THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 374 OF 2019 &
IA NO. 1938 OF 2019 and IA NOS. 391 & 675 OF 2020

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

2 SEI Venus 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&7thFloor, Mahalakshmi Chambers,
Mahatma Gandhi Road,
Bengaluru, Karnataka – 560001

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

3. Hubli Electricity Supply Company Limited,
Through its Managing Director,

P.B. Road, Navanagar,
Hubballi-580025

4. Karnataka Power Transmission Corporation Limited,
Through its Managing Director
Cauvery Bhavan,
K.G. Road,
Bengaluru – 560009 **... Respondents**

Counsel for the Appellant(s)	:	Mr. Sajan Pooovayya Sr. Adv.
	:	Mr. Shri Venkatesh
	:	Ms. Nishtha Kumar
	:	Mr. Somesh Srivastava
	:	Mr. Vikas Maini
	:	Mr. SuhaelButtan
	:	Mr. Krishnesh Bapat
	:	Ms. Rivanta Solanki
	:	Ms. LasyaPamidi for Appellant-1 & 2
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
	:	Ms. Pallavi Sengupta for R-2 & 4

ORDER

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

This Appeal is preferred by the Appellants – M/s SEI Diamond Private Limited and SEI Venus Pvt. Ltd**.** (hereinafter referred to as **"Appellants"**) challenging the legality, validity and propriety of the order dated 26.09.2019 in O.P. No. 213 of 2017 passed by Karnataka Electricity

Regulatory Commission (hereinafter referred to as **"KERC/Commission/Respondent No.1"**), whereby the Respondent Commission erroneously held that the non-availability of the evacuation system of the Karnataka Power Transmission Corporation Limited-Respondent No.4 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. 6.92 per unit to Rs. 6.83/- per unit for the energy supplied under the PPA from the date of commissioning of the Project.

2. Facts which led to filing of Appeal in brief are as under:

Appellants are Solar Power Developers having generating capacity of 30 MW each. Appellants have established their Solar Projects in Nelagettanahatty Village, Challakere Taluk, Chitradurga District, Karanataka. 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-Hubli Electricity Supply Company Limited ("**HESCOM/Respondent No.3**") is also one of the distribution licensees operating in the State of Karnataka and is a Government of Karnataka undertaking. Respondent No.4-Karnataka Power Transmission Company

Limited ("**KPTCL/ Respondent No. 4"**) is the Intra State Transmission Licensee in the State of Karnataka.

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. SunEdison Energy Holding (Singapore) Pvt. Ltd., the KREDL on 19.11.2014 accepted five different bids of SunEdison 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. SunEdison Energy Holding (Singapore) Pvt. Ltd for five Solar PV Power Projects of 30 MW each. Subsequently, in terms of RfP, M/s SunEdison 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. SunEdison 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 Nos.2 & 3 – BESCOM & HESCOM executed a 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. 6.92 and Rs. 6.83 per unit, respectively. Scheduled Commissioning Date was 17.06.2016, 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. 4 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 kV DC line from the 400 kV PGCIL Hiriyur sub-station to the 220 kV Thallakku sub-station. However, it did not specify the time within

which the said proposed 220 kV DC line from the 400 kV PGCIL Hiriyur sub-station to the 220 kV Thallakku sub-station would be ready. Thereafter, Respondent No. 4-KPTCL vide its letter dated 10.06.2015, accorded regular evacuation approval to the Appellants, and Respondent No. 4 agreed to develop 220 kVDC line from the 400 kV PGCIL Hiriyur sub-station to the 220 kV Thallakku sub-station. The evacuation approval was conditional inasmuch as 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 sub-station. However, in the said proposal it was provided that the said proposal will remain valid upto 17.06.2016 only i.e., the date of SCOD.

7. Apparently, the Appellants were given a common evacuation approval by Respondent No. 4 from 220kV DC line from the 400 kV PGCIL Hiriyur sub-station to the 220 kV Thallakku sub-station (for short "transmission line") to facilitate interconnectivity of the Appellants' Project. However, Respondent No.4's substation and the associated transmission lines were imminently delayed due to various reasons like Right of Way ("**RoW"**) issues at different locations which were allegedly beyond the reasonable control of Respondent No. 4 also. Therefore, on 02.03.2016 and 02.05.2016, Respondent Nos. 2& 3 vide their letters extended the

SCOD of the Appellants' projects from 17.06.2016 to 16.09.2016 and 17.09.2016 respectively.

8. On 08.03.2016, vide its letter Respondent No.4 informed that the Appellant No.1's Project was withdrawn from the comprehensive evacuation scheme under its letter dated 10.06.2015 and a fresh tentative evacuation scheme was approved by Respondent No.4 for them, which was also conditional like the earlier one.

9. From 17.09.2016 to 09.02.2017, various letters were sent by the Appellants to Respondent Nos.2 & 3 apprising that the work of construction of the power plants is almost completed and they are ready to interconnect their solar power projects to the grid. It was informed that due to the delay in completion of power evacuation related works of Respondent No.4-KPTCL, commissioning of their projects would be delayed. Therefore, in terms of Article 14.3.1(e) of PPA, the Appellants sought for extension of SCOD on the ground of force majeure events.

10. On 10.01.2017, Respondent No.4 vide its letter issued regular evacuation approval to the Appellants, which again is a conditional approval. Respondent No.4 in response to the letters issued by Appellant on 27.12.2016 and 19.01.2017 informed the Appellants that the works

relating to transmission line would likely to be completed by 31.03.2017. 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.

11. After repeated requests by the Appellants, vide letter dated 24.03.2017 Respondent No. 4 granted alternative evacuation facility and further granted provisional interconnection approval vide its letter dated 28.03.2017. On that day, the Appellants commissioned the power projects.

12. Admittedly, from the date of achieving COD i.e., from April 2017 the Appellants raised invoices against Respondent No.2 for the energy supplied from 28.03.2017 in terms of PPA. Respondent Nos. 2 & 3 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 Nos. 2 & 3 to modify the PPA, *inter-alia*, to reflect the revised SCOD as 28.03.2017. 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 & 3.

13. Appellants *vide* various letters from April 2017 to November 2018 requested Respondent Nos.2 & 3 to make payments towards supply of energy for the aforesaid months. On 24.07.2017 and 01.08.2017, Respondent Nos.2 & 3 sent letters to the Respondent Commission requesting for approval of extension of SCOD on the ground of force majeure, since the delay was solely attributable to Respondent No. 4 in completing the power evacuation works.

14. Respondent Nos.2 & 3 directed the Appellants to file a Petition before the Respondent Commission for approval of SCOD as 28.03.2017 vide its letter dated 11.09.2017. Accordingly, on 03.11.2017, the Appellants filed a Petition being O.P. No. 213 of 2017 before the State Commission seeking approval of SCOD as 28.03.2017.

15. Thereafter, it is submitted that in spite of repeated requests by the Appellants, Respondent Nos.2 & 3 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 Nos.2 & 3 filed its Statement of Objections, wherein the Respondent Nos.2 & 3 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 28.03.2017 on account of delay in transmission works by Respondent No.4, treating the same as Force Majeure. However, Respondent Nos.2 & 3 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 Appellant, 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, Appellant No.1, on 16.01.2019, had 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 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 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 the 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 No.4 filed its Statement of Objections and additional objections stating that Appellants' Power Projects were not ready for commissioning before the stipulated time. 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. 4, on or after the SCOD, cannot be treated as a *Force Majeure* event, therefore, the SCOD cannot be extended up to 28.03.2017. That apart, the Respondent Commission while passing the Impugned Order has reduced the tariff applicable from Rs. 6.92 and Rs. 6.83 per unit to Rs. 6.51/- per unit 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 instant 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 and 213/2017 before the Karnataka Electricity Regulatory Commission.

(c) Declare that the claims of Respondents 2 & 3 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.

(d) Declare that the Appellants are entitled to extension of SCOD to 28.3.2017 without levy any penalty / LD's;

(e) Declare that the actions of Respondents 2 and 3 in withholding the legitimate dues of the Appellants are arbitrary and illegal and therefore the Respondents 2 & 3 be directed to pay the amount of Rs. 106,57,25,399/- forthwith to the Appellants;

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

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

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

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 in the instant appeal, Respondents submit as under:

24. 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. Initially, the Appellants intended to evacuate power from P.D.Kote. Thereafter, the Appellants sought to evacuate power from Thallak Substation. The said change sought by the Appellants was granted. Therefore, location of plant was the choice of the Appellants. 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 to 220Kv DC line from 400kV PGCIL Hiryur Substation to 220kV Thallaku substation 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 10.01.2017 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 16.03.2017. There is no explanation as to why the Appellants accepted conditions in evacuation scheme and also reason for not seeking alternative evacuation approval, when 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. In the light of these undisputed facts, the conclusions arrived at by the State Commission do not require inference.

27. Respondent No.2 further states that non-availability of evacuation system of Respondent No.4 on or after SCOD be treated as a force

majeure event, which is incorrect. Respondents submit that the 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 evacuation was 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.4, 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 stated 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. In the

circumstances, the contention of the Appellant 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 decision of this Tribunal dated 21.03.2018 in Appeal No.176 of 2015 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. With regard to another ground of challenge by the Appellants that the Appellants cannot be penalised for fault on the part of Respondent No.4. Respondent No.4 in the objections before the State Commission has specifically stated that the approvals granted by it were conditional and the said conditions were

accepted by the Appellants. There was no specific commitment with regard to date of completion of 220Kv DC line from 400kV PGCIL Hiryur Substation to 220kV Thallaku substation by the Respondent No.4. 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, therefore, in the circumstances, the contentions raised in support of this ground are entirely misconceived, untenable and deserve rejection.

30. Request of 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 Appellant has accepted the same and submitted itself to the jurisdiction of the State Commission by filing an Original Petition in O.P.No. 213 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. Therefore, after having submitted itself to the jurisdiction of the

State Commission and after having sought to invoke dispute resolution mechanism contemplated under the Electricity Act, 2003, the question of urging such ground does not arise.

31. With regard to the ground raised by the Appellants that BESCOM is stopped by the doctrine of promissory estoppel, it is pointed 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. 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. In the circumstances, according to Respondent No.2 the contentions and legal

proposition in this regard have no application to the facts of present case.

32. So far as the ground raised by the Appellants that the evacuation approval dated 10.06.2015 granted by Respondent No.4 was co-terminous with commercial operation date is concerned, it is stated that a contention was raised by the Appellants that Respondent No.4 was obliged to complete the transmission line within SCOD i.e. 17.06.2016 as the Respondent No.4 was aware of the SCOD. However, 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 transmission line and the fact that subsequently the Appellants sought alternate evacuation, would indicate that contentions being raised are baseless and untenable. A perusal of the general terms and conditions of evacuation approval dated 08.03.2016 indicates that the facility will be ready after completion of evacuation line work and the Appellants have to approach transmission utility seeking synchronization of generating project with the grid along with statutory clearance

and compliances. In the circumstances, it is stated that the contentions to the contrary are wholly untenable and deserves to be rejected.

33. It is further stated that 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. Respondent No.2 and 4 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. Therefore, the grounds urged on such erroneous assumptions deserve to be rejected.

34. 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 sole intention of causing prejudice against the Respondents. 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. Respondents further 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. Therefore, all contentions on levy of liquidated damages are liable to be discarded.

36. Respondents further submit 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 2015) 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. 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. Respondents submit that the 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.

38. **The Appellants have filed rejoinder, the gist of which, in brief, is as under:**

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. 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 by volition of parties 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 said extension. 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 perverse.

39. 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.

40. According to Respondent No.2, non-Availability of the evacuation line by Respondent No.4 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.

41. 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 Respondents but the said contention is incorrect.

42. 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.4-KPTCL.

43. The State Commission gave a finding that the liquidated damages cannot be recovered in the present proceedings by Respondent Nos.2 & 3. No appeal is filed by Respondent Nos.2 & 3 against such finding. The imposition of LDs is an afterthought inasmuch as the Respondent No.2 if intended to impose LDs on the delay, then it ought to have first called upon the Performance Security furnished by the Appellant No.1 under the PPA. Hence, this illegal action of Respondent No.2 is contrary to the PPA

as well as the Order of the Respondent Commission, which has not been assailed till date by Respondent No.2.

44. It is pointed out that LDs cannot be recovered unless there is an adjudication by a competent court or authority. Respondent Nos.2 & 3 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.***

45. It is further submitted that the Respondents have no lien over monies payable to the Appellant No.1. It is submitted that Respondent No. 2 has no right to withhold the amount payable to Appellant No.1 towards the monthly energy invoices raised by Appellant No.1. The act of withholding the monthly energy bills by Respondent No. 2 is in teeth of provisions of Section 171 of the Indian Contract Act, 1872.

46. With these submissions, the Appellants seeks for allowing of the appeal as prayed for.

47. Appellants have filed written submissions and the gist 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 Nos.2 & 3/BESCOM & HESCOM to be Non-est for the following reasons:

i) On 18.12.2014, Appellants entered into PPA with Respondent No.2-BESCOM and Respondent No.3-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 Appellant No.1 *vide* its letter 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. Similarly, Respondent No.3-HESCOM also granted extension of SCOD to Appellant No. 2 up to 17.09.2016. Therefore, the Revised SCOD as agreed by BESCOM & HESCOM 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 & HESCOM 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*.

iv) According to the Appellants the said finding of the Respondent-Commission is erroneous due to the following reasons:

The extension granted by BESCOM & HESCOM *vide* its letters dated 02.03.2016 and 02.05.2016, respectively, was never questioned by BESCOM & HESCOM. Further, the PPA which grants power/authority to BESCOM & HESCOM 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 Nos.2 & 3-BESCOM & HESCOM 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, 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.

48. Appellant further contends that the delay on the part of Respondent No.4-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 September 2016 for interconnecting to the grid, they could be commissioned on account of force majeure events, which had constrained the Appellants to approach 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 and the same is contrary to the settled legal position.

49. Appellant No.1

i) Appellant No.1 submits that initially KPTCL has granted tentative evacuation approval vide its letter dated 28.05.2015 and regular

evacuation approval was issued by KPTCL vide its letter dated 10.01.2017. In both the approvals it is the condition that "t***he evacuation of 30 MW Solar Power from your project is feasible only after commissioning of 220 kV DC line from 400 kV PGCIL Hiriyur substation to 220 kV Thallaku substation by KPTCL***." However, KPTCL had not given any firm date of completion of aforesaid substation. Appellant by letter dated 19.02.2017 informed BESCOM that Appellant No.1 would be able to commission its project and achieve SCOD only after completion of power evacuation works by KPTCL. On 14.03.2017, Appellant No.1 issued a letter to KPTCL pointing out that M/s Sagittarius had been accorded 200 MW Evacuation approval out of which only 80 MW was being used therefore, the balance capacity ought to be granted to the Appellants. Thereafter, since the transmission lines related works were incomplete, KPTCL vide its letter dated 24.03.2017 accepted the request of the Appellant for alternate evacuation by permitting the Appellants to evacuate power without commissioning of 220 kV DC Line 400KV PGCIL Hiriyur substation to 220 kV *Thallaku substation* by KPTCL. Therefore, the solar power plant of Appellant No.1 could commission only on 28.03.2017.

ii) Further, vide its letter dated 24.07.2017, BESCOM gave a detailed account of the delays occurred in the works of KPTCL to complete said transmission lines, to the Respondent Commission stating that transmission works of KPTCL likely to be completed by August 2017 and also recorded that Appellant No. 1 was ready as early as September 2016 and also put forth the request of the Appellant No. 1 to extend SCOD without any penalty as the delay was entirely due to Force Majeure events. Accordingly, BESCOM recommended Respondent Commission to approve the extension of SCOD up to 28.03.2017 on account of Force Majeure conditions. In view of the above, on 03.11.2017, the Appellants had filed the Original Petition being O.P. No. 213 of 2017 before the Respondent Commission.

50. Appellant No.2

iii) Pursuant to the application of Appellant No. 2 seeking for grant of evacuation approval in November, 2015, KPTCL, vide its letter dated 08.03.2016 approved the tentative evacuation scheme for 30 MW Solar Power Plant of the Appellants near

*Neelagettanahatt*y village, *NayakanahattyHobli*, *Challakere* Taluk , *Chitradurga* District with the condition that same would only be feasible after commissioning of 220 kV DC line from 400kV PGCIL Hiriyur substation to 220 kV *Thallakusubstation* by KPTCL. Vide its letters dated 17.09.2016 to 17.10.2016 Appellant No.2 apprised HESCOM that the construction work of their Projects were almost completed and ready to interconnect the Solar Power Project to the grid. KPTCL, *vide* its letter dated 10.01.2017 issued regular evacuation approval with the same condition mentioned above. Thereafter, in its letter dated 19.01.2017, KPTCL has accepted that the works relating to transmission line are incomplete and would likely to complete by 31.03.2017. However, alternative evacuation was provided to Appellant No.2 with Appellant No.1 from the same line without commissioning of the 220 kV DC Transmission Line from 400 KV PGCIL Hiriyur substation to 220 KV Thallaku Substation by KPTCL on 28.03.2017. Accordingly, the solar power plant of Appellant No.2 could commission only on 28.03.2017.

iv) Vide its letter dated 01.08.2017 issued to the Respondent Commission, HESCOM acknowledged that, earlier, Appellant

No.2 was granted extension of SCOD upto 16.09.2016 by it on the ground of Force Majeure. Further, in the said letter HESCOM admitted that Appellant No. 2 had complied with the condition precedents as provided in Article 4.2 of the PPA and was ready in all aspects to commission its power plant. In the said letter, HESCOM also gave a detailed accounts of the delays occurred in the works of KPTCL and sought approval of the SCOD in so far as Appellant No.2 is concerned on account of Force majeure.

v) BESCOM and HESCOM vide their letters dated 11.09.2017 and 28.09.2017 directed the Appellants to file a Petition before the Respondent Commission in light of Respondent Commission's letter dated 16.08.2017. The Appellants had filed the Original Petition being O.P. No. 213 of 2017 before the Respondent Commission. However, the Respondent Commission 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 were 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.4-KPTCL in laying down the 220 kV DC Transmission Line from 400 KV PGCIL Hiriyur substation to 220 KV *Thallaku Substation* 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 rejected the plea of force majeure opining that the tentative evacuation approval being granted on 08.03.2016 and whereas the regular evacuation approval being granted on 10.01.2017 i.e. after the lapse of SCOD, therefore a prudent developer ought to have sought an assurance from KPTCL after submitting its evacuation application, hence, 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.

KPTCL, a state instrumentality in its actions if 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 contend that the said definition is entirely in relation to development of a 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.4-KPTCL has delayed creation of evacuation infrastructure, therefore, the Appellants cannot be held “imprudent” for the delay caused by KPTCL.

viii) The Respondent Commission by the Impugned Order has rendered the entire PPA redundant. 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.

ix) 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 September, 2016, since through various letters, the Appellants informed Respondents-BESCOM & HESCOM about the readiness of their project and the Respondents at no point of time refuted the same. 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. 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.

x) 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, relevant 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. It is established that the delay in commissioning of solar power projects i.e. from 17.09.2016 to 28.03.2017 was solely due to 'Force Majeure' conditions as defined in the PPA.

xi) 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 several case laws.

51. Relying on the decision of this Tribunal in the case of Chamundeshwari, learned counsel contends that the KPTCL's failure to keep the transmission line ready amounts to force majeure event, but 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.

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 Respondents-BESCOM & HESCOM, learned counsel submits that in OP No. 213 of 2017 filed before the Respondent Commission seeking extension of SCOD, Respondents-BESCOM & HESCOM on 10.04.2018 and 30.10.2018 filed Statement of Objections, wherein they clearly admitted that BESCOM had addressed a letter to Respondent Commission and requested for approval for extension of SCOD upto 28.03.2017 on force majeure conditions, and further HESCOM had written a letter to Respondent Commission on 01.08.2017 for approval of the revised SCOD on account of Force Majeure event. 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. Having accepted the fact that there was a force majeure condition, which resulted in delay, at a belated stage it had taken a belligerent view 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. It is settled legal position that when a party has admitted a particular fact scenario, it is bound by those statements and an adjudicating body such as the Respondent Commission ought to have taken note of admissions to determine a dispute between the parties. 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. 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.

55. Therefore, 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.

56. It is submitted that the Impugned Order at para 23 holds that LD's cannot be recovered in the present proceedings by BESCOM & HESCOM. 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, HESCOM, KPTCL and BESCOM raised the issue that the Appellants are liable to pay LDs for delay in achieving SCOD, but at no point, the HESCOM & BESCOM have ever stated that it has adjusted/ set off LDs against the invoices of the Appellants. Till date, the Respondents have not filed an Appeal against the said finding of the Respondent Commission

57. However, in the proceedings before this Tribunal, for the first time, BESCOM has tried to paint a completely new picture by contending that in the Statement of Objection it stated that it has been setting off LDs against the invoices of the Appellants since March, 2017. 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. Admittedly, no such prayer was made by the Appellants as no such letter/ demand was ever issued by BESCOM.

58. 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 but this procedure has not been adhered to by BESCOM.

59. Reiterating the contention in the rejoinder that the Respondents have no lien over monies payable to it, the Appellants further submits as under:

Even the PPA executed between the Appellants and BESCOM/HESCOM do not in any manner permit BESCOM/HESCOM to enjoy any lien over the monies payable to Appellants, and if at all, the money can only be set off as per the procedure provided under the PPA i.e. Article 13.3.2.

60. BESCOM and HESCOM *vide* its letter dated 24.07.2017 and 01.08.2017 respectively had agreed and accepted that the delay on the part of the Appellants in commissioning of the Project is due to *Force Majeure* events. However, in the instant case, BESCOM/HESCOM have failed to show that they have suffered any loss owing to purported delay caused by the Appellants. Therefore, it is submitted that LDs illegally

recovered by BESCOM/HESCOM ought to be reimbursed to the Appellants with applicable interest/ carrying cost.

61. Further, 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. 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. For this, reliance is placed on *Adani Power Maharashtra Limited vs. MERC* wherein this Tribunal categorically has held that the Tribunal has the power to grant a relief which is not earlier prayed for, in the interest of justice.

62. On the pretext of delay in achieving the SCOD on the part of the Appellants for its Solar Power Projects, tariff was reduced to Rs.6.51/- per unit. But this reasoning of the Respondent Commission 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. The relevant provisions of the Electricity Act 2003, National Electricity Policy and the Tariff Policy established the fact that promotion of RE Generation is the Statutory Duty and Obligation of the Respondent Commission.

(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. Further, clause 5.12.1, 5.12.2 & 5.12.3 of the National Electricity Policy clearly indicates that the emphasis on the intention behind Section 86(1)(e) is to promote generation and co-generation from non-conventional and renewable sources of energy. Clause 6.4 of the Tariff Policy mandates the State Commission to fix a purchase obligation for procurement of energy from non-conventional sources thereby promoting generation and procurement of non-conventional sources of energy. Further, this Tribunal in catena of Judgments has time and again held that generation of power from renewable energy sources need to be promoted under Section 86(1)(e) of the Act.

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. Therefore, when such is the intent of the legislature, Respondent Commission cannot reduce the tariff, for the reasons not attributable to the Appellants. The said finding of the Respondent Commission in fact resulting in reading down Section 86

(1) (e) of the Act and such power is not vested with the State Commission as it is a creature of the very same statute. Further, 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.

(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.

With these submissions, Appellants seek for allowing the appeal by setting aside the impugned Order passed by the Respondent Commission.

63. 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 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 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 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. Therefore, it is clear that the said document can, by no stretch of imagination, be construed as any admission by BESCOM. Therefore, this argument deserves to be rejected and consequently the entire argument with regard to force majeure which is mainly based on the so-called admission of BESCOM also fails.

64. With regard to the contention of the Appellants that delay in commissioning of the 220/66kv proposed sub-station 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.

65. 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. It is significant to mention that the identification of the sub-station was based on the specific request to provide approval for evacuation from the very same location, as per letter dated 6.3.2015. Thereafter, both tentative and regular evacuation

approvals were granted subject to commissioning of the 220 KV sub-station. Since the Appellants were specifically seeking evacuation approval through the specified proposed sub-station, conditional approval has been granted. 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.

66. 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. In fact, even though the sub-station was actually commissioned on 30.11.2018, the projects of the Appellants were commissioned prior to the same. Therefore, the Appellants are not permitted to contend that the station not being ready left them in a situation of force majeure and no alternative was available.

67. 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.

68. 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, 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. Having regard to the same, by no stretch of imagination it would be possible to contend or construe that delay in execution of the sub-station by KPTCL would amount to a force majeure event.

69. 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. A perusal of the said Article indicates that when non-performance is connected to negligent or intentional act, error or omission of the party, such a party cannot claim force majeure. Further, a party affected by force majeure event has to take steps to prevent the force majeure event. In this regard, Article 14.6 clearly cast an obligation on the Appellant to make reasonable efforts to mitigate the effect of force majeure as soon as practicable. No such effort has been made by the Appellants. Therefore, the question of invoking Article 5 of the PPA would not arise. Apart from this, the factual matrix would show that the inspection by CEIG was done only on 28.3.2017, pursuant to which synchronization has taken place. The correspondence till then indicates that the project was almost ready. However, the project being almost ready was a ruse to contend that the project was ready in all respects within the stipulated date. Therefore,

the question of the Appellants being entitled to the extended time frame without tariff implication would not arise.

70. 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. 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. Therefore, the submissions with regard to violation of KPTCL's obligation have no relevance.

71. 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.

72. Learned counsel further contends that a perusal of Annexures would clearly indicate that the projects in question were almost ready. However, 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. Therefore, it is clear that the project was not ready on time. Hence the contention that the project was in fact ready before the Scheduled Commercial Operation Date but the delay was only on account of non-commissioning of the line is not tenable.

73. Article 5.8 deals with the aspect of liquidated damages. According to the Respondents, the procedure being stated, as required to be followed in the submissions of the Appellants, is not found in Article 5.8. 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. In answering the said question, the State Commission has concluded that the

issue cannot be gone into in the present proceedings. This is in the context of the direction sought. At any rate, 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.

74. 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 of 2015. On this aspect, it is submitted that no reliance can be placed on the said decision for two reasons. Firstly, the said judgement is subject matter of appeal in C.A.No 6888/2018, which is presently pending adjudication. Therefore, the order has not attained finality. Secondly, a judgement is a precedent for only what it decides and it cannot be applied as a precedent without reference to the factual background in which the decision has been rendered. 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 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.

75. 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. The Appellants contended that the said decision is in applicable in the facts of the present case. In this regard, 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.

76. 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. The contention of the Appellants that the State Commission has wrongly placed reliance on the decision in the case of Sasan Power is untenable. 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.

77. 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, and 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. The Hon’ble Supreme Court was pleased to examine the increase in cost of coal from Indonesia and held that merely because the contract has become onerous to perform, it cannot be construed to be a force majeure event especially when alternative modes of performance of contract was available. 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.

78. 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.

79. Learned counsel for Respondent Nos.2 to 4 has filed additional written submissions on 14.10.2020 alleging that since certain new contentions which had not been urged 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.

80. As regards the letters dated 14.03.2017 and 24.03.2017, which have been produced as Annexures by the Appellants, learned counsel submits that vide letter dated 14.03.2017, the Appellants requested KPTCL to provide alternative means of evacuation in view of non commissioning of 220 Kv DC Line from 400 Kv PGCIL Hiriyur Substation to 220kV Tahallaku substation and by letter dated 24.03.2017 KPTCL has allowed the Appellants to evacuate power without commissioning of the said line. 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. It is a fact that when alternate evacuation approval was sought, such approval was provided. Therefore, the delay in obtaining the alternate evacuation approval by the Appellants is the mistake on the part of the Appellants. 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 04.03.2017. The scheduled commissioning date was 17.6.2016. Therefore, it is evident that the work of the project was not even complete within the scheduled commissioning date.

81. 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]*

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.

82. So far as the new allegations made with regard to the conduct of BESCOM and HESCOM are 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

and HESCOM 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. 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 and HESCOM 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

83. 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.

84. 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.

85. 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.

86. 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.

87. **Learned counsel for the Appellant has filed short note of submissions, which is as under:**

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 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) Colly, i.e. letter dated 14.03.2017 has been introduced for the first time.	Letter dated 14.03.2017 issued by the Appellant No.1 was the part of the records before the Respondent Commission, however, the same was inadvertently missed while filing the present Appeal. In so far as letter dated 24.03.2017 is concerned, the same was part of the Appeal**.** However, inadvertently an incomplete copy of the said letter was filed at the time of filing of the Appeal. Accordingly, the complete copy of the said letter has been filed along with the WS.
2.	Contention at e(ii) qua CEIG approval has been	The contention qua CEIG approval had already been

	raised for the first time through the written synopsis.	raised in the Rejoinder dated 19.03.2020 filed by the Appellants.
3.	In Para 10.6 of the WS @ Pg. 23 and Pg. 24, 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 and 11.4, 12.2 (c), 12.3, 12.7, 12.10 (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 **12.2 (c)** is concerned, the same has already been raised at (iii) In so far as Para 12.7 is concerned, qua LD, the same has already been raised by the Appellants in the Rejoinder dated 19.03.2020. (iv) In so far as Para 13.1 and 13.3 is concerned, the same has been raised in the Appeal itself.

88. Learned counsel for the Appellant has also filed additional written submissions on 15.02.2021, in brief as under:

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

89. 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.

90. 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**]

91. 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.

92. Heard both the parties at length and perused written submissions as well.

ANALYSIS & CONCLUSION

93. The Appellants are SEI-Diamond and SEI-Venus. Both have established solar project of 30 MWs at Chellakere Taluk in Chitradurga District of Karnataka. Apparently, one SunEdison Energy Holding (Singapore) Pvt. Ltd. promoted and incorporated five Special Purpose Vehicle (SPVs) as developers of five separate projects. The Appellants are two SPVs out of five. Appellant No.1-Diamond entered into Power Purchase Agreement with Respondent No.2- BESCOM on 18.12.2014 for a period of 25 year at Rs.6.92 per unit. In terms of PPA, the Schedule Commissioning Date (SCOD) was 18 months from the effective date i.e. 17.06.2016.

94. The Appellant No.2-Venus also entered into Power Purchase Agreement on the very same date i.e., on 18.12.2014 with Respondent No.3- HESCOM for purchase of power from 30 MW solar project at Rs.6.83 per unit. This was also for 25 years and the SCOD is also 18 months from the effective date i.e. 17.06.2016. These two projects had to be setup in Chellakere Taluk in Chitradurga District initially, however in March 2015 the location of both the projects was shifted from Chellakere Taluk to Pavagada Taluk in Tumakuru District.

95. The PPAs executed between the parties were duly approved after a lapse of 6 months i.e. on 04.05.2015. It is not in dispute that there is the provision of extension of SCOD to be granted by Respondent No.2-BESCOM. It is also not in dispute that in the approval of PPA the definition of 'force majeure' was also modified and it was made as an inclusive clause. Hence, it becomes exhaustive clause to include many events as force majeure.

96. KPTCL issued a tentative evacuation approval to Appellant No.1-Diamond, and at clause 12 of the same it was mentioned that evacuation of power will be commenced after commissioning of proposed 220 kV Kotaguda (Pavagada) DC line. It is noticed that there was no specific time

line within which the above DC line would be ready. This was on 28.05.2015. Subsequently, regular evacuation approval to Appellant No.1-Diamond was granted on 10.06.2015 wherein the approval was indicated as valid up to 17.06.2016. KPTCL undertook to develop this line. Admittedly, supplemental PPAs came to be executed incorporating the changes so far as Appellant No.2-Venus. On 25.06.2015 the location of both the projects of the Appellants again got changed from Pavagada Taluk to Chellakere Taluk in Chitradurga District. Appellant No.2 sought tentative approval for the proposed solar plant situated at Neelagettanahatty of Chellakere Taluk. It is not in dispute that both the Respondents -BESCOM and HESCOM extended the SCOD to 17.09.2016 without any objection.

97. On account of change in location, KPTCL by addressing a letter to Appellants-Diamond and Venus dated 08.03.2016 withdrew the earlier evacuation scheme and further proposed a new scheme. Even in terms of this new evacuation scheme, KPTCL informed that evacuation of power would be feasible only after commissioning of 220 kV DC line (from 400kV PGCIL Hiriyur sub-station to 220 kV Thallakku sub-station). Both the Appellants informed respective DISCOMs by letter dated 17.09.2016, 17.10.2016 and 09.02.2017 that the construction of the projects were

nearly completed and are ready to get interconnected with the Powergrid (transmission). They also requested Respondent–DISCOMs to extend SCOD of the project on account of delay caused by KPTCL in completing the transmission lines.

98. On 27.12.2016, both the Appellants addressed letters to KPTCL requesting them to provide status of the project and also the likely date of completion of the proposed line (220 kV line).

99. It is not in dispute that on 10.01.2017, KPTCL issued regular evacuation scheme to Appellant No.2 again indicating that evacuation of power would be possible only after commissioning of 220 kV DC line, as stated above. On 19.01.2017, KPTCL informed that transmission line is likely to be completed by end of March 2017. Based on this letter dated 19.01.2017, both the Appellants addressed letters to respective DISCOMs on 03.02.2017 and 09.02.2017 seeking extension of SCOD till 31.03.2017. They also informed that the projects were almost ready for interconnecting to the Grid and requested the DISCOMs to intimate KPTCL for facilitating the same by completing the construction of transmission line.

100. Meanwhile, Respondent-Commission directed all DISCOMs not to allow any extension of time beyond stipulated SCOD of the project without obtaining its prior approval.

101. In the meantime, KPTCL granted alternative evacuation facility to both the Appellants-Diamond and Venus and revoked the condition in the regular evacuation approval on account of non-commissioning of 220 kV DC line. This was on 24.03.2017 and 28.03.2017 respectively. Commissioning certificates were also issued on 28.03.2017 and 38.03.2017 respectively. Both the Appellants raised invoices for supplying energy for the months of May 2017 to November 2018.

102. So far as Respondents-BESCOM and HESCOM are concerned, on 24.07.2017 and 01.08.2017 requested Respondent-Commission to approve the extension of SCOD to 28.03.2017 stating that delay in completion of 220 kV transmission line work as an event of force majeure. However, Respondent-Commission directed the Respondents-BESCOM and HESCOM to advise both the Appellants-Diamond and Venus to file Petitions before the Commission for extension of SCOD in terms of force Majeure clause of the PPAs. Accordingly, in terms of advice by the DISCOMs, the Appellants filed common petition on 03.11.2017 in OP No.213 of 2017 seeking approval of change of SCOD as 28.03.2017.

103. Respondents-BESCOM and HESCOM filed objection statements stating that there was no evidence to prove that projects were ready for commissioning within the SCOD *de hors* the availability of evacuation facility. Meanwhile, Respondent-BESCOM invoked the performance bank guarantee of the Appellant-Diamond. Aggrieved by the said action, Writ Petitions were filed before the High Court of Karnataka seeking stay of the action of the Respondent-BESCOM. An interim order was granted directing the Respondent-BESCOM not to take any precipitative action.

104. Ultimately, on 20.06.2019, O.P. No. 213 of 2017 filed by the Appellants was disposed of opining that non-availability of evacuation system of KPTCL, on or after SCOD, cannot be treated as force majeure event, therefore, the question of extending the SCOD up to 28.03.2017 was rejected. Further, the tariff applicable to Appellant No.1-Diamond was reduced to Rs.6.51 per unit from Rs.6.92 per unit and so far as Appellant No.2-Venus, it was also reduced to Rs.6.51 per unit from Rs.6.83 per unit.

105. Apart from the above reduction of tariff, the Respondent-Commission rejected the claim of Respondent-BESCOM for payment of liquidated damages opining that in the said Petition the same cannot be entertained. According to the Appellants though Respondent-BESCOM claimed

liquidated damages before the Commission, but at no point of time Respondent-BESCOM issued any communication either to Appellant No.1-Diamond or Appellant No.2-Venus demanding liquidated damages. Only after passing of the impugned order, for the first time, Respondent-BESCOM stated that it has set off LCs against the invoices of Appellants-Diamond and Venus during the pendency of this appeal. Appellants contend that arbitrarily and illegally Respondent-BESCOM adjusted about Rs. 38.27 Crores belonging to Appellant No.1. Similarly, on 21.03.2020, Respondents-BESCOM and HESCOM issued letter to Appellant-Venus stating that they have adjusted a sum of Rs.10.50 Crores towards alleged liquidated damages from the energy bills issued by Appellant-Venus.

106. We have to first see "***whether Respondent-Commission was justified in opining that extension of SCOD from 17.06.2016 to 17.09.2016 granted by both the DISCOMS to be non-est in the eyes of law"?***

107. The Appellants and the DISCOMs entered into PPAs on 18.12.2014. Initially, it was for 18 months from the effective date. SCOD has to happen by 18 months from the date of signing of the PPA. Approval of PPA happened only on 04.05.2015, almost after lapse of five months from the

date of presenting the signed PPA. We refer to Article 3.1 of PPA which reads as under:

> *"3.1 Effective date*
> *This Agreement shall co me into effect from the date of its execution by both the parties and such date shall eb referred to as the Effective Date."*

In terms of this, automatically the SCOD date gets extended to 17.11.2016 i.e. 18 months from 04.05.2015.

108. Now it is well settled by the Judgment of this Tribunal, which is affirmed by Judgments of this Tribunal as well as Hon'ble Supreme Court that untoward event or change of circumstances which totally upsets the very foundation upon which the parties restated their bargain, then the performance of the contract becomes impossible and the parties can be absolved from further performance of the contract. The Appellant places reliance on the following judgments, which are referred to as under:

(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 Hon'ble 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 Hon'ble 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 Hon'ble 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

109. Appellants placed reliance on the judgment of this Tribunal in the case of Chamundeshwari Electricity Supply Company Limited to substantiate their contention that it was the failure of the KPTCL to keep transmission ready , the force majeure event had occurred. The Respondent in its impugned order has not referred to this finding of the Tribunal in Chamundeshwari's Case. In Chamundeshwari's case, this Tribunal opined 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.***

110. In Appeal No.340 of 2016 in the case of Azure Sunrise Pvt. Ltd. vs Chamundeshwari Electricity Supply Corporation Limited & Anr this Tribunal opined that the effective date would be not signing of the PPA but when PPA becomes implementable. It is seen that in terms of Article 5.7.3 of the PPA, Respondent-BESCOM extended the time for SCOD up to 17.09.2016 so also Respondent-HESCOM granted extension up to 17.09.2016. The Respondent Commission was not justified in totally ignoring the approved PPA, therefore, the revised SCOD has to be 17.09.2016. Article 5.7.3 of PPA read as under:

"5.7.3 In case of extension due to reasons specified in Article 5.7.1(b) and (c), any of the dates specified therein can be extended, subject to the condition that the Scheduled Commissioning Date would not be extended by more than 6 (six) months."

111. It is seen that Respondents-BESCOM & HESCOM in terms of their letters dated 02.03.2016 and 02.05.2016 extended the date of SCOD.

Article 5.7.3 of the PPA was approved by approving the PPA. Therefore, it was not correct on the part of the Commission to ignore this fact. The specific Article 5.7.3 of the PPA was approved empowering DISCOMs to extend the SCOD on account of force majeure event. Once the PPA was approved including the clause 5.7.3 there was no requirement for Respondents-BESCOM&HESCOM to approach Respondent-Commission for extension of time. The said extension of time in terms of the above specific Article 5.7.3 becomes an agreement between the parties by mutual consent. Once PPA was approved in terms of Section 86 (1) (b) of the Act, the Respondent – Commission has no power to strike down the extension granted by DISCOMs totally ignoring the judgment of this Tribunal in Azure Sunrise Power Limited's case. Till the judgment of Azure's case is set aside/modified, the Respondent-Commission is bound to apply the law declared by this Tribunal as an Appellate Authority. As a matter of fact, in Azure Sunrise Power Limited's case also the Respondent thereunder relied upon the judgment in "All India Power Engineers Federation" (2017 (1) SC 487). In Azure Sunrise Power Limited's case at Para 11.6 this Tribunal distinguished the judgment of All India Power Engineers Federation judgment 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."

112. Therefore, as contended by the Appellant the SCOD by mutual consent was in fact extended till 17.9.2016. Therefore, we are of the opinion, the authority of BESCOM and HESCOM to extend SCOD in terms of approved PPA being valid is no more *res integra*.

113. ***"Whether the delay caused by KPTCL in completing the DC line required, as stated above, amounts to force majeure or not?"***

114. Appellants contended that they were ready with the project as early as September 2016 for interconnecting their respective solar plants to the Grid. Letter dated 17.09.2016 filed as Annexure-A.7 is perused. According to the Respondent Commission which is also the argument of the DISCOMs before us that non-availability of evacuation system of KPTCL cannot be treated as force majeure since the Appellants themselves were

not ready with their plants within the timeframe, therefore, they had indicated that they were almost ready in their letters addressed to Respondent No.2 & 3.

115. In terms of revised and approved PPA having the seal of Commission on 04.05.2015, it is 'all inclusive clause', which would mean that all the events which are beyond the control of the parties or preventing partly or wholly to commission the project.

116. "*Whether due to this unavoidable delay on account of non-completion of DC line by KPTCL, the affected party should suffer"? "Was it responsible for the said delay, and if it is not the affected party who is responsible for the said delay?*

"whether the commission is justified in opining that delay on the part of KPTCL would not amount to force majeure"?

117. It is noticed that it is the responsibility of the Appellants to get evacuation facility. It is not in dispute that Appellants did not approach the transmission utility for such facility. KPTCL is also a statutory authority which has to grant evacuation/evacuation clearance approval. What we have to see is whether the Appellant's obligation to perform its part of the contract was hampered by delaying granting of evacuation facility. Initially

the evacuation facility was from Kotagudda Power Station. The same was valid up to 17.06.2016. Subsequently on 08.03.2016, the tentative evacuation system was approved by KPTCL when the location was changed to Neelagettanahatty of Chellakere Taluk since the earlier evacuation scheme pertaining to Kotagudda was withdrawn. Pertaining to this Chellakere evacuation line, the regular evacuation was issued by KPTCL on 10.01.2017. This letter of 10.01.2017 clearly indicated that the evacuation of power from the Appellants project is possible only after commissioning of 220 kV DC line of Thallaku substation. However, there was no certainty within what time this line would be completed. As a matter of fact, Appellant No.1 informed BESCOM on 17.09.2016 that its power project was in advance stage of implementation and only on account of delay till completion of evacuation system, the project commissioning was delayed. The Appellant – Diamond informed BESCOM on 09.02.2017 that on account of force majeure event and on account of delay on the part of KPTCL, Appellant No.1 is not able to commission its project to achieve SCOD. On account of exorbitant delay, Appellant No.1 demanded KPTCL by letter dated 14.1.2017 that though M/s Sagittarius was accorded evacuation but only 80 MW was being used out of 200 MW evacuation approval, therefore, the balance capacity could be granted to Appellant. It is noticed that this letter was in fact placed before Respondent

Commission but inadvertently missed out while filing the appeal. However, this must be within the knowledge of Respondent-DISCOM. Therefore, they cannot submit that the said letter was introduced for the first time before the Appellate Authority. So far as letter dated 24.03.2017 wherein KPTCL did acknowledge that Solar power project of the Appellant was ready for commissioning but on account of non-completion of transmission lines of KPTCL and also related works, the power could not be evacuated. Indicating the same, KPTCL accepted the request of the Appellant and provided alternate evacuation by permitting the Appellants to evacuate power without commissioning of 220 kV DC line at Thallaku sub-station. Thus, the solar power plant of Appellant No.1 was commissioned on 28.03.2017 which was certified by Respondent No.2 BESCOM by issuing Commissioning Certificate dated 30.03.2017.

118. It is noticed from the letter dated 19.06.2017 addressed by Respondent No.2 BESCOM that it has acknowledged that solar power plant of the Appellant was subject to completion of 220 kV transmission line as stated above. It is relevant to point out that in this letter they further acknowledged that Appellants were ready in all aspects to commission its power plant and requested for startup power. Respondent-BESCOM further appreciated the persistent follow up made by Appellant No.1 with

KPTCL for providing alternate evacuation connectivity, which was ultimately granted on 24.03.2017 by KPTCL. It is further noticed that in the letter addressed to the Commission by Respondent No.2 –BESCOM all the details enumerating the delay occurred in the work of KPTCL to complete Kotagudda sub-station and transmission lines were mentioned. They also informed Respondent Commission that the transmission works were likely to be completed by August 2017. BESCOM recorded that Appellant No.1 was ready as early as September 2016. They also acknowledge in this letter that the request for Appellant No.1 to extend SCOD without any penalty as the delay was inordinate due to force majeure events. In fact, BESCOM recommended to the Commission to approve the extension of SCOD up to 28.3.2017 on account of force majeure issues. In fact, in the objections statement to OP No.213 of 2017 filed before the Respondent Commission, BESCOM clearly admitted that it had addressed a letter to Respondent Commission and requested for approval for extension of SCOD up to 28.03.2017.

119. So far as Appellant No.2 is concerned, Appellant No.2 sought for grant of evacuation approval way back in November 2015, to which KPTCL responded only on 8.3.2016 stating that the tentative evacuation scheme was approved by KPTCL so far as Appellants near

Neelagettanahatty Village of Chellakere Taluk. They also highlighted the fact that feasibility of evacuation would be only after commissioning of 220 KV DC line i.e. Hiriyur to Thallaku sub-station. According to the Appellants, this approval was made co-terminus with the SCOD of the project. Like Appellant No.1, Appellant No.2 also informed HESCOM that their power projects were in advance stage of completion and only due to delay in completion of evacuation related works by KPTCL, the commissioning of the projects may be delayed, therefore, according to the Appellant, clause 14.3.1 comes into play. Respondent No.2 by letters dated 17.9.2016 and 17.10.2016 apprised Respondent No.3 – HESCOM that construction work of their projects was almost completed and ready to interconnect the solar power project to the grid and the same was getting delayed on account of delay in completing the evacuation system. According to the Appellant in terms of Article 14.3.1 extension of SCOD were invoked on account of force majeure events. KPTCL, in fact, by letter dated 10.01.2017 granted regular evacuation approval.

120. In respect of both the Appellants the condition was that the evacuation of power from both the Appellants is feasible only after completion of 220 KV DC line from Hiriyur sub-station to Thallaku sub-station by KPTCL. Till then KPTCL did not say when 220 kV DC line is

likely to be ready. Only by letter dated 19.01.2017 for the first time KPTCL informed the appellants that the DC line works would be completed by 31.03.2017 and they accepted the delay in execution of the said transmission line. As in the case of Appellant No.1 alternative evacuation was provided to Appellant No.2 also from the same line without commissioning of 220 kV DC line from Hiriyur to Thallaku. Ultimately, from this provisional evacuation approval on 28.3.2017, evacuation of power from solar plant of Appellant No.2 was commissioned. Commissioning certificate is dated 30.03.2017. HESCOM also issued a letter dated 01.08.2017 to Respondent Commission acknowledging that the extension of SCOD was up to 16.9.2016 by HESCOM on the ground of force majeure events. They further acknowledged that Appellant No.2 has complied with all the requirements in terms of Article 4.2 of the PPA. Like BESCOM, HESCOM also acknowledges that appellant was ready in all respects and it sought for startup power also. They also acknowledged that Appellant No.2 was persisting with KPTCL to provide alternate power evacuation connectivity which was explored by KPTCL. In this letter dated 01.08.2017 HESCOM narrated all the details pertaining to delays occurred in the works of KPTCL, therefore, it sought the approval of extension of SCOD on account of force majeure.

121. Impugned order was a result of filing OP before the Respondent Commission as directed by the Respondent Commission through BESCOM and HESCOM. HESCOM also filed statement of objections wherein it admitted at Para 15 addressing a letter to the Respondent Commission requesting for approval for extension of SCOD up to 28.03.2017 on account of force majeure conditions.

122. The Appellants had to file OP before the Commission though BESCOM and HESCOM had categorically accepted that the delay was a force majeure event. The Respondent Commission however, firstly directed the appellants to file petitions before the Commission and later rejected the force majeure on the ground that the Appellants were not prudent and had not taken adequate steps to seek clarification from KPTCL at the time when conditional approval was granted by KPTCL.

123. "*Whether this approach of the Respondent Commission rejecting the force majeure is correct or whether the finding is perverse, arbitrary and contrary to the admitted factual position and settled law"?*

124. It is noticed that force majeure clause was amended by order dated 04.05.2015 to include all the events which are beyond the control of the

parties as an event of force majeure. The delay or failure on the part of KPTCL in providing evacuation system to the Appellants on account of non-completion of 220 KV line as stated above would amount to force majeure or not in terms of Article 4.3.1(e). The Respondent Commission so far as conditional evacuation approval opined that it was an imprudent decision. According to the Respondent Commission, the Appellants were not justified to plead force majeure placing reliance on tentative evacuation approval granted on 08.03.2016 since the regular evacuation approval being granted on 10.01.2017 which happens to be after the lapse of SCOD. According to the Respondent Commission the Appellants should have been prudent developers and they ought to have sought an assurance from KPTCL after submitting application for evacuation.

125. ***"Whether the Respondent Commission in justified in saying that non-availability of evacuation of KPTCL on or after scheduled commissioning date cannot be treated as force majeure event"?***

126. According to us this finding of the Commission is not justified for the following reasons:

(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.

(e) It was incumbent upon the appellants to obtain evacuation approval by approaching KPTCL in terms of clause 4.2 (e) after approval of PPA. Apparently, one cannot expect the appellants to physically complete the transmission line work themselves since such work is within the domain of KPTCL.

(f) In fact when tentative approval was granted on 08.3.2016, it was co-terminus with the SCOD of the project, therefore, there was no occasion for the appellants to think that evacuation work would not be completed by SCOD as envisaged in the PPA.

(g) Since, it was co-terminus with the SCOD, no occasion arose for appellants to approach KPTCL seeking clarification as opined by the Commission in the impugned order.

(h) We do not find any adverse opinion being expressed against the appellant indicating laxity on their part in their application for evacuation. After submission of valid application, one would

expect that SCOD would be adhered to by KPTCL since tentative evacuation was co-terminus with the SCOD.

(i) We also note that the Appellants addressed several letters to licensees i.e. 19.08.2016, 09.09.2016, 14.09.2016, 01.10.2016, 17.10.2016, 16.11.2016, 27.12.2016 and 09.02.2017 again and again informing respondent – BESCOM and HESCOM about their readiness and complained that delay being caused by KPTCL in completing the evacuation system. We also note that neither BESCOM nor HESCOM refuted the said complaint of delay of KPTCL made by the Appellants or their statement of readiness to generate power. In fact, the letters already referred to above i.e. 19.06.2017, 24.07.2017 and 01.08.2017 both respondent no. 2&3 admitted readiness of the solar plants, therefore, there was no justification on the part of the Respondent Commission to opine that the appellants were imprudent. It is clear that none of these letters and content seems to be considered by the Respondent Commission.

(j) We also note that KPTCL being a State instrumentality is an independent utility functioning without any influence or interference. The appellants definitely cannot interfere or step into the shoes of KPTCL to complete the evacuation system except requesting KPTCL to complete the evacuation system or to provide provisional evacuation benefit. If KPTCL has not completed its obligation of keeping the evacuation system

ready knowing fully well that date of SCOD, one cannot blame the appellants to shoulder them with the responsibility of completing the evacuation infrastructure. What Appellants could have done was to keep following up requesting the utilities to perform their duties. The Respondent Commission totally ignored this aspect.

(k) It is also seen that Respondent Commission opined that, since the appellants did not seek clarification from KPTCL after evacuation approval was granted, makes the action of the appellants imprudent by referring to prudent utility practices. The definition of prudent utility practice defined under PPA read 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"*

l) The above definition clearly indicates that prudent utility practice is wholly in relation to development of a project and it does not in

any manner refer to action of the developer. KPTCL is responsible to create evacuation infrastructure. In what way the appellants can be blamed for not maintaining prudent utility practices as a developer. Therefore, we are of the opinion that the Respondent Commission was incorrect in opining that the appellants were imprudent for the delay caused by KPTCL.

m) If the opinion of the Commission about imprudence of the Appellants is accepted, the very meaning of the force majeure would change and would in fact become redundant. In terms of PPA untoward incidents are force majeure and have to be beyond the control of the parties as well as the third parties. Therefore, the Respondent Commission was not justified to place reliance on the exceptional provision of the force majeure articles.

127. In Chamundeshwari's case the evacuation approval referred to is similar to Clause 9 of evacuation approval and pertaining to Appellant No.1, clause 2 (f) of the approval pertaining to Appellant No.2. In this case, it was opined that power evacuation approval comes within the ambit of words "subject to" in para (f) of the PPAs, therefore, clause 6 and clause 9 of the evacuation approval in the present case squarely falls within the opinion expressed in Chamundeshwari's case. Therefore, failure of the KPTCL to create evacuation infrastructure is a force majeure event like in the case of Chamundeshwari. Article 4.1 of the PPA reads as under:

"4.1 Conditions Precedent

Save and except as expressly provided in Articles 4, 14, 18, 20 or unless the context otherwise requires, the respective rights and obligations of the Parties under this Agreement shall be subject to the satisfaction in full of the conditions precedent specified in this Clause 4 (the "Conditions Precedent") by the Developer within 365 (Three Hundred and Sixty Five) days from the Effective Date, unless such completion is affected by any Force Majeure event, or if any of the activities is specifically waived in writing by ESCOM."

128. This clearly states that respective rights and obligations of the parties is subject to satisfaction of all condition precedent as envisaged in Article 4.2, which reads as under:

"4.2. Conditions Precedent for the Developer

The Conditions Precedent are required to be satisfied by the Developer shall be deemed to have been fulfilled when the Developer shall have:

a) *Obtained all Consents, Clearances and permits required for supply of power to ESCOM as per the terms of this Agreement;*
b) *Made adequate arrangements for water required for the Solar Thermal Project and submitted the documentary evidence in the form of an approval from the competent state/local authority for the quantity of water required for the power station;*
c) *Achieved Financial Closure and provided a certificate to ESCOM from the lead banker to this effect;*
d) *Made adequate arrangements to connect the power project switchyard with the Interconnection Facilities of the Delivery Point;*

e) Obtained power evacuation approval from Karnataka Power Transmission Company Limited ("KPTCL") / ESCOM, as the case may be;

f) Produced as per the requirements set out in Schedule 1, the documentary evidence of having the clear title and possession of the land required for the Project in the name of Developer;

g) Fulfilled Technical Requirements for Solar PV Project as per the format provided in Schedule 2 and also provides the documentary evidence for the same;

h) Delivered to ESCOM from the Single Business Entity confirmation, in original, of compliance with the equity lock in condition set out in 5.2; and

i) Delivered to ESCOM a legal opinion from the legal counsel of the Developer with respect to the authority of the Developer to enter into this Agreement and the enforceability of the provisions thereof."

129. Reading of Article 4.2 clause 4.2 (e) clearly indicate that evacuation approval from KPTCL is a condition precedent. Such delay of evacuation on the part of KPTCL has been held as force majeure in Chamundeshwari's case.

130. Then coming to the observations of the Respondent Commission that appellants not being ready for commissioning of the solar power plants, it opined that by letters dated 03.02.2017 and 09.02.2017 the appellants have admitted that projects were almost ready for

interconnections. Since electrical safety approval of CEIG was granted on 25.03.2017, the plants can be taken as completed as 25.03.2017.

131. It is noticed that the Commission also referred to the Chief Electrical Inspector's certification being March 2017, therefore, the appellants plants were not ready either in August or September. Both the appellants and respondents addressed lengthy arguments on this issue. Apparently, the evacuation line itself was not ready with reference to revised SCOD, therefore the appellant being ready would not be of any consequence. On the other hand, in the letters addressed to BESCOM and HESCOM, as stated in the above paragraphs, the appellants repeatedly informed that they were ready for commissioning the projects. At no point of time this was refuted by the Respondents BESCOM and HESCOM. On the other hand, the letters addressed by BESCOM and HESCOM, the licensees, in fact agreed for extension of SCOD to be granted to the appellant by explaining all the reasons for delays and appreciating the persisting and persuasive approach of the appellants for completion of the evacuation infrastructure. The parties to the contract i.e. PPA are distribution licensee and the generators. If the licensee accepted the explanation offered by the appellants for not commissioning the solar plant within the SCOD on account of delay of 200 kV DC lines by KPTCL, we fail to understand how

the respondent Commission can conceive a thought and express in its impugned order that the appellants were not ready. In fact, both the licensee and KPTCL in the proceedings before the Respondent Commission have agreed with the contentions raised by the appellants in the OP before the Commission.

132. It is relevant to refer to conduct of the BESCOM and HESCOM in the entire proceedings before the Tribunal and the Commission. As already stated above, from 19.08.2016 onwards up to 09.02.2017 almost every month time and again Appellants kept on informing BESCOM and HESCOM about the delay of KPTCL in creating the evacuation infrastructure. At no point of time this was refuted by the licensees. On the other hand, accepting the reasons of delay caused to the Appellants as force majeure, requested the Commission to extend SCOD of the Appellant till 28.03.2017. At that point of time as stated above, Respondent Commission directed the Appellants to approach the Commission for seeking extension through the licensees. Apparently, the Appellants filed Petitions and in the statement of objections filed by BESCOM and HESCOM they clearly admitted letters being addressed to them by the Appellants explaining the delay of the KPTCL to complete the evacuation infrastructure. On these grounds alone, licensees sought

extension of time. In fact, Respondent Commission referred to letters dated 24.07.2017 and 01.08.2017. The relevant extracts of the Impugned Order are being reproduced as follows: -

> *"10)* The other material facts relating to OP No.213/2017 may be stated as follows:*:*
>
> *….*
>
> *(h) The Petitioners requested the 1st Respondent (BESCOM) and the 2nd Respondent (HESCOM) to insert the Scheduled Commissioning Date as '28.03.2017' in the PPAs of the Petitioners, by extending the time, on the ground of the Force Majeure Event. The 1st Respondent, in turn, vide letter dated 24.07.2017 (ANENXURE-F) and the 2nd Respondent (HESCOM), vide letter dated 01.08.2017 (ANNEXURE-F), addressed to this Commission, requested this Commission for approval of the extension of the Scheduled Commissioning Date till 28.03.2017, on the ground of the Force Majeure Event, as there was delay in completing the 220 kV Transmission Line from the 400 kV PGCIL Hiriyur Sub-Station to the 220 kV Thallakku Sub-Station.*
>
> *….*

15) From the pleadings and the submissions of the parties in both the Petitions, the following issues would arise, for our consideration:

(1) Whether this Commission has jurisdiction to call upon the Petitioners to prove the Force Majeure events, relied upon by them, by filing a Petition, urging the relevant grounds and producing proper evidence, ***for the scrutiny of the Commission, inspite of the Respondents admitting or not denying the occurrence of the Force Majeure Events, alleged by the Petitioners****?*

16…

(iv) Therefore, the BESCOM and the HESCOM already extending the time of the Scheduled Commissioning Date for a period of three months or they having no objection to extend the time for a further period, till the Scheduled Commissioning Dates of the Projects, is of no relevance in the eye of law."

133. Therefore, in principle the impugned order also records that the principle contention of the Appellants that on account of force majeure

event its projects were delayed and licensees sought approval of the extended SCOD but BESCOM and HESCOM have totally taken a 'U' turn in the present appeal. Therefore, we are of the opinion that the Respondent Commission was not justified in opining that the appellants were not ready in August / September 2016 to commission the power plants.

134. So far as the CEIG approval, the respondent Commission took this approval dated 28.03.2017 as the date of readiness of the appellants. It is noticed that CEIG is a statutory authority in terms of Section 162 of the Act. In terms of regulation 32 and 43 of CEA (measures relating to safety of electric supply) Regulations of 2010, approval has to be granted. Regulation 43 reads as under:

"43. Approval by Electrical Inspector: -

(1) Voltage above' which electrical installations will be required to be inspected by the Electrical Inspector before commencement of supply or recommencement after shutdown for six months and above shall be as per the notification to be issued by the Appropriate Government, under clause (x) of sub-section (2) of section 176, and sub-section (1) of section 162 of the Act.

(2) Before making an application to the Electrical Inspector for permission to commence or recommence supply after an installation has been disconnected for six months and above at voltage exceeding 650 V to any person, the supplier shall

ensure that electric supply lines or apparatus of voltage exceeding 650 V belonging to him are placed in position, properly joined and duly completed and examined and the supply of electricity shall not be commenced by the supplier for installations of voltage needing inspection under these regulations unless the provisions of regulations 12 to 29, 33 to 35, 44 to 51 and 55 to 77 have been complied with and the approval in writing of the Electrical Inspector has been obtained by him:

Provided that the supplier may energise the aforesaid electric supply lines or apparatus for the purpose of tests specified in regulation 46

(3) The owner of any installation of voltage exceeding 650 V shall, before making application to the Electrical Inspector for approval of his installation or additions thereto, test every circuit of voltage exceeding 650 V or additions thereto, other than an overhead line, and satisfy him self that they withstand the application of the testing voltage set out in sub-regulation (1) of regulation 46 and shall duly record the results of such tests and forward them to the Electrical Inspector:

Provided that an Electrical Inspector may direct such owner to carry out such tests as he deems necessary or accept the manufacturer's certified tests in respect of any particular apparatus in place of the tests required by this regulation

(4) The owner of any installation of voltage exceeding 650 V who makes any addition or alteration to his installation shall not connect to the supply his apparatus or electric supply lines, comprising the said alterations or additions unless and until

such alteration or addition has been approved in writing by the Electrical Inspector."

135. In terms of regulation 43, the main provision which comes into play only at the time of commencement of supply of power. This can be achieved only when the required transmission line (either provisional or regular line) is kept ready i.e. evacuation system. Therefore, the certificate of CEIG has nothing to do or it does not demonstrate the readiness or non-readiness of any generating unit. At the most it can be one of the ways to indicate that generators were ready to inject power. Even if the solar plant of appellants were to be ready to inject power, if the evacuation line is not available, at that point of time the question of CEIG report or safety of the supply of power would not come into picture. This certificate comes into play only when distribution system gets connected with the works of the generating company. Therefore, based on this report in peculiar facts of the present case the Respondent Commission was not justified to opine that CEIG approval also indicate the deficits of the appellants being ready to commission its plants.

136. The conduct of BESCOM cannot be appreciated for the following reasons:

In terms of Article 6.1.3, BESCOM was required to extend all the support to the generator to complete the solar power plant. By September 2016 it was obvious that there was delay on the part of KPTCL substation works so as to evacuate power from the solar plants of the Appellants. Various letters as already indicated were addressed to both BESCOM and HESCOM right from August 2016. Whenever the Appellants seeking connectivity request to KPTCL, copies were addressed to both BESCOM and HESCOM. At no point of time, both licensees found fault with the Appellants. On the other hand, in June 2017, BESCOM records that the Appellants projects were ready in all respects and only on account of inaction on the part of KPTCL to complete the transmission line, delay has happened. After acknowledging and accepting the said delay on the part of KPTCL, BESCOM issued letters to the Respondent Commission to alter the SCOD on the ground of force majeure. HESCOM address such letter on 01.08.2017. Surprisingly BESCOM now takes altogether a different stand from its earlier stand. Before the Respondent Commission BESCOM admitted on oath that it has requested approval or extension of SCOD up to 30.03.2017 on the ground of force majeure. Having admitted so on earlier occasion, it is not open to the BESCOM to take a different stand. A party cannot escape its earlier admissions. Strangely, Respondent Commission has totally ignored this fact while determining the

dispute between the parties. We rely on the Judgment of the Hon'ble Supreme Court in "Divisional Manager, United Insurance Co. Ltd. &Ors. Vs. Samir Chandra Chaudhary," (2005 (5) SCC 784). It is well settled that a party cannot approbate and reprobate at the same time. Reliance is placed on the following judgments.

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

137. In the light of this conduct, Respondent Nos.2 and 3 are estopped from taking altogether a contrary stand. As contended by the Appellant, the principles of Estoppel apply to the action of the Respondent-Licensees.

138. In the light of above discussion and reasoning we are of the opinion that the delay in commissioning of solar plant of the appellants between 17.09.2016 and 28.03.2017 falls within the domain of force majeure event as defined in the PPA.

139. From the stand taken in the above proceedings, initially in the Objection Statement filed on 02.12.2019, BESCOM submits it has set-off LDs against invoices of the Appellants since March 2019. Again in the Objection Statement dated 09.12.2019, its stand is that it has been setting off Liquidated Damages right from March 2017. The Appellants did contest the alleged set-off of LDs by filing IA No. 01/2019 before the Respondent Commission and have withdrawn the said IA. Therefore, according to Respondents, the Appellants cannot seek any positive direction from the Tribunal.

140. According to Appellants, the said stand of the Respondent Nos. 2 & 3 on different occasions amounts to capricious action, and it is with the intention of enriching themselves unjustly without following the procedure contemplated. At no point of time, the Respondents had issued letters to the Appellants demanding Liquidated Damages. As on today, there is rejection of the claim of Respondent Nos. 2 & 3 so far as LD charges. Respondent Nos. 2 & 3 have not filed cross objection on Appeal challenging the rejection of LD claim in terms of the impugned order.

141. It is also seen that in terms of the procedure contemplated under PPA, deduction or set-off can be done by the DISCOMS only in terms of Article 13.3.2 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."*

142. It is seen they cannot simply ask for Liquidated Damages in terms of the Article. If BESCOM claims any amount from the Appellant through invoice to be payable by the Appellant, and if it is not disputed by the Appellant within 15 days of the receipt of the said invoice, then such deduction or set-off to the extent of the amounts undisputed can be

undertaken by the BESCOM. There is specific mentioning that unless 15 days of period expires, the BESCOM is not entitled to claim any deduction or set-off. Apparently, no such procedure was ever complied with by the BESCOM. On the other hand, only in the proceedings before the Commission on different occasions at different point of time, they came out with the defence of set-off of LD charges against the payment in respect of supply of energy.

143. Then coming to the issue pertaining to the liquidated damages, whether Respondent nos. 2 and 3 were justified to recover/adjust the alleged liquidated damages contrary to the directions issued in the impugned order and so also in total violation of terms of PPA pertaining to recovery of liquidated damages.

144. The Petition was filed in pursuance of directions of the Commission itself through the licensees seeking extension of SCOD. This was almost seven months after the SCOD. Apparently, Respondent Nos. 2 and 3 did not honour the invoices raised by the Appellants making payments right from the date of COD in spite of several requests and demands. The Respondent Commission at at Para 23 of the impugned order opined that liquidated damages cannot be recovered in the said proceedings by

BESCOM and HESCOM. The Appellants have sought for tariff as agreed between the parties in the PPAs. An application came to be filed for this relief. Surprisingly, in the said application, which was pending, the Respondent-Discoms never even whisper adjustment of liquidated damages against the invoices raised by the Appellants. In other words, they did not even express their intention of setting of liquidated damages against the bills raised by the Appellants. Apparently, the said application was withdrawn before the Commission since the Appellants were apprehending inordinate delay for disposal of the petitions pending before the Commission. In the statement of objections, HESCOM raised the payment of LD and BESCOM raised such objection in its additional statement filed on 09.07.2019. Surprisingly KPTCL who was responsible for the delay also supported Respondents claim pertaining to liquidated claim. All along after the Respondent BESCOM has been contending that it is liable to receive LD from the Appellant that at no point it has stated that they are adjusting or setting off LDs against invoices of the Appellants.

145. In the above circumstances, in the impugned order at Para 22 and 23, Respondent-Commission opined as under:

> "(i) In the above background the Impugned Order was passed wherein the Respondent Commission inter-alia held as follows: -

"22) ISSUE No.(7): Whether there can be a direction in the present proceedings, for payment of the Liquidated Damages, as per Articles 4.3 and 5.8 of the PPAs?

(a) ***The Respondents claim that, there should be a direction for payment of the Liquidate Damages, as per Articles 4.3 and 5.8 of the PPAs.*** *The Petitioners have contended that, in the present proceedings, there cannot be any direction for payment of the Liquidated Damages, unless the Respondents have made any counter-claim for the Liquidated Damages. The scope of the Petitions filed by the Petitioners does not cover the issue relating to the liability for payment of the Liquidated Damages, under the terms of the PPAs. The respective contentions of the parties, in this regard, are kept open.*

(b) ***For the above reasons, we hold that, there can be no direction against the Petitioners, for payment of the Liquidated Damages, in these proceedings. Therefore, we answer Issue No.(7) in the negative****.*

….

23….

(c) The claims of the Respondents, for award of the Liquidated Damages against the Petitioners, cannot be entertained in these proceedings ……."

146. We are of the opinion that such action of the Respondent Nos. 2 & 3 is contrary to the terms of PPA and the Respondent Commission was justified in rejecting the same. Respondent Nos. 2 & 3 were not justified in withholding the amounts payable to Appellants towards the monthly

energy invoices and the same amounts to contrary to the procedure. The Respondents cannot exercise lien over the moneys payable to the Appellants unless they follow the procedure contemplated. None of the terms of PPA gives such right to them; on the other hand Article 13.3.2 is the only procedure by which adjustment / set-off can be invoked after strict compliance of the procedure.

147. We are of the opinion that the commissioning of the project was delayed on account of force majeure event. The letters dated 24.07.2017 and 01.08.2017 written by Respondent Nos. 2 & 3 make it crystal clear that both the licensees accepted that the delay on the part of the Appellants in commissioning of the project was on account of non-completion of evacuation infrastructure by KPCTL and therefore, it is an event of force majeure. If the Appellants were not responsible for the delay in commissioning the project, question of payment of Liquidated Damages would not arise. As already stated above, there is no adjudication of such LD charges till date.

148. In the reply filed by the Respondent BESCOM to the Appeal, they have taken a stand that the relief sought by the Appellants seeking payment of interest / carrying cost on the amounts withheld by Respondent Nos. 2 & 3 is beyond the scope of the reliefs. It is seen that

when the Appellant filed petition before the Respondent Commission, the parties were at consensus *ad idem* so far as force majeure. During the proceedings pending before the Commission, BESCOM stopped making payments and they did not even whisper about the possibility of set-off. After filing the Appeal, BESCOM has taken up plea of adjusting the dues towards LDs from the invoices of the Appellants. Non-payment of the legitimate dues to the Appellants is strictly connected to the issue of force majeure event. This Tribunal in Appeal No. 241 of 2016 in the Judgment dated 31.05.2019 in the case of ***Adani Power Maharashtra Limited vs. MERC*** opined that the Tribunal has ample power to grant relief which was not earlier sought for, if ends of justice demands such relief. Paragraphs 152 to 160 of the said Judgment are relevant, which read 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."

149. Therefore, we are of the opinion that in the circumstances of the case, if any relief is to be granted in the interest of justice, this Tribunal is empowered to consider the same.

150. Apparently, the Respondent Commission has reduced the tariff to Rs.6.51 on the ground of alleged delay of SCOD on the part of the Appellants. We have already stated how the Respondent Commission has erred in giving such opinion.

151. In terms of Section 86 (1) (e) of the Act, one has to encourage and promote renewable energy. The National Electricity Policy and Tariff Policy do provide several concessions and promotional measures so far as promoting potential non-conventional source of energy. Potential non-conventional source of energy in this country is solar power. Promotion of renewable energy generation is the statutory duty and obligation of the Respondent Commission. It is relevant to refer to the Judgment of ***Hindustan Zinc Ltd. v. Rajasthan Electricity Regulatory Commission*****,[(2015) 12 SCC 611].** In several Judgments of this Tribunal, time and again, we opined that generation of power from renewable energy source needs to be promoted. One of such Judgments is ***Rithwik Energy vs. Transmission Corporation of Andhra Pradesh*** *[2008 (ELR) (APTEL) 237]* - Para 34 which reads as under:

> *"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."

152. The State Commission being a quasi judicial body, a creature of the Statute is bound by the provisions of the Act and national policy. It is required to function and discharge its duties within the parameters prescribed by the Act. We refer to the following Judgments on this aspect of the matter:

(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. Renuka Singla & Ors.: (1994) 1 SCC 175 (Para 8)

153. In the proceedings before it, the Respondent Commission totally ignoring the conduct of the Respondents in approbating and reprobating on different occasions, has acted contrary to the duties to be exercised by the Commission totally ignoring its obligation to promote renewable energy generation. On the pretext of protecting the consumer, it totally abdicated its duties and obligations and proceeded to pass the impugned order undermining and circumventing the mandate of the Act.

154. 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.

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

156. 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.

157. Therefore, we are of the opinion that the Appeal deserves to be allowed. Accordingly, we set aside the impugned order dated 26.09.2019 and pass the following directions:

(i) The first Appellant is entitled at Rs. 6.92 per unit and the second Appellant is entitled at Rs.6.83 per unit as energy charge in terms of the PPA.

(ii) Respondent Nos. 2 & 3 are directed to refund the amounts withheld by them by 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 in accordance with the procedure contemplated.

158. In view of the disposal of the appeal, IAs pending if any, shall stand disposed of. No order as to costs.

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

Ravindra Kumar Verma	**Justice Manjula Chellur**
[Technical Member]	**[Chairperson]**

Dated: 14th July, 2021

REPORTABLE/~~NON-REPORTABALE~~

Ts/tpd