 2<sup>nd</sup> Respondent issued a Commissioning Certificate dated 08.12.2017. Further he submitted that, the 1<sup>st</sup> Respondent rejected the request of the Petitioner for extension of SCOD through its letter dated 15.11.2017, inter-alia directed the Petitioner to approach the Commission for the same. The Petitioner relying upon the letter dated 04.10.2017 written by the 1<sup>st</sup> Respondent had approached the Commission with this Petition for extension of time.
- vii) Further he submitted that the 1<sup>st</sup> Respondent without considering whether the delay in the project was result of Force Majeure or not, invoked Article 12 of the PPA and applied the reduced tariff of Rs. 4.36/unit as opposed to the PPA agreed Tariff of Rs. 4.84/unit. Further the 1<sup>st</sup> Respondent levied liquidated damages as per PPA Clause 4.3 and 5.8. 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 project was delayed by about one month and therefore, levying the reduced tariff of Rs. 4.36/unit as opposed to the PPA tariff would be highly inequitable and frustrate the PPA. With all this he prays to allow the Petition as prayed for.

- viii) 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 2<sup>nd</sup> Respondent directed the Petitioner to pay processing fee towards evacuation scheme approval. On 09.12.2016 the Petitioner paid the processing fee. On 11.04.2017 the Respondent No. 2 granted the Petitioner tentative evacuation approval under self-execution basis. The Petitioner vide its letter dated 27.04.2017 communicated acceptance for tentative evacuation scheme and also requested to issue regular evacuation approval and also land in Sampige substation for construction of 110KV terminal bay. The 2<sup>nd</sup> Respondent on 11.05.2017 has granted the Petitioner regular evacuation scheme approval and in 117<sup>th</sup> TB Committee meeting held on 04.05.2017 and 2<sup>nd</sup> Respondent has decided to lease the land at Sampige substation as per the Petitioner's request. All these events are evident that there is no delay on the part of the 2<sup>nd</sup> Respondent in granting evacuation approval as alleged by the Petitioner. 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 considered 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.

- ix) On perusal of the records, it appears that, the Petitioner has applied for Project Evacuation Approval of its full capacity of 20 MW from 110 KV SC Sampige 110KV/11KV 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 2<sup>nd</sup> 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, dated 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 2<sup>nd</sup> 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 2<sup>nd</sup> Respondent), and submitted the correct details to the KPTCL/2<sup>nd</sup> Respondent. The Petitioner was thereafter granted tentative evacuation approval by a letter, dated 11.04.2017 (Annexure-H to the Amended Petition). Therefore, that KPTCL/2<sup>nd</sup> Respondent took time about six months twenty days to

respond to the Petitioner's application for Project Evacuation even though the Petitioner had provided all required documents and data to KPTCL/2<sup>nd</sup> Respondent in its application.

- x) In the letter, dated 11.04.2017 (Annexure-H to the Amended Petition), KPTCL/2<sup>nd</sup> Respondent stated that the sub-stations studied for feasibility in Turuvekere Taluk, Tumkur District were 110/11 KV Mayasandra s/s for 10 MW and 110/11 KV Nonavinkere 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 11.04.2017, 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 Turuvekere Taluk, Tumkur district. As per Annexure-J (filed in the Amended Petition) dated 27.04.2017 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 by a letter, dated 11.05.2017 (Annexure-K to the Amended Petition) by KPTCL/2<sup>nd</sup> Respondent. The Petitioner was granted land inside the Sampige S/s along with the Regular Evacuation Approval on 11.05.2017 (Annexure-K to Amended Petition). 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. In the 117<sup>th</sup> TB Committee meeting held on 04.05.2017, the Respondent No. 2 has decided to lease the land at 110/11 KV Sampige Sub-Station as per the Petitioner's request. 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 15.01.2017.

- xi) The Petitioner made all efforts to obtain connectivity in a time bound manner. The Petitioner provided all required documents along with its application, within one week after Effective Date on 14.10.2016. KPTCL acknowledged that the petitioner vide letter dated 27.04.2017 (Annexure-J filed with the Amended Petition) had approached KPTCL seeking evacuation for the present project. Accordingly, the Petitioner had achieved all Condition Precedents as on 02.06.2017 (Annexure-L filed with the Amended Petition). The KPTCL/2<sup>nd</sup> Respondent caused inordinate delay in grant of project evacuation approval on account of lack of a feasibility study being conducted by itself.
- xii) 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 <sup>st</sup> Respondent	"D" filed along with Amended Petition

2.	14.10.2016	KERC Approval for PPA 23.05.2016	"E" filed along with Amended petition
3.	21.10.2016	Application given by the Petitioner to KPTCL for Regular evacuation approval at Turuvekere Taluk, Tumkuru District	"G" filed along with Amended Petition
4.	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 <sup>nd</sup> Respondent
5.	12.12.2016	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 <sup>nd</sup> Respondent
6.	11.04.2017	Tentative evacuation approval was granted	"H" filed along with Amended Petition
7.	27.04.2017	Letter written by Petitioner to the KPTCL accepting Tentative Evacuation Scheme and further requesting to give final evacuation approval and also spare space inside 110/11 KV Sampige KPTCL Substation	"J" filed along with Amended Petition
8.	11.05.2017	Letter written by KPTCL to the Petitioner regarding approval of regular evacuation scheme for proposed 20 MW (AC) solar project in Turuvekere Taluk, Tumkuru District	"K" filed along with Amended Petition
9	04.05.2017	117 <sup>th</sup> Land Sparing Committee decided to spare land for construction of 110 KV bay on lease basis	In Para 5 of the Written Submission made by the Respondent No. 1 & 2 dated 15.11.2021
10.	08.12.2017	Commissioning Certificate issued by Executive Engineer (Ele), TL & SS Division, KPTCL, Tumkuru certifying that the project was commissioned on 13.11.2017	"Q" filed along with Amended Petition

**Table 2**

<b>Sl. No.</b>	<b>The difference of Period shown in Annexure-G (filed with Amended Petition) and Annexure-H (filed with Amended Petition)</b>	<b>Days</b>
1.	21.10.2016 to 31.10.2016	11 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.	01.04.2017 to 11.04.2017	11 days
<b>Total</b>		<b>173 days</b>

The above events would show that KPTCL took about 173 days for grant of the evacuation approval from the date of application the Petitioner could not go ahead with the execution of the project as planned because of delays in getting evacuation approval and sparing land by the 2<sup>nd</sup> Respondent within time which led to delay in the commissioning the plant.

- 21) The petitioner vide letter dated 25.09.2017 requested 1<sup>st</sup> Respondent BESCOM for extension of time for achieving completion of the project and BESCOM granted extension time upto 13.11.2017 and the project was commissioned on 13.11.2017 as evidenced from the Commissioning certificate issued on 08.12.2017.
- 22) During the course of arguments, the Learned Counsel for the Petitioner in support of his arguments, he has 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.

- 23) We have perused the above judgements, in the case of Chennammagathihalli Solar Power Project Vs BESCO 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 1<sup>st</sup> 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 1<sup>st</sup> 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."*

- 24) 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 on the judgement of Channammagathihalli 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 thereby, the Petitioner is entitled for extension of time on the ground that the delay caused in granting approval of evacuation scheme/Bay allotment as Force Majeure Event.

- 25) 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. But the 1<sup>st</sup> Respondent has issued a letter to the Petitioner dated 17.11.2017 communicating the approval of BESCOM 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.

26) 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 performs 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.

- 27) On perusal of the letter written by the Petitioner to the BESCO dated 25.09.2017 (Annexure-N 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 Turuvekere Taluk Tumkuru District narrating several factors like demonetization, PE approval, GST and also there had been inordinate delay in obtaining several consents and permits from the appropriate Government Departments and harsh weather conditions etc., and requested to extend time line for SCOD by a period of 30 days.
- 28) On perusal of the letter written by KERC to the BESCO dated 04.10.2017 (Annexure-R1 filed by the 1<sup>st</sup> Respondent along with objections) it is observed that the KREC directed BESCO to informing developers to file a Petition before the Commission after successful commissioning of the project with all the relevant grounds/documents for 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 should 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-R (filed along with Amended Petition) a letter written by BESCO to the Petitioner dated 17.11.2017 it can be seen that BESCO has approved to commission the project on or before 13.11.2017 subject to certain conditions. In this letter (in reference No. 4) the 1<sup>st</sup> Respondent has based reliance on the guidelines given by the KERC through a letter dated 04.10.2017

(Annexure-R1 filed by the 1<sup>st</sup> Respondent along with objections). However, the Petitioner has commissioned the project on 13.11.2017 as per Annexure-R (filed along with Amended Petition) and also approached the KERC for an order of extension of time as per conditions mentioned in it.

- 29) All these documents establish 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. As stated above BESCO has extended the time line considered the request of the petitioner. Thereby, to this extent of the arguments addressed by the Learned Counsel for the Respondents holds no water.
- 30) 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-Q to the Amended Petition) dated 08.12.2017 which shows he had commissioned the project on 13.11.2017.

- 31) In view of the discussions made above and also in **Para 20 (c)(xii) (at Page No. 51 Table-2)** the tables disclose delay of 173 days for evacuation

approval, the prayer of the Petitioner falls within the parameters as discussed under Force Majeure events and in the present case on hand the Petitioner has suffered delay in issuing evacuation approval and introduction of GST Law, has commissioned the project on 13.11.2017. As per observations made herein above judgements relied by the Counsel for the Petitioner and the grounds urged by the Petitioner in the Petition, the delay 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 time upto 13.11.2017.

- 32) **Issue No. 2:** For what relief the Petitioner is entitled to?
- 33) 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 upto 13.11.2017, the petitioner is entitled for the tariff as agreed in clause 12.1 of the 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. 4.84/kWh tariff.
- 34) 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 upto 13.11.2017, the

Petitioner is not liable to pay liquidated damages. Hence, this Issue No. 2 is answered accordingly.

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

36) 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 Turuvekere Taluk, Tumkuru District and the Petitioner is entitled tariff at Rs. 4.84/- 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