

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

**APPEAL No. 330 OF 2022 &
IA NOS.1194 OF 2022 & 213 OF 2023**

Dated: 31.01.2025

**Present: Hon'ble Mr. Sandesh Kumar Sharma, Technical Member
Hon'ble Mr. Virender Bhat, Judicial Member**

IN THE MATTER OF:

ACME Heergarh Powertech Private Limited
104, Munish Plaza, 4637/20, Ansari Road,
Daryaganj, New Delhi- 110002

...Appellant

VERSUS

1. **Maharashtra Electricity Regulatory Commission**
Center No. 1, 13th Floor,
World Trade Centre, Cuffe Parade,
Colaba, Mumbai- 400005

2. **Maharashtra State Electricity Distribution Company Limited**
Prakashgad, 5th Floor, Station Road,
Bandra (E), Mumbai- 400005,
Maharashtra

...Respondents

Counsel for the Appellant(s) : Mr. Aniket Prasoon
Ms. Priya Dhankar
Ms. Shweta Vashist
Ms. Akanksha Tanvi
Mr. Akash Lamba
Mr. Shubham Mudgil
Mr. Rishabh Bhardwaj
Ms. Anandini Thakre
Mr. Nimesh Jha

Counsel for the Respondent(s) : Ms. Pratiti Rungta for R- 1

Mr. Ravi Prakash
Mr. Samir Malik
Mr. Rahul Sinha
Ms. Nikita Choukse
Ms. Udit Saxena for R- 2

JUDGEMENT

PER HON'BLE MR. SANDESH KUMAR SHARMA, TECHNICAL MEMBER

1. The captioned appeal has been filed by ACME Heergarh Powertech Private Ltd. (hereinafter "AHPPL" or "Appellant") against the Impugned Order passed by Maharashtra Electricity Regulatory Commission (hereinafter "MERC" or "Commission" or "Respondent No. 1") in Case No. 07 of 2022 dated 07.07.2022 for extension of Scheduled Commercial Operation Date (hereinafter "SCOD") of the Appellant's 300 MW solar power project situated at Bhadla, Bap, Jodhpur, Rajasthan from 20.04.2022 to 23.05.2022, on account of Force Majeure event of disruption in global supply chain due to Covid-19 pandemic.

Description of the Parties:

2. The Appellant, ACME Heergarh Powertech Private Limited qualifies as a generating company under Section 2 (28) of the Electricity Act, 2003. It is a Special Purpose Vehicle (in short "SPV") created by ACME Solar Holdings Private Limited to develop the project and sell the generated energy to Respondent No. 2.

3. Respondent No. 1 is the Maharashtra Electricity Regulatory Commission, formed by virtue of Section 14 of the Electricity Regulatory Commission Act, 1998 and it continues to function under Section 82 (1) of the Electricity Act, 2003.

4. Respondent No. 2, Maharashtra State Electricity Distribution Company Limited (in short "MSEDCL") was established under the Government of Maharashtra's General Resolution No. ELA-1003/P.K.8588/Bhag-2/Urja-5 dated 24.01.2005, and commenced operations on 06.06.2005, in accordance with the provisions of the Electricity Act, 2003. MSEDCL holds a distribution licence under the Electricity Act, 2003, and is responsible for the distribution and supply of electricity throughout the State of Maharashtra, excluding the Mumbai license area.

Factual Matrix of the Case

5. ACME Solar Holdings Limited was selected as the successful bidder for the development of 300 MW (AC capacity equivalent to 450 MW DC capacity) solar power project situated at Bhadla, Tehsil: Bap, District: Jodhpur, Rajasthan through the Letter of Award dated 19.03.2019, in the competitive bidding process conducted by the Respondent No. 2, MSEDCL (Request for Selection Document No. MSEDCL/RE/2018/1000 MW Solar/T-037 dated 05.12.2018), and thereby, the Appellant, ACME Heergarh Powertech Private Limited was established by ACME Solar Holdings Limited as a SPV for the execution of the Project.

6. The Appellant thereby furnished the Performance Bank Guarantee in terms of the LoA and the RfS, which was amended on 31.03.2022 and now amounts to Rs. 24,00,00,000/- (Rupees Twenty-Four Crores Only).

7. Thereafter, the Appellant and Respondent No. 2 entered into a Power Purchase Agreement (in short "PPA") under which the Appellant was obligated to develop and operate the Project and supply the electricity generated to MSEDCL

at a tariff of Rs. 2.72 per unit for 25 years from the Project's Commercial Operation Date (in short "COD").

8. Also, as per Article 3.3 (1) of the PPA, the Appellant was obligated to commission the Project within 24 months from the Effective Date of the PPA, which is 24 months from 26.06.2019, making the Scheduled Commercial Operation Date (in short "SCOD") as 26.06.2021 and if the Appellant fails to commission the Project by the SCOD, MSEDCL was entitled to forfeit the Performance Bank Guarantee provided by the Appellant, except in cases where the delay is due to a Force Majeure (hereinafter, "FM") event.

9. The Project commissioning however was delayed beyond the stipulated timeline due to the COVID-19 pandemic and thus the Appellant sought an extension citing the same which was duly granted by the Commission via order dated 20.06.2020 in Case No. 78 of 2020 while recognizing the COVID-19 pandemic and resulting lockdowns as a Force Majeure event and consequently, Respondent No. 2, MSEDCL vide letter dated 23.09.2020 extended the SCOD upto 28.12.2021 as per the Ministry of New and Renewable Energy (hereinafter, "MNRE") office memo dated 13.08.2020 which mentions as under:

"a) All Renewable Energy (RE) implementing agencies of the Ministry of New & Renewable Energy (MNRE) will treat lockdown due to COVID-19, as Force Majeure. b) All RE projects under implementation as on the date of lockdown, i.e. 25th March 2020, through RE Implementing Agencies designated by the MNRE or under various schemes of the MNRE, shall be given a time extension of 5 (five) months from 25th March 2020 to 24th August 2020. This blanket extension, if invoked by the RE developers, will be given without case

to case examination and no documents/evidence will be asked for such extension.”

10. Thereafter, on 19.04.2021, the Appellant issued a force majeure notice to Respondent no. 2 on account of the second wave of COVID-19 followed by letters dated 12.05.2021 and 26.05.2021 highlighting the continuation of force majeure event due to COVID-19 second wave.

11. On 29.06.2021, MNRE issued another office memorandum allowing renewable energy developers an extension in the timeline from 01.04.2021 to 15.06.2021 on account of COVID-19 second wave which read as under:

“Sub: Time-extension in Scheduled Commissioning Date of Renewable Energy (RE) Projects considering disruption due to the second surge of COVID-19

1. Reference is invited to this Ministry's O.M. No. 283/18/2020-GRID SOLAR dated 12th May, 2021, providing for a mechanism for claiming time-extension, on account of second surge of COVID-19, for RE projects, being implemented through Implementing Agencies designated by MNRE or under various schemes of MNRE and having their Scheduled Commissioning Date (SCD) on or after 1 April, 2021.

2. It was also provided that the quantum of time-extension to be granted in this manner will be notified separately by MNRE.

3. In this regard it has been noted that with the improvement in the COVID-19 situation in the country, many States/UTs have begun the process of unlocking. Broadly, the period of disruption due to second surge of COVID-19 seems to be from 1 April, 2021 to 15th June,2021.

4. *It has also been noted that activities related to RE projects are covered under essential activities, and are allowed to continue even during the lockdown situations.*

5. *However, in order to facilitate the ease of doing business and as a measure of relief to RE projects so that they can deal with difficulties arising out of the restrictions imposed on account of the second COVID-19 surge, it has been decided that the entire period of disruption i.e. 1 April, 2021 to 15th June, 2021 (both dates inclusive), can be allowed as time-extension to RE projects, being implemented through Implementing Agencies designated by the MNRE or under various schemes of MNRE, following the process stated in MNRE's O.M. No. 283/18/2020- GRID SOLAR dated 12.05.2021*

6. *This issues with approval of Hon'ble Minister (NRE & Power)."*

12. The Appellant further sent a letter dated 02.07.2021 and a follow-up letter dated 13.09.2021 to MSEDCL requesting an extension of the SCOD from 28.12.2021 to 28.03.2022 on account of disruption due to the second wave of COVID-19.

13. Further, the MNRE again issued an office memorandum dated 03.11.2021 wherein the ministry acknowledged the disruption in the supply chain as a force majeure event and empowered the Dispute Resolution Committees to look into such time extension requirements and make recommendations to the ministry.

14. Thereafter, the Appellant issued another letter to Respondent No. 2 on 08.11.2021 following up on the earlier request for an extension of SCOD in the light of the MNRE memo dated 03.11.2021.

15. Finally, on 26.11.2021, the Appellant issued a letter to Respondent no. 2 seeking an extension of SCOD from 28.12.2021 to 14.09.2022 on the basis of the second wave of the COVID-19 pandemic and disruption in the global supply chain.

16. Thereafter, the Appellant filed a Petition via case no. 07 of 2022 with Respondent No.1, Commission under Sections 86(1) (e), 86(1) (f), and 86(1) (k) of the Electricity Act, 2003 along with Article 8 of the Power Purchase Agreement (PPA) seeking an extension of the Scheduled Commercial Operation Date (SCOD) from 28.12.2021 to 14.09.2022 based on the occurrence of force majeure events.

17. While the petition was still under consideration, Respondent No. 2, MSEDCL, vide letter dated 28.12.2021, granted an extension of the SCOD up to 14.03.2022 due to the second wave of the COVID-19 pandemic and therefore, the only issue remaining with the Commission was of extension of SCOD on account of disruption in global supply chain.

18. The Appellant later informed MSEDCL through letters on 17.02.2022, 02.03.2022, and 04.03.2022 about ongoing global supply chain disruptions, a continuing force majeure event, and requested a further SCOD extension up to 14.09.2022.

19. Consequently, the Appellant submitted an Interlocutory Application on 04.03.2022, with diary number 40 of 2022 wherein the Appellant sought directives from the Respondent No. 1 Commission to prevent MSEDCL from encashing the PBG (No. 1945IGFIN005119, dated 19.08.2019, and amended on 31.03.2021) under the Power Purchase Agreement (PPA) and to refrain from imposing any liquidated damages.

20. The said interim application was thereby allowed by the Respondent No.1, Commission vide order dated 11.03.2022 and the Commission therefore directed MSEDCL not to take any coercive action against the Appellant.

21. The Appellant thereafter commissioned the entire Project capacity by 23.05.2022 and consequently requested a SCOD extension from 14.03.2022, to 23.05.2022 due to a force majeure event involving disruptions in the supply of solar project equipment, including solar modules and other related equipment, both domestically and globally.

22. The Respondent No.1, Commission, in the Impugned Order, recognized the disruption in the supply chain as a force majeure event and granted a SCOD extension from 14.03.2022, to 19.04.2022, while imposing liquidated damages for the period from 20.04.2022, to 23.05.2022 for the delay in commissioning of the project wherein the Commission noted that:

“29. In the present case, although AHPPL has stated that it was affected on account of Force Majeure event of supply chain disruption in China during the period of July 2021 to December 2021, it has issued letter to MSEDCL on this account only on 26 November 2021. It is important to note that in present Petition, AHPPL had sought extension on account of two different events of Force Majeure. In first event i.e. 2nd wave of Covid-19, MSEDCL has issued proper notice of Force Majeure to MSEDCL, as has been laid down in the PPA. Whereas in second event i.e. disruption of supply chain in China, instead of issuing proper notice under article 8.1 (c) of the PPA, AHPPL has simply issued a letter dated 26 November 2021 to MSEDCL seeking extension in SCOD by six month. Further, AHPPL has not issued any notice for

cessation of event. As AHPPL has intimated MSEDCL about disruption in supply chain in China only on 26 November 2021, effect of said Force Majeure event has to be considered based on the merits and the provisions of PPA and other applicable provisions, only from that date. The vendors in China have started issuing Force Majeure notice in July 2021, but AHPPL has decided to communicate the same to MSEDCL only on 26 November 2021. Hence, effect of this Force Majeure event cannot be considered for the period prior to 26 November 2021. Further, as there is no cession notice for this event, December 2021 as stated in Petition needs to be considered as cession of event. Accordingly, relief for Force Majeure event on account of disruption of supply chain in China can be considered only for the period of 26 November 2021 to 31 December 2021 i.e. 36 days.

30. The Commission is inclined to consider the Force Majeure event due to the fact that AHPPL had informed the Forced Majeure event on 26 November 2021, they did make efforts to procure the modules/equipment required for advancing the commissioning from alternate source and the fact that there was a disruption in supply from China for the period between 26 November 2021 (the date on which AHPPL informed MSEDCL), till the cessation of the event. Thus, the Liquidity damages as per provisions of the PPA stand limited to 34 days instead of 70 days.

31. Once, the Force Majeure event has been upheld, only relief available under the PPA is that the affected party is exempted from its obligation for that period without any compensation in tariff. Hence, in terms of Article 8.2 of the PPA, AHPPL is eligible for time extension for

meeting its obligations i.e. SCoD by 36 days. Hence, SCoD of AHPPL plants is extended from 14 March 2022 to 19 April 2022.

...

34. Hence, the following Order.

ORDER

1. Case No. 7 of 2022 is partly allowed.
2. Scheduled Commercial Operation Date of 300 MW Solar Project of ACME Heergarh Powertech Pvt. Ltd. is extended to 19 April 2022.
3. For delay in commissioning beyond this date of 19 April 2022, Maharashtra State Electricity Distribution Co. Ltd. can raise claim for Liquidated Damages as per provisions of PPA in terms of para 30 above.”

23. Hence, through this appeal, the Appellant approached this Tribunal to seek a grant of extension from 20.04.2022 to 23.05.2022.

Issues:

24. The issue to be decided by this Tribunal is whether the Commission erred in extending the SCOD only till 19.04.2022 and not till the original date of commission i.e. 23.05.2022, which is further dealt with in two parts:

- a. Whether the Commission erred in considering the start date of the Force majeure event as 26.11.2021 instead of June 2021.

- b. Whether the Commission erred in considering the cessation date of Force Majeure Event as 31.12.2021 instead of the original commissioning date i.e. 23.05.2022.

Analysis

25. The question regarding the extension of SCOD due to the first and second wave of COVID-19 is already settled. The only question in front of this Tribunal is with respect to the extension of SCOD based on a force majeure event of disruption in the global supply chain.

26. There is no quarrel in accepting that '*Disruption in the supply chain*' is accepted as a valid force majeure event by the Commission, the Appellant as well as the Respondents in the light of MNRE's Memo (F. No. 283/56/2021-GRID SOLAR) dated 03.11.2021 which stated that:

"2. It has been represented to this Ministry that there are some temporary disruptions in supply of imported solar PV modules on account of various factors, for which extension in project commissioning timelines and postponement of scheduled date of imposition of BCD on import of solar cells & modules have been requested.

3. The issue was examined. It is noted that generally the procurement of solar PV modules for the solar power project takes place only in the last few months of commissioning and so only the projects scheduled for commissioning in coming 5-6 months are likely to get affected due to this temporary situation. It is also noted that to facilitate Renewable

Energy (RE) projects, this Ministry has already granted time extensions on account of 1^o and 2 waves of COVID-19.

4. In order to further address specific issues cited in Para-2 above, for projects under implementation through MNRE's Renewable Energy Implementing Agencies (REIAs) [SECI/NTPC/NHPC] and having Scheduled Commissioning Date (SCD) before April 1, 2022 after considering all time extensions including the extensions given on COVID-19, and considering the scheduled date of imposition of BCD on import of solar cells & modules as April 1, 2022, it has been decided to empower the Dispute Resolution Committee (DRC) to look into any additional time extension requirement of these projects in exceptional circumstances on account of issues cited at Para-2 above, and make a recommendation to this Ministry on merits on a case-to-case basis.”

27. Apart from the extension for COVID-19 second wave (which was duly granted), the Appellant sought extension for a period of 70 days from 15.03.2021 till the actual commissioning date; however, the Commission only granted an extension of 36 days wherein the period between 26.11.2021 to 31.12.2021 was exempted under the force majeure event of disruption of supply chain against the extension sought by the Appellant till 23.05.2022.

A. The Commission erred in considering the Start date of the Force Majeure event as 26.11.2021

Appellant's Submissions:

28. The Appellant submitted that the Commission erred in considering the start date of FM as the date on which the Appellant issued the FM notice i.e. 26.11.2021

as the FM clauses must be interpreted in a liberal manner. To support his argument, the Appellant referred to the case of **Dhanrajamal Gobindram v. Shamji Kalidas and Co., AIR 1961 SC 1285**, wherein the Hon'ble Supreme Court held that:

“17. McCardie, J. in Lebeauvin v. Crispin has given an account of what is meant by “force majeure”, with reference to its history. The expression “force majeure” is not a mere French version of the Latin expression “vis major”. It is undoubtedly a term of wider import. Difficulties have arisen in the past as to what could legitimately be included in “force majeure”. Judges have agreed that strikes, breakdown of machinery, which, though normally not included in “vis major” are included in “force majeure”. An analysis of rulings on the subject into which it is not necessary in this case to go, shows that where reference is made to “force majeure”, the intention is to save the performing party from the consequences of anything over which he has no control. This is the widest meaning that can be given to “force majeure”, and even if this be the meaning, it is obvious that the condition about “force majeure” in the agreement was not vague. The use of the word “usual” makes all the difference, and the meaning of the condition may be made certain by evidence about a force majeure clause, which was in contemplation of parties.”

(Emphasis Supplied)

29. The Appellant also relied on the case of **Hunsan Kodili Solar Power Project v. Bangalore Electricity Supply Company Limited**, 2021 SCC Online APTEL 64, while arguing that that the Force Majeure event is applicable despite the party not having met the pre-condition of serving a notice in relation thereto.

The relevant excerpt of the judgment relied upon by the Appellant is reproduced hereunder:

“83. The State Commission has approved the tariff of Rs. 8.40/- per unit for the Appellant's plant as per the State Commission order dated 10.10.2013. In view of the progressive reduction in cost of equipment and the project cost, the State Commission reduced the tariff to Rs. 4.36/- per unit with effect from 1.4.2017 in its order dated 12.4.2017. The Appellants have taken benefit of reduced project cost since the equipment orders for the plant were placed by the Appellant on 9.9.2016, as disclosed in the written submission filed by the Appellant. Therefore, no prejudice will be caused to the Appellants by the order of the State Commission

...

110. According to Respondent, in terms of PPA, requisite notice of force majeure has to be issued by the Appellant to the BESCO which is absent in the present case. They also contended that so far as different activities to be carried out by the Appellant, at every stage, it was the Appellant who had acted in a belated manner. Therefore, the Respondent Commission was justified in opining that Appellants were responsible for the delay caused in commissioning the project.

...

120. In terms of Clause 8.3(sub-clause iv) of PPA, the inability despite complying legal requirements to obtain, renew or maintain required licenses or legal approvals will also constitute as force majeure events. Therefore, we are of the opinion that the delay in receiving tariff clearances/approvals by the State Govt. and its instrumentalities which are beyond the control of the Appellants has to be treated as element

of force majeure, since the same would directly and seriously affect the implementation of the solar projects. The land conversion was on 21.05.2016, the final evacuation approval was on 13.10.2016. Therefore, in that situation, it would be extremely difficult to achieve COD on 02.01.2017 in terms of PPA.”

(Emphasis Supplied)

30. The Appellant further submitted that the Force Majeure event, i.e., disruption in supply, commenced much prior to 26.11.2021 in the months of April-May 2021, and the same was communicated to MSEDCL vide letter dated 02.07.2021.

Respondent's Submissions

31. The Respondent submitted that Article 8.1 of the PPA provided that the Appellant/affected party has to mandatorily give notice of force majeure event as a pre-condition for claiming relief under force majeure in addition to a notice to the other party regarding cessation of such event of Force Majeure, thus resultantly, the period between these two notices can be considered as period of Force Majeure for affected Party. Para 8.1 of the PPA reads as under:

“8.1. Force Majeure Events:

c) The affected Party shall give notice to other party of any event of Force Majeure as soon as reasonably practicable, but not later than 7 days after the date on which such Party knew or should reasonably have known of commencement of the event of Force Majeure.

.....

d) 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 the remedial measures proposed, and 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 situation.

*i. **The affected Party shall give notice to the other Party of (1) cessation of relevant event of Force Majeure; and (2) 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.***”

32. Additionally, the Respondents submitted that as per Article 8.1 of the PPA, the Appellant was bound to provide notice within 7 days of knowing the commencement of the force majeure event and since the Appellant issued the force majeure notice regarding disruption of supply chain only on 26.11.2021, the Commission rightly considered the same as the date for commencement of force majeure period.

33. Respondent no. 2 on the other hand submitted that the Appellant's letter dated 26.11.2021 cannot be treated as a notice under Article 8.1 of the PPA since the letter dated 26.11.2021 lacks the particulars mandated under Article 8.1 and thus does not qualify as a Force majeure notice as the letter dated 26.11.2021 does not provide any basis as to why the extension is being sought till 14.09.2022 in addition to the fact that the vendors in China had started invoking force majeure clauses in their agreements since July 2021 as against the Appellant's letter dated 26.11.2021.

34. Respondent no. 2 further submitted that the party claiming relaxation/compensation under a Force Majeure event is mandatorily required to fulfil pre-requisites as mentioned in the corresponding provisions of the respective agreement under which such relief is being sought ergo when a party fails to fulfil the pre-requisites for claiming Force Majeure i.e., failing to issue any notice of force majeure and/or notice of cessation of force majeure, it would not be entitled to claim such relief; and in order to support this argument, the Respondent no. 2 relied upon the following case laws:

35. In ***Maruti Clean Coal and Power Limited v. Power Grid Corporation of India Limited and Anr.*** (2017 SCC OnLine APTEL 70), this Tribunal held that:

*“12. Thus the Appellant was required to give notice of the event of Force Majeure as soon as practicable but not later than 7 days after the date on which the Appellant knew or should reasonably have known of the commencement of the event of Force Majeure and **such notice is a pre-condition to the Appellant's entitlement to claim relief under the PPA.** According to the Appellant the accident occurred on 28/10/2015. The Appellant informed PGCIL about the same by letter dated 28/12/2015 i.e. two months after the date of accident. Thus the notice is not as per Clause 14.4 of the TSA.*

13. Clause 9.0 of the BPTA provides for notice. It reads as under:

“9.0 The parties shall ensure due compliance with the terms of this Agreement. However, no party shall be liable for any claim for any loss or damage whatsoever arising out of failure to carry out the terms of the Agreement to the extent that such a failure is due to force majeure events such as war, rebellion, mutiny, civil

commotion, riot, strike, lock out, fire, flood, forces of nature, major accident, act of God, change of law and any other causes beyond the control of the defaulting party. But any party claiming the benefit of this clause shall satisfy the other party of the existence of such an event and give written notice of 30 days to the other party to this effect. Transmission/drawal of power shall be started as soon as practicable by the parties concerned after such eventuality has come to an end or ceased to exist.”

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

36. In **Himachal Sorang Power Limited v. CERC and Ors.** (2015 SCC OnLine APTEL 148), this Tribunal held that:

“21. Now, we are to decide whether the learned Central Commission failed to consider the impact of the force majeure event on the appellant's project and to allow reasonable time to mitigate the effects of the force majeure and restore work on site. We have quoted above the force majeure clause of the BPTA. The said clause 13 dealing with force majeure requires that the party claiming the benefit of the force majeure event shall satisfy the other party of the existence of such an event and give a written notice within a reasonable time to the other party to this effect and transmission and drawl of power shall be started as soon as practicable by the parties concerned after such eventuality has come to an end or ceased to exist.

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

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

majeure. If the appellant fails to restore or recover from the alleged force majeure for unreasonably long time, it cannot be held entitled to any benefit on that score.

...

26. We have carefully and deeply perused the aforementioned letters sent by the appellant only to find that there is no mention of the existence of the occurrence or existence of any geological surprise or force majeure event. Thus, we hold that no notice, informing occurrence or existence of any force majeure event as required by clause 13 of the BPTA entered into between the parties, had ever been given by the appellant to the respondent no. 2 Power Grid by fulfilling the requirements of the provisions mentioned in clause 13. The appellant was bound to give a notice in writing within reasonable time to respondent no. 2 informing it of the existence of force majeure event but such a notice had never been given. There is no compliance of the provisions of Clause 13 dealing with force majeure under the said BPTA entered into between the appellant and the respondent no. 2- Power Grid. We agree with the findings and reasonings recorded in the impugned order about the non-existence of force majeure event. Since there is no provision under Clause 13 of the BPTA providing for any benefit for extension of time to recover from the effect of the so called force majeure event, no benefit of the said submission of the appellant can be granted to it. The clause 13 simply provides that the transmission/drawal of power shall be started as soon as practicable by the parties concerned after such eventuality has come to an end or ceased to exist. It does not provide for any kind of relaxation or extension of time to be granted to a developer to overcome or recover from the effect of such force majeure event.

...

33. We hold that the learned Central Commission has considered the factum of force majeure event in letter and spirit by going through the communications sent by the appellant to the respondent no. 2-Power Grid and correctly found that during the period there was no force majeure event. The notice of force majeure as required by the provisions of clause 13 dealing with force majeure under BPTA cannot be said to be a correct and legal notice because in the said communication we do not find any mention of the occurrence or existence of any force majeure event and no effort was made by the appellant to satisfy the opposite party, namely, the respondent no. 2. The Central Commission has not erred in holding that the appellant did not comply with the requirements of the BPTA in effectively invoking the force majeure clause to seek amendment of the BPTA for the commencement of the open access.”

37. The Respondent submitted that it is difficult to compute the actual loss suffered by the distribution licensee and thus the PPA includes a clause for liquidated damages in order to compensate the licensee in case of default by the generator and thereby the Commission has rightly awarded the Respondent no. 2 with liquidated damages. In order to support its argument, the Respondent referred to the following case laws:

- a. In ***Bharat Sanchar Nigam Limited v. Reliance Communication Ltd.*** (2011) 1 SCC 394 this Tribunal held that:

“53. Lastly, it may be noted that liquidated damages serve the useful purpose of avoiding litigation and promoting commercial

certainty and, therefore, the court should not be astute to categorise as penalties the clauses described as liquidated damages. This principle is relevant to regulatory regimes. It is important to bear in mind that while categorising damages as "penal" or "liquidated damages", one must keep in mind the concept of pricing of these contracts and the level playing field provided to the operators because it is on costing and pricing that the loss to BSNL is measured and, therefore, all calls during the relevant period have to be seen. (See Communications Law in India by Vikram Raghavan at p. 639.) Since Clause 6.4.6 represents pre-estimate of reasonable compensation, Section 74 of the Contract Act is not violated. Thus, it is not necessary to discuss various judgments of this Court under Section 74 of the Contract Act.

- b. In **M/s Lanco Kondapalli Power Limited v. Andhra Pradesh Electricity Regulatory Commission & Ors.** Appeal 154 of 2013, the Tribunal held that:

“51. We agree with the contentions of Learned Senior Counsel for Respondent nos. 2 to 7 that in view of the difficulties in calculating the actual damages, suffered by a party due to non-supply of electricity by another party, a pre-calculated liquidated damages on pre-estimated basis are agreed between the parties in the PPAs for breach of contract. Electricity is accounted for on the basis of 15 minutes time block for each day and the demand for electricity varies during the day depending on the time of the day and also varies in different seasons. The Distribution Companies also have contracts with a number of generating stations and also buy

electricity in the short term market to meet their varying demand from different hours of the day. Sometimes, due to mis-match between the demand and availability of electricity load shedding is also resorted to. Due to non-availability of power from a contracted source due to delay in COD of the project, the distribution licensee may have to carry out load shedding or procure power from alternate sources which may be more expensive. It is very difficult to compute the actual loss due to breach of contract by a generating company to the Distribution licensee. For this reason a provision is kept in the PPA for Liquidated Damages at a pre- estimate of the loss as agreed between the parties at the time of entering into the PPA.

Our Observations and Conclusion

38. We have heard the arguments on both sides. Article 8.1(c) of the PPA provides for a pre-condition upon the Appellant to provide a notice as soon as they become aware of the force majeure conditions. The clause states as under:

“8.1. Force Majeure Events:

c) The affected Party shall give notice to other party of any event of Force Majeure as soon as reasonably practicable, but not later than 7 days after the date on which such Party knew or should reasonably have known of commencement of the event of Force Majeure.”

39. The Respondents argued that the Appellant sent a notice for force majeure on account of disruption in the supply chain on 26.11.2021 even though Acme

Solar Holdings (Parent company of the Appellant) and other vendors have started issuing the FM Notices from July 2021 onwards.

40. On the contrary, it is seen that the Appellant and Respondent No. 2 have exchanged correspondences concerning the Force Majeure event on account of disruption in the supply chain much before 26.11.2021.

41. It is important to take note of such two letters, one written by MSEDCL and the other by the Appellant.

42. MSEDCL vide letter dated 26.06.2021 has acknowledged the fact of Force Majeure event on account of disruption in the supply chain, the text of the letter is reproduced as under:

“To,

M/s. ACME Heergarh Powertech Pvt. Ltd,

Plot No.152, Sector-44,

Gurgaon-122002,

Haryana, India

Sub: Regarding extension of Financial Closure (FC) and Scheduled Commercial operation Date (SCoD) on account of COVID-19 outbreak to your 300 MW solar project selected through competitive bidding process proposed to be developed in Rajasthan State.

Ref: 1. Rfs No. MSEDCL/RE/2018/1000 MW Solar/T-037 Dated 05/12/2018

2. Power Purchase Agreement dated 21.08.2019 executed between MSEDCL and M/s AHPPL

3. Force majeure notice dated 19.04.2021 ,12.05.2021 and 25.05.2021 from M/s. AHPPL

This has reference to your Force Majeure notice under reference (3), seeking appropriate extension for achievement of Financial Closure (FC) and Scheduled Commercial Operation Date (SCoD) due to disruption of supply chain on account of second surge of COVID-19 outbreak.

In this regards, MSEDCL needs to take the status of the various project activities and the impact of the force majeure event on the project activities in details. Further, you may also clarify that because of lockdown, which are the project activities are affected.

In this regard, it is requested to submit the information in attached proforma along with supportive documents/photos immediately, so that further decision in respect of your request/notice will be taken by MSEDCL.

Thanking you and

Regards,



Chief Engineer (Renewable

43. From the above, it can be seen that MSEDCL has taken note of the notice given by the Appellant regarding the disruption of the supply chain on account of the second surge of the COVID-19 outbreak.

44. Further, the Appellant vide letter dated 02.07.2021 replied to the above letter furnishing the required information, the extract is quoted as under:

“Sub: Submission of Status of various activities of the Project and impact on the Project due to second surge of Covid -19.

Ref:

- 1. Ref No MSEDCL/RE/2018/1000 MW Solar/T-037 dated 05.12.2018*
- 2. LoA No. CE(PP)/Solar/T-37/LOA/No 07881 Dated: 19/03/2019*

3. *PPA dated 21.08.2019 executed between Maharashtra State Electricity Distribution Company Limited and ACME Heergarh Powertech Private Limited*
4. *Government of Rajasthan order no. P. 33(2)Grah-9/2019 Dated 14.04.2021 and its subsequent amendments.*
5. *M/S ACME Heergarh Powertech Private Limited Letter No. ACME/BUS/190421/3770 dated 19.04.2021*
6. *M/S ACME Heergarh Powertech Private Limited Letter No. ACME/BUS/120521/3817 dated 12.05.2021*
7. *Ministry of New and Renewable Energy O.M with ref. no. F. No. 283/18/2020-GRID SOLAR dated 12.05.2021*
8. *M/S ACME Heergarh Powertech Private Limited Letter No. ACME/BUS/120521/3817 dated 26.05.2021*
9. *MSEDCL Letter vide Ref. CE(RE)/Solar/13282 Dated 16/06/2021.*
10. *Ministry of New and Renewable Energy O.M with ref. no. F. No. 283/18/2020-GRID SOLAR dated 29.06.2021*

Respected Sir/Madam,

This is with above mentioned references, ACME Solar Holdings Pvt. Ltd was awarded with 300 MW Solar Power Project (Project) and pursuant to which a Power Purchase Agreement dated 21.08.2019 (PPA) was executed between Maharashtra State Electricity Distribution Company Limited (MSEDCL) and ACME Heergarh Powertech Private Limited (ACME) for supply of the power from the 300 MW Solar Power Project which is being developed in the State of Rajasthan.

With reference to MSEDCL Letter under ref. (9) wherein MSEDCL has requested ACME to submit the status of various project activities and impact of the force majeure event on the various project activities, we are

hereby submitting the same as Annexure to this document and in the MSEDCL proforma:

- a. Annexure A: MSEDCL proforma for Abstract of Solar Projects who has attained Financial Closure but not commissioned.
- b. Annexure B: Letters / Documentary proof regarding request received from Sub-vendors regarding delay in delivery of equipment due to ongoing COVID-19 pandemic situation.
- c. Annexure C: Revised Project Schedule.
- d. Annexure D: Photos of Transmission line, Land development and other site activities.

Further, we would like to draw your kind attention that MNRE has also acknowledged through Office Memorandum (OM) referenced as F. No. 283/18/2020-GRID SOLAR dated 29th June 2021 (as referred in Sl. 10) in which MNRE have stated that:

MNRE OM Dated 29.06.2021, Clause 5 inter alia states that:

"However, in order to facilitate the ease of doing business and as a measure of relief to RE projects so that they can deal with difficulties arising out of the restrictions imposed on account of the second COVID-19 Surge, it has been decided that the entire period of disruption i.e. r April 2021 to 15th June 2021(Both dates inclusive), can be allowed as time-extension to RE projects, being implemented through Implementing agencies designated by the MNRE or under various schemes of MNRE, following the process stated in MNRE's O.M No. 283/18/2020-Grid Solar Dated 12.05.2021"

In line with the above, Developers are eligible to get the Extension of Time in case the plant is scheduled to commission after 1st April 2021.

The situation of COVID-19 Pandemic and the imposition of lockdown from the State government are beyond the reasonable control and is not

attributable to ACME and has rather affected planning and overall Project costs adversely as the works were suspended/disrupted during the imposed lockdown situation.

In view of the above, we request your good office to kindly consider our request for extension of time for SCOD due to above mentioned issues encountered by ACME during the 2nd surge of (Covid- 19 which was beyond the control of SPD and grant of Extension of Time for further three (3) Months under the Force Majeure (in terms of PPA Article 8.1(c)).

This letter is issued without prejudice to rights or remedies available to ACME under the PPA or law.

Yours faithfully,

For and on behalf of ACME Heergarh Powertech Private Limited.”

45. It, thus, can be noticed that the Appellant has given notice to the MSEDCL regarding the occurrence of a Force Majeure Event due to the disruption of the supply chain due to the spread of COVID-19 in China.

46. It is also noted that Acme Solar Holdings, vide its letter dated 22.07.2021 issued a force majeure notice to the Appellant specifically mentioning disruption of the supply chain due to the spread of COVID-19 in China. The letter stated as under:

“Subject: Force Majeure intimation under Clause 41 of the Supply Agreement dated 27.04.2021 signed between ACME Heergarh Powertech Private Limited and ACME Cleantech Solutions Private Limited and request for extension in delivery.

Ref:

1. Supply Agreement dated 27.04.2021 signed between ACME Heergarh Powertech Private Limited and ACME Cleantech Solutions Private Limited

Dear Sir,

ACME Heergarh Powertech Pvt Ltd (ACME Heergarh), a wholly owned subsidiary of ACME Solar Holdings Private Limited (ASHPL) is implementing a Solar Power Project of 300 MW capacity (the Project) located in the State of Rajasthan. ACME Heergarh has signed an agreement for Supply of PV Modules with ACME Cleantech Solutions Pvt. Ltd. (ACSPL) for the Project.

It is submitted that our vendor has issued FM notice in the month of July 2021 on account of disruption in supply chain & spread of COVID-19 pandemic. The vendors have declared the force majeure event due to the wide spread epidemic because of Covid-19 in China, which affected the production capacities of manufacturers. Also there are ongoing issues of shortage of Raw Material of PV Modules, which disrupts the entire supply chain

In view of the above, ACSPL is hereby similarly notifying your good office of the Force Majeure (in terms of Clause 41 of the Supply Agreement dated 27.04.2021) caused by disruption in supply of PV Modules. Please note that in terms of continuing Force Majeure

situation, we are severely impacted and we will continue to keep your good office informed on the evolving circumstances.

Kindly note that no cause of action for breach or liability will arise as a consequence of this Force Majeune Event on us, for the occurrence of aforesaid events are completely beyond the reasonable control of ACSPL

This Notice is issued without prejudice to the rights of ACSPL”

47. Similarly, notices were further issued by Acme Solar Holdings on 30.08.2021 and 12.10.2021 to the Appellant mentioning that there is a disruption in the supply chain and Acme Solar’s vendors have also issued FM notices and have intimated delay in delivery due to disruption in the supply chain.

48. It is, therefore, pertinent to note here that MSEDCL’s letter dated 16.06.2021 in response to Appellant’s FM notices discussed extension of SCOD ‘*due to disruption in the supply chain on account of a second surge of Covid-19 outbreak*’.

49. Additionally, the Appellant initially asked for three months extension based on MNRE Memo dated 29.06.2021 vide Letter dated 02.07.2021. However, the Appellant was informed about the delay due to disruption in the supply chain by its parent company only on 22.07.2021, and thereafter, the Appellant followed up on the same via letter dated 13.09.2021 wherein the Appellant mentioned ‘*disrupting supplies of manpower and material*’; as quoted below:

“M/s ACME Heergarh Powertech Pvt Ltd (ACME Heergarh) vide letters dated 19.04.2021, 12.05.2021 and 26.05.2021 notified your good office

of Force Majeure situation faced on account of 2nd wave of COVID-19 under Article 8.1 of the above referred PPA dated 21.08.2019. ACME Heergarh emphasized that the restrictions imposed by States are disrupting supplies of manpower and material which are impacting the project execution activities and the same is beyond our reasonable control. Further, vide letter dated 16.06.2021, your good office sought status of various project activities and impact of force majeure event on the project activities. Accordingly, ACME Heergarh submitted following details vide letter dated 02.07.2021:...

50. Despite the aforementioned facts, the State Commission and Respondent No. 2 have considered the fact that the notice dated 26.11.2021 is the official date of notice sent by the Appellant to the Respondent for extension of SCOD based on disruption in the supply chain.

51. We decline to accept such consideration by the Respondents that 26.11.2021 is to be considered as the start date of FM event of a disruption in the supply chain.

52. Respondent No. 2 stated that this Tribunal time and again held that PPA is a sacrosanct document since it is approved by a regulatory authority created under a statute after the parties sign and submit the same for approval. (**Uttar Pradesh Power Corpn. Ltd. v. U.P. ERC, 2021 SCC OnLine APTEL 31**).

53. Respondent No. 2, further, argued that the notice dated 26.11.2021 does not qualify as proper notice and thus cannot be considered for the purpose of grant of extension under FM circumstances.

54. However, we do not agree with the same as by relying on the judgments referred to by Respondent no. 2, it is clear that the letter dated 26.11.2021 sent by the Appellant to Respondent no. 2 can be accepted as a proper notice as it clearly mentions the purpose of the letter as well as accurately mentions the FM event on the basis of which the Appellant is asking for grant of extension of SCOD.

55. As such the State Commission erred in considering the Start date of the Force Majeure event as 26.11.2021.

B. The Commission erred in considering the end date of cessation of Force Majeure event as 31.12.2021

Appellant's Submissions:

56. The Appellant submitted that the Commission erred in considering the *end date or 'date of cessation'* of the Force Majeure event as 31.12.2021 based on the fact that the Appellant mentioned in the original petition filed in the Commission that it was impacted by the said Force Majeure event from July 2021 to December 2021; however, in the same petition, the Appellant also mentioned that the Force Majeure event is '*continuing*' and sought extension of 6 months and '*any consequential delay thereof*'.

57. The Appellant further submitted that the Commission failed to take into consideration that in the original petition, the Appellant submitted that the supply from Chinese vendors is likely to occur after March/April (unless the position further aggravates in China).

58. The Appellant further submitted that in the Interlocutory Application, filed by the Appellant in MERC bearing Diary No. 40 of 2022, the Appellant categorically stated that the '*force majeure in China is still continuing and delivery of solar modules is yet to be received*' and has also annexed the details of the actual module delivery along with the application which was duly allowed by the Commission vide order dated 11.03.2022.

59. Additionally, in the letter dated 26.11.2021, the Appellant also stated that the bulk of the module supply may be arranged only after March/April 2022.

60. Further, the Appellant also informed MSEDCL regarding the continuation of the Force Majeure event i.e., disruption in the supply chain due to the spread of Covid-19 in China via letters dated 17.02.2022, 02.03.2022, and 04.03.2022 as well reflecting that the disruption in supply chain was continuing beyond 31.12.2021.

61. The Appellant submitted that the Respondent Commission failed to appreciate that the solar PV modules imported for the Project from China were actually delivered to the Appellant between 22.02.2022 and 09.03.2022 (i.e., post 31.12.2021), instead of between 25.07.2021 and 02.12.2021 (as per the original delivery schedule mentioned in the respective Purchase Orders) which clearly evidences that the impact of the Force Majeure event, i.e., disruption in supply chain, did not cease in December 2021; rather, the same persisted much beyond December 2021, which was duly intimated by the Appellant to MSEDCL vide letters dated 17.02.2022, 02.03.2022, and 04.03.2022

62. The Appellant also stated that it is covered by the MNRE OMs dated 25.01.2023 and 01.05.2023 which provided an extension up to March 2024 on the

occasion of FM event caused by disruption in supply chains to solar PV/solar PV-wind hybrid projects, for which bids were finalized before 09.03.2021.

63. The Appellant drew attention to the MERC order in Case No. 14 of 2023, dated 09.10.2023 namely '**Tata Power Green Energy Limited v. Tata Power Company – D**', wherein the Commission granted a suitable extension to the developer therein on the basis of MNRE memo dated 25.01.2023 and 01.05.2023:

“13. The Commission notes that although above quoted MNRE OM are applicable for Central Agencies implementing Renewable Energy projects, but for maintaining parity for the projects being implemented by State Discoms, this Commission has been adopting such OM for state specific projects also. MNRE vide its Office Memorandum dated 25 January 2023 and 1 May 2023 has duly acknowledged the long-lasting impact of uncontrollable event of COVID-19 and consequent supply chain disruption caused on account of the same. MNRE allowed extension up to March 2024 for completion of the solar PV/ solar PV-wind hybrid power projects wherein last date of bid submission was prior to 9 March 2021. The last date of Bid Submission for bidding process under which TPGL’s project under consideration was selected is 6 July 2020 i.e. before 9 March 2021 as stipulated on MNRE OM. Hence, TPGL’s project is eligible for extension of SCOD upto March 2024 as allowed in above mentioned MNRE OM. However, as the project has already been commissioned on 2 August 2022 which is prior to March 2024, said date of commissioning needs to be considered as extended date of SCOD by allowing delay of 26 days.”

(Emphasis Supplied)

64. The Appellant further relied upon another order of MERC in the case filed by ***Avaada Sunce Energy Private Limited in Order dated 24.08.2022 in Case No. 33 of 2022*** wherein the Commission has granted extension to the generator up to the original COD under similar circumstances as quoted below:

“18. Considering all above aspects, the Commission is of the opinion that as ASEPL has been affected on account of disruption in supply of Solar module from China, which is beyond their control. MSEDCL has objected that ASEPL should have resorted to prudent utility practices for ensuring commissioning of the project within SCOD. In this regard, the Commission is of the opinion that as ASEPL has already commissioned 200 MW capacity within extended SCOD, and commissioning of balance 150 MW capacity is delayed by only 17 to 59 days, it cannot be claimed that ASEPL has failed in undertaking prudent utility practices. Infact, due to such prudent practices power from 1st phase of 100 MW is made available almost 3 months before SCOD and 2nd phase of 50 MW is made available one month before SCOD. Hence, MSEDCL contention in this regard is not correct.

19. The Commission notes that ASEPL in present Petition has sought extension of up to 31 May 2022 during which it was affected by Force Majeure event of disruption of supply chain of solar modules and other solar equipment from China. However, as project has been commissioned during the pendency of the present Petition, ASEPL has requested to grant only 59 days extension corresponding to actual delay in commissioning of the project.

(...)

21. In the present case, although specific notice referring to Force Majeure clause has not been issued, ASEPL letter dated 7 December 2021 reproduced in para 16 above effectively served the same purpose of bringing disruption in supply to the notice of MSEDCL and informed them that no supply is expected from China till February 2022 and sought extension in SCOD till 31 May 2022. Hence, the Commission is of the opinion that disruption in supply chain needs to be considered as event of Force Majeure under the PPA.

22. As ASEPL has intimated MSEDCL about disruption in supply chain only on 7 December 2021, effect of said Force Majeure event has to be considered only from that date. Further, as there is no cessation notice for this event, end of February 2022 as stated in above said letter dated 7 December 2021 by which supply chain can be restored needs to be considered as cessation of event. Accordingly, relief for Force Majeure event on account of disruption of supply chain can be considered only for the period of 7 December 2021 to 28 February 2022 i.e. 84 days.”

(Emphasis Supplied)”

Respondent's Submissions:

65. Respondent no. 1 submitted that under Article 8 of the PPA, the Appellant failed to issue a notice for the cessation of the force majeure event and thus in the absence of such cessation notice, the Commission rightly relied upon the delivery schedule of Solar generation system components furnished by the Appellant and accordingly considered the effect of the force majeure event from 26.11.2021 till

31.12.2021 i.e. 36 days and liquidated damages as per provisions of PPA stand limited to 34 days instead of 70 days.

66. Further, the Respondent no. 1 submitted that the Appellant in the written arguments dated 27.05.2022 filed before the Respondent Commission had given a table of purchase orders as well as delivery schedule in which it had stated that the M/s ACME Cleantech (who is the vendor of the Appellant) would get the delivery by 02.12.2021 and the same fact was recorded by the Commission and since the Appellant never issued a cessation notice, the Commission rightly considered December, 2021 to be the cessation of event.

67. The Respondents further stated that as per Article 8.1 (d) of the PPA, the Appellant was supposed to specify the remedial measures proposed and give regular updates i.e., at the minimum weekly reports to MSEDCL on the progress of those remedial measures however, the Appellant neither issued any notice of cessation of Force Majeure proposing any remedial measures nor did it give regular updates i.e., at the minimum weekly reports to MSEDCL on the progress of those remedial measures.

68. The counsel for Respondent no. 2 further submitted that similarly placed generators who were also exporting the equipment from China for the projects undertaken in Jaisalmer, Rajasthan, as Appellant, were able to procure said products and Commission the project within the extended time which proves that the Appellant did not make sincere efforts towards mitigating the risk associated with the invocation of the Force Majeure clause by the vendors in China.

69. Respondent no. 2 provided the details of similar projects as follows:

- (i) M/s ReNew was selected as the successful bidder for the tender of 300 MW capacity (**@Pg. 10 of MSEDCL's Reply**). In this regard, the following event of chronology assumes significance:

S. No.	Event	Date
1.	PPA	26.06.2019
2.	Effective date	26.06.2019
3.	Financial Closure (10 months from Effective Date)	12.09.2020
4.	SCOD (24 months from the Effective Date)	25.06.2021
5.	Extension to SCOD in view of first wave of Covid 19	24.11.2021
6.	Project commissioned on	15.11.2021

- (ii) Avaada Sunce Energy Pvt. Ltd was selected as the successful bidder for the tender of 350 MW capacity (**@Pg. 10 of MSEDCL's Reply**). In this regard, the following event of chronology assumes significance:

S. No.	Event	Date
1.	PPA	26.06.2019
2.	Effective date	26.06.2019
3.	Financial Closure (10 months from Effective Date)	27.10.2020
4.	SCOD (24 months from the Effective Date)	25.06.2021
5.	Extension to SCOD pursuant to first wave of Covid 19	24.11.2021

6.	First phase 100 MW part commissioned on	01.11.2021
7.	Extension of SCOD pursuant to second wave of covid 19 (by 76 days)	08.02.2022
8.	Project commissioned on	08.04.2022

70. Respondent no. 2 argued that the letters dated 17.02.2022, 02.03.2022, and 04.03.2022, issued by the Appellant to notify MSEDCL about the ongoing Force Majeure event, did not contain the necessary information as required under Article 8 of the PPA but instead, these letters merely requested an extension of time by six months and do not demonstrate as to why extension for six months is required.

71. Respondent no. 2 further submitted that if the Appellant had been dissatisfied with the Respondent Commission's decision not to consider these letters in the Impugned Order, the Appellant should have filed a review petition rather than preferring the present appeal before this Hon'ble Tribunal considering that non-consideration of a material document has been settled to be a valid ground for review. In this regard, reliance is being placed upon the following cases where the court held that having failed to file any review, the Appellant cannot be allowed to raise the said issue in the present Appeal:

a. In ***Mohd. Akram Ansari v. Chief Election Officer*** (2008) 2 SCC 9, the Supreme Court held that:

“14. In this connection we would like to say that there is a presumption in law that a Judge deals with all the points which have been pressed before him. It often happens that in a petition or appeal several points are taken in the memorandum of the petition or

appeal, but at the time of arguments only some of these points are pressed. Naturally a Judge will deal only with the points which are pressed before him in the arguments and it will be presumed that the appellant gave up the other points, otherwise he would have dealt with them also. If a point is not mentioned in the judgment of a Court, the presumption is that that point was never pressed before the learned Judge and it was given up. However, that is a rebuttable presumption. In case the petitioner contends that he had pressed that point also (which has not been dealt with in the impugned judgment), it is open to him to file an application before the same learned Judge (or Bench) which delivered the impugned judgment, and if he satisfies the Judge (or Bench) that the other points were in fact pressed, but were not dealt with in the impugned judgment, it is open to the concerned Court to pass appropriate orders, including an order of review. However, it is not ordinarily open to the party to file an appeal and seek to argue a point which even if taken in the petition or memorandum filed before the Court below, has not been dealt with in the judgment of the Court below. The party who has this grievance must approach the same Court which passed the judgment, and urge that the other points were pressed but not dealt with.”

- b. In **Official Trustee of West Bengal v. Stephen Court Limited** (2006) 13 SCC 401, the Supreme Court held that:

“51. It was also not a case where the parties were at issue in strict sense of the term. The Official Trustee in his affidavit in opposition filed before the High Court of Calcutta might have raised several

contentions. Presumption, however, would be that those contentions which had been accepted by the High Court were put forward by it. If that be so, it does not lie in the mouth of the Official Trustee now to contend that it had raised other contentions also. If it had raised any other contention, which had not been considered by the High Court, the remedy of the Official Trustee was to move the said court itself for appropriate directions.”

Our Observation and Conclusion

72. Heard both the parties. The primary question posed to the Respondents was why the Commission chose 31.12.2021 as the date of cessation. The Respondent Commission explained the same by stating that the Appellant itself mentioned in the pleadings that it will receive the delivery by 02.12.2021 and thereby the Commission granted an extension for the whole month of December which can be picked up from the following extract of the impugned order:

“11.5 Owing to the Force Majeure Events in China, the Chinese vendors issued Force Majeure notices to M/s ACME Cleantech and intimated that delivery date of equipment will be delayed as against the Delivery Schedule as provisioned under Para 6.1 of the Purchase orders issued to such vendors and exact date for the same cannot be ascertained. Pursuant thereto, M/s. ACME Cleantech issued Force Majeure notices to under the provisions of Module Supply Agreement. A table encapsulating the schedule of delivery under the Purchase Orders executed between M/s. ACME Cleantech and Chinese vendors is stated hereinbelow:

Sr. No.	Details of Purchase Order(s)	Delivery Schedule as per Para 6.1 of the Purchase Order(s)
1	<i>Purchase Order dated 11.06.2021 executed between ACME Cleantech and ZNSHINE PV Tech Co. Ltd. for 48.6 MW capacity</i>	25 July 2021
2	<i>Purchase Order dated 14.06.2021 executed between ACME Cleantech and CECEP Solar Technologies (Zhenjiang) Co. Ltd. for 202.5 MW capacity</i>	25 July 2021
3	<i>Purchase Order dated 17.06.2021 executed between ACME Cleantech and BEYONDSUN Green Energy Technology Co. Ltd. for 43.2 MW capacity</i>	25 July 2021
4	<i>Purchase Order dated 16.08.2021 executed between ACME Cleantech and Tangshan Haitai New Energy Technology Co. Ltd. for 275.4 MW capacity</i>	17 September 2021- 17 November 2021
5	<i>Purchase Order dated 16.08.2021 executed between ACME Cleantech and Econess Energy Co. for 302.4 MW capacity</i>	17 September 2021- 02 December 2021

...

29. *In the present case, although AHPPL has stated that it was affected on account of Force Majeure event of supply chain disruption in China during the period of July 2021 to December 2021, it has issued letter to MSEDCL on this account only on 26 November 2021. It is important to note that in present Petition, AHPPL had sought extension on account of two different events of Force Majeure. In first event i.e. 2nd wave of Covid-19, MSEDCL has issued proper notice of Force Majeure to MSEDCL, as has been laid down in the PPA. Whereas in second event i.e. disruption of supply chain in China, instead of issuing proper notice under article 8.1 (c) of the PPA, AHPPL has simply issued a letter dated 26 November 2021 to MSEDCL seeking extension in SCOD by six month. Further, AHPPL has not issued any notice for cessation of event. As AHPPL has intimated MSEDCL about disruption in supply chain in China only on 26 November 2021, effect of said Force Majeure event has to be considered based on the merits and the provisions of PPA and other applicable provisions, only from that date. The vendors in China have started issuing Force Majeure notice in July 2021, but AHPPL has decided to communicate the same to MSEDCL only on 26 November 2021. Hence, effect of this Force Majeure event cannot be considered for the period prior to 26 November 2021. Further, as there is no cession notice for this event, December 2021 as stated in Petition needs to be considered as cession of event. Accordingly, relief for Force Majeure event on account of disruption of supply chain in China can be considered only for the period of 26 November 2021 to 31 December 2021 i.e. 36 days”*

73. However, the data in the table shows the original date of scheduled delivery which was provided by the vendors at the time of purchase orders, and does not

reflect the estimated date of delivery considering the delay caused by disruption in the supply chain.

74. Additionally, if we look into the submissions of the Appellant; the Appellant clearly mentioned in the letter dated 26.11.2021 that the delivery is expected to be arranged only after March/April 2022:

“We have also approached other Chinese vendors to supply the solar modules within required delivery period; however they have also regretted supplies in next 4-5 months citing partial operations, power concerns and raw material shortages. The copies of such communications are also attached as Annexure IV (Colly.).

It is expected that once the power crisis in China is eased out and shipping constraints are resolved, Chinese vendors will be able to supply the desired quantity of solar modules and other materials to Indian importers like ACME. They have further indicated that in view of Christmas and New Year holidays, Spring Festival in China and Chinese New Year in February 2022, it is estimated that the bulk of the module supply may be arranged only after March/April 2022.

In view of the above unprecedented challenges, which are beyond our reasonable control, we request your goodself to kindly grant at least six months extension till 14th September 2022 for the Project to achieve SCOD.”

75. Further, even in the original petition namely case no. 07 of 2021 before the Commission, the Appellant repeatedly mentioned the same:

“4.42 It is the case of the Petitioner that the aforementioned circumstances have disrupted the supply chain in China from where the Petitioner is sourcing its modules and other solar equipment. It is also the case of Petitioner that the circumstances in China which have caused this disruption being unforeseeable, is beyond the reasonable control of the Petitioner, occurred after the bid submission date. Therefore, the same qualifies as a Force Majeure Event under Article 8 of the PPA. Further, it is submitted that while the Petitioner has approached the Hon'ble Commission owing to inaction on behalf of MSEDCL, it is most respectfully submitted that, under the reasonable understanding of the Petitioner and also based on the communications as received from the Acme Clean Tech that the supply of modules/equipment is likely to occur after March / April 2022 (unless the situation is further aggravated in China) and hence the Petitioner currently is in the position to achieve its SCOD by 14.09.2021. In a scenario, where the current estimates suffer another setback due to problems in China or any such event beyond reasonable control of the Petitioner, it reserves its right to approach the Hon'ble Commission in such an event.”

76. Another factor to note is that both the Appellant as well as the respondent have mentioned the case of ***Avaada Sunce Energy Private Limited in Order dated 24.08.2022 in Case No. 33 of 2022*** which is similar to the present case wherein the Appellant submitted that the Commission, while granting Avaada extension till its actual COD, arbitrarily denied the same to the Appellant and on the other hand, the Respondent submitted that the Appellant was not able to complete the project in time even though similarly placed projects like Avaada were able to commission well within the extended time granted.

77. It is to be noted here that Avaada sought an extension till May 2022 however in its FM notice, it mentioned that no supply is to be expected before February 2022. The Commission took the End of February 2022 as the date of the end of the commissioning date and granted an extension accordingly. However, in the case of the Appellant, the FM notice dated 26.11.2021 clearly stated that the supply of modules/equipment is likely to occur after March / April 2022, and yet the Commission considered the date of cessation as the date of actual delivery i.e. 2 December 2021 instead of the estimate that the Appellant provided which proves the arbitrary nature of the Commission while passing the Impugned order.

78. Similarly, the same was conveyed to the Commission in the interlocutory application with diary number 40 of 2022, which was allowed by the Commission on merits. The Appellant, in the interlocutory application, attached the bills of loading which mentioned that the shipments from China were shipped only in February and thus it is wrong on the part of the Commission to decide that the FM event ended on 31.12.2021. The collective data of dispatch orders from China is as follows:

SL. NO.	SUPPLIER NAME	PORT OF ORIGIN	PORT OF DESTINATION	HOUSE BILL OF LADING NO.	MWp	NO. OF CONTAINERS	ACTUAL DEPARTURE DATE FROM ORIGIN PORT
1	SHAANXI TOPRAY SOLAR CO	QINGDAO	ICD JODHPUR	SZYC22012478			
2	RENESOLA	SHANGHAI	ICD JODHPUR	ASSH22020141	7.54	29	14.02.2022
3	TANGSHAN HAITAI NEW ENERGY TECHNOLOGY	TIANJIN	ICD JODHPUR	SZYC22012780	10.23	33	20.02.2022
4	TANGSHAN HAITAI NEW	TIANJIN	ICD JODHPUR	SZYC22012792	4.89	15	16.02.2022

	ENERGY TECHNOLOGY						
5	TANGSHAN HAITAI NEW ENERGY TECHNOLOGY	TIANJIN	ICD JODHPUR	CETGD2200674	9.77 3.16	30 12	16.02.2022
6	TANGSHAN HAITAI NEW ENERGY TECHNOLOGY	TIANJIN	ICD JODHPUR	CETGD2200353	3.16	12	05-Jan-22
7	TANGSHAN HAITAI NEW ENERGY TECHNOLOGY	TIANJIN	ICD JODHPUR	CETGD2200472	3.16	12	25-Jan-22
8	TANGSHAN HAITAI NEW ENERGY TECHNOLOGY	TIANJIN	ICD JODHPUR	CETGD2200483	3.16	12	25-Jan-22 25-Jan-22
9	TANGSHAN HAITAI NEW ENERGY TECHNOLOGY	Xiangang	ICD JODHPUR	SZYC22011527 B	3.16		28.01.2022
10	TANGSHAN HAITAI NEW ENERGY TECHNOLOGY	Xiangang	ICD JODHPUR	SZYC22011527 C	2.37	12	28.01.2022
11	TANGSHAN HAITAI NEW ENERGY TECHNOLOGY	Xiangang	ICD JODHPUR	SZYC22012768	7.35	9	16.02.2022
12	TANGSHAN HAITAI NEW ENERGY TECHNOLOGY	Xiangang	ICD JODHPUR	SZYC22012714	11.07	28	16.02.2022
13	SHAANXI TOPRAY SOLAR CO	QINGDAO	ICD JODHPUR	WLC20118899	4.44	34 17	
14	SHAANXI TOPRAY SOLAR CO	QINGDAO	ICD JODHPUR	WLC20127984	6.5	25	22-01-2022 01-02-2022

15	Econess Energy	SHANGHAI	ICD JODHPUR	SHASEC220015	3.84	12	16-02-2022
16	Econess Energy	SHANGHAI	ICD JODHPUR	SHASEC220016	2.88	9	16-02-2022
17	Econess Energy	SHANGHAI	ICD JODHPUR	SHASEC220017	3.84	12	16-02-2022
18	Econess Energy	SHANGHAI	ICD JODHPUR	SHASEC220028	3.84	12	26-02-2022
19	Econess Energy	SHANGHAI	ICD JODHPUR	SHASEC220029	3.84	12	26-02-2022
20	Econess Energy	SHANGHAI	ICD JODHPUR	SHASEC220031	3.52	11	26-02-2022
21	Econess Energy	SHANGHAI	ICD JODHPUR	TGLSDELF2200 202	3.3	10	15.02.2022
22	SHAANXI TOPRAY SOLAR CO	QINGDAO	ICD JODHPUR	SZYC22012153	8.32	32	03.02.2022
Total					113.3 4	390	

79. The table reflects that the orders were dispatched as late as 26.02.2022 and the Commission yet continued to consider the date of delivery as December 2021.

80. Furthermore, it has been submitted by the Appellant that the original date of delivery from China is between 22.02.2022 and 09.03.2022. The actual delivery dates, as submitted by the Appellant are mentioned below:

MODULE ARRIVAL DETAILS

Delivery date	Date	AC	DC as per COD
22-Feb- 2022	24 March 2022	50 MW	50.46
27-Feb- 2022	11 April 2022	50 MW	50.52
28-Feb- 2022	29 April 2022	100 MW	100.92
01-Mar- 2022	19 May 2022	50 MW	50.14
08-Mar- 2022	19 May 2022	50 MW	53.99
09-Mar- 2022	19 May 2022	Additional	27.16

81. Considering the same, the duration of the FM event for disruption in the supply chain is to be considered from 26.11.2021 to 09.03.2022 i.e. 104 days.

However, since the Appellant commissioned on 23.05.2022 with a delay of 70 days therefore the delay is condoned till the original date of commission only.

ORDER

For the foregoing reasons as stated above, we are of the considered view that the captioned Appeal No. 330 of 2022 is allowed. The impugned order of the Commission in Case No. 07 of 2022 dated 07.07.2022 is set aside.

The SCOD for the commissioning of the project is extended up to the actual date of commissioning i.e. 23.05.2022, the Appellant is entitled for all consequential benefits accordingly.

The Captioned Appeal and pending IAs, if any, are disposed of in the above terms.

PRONOUNCED IN THE OPEN COURT ON THIS 31st DAY OF JANUARY, 2025.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member

REPORTABLE / ~~NON-REPORTABLE~~
pr/mkj