

**Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal no. 123 of 2012 & IA no. 396 of 2012

Dated: 4th February, 2014

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member**

In the matter of:

Gujarat Urja Vikas Nigam Limited,

Sardar Patel Vidyut Bhawan,

Race Course Road,

Vadodra-390 007,

Gujarat, India.

... **Appellant**

Versus

1. **Gujarat Electricity Regulatory Commission,**

1st Floor, Neptune Tower,

Opposite Nehru Bridge,

Ashram Road,

Ahmedabad-380 009

Gujarat, India.

2. **M/s. Cargo Solar Power Gujarat Pvt. Ltd.,**

1/9, Jindal House, Asaf Ali Road,

New Delhi-110 002

3. **Gujarat Energy Development Agency,**

4th Floor, Block No. 114/2,

Udyog Bhavan,

Sector-11,

Gandhinagar-382330

Gujarat, India.

4. **The Principal Secretary,**

Energy & Petrochemicals Department,

Govt. of Gujarat, 5th Floor, Block No. 5,

Sachivalaya, Gandhinagar-382 010

...**Respondent(s)**

Counsel for the Appellant(s) : Mr. Anand K. Ganesan,
Ms. Swapna Seshdri

Counsel for the Respondent(s) : Mr. Vikas Singh, Sr. Adv.
Mr. Venkatesh, Mr. Varun K. Chopra,
Mr. Aman Panwar, Ms. Deepika
Mr. Vivek Oriel,
Ms. Mazag Andrabi for R-2

JUDGMENT

RAKESH NATH, TEHNICAL MEMBER

This Appeal has been filed by Gujarat Urja Vikas Nigam Ltd. (“GUVNL”) against the impugned order dated 7.4.2012 passed by the Gujarat Electricity Regulatory Commission (“State Commission”) in Petition no. 1125 of 2011 filed by M/s. Cargo Solar Power Gujarat Private Limited, Respondent no. 2. In this impugned order, the State Commission has allowed the petition filed by Cargo Solar holding that the events during the time period elapsed in obtaining statutory/government clearances from the governmental instrumentalities towards land and water sources are forced majeure events and consequently extended the period of Scheduled

Commercial Operation Date of the Solar Project of the Respondent no. 2 by 19 months.

2. The State Commission is the first Respondent. M/s. Cargo Solar Power Gujarat Pvt. Ltd., a developer of Solar Thermal Project (hereinafter referred to as Cargo Solar) is the second Respondent.

3. The brief facts of the case are as under:

(A) On 6.1.2009 the State Government notified the Solar Power Policy, 2009 for promotion of solar power projects in the State.

(B) In pursuance of the Policy, the State Government issued a letter of intent dated 1.8.2009 to Cargo Solar, the second respondent, allocating a 25 MW capacity Solar Thermal Power Project to be set up in the State of Gujarat.

(C) On 29.1.1010, the State Commission passed an order determining generic tariff for purchase of electricity by GUVNL, the Appellant and other distribution licensees from Solar Power Projects. The order provided for a cut-off date, namely 28.1.2012, for the projects to be commissioned for which the tariff would be applicable.

(D) On 30.4.2010, GUVNL and Cargo Solar entered into a Power Purchase Agreement (PPA) which envisaged completion of the Solar Thermal Project within 20 months i.e. before 31.12.2011 in terms of the order dated 29.1.2010.

(E) Cargo Solar (R-2) wrote a letter dated 2.6.2011 to the Principal Secretary, Energy Petrochemical Department, Government of Gujarat to extend the time for completion of the Project due to some reasons. This request was rejected by the

Principal Secretary, Government of Gujarat vide letter dated 28.6.2011.

(F) Thereafter, Cargo Solar filed a petition no. 1125 of 2011 on 21.9.2011 before the State Commission seeking declaration of the time elapsed in obtaining statutory or Government clearances from the Govt. instrumentalities towards land and water sources as Force Majeure Events and to extend the scheduled date of commercial operation from 31.12.2011 to 31.7.2013 and consequential relief.

(G) The State Commission by the impugned order dated 7.4.2012 held that the above delay was due to force majeure events and extended the date of completion of the project by 19 months i.e. upto 31.7.2013 and granted the consequential relief to Cargo Solar.

(H) Aggrieved by the impugned order dated 7.4.2012 of the State Commission granting extension for commissioning of the Solar Thermal Project of Cargo Solar, GUVNL has filed this Appeal.

4. GUVNL (Appellant) has made the following submissions:

i) The State Commission has not construed the provisions of the PPA dated 30.4.2010 entered into between GUVNL and Cargo Solar in pursuance of the order dated 29.1.2010 passed by the State Commission. The rights and obligations of GUVNL and Cargo Solar are totally governed by the Order dated 29.1.2010 and the PPA. The State Commission should not have gone into legitimate expectation, etc. of Cargo Solar under the Solar Power Policy notified by the State Government or in respect of actions or in-

actions on the part of various government authorities relating to land, water, etc. required for the Project particularly when in the Order dated 29.1.2010 the State Commission did not provide for land or water availability as condition precedent or condition subsequent for the performance of the obligation on the part of Cargo Solar.

ii) PPA dated 30.4.2010 does not provide for land availability or water linkage being provided by the State Government or by any other Government Authority or grant of any licenses, approvals, permissions, etc. as a pre-condition for performance of the obligation of Cargo Solar.

iii) In the Solar Policy of the State Government also, there was no obligation on the part of the State Government to provide land or water or otherwise grant approvals for the use of agriculture land by

conversion for industrial purpose for setting up the project. It was the responsibility of the project developer to identify and acquire the land and provide other facilities for implementation of the project.

iv) The Bombay Tenancy and Agricultural Land (Vidharbha Region and Kutch Area) Act, 1958 was in force when Cargo Solar applied for and obtained the allocation for setting up the Solar Thermal Project. Cargo Solar was, therefore, aware of the restriction on land use in the Kutch area, the need for applying for and obtaining approval from the Government Authorities for conversion and use of land in the Kutch area and such approval may not be available as a matter of course. The Cargo Solar was, therefore, not entitled to proceed on the basis that it will set up the project only in Kutch area and that it will get the approval for conversion of land as a matter of right.

v) The State Commission has misconstrued the attempt of the State Government to provide waste land to the possible extent to facilitate the establishment of the power project as amounting to the binding obligation of the State Government to do so and in the absence of the same to be a Force Majeure condition. The acquisition of land was the sole responsibility of Cargo Solar and it was free to acquire the land from private parties. Similarly obtaining water linkage was also the entire responsibility of Cargo Solar.

vi) Cargo Solar applied for water linkage for 50 MW instead of 25 MW for which it had the PPA with GUVNL. Thus, delay in getting water linkage was entirely due to Cargo Solar.

vii) The State Commission has wrongly held that the liquidated damages as stipulated in the PPA is not

payable by Cargo Solar on account of existence of Force Majeure condition.

5. On the above issues Cargo Solar filed reply and written submissions supporting the findings of the State Commission.

6. We have heard Ms. Swapna Seshdri, learned counsel for the Appellant and Shri Vikas Singh, learned Sr. Advocate representing the Respondent no. 2. Both the parties have also filed written submissions which we shall be discussing in the following paragraphs.

7. In light of the rival contentions of the parties, the only question that arises for our consideration is:

Whether the State Commission is justified in holding that the time taken by Cargo Solar in obtaining statutory and government clearances

from Government instrumentalities towards land and water sources required for setting up the Solar Power Project was due to Force Majeure Events as defined in the Power Purchase Agreement and consequently extending the period of Scheduled Commercial Operation Date for completion of the Solar Project of Cargo Solar?

8. Let us first examine the findings of the State Commission in the impugned order. The extracts of the findings of the State Commission are as under:

“8.20 The petitioner had signed MOUs with farmers for procurement of the agricultural lands and also applied for permission u/s 89(1)(A) to the Collector, Kutch vide letter dated 07.08.2010. On verification of the said letter it appears that the letter was received on 07.08.2011 by the Dy. Collector Office. The petitioner through an additional written submission dated 1.2.2012 has submitted a copy

of the Dy. Collector Anjar, Kutchh letter dated 31.1.2012, which states that the above letter for permission under section 89(1) (A) of The Bombay Tenancy and Agricultural lands (Vidarabh Region and Kutch area) Act 1958 read with Rule 45 thereto was submitted by the petitioner on 7.8.2010 and the same was forwarded to the Mamlatdar, Rapar vide letter dated 16.8.2010 for further action. Thus, it is clear that the petitioner had sought approval from the Dy. collector, Anjar, kutchh for procurement of agricultural land on 7.8.2010 and the said permission is awaited as submitted by the petitioner.”

“8.28 As has been established, the petitioner approached various authorities for allotment of water required for the project and as it could not get approval for water supply from any other sources, decided to utilize water from the Surajbari Creek. However, approval of the Ministry of Environment and Forest, Government of India is mandatory for carrying out any work in the CRZ area and for drawal of water from the creek, for

which CRZ study and EIA are pre-requirements. Permission for conducting CRZ study and EIA was granted by the Gujarat Maritime Board on 26.04.2011 and consequently the petitioner entrusted the EIA of marine area to M/s. Indomer Coastal Hydraulic Pvt. Ltd. and the CRZ study to Anna University, Chennai. Both these studies are yet to be completed.”

“8.30 Now we deal with issues ‘e’ and ‘f’ together. As stated above, the petitioner is unable to obtain the permission/ approval for the land and water which are pre-requisite for the project. The said delays fall in the category of Force Majeure event in terms of the PPA read with the provisions of (i) the Bombay Tenancy and Agriculture Act (Vidharbh Region and Kutch) Act, 1958, (ii) the Environment (Protection) Act, 1986 and (iii) the CRZ Regulations. Due to Force Majeure event as stated above, the petitioner is unable to achieve the (i) date of (construction) default (ii) Commercial Operation Date and (iii) Scheduled Commercial Operation Date as specified in the PPA. In terms of Article 8.2

of the PPA when any party is unable to fulfill his obligation in terms of the agreement, due to Force Majeure event, delay, if any, shall not be construed as a breach of its obligations. As such, period of such delay is required to be suspended or excused in respect of such party and to that extent the period of Commercial Operation Date, Date of Construction default and Scheduled Commercial Operation Date are to be extended”.

9. Thus, the State Commission has held that the delay caused due to obtaining the permission/approval for land and water which are pre-requisites for the project, fall under the category of Force Majeure event in terms of the PPA read with the provisions of the relevant land Act, Environmental Protection Act and the CRZ Regulations. Referring to the PPA, the State Commission held that in terms of Article 8.2 of the PPA when any party is unable to meet its obligation due to Force Majeure event the

delay shall not be construed as a breach of obligations. Accordingly, the State Commission decided that the period of delay in obtaining clearances for land and water linkages is required to be suspended or excused and to that extent the period of Commercial Operation Date, Date of Construction default and Scheduled Commercial Operation Date are to be extended.

10. Let us examine the Power Purchase Agreement dated 30.4.2010 entered into between Cargo Solar and GUVNL.

11. The “Approvals” are defined as clearances, licenses and consents as are listed in Schedule 3 and other statutory approvals. Schedule 3 includes permission from statutory and non-statutory bodies required for the project and clearances from the Department of Forest, Ecology and Environment, if required.

12. Article 2 of the PPA regarding licenses, permits and conditions precedent stipulates as under:

“2.1 The Power Producer, at its sole cost and expense, shall acquire and maintain in effect all clearances, consents, permits, licenses and approvals required from time to time by all regulatory / statutory competent authority(ies) in order to enable it to perform its obligations under the Agreement. GUVNL will render all reasonable assistance to the Power Producer to enable the latter to obtain such clearances without any legal obligation on part of GUVNL.

Provided, however, non-rendering or partial rendering of assistance shall not in any way absolve the Power Producer of its obligations to obtain such clearances. Nor shall it mean to confer any right or indicate any intention to waive the need to obtain such clearances”

13. Thus, in terms of the PPA, Cargo Solar has to take the necessary steps required for obtaining the

clearances, approvals, etc. and bear all the expenses involved. GUVNL will render all reasonable assistance to Cargo Solar in obtaining such clearances without any legal obligation but it will not absolve Cargo Solar of its obligation to obtain the clearances.

14. Under Article 4.1 of the PPA regarding Obligations of the Power Producer, Cargo Solar has to obtain all statutory approvals, clearances, etc. necessary for the Project at its own cost in addition to the Approvals listed in Schedule 3. Also Cargo Solar has to construct, operate and maintain the Project during the term of PPA at its own cost and risk and fulfil all obligations undertaken under the PPA.

15. Force Majeure Events are described in the PPA as under:

“8.1 Force Majeure Events:

(a) Neither Party shall be responsible or liable for or deemed in breach hereof because of any delay or failure in the performance of its obligations hereunder (except for obligations to pay money due prior to occurrence of Force Majeure events under this Agreement) or failure to meet milestone dates due to any event or circumstance (a "Force Majeure Event") beyond the reasonable control of the Party experiencing such delay or failure, including the occurrence of any of the following:

i. acts of God;

ii. typhoons, floods, lightning, cyclone, hurricane, drought, famine, epidemic, plague or other natural calamities;

iii. acts of war (whether declared or undeclared), invasion or civil unrest;

iv. any requirement, action or omission to act pursuant to any judgment or order of any court or judicial authority in India (provided such requirement, action or omission to act is not due

to the breach by the Power Producer or GUVNL of any Law or any of their respective obligations under this Agreement);

v. inability despite complying with all legal requirements to obtain, renew or maintain required licenses or Legal Approvals;

vi. earthquakes, explosions, accidents, landslides; fire;

vii. expropriation and/or compulsory acquisition of the Project in whole or in part by Government Instrumentality;

viii. chemical or radioactive contamination or ionising radiation; or

ix. damage to or breakdown of transmission facilities of GETCO / DISCOMs;

x. exceptionally adverse weather condition which are in excess of the statistical measure of the last hundred (100) years.

(b) Force Majeure Exclusions: *Force Majeure shall not include the following*

conditions, except to the extent that they are consequences of an event of Force Majeure:

1. Unavailability, Late Delivery or Change in cost of plants and machineries, equipment, materials, spares parts or consumables for the project;

2. Delay in performance of any contractor / sub contractor or their agents.

3. Non performance resulting from normal wear and tear experience in power generation materials and equipments

4. Strike or Labour Disturbances at the facilities of affected parties

5. Inefficiency of finances or funds or the agreement becoming onerous to perform, and

6. Non performance caused by, or concerned with, the affected party's'

- (i) *Negligent and intentional acts, errors or omissions;*
- (ii) *Failure to comply with Indian law or Indian Directive; or*
- (iii) *Breach of or default under this agreement or any project agreement or Government Agreement”*

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“8.2 Available Relief for a Force Majeure Event:

No party shall be breach of its obligations pursuant to this agreement to the extent that the performance of its obligations was prevented, hindered or delayed due to a Force Majeure event. For avoidance of doubt, neither Party’s obligation to make payments of money due and payable prior to occurrence of Force Majeure events under the Agreement shall be suspended or excused due to the occurrence of a Force Majeure Event in respect of such Party”.

16. As per the Force Majeure clause, neither party shall be responsible or liable for breach because of any delay or failure in performance of its obligations or to meet the milestone dates due to event or circumstances beyond the reasonable control of the party. The Force Majeure Events include inability to obtain legal approvals by a party despite complying all legal requirements to obtain the required legal approvals.

17. Article 8.1(b) describes the Force Majeure Exclusions i.e. the events not included as Force Majeure. The list of exclusions *inter alia*, includes non-performance caused by party's negligent and intentional acts, errors or omissions.

18. Article 8.2 provides for the relief for a Force Majeure Event. According to Article 8.2, a party shall

not be in breach of its obligations to the extent of delay due to Force Majeure Event.

19. Thus, as per the PPA, inability despite complying all legal requirements to obtain required legal approvals falls under the Force Majeure Events. Let us examine whether the delay in obtaining land and water linkage clearances/ approvals by Cargo Solar fall under the Force Majeure Event and whether there was delay in obtaining the land and water clearance/approvals despite Cargo Solar complying with all legal requirements for obtaining such approvals.

20. According to GUVNL, the approval as defined in the PPA would not cover the approval to be granted by the Collector for land use, water linkage, etc. The land could have been acquired by Project Developer

from sources other than through conversion of agriculture land as sought to be done by Cargo Solar. Cargo Solar could have acquired the land directly from the land owners instead of obtaining from the State Government through the conversion route. Merely because it is onerous or expensive to arrange the land from other sources cannot be a ground for Force Majeure.

21. According to Cargo Solar, the project has been delayed due to following reasons which were beyond their control and the same are covered in Force Majeure clause of the PPA:

a) Delay in procurement of land caused due to delay in getting permission of District Collector required under Section 89 of the Bombay Tenancy and Agriculture Lands (Vidharbha Region and Kutch Area) Act, 1958.

b) Delay in procurement of water supply permission due to conditions laid down to procure Ministry of Environment & Forest's approval.

22. We notice that Solar Power Policy 2009 of the State Government notified on 6.1.2009 stipulates that the GEDA, the Government agency for development of renewable energy sources and Gujarat Power Corporation Ltd. shall be the State Government nodal agencies for facilitation and implementation of Solar Power Policy. These nodal agencies will facilitate and assist the project developers. They will also undertake the activities which include the identification of suitable locations for Solar Projects, in preparing a land bank and requirement of erection/up-gradation of connecting infrastructure to the project site and facilitate in arranging right of way, water supply and in obtaining clearances and approval which are in the

purview of the State Government. In pursuance of the State Government Policy, Cargo Solar was allocated to set up a 25 MW Solar Thermal Power Project in the State.

23. Subsequently, the State Commission passed the order dated 29.1.2010 determining the generic tariff for procurement of power by the distribution licensees and others from Solar Energy Projects. In this tariff order, the State Commission decided the parameters for determination of tariff and the generic tariff for Solar Photovoltaic and Solar Thermal Power Projects applicable for 25 years having Commercial Operation Date upto 31.12.2011. It is noticed that the levelised tariff for Solar PV Project is Rs. 12.54/kWh and for Solar Thermal Project Rs. 9.29 per kWh i.e. the tariff of Solar Thermal Power Project is much lower than the tariff for Solar PV Project.

24. We find that the PPA defines the “Approvals” means the permits, clearances, licenses and consents as listed in Schedule 3 and any other statutory approvals. Schedule 3 of the PPA includes ‘permission from all other statutory and non-statutory bodies required for the Project’ besides the specific consents and approvals listed therein. Article 8.1 stipulating events of Force Majeure clearly include inability of a party obtains legal approvals despite complying with all legal requirements to obtain such approvals.

25. As rightly held by the State Commission, the approval required from District Collector under Section 89 of the Bombay Tenancy and Agriculture Lands (Vidharbha Region and Kutch Area) Act, 1958 and obtaining environmental clearance and CRZ clearance from the Ministry of Environment & Forest under the

Environment (Protection) Act, 1986 are the legal approvals required for acquisition of agricultural land and use it for the purpose of setting up the solar power project and for meeting the requirement of water required for the project from the identified water source respectively. Such approvals will fall within the definition of 'approvals' as given under the definition and 'Legal Approvals' as given under article 8.1 (a) (v) of the PPA. The delay in obtaining these approvals despite Cargo Solar complying with all legal requirements to obtain these approvals would fall within the Force Majeure Events under clause 8.1(a)(v) of the PPA.

26. Learned counsel for the GUVNL has argued that obtaining all statutory approvals, clearances, etc. fall under the Obligations of the Power Producer as per

clause 4.1 of the PPA. The obligations of GUVNL as per the PPA do not include such approvals.

27. Undoubtedly the obligation to obtain the statutory approvals, clearances, etc. and bearing the cost of obtaining such approvals lies with the Project Developer according to the PPA. However, the question here is not that whether it is not the obligation of the Project Developer i.e. Cargo Solar to obtain such approvals but whether the delay in obtaining such approvals from the Government instrumentalities despite the Project Developer complying with the legal requirements to obtain such approvals would be covered under Force Majeure Event or not. Thus, we do not find force in the argument of the learned counsel for the Appellant that the delay in obtaining the above approvals for land and

water linkage would not qualify for inclusion under Force Majeure Event.

28. Let us now examine if Cargo Solar has complied with legal requirements for obtaining the approvals for land and water.

29. We find that Cargo Solar (R-2) in its letter dated 2.6.2011 to Principal Secretary, Energy and Petrochemical Department, Government of Gujarat had informed that they had been experiencing delays in obtaining approvals relating to allotment of land and water for the project notwithstanding concerted and regular efforts made by them and compliance of their obligations under the PPA including in relation to making the necessary applications and pursuing them actively. It was informed that out of 196 hectares land, 159.35 hectares is private agriculture land and 36.65 hectares of Government wasteland. The Government

land is in the form of multiple patches dispersed across the propose site surrounded by private lands and so without having Government land approved, they could not have a contiguous and continuous patch of symmetric land which is critical requirement of Solar Thermal Project. The status of conversion of private agriculture land to industrial use for the project was also brought to the notice of the Principal Secretary in this letter.

30. As regards water allocation for cooling, cleaning and make up water the total requirement was indicated as 1.68 cusecs as per the details furnished in the above letter dated 2.6.2011 to the Principal Secretary, Government of Gujarat. It was informed by Cargo Solar that they had approached Gujarat Water Infrastructure Ltd. ("GWIL") for allocation of water from a Canal and at the same time approached Gujarat Maritime Board ("GMB") for drawal of water

from Surajbari Creek. While GWIL had not approved the water allocation from Surajbari canal despite repeated requests and follow up, GMB had given conditional approval of water from Surajbari Creek subject to CRZ approval. However, CRZ approval would take time as it has to be cleared finally by Ministry of Environment & Forest (MOEF). Further, it was indicated that the CRZ study had been under process for filing to the MOEF.

31. Through the above letter dated 2.6.2011, Cargo Solar requested for extension of COD of the project from 31.12.2011 to 31.3.2013 without any penalty or Liquidated Damages. However, such extension was denied by the Energy & Petrochemical Deptt. Thereafter, Cargo Solar (R-2) approached the State Commission to declare that the time elapsed in obtaining statutory/Government clearance from

Government instrumentality towards land and water source may be considered as Force Majeure Event as per the terms and conditions of the PPA and prayed to extend the Date of Construction Default and SCOD from 31.12.2011 to 31.7.2013 and consequential reliefs as per the PPA.

32. We find that the Cargo Solar in its submissions before the State Commission had stated that they had sent a letter to the District Collector on 7.8.2010 for granting permission to buy the agriculture land for non-agricultural purpose. This copy of the letter was also produced before the State Commission. It was also submitted by Cargo Solar that they had been directed by Gujarat Maritime Board to get Environmental Impact Assessment and approval of CRZ which are mandatory for approving source of water from Surajbari Creek. Accordingly, they had

prepared EIA through their consultants and the Report had been sent for CRZ study for which work had been assigned to Anna University.

33. The objection raised by GUVNL before the State Commission was that acquisition of land and water linkage was the sole obligation of Cargo Solar and the delay in getting approvals from Govt. instrumentalities for land and water would not be covered under the Force Majeure Events as per the PPA. GUVNL also pointed out that Cargo Solar had applied for land and water for a 50 MW Project as against 25 MW project provided in the PPA.

34. Let us examine the relevant findings of the State Commission in regard to approval for land.

“8.14 It is a fact that The Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch area) Act, 1958, read with Rule 45 thereof are the

Act and Rules made by the legislature and the provisions of the same are mandatory in nature which are required to be followed by the person concerned. As the above Act and Rules framed under it were passed by the legislature, they are statutory provisions in the eye of law. Section 89 of the above Act, recognizes that the collector or other person authorized by the state government is empowered to grant a permission for transfer of agricultural land to non agriculturist. Thus the collector or the officer authorized by the state government is a statutory authority who grants the permission. The permission /approval granted by the above authority is a statutory permission/approval as it is under the provision of the said Act.”

“8.16 Clause 4 of the Schedule 3 of the PPA mandates on the petitioner to obtain statutory clearances, permission or approval, if any, from the concerned authorities. Thus, it is mandatory for the petitioner to obtain the statutory approval, if any, which is necessary for the Power Project. Land is

one of the important factors for the construction of the project by the petitioner. The title of the land in the petitioner's name is necessary prior to construction activity as well as whenever the petitioner (project developer) approaches the financial institutions for receiving the term loan for the project. Hence, the approval from the Collector/or authorized officer of the state government is mandatory for the petitioner for the agricultural land for which the MOUs were signed by the petitioner as the petitioner is a non-agriculturist.

8.17 From the above, it appears that it is an obligation on the part of the petitioner to acquire the land for the project. The petitioner had executed MOUs with various agricultural land owners and also applied to the Dy. Collector Anjar, Kutchh for approval/permission on 7.8.2010 u/s 89(1)(A) of The Bombay Tenancy and Agricultural lands (Vidarabh Region and Kutch area) Act 1958 read with Rule 45 there to.”

“8.19 Article 8.1(a) (iv) of the PPA provides that any inability despite complying with all legal requirements to obtain or maintain license or legal approval which leads to delay or failure in the performance of obligation by the party concerned of the PPA be considered as ‘Force Majeure’ event. Both the petitioner and the respondent No.1, consciously agreed that any delay in obtaining legal approval is to be considered as a Force Majeure event. As stated above, it is obligatory on the part of the petitioner to obtain permission from the collector/ authorized officer by the state government for the procurement of the agricultural land for which MoUs were executed by the petitioner for utilization for non agricultural purpose as provided in clause 4 of the schedule 3 which is statutory in nature.

8.20 The petitioner had signed MOUs with farmers for procurement of the agricultural lands and also applied for permission u/s 89(1)(A) to the Collector, Kutch vide letter dated 07.08.2010. On verification of the said letter it appears that the letter was

received on 07.08.2011 by the Dy. Collector Office. The petitioner through an additional written submission dated 1.2.2012 has submitted a copy of the Dy. Collector Anjar, Kutchh letter dated 31.1.2012, which states that the above letter for permission under section 89(1) (A) of The Bombay Tenancy and Agricultural lands (Vidarabh Region and Kutch area) Act 1958 read with Rule 45 thereto was submitted by the petitioner on 7.8.2010 and the same was forwarded to the Mamlatdar, Rapar vide letter dated 16.8.2010 for further action. Thus, it is clear that the petitioner had sought approval from the Dy.collector, Anjar, kutchh for procurement of agricultural land on 7.8.2010 and the said permission is awaited as submitted by the petitioner.

8.21 The said letter/application dated 7.8.2010 also states that the petitioner desires to set up a Solar Thermal Power Project. The petitioner had also obtained item code certificate from the Ministry of Commerce and Industries, New Delhi bearing 2381/ SIA/IMO/2010 dated 16.07.2010. The

petitioner proposed to purchase agricultural land admeasuring 191-65-65 hectare situated in the sim of village Khanpar, Tal. Rapar, Kutch and requested to grant prior permission u/s 89(1)(A) of the Kutch Tenancy Act read with Rule 45 thereof. The owners of the land had given their consent to sell the land to the company. The said approval of the competent authority is still awaited as submitted by the petitioner. Thus, it is a fact the petitioner has not received an approval u/s 89(1)(A) of the Bombay Tenancy Act, 1958 which is statutory in nature. The petitioner had entered in MOUs with land owners and applied for the permission u/s 89 (1) (A) to the authority concerned on 7.8.2010 i.e. well in advance to fulfill the legal requirement which is still awaited. Thus, the delay in obtaining the above legal permission is beyond the control of the petitioner as stated in Article 8.1(a) (v) of the PPA. Hence, we decide that the delay that occurred in obtaining above approval is a 'Force Majeure' event as per article 8.1(a) (v) of the PPA.

8.22 Now, we deal with the time period that elapsed (delay) in obtaining the said approval which qualifies as a period of Force Majeure event. The letter/application dated 7.8.2010 was submitted to the Dy. Collector, Anjar, Kutch by the petitioner to get approval for procurement of agricultural land for the Solar Power Project. It is also stated by the petitioner that the approval is still awaited which is not disputed by the respondents. Thus, the delay that occurred in obtaining the approval for procurement of agricultural land for the project is 17 months and it may be extended upto the date on which such approval/ permission is granted by the appropriate authority. Therefore, we decide that the delay in obtaining the permission for purchase of agricultural land for the Solar Thermal power project is a 'Force Majeure' event and the petitioner is entitled to receive the relief in terms of Articles 4.3.and 8.2 of the PPA.”

35. The perusal of the impugned order would show that the State Commission has examined in detail the legal approval required by the Cargo Solar under the Bombay Tenancy and Agriculture Lands, action taken by them to obtain such approval and then concluding that the delay in obtaining the approval for land was beyond the control of Cargo Solar and thus would fall under Force Majeure Event as per Article 8.1(a) (v) of the PPA. We are in agreement with the findings of the State Commission. The delay in getting the legal approval for land is beyond the control of the Cargo Solar and is squarely covered under Force Majeure Event under Article 8.1 (a)(v) of the PPA.

36. The controversy raised by the Appellant GUVNL in this appeal is with regard to the letter dated 7.8.2010 vide which Cargo Solar had applied for permission u/s 89(1)(A) of the 1958 Act to the District Collector,

Kutch. We find that though the letter sent by Cargo Solar is dated 7.8.2010, the date written by hand under the initials of the recipient shows 7.8.2011. As indicated in the paragraph 8.20 of the impugned order, the State Commission had made an observation that it appeared that the letter dated 7.8.2010 was received in the office of Dy. Collector on 7.8.2011. Cargo Solar through additional written submission dated 1.2.2012 submitted a copy of Dy. Collector, Anjar, Kutch dated 31.1.2012 stating that the above letter of permission u/s 89(1)(A) of the 1958 Act was submitted by Cargo Solar on 7.8.2010 and the same was forwarded to Mamlatdar, Rapar vide letter dated 16.8.2010 for further action. Based on the additional written submissions by Cargo Solar dated 1.2.2012, the State Commission accepted that Cargo Solar had

sought approval from Dy. Collector Anjar, Kutchh for procurement of agricultural land on 7.8.2010.

37. According to the GUVNL, the additional written submission was submitted after conclusion of the hearing without endorsing a copy to GUVNL. This is denied by learned Sr. counsel for Cargo Solar (Respondent no.1). According to him, a copy of the additional written submission dated 1.2.2012 was served on GUVNL on the same day i.e. 1.2.2012. In support of their claim they have produced a proof of service of the said additional written submissions dated 1.2.2012 to GUVNL.

38. We find that the affidavit dated 1.2.2012 was only in the form of the clarification to the written arguments dated 11.1.2012 submitted to the State Commission by Cargo Solar to clarify that the office of

the Deputy Collector had inadvertently endorsed the receipt of the application dated 7.8.2010 and that the said application had been received on 7.8.2010 itself. No other submissions were made in the affidavit dated 1.2.2012 except the clarification regarding date of application made in the office of the Collector.

39. The issue regarding the date of receipt of the letter dated 7.8.2010 in the office of the Collector was never raised by the GUVNL before the State Commission. However, the State Commission had raised a doubt about the receipt of letter dated 7.8.2010 in the office of the Collector. The State Commission after being satisfied that Cargo Solar had sought approval from the Dy. Collector, Ajnar, Kutchh for procurement of agricultural land on 7.8.2010 passed the impugned order. We do not find any infirmity in the findings of the State Commission.

40. Learned counsel for the Appellant has argued that the quantity of water sought by Cargo Solar for allocation is for 50 MW project and not 25 MW project as provided for in the PPA.

41. We find that this issue has been dealt with by the State Commission in paragraph 8.25 of the impugned order which is reproduced below:

“8.25 The respondent contended that the quantity of water demanded for allocation by the petitioner is for 50 MW project. The petitioner clarified that it had asked for the water allocation for only 25 MW. The petitioner had requested to the Hon’ble Minister, Water Resources, Water supply & Urban Development, Govt. of Gujarat, vide letter dated 12th August, 2010 to approve the water availability for his proposed 25 MW power plant (with possible expansion to 50 MW). Thus, it is categorically stated that the quantity of water demanded by the petitioner is for 25 MW capacity of the plant. It is

also mentioned in the said letter that the petitioner would apply for its project in JNNSM for 50 MW. On verification of this letter, it appears that the proposed plant does not mention the storage type. It is also mentioned that the petitioner is assessing the viability of using air-cooled condenser in his balance of plant. The petitioner had also approached various government authorities namely (i) the Principal Secretary, Water Supply & Resources Department Govt. OF Gujarat on 5.9.2010 (ii) Gujarat Water Infrastructure Limited on 12.9.2010 and (iii) Gujarat Maritime Board (GMB) on 11.10.2010 and requested for allocation of water supply for its 25 MW Solar Thermal Power project with storage type. The above communications made by the petitioner categorically state that the petitioner has asked for water allocation for 25 MW. Finally, the GMB that had permitted to carry out the CRZ study to receive water from the Surajbari Creek also states the capacity of the plant as 25 MW. From the above communications, it appears that the quantity of

water allocation requested by the petitioner is for 25 MW only.”

We find that Cargo Solar has sought water for 25 MW Solar Thermal Power Project with 9 hours of thermal storage. Cargo Solar has submitted that the water requirement for their project is more as compared to other Solar Projects as they were installing Solar Thermal Project with 9 hours storage. The State Commission has analysed the issue in details and has concluded that the quantity of water allocation sought by Cargo Solar is for 25 MW only. We do not find any infirmity in the findings of the State Commission.

42. Learned counsel for the Appellant has also raised a number of issues relating to genuineness of the documents submitted by Cargo Solar contending that the area of land sought by the developer was in excess.

These issues were never raised before the State Commission and, therefore, in our opinion these are not permissible to be raised at the Appeal stage.

43. However, Cargo Solar has clarified that they were constructing a Solar Thermal Power Project with 9 hours of thermal storage for which the land requirement is more than normative land requirement of a normal Solar Thermal Project without storage. Learned Sr. counsel for Cargo Solar has also informed that land from private owners has already been procured and some of the equipments of power project have already reached the site. In view of this, we do not wish to go into the controversies raised now by the Appellant which were not raised before the State Commission.

44. Learned counsel for the Appellant has argued that it was open to Cargo Solar to put up the project in any area other than Kutch as the procurement of land in Kutch required the approval of the Collector under Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch Area) Act, 1958 with Rule 45 thereof. We do not find any force in this argument. The project developer had freedom to select appropriate land and technology as per the State Government Policy and the State Commission's order dated 29.1.2010. The PPA dated 30.4.2010 entered into between Cargo Solar and GUVNL also defines the Project to be established in District Kutch. It is not open for GUVNL at this stage to question the location selected by Cargo Solar. We are of the view that the question of delay in obtaining the statutory approvals under Force Majeure Events has to be dealt strictly as

per clause 8.1 of the PPA. The State Commission has correctly done so after examining the type of clearances/approval required after satisfying that Cargo Solar had complied with all legal requirements to obtain such approvals.

45. Learned counsel for the Appellant has also argued that the State Commission in its order dated 29.1.2010 had rejected the suggestion of one of the project developers that the Government should identify and designate the authorities who would facilitate the developers in acquiring land, consummating agreements for water supply, environmental clearances, etc. Therefore, the State Commission ought not to have allowed the delay caused due to obtaining of approvals for land and water supply as Force Majeure event.

46. Let us examine the relevant portion of the order dated 29.1.2010 which is reproduced below:

“7.1 Designated Authority

M/s. Essar Power Ltd. has suggested that the Government should identify and designate the authorities who would facilitate for developers in acquiring land, consummating agreements, for water supply, environmental clearance and installation of various solar radiation measurement instruments.

Commission’s Ruling

The suggestions submitted by M/s. Essar Power Ltd. fall within the jurisdiction of the Govt. of Gujarat. Hence, the Commission does not give any ruling on it”.

47. The State Commission in the above order did not give a finding on suggestion of one of the project developers that Government should identify and designate authorities to facilitate the developers in acquiring land, arranging water supply, etc., as it felt

that the above suggestion would fall in the jurisdiction of the State Government. Thus, the State Commission did not give a finding on the above suggestion as it felt that the same did not fall in its jurisdiction. However, in the present case we have to examine if there was a delay in obtaining the legal approvals from the Government instrumentalities which were beyond the control of Cargo Solar and whether the same would fall under Force Majeure Events clause of the PPA or not in the circumstances of the present case. We have come to the conclusion that the delays in obtaining legal approvals for land and water would fall under Article 8.1 (a)(v) of the PPA and covered as a Force Majeure Event. Thus, this contention of GUVNL does not deserve acceptance.

48. Learned counsel for the Appellant has also argued that Cargo Solar could have acquired the land directly

from the land owners instead of acquiring Government land and this would have expedited the procurement of land. We find that Cargo Solar had already explained in their letter dated 2.6.2011 to the Principal Secretary, Government of Gujarat and also in submissions before us that out of total 196 hectares land, 159.35 hectares was private land and 36.05 hectares Govt. land. As they required a contiguous and continuous patches of land for their Solar Thermal Project with heat storage, it was necessary to acquire some Government land which was lying between the patches of the private land. Moreover, approval of District Collector is required for procurement of private agriculture land for change of use for setting up the solar project. Thus, we do not find any merit in the above argument of learned counsel for the Appellant.

49. Learned counsel for the Appellant has relied on the following authorities to substantiate her arguments:

- i) Seaboard Lumber Company and Capital Development Company -v- United States 308 F.3d 1283, relevant paras 40 to 61 and 96
- ii) Ocean Tramp Tankers Corporation -v- V/o Soveracht [1964] 1 All E.R. 161, relevant pages 166 to 167
- iii) Continental Construction Co. Ltd -v- State of Madhya Pradesh (1988) 3 SCC 82, relevant paras 5 and 8 to 11
- iv) Travancor Devaswom Board -v- Thanath International (2004) 13 SCC 44, relevant paras 11 to 14
- v) Eacom's Controls (India) Ltd. -v- Bailey Controls Co. and Others AIR 1998 Delhi 365, relevant paras 24 to 25 and 28 to 29
- vi) Satyabrata Ghose -v- Mugneeram Bangur and Co. and anr. AIR 1954 SC 44
- vii) Govindbhai Gordhanbhai Patel and others -v- Gulam Abbas Mulla Allibhai and others AIR 1977 SC 1019
- viii) Mohan Lal & Anr v. Grain Chamber Ltd AIR 1968 SC 772
- ix) The Naihati Jute Mills Ltd. v. Khyaliram Jagannath AIR 1968 SC 522

- x) Mugneeram Bangur & Co. -v- Sardar Gurbachan Singh (1965) 2 SCR 630
- xi) Davis Contractors -v- Fareham U.D.C. (1956) 2 All E.R. 145
- xii) Ostime -v- Duple Motor Bodies Limited (1961) 2 All E.R.
- xiii) Suresh Narain Sinha -v- Akhauri Balbhadra Prasad and others AIR 1957 Patna 256
- xiv) Alopi Parshad vs. Union of India (1960)2 SCR 793
- xv) Gambhirmull Mahabir Prasad vs. Indian Bank Ltd. AIR 1963 Calcutta 163
- xvi) Ved Prakash Gupta vs. Shishu Pal Singh AIR 1984 Allahabad 288

50. We have examined the above rulings and found that these are relating to interpretation of force majeure condition under specific contracts and frustration of contract or self induced frustration of contract which are not applicable to the present case. In this case the State Commission's findings regarding force majeure and consequential relief have been based on the correct interpretation of the PPA entered into between the parties in the present case. It is not

the case of the Cargo Solar that the contract has been frustrated or it has become impossible to perform due to delay in obtaining the statutory clearances or that they will not be able to perform their obligations under the PPA as it has become onerous or expensive. On the other hand, Cargo Solar have contended that they are going ahead with the execution of the project for supply of power to the Appellant. They have informed that the entire 410 Acres of private land required for the project has been purchased and on 7.8.2010 application has been made under Section 89A of the Act for using the said land for non-agricultural purpose. Already permission under Section 89A for 125 Acres out of 410 Acres of private land has been received and for balance 285 acres the permission is pending. According to Cargo Solar, the main problem due to which the approval for land has been delayed is

due to mismatch within Government records on the exact size of the plots within the Kutch Region. They have also informed that various orders have already been placed for the equipment and substantial investment has already been made towards the project.

51. Learned counsel for the Appellant has also furnished a list of Solar Power Project which have been successfully commissioned in Kutch to say that Cargo Solar has not been serious about completing the project. As rightly pointed out by Shri Vikas Singh, learned Sr. counsel for Cargo Solar, the plants indicated in the list by the Appellant are all Solar PV Plants and the land requirement for such plants is much lower than that required for Solar Thermal Plant with heat storage. Further the Solar Thermal Plant also requires contiguous and continuous patch of

land. As correctly pointed out, we also feel that the case of Cargo Solar for delay in approvals required for procurement of land and water for their Solar Thermal Project which has to be examined in specific circumstances of the case in terms of the PPA could not be compared with the Solar PV projects which have been commissioned in Kutch area.

52. In view of above discussion, we answer the question posed in this Appeal that the impugned order is justified and the findings of the State Commission in the impugned order are deserved to be confirmed.

53. Before parting with this case, we would like to point out one important aspect of the matter relating to Solar Thermal Project. The Solar Thermal Project with thermal storage is a new technology for India. Although a number of projects on Solar Thermal

Technology have been established in some advanced countries, in India no such project has so far been commissioned and the project of Cargo Solar may be one of the first such projects. The tariff of Solar Thermal is also lower than Solar PV. Cargo Solar is putting up the Solar Thermal Project with 9 hours of storage which would enable operation of the project even after the sunset to meet the crucial evening and morning peak power requirements of the State. In our opinion, development of such projects should be encouraged. Clause 5.12.1 of the Tariff Policy also stipulates that adequate promotional measures have to be taken for development of technologies and sustained growth of non-conventional energy sources/renewable sources. On a query from the Bench, it was clarified by Cargo Solar that as a result of the delay in execution of the project they would not

be entitled to the generic tariff determined by the State Commission earlier in the order dated 29.1.2010 but the tariff determined in the subsequent order for the next control period would alone be applicable which is lower than the tariff determined in the order dated 29.1.2010.

54. While concluding our judgment, we deem it appropriate to record our deep appreciation for the thorough preparation and effective presentation made by Ms. Swapna Seshadri, learned counsel for the Appellant and Mr. Vikas Singh, learned Senior counsel for the Respondent on various dates of hearings, which enabled us to understand the issue and decide the matter. Accordingly, recorded.

55. Summary of our findings:

i) The approvals under Bombay Tenancy and Agriculture Land (Vidharba Region and Kutch Area) Act, 1958 and for water source under the Environment (Protection) Act, 1986 and CRZ Regulations sought by Cargo Solar are the statutory/legal approvals under the PPA. The delay in obtaining these approvals by the Government instrumentalities by Cargo Solar would fall in the category of Force Majeure Events under Article 8.1(a)(v) of the PPA. As such the period of such delay is required to be suspended or excused and to that extent the period of Commercial Operation Date, Date of Construction default and Scheduled Commercial Operation Date are to be extended in terms of the PPA.

ii) The findings of the State Commission and the consequential relief granted to Cargo Solar are correct and therefore, upheld.

56. In view of our above finding, the Appeal is dismissed as devoid of merits. Consequently the State Commission's impugned order is confirmed. No order as to costs.

57. Pronounced in the open court on this **4th day of February, 2014.**

**(Rakesh Nath)
Technical Member**

**(Justice M. Karpaga Vinayagam)
Chairperson**

REPORTABLE/NON-REPORTABLE

vs