



TELANGANA STATE ELECTRICITY REGULATORY COMMISSION
5th Floor, Singareni Bhavan, Red Hills, Lakdi-ka-pul, Hyderabad 500 004

O. P. No. 52 of 2021

Dated 17.10.2022

Present

Sri T. Sriranga Rao, Chairman
Sri M. D. Manohar Raju, Member (Technical)
Sri Bandaru Krishnaiah, Member (Finance)

Between:

M/s Suraj Kiran Solar Technologies Private Limited,
Regd. Office at C-105, Anand Niketan,
New Delhi 110 021.

... Petitioner

AND

1. Southern Power Distribution Company of Telangana Limited,
Corporate Office, # 6-1-50, Mint Compound,
Hyderabad 500 063.
2. Chief General Manager (IPC & RAC),
TSSPDCL, Corporate Office, # 6-1-50,
5th Floor, Mint Compound, Hyderabad 500 063.

... Respondents

The petition came up for hearing on 20.12.2021, 17.01.2022 and 31.01.2022. Sri. P. Pavan Kumar Rao, Advocate for petitioner and Sri. Mohammad Bande Ali, Law Attaché for respondents have appeared physically on 20.12.2021 and through video conference on 17.01.2022 and 31.01.2022. The proceedings of the matter has been conducted on 20.12.2021 physically and on 17.01.2022 and 31.01.2022 through video conference. The matter having been heard and having stood over for consideration to this day, the Commission passed the following:

ORDER

M/s Suraj Kiran Technologies Private Limited (petitioner) has filed a petition on 25.10.2021 under Section 86 (1) (f) and (k) of the Electricity Act, 2003 (Act, 2003)

seeking extension of scheduled commercial operation date (SCOD) and consequential relief of refund of penalty.

2. The averments in the petition are extracted below:

- a. It is stated that the petitioner is a company incorporated under the provisions of the Companies Act, 1956 (Act, 1956) and is engaged in the business of generation and sale of solar power. It is stated that the petitioner herein in its usual course of business has set up a 50 MW solar power project as an SPV under the solar competitive bidding 2015 policy located at Siddipet Village and District for onward sale of solar power to the Southern Power Distribution Company of Telangana Limited (TSSPDCL/ respondent No.1).
- b. It is stated that the respondent No.1 is a company incorporated under the Act 1956, which supplies power to all the consumers in the State of Telangana and the respondent No.2 are the officials of the respondent No.1
- c. It is stated that the Government of Telangana (GoTS) as part of its efforts to promote renewable energy and to increase the solar power generation capabilities within the State of Telangana had introduced the 'Telangana Solar Power Policy, 2015' (Solar Policy) by way of its letter dated 18.03.2015 wherein it directed the Transmission Corporation of Telangana Limited (TSTRANSCO) and Telangana State Power Coordination Committee (TSPCC) to initiate the process of floating tender on behalf of the Telangana State DISCOMs (TSDISCOMs) for the purchase of 2000 MW Solar power by way of competitive bidding.
- d. It is stated that the State Government in furtherance of the said process through the respondent No.1 has floated the said tender under which the petitioner herein was selected as a successful bidder through an open market competitive bidding process for sale and supply of 50 MW to the respondent No.1. Thereafter, the respondent No.2 CGM has issued a letter of intent (LOI) bearing letter No. CGM (Comml & RA) / SE (IPC) / D. No. 1310 dated 16.12.2015 in favour of the petitioner herein with an unconditional acceptance to the quoted tariff of Rs.5.2614 per kWh and to an exclusive sale to the 1st respondent.

- e. It is stated that a power purchase agreement (PPA) bearing NCE SOLAR PPA No. 2000 MW / 03 / 2016 dated 03.02.2016, was entered between the respondent No.1 and the petitioner. The solar power developer (SPD) i.e., the petitioner herein is selected for installing the solar power project of 50 MW which is located at Siddipet village and Medak district (presently Siddipet district), Telangana. As per the PPA, within a period of 15 months from the effective date of signing of the PPA, the project should be operational i.e., commercial operational date (COD) is by 02.05.2017. The PPA shall be in force for a period of 25 years from the date of COD, i.e., the project is said to be fully commissioned/commenced only when it is connected to the nearest grid substation, i.e., the 220 / 132 kV Siddipet grid substation for easy power evacuation within the time frame stipulated under this agreement. The SCOD is the date on which the petitioner is required to start injecting power from the project to the delivery point, i.e., 220 / 132 kV Siddipet grid substation and the same was to be achieved within 12 months from the effective date.
- f. It is stated that as per the Clause 4 of the preamble of PPA, TSDISCOM is not responsible nor it would recommend to any department of the Government for the grant of permission or sanction for the solar power project. The petitioner on its own should obtain permission or sanctions from the Government authorities for establishing the project. The respondent No.1 is not responsible nor recommends anybody for the implementation of the project.
- g. It is stated that as per Article 6.1 (vii) of the PPA, the petitioner has to complete the financial closure by producing the documentary evidence showing the clear title and possession of the acquired land within 6 months for the signing of the PPA i.e., by 02.07.2016.
- h. It is stated that subsequent to the signing of PPA, owing to various unforeseeable events and circumstances, the development and setting up of all solar power projects in the State of Telangana was materially and adversely affected. The said events which had State-wide ramifications across sectors, were entirely beyond the reasonable control of power developers and could not have been prevented even by

employing prudent utility practices or by exercise of reasonable skill and care and as such, fall within the definition of Force Majeure events in terms of Article 9 of the PPA.

- i. It is stated that the material and adverse effect of these Force Majeure events was felt by the solar power developers in all stages of development and setting up of solar power projects.
- j. It is stated that it has faced various constraints/difficulties while executing the project which were beyond the control of the petitioner.

Force Majeure Events after signing of the PPA dated 03.02.2016:

i. Unprecedented incessant rains:

The State of Telangana experienced excessive rains and massive storm during months of July to September, 2017, as is a matter of public record. The incessant rains and storm resulted in, inter alia, flooding and substantial damage to roads connecting the project site, which consequently led to stoppage of work at the project site and idling of labor and equipment, thereby severely hampering construction works.

ii. District Re-organization:

The GoTS by way of Notification vide G.O.Ms.No.236, in exercise of its powers under Section 3 of the Telangana Districts (Formation) Act 1974 and in the interest of better administration and development of Telangana, notified new Districts and reorganized boundaries of existing districts, revenue divisions, mandals/tehsils and villages with effect from 11.10.2016. This involved overhauling of the existing revenue machinery since land revenue records were moved from existing to newly created districts and mandals. The district re-organization process, inter alia, involved:

- a. change of circle rates, causing land owners to renegotiate / renege on land sale agreements;*
- b. shifting of revenue records from old district to the new district; and*
- c. Upgradation of registration and revenue department's website.*

It is stated that owing to the aforesaid, it had faced the following issues:

- a. proper revenue records were not available in the Tehsil Offices and as a result thereof, requests for information, record of rights, encumbrance certificate, permits and approvals/ registration could not be processed in time;*
- b. contiguous land parcels were not available for acquisition since some land owners who were willing to offer land for development of solar power projects, changed their decision post reorganization;*
- c. concerned officials were unavailable during the reorganization as they were deputed on special duties;*
- d. Newly formed TSTRANSCO and TSNPDCL had to be briefed in regard to all project related activities since the concerned offices were not in possession of the basic documents and initial reports related to the project such as PPA and estimates for transmission line and bay work.*

It is stated that, in addition to the natural calamities that affected the State, the decision of the Telangana State Government to reorganize the districts has adversely affected the execution of all solar power projects including its project and made the commissioning of the project within the stipulated timelines impossible. The land prices were sky-rocketed, land is being converted into plots and people were waiting to sell their lands for higher prices.

It is stated that the reorganization of districts which was effected by the GoTS by issuing Government Orders under the provisions of Telangana Districts (Formation) Act, 1974 read with Section 3 of the Central Act No.6 of 2014 is thus a political Force Majeure event within the meaning of Force Majeure as defined in the PPA. Therefore, the reorganization of districts in the State of Telangana which started in June/July 2016 and culminated in October 2016 and further continued to have its after effects till the 1st quarter of

2017 is another Force Majeure event which prevented the petitioner from procuring the said land.

iii. **Financial closure**

It is stated that though it had approached their lender, L&T Finance for funding of the project well in time, the acquisition of land had to be completed before the bankers could process the request for financial support and therefore the financial closure could not be completed within the planned time frame.

iv. **Demonetization**

It is stated that the demonetization led to delays in site execution and implementation of project timelines. It is stated that due to unavailability of cash and the requirement of paying daily wage labourers in cash, contractors/suppliers refused to provide any services pending cash payments thereby seriously affecting and delaying the project development activities.

v. **GST implementation by Government of India (GoI)**

The procurement of solar plant materials affected due to Implementation of GST by GoI. Though the ordering and procurement of major items like PV Modules, Inverters was done well in time and arranged to site within the prescribed period, due to implementation of GST by GoI from July 15, 2017, many sub-vendors were unable to deliver the materials in time as many configuration changes like changing the invoices to suit GST requirement, e-way bill requirements, etc., had to be made by them which has become more complicated. This has affected the supply of balance materials to site & installation of same could not be effected in time. The installation of same was progressively completed within next few months.

vi. **Right of Way – Underground Issue**

It is stated that that the project is to be commissioned in Siddipet town, where there was a sub-station which was in a densely populated residential area. Due to non-availability of large tracts of land, suitable for commissioning of a 50 MW solar plant, the project was planned at a distance of about 32 kilometers from the

Siddipet town. For evacuation of power, it had to lay transmission lines to the substation. The transmission lines had to be laid through thickly populated commercial/residential areas. It had implemented underground cabling. Since the available corridor for laying underground cables was very narrow, there was only a single corridor which was allotted to it as well as a neighboring solar power developer, it had to align its timelines with that of the neighbouring solar power unit, which has significantly delayed the transmission line laying works.

vii. Local agitation by villagers against laying of transmission lines

The local villagers have opposed and agitated against the laying of transmission lines from the project to the substation in Siddipet, apprehending reduction in valuation of their properties due to the transmission lines. The said villagers also filed a Civil Suit before the jurisdictional civil court vide O. S. No. 142 of 2017 and was granted a stay order vide Order dated 23.08.2017 in I. A. No. 593 of 2017 in O. S. No. 142 of 2017 and Writ Petition before the Hon'ble High Court of Judicature at Hyderabad for the State of Telangana and Andhra Pradesh vide W.P.No.29790 of 2017 in which the Hon'ble High Court had for a period of 4 (four) months granted a stay order in favour of the local villagers, which was subsequently vacated by the petitioner.

- k. It is stated that as brought out above, it is abundantly clear that solar power projects across the State of Telangana including its project were affected by Force Majeure events. It is stated that Article 9.2 of the PPA clearly provides that in case of Force Majeure events affecting the solar power developer, the SCOD shall be deferred for a period commensurate with the period of delay attributable to the Force Majeure events subject to a maximum period of 12 months. Article 9.2 of the PPA is reproduced herein below:

"9.2 In the event of a delay in COD due to:

(a) Force Majeure Events affecting the Solar Power Developer;

Or

(b) *DISCOM Event of Default as defined in 10.2, the scheduled COD shall be deferred, for a reasonable period but not less than, day-for-day basis subject to a maximum period of 12 months, to permit the Solar Power Developer or to overcome the effects of the Force Majeure events affecting the Solar Power Developer or DISCOM, or till such time such event of default is rectified by the Solar Power Developer or the DISCOM, whichever is earlier. Provided further that, the validity of Performance Bank Guarantee shall be extended suitably covering the extended period."*

- l. It is stated that in view of the afore-quoted Article 9.2, it is entitled to an extension of SCOD of its solar power project on account of the delay caused by the Force Majeure events. This extension is in terms of the provisions of the PPA and does not amount to an amendment of the PPA.
- m. It is stated that it has from time to time informed the respondent No.1 about all the aforesaid events and the issues faced by it which were beyond the reasonable control of the petitioner and could not have been prevented by employing prudent utility practices or by exercise of reasonable skill and care. In the backdrop of such events of Force Majeure, the petitioner while continuing its best possible efforts to mitigate the delays caused such a delay.
- n. It is stated that all the solar power developers have made a representation to the Hon'ble Chief Minister of Telangana for extension of COD in view of the peculiar circumstances in acquiring the land for the project e.g., formation of new Districts. The Hon'ble Chief Minister was pleased to grant extension of time for achieving COD for all the solar power developers including the petitioner herein.
- o. It is stated that a letter dated 21.04.2017 has been issued by the office of Hon'ble Chief Minister, addressed to the TSSPDCL, TSNPDCL and TSTRANSCO has directed them to extend the COD for commissioning of solar project for which PPAs have been entered into between the solar power developers and the DISCOMs up to 30.06.2017 without any penalty.

- p. It is stated that the petitioner has requested the TSSPDCL and TSTRANSCO to extend the time for COD for the project, besides the general extensions granted by the respondent No.1 citing several reasons being faced by the petitioner in completion of the project. The time extended by the Government vide letter dated 21.04.2017 has given extension of COD in general to all the solar power developers till 30.06.2017 is not much helpful to the petitioner herein due to various reasons akin to the petitioner. It is further stated that its SCOD is 02.05.2017 and an extension till 30.06.2017 cannot make up for the delays caused to the petitioner which is beyond its control.
- q. It is stated that thereafter the Energy Department, GoTS by way of letter dated 29.06.2017, extended the SCOD of all solar power projects, without any penalty up to 30.06.2017 and directed the TSDISCOMs to take further action accordingly.
- r. It is stated that the petitioner understands that the Commission by way of order dated 18.08.2017, accorded inprinciple approval for extending SCOD of all solar power projects up to 30.06.2017. It is stated that all the solar power developers herein made a further representation to the GoTS for the extension. The Special Chief Secretary to Government, Energy Department, the State of Telangana has addressed a letter dated 23.08.2017 to the TSTRANSCO, TSSPDCL and TSNPDCL to extend the SCOD to another four months i.e., from 30.06.2017 to 31.10.2017 to the solar power projects in the State who have participated in the bidding of 2015.
- s. It is stated that all the works related to the petitioner's project were completed by September, 2017 and accordingly on 09.10.2017, the Chief Electrical Inspector, Telangana has issued the statutory approval to the petitioner for its project.
- t. It is stated that the respondent No. 1 vide letter dated 03.11.2017 issued the synchronization certificate to the petitioner's project, by declaring the date of synchronization as 27.10.2017.
- u. It is stated that, as things stood thus, the respondent No. 1 had addressed a letter to the petitioner's banker, i.e., Yes Bank Limited who has provided the performance bank guarantees in favour of the

respondent No.1 herein, by referring to the delay on part of the petitioner by a period of 178 days from the SCOD, the respondent decided to invoke an amount of Rs. 10,00,00,000/-, covered under three performance bank guarantees bearing Nos.006GM01160110002 for Rs. 5,00,00,000/-, 006GM01160110004 for Rs. 3,50,00,000/- and 006GM01160110008 for Rs. 1,50,00,000/-, all of which have been issued on 11.01.2016 and were valid till 31.03.2018 for a claim period up to 30.04.2018.

- v. It is stated that, the petitioner through their EPC contractor had submitted a written representation to the respondent No. 1 dated 05.10.2018, requesting them to condone the delay in achievement of SCOD, by reiterating the extensions as provided by the GoTS and the respondents from time to time, which was extended to solar projects forming part of competitive bidding process of 2015 and the petitioner also categorically mentioned the fact that the SCOD was achieved by the petitioner on 27.10.2017, which was well within the period of deadline for extension, as granted by the Energy Department, GoTS, i.e., before 31.10.2017.
- w. It is stated that, by virtue of the said invocation, the petitioner's PBGs have been invoked and total amount Rs. 10,00,00,000/- stood transferred to the credit of the account of the respondent No. 1.
- x. It is stated that the afore-stated reasons were beyond the reasonable control of the petitioner and could not have been prevented by employing prudent utility practices or by exercise of reasonable skill and care. The project financial closure was achieved on the basis of the tariff agreed. Any reduction of tariff would be prejudicial to the interest of the project as such and hence the petitioner craves leave of the Commission to maintain the tariff as agreed between the petitioner and the 2nd respondent.
- y. It is stated that the delay in filing this present petition is on account of the various issues faced by the petitioner in ensuring that the transmission lines were not disturbed due to the local agitation by the farmers, also there were differences between the petitioner and the EPC Contractor engaged for the purpose of commissioning of the project. Thereafter, due to the onset of the n-Cov19 virus/ Corona virus pandemic, many of

the employees/families of the employees were affected which had direct bearing on operations/pursuing the matter, all of which led to the delay in achieving SCOD.

Law Related to Force Majeure

- z. It is stated that the principles relating to Force Majeure have been crystallized and settled by the Hon'ble Supreme Court in various judgments particularly in the judgment titled *Dhanrajamal Gobindram Vs. Shamji Kalidas & Co.* wherein the Hon'ble Supreme Court has clearly interpreted the term Force Majeure by holding that:

"An analysis of rulings on the subject into which it is not necessary in this case to go, shows that where reference is made to Force Majeure', the intention is to save the performing party from the consequences of anything over which he has no control. This is the widest meaning that can be given to Force Majeure', and even if this be the meaning, it is obvious that the condition about Force Majeure' in the agreement was not vague."

- aa. It is stated that the aforesaid ratio laid down by the Hon'ble Supreme Court, squarely applies to the present case in as much as the events and the circumstances narrated in the aforesaid paragraphs were beyond the control of the petitioner and squarely fall within the meaning of Force Majeure Clause contained in the PPA.
- ab. It is stated that various electricity regulatory Commissions and also Hon'ble APTEL have recognized the Force Majeure like situations that are faced by the renewable energy power developers and applied the ratio laid down by the Hon'ble Supreme Court on the issue as to what constitutes '*Force Majeure*' under PPA's or such other concluded contracts between the parties.
- ac. It is stated that in the case of *GUVNL Vs. GERC, Cargo Solar*, the Hon'ble APTEL vide its order/judgment dated 04.02.2014 in Appeal No.123 of 2012 held that:

"The approvals under Bombay Tenancy and Agriculture Land (Vidharba Region and Kutch Area) Act, 1958 and for water source under the Environment (Protection) Act, 1986 and CRZ Regulations sought by Cargo Solar are the statutory/legal

approvals under the PPA. The delay in obtaining these approvals by the Government instrumentalities by Cargo Solar would fall in the category of Force Majeure Events under Article 8.J(a)(v) of the PPA. As such the period of such delay is required to be suspended or excused and to that extent the period of Commercial Operation Date, Date of Construction default and Scheduled Commercial Operation Date are to be extended in terms of the PPA."

- ad. It is stated that in the case of *M/s Lanco Anpara, in Petition No.882 of 2012* before the Uttar Pradesh Electricity Regulatory Commission (UPERC) enumerated certain factors leading to delay in Commercial Operation of project, including delay in project construction, earthquake in China leading to delay in procurement of equipment's, delay in water supply from river Ganga, labour strike, etc. In its order dated 09.11.2012, UPERC granted extension of SCOD and considered the actual COD as the revised COD while observing as under:

"Hence, in consideration of the fact that the reasons for delay were Force Majeure in nature and were not in control of any party to the PPA, the Commission opines that the plea for extension of CODs is justified. Therefore, the Commission approves actual dates of commissioning as RCODs i.e., for Unit-1 as 10.12.2011 and for Unit-2 as 18.01.2012. Consequently, the "Expiry Date" shall be extended by 258 days (no of days between scheduled and actual RCOD of Unit-1) in the PPA dated 12.11.2006. The requisite amendments in the PPA and SPPA shall be made accordingly. All other terms and conditions shall remain as provided in the PPA and SPPA. The above would not have any financial implication in tariff".

- ae. It is stated that in respect of the similarly placed PPA holders who were also successful bidders in the same tender process, this Commission vide its Order in O.P.No.13 of 2018 dated 13.08.2018 in the case of *M/s ACME Medak Solar Energy Private Limited*, held as under:

"The delay caused due to events narrated by the Petitioner and not specifically contradicted by the Respondent certainly entitles

the Petitioner to extension of SCOD. Thus, the extension of the SCOD by the GOTS through letter dated 23-08-2017 of Energy department is based on reasons and the commission concurs with the extension of the SCOD. The contention of the Respondent that the events narrated by the Petitioner have no connection to the plea of Force Majeure is not tenable

In view of the aforementioned reasons, the delay as pleaded by the Petitioner is liable to be condoned apart from the fact that the SCOD finally stood extended up to 31-10-2017, by which date the project was completed in all respects by synchronization with the grid of the respondent on 14-07-2017, thus fulfilling the terms of the PPA. The point is answered accordingly”.

- af. It is stated that in view of the afore-stated facts and the approved undertaking formulated by this Commission, the petitioner is filing the instant Petition to put forth its case in regard to the position of law on extension of SCOD under the PPA.
- ag. It is stated that unless the prayers made herein below are granted in favor of the petitioner, the petitioner shall suffer irreparable loss and harm to its business which also affects the viability and feasibility of its projects.

3. The petitioner has sought the following reliefs in the petition.

- “a. *To extend the time for Schedule Commercial Operation Date (SCOD) from to 02.05.2017 up to the date of synchronization, i.e., 27.10.2017 without levying any penalty for the extended period of SCOD at the tariff agreed between the petitioner and the respondent No.1 in the power purchase agreement dated 03.02.2016 involving 178 days delay by condoning the same.*
- b. *Consequently, direct the respondent No.1 to refund the penalty levied and collected from the petitioner by invoking the performance bank guarantees (PBG No.006GM01160110002, 006GM01160110004, 006GM01160110008) provided by the petitioner to the respondent No.1, aggregating to Rs. 10,00,00,000/- to the petitioner.”*

4. The respondents have filed their counter affidavit, stating as below:
- a. The petitioner filed the present petition under Section 86 (1) (f) and (k) praying the Commission for the relief as mentioned in the petition.
 - b. It is stated that the PPA was entered with the petitioner on 03.02.2016 for purchase of 50 MW Solar power from its solar power project connected at 220/132 kV Siddipet SS, Medak District, Telangana at a tariff of Rs.5.2614 per unit for a period of 25 years from COD. As per the terms of PPA, the petitioner has to commission its solar power project within 15 months from the date of signing of the PPA i.e., 02.05.2017. However, the solar power project of the petitioner was synchronized to the grid on 27.10.2017 with delay of 178 days as against the SCOD i.e., 02.05.2017.
 - c. It is stated that as per the PPA, this respondent is entitled to encash the performance bank guarantee in the following manner in case the petitioner fails to commission the project within the stipulated period:
 - (i) Delay upto one (1) month – Rs.3 lakh per MW on per day basis proportionate to the capacity not commissioned.
 - (ii) Delay of more than one (1) month and up to three (3) months – Rs. 7 lakh per MW on per day basis proportionate to the capacity not commissioned, in addition to the amount stated in the above 3 (a).
 - (iii) Delay of more than three (3) month and up to five (5) months – Rs. 10 lakh per MW on per day basis proportionate to the capacity not commissioned, in addition to the amount stated in the above 3 (a) & 3 (b).
 - d. It is stated that this respondent is entitled to encash the performance bank guarantee furnished by the petitioner in terms of the PPA since the petitioner commissioned its project with a delay of 178 days and the same was encashed.
 - e. It is stated that the events such as unprecedented incessant rains, district reorganization, financial closure, demonetization, GST implementation by GoI, right of way underground issue, local agitation by villagers against laying of transmission lines do not fall under the head of Force Majeure covered by Article 9 of the PPA. Therefore, the

contention of the petitioner that the delay in commissioning of the project due to Force Majeure event becomes untenable and hence cannot be accepted. The reasons cited by the petitioner are to avoid performance of its obligations under the PPA and to gain extension of time for SCOD on the pretext of alleged Force Majeure event. Further petitioner cannot arbitrarily declare an event or circumstance a “*Force Majeure*” and also cannot arbitrarily declare its cessation. It is to state that petitioner is trying to gain time under the guise of Force Majeure. Hence the reasons cited by petitioner do not deserve consideration.

- f. It is stated that moreover petitioner had never informed this respondent stalling the execution of the work of the project due to unprecedented incessant rains, district reorganization, financial closure, demonetization, GST implementation by Gol and difficulty in laying of transmission lines for setting up of solar power project.
- g. It is stated that after extension of the SCOD for additional 4 months i.e., 30.06.2017 to 31.10.2017 by the GoTS to the solar power projects in the state who entered PPA with DISCOMs who participated in the bidding 2015, the respondent communicated the same to the Commission seeking consent/ approval for extension of SCOD up to 31.10.2017. Thereupon, the Commission vide letter dated 30.11.2017 communicated the following without extending SCOD upto 31.10.2017:
- (i) the ratio laid down by the Hon’ble Apex Court in Civil Appeal No.6399 of 2016; *Gujarat Urja Vikas Nigam Limited Vs. Solar Semiconductor Power Company (India) Private Limited and Others* is binding on the stakeholders and in view of the Hon’ble Supreme Court decision in the above case, no general order can issued for extension of time.
 - (ii) For extension of time, each case has to be examined with reference to the terms of PPA by following the principle of natural justice.
 - (iii) Each developer has to file a petition before the Commission furnishing the reason for extension of time which can be examined within the framework of the PPA.

- h. It is stated that the aforementioned order of the Commission was communicated to the petitioner vide Letter No.148, dated 03.02.2018, but the petitioner failed to file petition before the Commission till 25.10.2021 and on the other hand the petitioner performance bank guarantees aggregating to Rs.10 crore were encashed in lieu of the amount to be paid for the delay of 178 days in Commissioning the project towards penalty.
- i. It is stated that the petitioner having not done so now filed the present petition after a lapse of about 3 years 8 months seeking extension of SCOD from 02.05.2017 to 27.10.2017. Therefore, the petitioner is not entitled to seek refund of the penalty amount.
- j. It is stated that agreed tariff of the petitioner is Rs.5.2614 per unit as per PPA which is discovered competitively through competitive bidding in the year 2015 expecting the synchronization of the solar plant in the year 2017. Since the petitioner could not commission the project within the SCOD, the very purpose of fixing SCOD stood defeated causing monetary loss to this respondent. Hence this respondent prays the Commission to dismiss the petition and to refix/revise the tariff as per the prevailing rates in case the Commission is inclined to extend SCOD. The prices discovered through competitive bidding has been falling down and the same is illustrated as follows:



5. The Commission has heard the counsel for the petitioner and the representative of the respondents. It has perused the material available on record. The submissions made on the relevant days of hearing are briefly extracted below:

Record of proceedings dated 20.12.2021:

“... .. The counsel for the petitioner stated that the matter is coming up for filing the counter affidavit for the first time. The representative of the respondents

stated that he needs three weeks' time for filing counter affidavit. The counter affidavit may be filed by 10.01.2022 by serving the same to the counsel for petitioner through email or in physical form. The counsel for petitioner may filed the rejoinder, if any by the date of hearing by serving the same to the respondent through email or in physical form. Accordingly, the matter is adjourned."

Record of proceedings dated 17.01.2022:

"... .. The counsel for the petitioner stated that he is ready to argue the matter and need to submit his version of the case. The representative of the respondents stated that the respondent have already filed the counter affidavit and therefore, the matter may be adjourned so as to make submissions in the matter. The counsel for petitioner has stated that he is not in receipt of the counter affidavit filed by the respondents so far. However, he has insisted for hearing the matter. However, the Commission pointed out as the counter affidavit is filed, it may be appropriate to hear the matter at a later date after service of the counter affidavit to the petitioner. As the counsel for petitioner stated that SCOD had been extended by the government, there is urgency for hearing the matter, the matter is adjourned to a short date."

Record of proceedings dated 31.01.2022:

"... .. The counsel for the petitioner stated that the petition is filed for its extension of scheduled commercial operation date upto 27.10.2017 and consequential relief. He stated that due to several events, which can be called as Force Majeure conditions, the project could not be completed in time. It is his case that initially procurement of land was in issue, but later the petitioner suffered delays due to demonetization, rains and non-availability of labour. It is also stated that the petitioner suffered right of way issue due to location of substation in the town, as the stringing of the lines on overhead basis was impossible. The petitioner had to resort to underground cabling of the transmission line connecting to the substation.

Subsequently, the project was completed and it was synchronized with a delay of about eight months. The project is now functional and the energy is being delivered to the licensee. The Commission had occasion to consider the extension of SCOD in several cases earlier filed before it. He also relied on the judgment of the Hon'ble Supreme Court that SCOD should be extended

considering the Force Majeure events. The counsel for petitioner sought reference to the communication made by the government in this regard. By extending the SCOD, the petitioner is entitled to refund of the bank guarantee furnished by it, which had been encashed by the licensee.

The representative of the respondent stated that the petitioner is not entitled to any relief in the relief, both on extension of SCOD as also refund of the bank guarantee furnished by the petitioner. It is his case that the Commission had decided to examine the extension of SCOD on a case to case basis and informed the licensee that it should convey to the developers that they should file petitions before the Commission for extension of SCOD. The same was also communicated to the petitioner in this case. The petitioner has slept over the matter for nearly three years and eight months and then approached the Commission. The petitioner is not diligent in establishing the project as also approaching the Commission, as such it is not entitled to any relief. Though, the Hon'ble Supreme Court held Force Majeure conditions in favour of the petitioner, however, the petitioner cannot take advantage of the said order due to lapses on its part. The Commission may consider refusing to extend the SCOD. ”

6. The issue that arises for consideration in this petition is that -
'Whether the petitioner is entitled to the reliefs as claimed by it?'

7. The petitioner entered into a PPA on 03.02.2016 for establishing 50 MW solar power project under the competitive bidding route of 2015 to be located at Siddipet village in Medak district and connected to 220/132 kV Siddipet substation. Being a 50 MW project the SCOD is fixed as 15 months from the date of signing of the agreement and the said date falls on 02.05.2017.

8. The petitioner was given letter of intent on 16.12.2015 with a tariff of Rs. 5.2614 per kWh. The petitioner obtained approvals/permissions of various authorities in the year 2016 and 2017 with regard to various works towards execution of the project. Ultimately, the project has been synchronised to the grid on 27.10.2017. Notifying the synchronisation of the project a letter dated 03.11.2017 along with solar plant commissioning certificate has been issued by the Superintending Engineer/ operation circle/Siddipet.

9. While things stood thus, the licensee had invoked the bank guarantee as seen from the submissions made by the petitioner. Nothing is placed on record to state or show that the licensee had in fact invoked the bank guarantees. Even the counter affidavit does not speak of the actual action except stating that the bank guarantees have been encashed. Thus, the petitioner is now before the Commission seeking extension of SCOD from 02.05.2017 to 27.10.2017 and also refund of bank guarantees to the tune of Rs.10 crore.

10. From the pleadings, it is noticed that the licensee had in fact issued a letter dated 03.02.2018 requiring the petitioner to obtain orders from the Commission for extension of SCOD as by them, the actual SCOD had already taken place as noted above. Reference has been made to letter dated 05.10.2018 addressed by the petitioner to the officers of the licensee. The said letter does not speak of any earlier references or any correspondence resting in the matter except seeking extension of SCOD in terms of the decision of the Government on two occasions as approved by the Commission.

11. Further, petitioner sought to highlight the litigation arising out of and in case of land acquisition before the Hon'ble High Court for the State of Telangana and Andhra Pradesh as it then was and the Principal Junior Civil Judge Siddipet in the original suit proceedings. The original suit proceedings resulted in initially obtaining an injunction against the petitioner for utilisation of land, but subsequently the suit was dismissed as compromised, which information is not filed by the petitioner. Likewise, the writ proceedings initiated before the Hon'ble High Court was initially taken on record and an interim order had been passed, however even the said writ petition was subsequently by order dated 27.11.2017 has been dismissed as withdrawn. The relevant details as available on the website of e-courts in respect of the suit is extracted below:

Junior Civil Judges Court, Siddipet

Case Details

Case	Type:	OS	-	ORIGINAL	SUIT
Filing	Number:	1586/2017	Filing	Date:	23-08-2017
Registration	Number:	142/2017	Registration	Date:	23-08-2017

CNR Number: TSME07-000438-2017

Case Status

First Hearing Date: 11th October 2017

Decision Date: 25th November 2017

Case Status: Case disposed

Nature of Disposal: Uncontested--COMPROMISED

Court Number and Judge: 1-Prl Junior Civil Judge

Petitioner and Advocate

- 1) Kanugula Srinivas Advocate- S. Laxminarayana
- 2) Kanugula Laxmi Advocate-S. Laxminarayana
- 3) Kummari Yadaiah Advocate-S. Laxminarayana
- 4) Kanugula Sathaiah Advocate-S. Laxminarayana
- 5) Yasareni @ Kanugula Rajaiah Advocate-S. Laxminarayana
- 6) Gangasami Deepa Advocate-S. Laxminarayana
- 7) Rajaramgari Veerareddy Advocate-S. Laxminarayana
- 8) Gangasani Laxmareddy Advocate-S. Laxminarayana
- 9) Chandireddy Yadavareddy Advocate-S. Laxminarayana
- 10) Rajaramgari Srinivas Reddy Advocate-S. Laxminarayana
- 11) Rajaramgari (Kancharla) Rajireddy Advocate-S. Laxminarayana
- 12) Gangapuram Yellaiah Advocate-S. Laxminarayana
- 13) Venkatapuram Durgaiah Advocate-S. Laxminarayana
- 14) Rajaramgari Venkatreddy Advocate-S. Laxminarayana

Respondent and Advocate

- 1) M/s Surajkiran Solar Technology Pvt. Ltd Rep. by Hanmanth (D2)
- 2) Hanmanth
- 3) Sujan Kumar
- 4) Naveen

Acts

Under Act(s)		Under Section(s)		
CODE OF CIVIL PROCEDURE		26		
Case History				
Registration Number	Judge	Business on Date	Hearing Date	Purpose of Hearing
142/2017	Prl Junior Civil Judge	11-10-2017	25-11-2017	WRITTEN STATEMENT
142/2017	Prl Junior Civil Judge	25-11-2017		Disposed

12. Also, the writ petition was withdrawn by the petitioners therein, the order is extracted below:

“Learned counsel for petitioners filed letter dated 28-11-2017 requesting the Court to permit the petitioners to withdraw this writ petition.

Permission is accorded.

The writ petition is accordingly dismissed as withdrawn. No order as to costs.

Miscellaneous petitions, if any, pending, shall stand closed.”

13. Thus, the averments that the litigation has hampered the completion of the project is irrelevant and uncalled for.

14. The petitioner had synchronised the project on 27.10.2017, whereas the licensee has required it to file the petition before the Commission for extension of SCOD on 03.02.2018, yet the petitioner has approached the Commission on 25.10.2021 after a lapse of three years eight months. This shows the laxity on the part of the petitioner and there is no correspondence from 05.10.2018 till the filing of the petition which shows its callousness in settling the issue. Further, the petitioner sought to rely on the order dated 23.09.2021 of the Hon'ble Supreme Court in respect of extension of limitation in filing petitions and applications as originally passed 23.03.2020 and extended from time to time. Specifically stated the observations in M.A.No.665 of 2021 are required to be considered here. The same are extracted below:

- I. In computing the period of limitation for any suit, appeal, application or proceeding, the period from 15.03.2020 till 02.10.2021 shall stand excluded. Consequently, the balance period of limitation remaining as on 15.03.2020, if any, shall become available with effect from 03.10.2021.*
- II. In cases where the limitation would have expired during the period between 15.03.2020 till 02.10.2021, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 03.10.2021. In the event the actual balance period of limitation remaining, with effect from 03.10.2021, is greater than 90 days, that longer period shall apply.*
- III. The period from 15.03.2020 till 02.10.2021 shall also stand excluded in computing the periods prescribed under Sections 23 (4) and 29 A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe*

period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of 5 proceedings.

IV. *The Government of India shall amend the guidelines for containment zones, to state.*

“Regulated movement will be allowed for medical emergencies, provision of essential goods and services, and other necessary functions, such as, time bound applications, including for legal purposes, and educational and job-related requirements.”

15. The above said order of the Hon’ble Supreme Court is of no avail to the petitioner as the petitioner had ample opportunity prior to March 2020 to approach the Commission for extension of SCOD as well as reimbursement of the bank guarantees encashed by the licensee. Having slept over the issue, it is not appropriate for the petitioner to now agitate the issue by taking a plea of invoking jurisdiction within the period of limitation as granted by the Hon’ble Supreme Court. The extension of limitation granted the Hon’ble Supreme Court was in peculiar circumstances arising out of the spread of pandemic COVID-19 and cannot be applied to a case where the petitioner is not diligent in pursuing his grievance in a timely manner and that the action way back in November 2017.

16. At this stage, it is appropriate to notice the observations of Hon’ble Supreme Court in the latest judgment dated 19.09.2022 in the matter of *M/s Tech Sharp Engineers Private Limited Vs. Sanghvi Movers Limited in Civil Appeal No.296 of 2020*. It has been observed as below:

“18. *The fact that an application for initiation of CIRP, may have been filed within three years from the date of enforcement of the relevant provisions of the IBC is inconsequential. What is material is the date on which the right to sue accrues, and whether the cause of action continuous.*

... ..

23. *It is now well settled that the provisions of the Limitation Act are applicable to proceedings under the IBC as far as may be Section 14 (2) of the Limitation Act which provides for exclusion of time in computing the period of limitation in certain circumstances, provides as follows:*

“14. *Exclusion of time of proceeding bona fide in court without jurisdiction.—*

(1)

(2) *In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.”*

24. *Similarly, under Section 18 of the Limitation Act, an acknowledgment of present subsisting liability, made in writing in respect of any right claimed by the opposite party and signed by the party against whom the right is claimed, has the effect of commencing of a fresh period of limitation, from the date on which the acknowledgment is signed. However, the acknowledgment must be made before the period of limitation expires.*

25. *Proceedings in good faith in a forum which lacks jurisdiction or is unable to entertain for like nature may save limitation. Similarly, acknowledgment of liability may have the effect of commencing a fresh period of limitation.*

... ..

29. *A claim may not be barred by limitation. It is the remedy for realisation of the claim, which gets barred by limitation. The impugned order of the NCLAT is unsustainable in law. ”*
(emphasis supplied)

17. It is clear from the observations of the Hon’ble Supreme Court that a claim may survive but the remedy may not survive if it is barred by limitation. In the instant case, the issue arose as early as 03.11.2017 when the licensee confirmed the synchronisation of the project or at best on 03.02.2018 when the licensee required the petitioner to obtain necessary orders from the Commission duly extending the SCOD. Both these dates would emphatically make it clear that the limitation ran out either on

02.11.2020 or 02.02.2021 whereas the petition is filed after a sweet ten months. As pointed out above, the laxity is on the face of it from the dates noted above, since no correspondence whatsoever has been placed on record to show that the petitioner was diligent in its act.

18. No doubt, the Commission has considered extending SCOD in several cases where the solar generators had approached the Commission in a timely manner keeping in view the directions of the Government to the licensee which did not oppose the extension at its own action, but it was guided by its owner the Government.

19. Also, the Commission is conscious of the fact that it itself had disposed of petitions or extension of SCOD in the year 2021. The observations made therein while disposing of such petitions is appropriately noticed here:

O.P.No.28 of 2020 M/s Enrich Energy Private Limited decided on 09.03.2021

“

14. *The petitioner ought to have approached the Commission with a proper petition as has been informed to it by the licensee in its letter dated 03.02.2018. For whatever reasons that may be attributable to the petitioner, the petitioner has chosen not to invoke the jurisdiction of the Commission for a period of two years nine months and no reasons are set forth in the petition.*
15. *The Commission notices that the petitioner having accepted the delay could not have reverted to the Commission seeking to recover the amounts which it has voluntarily paid the amount. But at the same time, the delay as occasioned has been already accepted by the Commission based on the acceptance of the government of the Force Majeure events. Since the Commission has considered these aspects in several cases and that the extension of SCOD as accepted by the government insofar as several other generators are concerned, the present request made by the petitioner can be accepted.*
16. *The present prayer is to accord approval for extended SCOD, as such the same can be considered for allowing. Thus, the SCOD of the petitioner's project would stand to be synchronized on*

31.03.2017, which date is not denied by the licensee. In fact, this will fit into the generic extension given by the government as accepted by the Commission as stated above. Accordingly, as the SCOD is within the time granted by the government and accepted by the Commission, the petitioner is not liable to pay any penalty in terms of the PPA.

17. The Commission, in the circumstances and for the reasons observed above, allows the petition and declares the SCOD as 31.03.2017. Consequently, the petitioner is entitled to refund of the penalty collected by the licensee for a sum of Rs.24,26,667/- (Rupees twenty four lakh twenty six thousand six hundred and sixty seven only).
18. Subject to the findings and observations recorded above, the petition is allowed as prayed for, but in the circumstances, without costs.”

O.P.No.27 of 2021 M/s Paramount Minerals & Chemicals Limited, decided on 17.11.2021

“

17. The petitioner ought to have approached the Commission with a proper petition as has been informed to it by the licensee in its letter dated 03.02.2018. For whatever reasons that may be attributable to the petitioner, the petitioner has chosen not to invoke the jurisdiction of the Commission for a period of three years eight months and no reasons are set forth in the petition.
18. The Commission notices that the petitioner having accepted the delay ought not have reverted to the Commission seeking to recover the amounts which it has voluntarily allowed the licensee to deduct from power sale invoice of October, 2019. But at the same time, the delay as occasioned has been already accepted by the Commission based on the acceptance of the Government of the Force Majeure events. Since the Commission has considered these aspects in several cases and that the extension of SCOD as accepted by the Government insofar as several other

generators are concerned, the present request made by the petitioner can be accepted.

19. *The present prayer is to accord approval for extended SCOD, as such the same can be considered for allowing. Thus, the SCOD of the petitioner's project would stand to be synchronized on 31.03.2017, which date is not denied by the licensee. In fact, this will fit into the generic extension given by the Government as accepted by the Commission as stated above. Accordingly, as the SCOD is within the time granted by the Government and accepted by the Commission, the petitioner is not liable to pay any penalty in terms of the PPA.*
20. *The Commission, in the circumstances and for the reasons observed above, allows the petition and declares the SCOD as 31.03.2017. Consequently, the petitioner is entitled to refund of the penalty collected by the licensee for a sum of Rs. 8,17,740/- (Rupees eight lakh seventeen thousand seven hundred and forty only).*
21. *Subject to the findings and observations recorded above, the petition is allowed as prayed for, but in the circumstances, without costs."*

O.P.No.6 of 2020 M/s Satec Envir Engineering (India) Private Limited decided on 29.12.2021

"

42. *As pointed out by the petitioner, in counter affidavit of 1st respondent, it is said about filing of the petition before the Commission for amending the penalties and re-fixation of tariff, as per the directions given on 18.08.2017 by the Commission, for approving the extended SCOD upto 30.06.2017 for solar power projects of competitive bidding 2015. The 1st respondent filed petition on 11.10.2017 and was firstly returned on 21.10.2017 for complying of certain objections and its was resubmitted on 29.11.2017 without complying the objections and again its was returned on 23.02.2018 for complying objections and it was resubmitted on 31.03.2018 without complying the objections and finally it was returned on 07.06.2018 along with letter and*

thereafter that petition was not resubmitted by the respondent probably for the reason of giving directions by the Commission i.e., on 30.11.2017 by addressing a letter to TSDISCOMs wherein it was directed for filing of individual petitions by each of the Solar Power Developer for extension of SCOD to enable the Commission to examine each case separately with reference to the provisions in PPA of each of the Solar Power Developer by following the principles of natural justice. On the other hand, petitioner filed petition, at the first instance, on 05.05.2018 before the Commission for extension of SCOD, which was returned with office objections on 14.05.2018 and of which, 1st respondent had no knowledge. The petitioner instead of resubmitting the petition by complying the objections within time granted, filed the instant petition on 09.07.2019 i.e., after more than one (1) year from the return of the petition filed at first instance, by changing the prayer and by adding the plea of Force Majeure events and Change of Law. As such, on the date of issuance of Preliminary Default Notice dated 06.09.2018 to the petitioner by 1st respondent, no petition of any kind filed by either 1st respondent or the petitioner, was pending before the Commission, therefore it cannot be said that 1st respondent has taken inconsistent or contradictory stand.

43. As per the provisions of PPA, the 1st respondent is entitled to take recourse to deal with the non-fulfilment obligations / responsibilities by the Petitioner and to issue a Preliminary Default Notice as per Article 10.3.1 of PPA by expressing the intention of 1st respondent to terminate PPA and after the lapse of conciliation period as per Article 10.3.2 of PPA to cause a termination notice. In the given circumstances, 1st respondent rightly issued Preliminary Default Notice on 06.09.2019 and termination of notice of PPA dated 20.01.2020 which stands good and which is valid and sustainable.
44. For the above stated reasons, the Issue No.2 is in favour of the respondents.

45. *In view of answering the Issue No.1 against to the petitioner and Issue No.2 in favour of the respondents, the petitioner is not entitled to any reliefs. In the result, the petition is dismissed without costs.”*

20. Though the Commission had accepted and granted extension of SCOD or refused in the respective cases, each case had its peculiar facts and circumstances. Thus merely because the Commission had considered the issue in the year 2018 and 2021, it does not mean it is estopped from looking at the facts and circumstances in each case. Although the law does not put fetters to extend the SCOD, it is appropriate to state that the aggrieved person should approach the proper forum in timely manner and this is the reason in this case to deny the relief.

21. In view of the discussion and observation, the Commission is not inclined to grant any relief to the petitioner. The petition stands dismissed without any costs.

This order is corrected and signed on this the 17th day of October, 2022.

Sd/-	Sd/-	Sd/-
(BANDARU KRISHNAIAH)	(M. D. MANOHAR RAJU)	(T. SRIRANGA RAO)
MEMBER	MEMBER	CHAIRMAN

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