THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 360 OF 2019 & IA NO. 1932 OF 2019

Dated: 14th July, 2021

Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. Ravindra Kumar Verma, Technical Member

In the matter of:-

1. SEI Aditi Power Private Limited
   Menon Eternity, 10th Floor, New #165 (Old #110)
   St. Mary's Road, Alwarpet
   Chennai 600018

2. SEI Bheem Private Limited
   Menon Eternity, 10th Floor, New #165 (Old #110)
   St. Mary's Road, Alwarpet
   Chennai 600018

3. SEI Suryashakti Private Limited
   Menon Eternity, 10th Floor, New #165 (Old #110)
   St. Mary's Road, Alwarpet
   Chennai 600018 **.... Appellants**

Versus

1. Karnataka Electricity Regulatory Commission
   Through its Secretary
   912, 6&7th Floor, Mahalakshmi Chambers,
   Mahatma Gandhi Road,
   Bengaluru, Karnataka – 560001

2. Bangalore Electricity Supply Company Limited,
   Through its Managing Director,
   K.R. Circle, Bangalore – 560001

3. Karnataka Power Transmission Corporation Limited,
Through its Managing Director
28, Race Course Road,
Bangalore – 560009 **... Respondents**

Counsel for the Appellant(s)	:	Mr. Basava Prabhu S.Patil Sr. Adv.
	:	Mr. Shri Venkatesh for Appellant-1 & 2
	:	Ms. Nishtha Kumar
	:	Mr. Somesh Srivastava
	:	Mr. Vikas Maini
	:	Mr. Suhael Buttan
	:	Mr. Krishnesh Bapat
	:	Ms. Rivanta Solanki
	:	Ms. Lasya Pamidi for Appellant-1
Counsel for the Respondent(s)	:	Mr. S. Sriranga Subbanna Mr. Balaji Srinivasan
	:	Ms. Medha M. Puranik
	:	Ms. Aishwarya Choudhary
	:	Ms. Sumana Naganand
	:	Ms. Anini Debbarman
	:	Ms. Garima Jain for Ms. Pallavi Sen Gupta R-2 & 3

JUDGMENT

(PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON)

1. This Appeal is preferred by the Appellants – M/s SEI Aditi Power Private Limited; SEI Bheem Pvt. Ltd. and SEI Suryashakti Pvt. Ltd**.** (hereinafter referred to as **"Appellants"**) challenging the legality, validity and propriety of the order dated 26.09.2019 in O.P. No. 212 of 2017 passed by Karnataka Electricity Regulatory Commission (hereinafter referred to as **"KERC/Commission"**), whereby the Respondent

Commission has held that the non-availability of the evacuation system of the Karnataka Power Transmission Corporation Limited-Respondent No.3 on or after the Scheduled Commissioning Date ("**SCOD"**) cannot be treated as a *Force Majeure* event in commissioning the Appellants' Power Project and accordingly reduced the tariff applicable from Rs. 6.86 per unit to Rs. 6.51/- for the energy supplied under the PPA from the date of commissioning of the Project.

2. The brief facts which led to filing of this Appeal are as under:

The Appellants are Solar Power Developers having generating capacity of 30 MW each. Appellant No.1 has established its Solar Project Near Pallavalli Village, Pavagada Taluk, Tumakuru District. Appellant No. 2 has established its Solar Project at Uppatahalli and Agalmadke Villages, Pavagada Taluk, Tumakuru District. Appellant No.3 has established its Solar Project at Kamballahalli Village, Pavagarda Taluk, Tumakuru District. Respondent No. 1 is the Karnataka Electricity Regulatory Commission for the State of Karnataka exercising jurisdiction and discharging functions in terms of the Electricity Act, 2003. Respondent No.2-Bangalore Electricity Supply Company Limited (**"BESCOM/Respondent No.2**") is the distribution licensee operating in the State of Karnataka and is a Government of Karnataka undertaking.

Respondent No. 3 is the Intra State Transmission Licensee in the State of Karnataka (**"KPTCL/Respondent No.3"**).

3. On 30.05.2014, the Karnataka Renewable Energy Department Ltd. ("**KREDL**"), on behalf of the Government of Karnataka invited proposals for undertaking development of 500 MW of Solar Power Energy in the State of Karnataka from private parties vide its Request for Proposal ("**RfP**"). After receiving the Proposals from certain bidders, including M/s. Sun Edison Energy Holding (Singapore) Pvt. Ltd., the KREDL on 19.11.2014 accepted five different bids of Sun Edison Energy Holding (Singapore) Pvt. Ltd., for development of five Solar PV Power Projects of 30 MW capacity each in Chellakere Taluk, Chitradurga District. Thereafter, separate Letters of Award ("**LoA**") dated 19.11.2014 were issued to M/s. Sun Edison Energy Holding (Singapore) Pvt. Ltd for five Solar PV Power Projects of 30 MW each. Subsequently, in terms of RfP, M/s Sun Edison Energy Holding (Singapore) Pvt. Ltd. promoted and incorporated five Special Purpose Vehicles ("**SPVs**"), namely SEI Aditi Power Private Limited, SEI Bheem Private Limited, SEI Suryashakti Power Private Limited, SEI Diamond Private Limited and SEI Venus Private Limited.

4. M/s. Sun Edison Energy Holding (Singapore) Pvt. Ltd vide its letter dated 10.12.2014 requested the Distribution Licensees concerned to

accept the SPVs as the developers of the different Solar Power Projects and also requested to execute the PPAs with them. Meanwhile, on 08.12.2014, the Appellants submitted Performance Bank Guarantees ("**PBGs"**) to the tune of Rs. 3 crores (Three Crore Only) each for performance of their obligations under their respective PPA's and the said PBGs were to be kept in force till the commissioning of the Project.

5. On 18.12.2014, Respondent No.2 executed PPA with the Appellants for development of Solar Power Projects in the State of Karnataka having the capacity of 30 MW each at a tariff of Rs. 6.86, Rs. 6.89 and Rs 6.97 per unit respectively. Scheduled Commissioning Date was 18.06.2016, i.e. 18 months from the effective date. The PPA was approved by the Respondent-Commission on 04.05.2015.

6. On 28.05.2015, Respondent No. 3 granted tentative evacuation approval, and clause 12 of the said approval clearly mentioned that the proposed evacuation of power will commence only after commissioning of proposed 220/66 kV Kotaguda (Pavagada) sub-station. However, it did not specify the time within which the said proposed 220/66 kV Kotaguda sub-station would be ready. Thereafter, Respondent No. 3 vide its letter dated 10.06.2015, accorded regular evacuation approval to the Appellants and Respondent No. 3 agreed to develop 220/66/11Kv KPTCL Kotaguda

Substation at Kotagudda Village, Pavakada Taluka, Tumakuru District. The distance between the common Pooling Station and the Kotagudda (Pavagqda) Sub-Station, where power was to be evacuated, was about 13 KMs. In clause 6 of this regular evacuation approval it was again clearly specified that the proposed evacuation of power will commence only after commissioning of proposed 220/66 kV Kotaguda (Pavagada) sub-station. However, in the said approval it was provided that the said approval will remain valid upto 17.06.2016 only.

7. Apparently, the Appellants were given a common evacuation approval by Respondent No. 3 from its 220/66/11kV Kottagudda Substation and the associated Kottagudda-Madhugiri transmission lines to facilitate interconnectivity of the Appellants' Project. However, the said Kottagudda Substation and the associated transmission lines were imminently delayed due to various reasons like Right of Way ("**RoW"**) issue at different locations which were allegedly beyond the reasonable control of Respondent No. 3 also. On 02.03.2016, Respondent No. 2 *vide* its letter extended the SCOD from 17.06.2016 to 17.09.2016.

8. A letter dated 19.08.2016 was sent by the Appellants to Respondent No. 3 apprising that the work of construction of all the power plants is almost ready and that the pooling station is also completed, which is ready

for inspection. It is also stated that the project could only be commissioned if 220 KV line from Kotagudda substation to Madhugiri is ready and requested Respondent No. 3 to explore the possibilities of evacuating power *via* other available lines. The Appellants were continuously following up with Respondent No. 3 for the provision of start-up Power and connectivity for evacuating power from their Power Projects through other available lines.

9. Appellants informed Respondent No.2 by its letters dated 09.09.2016, 14.09.2016 and 17.10.2016 that the construction work of the Projects was almost completed and ready to interconnect the Solar Power projects to the grid. It is also informed that Respondent No. 3 has stated they would require time till 31.12.2016 to complete their substation works and their balance transmission line works. In view thereof, the Appellants requested Respondent No.2 to extend the PPA (at the same tariff) until start up power for interconnectivity is received from Respondent No. 3. By another set of letters dated 12.12.2016 and 27.12.2016, the Appellants requested Respondent No. 3 to update the status of the pending works and also the likely date of commissioning of substation 220/66 KV line. On 17.01.2017, the Appellants issued a letter to Respondent No.2 requesting it not to encash the 4 Performance Bank Guarantees till 08.01.2017 and also requesting it to obtain the date of completion of pending works by

Respondent No. 3 to enable it to commission the Project. Respondent No. 3 vide its letter dated 19.01.2017 apprised the Appellants that the ongoing work of the Transmission Line and 2 Nos. 220 KV Terminal Bays at Madhugiri Sub station would likely to be complete by 31.03.2017.

10. Subsequently, vide letter dated 09.02.2017, the Appellants intimated Respondent No.2 that the they are ready for interconnecting the 30 MW Solar Power to the grid, but they would be in a position to commission only after completion of power evacuation works by Respondent No. 3. They further stated that the delay in achieving the SCOD is due to the delay on the part of Respondent No. 3 in completing the transmission line works and therefore the same is beyond the control of the Appellants, which would amount to an event of *Force Majeure*. Accordingly, the Appellants requested Respondent No. 2 to extend the SCOD until Respondent No. 3 facilitates evacuation of power, without any charge or penalty.

11. Respondent No. 3 granted temporary evacuation facility vide its letter dated 24.03.2017, and further granted provisional interconnection approval vide its letter dated 31.03.2017. Therefore, the Appellants were able to commission the Power Project only on 30.03.2017 and declare its Commercial Operation Date ("**COD**"). However, the temporary evacuation facility granted to the Appellants was not in a position to evacuate the

power, if generated at its full capacity of each plant of the Appellants due to which, the Appellants could generate only 15 MW of power till December 2018 in place of 30 MW.

12. Admittedly, the Appellants raised invoices against Respondent No.2 for the energy supplied from 30.03.2017 in terms of PPA. Respondent No.2 requested the Appellants to extend the PBGs and keep them in force although the same were not required to be kept in force after commissioning of the Projects. The Appellants approached Respondent No. 2 to modify the PPA, *inter-alia*, to reflect the revised SCOD as 30.03.2017. The Appellants had been generating power since the COD as per PPA subject to evacuation constraints imposed and has been supplying power to Respondent No.2.

13. Appellants vide letters dated 11.04.2017, 06.05.2017 and 07.06.2017 requested Respondent No.2 to make payments towards supply of energy for the months of March 2017, April 2017, May 2017 and June 2017 respectively. On 24.07.2017, Respondent No.2 sent a letter to the Respondent Commission requesting it to approve the extension of SCOD in respect of the Appellants' solar Power Projects up to 30.03.2017, since the delay was solely attributable to Respondent No. 3 in completing the power evacuation works. Further, vide this letter, Respondent No. 2

clearly acknowledged that there was a force majeure event and the Appellants could not be held liable for the delay.

14. When the Appellants again issued letters dated 04.08.2017 and 04.09.2017 requesting Respondent No.2 for payment towards the energy supplied for the months of July 2017 and August 2017, Respondent No.2 vide its letter dated 11.09.2017 directed the Appellants to file a Petition before the Respondent Commission for approval of SCOD as 30.03.2017. Accordingly, on 03.11.2017, the Appellants filed a Petition being O.P. No. 212 of 2017 before the State Commission seeking approval of SCOD as 30.03.2017.

15. Thereafter, it is submitted that in spite of repeated requests by the Appellants, Respondent no.2 did not choose to make any payment rather informed the Appellants that the payments will not be made until disposal of the petitions by the State Commission. The Appellants were asked to maintain the PBG's in force.

16. On 10.04.2018, Respondent No.2 filed its Statement of Objection in the Petition filed by the Appellants, wherein Respondent No.2 had clearly admitted that vide its letter dated 24.3.2017 it had recommended the Respondent Commission to extend SCOD of the Appellants' Projects to 30.03.2017 on account of delay in transmission works by the Respondent

no.3, treating the same as Force Majeure. However, Respondent No.2 also made contradictory averments to the effect that the Appellants' projects were not ready for commissioning and that the delay in the commissioning of the Projects was for reasons attributable to Appellants. According to the Appellants, it is an afterthought and is false and aimed at depriving the legitimate dues of the Appellants towards energy supplied under the PPA.

17. On 09.01.2019, Respondent No.2 taking undue advantage of the pendency of the proceedings before the Respondent Commission, issued a letter to the HDFC bank seeking invocation of the PBG's submitted by the Appellants' in terms of clause 4.4 of the PPA, without any prior notice to the Appellants. Aggrieved by the said action of Respondent No.2, the Appellants on 16.01.2019, filed a Writ Petition being W.P. (C) 2354 – 57 of 2019 before the Hon'ble Karnataka High Court seeking stay of the aforesaid action of Respondent No.2. On 17.01.2019, the Hon'ble High Court passed Interim Order directing Respondent No.2 not to take any precipitative action in terms of the letter dated 09.01.2019 issued by the Respondent No.2.

18. As there was no response from Respondent No.2 in spite of repeated requests for payment of outstanding dues, on 29.01.2019, the

Appellants filed an IA being I.A. No. 01 of 2019 before the Respondent Commission, inter *alia,* seeking payment of 50% of the outstanding amount due to them, without paying requisite court fee. Appellants filed another IA being IA No. 2 of 2019 *inter-alia,* seeking exemption from payment of court fee in filing IA No. 1 of 2019. However, when the Respondent Commission refused to entertain IA No.2 of 2019 and insisted for the payment of stipulated fees for hearing IA No. 1 of 2019, the Appellants filed a withdrawal memo seeking withdrawal of the aforesaid IAs, with a liberty to file a fresh IA, so that hearing of the main Petition can be expedited.

19. Subsequently, Respondent Nos.2 & 3 filed its Statement of Objections, wherein it is stated that the Appellants' Power Projects were not commissioned within the stipulated time. It is further submitted by Respondent No.2 that non-commissioning of the Kotagudda (Pavagada) Sub-Station cannot be treated as a *Force Majeure* event. Therefore, the Appellants herein cannot claim the benefit of the Force Majeure events and are liable to pay Liquidated Damages in terms of Article 4.3 and 5.8 of the PPA.

20. On 26.09.2019, the Respondent Commission passed the Impugned Order holding that the non-availability of the evacuation system of

Respondent No. 3, on or after the SCOD, cannot be treated as a *Force Majeure* Event, therefore, the SCOD cannot be extended up to 30.03.2017. That apart, the Respondent Commission while passing the Impugned Order reduced the Tariff applicable from Rs. 6.86/-, Rs. 6.89 and Rs. 6.97 Per Unit to Rs. 6.51/- for the energy supplied under the PPA from the date of Commissioning of the Project.

21. Aggrieved by the Impugned Order, the Appellants are filing the present Appeal seeking for the following reliefs:

(a) "That this Hon'ble Tribunal may be pleased to allow the present Appeal and set aside the Impugned Order dated 26.09.2019 in terms of the grounds raised above;

(b) Grant all the reliefs claimed in OP No. 212 before the Karnataka Electricity Regulatory Commission.

(c) Declare that the actions of Respondent No.2 in withholding the legitimate dues of the Appellants are arbitrary and illegal and therefore Respondent No.2 be directed to pay outstanding amount of Rs.142,31,29,728/- due to the Appellants as of 16.10.2019 along with interest;

(d) Direct Respondent No.2 not to deduct any amount pertaining towards their claims of LD's from the amounts due to the Appellants.

(e) Declare that the claims of Respondent No.2 against the Appellants towards alleged liquidated damages are not tenable in law and are illegal as they are not in accordance with the provisions of the PPA;

(f) Declare that the Appellants are entitled to extension of SCOD to 30.03.2017 without levy any penalty/LD;

(g) Declare that Appellants are entitled to interest on the aforesaid outstanding amount till the principal amount is paid;

And/Or

(h) For such other relief as circumstances and nature of the case may require."

Learned counsel for Respondent No.2 has filed reply, the gist of which, in brief, is as under:

22. A perusal of the prayers sought in the Appeal indicates that the prayers with regard to the issue of liquidated damages and interest are outside the scope of original proceedings.

23. While supporting the findings of the State Commission in the impugned order, with regard to the grounds raised by learned counsel for the Appellants in the instant appeal, learned counsel for the Respondents submits as under:

24. Respondents submit that the contention of the Appellants that the non-availability of evacuation line by KPTCL was a force majeure event as contemplated under the PPA and the same has not been appreciated by the State Commission, suffers from serious anomalies and it seems to be stemming from misreading of provisions of PPA and obligations of the parties stipulated in the PPA. According to learned counsel, perusal of the PPA makes it clear that it lays down the obligation of the parties to the contract. Article 4 specifically deals with Condition Precedents and it is stipulated therein that these conditions are to be satisfied within a period of 365 days from effective date i.e. date of signing of the PPA. In the instant case, many of the conditions have not been fulfilled on the stipulated date such as conversion of land, title of land, evacuation approval, approval of CEIG etc.,

25. Further, according to the Respondents, the delay in completion of work pertaining of Kottagudda sub-station should not be construed as a force majeure event, as alleged by the Appellants since the obligation was on the Appellants to obtain evacuation approval from the State Transmission Utility and that the Respondents had no role to play.

26. Appellants obtained regular evacuation approval on 10.06.2015 from KPTCL, which was conditional. Due to the delay in completion of sub-station, the Appellants choose to seek revised evacuation approval from KPTCL only on 19.08.2016 i.e, 2 months from SCOD. It was within the knowledge of the Appellants that the evacuation to designated station was not possible because of delay. It was well within the hands of the Appellants to obtain revised evacuation approval and achieve scheduled commissioning date in terms of PPA. In the circumstances, question of invoking Article 14.3.1 and terming the events to be force majeure does not arise. Not only Article 4.2(e) which remained unfulfilled but also various other conditions precedent also remained unfulfilled as on the date of SCOD.

27. Respondents further submit that another ground of challenge by the Appellants is that non-availability of evacuation system of respondent No.3 on or after SCOD be treated as a force majeure event, which according to the learned counsel is incorrect. Respondents submit that the contention that amendment to definition of force majeure and non-completion of construction of sub-station would amount to force majeure event, is contrary to law as well as on facts. The very fact that there was an alternative available and the same has been used for subsequent evacuation, would take away the non-availability of original evacuation scheme outside the purview of Article 14. Respondent No.3, at no point of time, did assure availability of the substation by a specified date. Having accepted such a conditional approval and being aware of the delays caused in completion of said sub-station work, question of the Appellants treating the same as a force majeure event as such event being out of the control of the Appellants, would not arise.

28. It is further submitted that by misreading the communication of Respondent No.2 dated 24.07.2017, the Appellants treated the contention in the letter that there was delay on the part of KPTCL, as an opinion expressed and that the contention of the

Appellants that there was recommendation to extend SCOD up to 30.03.2017 on force majeure condition is denied. Moreover, there were many other conditions which were not fulfilled as on the date of SCOD i.e., 17.06.2016. In the circumstances, the contention that the State Commission came to a wrong conclusion in holding that there was no force majeure event is wholly misconceived and untenable. Further, there was no force majeure notice by the Appellants as contemplated under Article 14 within 7 days of force majeure event, which would also disentitle the Appellants from claiming benefit of force majeure. The contention that by virtue of force majeure event the Appellants were to be absolved of condition precedent while other party to the contract would be bound by the provisions of PPA, is a contention which deserves to be rejected. The judgments relied upon by the Appellants to substantiate this contention have no application to the facts of the present case. The decision of this Tribunal dated 21.03.2018 in Appeal No.176 of 2016 on which heavy reliance has been placed by the Appellants is a subject matter of Civil Appeal 6888/2018 which is pending adjudication before the Hon'ble Supreme Court. Therefore, the said judgment has not attained finality.

29. There was no specific commitment with regard to date of completion of Kottagudda Sub-station by the Respondent No.3 at any point of time. There was no obligation on the part of Respondent No.3 to complete Kottagudda Sub-Station by a specified date either by PPA or by any other contract. There was no explanation either in the original petition or in the present proceedings as to why the Appellants did not seek evacuation through an alternate scheme before the SCOD. According to the learned counsel, in the circumstances, the contentions raised in support of this ground are entirely misconceived, untenable and deserve rejection.

30. So far as the contention of the Appellants that the PPA which was approved by the Respondent Commission does not require any further consent for the purpose of grant of extension of SCOD, which is a matter of contract between the parties is concerned, learned counsel for the Respondents submits that when the request of the Appellants for extension of SCOD was placed before the State Commission, vide its letter dated 16.08.2017 the State Commission had indicated that a petition seeking such approval has to be filed before the State Commission. The Appellants

have accepted the same and submitted itself to the jurisdiction of the State Commission by filing an Original Petition in O.P.No. 212 of 2017 by invoking Section 86(l)(b) read with Section 86(l)(e) and Section 86(l)(f) of the Electricity Act, 2003 seeking approval to amend the PPA dated 18.12.2014.

31. With regard to the ground raised by the Appellants that BESCOM is stopped by the doctrine of promissory estoppels, Respondents point out that the letter of Respondent No.2-BESCOM dated 24.07.2017 narrated all the events which had taken place till such date and also adverted to the request of the Appellants seeking extension of SCOD based on contention of occurrence of force majeure event. All the reasons assigned by the Appellants for seeking SCOD were placed before the State Commission, with a request to consider the same, therefore there was no approbation and reprobation by Respondent No.2. Placing of all facts and contentions before the Regulator for the purpose of seeking approval, cannot be construed as acceptance of the contentions of the Appellants. Acceptance of such contentions being raised by the Appellants would lead to a situation where every bargain between the licensee and a generating company has to be accepted by the Regulatory

Commission on the ground that the same has been accepted by the parties. A distribution company is bound to seek approval of the State Commission in respect of every PPA and its modifications. It is also submitted that there can be no estoppel against law.

32. Respondents submit that a contention was raised by the Appellants that Respondent No.3 was obliged to complete the transmission line within SCOD i.e. 17.06.2016 as Respondent No.3 was aware of the SCOD. However, Respondents further stated that the Appellants lost sight of the fact that the evacuation approval granted was conditional and subject to completion of sub-station. The fact that the Appellants were aware of delay being caused in completion of sub-station work and the fact that subsequently the Appellants sought alternate evacuation, would indicate that contentions being raised are baseless and untenable.

33. Respondents submit that as far as the contention of the Appellants that Respondent Nos.2 and 3 being instrumentalities of state, must act in a fair and transparent manner is concerned, Respondent No.2 has acted in a fair and transparent manner and strictly in accordance with law and in terms of provisions of the PPA. The Appellants are

trying to enrich themselves at the cost of public interest. It is settled law that larger public interest should always prevail over private interest. The contentions that the Respondent Nos.2 and 3 are sister concerns is an absurd statement. Respondent No.2 and 3 are independent companies and are Board managed companies. Both companies have specified obligations imposed upon them as per the provisions of the Electricity Act, 2003.

34. As regards the ground raised by the Appellants that the impugned order is in the teeth of the mandate of Section 86(l)(e) of the Act is concerned, Respondents submit that the State of Karnataka is a renewable rich state and the generation capacity developed by the State of Karnataka is one of the highest in India. In view of the same, the allegation that the actions of the Commission not being in consonance with the objectives of Section 86(1)(e) is wholly untenable and these statements are made with a sole intention of causing prejudice against the Respondents. Providing of higher tariff to the Appellants, contrary to the provisions of the PPA and placing a premium on the defaults of the Appellants, cannot be construed as being in furtherance of policy to encourage non-conventional energy sources. It can only lead to enrichment of the Appellants at the cost of power

consumers of Karnataka. The contentions in this regard are totally misplaced and liable to be discarded.

35. Further, the Respondents submit that the contentions raised in the present appeal which deal with correctness or otherwise of liquidated damages cannot be subject matter of the present appeal.

36. It is further submitted that the reliance placed by the Appellants on the judgment of this Tribunal dated 21.03.2018 in "***CESC vs Sai Sudhir Energy (Chitrdurga) Pvt Ltd"*** (Appeal No.176 of 2016) is wholly misconceived and untenable since the facts in the case of Sai Sudhir are totally at variance from the facts of the present case. In case of Sai Sudhir, the generator had not even commenced any activities and no land had been procured and absolutely no work of establishing the plant was initiated. That is not the situation in the present case. Further, it is settled law that a judgment is a precedent for the facts it decides and even minute differences in facts can make sea change to the decision to be made. In the circumstances, question of applying the judgment in Sai Sudhir to the facts of the present case, would not arise.

37. Appellants are indulging in forum shopping. The Appellants have instituted Writ Petition No.2354-57 of 2019 before the Hon'ble High Court of Karnataka seeking protection from invocation of bank guarantee issued in pursuance to the PPA in question. The said petition is pending adjudication before the Hon'ble High Court of Karnataka. The Respondents are contesting the said proceedings. The entity indulging in such forum shopping is not entitled to any discretionary reliefs by this Tribunal.

Learned counsel for the Appellants has filed rejoinder, the gist of which, in brief, is as under:

38. Learned counsel for the Appellants submits that all the averments made by Respondent No.2 in reply are denied in *toto*, being without any basis and untenable in law. Further, Appellants submit that the Respondent Commission while passing the Impugned Order has completely glossed over the 1st extension granted by Respondent No.2. According to the terms of PPA, initially the SCOD was to be achieved by 17.06.2016, but the same was extended by Respondent No.2 for three months i.e., till 17.09.2016 by exercising its power under Article 5.7.3 of the PPA. In view thereof, the SCOD has to be taken as 17.09.2016.

According to the Appellant, once the PPA is approved by the Respondent Commission, all other extensions or actions in terms of the Agreement are to be decided by the contracting parties and there is no need to approach the Respondent Commission again for any extension of time under Article 5 of the PPA. However, a reading of the letter dated 11.09.2017 makes it clear that Respondent No.2 based on the approval of its Board had made a request to the Respondent Commission for extension of time but the Respondent Commission vide its letter dated 16.08.2017 instructed that the Appellants must file a Petition before the Respondent Commission. Hence, the Appellants approached the Respondent Commission. The extension of SCOD granted upto 17.09.2016 had attained finality as the same has been acted upon by the parties and the Impugned Order does not set aside the extension granted by the Respondent No.2 upto 17.09.2016. In view thereof, it is stated that the SCOD stood extended upto 17.09.2016 by volition of the parties as per the PPA approved by the Respondent Commission and hence has the sanctity of law. However, Respondent No.2 has illegally recovered Liquidated Damages ("**LD's**") from the Appellants without factoring the 1st extension of 3 months granted by it. The said action of Respondent No.2 is an abuse of power and is perverse device to unjustly enrich itself. It has been contended by Respondent No. 2 that the Respondent Commission has acted in

consumer interest by reducing the tariff of the Appellants on account of delay in SCOD and reliance was placed upon the Judgment of the Hon'ble Supreme Court in "***All India Power Engineer Federation Ors. vs. Sasan Power"*** (2017) 1 SCC 487 ("**Sasan's judgment"**). In this regard it is submitted that *Sasan*'s Judgment applies to a case where the concession given is outside the purview of the PPA. In such a case the Hon'ble Supreme Court has held that such a waiver/ concession ought to pass the muster of the Commission. In the present case on hand, the Respondent Commission had already approved the PPA enabling extension in exercise of power under Section 86 (1)(b) read with Section 63 of the Act. Therefore, *Sasan* Judgment has been incorrectly applied in the Impugned Order and is wrongly being relied upon by the Respondent No.2. Further, this Tribunal in "***Azure Sunrise Private Limited vs. CESCOM & Ors"*** (Appeal No 340 of 2016 dated 28.02.2020) while interpreting an identical PPA has distinguished the *Sasan* Judgment and has held that the Sasan Judgment is inapplicable in cases when the extension is granted within the framework of the PPA such as the present case.

39. Respondent No.2 in its Reply has stated that Non-Availability of the evacuation line by Respondent No.3 cannot be treated as Force Majeure Event as the Appellants themselves have failed to fulfil the Conditions

Precedent as per Article 4. According to the Appellant, this contention is baseless and devoid of any merit for the following reasons:

i) The definition of 'Force Majeure' as provided in the PPA was amended by the Respondent Commission *vide* its Order dated 04.05.2015 **to "include"** all the events which are beyond the control of the parties. Therefore, any event or circumstance which wholly or partly prevents or unavoidably delays an affected party in the performance of its obligation, including failure/delay on the part of the Respondent No.3 in laying down the 220/66 kV transmission lines, on the stipulated date is an event of Force Majeure event as prescribed in Article 14.3.1. (e) of the PPA, for the simple reason that there has been an inordinate delay on the part of the Statutory Authority i.e. Respondent No.3 in granting evacuation clearance, which has hampered the Appellants' performance of its obligation under the PPA.

ii) Further, the Respondent No.3 *vide* its tentative evacuation approval dated 28.05.2015 and the Regular evacuation scheme dated 10.06.2015 had stated that proposed evacuation of power will commence only after commissioning of proposed 220/66 kV Kotagudda (Pavagada) Sub-Station.

Since Respondent No.3, had not given any firm date of completion of the aforesaid sub-station, the Appellants *vide* their various letters to Respondent No.2 stated that the Appellants' Projects were ready to be interconnected to the grid and requested for start-up power. But Respondent No.3 repeatedly informed the Appellants that there is delay in completing its transmission line and sub-station. This delay on the part of KPTCL despite Appellants being ready as early as in August 2016, is clearly a Force majeure event for Appellants to achieve SCOD and as per the PPAs the said delay cannot be attributable to the Appellants.

iii) Further, the Appellants requested Respondent No.2 to extend PPA (at the same tariff) until start-up power for interconnectivity was received from Respondent No.3 as the Appellant's inability to commission the 3 x 30 MW solar cluster was for the reasons beyond its control and for the reasons not attributable to it. This fact has been accepted by the Respondent No.2 in its original Statement of Objection dated 10.04.2018 at Para 8.

iv) Respondent No.3 *vide* its letter dated 19.01.2017 apprised the Appellants that based on the progress of work achieved so far,

the total turnkey agency is likely to complete the work of 220/66/11 kV Kotagudda Sub-Station and associated 220 kV line by 31.03.2017. Thereupon, the Appellants vide their letters dated 09.02.2017 apprised Respondent No.2 of status of work of Respondent No.3 substation and associated transmission line which were likely to be completed by 31.03.2017 and further requested Respondent No.2 to provide support in getting the power evacuation facility completed by Respondent No.3 and also extend the SCOD until 31.03.2017 without any charge or penalty as the delay is entirely a Force Majeure event. The alternative evacuation was sought as early as on 19.08.2016 and the same was only provided to the Appellants on 24.03.2017. Accordingly, the Appellants' projects were commissioned on 30.03.2017 and the same was certified by Respondent No.2 vide its Commissioning Certificate dated 06.04.2017.

v) By its letter dated 24.07.2017, Respondent No. 2 has admitted that the Appellants were ready as early as September, 2016 and accepted the request of the Appellants to extend SCOD without any penalty as the delay was entirely due to Force Majeure events. Therefore, Respondent No.2 recommended

the Respondent Commission to approve the extension of SCOD up to 30.03.2017 on Force Majeure conditions. In that view of the matter, the Appellants had filed the Original Petition being O.P. No. 212 of 2017 before the Respondent Commission. The Respondent No.2 filed its Statement of Objections, wherein it was clearly admitted that it had addressed a letter to Respondent Commission and requested for approval for extension of SCOD upto 30.03.2017 on force majeure conditions. Hence, the said Respondent in appellate proceedings cannot dispute the context/ existence of the said letter.

vi) Thus, in view of the above, it can be safely established and concluded that the delay in commissioning of solar power projects i.e. 17.09.2016 to 30.03.2017 was solely due to 'Force Majeure' as defined in the PPA dated 18.12.2014.

vii) In addition to the above, in terms of the approval granted by the Respondent Commission, the Force Majeure Article was amended. The relevant excerpt of the said Article is reproduced below:-

"*A Force Majeure means any event or circumstances or combination of events **including those** stated below*……"

Thus, from the above it is clear that the change so made is quite significant as the events of force majeure are not only restricted to events as specified in the list as envisaged in Article 14 of the PPA.

viii) The Appellants placed reliance upon the decision of this Tribunal in '**Chamundeshwari Electricity Supply Company Limited v. Saisudhir Energy Pvt Ltd and Others, 2018 ELR (APTEL) 469"** to support their assertion that Respondent No.3's failure to keep the transmission line ready amounts to force majeure event. In the said decision, reference is made to the recital at Para 9(b) which is identical with the recital in Clause F in the PPA in the present case, and reference is made to Article 4.2.(e) of the PPA in that case which is identical with Article 4.2.(e) in the present case also.

40. It is the contention of Respondent No.2 that placing of all the facts and contentions before the Regulator for the purpose of seeking approval,

cannot be construed as acceptance of the contention of the Appellants. According to the Appellants, the said contention is incorrect for the following reasons: -

i) It is stated that at the first instance Respondent No.2 vide its letter dated 02.03.2016 had accepted and agreed that the delay in commissioning of the Appellants' Projects is not attributable to the Appellants and extended the SCOD from 17.06.2016 to 17.09.2016. On 24.07.2017, Respondent No.2 vide its letter requested the Respondent Commission to approve the extension of SCOD in respect of the Appellants' solar Power Projects up to 30.03.2017 on account of delay which was solely for the reasons attributable to Respondent No. 3 in completing the power evacuation works. This is evident from the letter dated 11.09.2017 issued by Respondent No.2, which records that letter dated 24.07.2017 has the approval of the board of Respondent No.2 for extension of SCOD. However, at a later stage, Respondent No.2 had taken a volte face by disputing its earlier stand by stating that there is no force majeure event and consequently, the Appellants are not entitled to get the extension of SCOD up to 30.03.2017.

ii) It is trite law that when a party has admitted a particular fact, it is bound by those statements and an adjudicating body would have to take note of admissions to determine a dispute between the parties.

in view of the above, the Respondent No2. is estopped from taking a position contrary to its earlier stand taken in its letters dated 24.07.2017 and 11.09.2017.

41. It is the contention of Respondent No.2 that evacuation approval dated 10.06.2015 granted by Respondent No.3 was conditional and subject to the completion of sub-station, therefore, the contention raised by the Appellants qua the aforesaid evacuation approval dated 10.06.2015 was co-terminus with CoD is baseless and untenable**.** This contention is incorrect for the following reasons:

42. In terms of clause 9 of the conditional evacuation approval dated 10.06.2015, it was valid up to 17.06.2016 subject to the currency of LOAs in force, and Respondent No.3 knew about the same. Hence it was incumbent duty on Respondent No.3 to see that Sub-Station and the transmission lines through which the power generated would be evacuated, must be ready by then. Anticipating the situation, the

Appellants by letter dated 19.08.2016, *inter-alia,* requested Respondent No.3 for alternative evacuation. Due to failure on the part of Respondent No.3, vide letter dated 24.03.2017 Respondent No.3 unequivocally accepted that it was not in a position to complete the said infrastructure and in view thereof, it is arranging temporary evacuation scheme, which will be used up to the date of commissioning of the proposed 220/66 kV transmissions lines.

43. In view of the aforesaid, there was no occasion for the Appellants to seek clarification from Respondent No.3, qua the date within which the transmission infrastructure would be completed by it. Hence, finding of the Respondent Commission that the Appellants had not been prudent is fallacious in nature, as the Appellants always had acted strictly in terms and conditions of the PPA and the approval granted by Respondent No.3 from time to time.

44. As regards the contention that being the instrumentality of the State, Respondent No.2 has acted strictly in accordance with law and so also in terms of the provisions of the PPA and, therefore, the impugned Order is not against the mandate of Section 86 (1) (e) of the Act is concerned, learned counsel submits that the said contention is wrong for the following reasons:

45. Respondent No.2 being an Instrumentality of the State must act in free, fair and transparent manner and should not enrich itself for the inactions on the part of another instrumentality of the State i.e. Respondent No.3-KPTCL. In support of his contention, he places reliance of the judgment of the Hon'ble Supreme Court in "***Kumari Shrilekha Vidyarthi vs. State of UP & Ors" (1991) 1 SCC 212*** and submits that Respondent No.2 has completely flouted and overridden the procedure provided in the PPA as well as the provisions of the Act. That apart, the Appellant has spent thousands of crores of rupees towards setting up the Project and any significant change in regulatory framework, adversely affects the already installed Project of the Appellants, which will certainly result in significant financial hardship to the Appellants which is contrary to the overall objective of Section 86(1)(e) of the Act.

46. The State Commission gave a finding that the liquidated damages cannot be recovered in the present proceedings by Respondent No.2. No appeal is filed by Respondent No.2 against such finding. However, to support its illegal action of withholding monies payable to the Appellants, Respondent No.2 for the first time on 12.12.2019 issued a letter to the Appellants stating that it has adjusted LD's to the tune of Rs. 115.86 Crores from the invoices of the Appellants. Such an action of Respondent

No.2 is illegal and made with a malicious motive to unjustly enrich itself without following due process of law. Further, in the proceedings before the Respondent Commission, Respondent No.2 has categorically averred that the Appellants are liable to pay LDs and at no point it stated that it has already adjusted LDs against the invoices of the Appellants. Until the said finding of the Respondent Commission is set aside by this Tribunal, the Respondent No.2 cannot set off/ adjust LDs on its own, whereas no appeal aggrieved by such finding of the State Commission is filed before this Tribunal by Respondent No.2.

47. It is pointed out that LDs cannot be recovered unless there is an adjudication by a competent court or authority. Respondent No.2 cannot become the authority to determine that there is a breach and determine the extent of damages and then recover the damages. In support of his contention, the Appellants relied upon the decision of the Hon'ble Supreme Court in "***State of Karnataka Vs. Rameshwar Rice Mills" (1987) 2 SCC 160.*** In support of its contentions, the Appellants place reliance on the following judgments of the Hon'ble Supreme Court and submits that in a catena of its Judgments it was held that damages can only be awarded once losses/legal injury is established.

(a) "**Kailash Nath Associates v. DDA,**" (2015) 4 SCC 136

(b) "**Fateh Chand vs. Balkishan Das**", AIR 1963 SC 1405

48. Appellants submitted that the Respondents have no lien over monies payable to the Appellants. It is submitted that Respondent No. 2 has no right to withhold the amount payable to the Appellants towards the monthly energy invoices raised by the Appellants. The said legal position has been fortified by the Hon'ble Supreme Court in "***Board of Trustees of the Port of Bombay and Others vs. Sriyanesh Knitter" [(1999) 7 SCC 359]***. It is pointed out that even though Section 171 of the Contract Act uses the word lien over "goods", the same is equally applicable in case of monetary transactions. In this regard, reliance is placed upon the judgment of Hon'ble Madras High Court in case of "***State Bank of Mysore v. Lakshmi Construction P. Ltd.," [1997 SCC OnLine Mad 1003]*.**

In view of the above submissions, it is submitted that the reply filed by Respondent No.2 is devoid of any merit and the instant Appeal may kindly be allowed.

49. Learned counsel for the Appellants has filed written submissions. The gist of which is as under:

Learned counsel contends that the Respondent Commission while passing the impugned Order has wrongly held the 1st Extension of SCOD

from 17.06.2016 to 17.09.2016 granted by Respondent No.2 to be Non-est for the following reasons:

i) On 18.12.2014, Appellants entered into PPA with Respondent No.2-BESCOM and as per Article 3.1 of the PPA, SCOD was 18 months from the Effective date i.e. date of execution of the PPA. However, the PPA did not come into force immediately inasmuch as the statutory approval of the Respondent Commission under Section 86 (1)(b) of the Act was granted only on 04.05.2015 i.e. after a lapse of almost 5 months. Therefore, as per Article 3.1 of the PPA, the SCOD of the Appellants Project was automatically extended by 5 months i.e. to 17.11.2016 i.e. 18 months from 4.5.2015. The delay from the date of signing of the PPA till the Regulatory Commission grants its approval has been considered as Force Majeure by this Tribunal in its Judgment dated 28.02.2020 passed in Appeal No. 340 of 2016 – "*Azure Sunrise Private Limited vs. CESCO & Anr*."

ii) The Appellants *vide* their letters dated 09.02.2016 requested Respondent No.2-BESCOM to grant extension of SCOD by 3 more months i.e. from 17.06.2016 upto 17.09.2016. The said

extension was granted by BESCOM vide letter dated 02.03.2016 by exercising its power under Article 5.7.3 of PPA. Therefore, the Revised SCOD as agreed by BESCOM was 17.09.2016.

iii) However, the Respondent Commission while passing the Impugned Order has completely disregarded the said extension on the premise that BESCOM had no power/authority to issue such an extension erroneously relying on the Judgment of the Hon'ble Supreme Court in "***All India Power Engineers Federation & Ors. v. Sasan Power Limited & Ors"*** *(2017) 1 SCC 487*. According to the Appellants the said finding of the Respondent-Commission is erroneous due to the following reasons:

iv) The extension granted by BESCOM *vide* its letter dated 02.03.2016 was never questioned by BESCOM. Further, the PPA which grants power/authority to BESCOM to extend the SCOD on account of Force Majeure conditions has been duly approved by Respondent Commission *vide* its letter dated 04.05.2015**.** Therefore, there is no need for Respondent No.2-

BESCOM to approach the Respondent-Commission again for any extension of time under Article 5.7.3 of the PPA. As a matter of fact, once the PPA is approved by the Respondent-Commission, all other extensions or actions in terms of the PPA are to be taken by the parties by mutual consent. Hence, the finding of the Respondent-Commission violates the very approval granted by it under Section 86(1)(b) of the Act.

v) Relying on the Judgment of this Tribunal in Azure Sunrise Private Limited's case, learned counsel points out that in the said judgment this Tribunal has already held that an extension granted in pursuance of Article 5.7.3 cannot be struck down by the Respondent Commission on an erroneous interpretation of the judgment in All India Power Engineers Federation. Therefore, the finding of the Respondent Commission is bad in law. In fact, the PPA in question in the Azure Case is identical to that of the Appellants and, the Hon'ble Tribunal has correctly distinguished the judgment in All India Power Engineer Federation and has held as follows:-

"11.6 We have perused the relevant portion of the above judgement relied upon by the learned counsel for the

Answering Respondent and note that the said judgement is distinguishable to the facts of the case in hand due to the fact that the said case was pertaining to a deviation in carrying out the commissioning test at MCR as defined in the PPA whereas in the instant case the extension of time has been granted by CESCOM under the relevant clause of the PPA approved by the State Commission. In the case of All India Power Engineers Federation &Ors. v. Sasan Power Limited &Ors., there was a clear impact on the tariff to be borne by the beneficiaries and in turn, consumers whereas in the present case the terms of tariff were not disturbed beyond the scope of approved PPA."

In view of the above, it is submitted that the SCOD stood extended to 17.09.2016 by volition of the parties as per the PPA. Therefore, the finding in impugned Order, in this regard, is liable to be set aside.

50. Learned counsel further contends that the delay on the part of Respondent No.3-KPTCL in completing its transmission lines and sub-station is a force majeure event, and, therefore, SCOD ought to have been extended by the Respondent-Commission. In this regard, it is submitted that though the Appellants' Solar Power Projects were ready as early as in August 2016 for interconnecting to the grid, they could be commissioned only on 30.3.2017 since KPTCL's transmission lines and substation were not ready. Although the said delay in commissioning squarely falls within the definition of force majeure as defined in Article 14 of the PPA, as

directed by Respondent Commission and BESCOM, the Appellants approached the Respondent Commission seeking extension of SCOD. However, the Respondent Commission held that non-availability of the evacuation system of KPTCL cannot be treated as force majeure event, which according to the Appellants is contrary to the admitted factual position and also to the settled legal position for the following reasons:

i) In terms of Article 4.2 (e) of the PPA, the Appellants had to apply for Evacuation approval from KPTCL or BESCOM. As early as in March, 2015 the Appellants applied for Evacuation Approval. However, on 28.05.2015, Respondent No.3-KPTCL granted Temporary Evacuation Approval and subsequently on 10.06.2015 Regular Evacuation Approval was granted. Both were subjected to commissioning of 220/66 *kv Kotaguda (Pavagada)* Sub-Station. While granting Temporary Evacuation Approval dated 28.05.2015 at Clause 7 it was categorically stated that "Evacuation Approval is for a period up to 17.06.2016 subject to currency of LOAs in force", which means that the said Approval was in fact coterminous with the SCOD of the PPA.

ii) Further, Respondent No.3- KPTCL for the first time *vide* its letter dated 19.01.2017 informed the Appellants that the evacuation line would not be made available till 31.03.2017. Thereafter, on the request made by the Appellants on 19.08.2016, the alternative line was granted to the Appellants vide Respondent No.3's letter dated 24.03.2017 i.e. after lapse of 8 months. Therefore, the Appellants in spite of being ready for commissioning as early as in August, 2016 were prevented from commissioning their respective solar projects due to the delay on the part of KPTCL.

iii) The Appellants contend that KPTCL *vide* its letters dated 09.09.2016 and 19.01.2017 and BESCOM *vide* its letter dated 24.07.2017 has accepted the delay on their part in completing the transmission lines and the substation within the stipulated time. Therefore, the Appellants' projects were delayed due to Force Majeure events and for reasons beyond their control.

iv) Even though Respondent No.2-BESCOM had categorically accepted the delay as Force Majeure, the Respondent-Commission at the first instance directed the Appellants to approach the Commission for extension of SCOD. However,

when the Appellants approached the Commission, it arbitrarily rejected the ground of Force Majeure holding that the Appellants were not prudent and have not taken adequate steps to seek a clarification from Respondent No.3- KPTCL at the time when the conditional approval was granted by KPTCL, and hence the Appellants are disentitled to seek relief of Force Majeure.

vi) It is pointed out that the definition of 'Force Majeure' as provided in the PPA was amended by the Respondent Commission *vide* its Order dated 04.05.2015 **to "include"** all the events which are beyond the control of the parties. Any event or circumstance which wholly or partly prevents or unavoidably delays an affected party in the performance of its obligation. Therefore, the delay on the part of the Respondent No.3-KPTCL in laying down the 220/66 kV transmission lines on the stipulated date is a Force Majeure event as per Article 14.3.1 (e) of the PPA. However, the Respondent-Commission while passing the Impugned Order has erroneously relied upon the exception of Force majeure i.e. the event of Force Majeure could be avoided if the affected party had taken reasonable care or complied with prudent utility

practices. The Impugned Order proceeds on the premise that a prudent developer ought to have sought an assurance from KPTCL after submitting its evacuation application. Therefore, the Appellants themselves have invited Force Majeure. This finding, according to the Appellants, is erroneous since, the evacuation approval was coterminous and there was no occasion for the Appellants to approach KPTCL for a clarification as held by the Respondent Commission in the impugned Order. Further, Respondent No.3-KPTCL being a State Instrumentality, in its functioning no influence or interference can be rendered by the Appellants. If such instrumentality in its actions delays performance of its obligation envisaged under the PPA, the Appellants cannot be held responsible.

vii) Drawing our attention to the term “Prudent utility practices” defined under the PPA, the Appellants submit that the said definition is wholly in relation to development of project and does not in any manner transcend beyond the action of the developer/ i.e. the Appellants. However, in the present case it is an admitted fact that Respondent No.3-KPTCL has delayed creation of evacuation infrastructure, therefore, the Appellants

cannot be held "imprudent" for the delay caused by KPTCL. The term "Prudent utility practices" reads as under:

> *"Prudent Utility Practices" shall mean the practices, methods and standards that are generally accepted internationally from time to time by electric utilities for the purpose for ensuring the safe, efficient and economic design, construction , commissioning, operation and maintenance of power generation equipment and which practices, methods and standards shall be adjusted as necessary, to take account:*
>
> *a) Operation and maintenance guidelines recommended by the manufacturer of the plant and equipment to be incorporated in the Power Project;*
>
> *b) The requirements of Indian law; and The physical conditions at the site of the Power Project"*

The Respondent Commission by the Impugned Order has rendered the entire PPA meaningless. Hence, the reliance on the exception provision of Force Majeure Article by the Respondent Commission is erroneous and the Impugned Order is liable to be set aside on this ground alone.

viii) According to the Appellants, another ground on which the Respondent Commission has erroneously rejected the Appellants contention of Force Majeure is that the Chief Electrical Inspector's Safety Certificate was issued only on March, 2017, therefore, the Appellants' Projects cannot be

considered to be ready in August/ September, 2016. In this regard it is submitted that through various letters, the Appellants informed Respondent No.2 about the readiness of their project and Respondent No.2 at no point of time refuted the readiness of the Appellants' projects. In such circumstances, it is unbelievable as to how the Respondent Commission held that the Appellants were not ready at the relevant point in time, when there was delay on the part of Respondent No.3-KPTCL. Hence, it is submitted that there was no admission on non-readiness by the Appellants and the Impugned Order is passed on a completely false premise.

ix) Further, as far as the approval of Chief Electrical Inspector is concerned, it is submitted that the CEIG approval dated 28.03.2017 was issued under Regulation 32 and Regulation 43 of the CEA (Measures relating to Sage of Electric Supply) Regulations, 2010. Regulation 43, which is the principle provision, comes into play at the time when the power supply is about to commence and when the installation of the Supplier is made with the Licensee. Admittedly this could only happen in the case of the Appellants when the requisite line was made ready by KPTCL. Hence, the CEIG Certification in no way

demonstrates the readiness or non-readiness of any generating unit as it only comes into play when the Licensee's works are connected with the works of a generating company.

Therefore, the reliance placed by the Respondent-Commission on the CEIG approval to hold that the generating station of the Appellants was not ready within time is wholly erroneous and the same is liable to be set aside.

x) It is further submitted that the Hon'ble Supreme Court as well as this Tribunal have time and again upheld and affirmed that in case of untoward event or change of circumstances, which totally upset the very foundation upon which the parties rested their bargain, then the performance of the contract becomes impossible and the parties can be absolved from further performance of the contract. On this aspect, learned counsel relies on the following judgments:

(a) The Hon'ble Supreme Court Judgment in Satyabrata Ghose Vs. Mugneeram [AIR 1954 SC 44] - Para 9**;**

(b) The Hon'ble Supreme Court Judgment in Energy Watchdog vs. CERC [(2017) 14 SCC 80 – Para 45;

(c) This Tribunal's Judgment in Gujarat Urja Vikas Nigam Limited vs. GERC &Ors. [Judgment dated 04.02.2014 passed in Appeal No. 123 of 2012] – Para 55;

(d) This Tribunal's Judgment in Chamundeshwari Electricity Supply Company Ltd. (CESC) Vs. Saisudhir Energy (Chitradurga) Pvt. Ltd & Ors. [Judgment dated 21.03.2018 passed in Appeal No. 176 of 2015]- Para 10.

(e) This Tribunal's Judgment in NTPC limited vs CERC – ELR (APTEL) 1096 – para 41 & 45;

(f) Rising Sun Energy Private Limited and Others vs NTPC limited & others – MANU/CR / 0114/2019 – para 170

51. Relying on the decision of this Tribunal in the case of Chamundeshwari, stated above, learned counsel contends that the KPTCL's failure to keep the transmission line ready amounts to force majeure event. However, the Respondent Commission while passing the Impugned Order has not returned any finding on the said Judgment. However, the finding/ conclusion on Force majeure in the case of Chamundeshwari is wholly applicable to the present case due to the following:

(a) Article 4.2 (e) of the two PPAs in question are identical.

(b) As in the instant case also, Article 4.1 of the PPA clearly states that respective rights and obligations of the parties shall be

subject to satisfaction in full of Condition Precedent as envisaged in Article 4.2 of the PPA.

(c) Further, at Para 9(e) of the Chamundeshwari's case refers to Evacuation approval similar to Clause 9 of the Evacuation approval dated 10.06.2015 issued to the Appellants.

(d) As per Chamundeshwari's case obtaining power evacuation approval comes within the ambit of the words "subject to" in the recital Para F of the PPA and, therefore, Clause 6 and Clause 9 of the Evacuation Approval in the present case being similar to Evacuation Approval as found in Para 9(e) of the Judgment.

52. Since the ratio of the aforesaid Judgment is squarely applicable to the case on hand, the Respondent Commission ought to have held that the failure on the part of Respondent No.3-KPTCL to create evacuation infrastructure is a *force majeure* event as the same was conclusively held by this Tribunal in Chamundeshwari's case. Therefore, on this ground, the impugned order is liable to be set aside.

53. Pointing out the conduct of BESCOM, learned counsel submits that in OP No. 212 of 2017 filed before the Respondent Commission seeking extension of SCOD, Respondent No.2-BESCOM filed Statement of Objections making two critical averments. Firstly, it acknowledged that

through various letters Appellants had conveyed completion of all plant activities at site and secondly, it has also accepted that it had written a letter to the Respondent Commission on 24.07.2017 for approval of the revised SCOD on account of Force Majeure conditions. However, Respondent No.2-BESCOM in the instant Appeal has taken completely a divergent position stating that the letter dated 24.07.2017 was not an admission of Force Majeure but only a device to place all facts for consideration of the Respondent Commission. In this regard reliance is placed on the Judgment of the Hon'ble Supreme Court Judgment in ***"Divisional Manager, United Insurance Co. Ltd. &Ors. Vs. Samir Chandra Chaudhary,"*** (2005) 5 SCC 784 – Para 11.

54. Further, according to the Appellants, on 09.09.2016, the Appellants pointed out that the works were all completed and request for startup power was already made to KPTCL. It was clearly stated that interconnection was not given and that is clearly for "*reasons beyond our control and not attributable to us*". The said intimation was not denied or responded to by BESCOM. Therefore, the said letter validly constitutes as a Force Majeure Notice.

55. Further, in the letter issued by Respondent No.2-BESCOM requesting for approval of the Respondent Commission to alter the SCOD

on force majeure conditions, it is clearly pointed out that owing to load constraints, the Appellants were only able to evacuate 13 MW of power as instructed by KPTCL. This has caused serious monetary losses to the Appellants. This also makes the position clear that BESCOM agreed that there is a force majeure condition that prevailed.

56. Apart from the above, it is also well settled principle of law that a party who has taken a position cannot approbate and reprobate at the same time. In this regard, the following judgments are relied:

(a) Amar Singh vs Union of India (2011) 7 SCC 69– Para 50;
(b) Joint Action Committee of Air Line Pilots' Assn. of India v. DGCA (2011) 5 SCC 435- Para 12;
(c) Suzuki ParasrampuriaSuitings (P) Ltd. V. Official Liquidator, (2018) 10 SCC 707- Para 12 to 14;
(d) PR Deshpande Vs MarutiBalaramHaibatti (1998) 6 SCC 507- Para 8 and 9;
(e) Mumbai International Airport Pvt. Ltd. Vs Golden Chariot Airport &Ors (2010) 10 SCC 422- Para 55-65.

57. Therefore, in view of the above, Respondent No.2-BESCOM is estopped from taking a position contrary to its earlier stand. BESCOM cannot on one hand take a clear stand that there is a Force Majeure event and on the other hand take a completely contradictory position that there is

no Force Majeure event, on the same set of facts. The principles of estoppel clearly bar such an action.

58. It is submitted that the Impugned Order at para 23 holds that LD's cannot be recovered in the present proceedings by BESCOM. In this regard, it is submitted that since the Respondents did not make payment of invoices of the Appellants from the date of CoD despite repeated requests, on 29.01.2019, the Appellants filed IA No.1 of 2019 in the Petition pending before the Respondent Commission for payment of Tariff as per the PPA. In the said IA there was no whisper of payment of LDs as at that point of time BESCOM had also not urged that it is either going or is presently setting off LDs. Ultimately, the said IA was withdrawn. However, in the Statement of Objection and additional statement of objection, KPTCL and BESCOM raised the issue that the Appellants are liable to pay LDs for delay in achieving SCOD, but at no point, the said Respondent has ever stated that it has adjusted/ set off LDs against the invoices of the Appellants.

59. However, in the proceedings before this Tribunal, for the first time, BESCOM has tried to paint a completely new picture by contending in the Statement of Objection to the I.A. No. 1932/2019 seeking directions qua the energy bills due and payable to the Appellants, that it has set off LDs

against the invoices of the Appellants since March, 2017 and that the Appellants had assailed the set off of LDs before the Respondent Commission in IA No. 01 of 2019 and have later withdrawn the said IA. Hence, the Appellants cannot seek a positive direction from this Tribunal now. In this regard, it is submitted that in the proceedings before the Respondent Commission, the BESCOM has categorically averred that the Appellants are liable to pay LDs but at no point it stated that it has already adjusted LDs against the invoices of the Appellants.

60. It is further submitted that unilateral adjustment/set off by BESCOM is in contravention to the procedure stipulated in Article 13.3.2 of the PPA. The said Article states that in case the amounts claimed by BESCOM, if any, from the Appellants through an invoice and which is not disputed by the Appellants within 15 days of the receipt of the said invoice, then such deduction or set-off to the extent of the amounts not disputed can be carried out by BESCOM only after the expiry of the said period of 15 days.

61. Reiterating the contention stated in the rejoinder that the Respondents have no lien over monies payable to it, the Appellants submit as under:

With regard to the contention of the Respondents that the reliefs sought by the Appellants before this Tribunal are beyond the scope of the reliefs sought before the Respondent Commission, it is submitted that at the time when the Appellants filed their Petition before Respondent Commission the parties were at consensus that there is force majeure event. However, during the proceedings, BESCOM stopped making payments to the Appellants and did not whisper about the set off of LDs. Therefore, at the time when the Appeal was filed the Appellants sought a specific prayer from this Tribunal that the payments withheld by BESCOM ought to be paid to the Appellants. However, after the instant appeal has been filed, Respondent no.2-BESCOM took a plea that it has been adjusting LDs from the invoices of the Appellants. Since the illegal recovery of LDs/ non-payment of legitimate dues of the Appellants is a consequence of the principle relief of Force Majeure, the said issue ought to be considered by this Tribunal in the instant appeal. On this aspect, learned counsel points out that this Tribunal in its Judgment dated 31.05.2019 passed in Appeal No. 241 of 2016 titled as *Adani Power Maharashtra Limited vs. MERC* has categorically held that the Tribunal has the power to grant a relief which is not earlier prayed for, in the interest of justice.

The Impugned Order is in teeth of the mandate of Section 86 (1) (e) of the Act:

62. Respondent Commission has reduced the tariff to Rs. 6.51 per unit (generic tariff applicable on the said date) on the pretext that there was a delay in achieving the SCOD on the part of the Appellants and the same is contrary to the express mandate of the Constitution of India, the Act, Policy, Judgments of the Hon'ble Supreme Court and of this Tribunal for the following reasons:-

(i) In consequence with the mandate of the Constitution, the Electricity Act 2003, National Electricity Policy and the Tariff Policy mandate the Respondent Commission for providing concessions and other promotional measures for promoting generation of electricity from non-conventional sources of energy. Solar power generation is an important avenue for promotion of non-conventional sources of energy.

(ii) Section 61 of the Act provides that the State Commission must specify the terms and conditions for determination of tariff and in doing so it should be guided by promotion of co-generation and

generation of electricity from renewable sources of energy. Section 86(1) (e) of the Act specifically mandates and provides that the State Commission must promote co-generation and generation of electricity from renewable sources of energy by providing suitable measures for connectivity to the grid and sale of electricity to any person, and specify for purchase of electricity for such sources, a percentage of total consumption of electricity in the area of Distribution Licensee.

(iii) In view of the above, it is clear that in terms of the mandate of Section 86 (1) (e) of the Act it is the statutory as well as incumbent duty of the State Commission to promote generation of electricity from renewable source of energy. For this purpose, the State Commission has to provide incentives, concessions and grid connectivity to RE Generators. The Hon'ble Supreme Court in catena of judgments has held that quasi-judicial body like the State Commissions, which is the creature of statute, is bound by its provisions. Its duties and functions are defined and circumscribed by the Act and the Commission should necessarily act within the parameters prescribed by the Act creating it. On this preposition of law, following are the relevant judgments:

(a) Manish Goel v. Rohini Goel: (2010)4 SCC 393 (Para 14)

(b) N.C. Dhoundial v. UOI &Ors.: (2004)2 SCC 579 (Para 14)

(c) State of Punjab &Ors. v. RenukaSingla&Ors.: (1994)1 SCC 175 (Para 8)

(iv) Therefore, the Impugned Order, which seeks to undermine the mandate of the Act is ultra vires the scheme of the Act read with Electricity Rules and the Policies cited above, and if it is permitted to stand, it would render the scheme of the applicable law governing renewable generation otiose.

63. For the foregoing reasons, it is humbly prayed that the relief as sought by the Appellants may be kindly allowed by setting aside the impugned Order passed by the Respondent Commission.

64. Learned counsel appearing for Respondent Nos.2 & 3 has filed written submissions, the gist of which is as under:

As regards the contention of the Appellants that BESCOM had accepted that non-existence of the sub-station i.e. Kottagudda sub- station as a force majeure event, it is submitted that the Appellants have relied upon a letter issued by BESCOM to Respondent Commission seeking approval to grant extension but the entire letter has not been read out. Only parts of this letter have been read. A complete reading of the letter makes the position clear that all aspects, which have been brought to the

notice of BESCOM have been placed before the State Commission. These are not the statements made by BESCOM. In the letter dated 09.02.2017, there is reference to three projects seeking extension and there are various reasons adverted to as the reasons to construe the delay as a force majeure event. It is also clarified that Appellant No.1 had issued letter dated 27.3.2017 requesting for NOC for commissioning of the project and that BESCOM granted NOC on 28.3.2017 without altering any of the terms of the PPA. Further, there is reference to the communication of the Respondent Commission dated 05.4.2017 indicating that for the purpose of seeking extension, the project proponent had to approach the Commission. After narrating the entire background, the issue is placed before the KERC for approval of SCOD up to 30.3.2017 based on force majeure condition.

65. With regard to the contention of the Appellants that delay in commissioning of the 220/66kv proposed sub-station at Kottagudda constitutes force majeure event is concerned, it is submitted that in the absence of the sub-station, even if the project was ready and all other conditions precedent were fulfilled, it would have been no avail and therefore the fact that the projects were not complete and available on the date of SCOD would be of no consequence. This argument is wholly fallacious and deserves rejection.

66. Further, it is submitted that it is an admitted fact that the project was originally envisaged to be set up at Challakere Taluk, Chitradurga District, but at the request of the Appellants, to suit its own convenience, the location of the project has been shifted to Pavagada, which is the present location of the project. It is the Appellants, who chose the location for the project and also chose the proposed 220 Station and Terminal Bay situated at Madhugiri to be the location from which the Appellants were to evacuate the power generated. Therefore, in view of the fact that the Appellants themselves sought approval of a specific sub-station for evacuation scheme, the Appellants cannot find fault with the action of KPTCL in granting conditional approval.

67. It is submitted that Respondent No.3-KPTCL is neither a party to the PPA nor is there any other contractual obligation on it to provide evacuation in a particular manner. The obligations under Article 5.3 and 5.4 regarding connectivity with the Grid, are solely with the Appellants. However, an alternate approval as sought by the Appellants on 19.8.2016 has been granted.

68. Apart from the above, it is submitted that Article 14, which deals with force majeure, also contemplates the manner in which force majeure is to be invoked. Article 14 contemplates a process of notice of occurrence

of a force majeure event as well as notification of seizing of such event and the exclusion of the time in between. In the present case, no such notice was issued by the Appellants. It is settled law that when there is no notice as contemplated under the contract to invoke force majeure, the question of invoking the same other than in a manner contemplated in the contract, would not arise. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in "***Himachal Sorang Power Ltd vs CERC & Ors"*** reported in SCC Online APTEL 148.

69. A perusal of Article 14.3.1 of the PPA makes it clear that a situation should have arisen in spite of the party taking reasonable care or complied with prudent utility practices. In the present case, it is calculated when Respondent No.3-KPTCL had repeatedly indicated that there will be delay in commissioning of the sub-station, the Appellants should have taken reasonable care to look for alternative ways of evacuation as it ultimately did on 16.3.2017.

70. As far as the contention of the Appellants that in terms of Article 5.7, extension of time ought to have been granted is concerned, it is submitted that if the said clause is invoked, Article 5.7.3 would also get attracted. However, for these Articles to get attracted, Article 14.5 has to be fulfilled. It is not the case of the Appellants that there is compliance of Article 14.5.

The specific case made out by the Appellants is non-availability of the transmission line resulted in force majeure event. However, in view of the fact that an alternate was available, and with reasonable care such alternate could have been availed by the Appellants, Article 14.4 would get attracted.

71. It is submitted that the Appellants have repeatedly contended during their submissions that there was violation on the part of Respondent No.3-KPTCL, which led to force majeure event. In this regard, it is contended that since KPTCL is not a party to the contract, no contractual obligation cast upon KPTCL. On the contrary, it was the Appellant who specifically sought permission to evacuate power through the proposed station. At no point of time, KPTCL had given any assurance to the Appellants that it would complete its sub-station by a particular date.

72. Learned counsel for Respondents submits that having regard to the pleadings and submissions made by the parties, the State Commission has framed the issues. Therefore, the allegations with regard to incorrectly framing issues for consideration are wholly untenable.

73. Learned counsel further contends that only after the expiry of scheduled commissioning date, the correspondence indicates that the project was ready to be connected to the Grid. The change in the

expressions used by the Appellants themselves would show that the project was not ready at the relevant point of time. In fact, there is no record which indicates that the project was anywhere close to being considered as ready, prior to the SCOD i.e. 17.6.2016. Therefore, the contention that the project was ready needs to be discarded.

74. In view of the admitted fact that SCOD could not be achieved, as per the provisions of Article 5.8, liquidated damages were levied and deducted. Aggrieved by the same, the Appellants filed an application seeking to challenge the levy of liquidated damages. The application is at Annexure A-25. In view of the fact that fee had to be paid to maintain such a prayer, the Appellants withdrew the said application. The liberty sought to make the challenge afresh was removed before filing of the Memo. With the same, the challenge to the question of levying liquidated damages has come to an end. However, in view of the rival submissions in the pleadings, the State Commission had formulated a question as to whether the issue of liquidated damages can be considered in the present proceedings at all. Having withdrawn the application unconditionally, the Appellants are precluded from seeking any relief with regard to liquidated damages. In the circumstances, the question of acceding to the oral request of the Appellants' counsel to pass orders to reverse the liquidated damages is wholly untenable and liable to be rejected.

75. The Appellants have contended that the issue with regard to non-availability of transmission line being a force majeure event has been dealt with in detail by this Hon'ble Tribunal in the matter of "**CESC vs. Sai Sudhir Energy Ltd"** in Appeal 176/2015. On this aspect, it is submitted that no reliance can be placed on the said decision. The facts in case of Sai Sudhir's case cannot be compared to the facts in the present case. It is settled law that existence of even one additional factor or the absence thereof, may change the outcome of a proceedings completely. Reliance in this regard is placed on the judgement of the Hon'ble Supreme Court in the matter of "***Padma Sundar Rao vs State of Tamil Nadu"*** **(2002 (3) SCC 533 at para 9)**. The of existence of an alternate for evacuation of power and availing the same by the generator and the fact that such an alternate was always existed, are factors, which exist in the present case and did not exist in the judgement sought to be relied upon. Therefore, the decision of **Sai Sudhir** cannot be applied as a precedent and the same is distinguishable on facts.

76. The Appellants while dealing with the decision rendered in the case of All India Power Engineer Federation vs Sasan Power Limited & Ors reported in (2017) 1 SCC 487, submitted that the State Commission could not have gone into the question of correctness or otherwise of extension of

time granted by BESCOM, as the grant or otherwise of extension has no repercussion on the public at large and the issue involved in that case was one of waiver, which is absent herein. It is submitted that the ratio laid down in the said judgement is clear and categorical. Where the issue relating grant of extension has repercussions on the tariff payable by the consumer at large, the Hon'ble Apex Court has held that in such cases, it is the State Commission alone which can go into the correctness or otherwise of such extension.

77. Admittedly, in the instant case, there has been delay in commissioning and such delay has financial repercussions as can be seen from Article 12 of the PPA. As per the provisions of PPA, reduced tariff is a PPA tariff. If the delay is waived it leads to increase in tariff, compared to PPA tariff. Viewed from this angle, the judgement in Sasan Power applies with full force and the State Commission is justified in examining the validity of the claim made by the Appellants seeking extension.

78. Contending that the Appellants have made a passing reference to the judgement rendered in the matter of Energy Watchdog v. CERC 2017 (14) SCC 80, but no specific finding in the said judgement was pointed out, it is submitted that the said judgement furthers the case of the Respondents inasmuch as the Hon'ble Supreme Court has construed that

the existence of an alternate would be a factor to consider a situation being a force majeure event or otherwise. Therefore, in the present case, the Appellants have not explored alternative modes of evacuation in timely manner and on their own delayed the commissioning of the plant. Therefore, contention of the Appellants that they are affected by a force majeure event is untenable.

79. The Appellants have also placed reliance on the decision rendered in the matter of Azure Sunrize Pvt Ltd vs CESC & Ors. (Appeal No 340/2016 dated 28.02.2020), to contend that the Effective date is to be construed as the date on which the PPA is approved by the State Commission. In this regard it is submitted that a holistic reading of the decision rendered by this Tribunal nowhere comes to the conclusion that the Effective date is to be construed as the date of approval of the PPA by the State Commission.

80. Learned counsel for Respondent Nos.2 & 3 has filed additional written submissions on 14.10.2020 alleging that since certain new contentions which had not been urged/argued during the oral hearing are found in the written submissions filed by the Appellant, it has filed an application for expunging of the additional statements, which had been newly raised in the written submissions of the Appellant. Learned counsel

is restricting his arguments to the new documents, contentions and judgments being relied upon by the Appellants.

81. As regards the letter dated 9.9.2016, which has been produced as Annexure by the Appellant, learned counsel submits that the said letter is a communication from KPTCL to the Appellant, which indicated that the work was likely to be completed by 31.12.2016. As has been pointed out earlier, the location of the project was changed according to the convenience of the Appellant and the point for evacuation was also chosen by the Appellant. Therefore, from the very beginning, the Appellant knows the fact that the sub-station was not complete, and it was a proposed sub-station. Further, KPTCL has also made it clear that evacuation is possible only when the sub-station is ready. There is no explanation whatsoever as to why the Appellant in spite of being aware of non-availability of the sub-station, chose to seek alternate evacuation only after undue delay. It is a fact that when alternate evacuation approval was sought, such approval was provided. Though the evacuation has taken place through alternate arrangement, the commissioning of the sub-station at Kottagudda took place only on 30.11.2018. It is further submitted that obtaining of approval of CEIG is an event which has to precede the commissioning of the plant. The CEIG Regulations as well as the provision of the PPA require the safety approvals to be in place before the

commissioning. The entire case of the Appellants in this regard is belied by the dates mentioned in the Report itself. The date of completion of work as reported by the Appellant itself is 1.10.2016. Pursuant to the same, defects in the work have been pointed out on 26.12.2016 and verification of compliance by CEIG has been done on 28.03.2017, though the scheduled commissioning date was 17.6.2016. Therefore, it is evident that the work of the project was not even complete in June of 2016 though the Appellant alleges that the work of the project was completed in October 2016.

82. Learned counsel points out that although during the oral hearing, 3 judgments were not cited, they have been referred to and produced in the written synopsis. At any rate, these judgments do not apply to the facts of the present case. These judgments are dealt with hereunder:

a) *SatyabrataGhose v. MugneeramBangur& Co. [AIR 1954 SC 44]*

83. In this case, the Hon'ble Supreme Court has dealt with frustration of contract as per Section 56 of Contract Act and held that doctrine of frustration of contract cannot be invoked when parties are aware of intervening circumstance that affects the performance of contract. In the present case, the Appellant was aware of the fact that only after the Kottagudda sub-station was ready, it would be permitted to evacuate

power. Therefore, onus was on the Appellant to approach the KPTCL in a timely manner to seek alternative options to evacuate power. In these circumstances, the Appellant cannot invoke doctrine of frustration.

b) NTPC v. Central Electricity Regulatory Commission

It is submitted that the above mentioned case is not applicable to the facts and circumstance of the present case as it pertains to tariff determination exercise conducted by CERC.

c) Rising Sun Energy v. NTPC Ltd, MANU/CR/0114/2019

In the aforementioned case, the Central Electricity Regulatory Commission has granted extension of time on account of delay in allotment of land and non-availability of transmission system. It is submitted that above mentioned case is not applicable to the present case as the Appellant herein was not ready to commission the plant within the Scheduled Commissioning Date dehors the availability of evacuation of facility.

84. So far as the new allegations made with regard to the conduct of BESCOM is concerned, it is submitted that the answering Respondent has

acted in terms of the PPA, and as directed by the State Commission, the ESCOM is bound to do so as per the statutory framework. Even if it is admitted for the sake of argument that BESCOM had agreed to the existence of a force majeure situation, but the Appellant himself has approached the State Commission seeking adjudication of the very same issue. The Appellant having suffered an order is contending that the answering Respondent had admitted the position and therefore the State Commission should not have decided otherwise. This contention has no substance and the Appellant cannot raise such contention in the present proceedings having regard to the fact that the adjudication has taken place based on the direction of the State Commission and on the basis of proceedings initiated by the Appellant. The following judgments referred to by the Appellant seem to be squarely based on the wrong premise that there is an admission of force majeure by BESCOM in earlier communications. However, the same is untenable.

a) Amar Singh vs Union of India (2011)7 SCC 59
b) Joint Action Committee of Airline Pilots Assn of India vs DGCA (2011) 5 SCC 435
c) Suzuki ParasrampuriaSuitings Pvt Ltd vs Official Liquidator (2018) 10 SCC 707
d) P.R.Deshpande vs MaruthiBalaramHaibatti (1998) 6 SCC 507

e) Mumbai International Airport Pvt Ltd vs Golden Chariot Airport and Ors (2010) 10 SCC 422

85. Referring to the new argument on unjust enrichment, which is raised by the Appellant in the written submissions, it is submitted that the said issue has been raised in the context of levy and deduction of liquidated damages. Since the said issue was raised and withdrawn by the Appellant before the State Commission, the State Commission has not gone into the issue of liquidated damages and therefore the question of deciding what has already been given up by the Appellant in the original proceedings would not arise.

86. Learned counsel contends that the contention raised by the Appellant with regard to cross objections is not permissible before this Tribunal. In this regard, the Appellant has placed reliance on the judgement in Appeal no 100/2013. However, it is settled law that when a party is not aggrieved by the final order, the question of challenging a finding does not arise, and such contentions can be raised in an appeal where successful party is arrayed as a Respondent.

87. As regards the contention that the impugned order is in the teeth of Section 86(1)(e) of the Act, learned counsel submits that the State Commission has adopted a policy of encouraging non-conventional energy sources through various policies and also by imposing RPO obligations.

The State of Karnataka is a renewable rich state, which is a direct consequence of policies formulated in furtherance of Section 86(l)(e) of the Act. The generation capacity developed in the State of Karnataka is one of the highest in India. In view of the same, the allegation that the actions of the Commission not being in consonance with the objectives of Section 86(1)(e) is wholly untenable and these statements are made with sole intention of causing prejudice against the Respondents. Providing of higher tariff to the Appellant contrary to the provisions of the PPA and placing a premium on the defaults of the Appellants, cannot be construed as being in furtherance of policy to encourage non-conventional energy sources. It can only lead to enrichment of the Appellants at the cost of power consumers of Karnataka. Therefore, the contentions in this regard are totally misplaced and liable to be discarded.

88. Viewed from any angle, the new contentions raised in the written submissions do not further the case of the Appellant and they are liable to be rejected.

89. Learned counsel for the Appellants has filed short note of submissions. It is submitted that the Written Submissions filed by the Appellants were strictly in terms of the arguments addressed by the counsel for the Appellants from time to time and the memorandum of the Appeal. For the kind convenience of this Hon'ble Tribunal, the table depicting the similarity between the averments made by the Respondent

No. 2 and 3 in the instant Application vis-à-vis the contentions raised in the memorandum of the Appeal and the Written Submissions filed by the Appellants are mentioned hereunder:

S.NO.	AVERMENTS MADE BY RESPONDENTS	RESPONSE TO THE AVERMENTS
1.	WS (1) i.e. letter dated 09.09.2016 has been introduced for the first time.	Letter dated 09.09.2016 issued by the Respondent No.3 i.e. KPTCL was the part of the records before the Respondent Commission, however, the same was inadvertently missed while filing the present Appeal.
2.	Contention at e(ii) qua CEIG approval has been raised for the first time through the written synopsis.	The contention qua CEIG approval had already been raised in the Rejoinder dated 18.03.2020 filed by the Appellants.
3.	In Para 10.4 of the WS @ Pg. 13 and Pg. 14, three of the Judgments cited, were not cited during the hearing.	(i) Satyabrata Ghose Vs. Mugneeram [AIR 1954 SC 44] has been cited. (ii) Energy Watchdog vs. CERC [(2017) 14 SCC 80 has been cited. (iii) Gujarat Urja Vikas Nigam Limited vs. GERC & Ors. (iv) Chamundeshwari Electricity Supply Company Ltd. (CESC) Vs. Saisudhir Energy (Chitradurga) Pvt. Ltd &Ors. has been cited. (v) NTPC limited vs CERC – ELR (APTEL) 1096 has been cited.

		(vi) Rising Sun Energy Private Limited and Others vs NTPC limited & others – MANU/CR / 0114/2019 has been cited.
4.	New allegations have been raised in Para 11.3, 11.4, 12.3 (d), 12.4, 12.10, 12.13 (f), 13.1 and 13.3 of the WS.	(i) In so far as **Para 11.3 and 11.4** of the WS is concerned qua Respondents approbating and reprobating, the same has already been raised in the Appeal. (ii) In so far as **12.3 (d)** is concerned, the same has already been raised. (iii) In so far as 12.4 is concerned, the same has already been raised. (iv) In so far as Para 12.10 is concerned the same has already been raised. (v) In so far as Para 13.1 and 13.3 are concerned, the same has been raised in the Appeal itself.

90. Learned counsel for the Appellant has filed additional written submissions on 15.02.2021 stating that the State Commission did not have jurisdiction to review the extension of time already granted by the

Respondents-BESCOM/HESCOM. On this aspect, learned counsel submits that in terms of the Act, the State Commission is required to discharge the following functions.

(a) A Regulatory role under section 61, 62, 63 and 64 of the Act

(b) An adjudicatory role when a dispute arises between licensees and Generating companies in terms of Section 86 (1) (f) of the Act

(c) An advisory role under Section 86 (2) of the Act

91. However, once a PPA is signed and has been granted approval by the appropriate commission, then from a regulator perspective it has been signed, sealed and accordingly the parties have to adhere to it. It is only when a dispute arises between the parties to the PPA/contract, then under Section 86 (1) (f) of the Act, the appropriate commission has jurisdiction to take cognisance of the same. But when there is no dispute and parties are acting in compliance of the terms of the PPA, the appropriate commission cannot proceed to take cognizance of the PPA. Moreover, once the PPA is approved by the appropriate Commission, all other extensions or actions in terms of the PPA are to be taken by the Parties by mutual consent.

92. In the instant case, on 18.12.2014, Appellants entered into PPA with BESCOM and HESOCM. However, the Statutory approval of the State

Commission was granted on 04.05.2015 i.e., after a lapse of almost 5 months . Further, Respondents/BESCOM& HESCOM vide its letter dated 02.03.2016 and 02.05.2016 extended time up to 3 months till 17.09.2016 in terms of Article 5.7.3 of the PPA, which empowered BESCOM/HESCOM to extend SCOD on account of Force Majeure events. However, the State Commission while passing the Impugned Order at Para 16 has completely disregarded the said extension on erroneous premise that BESCOM/HESCOM had no power/ authority to issue such an extension while placing reliance on the Judgment of the Hon'ble Supreme Court in the case of "*All India Power Engineers Federation & Ors. v. Sasan Power Limited & Ors" (2017) 1 SCC 487*, which according to the Appellants is bad in law and is in teeth of the Judgments rendered by this Tribunal wherein this Tribunal has categorically held that an extension granted in pursuance of Article 5.7.3 cannot be struck down by the State Commission. In this regard, learned counsel places reliance on the following judgments, wherein this Tribunal has categorically held that although an appropriate commission being a State Regulator has jurisdiction to look into the activities of Distribution Companies, but cannot meddle with the terms and conditions duly approved by the commission itself which has crystallised the rights of the parties.

(a) Judgment dated 28.02.2020 passed in Appeal No. 340 of 2016 titled as Azure Sunrise Private Limited vs. CESCO & Anr. [**Para 4 (iii) (v) and 11.6 of the Judgment**].

(b) Judgment dated 14.09.2020 passed in Appeal No. 351 of 2018 titled as Chennamangathihalli Solar Power Project LL.P & Anr. vs. BESCOM & Anr. [**Para 8.8, 8.11 and 9.1 of the Judgment**]

93. Moreover, it is submitted that as per Section 63 of the Act, the role of Appropriate Commission is limited only to adoption of tariff and to evaluate whether the said tariff has been discovered through transparent process of bidding. Further, the Hon'ble Supreme Court in the case of "*Gujarat Urja Vikas Nigam Limited v Solar Semiconductors Power Company (India) Private Limited"* reported as *(2017) 16 SCC 498* has emphasized on the sanctity of the PPAs entered into between the generator and the procurer of electricity to be maintained. The same principle has also been upheld in the case of "*Gujarat Urja Vikas Nigam Limited v Emco Limited & Anr." (2016) 11 SCC 182* and in "*Gujarat Urja Vikas Nigam Limited v Acme Solar Technologies (Gujarat Pvt.) Limited & Ors". (2017) 11 SCC 801*. Therefore, from a conjoint reading of the aforesaid Judicial Precedents with the facts and circumstances of the present case, it is clear that the approval granted by the State Commission did not require BESCOM/HESCOM to approach the State Commission again for any

extension of time under Article 5.7.3 of the PPA as once the PPA is approved by the State Commission, all other extensions or actions in terms of the PPA are to be taken by the Parties by mutual consent.

ANALYSIS & CONCLUSION

94. The PPA dated 18.12.2014 was entered in terms of Article 3.1 of PPA wherein 18 months was the time limit from the effective date to commission/complete the solar plant. After submitting the PPA for approval with the signatures of the parties, only after a lapse of five months, said approval was granted on 04.05.2015. The delay from the date of signing of PPA for the said approval was definitely not at the instance of the Appellants.

95. In terms of the signing of PPA, tariff price was fixed at Rs. 6.86, 6.89 and 6.97 respectively so far as the three Appellants and within 18 months from effective date, the project has to be completed. According to the Appellant, if we take the date of signing of the PPA by the parties, the question would be when does the effective date come into picture. The effective date to implement the terms of contract between the parties would be the day when PPA is approved. In the absence of approval of the PPA, the signed PPA only becomes agreed terms between the parties, but it has to get the seal of approval by the Respondent Commission to act

on the basis of the PPA by both the parties. The Respondent Commission by placing reliance on the Judgment of the Hon'ble Supreme Court of India in ***All India Power Engineering Federation*** opined that BESCOM had no power to extend the SCOD; therefore, they rejected contention of the Appellants that there is automatic extension of SCOD till the date of approval given by the Respondent Commission.

96. Whether the Respondent Commission was justified in opining so? In terms of PPA which is approved, BESCOM is empowered to extend SCOD on account of force majeure conditions. Therefore, from 04.05.2015 when the PPA becomes implementable on terms and conditions enumerated in the PPA which is approved by the Respondent Commission, it becomes a valid contract between the parties. If Article 5.7.3 of PPA empowers the Respondent BESCOM to extend SCOD, we are of the opinion that there is no need for the Respondent ESCOMS to approach the Commission for approval of extension of SCOD.

97. This Tribunal in its Judgment dated 28.02.2020 in the case of ***Azure Sunrise Private Limited vs. CESCO & Anr.*** opined that from the date of signing of PPA till Regulatory Commission grants its approval has to be considered as force majeure. The relevant Paragraphs read as under:

> ***"11. OUR FINDINGS***
>
> *11.1 We have carefully gone through the submission of the parties and*

also taken note of various judgements relied upon by the Appellant as well as the Respondent Discom. The main dispute between the generating company and the distribution company (CESCOM) revolves around the decision of the State Commission to review the extension of time already given by the Discom and reduced the same to 25 days against the agreed extension of 137 days.

11.2 It is the contention of the Appellant that Despite signing the PPA on 02.01.2015 the Appellant was provided the valid and approved PPA only on May 21, 2015, i.e. after the delay of about 137 days. It is relevant to note that CESCOM in view of such a delay in handing over the executable and enforceable PPA to the Appellant, granted an extension of 137 days under Article 5.7 of PPA. In this regard, we also note that in view of the prevailing situation, the State Commission itself vide its letter dated 13.04.2015 in response to the Appellant's letter dated 06.04.2015 stated that the delay in the approval of the PPA was solely attributable to CESCOM since the required documents and details were not received by it from CESCOM for further action.

11.3 While going through the Impugned Order of the State Commission, it is noticed that the Commission itself has held that its decision conveyed vide letter dated 01.12.2015 addressed to the CESC, "intimating to incorporate the reduced tariff of Rs. 6.51 per unit in the Supplemental Agreement dated 4.11.2015 was erroneous and not valid in law. However, the Commission intervened in the extension of time and reduced the same to 25 days from the granted extension of 137 days".

11.4 The facts and circumstances of the case placed before the State Commission and the adjudication done by the Commission are in contravention to each other and there is a reason to emerge that

neither reduction in extension of time nor the reduction in tariff was justified.

11.5 To strengthen his arguments, learned counsel for the Answering Respondent has placed reliance on the judgement of the Hon'ble Supreme Court in All India Power Engineers Federation & Ors. v. Sasan Power Limited & Ors., to state that any change/ modification/ alteration of the terms and conditions of the contract becomes part of the original contract and therefore requires an approval of the State Commission and the Commission in its regulatory role has to review the matter which has been rightly done by the State Commission by reducing the extension of time from 137 days to 25 days.

11.6 We have perused the relevant portion of the above judgement relied upon by the learned counsel for the Answering Respondent and note that the said judgement is distinguishable to the facts of the case in hand due to the fact that the said case was pertaining to a deviation in carrying out the commissioning test at MCR as defined in the PPA whereas in the instant case the extension of time has been granted by CESCOM under the relevant clause of the PPA approved by the State Commission. In the case of All India Power Engineers Federation & Ors. v. Sasan Power Limited & Ors., there was a clear impact on the tariff to be borne by the beneficiaries and in turn, consumers whereas in the present case the terms of tariff were not disturbed beyond the scope of approved PPA.

11.7 In view of the above facts, we are of the opinion that the decision of State Commission to reduce the extended time and tariff alongwith imposition of liquidated damages is not sustainable in the eyes of law and hence the Impugned Order deserves to be set aside."

98. We are of the opinion that the Judgment in ***All India Power Engineer Federation & Ors. vs. Sasan Power*** has no application to the facts of the present case. The Respondent Commission was not justified in opining that the extension granted by BESCOM has to be struck down.

99. Therefore, if we take the date of extension of SCOD, which was unequivocally accepted by the Respondent BESCOM, the SCOD get extended till 17.09.2016 by mutual consent of the parties which is legitimate and legal in terms of Article 5.7.3 of the PPA. Therefore, we opine that the Respondent Commission erred in opining that BESCOM had no authority to extend SCOD.

100. Whether the Respondent Commission was justified in opining that non-completion of transmission lines and substation by Respondent No. 3 – KPTCL does not amount to an event of force majeure? It is seen from the pleadings and other correspondences between the parties and also inter-se between the parties, solar power projects of the Appellants were ready as early as August 2016 to interconnect them with the grid, but they could commission only on 30.03.2017 on account of non-completion of construction work of transmission lines and sub-station as stated above. Article 14 of the PPA defines the word force majeure which reads as under:

"Article 14: Force Majeure

… …

14.3 Force Majeure

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

…. …

(e) unlawful or unauthorized or without jurisdiction revocation of, or refusal to renew or grant without valid cause, any clearance, license, permit, authorization, no objection certificate, consent, approval or exemption required by the Developer or any of the Contractors to perform their respective obligations under this Agreement and the Project Agreements; provided that such delay, modification, denial, refusal or revocation did not result from the Developer's or any Contractor's inability or failure to comply with any condition relating to grant, maintenance or renewal of such clearance, license, authorization, no objection certificate, exemption, consent, approval or permit.

14.7 Available Relief for a Force Majeure Event

Subject to this Article 14:

a) no party shall be in breach of its obligations pursuant to this Agreement except to the extent that the performance of its obligations was prevented, hindered or delayed due to

a Force Majeure Event;

b) every party shall be entitled to claim relief in relation to a Force Majeure event in regard to its obligations, including but not limited to those specified under Article 5.7.1

c) For avoidance of doubt, neither party's obligations to make payments of money due and payable prior to occurrence of Force Majeure events under this Agreement shall be suspended or excused due to the occurrence of a Force Majeure event in respect of such party.

d) Provided that no payments shall be made by either Party affected by a Force Majeure Event for the period of such event on account of its inability to perform its obligations due to such Force Majeure event."

101. It is noticed that the Appellants did not approach the Respondent Commission on their own seeking approval of the SCOD up to 30.03.2017 which was already accepted and admitted by the Respondent BESCOM by recommending the case of the Appellants for extension of SCOD up to 30.03.2017 highlighting the reasons why the Appellants were not able to commission the plants. At that point of time, the Respondent Commission directed the licensees to direct the Appellants to file petition. Therefore, the petition was filed before the Commission and in that proceedings, the present impugned order was passed.

102. The Respondent Commission rejected the said application filed by the Appellants opining that non-availability of the evacuation system of KPTCL cannot be treated as force majeure event.

103. Though the Respondent BESCOM themselves without even disputing the non-availability of evacuation system as a force majeure event took quite contrary stand during the proceedings before the Respondent Commission in later part of the proceedings. We will refer to the said conduct of the BESCOM later.

104. It is not in dispute that in terms of 4.2(e) of the PPA, it was an obligation for the Appellants to apply for evacuation approval from KPTCL. Accordingly in March, 2015 itself, the Appellants applied for evacuation approval much prior to the approval of the PPA itself by the Respondent Commission. In response, a temporary approval of evacuation was granted which was subsequently approved as regular evacuation approval on 10.06.2015. In terms of the provisional and regular evacuation approvals, it was subject to commissioning of 220/66 kV Kotaguda sub-station. The provisional approval stated that evacuation approval is for a period up to 17.06.2016 subject to currency of LoAs in force. Therefore, the said approval comes to an end with SCOD of the PPA.

105. As already referred to in the pleadings, for the first time the KPTCL informed the Appellants on 19.01.2017 that evacuation infrastructure will not be ready till 31.03.2017. This was in response to the request of the Appellants they informed about the date of completion. Though the Appellants sought alternative provisional arrangement, KPTCL could provide such alternative arrangement only on 24.03.2017 though the Appellants were ready as early as August 2016. Therefore, it is evident that on the persistent persuasion of the Appellants, the alternative line was provided for evacuation of the power from the solar plant of the Appellants. Therefore, the Appellants were prevented from commissioning their projects on account of either non-completion of the 220 kV line or non-providing alternative line by KPTCL.

106. One has to see what was the conduct of KPTCL and BESCOM when the Appellants were not able to commission the solar plants within 17.09.2016. Neither KPTCL nor BESCOM found fault with them till the proceedings before the Commission. On the other hand, the KPTCL vide letter dated 09.09.2016 and 19.01.2017, and BESCOM by its letter dated 24.07.2017 accepted the delay on their part in completing the transmission lines and admitted that the projects of the Appellants were delayed due to force majeure event which is beyond the control of the Appellants. As stated above, at the instance of the Respondent Commission, only through

BESCOM the Appellants approached the Respondent Commission seeking approval of extension of SCOD.

107. Whether the Appellants were not prudent and had not taken adequate steps to seek clarification from KPTCL when conditional approval was granted by KPTCL as observed by the Respondent Commission has to be seen by us i.e., whether such opinion is correct or wrong.

108. The PPA which was approved on 04.05.2015,which includes certain amendments. The relevant amendment was to include of the events which were beyond the control of the parties as event of force majeure. In other words, any event and circumstances which wholly or partly prevent or cause unavoidable delay, resulting in non-performance of its obligation would fall within the ambit of definition of force majeure.

109. According to Respondent Commission, the force majeure event if could have been avoided by the affected party by taking reasonable care or acted with prudent utility practice, then only the benefit of force majeure event would be allowed to such affected party. They further opined that as a prudent developer, the Appellants ought to have sought an assurance from KPTCL after submitting its application. Therefore, the Appellants

were not prudent, hence they cannot seek protection under the umbrella of force majeure.

110. It is already stated above that it is the obligation of the Appellants to apply for evacuation approval. In fact without any delay, the Appellants had sought for evacuation approval. The provisional approval was coterminous along with the date of SCOD. Therefore, there was no occasion for the Appellants to seek clarification from KPTCL. That apart, the Respondent No. 3 – KPTCL being a State Instrumentality has to function and discharge its duties, if any. If this State Instrumentality had delayed performance of its obligation even for genuine reason, was it correct on the part of the Commission to point out finger at the Appellants?

111. Even otherwise, we note that the term 'prudent utility practice' refers to development of the project by the Appellant. It provides that the developer cannot cross its limit in relation to development of the project. The delay for evacuation of power was not on account of Appellants because KPTCL has delayed creation of evacuation infrastructure. The term 'prudent utility practice' reads as under:

> *"Prudent Utility Practices" shall mean the practices, methods and standards that are generally accepted internationally from time to time by electric utilities for the purpose for ensuring the safe, efficient and economic design, construction, commissioning, operation and*

maintenance of power generation equipment and which practices, methods and standards shall be adjusted as necessary, to take account:

c) Operation and maintenance guidelines recommended by the manufacturer of the plant and equipment to be incorporated in the Power Project;

d) The requirements of Indian law; and The physical conditions at the site of the Power Project."

112. The observation of the Respondent Commission points out that placing more reliance on the exception provision of force majeure Article, it has proceeded erroneously to conclude reasoning and accordingly the impugned order was passed which is incorrect appreciation of the facts by the Respondent Commission.

113. There is yet another ground on which the Commission placed its impugned order i.e., CEIG Certificate which was issued in the month of March 2017. According to Respondents, since the CEIG report was issued only in the month of March 2017, the contention of the Appellants that their project was ready by August / September 2016 cannot be considered as correct. It is noticed that through various letters, the Appellants informed Respondent No. 2 about the readiness of their project. This was never denied or refuted by Respondent No. 2 – BESCOM. Then on what ground the Respondent Commission could

opine that the Appellants were not ready at the relevant point of time, we are unable to understand.

114. Therefore, we are of the opinion that this finding of the Respondent Commission is based on imagination and surmises completely on wrong premise. Even otherwise, provisions of Regulation 32 and Regulation 43 of the CEA (Measures relating to Sage of Electric Supply) Regulations, 2010 are applicable. Regulation 43 is the main provision which comes into effect only when the power supply is commenced i.e., when installation of the solar plant gets connected with the licensee. This happens only if the requisite lines of KPTCL were ready. Therefore, till such time, CEIG Certification stage would not arise. Therefore, the opinion of the Respondent Commission that CEIG Certification demonstrates that the Appellants were not ready with their solar plants in August / September is an erroneous approach. The said Certification comes in to play when the licensee's works are connected with the works of generating company through KPTCL lines.

115. It is no more *res integra* that in a case of untoward event or change of circumstances, which totally upset the very foundation upon which the parties agree to rest their bargain, and the performance of their contract become impossible, the parties are absolved from further performance of the contract. We place reliance on the following Judgments:

(a) The Hon'ble Supreme Court's Judgment in ***Satyabrata Ghose Vs. Mugneeram*** [AIR 1954 SC 44] - Para 9 which reads as under:

"9. The first paragraph of the section lays down the law in the same way as in England. It speaks of something which is impossible inherently or by its very nature, and no one can obviously be directed to perform such an act. The second paragraph enunciates the law relating to discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done. The wording of this paragraph is quite general, and though the illustrations attached to it are not at all happy, they cannot derogate from the general words used in the enactment. This much is clear that the word "impossible" has not been used here in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promissor finds it impossible to do the act which he promised to do."

(b) The Hon'ble Supreme Court's Judgment in ***Energy Watchdog vs. CERC*** [(2017) 14 SCC 80 – Para 45, which reads as under:

"45. First and foremost, the respondents are correct in stating that the force majeure clause does not exhaust the possibility of

unforeseen events occurring outside natural and/or non-natural events. But the thrust of their argument was really that so long as their performance is hindered by an unforeseen event, the clause applies. Chitty on Contracts, 31st Edn. at Para 14-151 cites a number of judgments for the proposition that the expression "hindered" must be construed with regard to words which precede and follow it, and also with regard to the nature and general terms of the contract. Given the fact that the PPA must be read as a whole, and that Clauses 12.3 and 12.7(a) are a part of the same scheme of force majeure under the contract, it is clear that the expression "hindered" in Clause 12.7(a) really goes with the expression "partly prevents" in Clause 12.3. Force majeure clauses are to be narrowly construed, and obviously the expression "prevents" in Clause 12.3 is spoken of also in Clause 12.7(a). When "prevent" is preceded by the expression "wholly or partly", it is reasonable to assume that the expression "prevented" in Clause 12.7(a) goes with the expression "wholly" in Clause 12.3 and the expression "hindered" in Clause 12.7(a) goes with the expression "partly". This being so, it is clear that there must be something which partly prevents the performance of the obligation under the agreement. Also, Treitel on Frustration and Force Majeure, 3rd Edn., in Para 15-158 cites the English judgment of Tennants (Lancashire) Ltd. v. C.S. Wilson and Co. Ltd. [Tennants (Lancashire) Ltd. v. C.S. Wilson & Co. Ltd., 1917 AC 495 (HL)] for the proposition that a mere rise in price rendering the contract more expensive to perform will not constitute "hindrance". This is echoed in the celebrated judgment of Peter Dixon & Sons Ltd. v. Henderson, Craig & Co.

Ltd. [Peter Dixon & Sons Ltd. v. Henderson, Craig & Co. Ltd., (1919) 2 KB 778 (CA)] in which it was held that the expression "hinders the delivery" in a contract would only be attracted if there was not merely a question of rise in price, but a serious hindrance in performance of the contract as a whole. At the beginning of the First World War, British ships were no longer available, and although foreign shipping could be obtained at an increased freight, such foreign ships were liable to be captured by the enemy and destroyed through mines or submarines, and could be detained by British or allied warships. In the circumstances, the Tennants (Lancashire) Ltd. [Tennants (Lancashire) Ltd. v. C.S. Wilson & Co. Ltd., 1917 AC 495 (HL)] judgment was applied, and the Court of Appeals held: (Peter Dixon case [Peter Dixon & Sons Ltd. v. Henderson, Craig & Co. Ltd., (1919) 2 KB 778 (CA)] , KB p. 784)

"… Under the circumstances, can it be said that the sellers were not "hindered or prevented" within the meaning of the contract? It is not a question of price, merely an increase of freight. Tonnage had to be obtained to bring the pulp in Scandinavian ships, and although the difficulty in obtaining tonnage may be reflected in the increase of freight, it was not a mere matter of increase of freight; if so, there were standing contracts that ought to have been fulfilled. Counsel for the respondents urged that certain shipowners, for reasons of their own, chose not to fulfil standing contracts. It was not only shipowners but pulp buyers and sellers. The whole trade was dislocated, by reason of the difficulty that had arisen in tonnage. It seems to me that the language of Lord Dunedin in Tennants

(Lancashire) Ltd. v. C.S. Wilson & Co. Ltd. [Tennants (Lancashire) Ltd. v. C.S. Wilson & Co. Ltd., 1917 AC 495 (HL)] is applicable to the present case: (AC p. 516)

'… Where I think, with deference to the learned Judges, the majority of the court below have gone wrong is that they have seemingly assumed that price was the only drawback. I do not think that price as price has anything to do with it. Price may be evidence, but it is only one of many kinds of evidence as to shortage. If the appellants had alleged nothing but advanced price they would have failed. But they have shown much more.'

That is exactly so here. Price, as price only, would not have affected it. They were all standing contracts, but the position has so changed by reason of the war that buyers and sellers and the whole trade were hindered or prevented from carrying out those contracts."

(c) This Tribunal's Judgment in ***Gujarat Urja Vikas Nigam Limited vs. GERC & Ors.*** [Judgment dated 04.02.2014 passed in Appeal No. 123 of 2012] – Para 55, which reads as under:

"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."

(d) This Tribunal's Judgment in ***Chamundeshwari Electricity Supply Company Ltd. (CESC) Vs. Saisudhir Energy (Chitradurga) Pvt. Ltd & Ors.*** [Judgment dated 21.03.2018 passed in Appeal No. 176 of 2015] - Para 10, which reads as under:

"10 (ii) We have also gone through the provisions of the PPA, communications exchanged between the Respondent No. 1 and KPTCL and between Respondent No. 1 and the Appellants. We observe that the initial scheduled commissioning date of the Solar Project was on or before 28.1.2014 and the conditions precedent were to be fulfilled in 240 days from the execution of the PPA. The Appellants on the request of the Respondent No. 1 has extended the commercial operation date of the Solar Project till 27.9.2014 on the ground of non-commissioning of the said 220 kV lines by KPTCL. However, due to delay in the execution/commissioning of the said 220 kV lines by KPTCL and conditional evacuation permission given by KPTCL vide letter dated 6.2.2014 the condition precedent as per Article 4.2 (e) of the PPA i.e. 'obtained power evacuation approval from Karnataka Power Corporation Ltd. (KPTCL)/ CESXC Mysore, as the case may be cannot be termed as fulfilled. Further, on enquiry by the Respondent No. 1, KPTCL intimated that the said 220 kV evacuation lines are likely to be commissioned in August

2015.

.....

.....

(v) From the above it becomes clear that under the facts and circumstances of the case on ***hand there is no legal infirmity in the decision of the State Commission, terming the nonavailability/non-commissioning of the said 220 kV lines as a Force Majeure event and performance of the contract has become impossible.***

[Emphasis Supplied]

(e) This Tribunal's Judgment in ***NTPC Limited vs CERC*** – ELR (APTEL) 1096 – para 41 & 45;

(f) ***Rising Sun Energy Private Limited and Others vs NTPC limited & Others*** – MANU/CR / 0114/2019 – Para 170

116. As stated above, the Appellants' stand is that on account of KPTCL's failure to keep the transmission line ready, they were not able to commission the project within the scheduled date. Therefore, it was beyond the control of the Appellants, hence force majeure. We note that the Respondent Commission did not refer to the decision of this Tribunal in the case of ***Chamundeshwari Electricity Supply Company Ltd. (CESC) Vs. Saisudhir Energy (Chitradurga) Pvt. Ltd & Ors***. In terms of ***Chamundeshwari*** judgment obtaining approval for evacuation of power falls within the ambit of the words "subject to" as provided in the recital Para F of the PPA. We note that Clauses 6 and 9 of evacuation approval

in the present case is similar to the evacuation approval as found in Para 9 (e) of the above said Judgment. Apart from that, Article 42 (e) of the two PPAs are identical. Similarly, Article 4.1 of the PPA in the present case denotes respective rights and obligations of the parties, which are subject to satisfaction of compliance of condition precedent as envisaged under Article 4.2 (e) of the PPA.

Para 9 (e) of the Judgment in ***Chamundeshwari***'s case reads as under:

> *"e) On request from the Respondent No. 1, KPTCL granted permission for evacuation of power & synchronisation vide letter dated 6.2.2014 and put the condition that the approval will be given only after the commissioning of 220 kV line between Birenhalli – Thallak&Hiriyur – Gowribindur. This permission was the primary requirement of the Solar Project. In absence of this permission no progress can be made especially in the case of Solar Project which had its unique characteristics. Till the said transmission line is installed by KPTCL no progress can be achieved in the Solar Project. Accordingly, the present case is the case of Force Majeure as evacuation approval is not in the control of the Respondent No. 1. The Appellant also know that they also cannot provide any effective legal evacuation facility to the Solar Project. In case of Force Majeure no party will be liable to make payment. Till date KPTCL has failed to commission the transmission lines. No plant can be commissioned without transmission lines."*

117. The ratio of the above said Judgment squarely applies to the facts of the present Appeal on hand; therefore, we opine that the Respondent Commission ought to have held that the failure on the part of the Respondent KPTCL to create infrastructure for evacuation in time amounts to force majeure event. Hence, we are of the opinion that the Respondent Commission erred so far as delay in evacuation infrastructure being completed as force majeure event.

118. It is also relevant to point out the conduct of BESCOM before the Respondent Commission while seeking extension of SCOD. One cannot ignore the fact that the Respondent BESCOM firstly acknowledged through various letters that the Appellant had conveyed the information of completion of the solar plant in all respects at the site and subsequently it has accepted that it had written a letter to the Respondent Commission for approval of the revised SCOD on account of force majeure conditions by letter dated 24.07.2017.

119. Surprisingly, the 2nd Respondent BESCOM has taken totally a different position before this Tribunal. It states that in the letter dated 24.07.2017, it was not an admission of force majeure event happening, but only an information to the Respondent Commission bringing all facts for its consideration. The letter dated 24.07.2017 reads as under:

"BANGALORE ELECTRICITY SUPPLY COMPANY LIMITED

(Wholly owned Government of Karnataka Undertaking)
9CIN-UO4010KA2002SGC030438)

NO: GM(Ele)/PP/BESCOM//DGM-1/AGM-1/BC-39/f-17-18/5315-16

Corporate Office,

K.R. Circle, BESCOM,

Bengaluru – 560001

Encl:

Date: 24.07.2017

To,
The Secretary,
Karnataka Electricity Regulatory Commission,
No. 6&7 floor, Mahalakshmi Chambers,
MG road, Bengalluru-560001.

Sir,

Sub: M/s SEI suryashakti power private Limited, M/s SEI Bheem Private Limited, M/s SEI Aditi Power Private Limited, M/s SEI Diamond Private Limited (SPV of M/s Sun Edison Energy Holding (Singapore) pte. Limited) power purchase agreement with BESCOM in respect of 30.00 MW Solar PV project each at Nagalmadike village, Pavagada Taluk, Tumkur District-reg- delay in commissioning of the project.

Ref: 1. KREDL Letter of Award letter No. KREDL/07/GC/500MW-LOA/ SEEHPL/2014-15/4535 dated: 19.11.2014.
2. KREDL Letter of Award letter No. KREDL/07/GC/500MW-LOA/ SEEHPL/2014-15/4536 dated: 19.11.2014.
3. KREDL Letter of Award Letter No. KREDL/07/GC/500MW-LOA/ SEEHPL/2014-15/4538 dated: 19.11.2014.
4. PPA execute on 18.12.2014
5. KERC Vide Letter No. KERC/S/F-31/Vol-34/15-16/147 dated: 04.05.2015
6. KERC Vide Letter No. KERC/S/F-31/Vol-33/15-16/169 dated: 04.05.2015
7. KERC Vide Letter No. KERC/S/F-31/Vol-35/15-16/146 dated: 04.05.2015

8. KPTCL letter no. CEE (P&C)/SEE (pig)/EE(PSS)/KCO-93/64150/F-734/20775 89 dated: 24.3.2017
9. Chief Engineer (Elec.,) Chitradurga O & M zone Chitradurga, letter no. CEE.SEE (E)(O)/AEE(O)/CZ/17-18/1939-44 dated: 6.6.2017

M/s SEI suryashakti power private Limited, M/s SEI Bheem Private Limited, M/s SEI Aditi Power Private Limited, SPV of M/s Sun Edison Energy Holding (Singapore) pte. Limited) had executed power purchase agreement with BESCOM on 18.12.2014 for 30MWs capacity each @ Rs.6.97, Rs.6.89 and Rs.6.86 per KWh respectively as per KREDL Letter of Award cited under ref(1) to ref(3) with tentative location at challakera taluk, Chitradurga District.

Hon'ble KERC vide letters cited under ref (5) to ref (7) have communicated approval of the Commission for the Power Purchase Agreements executed between BESCOM and M/s SEI suryashakti power private Limited, M/s SEI Bheem Private Limited, M/s SEI Aditi Power Private Limited.

As per PPA terms and conditions, the developer shall fulfill conditions precedent by 17.12.2015 and achieve SCOD by-17.6.2016(18 months from the effective date, effective date being the PPA date i.e., 18.12.2014).

M/s SEI suryashakti power private Limited, M/s SEI Bheem Private Limited, M/s SEI Aditi Power Private Limited, have not commissioned the project within SCOD as stipulated in PPA.

Hence, M/s SEI suryashakti power private Limited, M/s SEI Bheem Private Limited, M/s SEI Aditi Power Private Limited, vide letters dated: 9.02.2017 had requested for extension of SCOD duly quoting the following reason:

- *The proposed projects are to be connected to 220/66kV KPTCL Substation at Kotagudda, Pavagada Taluka, Tumakuru district. But the construction activities of 200/66kV KPTCL Substation at Kotagudda, Pavagada Taluka, Tumakuru district is likely to be completion by 31st March 2017.*

M/s SEI suryashakti power private Limited, M/s SEI Bheem Private Limited, M/s SEI Aditi Power Private Limited had requested to extend SCOD until KPTCL facilities evacuation of power from their project after commissioning of 220/66kV KPTCL Substation at Kotagudda, Pavagada Taluka, Tumakuru district until 31st March 2017 without any charge or penalty as the delay is entirely a Force Majeure event.
Extension of scheduled commissioning date for development of Solar power project of M/s SEI suryashakti power private Limited, M/s SEI Bheem Private Limited, M/s SEI Aditi Power Private Limited was placed before 80th Board of Director Meeting held on 26.11.2016 and it was resolved as stated below:

"RESOLVED THAT, for the reasons explained, approval be and is accorded to authorize MD, BESCOM to settle the application of developers on hand, based on legal opinion."

"RESOLVED FURTHER THAT, MD, BESCOM be and is authorized to constitute a committee for the future cases, to obtain legal opinion and to take further suitable prudent actions based on committee opinion, legal opinion and merits of each case of request from the developers.

Further, as per the BOD Resolution the same was forwarded for legal opinion … … which is passing near to the KPTCL's Kotagudda substation by tapping arrangements with restricting Load on Line as per thermal loading factor.

The Superintending Engineer (Ele.,), O & M circle Tumakuru informed that as the three solar projects were complete and ready, KPTCL had issued provisional interconnection approval vide letter dated 30.3.2017 for all three solar projects. The three solar projects were successfully interconnected with grid and started supplying power to BESCOM. Further, due to Load constraints on existing KPTCL's 66 kV Madhugiri-Shylapura transmission line, the 3 Solar Projects (SEI Aditi, SEI Bheem and SEI Suryashakti were allowed to evacuate from their three solar projects with a load of 13MW only as instructed by the KPTCL. As per the Oral instructions of concerned KPTCL authority to the power generation agencies, the generation of Power is restricted corresponding to the load constraints from their respective solar projects. (Copy enclosed).

Executive Engineer (Ele), MT Division Chitradurga BESCOM issued Commission certificates vide letters 21266-82/21283-99/21300-16 dated: 6.4.2017 stating that 30 MWs each of Solar power plant of M/s SEI suryashakti power private Limited, M/s SEI Bheem Private Limited, M/s SEI Aditi Power Private Limited were Interconnected/Synchronized with grid connecting from 66/33 kV company pooling station near Pallavalli village further connected through 220 kV SC Line on DC Towers to the Tapping point of 66kV KPTCL Madhugiri to Shyalapur Line near Kottagudda KPTCL substation at Kottagudda village, Pavagada taluk, Tumkur District on 30.3.2017.(copy enclosed).
PPA Clause 14.5"Notification of Force Majeure Event" under Article 14 is placed as Annexure-A.

M/s SEI suryashakti power private Limited, M/s SEI Bheem Private Limited, M/s SEI Aditi Power Private Limited had requested for the extension of SCOD on 31.3.2017 quoting the force majeure events.

As per the PPA, "COD" or "Commercial Operation Date" Shall mean the actual commissioning date of respective units of the Power Project where upon the Developer starts injecting power from the Power Project to the Delivery Point.

ARTICLE 12: APPLICABLE TARIFF AND SHARING OF CMD BENEFITS is placed as Annexure-B.

The proposal in respect of solar power projects for 30 MW each capacity of M/s SEI suryashakti power private Limited, M/s SEI Bheem Private Limited, M/s SEI Aditi Power Private Limited near Nagalmadike village, Pavagada Taluk, … …

Meanwhile, Hon'ble KERC vide letter dated: 16.3.2017, directed all ESCOMs to not to allow any extension of time beyond the Scheduled Commissioning date (CoD), if any, as per the original PPA without obtaining prior opinion of the Commission.

SEI Aditi Power Private Limited vide letter dated: 27.3.2017 had requested for NOC for commissioning of the project.

BESCOM consent was given vide letter date: 28.3.2017 to commission the project without altering any of the terms and conditions of the PPA.

Further, Hon'ble KERC vide letter dated: 05.04.2017, directed all the ESCOMs to advice the concerned SPD/SPVs under Land Owners/Farmers Scheme to file a petition before the Commission with all relevant grounds/documents for seeking approval for any extension of the Commissioning date.

Based on the Hon'ble KERC letter dated 5.4.2017, letter was addressed to M/s SEI suryashakti power private Limited, M/s SEI suryashakti power private Limited, M/s SEI Bheem Private Limited, M/s SEI Aditi Power Private Limited to file a petition before the Hon'ble Commission for seeking approval for any extension of the Commissioning date.

Further, KPTCL vide letter cited under ref (4) have communicated temporary Evacuation scheme stating, "temporary tapping of the existing 66KV Pavagada-Shylapur SC lIne of KPTCL having Coyote ACSR conductor at a suitable point & connecting to their (220KV evacuation line(to be charged at 66KV level) constructed from project common pooling station with necessary control equipment as per the KPTCL technical specifications".(copy enclosed).

Further, the Chief Engineer (Electy) O & M zone, Chitradurga vide letter dated: 6.7.2017 have forwarded SE (Ele), O & M Circle, Tumakuru report wherein it was stated that for the Project of M/s SEI suryashakti power

private Limited, M/s SEI suryashakti power private Limited, M/s SEI Bheem Private Limited, M/s SEI Aditi Power Private Limited, KPTCL has issued letters dated: 9.9.2016, 19.1.2017 & 10.5.2017 that they will likely to complete the Kotagudda substation and both transmission Line (220KV D/e Transmission Line from Madhugiri-Kotagudda) works by December 2016 and by March 2017 respectively. Again issued one more likely completion of the station and line by August 2017.

Further, The Superintending Engineer (Ele.,), O & M circle Tumakuru informed that the KPTCL has explored the feasibility to interconnect three solar project by connecting to the existing old 66kV Madhugiri-Shylapura Transmission line Tumakuru District, for kind perusal and approval for extension for SCOD upto 30.3.2017, on force majeure conditions.
Yours faithfully,
General Manager (Ele),
Power Purchase, BESCOM
Copy to:

1. *Deputy General Manager (F&C), Power Purchase, BESCOM Corporate Office, Bengaluru-01.*
2. *MF/OC"*

120. It is noticed that there is no mention that Appellants were not ready in August or September 2016 and extension cannot be granted. Last Para clearly says extension of SCOD is recommended up to 30.03.2017 for approval on force majeure reason.

121. This conduct of the Respondent BESCOM cannot be appreciated. On one hand it accepts there was force majeure event, and on the other hand it takes a different and divergent stand at a later stage. It is well settled legal position that a party having admitted a fact, then it is bound by such admission made by it. However, the Respondent Commission totally failed to take note of the conduct of 2nd Respondent BESCOM. It is well settled that Court has to take note of admissions while determining

the dispute between the parties. We place reliance on the Judgment of the Hon'ble Supreme Court of India in the case of ***Divisional Manager, United Insurance Co. Ltd. & Ors. Vs. Samir Chandra Chaudhary*** *[(2005) 5 SCC 784]* Para 11, which reads as under:

> *"11. …. The effect of admission is that it shifts the onus on to the person admitting the fact on the principle that what a party himself admits to be true may reasonably be presumed to be so, and until the presumption is rebutted, the fact admitted must be taken to be established. An admission is the best evidence that an opposing party can rely upon, and though not conclusive is decisive of matter, unless successfully withdrawn or proved erroneous. (See Narayan Bhagwantrao Gosavi Balajiwale v. Gopal Vinayak Gosavi [(1960) 1 SCR 773: AIR 1960 SC 100] Contemporaneous documents clearly show that the complainant right from the beginning had accepted the position that the branch had got knocked off the tree because of storm. If he wanted to explain the admission, the onus was on him to adduce material to show the contrary. Such material has to be of clinching nature so as to outweigh the admission".*

122. Over and above this, we note that in the letter dated 09.09.2016, the Appellants pointed out that all works were completed and request for start-up power was already made to KPTCL. This intimation was not disputed by BESCOM. They have mentioned in the said letter that interconnection was not given on account of reasons beyond their control on account of non-completion of evacuation infrastructure. Therefore, we

are of the opinion that this letter addressed to BESCOM constitutes force majeure notice.

123. As already stated above, in the letter issued by the Respondent BESCOM to Commission requesting for alteration of SCOD on account of force majeure event, they in an unequivocal terms pointed out that on account of load constraints, the Appellants were only able to evacuate 13 MW of power as instructed by KPTCL. Therefore, it was clear that though evacuation was possible, the Appellants suffered on account of non-evacuation of power to the full extent.

124. We are of the opinion that the Appellants were justified to contend that this has resulted in monetary losses to the Appellants.

125. Therefore, the Respondent BESCOM is taking different stand contrary to the stand taken by them earlier so far as force majeure event is concerned. They cannot approbate and reprobate at the same time. We are of the opinion that the principles of estoppel clearly bar such an action on the part of the Respondent BESCOM. The Respondent Commission, a neutral entity, was expected to analyse the facts as placed on record. But we note that it has totally ignored the change of stand from time to time by BESCOM.

126. For this proposition that a party who has taken a position cannot approbate and reprobate at the same, we refer to the following

Judgments:

A. *Amar Singh vs Union of India (2011) 7 SCC 69*

"50. This Court wants to make it clear that an action at law is not a game of chess. A litigant who comes to Court and invokes its writ jurisdiction must come with clean hands. He cannot prevaricate and take inconsistent positions."

B. *Joint Action Committee of Air Line Pilots' Assn. of India v. DGCA (2011) 5 SCC 435*

"12. The doctrine of election is based on the rule of estoppel—the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity. By that law, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had. Taking inconsistent pleas by a party makes its conduct far from satisfactory. Further, the parties should not blow hot and cold by taking inconsistent stands and prolong proceedings unnecessarily. [Vide Babu Ram v. Indra Pal Singh [(1998) 6 SCC 358] , P.R. Deshpande v. Maruti BalaramHaibatti [(1998) 6 SCC 507] and Mumbai International Airport (P) Ltd. v. Golden Chariot Airport [(2010) 10 SCC 422 : (2010) 4 SCC (Civ) 195] .]"

C. *Suzuki ParasrampuriaSuitings (P) Ltd. V. Official Liquidator, (2018) 10 SCC 707*

"12. A litigant can take different stands at different times but cannot take contradictory stands in the same case. A party cannot be permitted to approbate and reprobate on the same facts and take inconsistent shifting stands. The untenability of an inconsistent stand in the same case was considered in Amar Singh v. Union of India [Amar Singh v. Union of India, (2011) 7 SCC 69 : (2011) 3 SCC (Civ) 560] , observing as follows: (SCC p. 86, para 50)

"50. This Court wants to make it clear that an action at law is not a game of chess. A litigant who comes to court and invokes its writ jurisdiction must come with clean hands. He cannot prevaricate and take inconsistent positions."

13. A similar view was taken in Joint Action Committee of Air Line Pilots' Assn. of India v. DGCA [Joint Action Committee of Air Line Pilots' Assn. of India v. DGCA, (2011) 5 SCC 435] , observing: (SCC p. 443, para 12)

"12. The doctrine of election is based on the rule of estoppel—the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity. … Taking inconsistent pleas by a party makes its conduct far from satisfactory. Further, the parties should not blow hot and cold by taking inconsistent stands and prolong proceedings unnecessarily."

14. Resultantly we find no merit in the appeal. The appeal is dismissed."

D. *PR Deshpande Vs Maruti BalaramHaibatti* (1998) 6 SCC

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"8. The doctrine of election is based on the rule of estoppel — the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppel in pais (or equitable estoppel) which is a rule in equity. By that rule, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had. (vide Black's Law Dictionary, 5th Edn.)

9. It is now trite that the principle of estoppel has no application when statutory rights and liabilities are involved. It cannot impede right of appeal and particularly the constitutional remedy. The House of Lords has considered the same question in Evans v. Bartlam [(1937) 2 All ER 646] . The House was dealing with an order of the court of appeal whereby Scott, L.J. approved the contention of a party to put the matter on the rule of election on the premise that the defendant knew or must be presumed to know that he had the right to apply to set the judgment aside and by asking for and obtaining time he irrevocably elected to abide by the judgment. Lord Atkin, reversing the above view, has observed thus:

"My Lords, I do not find myself convinced by these judgments. I find nothing in the facts analogous to cases where a party, having obtained and enjoyed material benefit from a judgment, has been held precluded from attacking it while he still is in enjoyment of the benefit. I cannot bring myself to think that a judgment-debtor, who asks for and receives a stay of execution, approbates the judgment, so as to preclude him thereafter from seeking to set it aside,

whether by appeal or otherwise. Nor do I find it possible to apply the doctrine of election."

E. *Mumbai International Airport Pvt. Ltd. Vs Golden Chariot Airport &Ors* (2010) 10 SCC 422-

"55. Therefore, the conduct of the contesting respondent in view of its inconsistent pleas is far from satisfactory. By taking such pleas, the contesting respondent has succeeded in enjoying the possession of the premises for the last 10 years even after the expiry of its licence on 26-5-2000.

56. The complaint of the contesting respondent that Mr K.K. Gupta, while acting as Estate Officer and deciding the proceedings, failed to observe the principles of natural justice, by not summoning the officers of AAI, is without any substance. The Estate Officer has given adequate reasons for not summoning the officers of AAI by holding that beyond 26-5-2000, there is no written extension of the licence period. The Estate Officer held, and in our view rightly, that when written documents are there, any oral assurance, which purports to contradict the written documents need not be considered. Apart from that, this Court has already recorded that in the facts of the case and in the context of the statutory dispensation discussed above, there is no scope for an oral extension of licence. Therefore, the reasoning given by the Estate Officer, for not calling the officers of AAI to prove the case of oral extension of licence of the contesting respondent, is sound and does not call for any interference by this Court even when it acts as an appellate authority.

57. The Estate Officer also declined to issue directions for inspection of documents, as prayed for by the contesting respondent on valid grounds. The Estate Officer held that it has to decide whether the contesting respondent is in unauthorised occupation of the public premises within the meaning of the 1971 Act. That being the sole purpose of his enquiry, the Estate Officer thought, and rightly so, that its enquiry cannot be widened by including a plea of discrimination under Article 14 raised by the contesting respondent.

58. Apart from that, this Court also does not find any merit in the plea of discrimination raised by the contesting respondent, by contending that cases of other licensees have been extended whereas in its case, the licence has not been extended. Such a plea is not factually correct inasmuch as the licence of the contesting respondent was also extended twice. In any event, a plea of discrimination can only be raised in aid of a right. If a person has a right in law, to be treated in a particular way, but that treatment is denied to him, whereas others are given the same treatment, a plea of discrimination can be made out.

59. We have already discussed that the contesting respondent has no right in law, to get its licence extended. Therefore, one cannot have a plea of negative equality under Article 14. There may be very many administrative reasons for extending the period of licence of other licensees, but that does not give rise to a valid plea of discrimination, when admittedly the contesting respondent has

no right in law to get an extension.

60. Now the last point that remains is the authority of Mr K.K. Gupta to function as an Estate Officer. This is a point more of desperation than of substance.

61. Under Section 3 of the 1971 Act, the Central Government's power to appoint an Estate Officer is provided. From the compilation of notifications that have been filed in this case by the learned Attorney General, appearing for AAI, it transpires that the Ministry of Civil Aviation and Tourism, Department of Civil Aviation, issued a Notification dated 1-7-1997, appointing several persons as Estate Officers for the purpose of the 1971 Act. That notification was published in the Official Gazette. By a further Notification dated 15-5-2007, published in the Official Gazette, the Central Government amended its previous notification and for the words "Airport Director", the words "Deputy General Manager (Land Management)" were substituted.

62. It has not been argued by the learned counsel for the contesting respondent that while issuing a notification under Section 3, the Central Government will have to name a person or an individual as an Estate Officer. The appointment of such Estate Officer is by designation only. It is not in dispute that Mr K.K. Gupta, who functioned as an Estate Officer and decided the case of the contesting respondent, was promoted and brought to Mumbai as Deputy General Manager (Land Management). This is admitted in the affidavit of the contesting respondent. Therefore, Mr K.K. Gupta by virtue of his designation as Deputy General Manager

(Land Management) discharged his function as a valid Estate Officer. There can be no dispute about his authority to do so since by the subsequent Notification dated 15-5-2007, the words "Airport Director" have been substituted for the words "Deputy General Manager (Land Management)". Hence, there is no substance in these contentions of the contesting respondent.

63. This Court even acting as an appellate authority does not discern any error in the order dated 29-4-2010 of the Estate Officer. The appeal filed by the contesting respondent before the City Civil Court, Mumbai and transferred to this Court is therefore dismissed.

64. However, from the facts discussed above, it is amply demonstrated that the contesting respondent has blown hot and cold by taking inconsistent stands, and has therefore prolonged several proceedings for more than a decade. This Court is constrained to hold that it did not pursue its proceedings honestly in different fora. Therefore, the appeal, being Misc. Appeal No. 50 of 2010, filed by the contesting respondent before the Principal Judge, City Civil Court, Mumbai, which was transferred to this Court by this Court's order dated 11-5-2010 and formed part of these appeals, is dismissed with costs assessed at Rs. 5,00,000 to be paid by the contesting respondent in favour of the Supreme Court Mediation Centre within a period of two months from date.

65. The civil appeals filed by the Airports Authority of India and Mumbai International Airport are allowed. All interim orders are vacated."

127. Apparently, the proceedings in the Petition before the Respondent Commission were at the instance of the Commission filed by the Appellant Generator. In this Petition, the relief sought was approval for extension of SCOD up to 30.03.2017. It is noticed that there was no petition pending at the instance of the BESCOM seeking a direction for payment of Liquidated Damages before the Commission. However, when the Appellant filed IA No.1 of 2019 seeking intervention of the Commission for payment of tariff in terms of PPA, question of any reference to the payment of Liquidated Damages did not arise, since BESCOM did not make such claim. In other words, at that point of time, the BESCOM did not urge that either it is going to set-off LDs or has already set-off the LDs. The Appellant did withdraw the said IA for payment of tariff thinking that it would prolong the litigation. Only in the Statement of Objection and additional Statement of Objection to the main Petition, BESCOM and KPTCL for the first time claimed that the Appellants are liable to pay LD for achieving SCOD. Till then, BESCOM did not even whisper about the Liquidated Damages when the Appellants raised invoices right from the date of supply of power to the BESCOM.

128. The fact remains, the Respondent Commission rejected the claim of the BESCOM as regards the payment of LDs as the same was not the subject matter of the proceedings pending before the Commission.

Against this rejection, apparently, there is no appeal at the instance of the Respondent BESCOM.

129. It is relevant to refer to Section 171 of the Indian Contract Act, 1872 that only a banker, factor, wharfinger, attorney or a policy maker enjoys a lien over the goods of a counter party. For this proposition, we refer to the following Judgment:

Board of Trustees of the Port of Bombay and Others vs. Sriyanesh Knitter **[(1999) 7 SCC 359].**

> *"**17.**..This section is in two parts. The first part gives statutory right of lien to four categories only, namely, bankers, factors, wharfingers and attorneys of High Court and policy-brokers subject to their contracting out of Section 171.* ***The second part of Section 171 applies to persons other than the aforesaid five categories and to them Section 171 does not give a statutory right of lien. It provides that they will have no right to retain as securities goods bailed to them unless there is an express contract to that effect****. Whereas in respect of the first category of persons mentioned in Section 171 the section itself enables them to retain the goods as security in the absence of a contract to the contrary but in respect of any other person to whom goods are bailed the right of retaining them as securities can be exercised only if there is an express contract to that effect."*

130. One has to see whether money being a species of goods on which lien may be exercised. For this proposition, we refer to the following Judgment:

State Bank of Mysore v. Lakshmi Construction P. Ltd., [1997 SCC OnLine Mad 1003].

"19. The above contents of exhibit P-18 was relied upon by the plaintiff to claim a total lien over the deposits made by defendants Nos. 5 and 6 in their F.C. N.R. accounts for the U.S. dollars and sterling pounds. What has been stated in clear and unambiguous words in the said letter exhibit P-18 is that defendants Nos. 5 and 6 have given an undertaking to the manager of the plaintiff that till the suit loan with all its interest accrued is cleared, they would not withdraw the said deposits prematurely. Except the above meaning it was not at all possible to ascribe any other meaning for that. Section 171 of the Indian Contract Act, provides as follows:

"Bankers, factors, wharfingers, attorneys of a High Court and policy brokers may, in the absence of a contract to the contrary, retain, as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to the effect."

20. This "general lien" as it is realised from the section is culled by way of distinction from the "particular lien" of an artificer for work done by him on the goods in question was the basis for the English law and proved trade usage of relationship between bankers and customers. But it is also made clear that a banker's lien, when it is not excluded by special contract, express or implied, extends to all bills, cheques, and money entrusted or paid to him and all securities deposited with him, in his character as a banker. Thus, the statute does not seem to expressly refer to banker's lien in respect of deposits but, however, money has been held to be a species of goods over which, lien may be exercised. Looking into the provision of law stated above, there appears to be no lien or liability created by defendants.

Nos. 5 and 6 in favour of the plaintiff in the instant case over their money for loan due to the plaintiff…..

131. We also have to see whether Liquidated Damages can be recovered without adjudication by a competent court or authority. For this proposition, we refer to the following Judgment:

State of Karnataka Vs. Rameshwar Rice Mills **[(1987) 2 SCC 160]**

"7. …. On a plain reading of the words it is clear that the right of the second party to assess damages would arise only if the breach of conditions is admitted or if no issue is made of it. If it was the intention of the parties that the officer acting on behalf of the State was also entitled to adjudicate upon a dispute regarding the breach of conditions the wording of clause 12 would have been entirely different. It cannot also be argued that a right to adjudicate upon an issue relating to a breach of conditions of the contract would flow from or is inhered in the right conferred to assess the damages arising from a breach of conditions. The power to assess damages, as pointed out by the Full Bench, is a subsidiary and consequential power and not the primary power. Even assuming for argument's sake that the terms of clause 12 afford scope for being construed as empowering the officer of the State to decide upon the question of breach as well as assess the quantum of damages, we do not think that adjudication by the officer regarding the breach of the contract can be sustained under law because a party to the agreement cannot be an arbiter in his own cause. Interests of justice and equity require that where a party to a contract disputes the committing of any breach of conditions the adjudication should be by an

independent person or body and not by the officer party to the contract. The position will, however, be different where there is no dispute or there is consensus between the contracting parties regarding the breach of conditions. In such a case the officer of the State, even though a party to the contract will be well within his rights in assessing the damages occasioned by the breach in view of the specific terms of clause 12".

132. It is noticed that in these proceedings before the Tribunal, the Respondent Discom has taken a different stand by contending in the Statement of Objections to IA No. 1932 of 2019 that it has already set-off LDs against the invoices raised by the Appellant from March 2017 onwards. They went to the extent of saying that the Appellant assailed the set-off of LDs before the Commission in IA No.1 of 2019 and have later withdrawn the said application. The stand of the Respondent BESCOM seems to be very strange and rather misleading the Bench. We opine so because in the proceedings before the Respondent Commission in IA No.1 of 2019, BESCOM only averred that the Appellants are liable to pay LDs on account of delay in SCOD which was not their stand till petition was directed to be filed by KERC. It is pertinent to note that at no point of time, BESCOM in the proceedings before the Commission said that it has already adjusted LDs against the invoices of the Appellants. They also wrongly placed on record a statement that the issue of LD was raised before the Respondent Commission, but the said proceedings were withdrawn. The stand of the Appellants, which also seems to be correct, is

that from the records, there was no such prayer made by the Appellant found so far as issue of LD, since the Respondent BESCOM never raised any demand by issuing notice for Liquidated Damages as contemplated in terms of Article 13.3.2 of the PPA.

It is relevant to refer to the said Article which reads as under:

"*13.3.2. All payments required to be made under this Agreement shall also include any deduction or set off for:*

a) deductions required by the law; and

b) Amounts claimed by BESCOM, if any, from the Developer, through an invoice to be payable by the Developer, and not disputed by the Developer within fifteen (15) days of receipt of the said invoice, and such deduction or set-off shall be made to the extent of the amounts not disputed. It is clarified that BESCOM shall be entitled to claim any set off or deduction under this Article, after expiry of the said fifteen (15) days period.

*The Developer shall open a bank account at Bengaluru (**the Developer's Designated Account**') for all Tariff Payment s (including Supplementary Bills) to be made by BESCOM to the Developer, and notify BESCOM of the details of such account at least 90 (ninety) days before the dispatch of the first monthly bill."*

133. Reading of the above provision clarifies the position that whenever an invoice is raised and if any amounts are claimed by BESCOM, which is not disputed by the Appellant / generator within 15 days of the receipt of the said invoice, then such deductions or set-off to the extent of the

amount not disputed can be adjusted by BESCOM only after the expiry of the said period of 15 days. Apparently, on what date such amounts were claimed by the BESCOM seeking adjustment from the amount claimed by the generator is not forthcoming. In the absence of such procedure being complied with which was mutually agreed between the parties, we are of the opinion that the Respondent BESCOM was not justified putting forth their defense that they have already adjusted / set-off LDs from the amounts payable to the Appellants towards supply of energy.

134. Therefore, we are of the opinion that in the light of non-compliance of the procedure and further when the Commission specifically rejected such claim of the Respondent BESCOM and in the absence of any challenge by the BESCOM, we fail to understand on what basis the BESCOM could come out with the defense of adjustment of or set-off of LDs from the amounts payable to the Appellants. Therefore, we are of the opinion that as contemplated under the Contract Act, there is no lien which can be exercised by the Respondent BESCOM of the amounts payable to the Appellants especially in the light of specific procedure to be followed as mutually agreed between the parties as stated above.

135. At the time when the Appellants filed the Petition before the Respondent Commission, there was no dispute either pertaining to the force majeure event, non-completion of evacuation infrastructure by

KPTCL or any dispute pertaining to adjustment of Liquidated Damages. As a matter of fact, the Petition came to be filed as directed by BESCOM, since the Respondent Commission directed BESCOM to inform the generators to file such application. Therefore, in the proceedings before the Respondent Commission, the Appellant generators taking any stand pertaining to Liquidated Damages or adjustment or refuting the adjustment of the Liquidated Damages by the Respondent BESCOM would not arise. Therefore, question of seeking intervention of the Commission did not arise. Such claim of the 2nd Respondent BESCOM is a subsequent claim, that too before this Tribunal in these proceedings wherein they categorically stated that they have already adjusted the Liquidated Damages from the amounts payable to the generator. In the absence of following the procedure and in the absence of any decision that Respondent BESCOM was entitled to adjust/set-off for Liquidated Damages, the action of the BESCOM in coming out with such defense is nothing but an illegal recovery of LD amounts especially when the claim of the Respondent BESCOM was rejected before the Commission.

136. The principal relief sought was for extension of SCOD on account of force majeure event i.e., non-completion of evacuation system by KPTCL within the timeframe. The question of recovery of LDs would arise only if the claim of the generators is finally decided that it was not a force

majeure event. Therefore, we are of the opinion that such adjustment / set-off is nothing but an action without authority of law on the part of the BESCOM.

137. Then the question is whether this Tribunal can express its opinion pertaining to Liquidated Damages. We refer to Appeal No. 241 of 2016 Judgment dated 31.05.2019 in the case of ***Adani Power Maharashtra Limited vs. MERC*** wherein this Tribunal opined that it has power to grant a relief which is not earlier prayed for in the interest of justice. The relevant Paragraphs are as under:

> *"**152.** With regard to discretionary powers of Appellate Tribunal for Electricity, there cannot be a doubt that this Tribunal is a Court of first Appeal to consider orders of various State Commissions as well as CERC. Whether this Tribunal has discretionary power to mould relief, if specifically not sought for is one of the arguments addressed before us. It is well settled by various judgments of the Hon'ble Apex Court that if a plea is not specifically made and yet it is covered by an issue by implication and the parties knew that the said plea was involved in the trial, then the mere fact that such plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon if it is satisfactorily proved by evidence. What Court has to consider for such situation is whether the parties knew that the matter in question involved in the trial and they brought to the notice of the trial court about the same? Then it is purely a formality.*

153. *In order to grant relief on equities by keeping justice, equity and good conscience at the back of the mind, the Tribunal can shape the relief consistent with facts and circumstances established in a given cause of action. The Tribunal feels moulding of relief is necessary to meet ends of justice, after taking all facts and circumstances into consideration, can mould the relief by exercising discretionary power.*

154. *Order 41 Rule 25 empowers Appellate Court to frame an issue and remit it for trial which has been omitted to be framed and tried by the Trial Court which appears to the Appellate Court essential to the right decision of the case. For such circumstances, the Court should exercise powers of remand under Order 41 Rule 25 read with Rule 23(A) of CPC.*

155. *If new facts comes into existence after litigation has come to Court and the same has impact on the right to relief or the manner of moulding the relief and if it is diligently brought to the notice of the Tribunal, such fact has to be taken into consideration since equity justifies such action.*

156. *The exercise of Appellate jurisdiction includes not only to correct error in the judgment under challenge but also such disposition of the case as justice requires. Therefore, the Appellate Court is bound to consider any change, either in fact or in law, which has come into existence after the impugned judgment.*

157. *The court of appeal has to take notice of events which have come into existence after the institution of the suit and afford relief to the parties by considering changed circumstances if such changed circumstances would do complete justice between the parties.*

158. *If there is an important question which needs to be determined having reasonably wide ramifications, in such circumstances the parties*

must be allowed to raise such points on a remand made to the trial court, so that both parties may take up all points for fresh hearing and dispose of the matter.

159. *If new plea is raised and the Court is satisfied that such new plea deserves to be considered especially if it was raised in the trial court but not considered, the same has to be taken into account.*

160. *The above principles are narrated from the following judgments:*

(a) Bhagwati Prasad vs. Chandramaul (1966) 2 SCR 286

(b) Hindalco Industries Ltd. vs. Union of India and Ors. (1994) 2 SCC 594

(c) REMCO Industrial Workers House Building Cooperative Society vs. Lakshmeesha M. & Ors. (2003) 11 SCC 666

(d) PasupuletiVenkateswarlu vs. The Motor & General Traders, (1975) 1 SCC 770

(e) Shikharchand Jain vs. Digamber Jain PrabandKarini Sabha and Ors. (1974) 1 SCC 675

(f) Otis Elevator Company (India) Limited vs Commissioner of Central Excise (2016) 16 SCC 461

(g) Jute Corporation of India Limited v. Commissioner of Income Tax & Anr. 1991 Supp. (2) SCC 744."

138. Therefore, we are of the opinion that the prayer which was not initially there in the proceedings before the Respondent Commission as discussed above, can be granted by this Tribunal.

139. We also note that the reduction of tariff to Rs.6.51 from the agreed tariff in terms of PPA is not justified and it is against the very philosophy of the Electricity Act 2003 pertaining to renewable energy so also National

Electricity Policy and Tariff Policy wherein time and again, the Respondent Commission is mandated to provide concessions and other promotional measures to generation of electricity from non-conventional sources. Admittedly, the solar power is an important avenue for promotion of non-conventional source of energy. Therefore, it is the statutory duty and obligation of the Respondent to promote renewable energy generation. Section 61 of the Act also in specific terms and conditions provide that determination of tariff should be guided by promotion of cogeneration and generation of electricity from renewable source of energy. Section 86 (1) (e) specifically mandates that State Commission must promote cogeneration and generation of electricity from renewable source of energy by providing suitable measures for connectivity to the grid and sale of electricity by renewable energy generators.

140. We also have to see whether damages can be awarded without the proof of losses. For this proposition, we refer to the following Judgments:

A. *Kailash Nath Associates v. DDA, (2015) 4 SCC 136*

"44. The Division Bench has gone wrong in principle. As has been pointed out above, there has been no breach of contract by the appellant. Further, we cannot accept the view of the Division Bench that the fact that DDA made a profit from re-auction is irrelevant, as that would fly in the face of the most basic principle on the award of damages—namely, that compensation can only be given for damage or loss suffered. If damage or

loss is not suffered, the law does not provide for a windfall."

B. *Fateh Chand vs. Balkishan Das, AIR 1963 SC 1405*

"16. There is no evidence that any loss was suffered by the plaintiff in consequence of `the default by the defendant, save as to the loss suffered by him by being kept out of possession of the property. There is no evidence that the property had depreciated in value since the date of the contract provided; nor was there evidence that any other special damage had resulted. The contact provided for forfeiture of Rs 25,000 consisting of Rs. 1039 paid as earnest money and Rs 24,000 paid as part of the purchase price. The defendant has conceded that the plaintiff was entitled to forfeit the amount of Rs 1000 which was paid as earnest money. We cannot however agree with the High Court that 13 percent of the price may be regarded as reasonable compensation in relation to the value of the contract as a whole, as that in our opinion is assessed on an arbitrary assumption. The plaintiff failed to prove the loss suffered by him in consequence of the breach of the contract committed by the defendant and we are unable to find any principle on which compensation equal to ten percent of the agreed price could be awarded to the plaintiff. The plaintiff has been allowed Rs 1000 which was the earnest money as part of the damages. Besides he had use of the remaining sum of Rs 24,000, and we can rightly presume that he must have been deriving advantage from that amount throughout this period. In the absence therefore of any proof of damage arising from the breach of the contract, we are of opinion that the amount of Rs 1000 (earnest money) which has been forfeited, and the advantage that the plaintiff must have derived from the possession of the remaining sum of Rs 24,000 during all this period would be sufficient compensation to him. It may be added that the plaintiff has separately

claimed mesne profits for being kept out possession for which he has got a decree and therefore the fact that the plaintiff was out of possession cannot be taken, into account in determining damages for this purpose. The decree passed by the High Court awarding Rs 11,250 as damages to the plaintiff must therefore be set aside."

141. The Respondent Commission has totally ignored the obligation and the mandate it has to be remembered while discharging its duties. The State Commission on some flimsy ground raised by the BESCOM whose conduct is already narrated in the above paragraphs would go to show that the Respondent Commission has totally ignored its obligation while performing its duties and functions. In catena of Judgments, the Hon'ble Supreme Court, time and again has stated that a statutory authority who discharges its functions as quasi-judicial authority must discharge its functions and duties within the defined parameters prescribed by the Act creating such statutory body. The following Judgments are referred to for this proposition:

A. *Manish Goel v. Rohini Goel: (2010)4 SCC 393*

"14.Generally, no court has competence to issue a direction contrary to law nor can the court direct an authority to act in contravention of the statutory provisions. The courts are meant to enforce the rule of law and not to pass the orders or directions which are contrary to what has been injected by law. (Vide State of Punjab v. Renuka Singla [(1994) 1 SCC 175] , State of U.P. v. Harish Chandra [(1996) 9 SCC 309 : 1996 SCC (L&S) 1240 : AIR 1996 SC 2173] , Union of India v. Kirloskar Pneumatic Co. Ltd. [(1996) 4

SCC 453 : AIR 1996 SC 3285] , University of Allahabad v. Dr. Anand Prakash Mishra [(1997) 10 SCC 264 : 1997 SCC (L&S) 1265] and Karnataka SRTC v. Ashrafulla Khan [(2002) 2 SCC 560 : AIR 2002 SC 629] .)"

B. *N.C. Dhoundial v. UOI &Ors.: (2004)2 SCC 579*

"14. We cannot endorse the view of the Commission. The Commission which is a "unique expert body" is, no doubt, entrusted with a very important function of protecting human rights, but, it is needless to point out that the Commission has no unlimited jurisdiction nor does it exercise plenary powers in derogation of the statutory limitations. The Commission, which is the creature of statute, is bound by its provisions. Its duties and functions are defined and circumscribed by the Act. Of course, as any other statutory functionary, it undoubtedly has incidental or ancillary powers to effectively exercise its jurisdiction in respect of the powers confided to it but the Commission should necessarily act within the parameters prescribed by the Act creating it and the confines of jurisdiction vested in it by the Act. The Commission is one of the fora which can redress the grievances arising out of the violations of human rights. Even if it is not in a position to take up the enquiry and to afford redressal on account of certain statutory fetters or handicaps, the aggrieved persons are not without other remedies. The assumption underlying the observation in the concluding passage extracted above proceeds on an incorrect premise that the person wronged by violation of human rights would be left without remedy if the Commission does not take up the matter."

C. *State of Punjab &Ors. v. Renuka Singla& Ors.: (1994)1 SCC 175*

"8. The admission in medical course throughout India is governed by

different statutory provisions, including regulations framed under different Acts. During last several years efforts have been made to regulate the admissions to the different medical institutions, in order to achieve academic excellence. But, at the same time, a counter-attempt is also apparent and discernible, by which the candidates, who are not able to get admissions against the seats fixed by different statutory authorities, file writ applications and interim or final directions are given to admit such petitioners. We fail to appreciate as to how the High Court or this Court can be generous or liberal in issuing such directions which in substance amount to directing the authorities concerned to violate their own statutory rules and regulations, in respect of admissions of students. It cannot be disputed that technical education, including medical education, requires infrastructure to cope with the requirement of giving proper education to the students, who are admitted. Taking into consideration the infrastructure, equipment, staff, the limit of the number of admissions is fixed either by the Medical Council of India or Dental Council of India. The High Court cannot disturb that balance between the capacity of the institution and number of admissions, on "compassionate ground". The High Court should be conscious of the fact that in this process they are affecting the education of the students who have already been admitted, against the fixed seats, after a very tough competitive examination. According to us, there does not appear to be any justification on the part of the High Court, in the present case, to direct admission of respondent 1 on "compassionate ground" and to issue a fiat to create an additional seat which amounts to a direction to violate Section 10-A and Section 10-B(3) of the Dentists Act referred to above."

142. We are of the opinion that the impugned order rather undermines the mandate of the Act, National Policy and the very purpose of the scheme. If such action of the Commission is permitted to continue, it would definitely affect the promotion of renewable generation and the applicable law governing renewable generation would become redundant.

143. In fact, generation of power from renewable energy sources need to be promoted under Section 86 (1) (e) of the Act. For this proposition we refer to the following Judgments;

Rithwik Energy vs. Transmission Corporation of Andhra Pradesh [2008 (ELR) (APTEL) 237]

> *"34. A distinction, however, must be drawn in respect of a case, where the contract is re-opened for the purposes of encouraging and promoting renewable sources of energy projects pursuant to the mandate of Section 86(1)(e) of the Act, which requires the State Commission to promote cogeneration and generation of electricity from renewable sources of energy.*
>
> *35. The preamble of the Act also recognizes the importance of promotion of efficient and environmentally benign policies. It is not in dispute that non-conventional sources of energy are environmentally benign and do not cause environmental degradation. Even the tariff regulations under Section 61 are to be framed in such a manner that generation of electricity from renewable sources of energy receives a boost. Para 5.12 of the National Electricity Policy pertaining to non-conventional sources of energy provides that adequate promotional measures will have to be taken for development of technologies and a sustained growth of the*

sources. Therefore, it is the bounden duty of the Commission to incentivize the generation of energy through renewable sources of energy. PPAs can be re-opened only for the purpose of giving thrust to non-conventional energy projects and not for curtailing the incentives. The Commission, therefore, was not right in approving the principle of 30 minutes time block for measuring energy as that was not permitted under original Clause 1.4 of the PPA and other relevant Clauses. The action of the APERC does not promote generation through non-renewable sources of energy but affects the same adversely. In case the practice of reopening of PPAs continues for curtailing the incentives or altering the conditions to the detriment of the developers of the plants based on non-conventional sources of energy, it will kill the initiative of the developers to set up such plants. The policy to incentivize generation of electricity through renewal sources of energy will be defeated."

144. Time and again it is well settled that the State has a duty to take such measures, which shall promote generation and viability of renewable energy generators. For this proposition, we refer to the following Judgment:

Hindustan Zinc Ltd. v. Rajasthan Electricity Regulatory Commission, (2015) 12 SCC 611

"It has been rightly contended by the learned Senior Counsel for the respondents that Para 4.2.2 of the National Action Plan on Climate Change and the Preamble to the 2003 Act emphasise upon promotion of efficient and environmentally benign policies to encourage generation and consumption of green energy to subserve the mandate of Article 21 read with Article 48-A of the directive principles of State policy and Article 51-

A(g) of the fundamental duties enlisted under Chapter IV-A of the Constitution of India."

145. It is seen that Respondent Commission has totally ignored the fact that in terms of PPA Respondent BESCOM is authorised to extend SCOD for about six months. In fact, BESCOM extends SCOD by three months. Therefore, SCOD will be 17.09.2016. After this date, according to Appellants BESCOM accepting the reasons for the delay caused to Commission the plant was the delay on the part of the KPTCL to complete the evacuation system addressed a letter. However, this was denied by BESCOM. Letter dated 24.07.2017 addressed to State Commission, according to Appellants, refer to the delay caused by KPTCL in completing the transmission line.

146. Contents of Letter dated 24.07.2017 is perused. Last paragraph do state that delay in commissioning the plant was because of force majeure.

147. The fact remains that whether the acceptance of Force Majeure event being the cause of delay on the part of the BESCOM alone is relevant. Definitely, it cannot be. As stated above, BESCOM has taken different stand at different point of time. We have to see whether the Appellants were responsible for the delay in question. At no point of time,

prior to SCOD, Respondents did not attribute anything against the Appellants, not even in the letter of 24.07.2017. In fact, alternative line was requested way back on 19.08.2016 before 17.09.2016 The alternative line was given because some other plant could not inject 100% power generated by them. Such availability of alternative line because of non-utilisation of complete capacity was brought to the notice of KPTCL by Appellants themselves. It is nobody's case that KPTCL proposed earlier for any alternate evacuation of power. In fact, as stated above, BESCOM changes its stand. Last line as reported by concerned engineer in the letter dated 24.07.2017 refers to the cause being 'force majeure event'. The facts and circumstances clearly indicate, within the time allowed for SCOD, the transmission/evacuation of energy infrastructure was not ready. The Appellants have informed **Escoms**/Discoms persistently that evacuation of power was not possible for want of infrastructure being kept ready by KPTCL.

148. In light of the above discussion and reasoning, we are of the opinion that the impugned order warrants interference. Accordingly, we allow the Appeal by setting aside the impugned order dated 26.09.2019. We issue the following directions:

(i) The 1st Appellant is entitled at Rs. 6.86 per unit of energy, the 2nd Appellant is entitled at Rs.6.89 per unit of energy and the

3rd Appellant is entitled at Rs. 6.97 per unit of energy as energy charge in terms of the PPA.

(ii) Respondent No. 2 is directed to refund the amounts withheld by them on the pretext of adjusting the same towards Liquidated Damages.

(iii) The Appellants are entitled for carrying cost on the amounts delayed and so also on the amounts withheld.

149. In view of the disposal of the appeals, lAs pending if any, are disposed of accordingly. No order as to costs.

150. Pronounced in the Virtual Court on this the 14th day of July, 2021.

Ravindra Kumar Verma
[Technical Member]

Justice Manjula Chellur
[Chairperson]

Dated: 14th July, 2021

REPORTABLE/~~NON-REPORTABALE~~

Ts/tpd