



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

O. P. No. 57 of 2022

&

I. A. No. 52 of 2022

Dated 20.10.2023

Present

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

Between:

M/s Surajkiran Renewable Resources Private Limited,
Regd. Office at Adani Corporate House,
Shantigram, Near Vaishno Devi Circle,
S.G.Highway, Khodiyar, Ahmedabad 382 421.

... Petitioner.

AND

Southern Power Distribution Company of Telangana Limited,
Corporate Office, H.No.6-1-50, Mint Compound,
Hyderabad 500 063.

... Respondent.

The petition came up for hearing on 22.08.2022, 12.09.2022, 30.09.2022, 17.10.2022, 21.11.2022 and 12.01.2023. Sri. Khamar Kiran Kantamneni, Advocate for petitioner appeared on 22.08.2022, 12.09.2022, 30.09.2022, 21.11.2022, Sri. P. V. Nishanth, Advocate representing Sri Khamar Kiran Kantamneni, counsel for petitioner appeared on 17.10.2022 and Sri. Aniket Prasoon, Advocate representing Sri. Khamar Kiran Kantamneni, counsel for petitioner appeared on 12.01.2023. Sri. Mohammad Bande Ali, Law Attaché for respondent appeared on 22.08.2022, 12.09.2022, 30.09.2022, 17.10.2022, 21.11.2022 and 12.01.2023. The matter having been heard and having stood over for consideration to this day, the Commission passed the following:

ORDER

M/s. Surajkiran Renewable Resources Private Limited (petitioner) has filed a petition under Section 86 (1) (e) and 86 (1) (f) of the Electricity Act, 2003 (Act, 2003) read with clause in the power purchase agreement (PPA), seeking extension of SCOD and consequential reliefs in respect of the 50 MW connected to the 220/132 kV substation situated at K.M.Pally Village, Nalgonda District.

2. Originally the petitioner has filed the petition and sought the following prayers in the petition.

- a. Allow the present petition and declare that the petitioner is entitled to extension of time for commissioning the project in terms of Article 9.2 of the power purchase agreement dated 03.02.2016.
- b. Direct the respondent to give full legal effect to Article 9.2 of the power purchase agreement dated 03.02.2016 and to extend the scheduled commercial operation date of the project from 03.05.2017 to 11.10.2017 without any adverse consequence (including imposition of liquidated damages) on account of various events are circumstances that were beyond the control of the petitioner.
- c. Direct the respondent to return/refund to the petitioner the amount of Rs.10,53,00,000/- which has been unlawfully and arbitrarily deducted by the respondent from the petitioner as liquidated damages for alleged delay in commissioning of project.

3. The petitioner has filed the original petition with several contentions whereas, the petitioner has subsequently filed an Interlocutory Application (I.A.) with the following prayer:

- (i) Allow the present application and permit the petitioner to amend the petition in terms of the amendments sought in paragraph 7 of the present application.
- (ii) Replace the petition filed by the petitioner on 30.05.2022 with the amended petition and take the same on record;

The Interlocutory Application (I.A.) has been filed even before the pleadings are complete and is filed along with a copy of Amended Original Petition, hence the pleadings of petitioner in amended original petition are taken into consideration for the

purpose of this order without referring to the original filing made by the petitioner. Thus, the contentions raised by the petitioner in amended original petition are extracted below:

- a. It is stated that the petitioner is a generator within the meaning of Section 2(28) of the Act, 2003 and is *inter alia* engaged in the business of generation and sale of solar energy. The petitioner has its registered office at Adani Corporate House, Shantigram Near Vaishno Devi Circle, S.G.Highway, Khodiyar Ahmedabad 382 421. The petitioner owns and operates the project.
- b. It is stated that the respondent Southern Power Distribution Company of Telangana Limited (TSSPDCL) is a state-owned company entrusted with the function of distribution of electricity in 15 (fifteen) districts in the State of Telangana. The entire 50 MW of electricity generated from the project is being supplied/sold to the respondent under the PPA.
- c. It is stated that the Commission has the jurisdiction to adjudicate the present dispute under Sections 86(1)(e) and 86(1)(f) of the Act, 2003. Section 86(1)(e) of the Act, 2003 *inter alia* provides that the Commission shall discharge the function of promoting cogeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person. Further, in terms of Section 86(1)(f) of the Act, 2003 the Commission is empowered to adjudicate disputes between the licensees and generators. In addition to the above, it is significant to highlight that Article 11.4 of the PPA which specifically refers to adjudication of disputes arising out of the PPA by the Commission. Accordingly, it is stated that the Commission has the jurisdiction to entertain the present petition. Article 11 of the PPA is being reproduced hereinbelow for ease of reference:

“Article 11 Dispute Resolution

11.4 Failure to resolve the dispute in terms of clauses 11.1 to 11.3 or even otherwise, any party may approach TSERC to resolve the dispute under Section 86(1)(f) of the Electricity Act, 2003.”

- d. It is stated that the Government of Telangana (GoTS) vide letter dated 18.03.2015 directed Transmission Corporation of Telangana Limited (TSTRANSCO) and Telangana State Power Coordination Committee (TSPCC) to initiate the process of floating tender on behalf of Telangana State Electricity Distribution Companies (TSDISCOMs) for purchase of 2000 MW solar power. In furtherance of the same, TSTRANSCO and TSPCC vide letter dated

31.03.2015 instructed TSDISCOMs to initiate the process of floating tenders on behalf of TSDISCOMs for procurement of 2000 MW solar power.

- e. It is stated that accordingly, the respondent by way of Request for Selection (RfS) document bearing RfS (Bid) No.TSSPDCL/01/LTSP/2015 dated 01.04.2015 issued tender for selection of solar PV developers in the State of Telangana for procuring 2000 MW through tariff based competitive bidding process. In terms of the RfS, the respondent was to enter into power purchase agreements with the successful bidders for a period of 25 years.
- f. It is stated that accordingly, M/s Sky Power Southeast Asia II Investments Limited (original bidder) submitted its financial bid on 30.06.2015 for setting up a solar power project of 50 MW capacity and quoted a tariff of Rs.5.3719/- per unit. Pursuant thereto, original bidder was selected as the successful bidder for developing the project and supplying electricity generated therefrom to the respondent by way of issued letter of intent (LoI) dated 16.12.2015.
- g. It is stated that thereafter, in terms of clause 3.5.1(x) of the RfS, original bidder incorporated the petitioner as a special purpose vehicle for execution of the project. Further, in terms of clause 3.7.3 of the RfS, the petitioner also submitted a Performance Bank Guarantee (PBG) to the respondent to the tune of Rs.10,00,00,000/- at Rs.20,00,000/- per MW. Subsequently, the petitioner and the respondent entered into the PPA dated 03.02.2016 for development of the project and for sale of the electricity generated therefrom to the respondent at the tariff of Rs.5.3719 per unit for a period of 25 years from the commercial operation date (COD) of the project. The relevant provisions of the PPA are reproduced hereinbelow for ease of reference of the Commission:

“Article 1-Definitions

... ..

1.13 *“Commercial Operation Date”/“Date of Commercial Operation” (“COD”) means the date on which the project is declared by the solar power developer to be operational (which means project is able to inject power to grid), provided that the solar power developer shall not declare a generating unit to be operational until such generating unit has complied with the conditions of Clause 3.8 of this Agreement.*

... ..

1.43 *“Scheduled Commercial Operation Date (SCOD) or Scheduled date of Commercial Operations” means the date whereupon the SPD is required to start injecting power from the Power Project to the delivery Point, i.e. and shall mean twelve (12) months from*

the Effective Date for projects connecting at 33kV level and shall mean fifteen (15) months from the Effective Date for projects connecting at 132kV or 220kV level;

... ..

Article 9 Force Majeure

Definition of Force Majeure:

- (a) *“Force Majeure” shall mean any event or circumstance or combination of events or circumstances that materially and adversely affect the performance by either party (the “Affected Party”) of its obligations pursuant to the terms of this Agreement (including by preventing, hindering or delaying such performance), but only if and to the extent that such events and circumstances are not within the Affected Party’s reasonable control and were not reasonably foreseeable and the effects of which the Affected Party could not have prevented by Prudent Utility Practices or, in the case of construction activities, by exercise of reasonable skill and care. Any events or circumstances meeting the description of Force Majeure which have the same effect upon the performance of any of the Solar Power Project setup in accordance with solar policy announced by Govt. of Telangana State (GoTS) under the competitive bidding route and which therefore materially and adversely affect the liability of the Project or, as the case may be, the DISCOM to perform its obligations hereunder shall constitute Force Majeure with respect to the Solar Power Developer or the DISCOM, respectively.*
- (b) *Force Majeure circumstances and events shall include the following events to the extent, that they or their consequences satisfy the above requirements.*
- (i) *Non Political Events such as acts of God including but not limited to any storm, flood, Drought, Lighting, Earthquake or other natural calamities, fire, accident, explosion, strikes, labour difficulties, epidemic, plague or quarantine, air crash, shipwreck, train wrecks or failure (“Non Political Events”).*
- (ii) *Indirect Political Events such as acts of war sabotage, terrorism or act of public enemy, blockades, embargoes, civil disturbance, revolution or radioactive contamination (“Indirect Political Events”).*
- (iii) *Direct Political Events such as an Government Agencies or the DISCOMs unlawful or discriminatory delay, modification, denial or refusal to grant or renew, or any revocation of any required permit or Change in Law (Direct Political Events).*

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 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.

... ..
Article 10 Events of Default and termination

... ..
10.5 Penalties in case of Delayed Commissioning

Under normal circumstances the Project has to be commissioned within 15 months from the date of signing of this Agreement. In case of failing to achieve this milestone, the DISCOM shall encash the Performance Bank guarantee which was submitted by the solar developer to the DISCOM at time of entering this Agreement in the following manner: Contracted Capacity commissioned but with delay:

- (a) *Delay up to one (1) month - DISCOM shall encash Rs.3 lakh per MW on per day basis proportionate to the Capacity not commissioned.*
- (b) *Delay of more than one (1) month and up to three months –DISCOM shall encash Rs.7 lakh per MW on per day basis proportionate to the Capacity not commissioned, in addition to the amount stated in clause 10.5(a).*
- (c) *Delay of more than three (3) months and up to five (5) months - DISCOM shall encash Rs.10 lakh per MW on per day basis proportionate to the Capacity not commissioned, in addition to the amount stated in clauses 10.5(a) and 10.5(b).*

Note: By the way of illustration, if the COD is delayed by ten (10) days, an amount of Rs.1 lakh per MW shall be forfeited from the first tranche of PBG of value of Rs.3 lakhs per MW.

- (d) *In case the commissioning of Power Project is delayed beyond five (5) months from the scheduled commissioning date, the SPD shall pay to DISCOM, the Liquidated Damages at the rate of Rs.10,000/- (Ten Thousand) per MW per day of delay for the delay in such remaining capacity which is not commissioned. The amount of liquidated damages shall be recovered from the SPD from the payments due on account of sale of solar power to the DISCOM.*

Provided that the DISCOM shall have the liberty not to invoke this provision in a reasonable case as shown by the SPD for levying liquidated damages.”

- h. It is stated that thereafter, the respondent along with Northern Power Distribution Company of Telangana Limited approached the Commission by

way of O.P.No.3 of 2016 *inter alia* seeking adoption of the tariff discovered under the competitive bidding conducted by way of the RfS in terms of Section 63 of the Act, 2003, which was allowed by the Commission vide its order dated 15.02.2016. The relevant extract of the aforesaid order dated 15.02.2016 is reproduced hereinbelow for ease of reference of the Commission:

“19. The Commission has examined the proposals of the TSSPDCL in detail, that is manner of bidding process carried out i.e., under e-procurement platform, wide publicity thorough newspapers, uploading in their website, process of technical bids evaluation and allocation of capacity with price. The Commission also examined provisions contained in Section 63 of the Electricity Act, 2003 which is extracted below.

.....
20. The Commission has noticed that there are no specific guidelines issued under Section 63 by the Govt. of India for procurement of power from renewable sources of energy, especially solar power. However, the TS Discoms have followed the MNRE guidelines/ documents issued under JNN Solar Mission.

21. On examination of the provisions contained in Section 63 of Electricity Act, 2003, it is noticed that the bidding has been carried out in a transparent manner and within the guidelines available of MNRE, GoI. Therefore, the Commission in exercise of powers conferred on it u/s 63 of the Electricity Act, 2003 hereby adopts the tariffs as proposed by the TSSPDCL for procurement of 2000 MW solar power for each successful bidder with capacity as annexed herewith.

ANNEXURE-1

List of Bidders to whom LOIs issued falling below cutoff Tariff for 2000 MW Solar Tender						
Group-1						
Sl. No.	Name of the Company	Project	Quote	Allocated Capacity	Substation Allotted	District of Substation
..
Group-2						
Sl. No.	Name of the Company	Project	Quote	Allocated Capacity	Substation Allotted	District of Substation
..
4	M/s Sky Power Southeast Asia Investments Limited	2	5.3719	50	220/132 K.M.Pally SS	Nalgonda
..”

i. It is stated that at this juncture, it significant to highlight that as per Recital 8 of the PPA, the project was proposed to be and has been connected to 220/132 kV K.M.Pally grid substation. Accordingly, as per Article 1.43 read with

Article 10.5 of the PPA, the petitioner was obligated to commission the project within 15 months from the effective date that is by 03.05.2017, being 15 months from 03.02.2016. It is stated that while the petitioner had taken earnest steps for the development of the project with the intent of achieving commercial operation of the same by 03.05.2017. However, despite its best efforts, due to various unforeseeable events (explained hereinbelow) that were beyond the reasonable control of the petitioner, the project could only be commissioned by the petitioner on 11.10.2017, which is evident from the respondent's letter to TSPCC dated 10.11.2017.

j. It is stated that subsequent to the signing of PPA, owing to various unforeseeable events and circumstances which were clearly in the nature of Force Majeure events, the development and execution of many of solar power projects around that time period across 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, including the petitioner, could not have been prevented even by employing prudent utility practices or exercise of reasonable skill and care. Accordingly, it is humbly submitted that the following events which impacted the commissioning of the project fall within the definition of Force Majeure events in terms of Article 9 of the PPA:

(i) Force Majeure events affecting land acquisition:

(a) Sada Bainamas:

Most of the land in the State of Telangana was owned by farmers under unregistered and unstamped transfer deeds, locally called "Sada Bainamas". Despite various opportunities being granted by the GoTS for regularization of such Sada Bainamas, various land parcels continued to remain under Sada Bainamas. In this regard, GoTS once again by way of G.O.Ms.No.153 dated 03.06.2016 issued an order for the purpose of regularizing Sada Bainamas throughout the State of Telangana as one-time settlement so that people who acquired land in the past under unstamped and unregistered agreements/sale deeds, could apply and get their documents regularized by the Government.

Accordingly, as it was/is well known in public domain, the regularization of Sada Bainamas being underway made it difficult for the petitioner to acquire and register the land required for development of the project, since, the petitioner's lenders, as is a general practice, insisted on clear title of properties for 33 years, which excluded Sada Bainamas. Accordingly, the petitioner was effectively required to go on hunt for lands with proper marketable

title, which was further constrained by the substation wise bidding under the 2015 bid scheme, which meant procurement of lands within a certain radius of the said sub-station.

(b) District Re-organization:

It is stated that GoTS 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, by way of notification bearing G.O.Ms.No.245, notified new districts and reorganized boundaries of existing districts, 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 reorganization process, inter alia, involved the following, which made it practically difficult for the petitioner to acquire land and ascertain the marketable title of owners:

- change of circle rates, causing landowners to renegotiate/renege on land sale agreements;
- shift of revenue records from old district to the new district;
- non-availability of proper revenue records in the Tehsil Offices; and
- non-availability of contiguous land parcels since some landowners who were willing to offer land for development of projects, changed their decision post reorganization.

(c) In addition to the above, it is stated that GoTS had taken a policy decision of non-allotment of Government owned land for setting up of power projects, thereby forcing solar power project developers, such as the petitioner, to look for privately owned land for setting up the projects. It is pertinent to point out that some of these Government owned land parcels were found to be situated in between privately owned land parcels identified by the developers for development of solar power projects, making it practically difficult for the developers to acquire a single, contiguous stretch of land. Therefore, even the Ministry of New and Renewable Energy (MNRE) by way of its office memorandum dated 02.12.2016 acknowledged that the said policy decision resulted in delay in commissioning of solar power projects, such as the present case.

(d) Demonetization:

It is stated that the Government of India (GoI) by way of its notification dated 08.11.2016 withdrew the legal tender status of Rs.500 and Rs.1,000 denominations of banknotes ('Demonetization'). It is stated that demonetization has had a domino effect on land acquisition and other project execution activities, which were delayed considerably for the following reasons:

- The country witnessed a major cash crunch as 86% of the currency under circulation was rendered invalid and new currency distribution was curtailed. Banks were busy handling cash disbursements in lieu of old notes and did

not issue DDs, receive challans towards stamp duty, registration charges, etc.;

- landowners were not keen to sell their land as payments would be made to them by cheque and proceeds from such sale of land could not be withdrawn from the banks due to acute shortage of cash in semi urban and rural banks; and
- encumbrances created over land by way of loans taken by the landowners could not be settled as banks could not process loan repayments in time, making it impossible for developers to proceed for registration.

(e) Implementation of Goods and Services Tax (GST) by the GoI:

1. It is stated that it is a matter of record that in the year 2017, the GoI a unified indirect tax structure in the form of GST which was implemented with effect from 01.07.2017. It is stated that despite its best efforts, the petitioner was unable to procure essential items needed for the setting up of the project such as solar PV modules, inverters, etc., prior to 01.07.2017 due to the aforesaid Force Majeure events.
2. Thereafter, due to the implementation of GST laws with effect from 01.07.2017 many sub-vendors who were to supply the aforementioned items to the petitioner were unable to make deliveries on schedule, as many configuration changes such as amendment to invoices as per GST requirements, e-way bill requirements, etc., had to be completed.
3. Thus, due to delay in supply of such items to the project site, there was a consequent delay in the installation of the same, which was beyond the reasonable control of the petitioner and led to an overall delay in the commissioning of the project.
4. The aforesaid delay has also been recognized by MNRE in its office memorandum dated 20.06.2018, whereby MNRE has directed renewable energy project implementing agencies to grant extension of SCOD to renewable energy projects which had achieved Financial Closure prior to 01.07.2017 on account of implementation of GST laws.

(ii) Force majeure events affecting funding of projects:

In addition to the above and consequent to the same, it is stated that investor and lender sentiments were adversely affected, thereby creating a domino effect on disbursements and project overheads. Meaning thereby, since investors and lenders were unsure about the future of solar power projects in the State (due to the Force Majeure events detailed herein), disbursements for power projects were delayed, leading to periodic increase in project overheads and consequent escalation of project cost. As a result, viability of the projects was hampered thereby causing lenders further discomfort and uncertainty as regards making further investments in solar power projects, including but not limited to the petitioner's project.

(iii) Force majeure events affecting project execution work at site:

- (a) Unprecedented incessant rains: The State of Telangana experienced excessive rains in the months from June to October, 2016, going beyond the regular monsoon season. These rains

were unprecedented in the context of past 100 years and as such could not have been predicted by solar power project developers. Further, as a result of the above, there was extensive flooding of the project sites causing idling of labour and equipment at project sites and severely hampering construction works.

(b) Demonetization: *In addition to the impact on the land acquisition for the Project, Demonetization also led to further delays in execution and implementation of project timelines, as due to unavailability of cash, the petitioner could not make payments to the labour at the project site due to which contractors/suppliers refused to provide any services, thereby seriously affecting and delaying the project development activities.*

- k. It is stated that the material and adverse effect of the aforesaid Force Majeure events was felt by all solar power developers in the State of Telangana and across all 4 stages of development and setting up of solar power projects, viz. land acquisition, funding from the bank/investors, equipment supplies from India/abroad, and project site construction.
- l. It is stated that in view of the above and various representations received by GoTS in this regard, GoTS by way of its letter dated 29.06.2017, after careful consideration and acknowledgment of the diverse Force Majeure events encountered by the various solar project developers across the state, directed TSDISCOMs to extend the SCOD as specified in the respective PPAs of all solar power projects upto 30.06.2017, without any penalties.
- m. It is stated that in view of the above, TSDISCOMs approached the Commission for extension of the SCOD upto 30.06.2017 for PPAs entered into between 31.01.2016 and 28.02.2016. Accordingly, the Commission vide its letter dated 18.08.2017 granted in-principal approval to the same. In furtherance of the above, the respondent vide its letter dated 15.09.2017 informed the petitioner that this Hon'ble Commission has granted in-principle approval for extending the SCOD up to 30.06.2017 and called upon the petitioner to submit its acceptance to the same within one week.
- n. It is stated that the petitioner did not provide its acceptance/consent to the respondent's letter dated 15.09.2017. Furthermore, since most of the solar power projects in the State of Telangana had suffered extensively on account of the aforesaid Force Majeure events, the aforesaid extension of SCOD upto 30.06.2017 was inadequate. Accordingly, GoTS vide its letter dated 23.08.2017 granted a further extension of the SCOD by 4 months that is upto 31.10.2017 keeping in view the grave nature of hardships arising on account of the

aforesaid various Force Majeure events which materially thwarted the execution of the solar projects, and accordingly directed TSDISCOMs to take appropriate action in this regard. Further, GoTS vide its letter dated 04.12.2017 had also clarified that the extension of SCOD granted to solar power developers will be at the same tariff stipulated in the PPAs.

- o. It is stated that accordingly, while the petitioner was expecting that the respondent will follow the directions of GoTS contained in its aforesaid letters dated 29.06.2017 and 23.08.2017 and extend the SCOD pursuant to Article 9.2 of the PPA; however, the respondent vide its letter dated 03.02.2018 called upon the petitioner to file a petition for extension of SCOD before the Commission.
- p. It is stated that thereafter that is on 30.04.2018, in a completely arbitrary and high-handed manner, the respondent unilaterally that is without issuing any notice/intimation to the petitioner, encashed the petitioner's performance bank guarantee amounting to Rs.10,00,00,000/- on account of alleged delay in commissioning of the project, which as explained hereinabove was due to reasons not attributable to and beyond the control of the petitioner.
- q. It is stated that in this regard, the unlawfully and arbitrarily levied liquidated damages/penalty of Rs 10,53,00,000/- has been recovered by the respondent from the petitioner in the following manner:
 - (i) Rs.10,00,00,000/- has been recovered through encashment of performance bank guarantee furnished by the petitioner to the respondent;
 - (ii) Rs.53,00,000/- has been deducted by the respondent from the energy bill issued by the Petitioner towards the supply of electricity for the month of March 2019.
- r. It is stated that the petitioner is a genuine developer and has done everything possible within its control to ensure timely commissioning of the project. Despite the above, the execution of the project was affected due to reasons not attributable to and beyond the control of the petitioner, as explained hereinabove, being Force Majeure events in terms of Article 9 of the PPA. Accordingly, in terms of the PPA, the respondent ought to have granted extension of the SCOD and not levied liquidated damages/penalty upon the petitioner.

- s. It is stated that it is reiterated that the petitioner was affected by various constraints, difficulties, and obstacles as narrated in the above paragraphs, in executing the project, which were beyond the control of the petitioner and fall squarely within the definition of 'Force Majeure' as stated above. Therefore, the petitioner is entitled to refund of the penalty imposed by the respondent for the alleged delay in achieving SCOD for the reasons stated above, which are not attributable to the petitioner.
- t. It is stated that therefore, being aggrieved by the unlawful and arbitrary conduct of the respondent, the petitioner has been constrained to file the present petition *inter alia* seeking extension of the SCOD of the petitioner's solar power project on account of reasons beyond the control of the petitioner; direction to the respondent to return/refund to the petitioner the amount unlawfully and arbitrarily deduced by the respondent as liquidated damages for the alleged delay in commissioning of project; and consequential reliefs in relation thereto.
- u. It stated that in view of the factual scenario detailed hereinabove, the petitioner stated as follows:
- (i) It is stated that the respondent's conduct of imposing liquidated damages upon the petitioner for the alleged delay in commissioning the project is unlawful, erroneous, violative of the provisions of the PPA, bad in law and non-est.
 - (ii) It is stated that as explained hereinabove, the petitioner was prevented from fulfilling its obligation qua commissioning the project by the SCOD for reasons completely beyond its control. Additionally, Article 9.2 of the PPA explicitly provides that in the event the petitioner is prevented from fulfilling its obligations, then the SCOD is to be deferred for a reasonable period not less than day-to-day basis for the delay. Therefore, the petitioner is entitled to extension of time due to the occurrence of Force Majeure events.
 - (iii) It is stated that from a combined perusal of the PPA as a whole, it is evident that consequences for delay in commissioning the project as stipulated in Article 10.5 of the PPA are only applicable in the absence of extension of time under Article 9.2 of the PPA. In the present case, the petitioner is duly entitled to extension of the SCOD under Article 9.2 of the PPA. In any case, it is a settled principle of law that in cases of

Force Majeure events, the obligations of the parties, including the time period thereof, stand suspended during the period of the said Force Majeure. Therefore, the question of any delay in commissioning of the project does not arise, let alone any delay attributable to the petitioner. Accordingly, the respondent does not have any right or legal or tenable basis for levying liquidated damages/penalties upon the petitioner for any alleged delay in commissioning of the project.

- (iv) It is stated that there is no legal or tenable basis, whatsoever, for the respondent to levy the liquidated damages/penalties upon the petitioner.
- (v) It is stated in view of the above factual scenario and considering the extent and scope of the hardships faced by solar power developers, GoTS vide its letters dated 29.06.2017 and 23.08.2017 directed TSDISCOMs to grant blanket extension to all the developers up to 30.06.2017 and 31.10.2017, respectively. Therefore, the respondent ought not to be permitted to dispute the occurrence of the Force Majeure events claimed by the petitioner or the consequences that flow therefrom in terms of the clear and unambiguous provisions of the PPA, which is valid and binding upon the parties.
- (vi) It is stated that the Commission vide various orders in the case of similarly situated/placed solar power developers has already recognized the aforesaid events as Force Majeure events impacting project execution obligations and has accordingly granted extension of SCOD in terms of GoTS's aforesaid letters dated 29.06.2017 and 23.08.2017. Accordingly, it is stated that similar dispensation ought to be granted to the present petitioner keeping in view the principle of regulatory certainty and consistency. In this regard, the petitioner relies upon the following Orders of the Commission whereby extension of timeline has been granted to similarly situated generators for similar Force Majeure events:
 - (i) Order dated 13.08.2018 in O.P.No.11 of 2018:
"9. Detailed examination of the pleadings of the petitioner and information placed on record reveals that the petitioner face certain difficulties in implementation of the subject project. The petitioner pleaded that project site is surrounded by forest land on all three sides and evacuation system could be built only through a narrow corridor available. Another project developer, Divine Solar has already erected a transmission line for evacuation of

power from its project through that corridor. As a result of this there was not enough space to build second corridor. After prolonged consultation and discussion with the TSTRANSCO, the project developer was permitted to use the second arm of the same transmission line built by Divine Solar project vide its letter dated 29.08.2017 well beyond the scheduled date of synchronisation of 25.05.2017 as per PPA. This delay is apart from the delays caused due to re-organisation of districts, the confusion in the offices of the revenue authorities, change of circle rates causing land owners to re-negotiate/renege on land sale agreements, non-availability of revenue records, demonetisation resulting in difficulty in cash flow, bank transactions, difficulties in procuring labour to carry out labour work, which are beyond his control and which resulted in delay of 120 days in reaching the SCOD. The respondent, on the other hand, contended that the issues as Force Majeure pleaded by the petitioner are not Force Majeure events and the petitioner is not entitled to such benefit.

10. The incidents mentioned by the petitioner have some force to treat them as non-political events, which included labour difficulties mentioned in Article 9.1(b)(i) as one of the Force Majeure events. Further, Article 9.1(a) clearly mentions that if the “events and circumstances are not within the affected party’s reasonable control and were not reasonably foreseeable and the effects of which the affected party could not have prevented by prudent utility practices or, in the case of construction activities, by the exercise of reasonable skill and care. Any events or circumstances meeting the description of Force Majeure which have the same effect upon the performance of any of the solar power project set up in accordance with solar policy announced by GoTS under the competitive bidding route and which therefore materially and adversely affect the ability of the project or, as the case may be the DISCOM to perform its obligations hereunder, shall constitute Force Majeure with respect of the solar power developer or the DISCOM, respectively” which clearly encompasses the reasons given by the petitioner for the delay of 120 days as events termed as Force Majeure.
11. The delay caused due to the events narrated by the petitioner and not specifically contradicted by the respondent certainly entitles the petitioner to extension of SCOD. Thus, the extension of 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 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.
12. 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 upto 31.10.2017, by which date the project was completed in all respects by synchronisation with the grid of the respondent on 15.09.2017, thus fulfilling the terms of the PPA. The point is answered accordingly.”

(ii) Order dated 16.08.2018 in O.P.No.21 of 2018:

- “9. Detailed examination of the pleadings of the petitioner and information placed on record reveals that the petitioner face certain difficulties in implementation of the subject project. The petitioner pleaded delay due to re-organisation of districts, the confusion in the offices of the revenue authorities, difficulty in cash flow, bank transactions, difficulties in procuring labour to carry out labour work. Further the petitioner pleaded that demonetization of high value currency impacted the supply of labour etc., issues relating to acquisition of land for setting up the project, which are beyond its control and which resulted in delay of 174/175 days in reaching the SCOD. The petitioner claimed that the ROW issues at locations 49 and 78 to 93 has obstructed the progress of construction at various stages. In view of reorganisation of the districts, severe ROW issues arose in Dharoor village near Jagithyal town. The project is situated in Abbapur village in Karimnagar district. Dharoor village was taken out from Karimnagar district and added to Jagithyal district and as a result, the farmers who are not happy with reorganisation started demanding hefty compensation which was not market aligned. The petitioner by way of letter dated 14.07.2017 requested the DG/police, GoTS to intervene in the matter and render support for completion of transmission line. The petitioner requested for intervention by Special Chief Secretary, Energy Department, and the SP/Police, Jagithyal district for extending necessary support for resolving ROW issues, which clearly show the delay caused due to ROW issue. The petitioner claims that it took 67 days to resolve ROW issue. Further, the petitioner claimed that the farmers demanded special compensation which is 12 times higher than the proposed unit cost since the towers 82 to 93 come under the Jagithyal city limits within commercial/residential area. The respondent, on the other hand contended that the incidents as Force Majeure pleaded by the petitioner are not Force Majeure events and the petitioner is not entitled to such benefit and the reasons given by the petitioner for delay cannot be termed as Force Majeure events covered by Article 9.2 of PPA.
10. The incidents mentioned by the petitioner have some force to treat them as non-political events, which included labour difficulties mentioned in Article 9.1(b)(i) as one of the Force Majeure events. Further, Article 9.1(a) of PPA clearly mentions that if the “events and circumstances are not within the affected party’s reasonable control and were not reasonably foreseeable and the effects of which the affected party could not have prevented by prudent utility practices or, in the case of construction activities, by the exercise of reasonable skill and care. Any events or circumstances meeting the description of Force Majeure which have the same effect upon the performance of any of the solar power project set up in accordance with solar policy announced by GoTS under the competitive bidding route and which therefore materially and adversely affect the ability of

the project or, as the case may be the DISCOM to perform its obligations hereunder, shall constitute Force Majeure with respect of the solar power developer or the DISCOM, respectively” which clearly encompasses the reasons given by the petitioner for the delay of 174/175 days as events termed as Force Majeure.

11. *The delay caused due to the events narrated by the petitioner and not specifically contradicted by the respondent certainly entitles the petitioner to extension of SCOD. The mere denial of events claimed by the petitioner as having caused delay in reaching the SCOD as not Force Majeure events by the respondents is untenable since the petitioner had no control over the events. Thus, the extension of 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 SCOD up to 31.10.2017. The contention of the respondent that the events narrated by the petitioner have no connection to the plea of Force Majeure is not tenable.*
12. *In view of the aforementioned reasons, the delay of 159 days as pleaded by the petitioner is liable to be condoned up to 31.10.2017, by which time, the project was completed in all respects and total 30 MW was synchronised with the grid of the respondent no.1 by 15 /16.11.2017. The point is answered accordingly.”*
- (iii) Order dated 18.08.2018 in O.P.No.22 of 2018:
- “9. *Detailed examination of the pleadings of the petitioner and information placed on record reveals that the petitioner face certain difficulties in implementation of the subject project. The petitioner pleaded that project delay due to re-organisation of districts, the confusion in the offices of the revenue authorities, difficulty in cash flow, bank transactions, difficulties in procuring labour to carry out labour work. The petitioner further pleaded that land acquisition process got significantly delayed with the issue of a circular dated 10-06-2016 from Chief Commissioner of Land Administration directing all the concerned revenue officials to stop issuance of manual Pattadar passbooks which have no linkage with Telangana Land Records Management System (TLRMS). The circular also directed the revenue officials to issue online Pattadar passbooks (e-Passbooks) automatically generated from the TLRMS Portal. The process further got delayed because of the data updation process and huge pendency in issuance of e-passbooks from MeeSeva centres. The Chief Commissioner of Land Administration vide its circular dated 29.09.2016 acknowledging huge pendency in issuance of e-passbooks advised the revenue officials to opt for alternative methods and issue manual pattadar passbooks to bring down the level of pendency till on-line services gets ready. This has resulted in delay of 111 days in acquiring land attributable to the State Government agencies and which was beyond the control of the petitioner. It had a cumulative effect in tying up finances from*

financial institutions and obtaining financial closure of the project. The respondent, on the other hand contended that the incidents as Force Majeure pleaded by the petitioner are not Force Majeure events and the petitioner is not entitled to such benefit and the reasons given by the petitioner for delay cannot be termed as Force Majeure events covered by Article 9.2 of PPA.

10. The incidents mentioned by the petitioner have some force to treat them as non-political events, which included labour difficulties mentioned in Article 9.1(b)(i) as one of the Force Majeure events. Further, Article 9.1(a) of PPA clearly mentions that if the “events and circumstances are not within the affected party’s reasonable control and were not reasonably foreseeable and the effects of which the affected party could not have prevented by prudent utility practices or, in the case of construction activities, by the exercise of reasonable skill and care. Any events or circumstances meeting the description of Force Majeure which have the same effect upon the performance of any of the solar power project set up in accordance with solar policy announced by GoTS under the competitive bidding route and which therefore materially and adversely affect the ability of the project or, as the case may be the DISCOM to perform its obligations hereunder, shall constitute Force Majeure with respect of the solar power developer or the DISCOM, respectively” which clearly encompasses the reasons given by the petitioner for the delay of 216 days as events termed as Force Majeure.
 11. The delay caused due to the events narrated by the petitioner and not specifically contradicted by the respondent certainly entitles the petitioner to extension of SCOD. The mere denial of events claimed by the petitioner as having caused delay in reaching the SCOD as not Force Majeure events by the respondents is untenable since the petitioner had no control over the events. Thus, the extension of 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 SCOD up to 31.10.2017. The contention of the respondent that the events narrated by the petitioner have no connection to the plea of Force Majeure is not tenable.
 12. In view of the aforementioned reasons, the delay as pleaded by the petitioner is liable to be condoned up to 31.10.2017 and by that time, the project was completed in all respects and total 15MW was synchronised with the grid of the respondent no.1 by 25.09.2017. The point is answered accordingly.”
- (iv) Order dated 17.11.2021 in O.P.No.28 of 2020:
“6. The petitioner pleaded delay due to re-organisation of districts, the confusion in the offices of the revenue authorities, difficulty in cash flow, difficulties in procuring labour to carry out project work. The petitioner further pleaded that Sada Bainamas, land acquisition affected by demonetisation and districts re-organisation contributed to delay in setting up the project. The

respondent, on the other hand contended that the incidents as Force Majeure pleaded by the petitioner are not Force Majeure events and the petitioner is not entitled to such benefit and the reasons given by the petitioner for delay cannot be termed as Force Majeure events covered by Article 9.2 of PPA.

7. Some incidents mentioned by the petitioner have some force to treat them as non-political events, which included labour difficulties mentioned in Article 9.1(b)(i) of PPA as one of the Force Majeure events. Further, Article 9.1(a) of PPA clearly mentions that if the “any event or circumstance or combination of events or circumstances that materially and adversely affects the performance by either party (the “Affected Party”) of its obligations pursuant to the terms of this agreement (including by preventing, hindering or delaying such performance), but only if and to the extent that such events and circumstances are not within the affected party’s reasonable control and were not reasonably foreseeable and the effects of which the affected party could not have prevented by prudent utility practice or, in the case of construction activities, by the exercise of reasonable skill and care. Any events or circumstances meeting the description of Force Majeure which have the same effect upon the performance of any of the solar power project and which therefore materially and adversely affect the ability of the project or as the case may be, the DISCOM to perform obligations hereunder shall constitute Force Majeure with respect to the solar power developer or the DISCOM, respectively.” which clearly encompasses the reasons given by the petitioner for the delay of 34 days as events termed as Force Majeure. The petitioner had no control or dominance over the incidents mentioned causing the delay in completing the project and therefore, the said delay cannot be totally attributable to the petitioner.
8. The SCOD should have been achieved for the project as per PPA by 25.02.2017. The PPA provides for condonation of delay up to 12 months for reaching SCOD in case of Force Majeure events under clause 9.2 of the PPA, which would be 25.02.2018 with penalties as per clause 10.5 of the PPA. Therefore, the PPA would be still in force upto 25.02.2018, since SCOD has been extended up to 30.06.2017 with the concurrence of the Commission, the respondent can apply clause 10.5 of the PPA for the period beyond 30.06.2017 to regularise the project. The instant case does not even call for this consideration as the project is well within the extended period of SCOD by the Government, which the Commission had earlier accepted it.
9. The petitioner is of the view that if the delay exceeds beyond the period stipulated in the PPA, the respondent could terminate the contract. An important aspect regarding termination of PPA has been dealt with by the Hon’ble Supreme Court while upholding imposition of penalty in a decision rendered in *M.P.Power Management Company Ltd., Vs. Renew Clean Energy Pvt. Ltd.*,

& Others reported in AIR 2018 SC 3632. In paragraph 11, the Hon'ble Supreme Court observed as follows:

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10. *This observation of the Hon'ble Supreme Court with equal vehemence applies to the present matter too. In the light of the above judgement, the Commission is not inclined to go into the merits of the contention of the delay beyond the date of SCOD under the terms of the PPA as clause 10.5 provides for levy of penalty. However in the instant case, the delay that is attributed to the petitioner is 34 days only and even that period got merged into the extension granted by the Government upto 30.06.2017. The extension granted by the Government has been accepted by the Commission in several cases filed in the year 2018. That being the case, the petitioner cannot be fastened with any sort of penalty in view of the provisions of the PPA.*
 11. *Undoubtedly, the obligation to obtain all approvals and bearing the cost lies with the project developer as per the terms of PPA. However, the question is whether it is not the obligation of the project developer to obtain such approvals but whether the delay in obtaining such approvals from the Government instrumentalities despite the project developer complying with the legal requirements to obtain such approvals could be covered under Force Majeure event or not. In a case between Gujarat Urja Vikas Nigam Limited (GUVNL) Vs. Cargo Solar, a project developer, the Gujarat State Electricity Regulatory Commission has examined the provisions of PPA dated 30.04.2010 entered between the parties and the Commission held that the delay caused due to obtaining the permission/approval for land, water, etc., are prerequisite for the project and fall under the category of Force Majeure events. Accordingly, the State Commission decided that the period of delay in obtaining such clearances, it 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.*
 12. *The GUVNL filed an appeal before the Hon'ble ATE against the ruling of the State Commission in Appeal No.123 of 2012 and I.A.No.396 of 2012. The Hon'ble ATE in its judgment dated 04.02.2014 concluded that;*
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13. *This observation of the Hon'ble ATE applies to the present matter also. In the light of the above judgement, the petitioner is also entitled to receive the relief in terms of Article 9 of the PPA. Given the facts and circumstances, the petitioner initially allowed the performance bank guarantees (PBGs) to be encashed by the licensee and later recovered the said PBGs by paying the amount towards penalty and sought return of the PBGs, thus complied with the provisions of the PPA. Subsequently, it has realised its action and is now before the Commission, seeking extension of SCOD as well as refund of the penalty paid by it, keeping in view the decision of the Government and the Commission.*

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/-*
- (vii) It is stated that it is trite law that the principle of unjust enrichment requires; first, that the defendant has been 'enriched' by the receipt of a 'benefit'; secondly, that this enrichment is "at the expense of the plaintiff"; and thirdly, that the retention of the enrichment is unjust, and requires restitution. Accordingly, the respondent's conduct of levying liquidated damages upon the petitioner despite knowing fully well that the petitioner is entitled to extension of SCOD on account of Force Majeure events in terms of the PPA tantamount to unjust enrichment and thus, the petitioner is entitled to be restituted by way of directing the respondent to make payment of the said dues. In addition to the above, it is settled law that the meaning of 'restitution' in modern legal usage has been extended to include not only the restoration or giving back of something to its rightful owner, but also compensation, reimbursement, indemnification, or reparation for benefits derived from, or for loss or

injury caused to, another. As a general principle, the obligation to do justice rests upon all persons, natural and artificial; if one obtains the money or property of others without authority, the law, independently of express contract, will compel restitution or compensation. Therefore, the Hon'ble Supreme Court vide its judgment in Indian Council for Enviro-Legal Action v. Union of India & Ors., reported as 2011 (8) SCC 161, upheld levy of compound interest in a case of restitution of unjust enrichment. Applying the said principle to the present case, the respondent ought to be directed to reconstitute the petitioner by making payments of the unlawfully deducted amounts along with interest from the date of deduction till the date of refund of the aforesaid amount to the Petitioner at the rate stipulated in Article 5.2 of the PPA.

- (viii) It is stated that another important fact that needs to be considered by the Commission is that one of the requirements to introduce the Act, 2003 apart from reforming the electricity sector, was to promote renewable sources of energy as per commitments of India with respect to the Kyoto Protocol evolved by the United Nations in the year 1998. India ratified the Kyoto Protocol on 26.08.2002. Thus, as per the Kyoto Protocol, there was a mandate to promote development and increased use of new and renewable forms of energy. Hence, the Act, 2003 was also enacted to implement the said protocol/treaty.
- (ix) It is stated that the same is clearly evident from Sections 61(h) and 86(1)(e) of the Act, 2003, which contain enabling provisions that give appropriate scope to the Commissions to promote renewable energy. Additionally, even clause 5.12 of the National Electricity Policy (NEP) and clause 6.4 of the National Tariff Policy (NTP), which are statutory documents having force of law by virtue of being issued under Section 3 of the Act, 2003 provide for promotion of generation of electricity from renewable sources of energy.
- (x) It is stated in view of the above, it can be clearly ascertained that the mandate of the Act, 2003 read with the NEP, NTP, and the subsequent policy and regulatory initiatives is to promote the renewable energy sector, including solar. However, the action of the respondent impugned herein, that is levy of liquidated damages, that too for no fault of the

petitioner, are in direct contravention of the aforesaid mandate to promote generation of electricity from renewable sources of energy.

- (xi) It is stated in view of the above, the petitioner seeks the indulgence of the Commission. It is stated that the petitioner by way of the instant petition is seeking its contractually and legally protected rights.

4. The petitioner has sought the following prayers in the amended original petition.

- (i) to allow the present petition and declare that the petitioner is entitled to extension of time for commissioning the project in terms of Article 9.2 of the PPA dated 03.02.2016.
- (ii) to direct the respondent to give full legal effect to Article 9.2 of the PPA dated 03.02.2016, and to extend the Scheduled Commercial Operation Date of the Project from 03.05.2017 to 11.10.2017, without any adverse consequences (including imposition of liquidated damages), on account of various events and circumstances that were beyond the control of the petitioner.
- (iii) To direct the respondents to return/refund to the petitioner the amount of Rs.10,53,00,000/-, which has been unlawfully and arbitrarily deducted by the respondent from the petitioner as liquidated damages for alleged delay in commissioning of project, along with interest at the rate stipulated in Article 5.2 of the PPA dated 03.02.2016 from the date of deduction till the date of refund of the aforesaid amount to the petitioner.

5. The respondent has filed counter affidavit and stated as below.

- a. It is stated that a PPA was entered with the petitioner on 03.02.2016 for purchase of 50 MW solar power from its solar power project situated at K.M.Pally Village, Nalgonda District, Telangana at a tariff of Rs.5.3719 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 that is 02.05.2017. However, the solar power project of the petitioner was synchronized to the grid on 11.10.2017 with delay of 162 days as against the SCOD that is 02.05.2017.
- b. It is stated that as per clause 10.5 of the PPA, this respondent is entitled to encash the PBG 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).
- (iv) In case the commissioning of power project is delayed beyond five (5) months from the scheduled commissioning date, the SPD shall pay to DISCOM, the liquidated damages at the rate of Rs.10,000/- (Ten Thousand) per MW per day of delay for the delay in such remaining capacity which is not commissioned. The amount of liquidated damages shall be recovered from the SPD from the payments due on account of sale of solar power to the DISCOM.

Provided that the DISCOM shall have the liberty not to invoke this provision in a reasonable case as shown by the SPD for levying liquidated damages.

- c. It is stated that this respondent is entitled to encash the performance bank guarantee furnished by the petitioner in terms of clause 10.5 of the PPA since the petitioner commissioned its project with a delay of 5 months 9 days. Accordingly, the PBGs aggregating to amount of Rs.10 crore for the delay of 5 months were sent vide letter dated 18.04.2018 to the Branch Manager, Yes Bank Limited, Somajiguda for encashment and the same was credited on 21.04.2018.
- d. It is stated that as power project is delayed beyond five (5) months from the scheduled commissioning date, Rs.45 lakh (9 days x 10000 x 50 MW) was deducted towards liquidated damages from the payments due on account of sale of solar power by the petitioner
- e. It is stated that the events such as Sada Bainamas, district reorganization, demonetization and unprecedented incessant rains 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 stated 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 the petitioner had never informed this respondent stalling of the execution of the work of the project due to alleged Force Majeure events.
- g. It is stated that after extension of the SCOD timeline for additional 4 months that is from 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. There upon, the Hon'ble Commission vide letter dated 30.11.2017 communicated the following without extending SCOD upto 31.10.2017.
 - i) the ratio laid down by the Apex Court in Civil Appeal No.6399 of 2016; Gujarat Urja Vikas Nigam Limited verses Solar Semiconductor Power Company (India) Private Limited and Others is binding on the stakeholders and in view of the Supreme Court decision in the above case, no general order can be 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.1512/17, dated 03.02.2018, but the petitioner failed to file petition before the Commission till 31.05.2022.
- i. It is stated that the petitioner having done so now filed the present petition after a lapse of about 4 years 5 months seeking extension of SCOD from 02.05.2017 to 11.10.2017. Therefore, the petitioner is not entitled to seek refund of the penalty amount.
- j. It is stated that as per clause 10.5 of the PPA, the petitioner performance bank guarantees aggregating to Rs.10 crore were encashed on 18.04.2018 and

Rs.45 lakh was deducted in month of March 2019 from the payments due on account of sale of solar power by the petitioner. It is very much clear from the perusal of the PPA that PPA does not provide any clause for refund of the amount of Rs.10,45,00,000

- k. It is stated that amount if any refundable by the answering respondent is barred by limitation.
- l. It is stated that the Hon'ble Supreme Court in A.P.Power Coordination Committee and Others. Vs. M/s Lanco Kondapalli Power Limited and Others. dated 16.10.2015 in Civil Appeal No.6036 of 2012 held at the end of Para-29 and 30 as follows:

“... .. In the absence of any provision in the Electricity Act creating a new right upon a claimant to claim even monies barred by law of limitation, or taking away a right of the other side to take a lawful defence of limitation, we are persuaded to hold that in the light of nature of judicial power conferred on the Commission, claims coming for adjudication before it cannot be entertained or allowed if it is found legally not recoverable in a regular suit or any other regular proceeding such as arbitration, on account of law of limitation.

Hence we hold that a claim coming before the Commission cannot be entertained or allowed if it is barred by limitation prescribed for an ordinary suit before the civil court. But in appropriate case, a specified period may be excluded on account of principle underlying salutary provisions like Section 5 or 14 of the Limitation Act. We must hasten to add here that such limitation upon the Commission on account of this decision would be only in respect of its judicial power under clause (f) of sub-section (1) of Section 86 of the Electricity Act, 2003 and not in respect of its other powers or functions which may be administrative or regulatory.”

- m. It is stated that the law decided by the Apex Court in the aforementioned judgment the law of Limitation Act becomes applicable. Schedule appended to Limitation Act does not provide any period of limitation and hence Article 113 of the Limitation Act becomes applicable. As per Article 113 of the Limitation Act three years' period is provided for any suit for which no period of limitation is provided elsewhere in the schedule. The time in such suits begins to run when the right to sue accrues. In view of the above, the petitioner is not entitled to seek refund of the penalty amount as per the Limitation Act, 1963 (Act, 1963).
- n. It is stated that, if the delay in commissioning the project beyond SCOD due to the Force Majeure events i.e., due to various unforeseeable events that were beyond the reasonable control of the petitioner, then the petitioner could have filed the suit/petition before the Commission claiming the sums within 3 years

period from the date of cause of action, as the right to sue would accrue to the petitioner on the next day of encashment of PBGs by the respondent.

- o. It is stated that while the respondent is responding to the submissions made by the petitioner, any omission on the part of the respondent to deal with any specific contention or averment of petitioner should not be construed as an admission of the same by the respondent.
- p. It is prayed that the Commission may be pleased to dismiss the petition and may pass any order or orders as the Commission deems fit and proper in the circumstances of the case.

6. The petitioner has filed rejoinder to the counter affidavit filed by the respondent and contents of it are extracted below:

- a. It is stated that the counter is flawed, erroneous, baseless, fallacious, misconceived, contradictory and untenable. The petitioner denies and disputes the contentions and allegations made by the respondent. Save and except what are matters of record or what has been specifically admitted hereinbelow, any omission on the part of the petitioner to deal with any particular contention or allegation of the respondent should not be construed as an admission/ acceptance thereof by the petitioner.
- b. It is stated that the petition has been filed under Sections 86(1)(e) and (f) of the Act, 2003 read with Articles 9.2 and 11.4 of the PPA dated 03.02.2016 and applicable laws *inter alia* seeking extension of SCOD of the petitioner's 50 MW solar power project at K.M.Pally Village, Nalgonda District on account of reasons beyond the control of the petitioner, without any adverse consequences. Further, the petitioner is also seeking a direction to the respondent to return/refund to the petitioner the amount of approximately Rs.10,53,00,000/- which has been unlawfully and arbitrarily deducted by the respondent as liquidated damages for the alleged delay in commissioning of project and consequential reliefs in relation thereto.
- c. It is stated that the petitioner craves leave of the Commission to refer to and rely upon the documents filed by it along with petition as well as the application on behalf of the petitioner seeking amendment of the petition, bearing I.A.No.52 of 2022, which may be read with the present rejoinder, as the same have not been filed along with the present rejoinder, to avoid duplicity.

- d. It is stated that the petitioner further craves leave of the Commission to refer to and rely upon the contents of the petition and the I.A., which may be read as a part and parcel of the present rejoinder as the contents of the same are not being reproduced herein for the sake of brevity and to avoid prolixity.
- e. It is stated that before proceeding to specifically deal with and controvert the allegations and/or contentions and/or submissions raised by the respondent in the counter, the petitioner finds it relevant to place the following preliminary submissions and objections for the kind consideration of the Commission, in order to substantiate the fact that the counter is entirely baseless, fallacious, flawed, contradictory and untenable.
- f. It is stated that the counter is based on extraneous considerations, on sheer ignorance of the unequivocal terms of the PPA. The contentions raised by the respondent are frivolous and have been made merely to obfuscate the issues involved in the present case in order to mislead the Commission. Therefore, the counter is baseless, misconceived, and untenable.
- g. It is stated that the respondent has vaguely averred, at paragraph 6 of the counter, that the Force Majeure events stated by the petitioner do not fall under Article 9 of the PPA and that the petitioner cannot arbitrarily declare an event or circumstance as a Force Majeure event. It is pertinent to highlight that the respondent has not even bothered to substantiate or even explain the said contention(s), in any manner, whatsoever. It is stated that the respondent has utterly and completely failed to make out any case or provide any rationale in support of its contentions and therefore, the same ought to be completely disregarded by the Commission.
- h. It is stated that the Article 9 of the PPA lays down the provisions with regard to Force Majeure. The relevant excerpts of the PPA are reproduced *hereinbelow*:

“Article 9 Force Majeure

9.1 Definition of Force Majeure:

- (a) *“Force Majeure” shall mean any event or circumstance or combination of events or circumstances that materially and adversely affect the performance by either party (the “Affected Party”) of its obligations pursuant to the terms of this Agreement (including by preventing, hindering or delaying such performance), but only if and to the extent that such events and circumstances are not within the Affected Party’s reasonable control and were not reasonably foreseeable and the effects of which the Affected Party could not have prevented by Prudent*

Utility Practices or, in the case of construction activities, by exercise of reasonable skill and care. Any events or circumstances meeting the description of Force Majeure which have the same effect upon the performance of any of the Solar Power Project setup in accordance with solar policy announced by Govt. of Telangana State (GoTS) under the competitive bidding route and which therefore materially and adversely affect the liability of the Project or, as the case may be, the DISCOM to perform its obligations hereunder shall constitute Force Majeure with respect to the Solar Power Developer or the DISCOM, respectively.

- (b) *Force Majeure circumstances and events shall include the following events to the extent, that they or their consequences satisfy the above requirements.*
- (i) *Non Political Events such as acts of God including but not limited to any storm, flood, Drought, Lighting, Earthquake or other natural calamities, fire, accident, explosion, strikes, labour difficulties, epidemic, plague or quarantine, air crash, shipwreck, train wrecks or failure (“Non Political Events”).*
 - (ii) *Indirect Political Events such as acts of war sabotage, terrorism or act of public enemy, blockades, embargoes, civil disturbance, revolution or radioactive contamination (“Indirect Political Events”).*
 - (iii) *Direct Political Events such as a Government Agencies or the DISCOMs unlawful or discriminatory delay, modification, denial or refusal to grant or renew, or any revocation of any required permit or Change in Law (Direct Political Events).*

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 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.”*

- i. It is stated that upon perusal of the above, it becomes clear that the said provision is widely worded and is not an exhaustive provision. Meaning thereby, that while Article 9.1(b) of the PPA specifies certain events stated therein to be Force Majeure events as illustrations, however, it does not exclude any events from the ambit of Force Majeure. Rather it is apparent that the said provision is inclusive and would include any event which meets the broad conditions

stipulated therein. The criteria for qualifying as a Force Majeure event has been set out at Article 9.1(a) of the PPA, which stipulates that for an event/ circumstance to qualify as a Force Majeure event as per the PPA, it must satisfy the following broad conditions:

- (i) It must materially and adversely affect the performance of obligations under the PPA by the affected party (including by preventing, hindering, or delaying such performance).
- (ii) The events must be beyond the reasonable control and foreseeability of the affected party and of such a nature that could not have been prevented by employing prudent utility practices or by the exercise of reasonable skill and care.

j. It is stated that subsequent to the signing of PPA, owing to various unforeseeable events and circumstances which were clearly in the nature of Force Majeure events in terms of Article 9 of the PPA, the development and execution of many of solar power projects around that time period across the State of Telangana was materially and adversely affected. The said events which had State-wide ramifications across infrastructure sectors (and specifically renewable sector), were entirely beyond the reasonable control of power developers, including the petitioner and could not have been prevented and in fact have not been prevented even by employing prudent utility practices or exercise of reasonable skill and care. The details of such Force Majeure events affecting the project are reiterated hereinbelow:

(i) Force Majeure events affecting land acquisition:

(a) Sada Bainamas:

(i) *Most of the land in the State of Telangana was owned by farmers under unregistered and unstamped transfer deeds, locally called 'Sada Bainamas'. Despite various opportunities being granted by the GoTS for regularization of such Sada Bainamas, various land parcels continued to remain under Sada Bainamas. In this regard, GoTS once again by way of G.O.Ms.No.153 dated 03.06.2016 issued an order for the purpose of regularizing Sada Bainamas throughout the State of Telangana as one-time settlement so that people who acquired land in the past under unstamped and unregistered agreements/sale deeds, could apply and get their documents regularized by the Government.*

(ii) *Accordingly, as it was/is well known in public domain, the regularization of Sada Bainamas being underway made it*

difficult for the petitioner to acquire and register the land required for development of the project, since the petitioner's lenders (as is a general practice) insisted on clear title of properties for 33 (thirty three) years, which excluded Sada Bainamas. Consequently, the Petitioner was effectively required to go on hunt for lands with proper marketable title, which was further constrained by the substation wise bidding under the 2015 bid scheme, which meant and envisaged procurement of lands within a certain radius of the said sub-station.

(b) District Re-organization:

(i) GoTS 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, by way of notification bearing G.O.Ms.No.245, notified new districts and reorganized boundaries of existing districts, with effect from 11.10.2016. This involved over-hauling of the existing revenue machinery since land revenue records were moved from existing to newly created districts and mandals, shift of revenue records from old district to the new district etc., which made it practically difficult for the petitioner to acquire land and ascertain the marketable title of owners.

(ii) In addition to the above, it is stated that GoTS had taken a policy decision of non-allotment of Government owned land for setting up of power projects, thereby forcing solar power project developers, such as the petitioner, to look for privately owned land for setting up the projects. It is pertinent to point out that some of these Government owned land parcels were found to be situated in between privately owned land parcels identified by the developers for development of solar power projects, making it practically difficult for the developers to acquire a single, contiguous stretch of land parcels. Therefore, even the MNRE by way of its office memorandum dated 02.12.2016 acknowledged that the said policy decision resulted in delay in commissioning of solar power projects, such as the present case.

(c) Demonetization:

In addition to the above, it is stated that the Government of India by way of its notification dated 08.11.2016 withdrew the legal tender status of Rs.500 and Rs.1,000 denominations of banknotes ('Demonetization'). It is stated that demonetization has had a domino effect on land acquisition and other project execution activities.

(d) Implementation of GST by the GoI:

(i) It is a matter of record that in the year 2017, the GoI introduced a unified indirect tax structure in the form of GST which was implemented with effect from 01.07.2017. It is stated that due to the implementation of GST laws with

effect from 01.07.2017, there was a delay in supply of essential items needed for the setting up of the project such as solar PV modules, inverters, etc., to the project site. Thus, there was a consequent delay in the installation of the same, which was beyond the reasonable control of the petitioner and led to an overall delay in the commissioning of the project.

(ii) It is stated that the aforesaid delay has also been recognized by MNRE in its office memorandum dated 20.06.2018, whereby MNRE has directed renewable energy project implementing agencies to grant extension of SCOD to renewable energy projects which had achieved financial closure prior to 01.07.2017 on account of implementation of GST laws.

(e) Force majeure events affecting funding of projects:

In addition to the above and consequent to the same, it is stated that investor and lender sentiments were adversely affected, thereby creating a domino effect on disbursements and project overheads. Meaning thereby, since investors and lenders were unsure about the future of solar power projects in the State of Telangana (due to the Force Majeure events detailed herein), disbursements for power projects were delayed, leading to periodic increase in project overheads and consequent escalation of project cost. As a result, viability of the projects was hampered thereby causing lenders further discomfort and uncertainty as regards making further investments in solar power projects, including but not limited to the petitioner's project.

(f) Force majeure events affecting project execution work at site:

(i) Unprecedented incessant rains: The State of Telangana experienced excessive rains in the months from June to October 2016, going beyond the regular monsoon season. These rains were unprecedented in the context of past 100 (one hundred) years and as such could not have been predicted by solar power project developers. Further, as a result of the above, there was extensive flooding of the project sites causing idling of labour and equipment at project sites and severely hampering construction works.

(ii) Demonetization: In addition to the impact on the land acquisition for the project, Demonetization also led to further delays in execution and implementation of project timelines, as due to unavailability of cash, the petitioner could not make payments to the labour at the project site due to which contractors/suppliers refused to provide any services, thereby seriously affecting, and delaying the project development activities.

k. It is stated that the material and adverse effects of the aforesaid Force Majeure events were felt by all solar power developers in the State of Telangana and across all 4 (four) stages of development and setting up of solar power projects,

viz. land acquisition, funding from the bank/investors, equipment supplies from India / abroad, and project site construction works.

- l. It is stated that all of the events as detailed hereinabove that affected the petitioner and consequently led to the delay in the commissioning of the project, were entirely outside/beyond the reasonable control of the petitioner and could have not been foreseen by the petitioner, in any manner, whatsoever. Further, it is stated that the said events could not have been prevented by the petitioner and the same were not attributable to the petitioner in any manner. Therefore, it is stated that the said events duly qualify as Force Majeure events in the terms of Article 9 of the PPA.
- m. It is stated that in this regard, it is pertinent to highlight that Article 9.2 of the PPA stipulates that in the event the petitioner is prevented from fulfilling its obligations due to Force Majeure events, then the SCOD is to be deferred for a reasonable period not less than day-to-day basis for the said delay. Accordingly, it is stated that the petitioner is entitled to extension of time due to the occurrence of the Force Majeure events stated/explained hereinabove.
- n. It is stated that the petitioner is entitled to extension of time due to the occurrence of Force Majeure events in the explicit and unequivocal terms of the PPA, and the same ought not to be arbitrarily disregarded by the respondent without any basis whatsoever. Accordingly, the respondent's contentions to the contrary are entirely unlawful, arbitrary, erroneous, mala fide, and untenable.
- o. It is stated that the respondent has alleged that the petitioner had never informed the respondent of the stalling of the execution of the work of the project due to the Force Majeure event. It is stated that the said contention ought to be disregarded by the Commission as the same is completely untenable on account of being beyond the provisions of the PPA.
- p. It is stated that upon perusal of Article 9 of the PPA, it becomes unequivocally clear there is no requirement of a Force Majeure notice to be sent by the petitioner to the respondent in case of the occurrence of a Force Majeure event under Article 9 of the PPA.
- q. It is stated that the Hon'ble Supreme Court of India has been repeatedly held that a contract should be read on its terms and not any extraneous/extrapolated terms. Reliance in this regard is placed on the Hon'ble Supreme Court's judgment dated 05.10.2017 in *Nabha Power Limited v. Punjab State Power*

Corporation Limited and Anr. (2018) 11 SCC 508, the relevant excerpts whereof are reproduced hereinbelow for ready reference:

“49. We now proceed to apply the aforesaid principles which have evolved for interpreting the terms of a commercial contract in question. Parties indulging in commerce act in a commercial sense. It is this ground rule which is the basis of *The Moorcock* [*The Moorcock*, (1889) LR 14 PD 64 (CA)] test of giving “business efficacy” to the transaction, as must have been intended at all events by both business parties. The development of law saw the “five condition test” for an implied condition to be read into the contract including the “business efficacy” test. It also sought to incorporate “the *Officious Bystander Test*” [*Shirlaw v. Southern Foundries (1926) Ltd.* [*Shirlaw v. Southern Foundries (1926) Ltd.*, (1939) 2 KB 206 : (1939) 2 All ER 113 (CA)]]; This test has been set out in *B.P. Refinery (Westernport) Proprietary Ltd. v. Shire of Hastings* [*B.P. Refinery (Westernport) Proprietary Ltd. v. Shire of Hastings*, 1977 UKPC 13 : (1977) 180 CLR 266 (Aus)] requiring the requisite conditions to be satisfied: (1) reasonable and equitable; (2) necessary to give business efficacy to the contract; (3) it goes without saying i.e. the *Officious Bystander Test*; (4) capable of clear expression; and (5) must not contradict any express term of the contract. The same penta-principles find reference also in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* [*Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, (1998) 1 WLR 896 : (1998) 1 All ER 98 (HL)] and *Attorney General of Belize v. Belize Telecom Ltd.* [*Attorney General of Belize v. Belize Telecom Ltd.*, (2009) 1 WLR 1988 (PC)] Needless to say that the application of these principles would not be to substitute this Court's own view of the presumed understanding of commercial terms by the parties if the terms are explicit in their expression. The explicit terms of a contract are always the final word with regard to the intention of the parties. The multi-clause contract inter se the parties has, thus, to be understood and interpreted in a manner that any view, on a particular clause of the contract, should not do violence to another part of the contract.”

- r. It is stated that in light of the above, the provisions of the PPA have to be construed as per the specific terms provided therein and not any extraneous stipulation that the respondent is attempting to extrapolate into the PPA. Therefore, since Article 9 does not stipulate any requirement of issuance of notice in case of occurrence of a Force Majeure event, the same cannot be extrapolated into the PPA. Accordingly, it is stated that the contentions raised by the respondent ought to be disregarded by the Commission.
- s. It is stated that in any event, as mentioned above, it must also be taken in account that the all the aforesaid Force Majeure events which impacted the present project were overarching and encompassing and involved State-wide ramifications across infrastructure sectors (and specifically the renewable

sector). Therefore, it is apparent that the respondent was very much aware of the same and was in no case oblivious to the occurrence of such Force Majeure events.

- t. It is stated that at this juncture, it is imperative to reiterate that in view of the various Force Majeure events detailed hereinabove and various representations received by GoTS, GoTS by way of its letter dated 29.06.2017, directed TSDISCOMs to extend the SCOD as specified in the respective PPA of all solar power projects up to 30.06.2017, without any penalties.
- u. It is stated that accordingly, TSDISCOMs approached the Commission for extension of the SCOD upto 30.06.2017 for power purchase agreements entered into between 31.01.2016 and 28.02.2016. The Commission vide its letter dated 18.08.2017 granted in-principle approval to the same. In furtherance of the above, the respondent vide its letter dated 15.09.2017 informed the petitioner that the Commission has granted in-principle approval for extending the SCOD up to 30.06.2017 and called upon the petitioner to submit its acceptance to the same within one week.
- v. It is stated that however, the petitioner did not provide its acceptance/consent to the respondent's letter dated 15.09.2017. Furthermore, since most of the solar power projects in the State of Telangana had suffered extensively on account of the aforesaid Force Majeure events, the aforesaid extension of SCOD up to 30.06.2017 was inadequate. Accordingly, GoTS vide its letter dated 23.08.2017 granted a further extension of the SCOD by 4 months, that is up to 31.10.2017 keeping in view the grave nature of hardships arising on account of the aforesaid various Force Majeure events which materially thwarted the execution of the solar projects, and accordingly directed TSDISCOMs to take appropriate action in this regard. Further, GoTS vide its letter dated 04.12.2017 had also clarified that the extension of SCOD granted to solar power developers will be at the same tariff stipulated in the PPAs.
- w. It is stated that accordingly, while the petitioner was expecting that the respondent will follow the directions of GoTS contained in its aforesaid letters dated 29.06.2017 and 23.08.2017 and extend the SCOD pursuant to Article 9.2 of the PPA; however, the respondent vide its letter dated 03.02.2018 called upon the petitioner to file a petition for extension of SCOD before the Commission.

- x. It is stated that thereafter that is on 30.04.2018, in a completely arbitrary and high-handed manner, the respondent unilaterally that is without issuing any notice/intimation to the petitioner, encashed the petitioner's PBG amounting to Rs.10,00,00,000/- on account of alleged delay in commissioning of the project, which as explained hereinabove was due to reasons not attributable to and beyond the control of the petitioner.
- y. It is stated that the petitioner, being a genuine developer did everything reasonably possible to ensure timely commissioning of the project. Despite the above, the execution of the project was affected due to reasons not attributable to and beyond the control of the petitioner (as explained hereinabove), being Force Majeure events in terms of Article 9 of the PPA. Accordingly, in terms of the PPA, the respondent ought to have granted extension of the SCOD and not levied liquidated damages/penalty upon the petitioner.
- z. It is stated that in this regard, it is reaffirmed that the consequences for delay in commissioning the project as stipulated in Article 10.5 of the PPA are only applicable in the absence of extension of time under Article 9.2 of the PPA. In the present case, it is stated that the petitioner is duly entitled to extension of the SCOD under Article 9.2 of the PPA, as explained hereinabove. Therefore, the question of any delay in commissioning of the project does not arise, let alone any delay attributable to the petitioner. Accordingly, the respondent does not have any right or legal or tenable basis for levying liquidated damages/penalties upon the petitioner for any alleged delay in commissioning of the project. The relevant excerpts of Article 10.5 of the PPA are reproduced hereinbelow for ease of reference of the Commission:

"10.5 Penalties in case of Delayed Commissioning

*Under normal circumstances the Project has to be commissioned within 15 months from the date of signing of this Agreement. In case of failing to achieve this milestone, the DISCOM shall encash the Performance Bank guarantee which was submitted by the solar developer to the DISCOM at time of entering this Agreement in the following manner:
Contracted Capacity commissioned but with delay:*

- (a) *Delay up to one (1) month - DISCOM shall encash Rs.3 lakh per MW on per day basis proportionate to the Capacity not commissioned.*
- (b) *Delay of more than one (1) month and up to three months – DISCOM shall encash Rs.7 lakh per MW on per day basis proportionate to the Capacity not commissioned, in addition to the amount stated in clause 10.5(a).*

(c) *Delay of more than three (3) months and up to five (5) months - DISCOM shall encash Rs.10 lakh per MW on per day basis proportionate to the Capacity not commissioned, in addition to the amount stated in clauses 10.5(a) and 10.5(b).*

Note: By the way of illustration, if the COD is delayed by ten (10) days, an amount of Rs.1 lakh per MW shall be forfeited from the first tranche of PBG of value of Rs.3 lakhs per MW.

(d) *In case the commissioning of Power Project is delayed beyond five (5) months from the scheduled commissioning date, the SPD shall pay to DISCOM, the Liquidated Damages at the rate of Rs.10,000/- (Ten Thousand) per MW per day of delay for the delay in such remaining capacity which is not commissioned. The amount of liquidated damages shall be recovered from the SPD from the payments due on account of sale of solar power to the DISCOM.*

Provided that the DISCOM shall have the liberty not to invoke this provision in a reasonable case as shown by the SPD for levying liquidated damages.”

aa. It is further stated that it is also imperative to reiterate that the Commission vide various orders in the case of similarly situated/placed solar power developers has already recognized the aforesaid events (which in view of their overarching nature had state wide ramifications on infrastructure projects) as Force Majeure events impacting project execution obligations and has accordingly granted extension of SCOD in terms of GoTS aforesaid letters dated 29.06.2017 and 23.08.2017, without the levy of any liquidated damages. Therefore, it is stated that similar dispensation ought to be granted to the present petitioner keeping in view the principle of regulatory certainty and consistency. Reliance in this regard is placed by the petitioner on the Commission's orders dated 13.08.2018 in O. P. No.11 of 2018, 16.08.2018 in O. P. No. 21 of 2018, 18.08.2018 in O. P. No. 22 of 2018 and 17.11.2021 in O. P. No. 28 of 2020, the relevant extracts whereof are reproduced in the I. A. and are not being repeated herein for the sake of brevity.

ab. It is stated that in this regard, it is pertinent to state that it is trite law that the principle of unjust enrichment requires; first, that the defendant has been 'enriched' by the receipt of a 'benefit'; secondly, that this enrichment is 'at the expense of the plaintiff'; and thirdly, that the retention of the enrichment is unjust and requires restitution. Accordingly, it is reaffirmed that the respondent's conduct of levying liquidated damages upon the petitioner despite knowing fully well that the petitioner is entitled to extension of SCOD on account of Force

Majeure events in terms of the PPA tantamounts to unjust enrichment and thus, the petitioner is entitled to be restituted by way of directing the respondent to make payment of the said dues.

- ac. It is further stated that it was the respondent itself (along with other TSDISCOMs) that approached the Commission for extension of the SCOD up to 30.06.2017 for PPAs entered into between 31.01.2016 and 28.02.2016 on account of the Force Majeure events as detailed hereinabove. Thus, the respondent cannot now at this stage be allowed to take a contrary position by contending that the said events are not Force Majeure events, or that the respondent is entitled to encash the PBG of the petitioner and/or levy liquidated damages on the petitioner. To the said extent, there is an estoppel against the respondent and moreover, it cannot be allowed to approbate and reprobate in context of similar Force Majeure events.
- ad. It is stated that in this regard, it is pertinent to highlight that the respondent, in the Counter has alleged that since the petitioner failed to file a petition before the Commission till May 2022 in accordance with the Commission's letter dated 30.11.2017 and the petitioner having done so now, after an alleged lapse of 4 (four) years and 5 (five) months, it is not entitled to seek refund of the penalty amount. It is stated that the respondent by way of making such submissions is attempting to mislead the Commission and the said submissions is liable to be disregarded since the present petition has been filed by the petitioner within the period of limitation, particularly in light of the Hon'ble Supreme Court's order dated 10.01.2022, as explained in detail hereinbelow. Therefore, since the claims of the petitioner are well within limitation, therefore there is no rhyme or reason for the respondent to make such submissions before the Commission. Even otherwise, it is submitted that as such, there was no last date communicated to the petitioner for filing of the petition before the Commission in the respondent's letter dated 03.02.2018 and presumably in the Commission's letter dated 30.11.2017. Moreover, considering the principles of equity, as similarly affected projects developers have been granted reliefs based on the similar Force Majeure events, it would be travesty of justice if the present petitioner is denied such relief on account of pedantic ground(s).
- ae. It is stated that notwithstanding and without prejudice to the above, it is stated that even otherwise, the non-filing of a petition at the time of the issuance of the

Commission's letter dated 30.11.2017, cannot take away the petitioner's substantive right to seek reliefs by way of the present petition, which is in accordance with the law and is within the period of limitation. Therefore, it is stated that the contentions of the respondent are liable to be rejected by the Commission.

- af. It is stated that in view of the above, it is reaffirmed and reiterated that the conduct of the respondent in encashing the PBG of the petitioner and/or levying liquidated damages on the petitioner for alleged delay in commissioning is absolutely illegal, arbitrary, violative of the provisions of the PPA, bad in law and non-est.
- ag. It is stated that the respondent in its counter, has made a very vague aversion to the effect that the petitioner is not entitled to seek refund of the penalty amount as the same is barred by limitation, without even substantiating or justifying such an aversion, in any manner, whatsoever.
- ah. It is stated that having said that it is pertinent to highlight that the respondent has alleged that the petitioner could have filed the petition before the Commission within 3 (years) from the date of the cause of action, as the right to sue would accrue to the petitioner on the next day of encashment of the PBG by the respondent. Meaning thereby, that as per the respondent's own admission, the cause of action for filing the present petition of the petitioner arose on 19.04.2018, which is the next day from the arbitrary and unlawful encashment of the petitioner's PBG by the respondent.
- ai. It is stated that accordingly, the period of limitation of 3 (three) years from 19.04.2018 would have expired on 19.04.2021, as per Article 113 of the Limitation Act, 1963. However, the respondent has deliberately chosen not to highlight that the Hon'ble Supreme Court upon considering the spread of the new variant of the COVID-19 and the drastic surge in the number of COVID-19 /Omicron cases across the country, inter alia way of its order dated 10.01.2022, passed in Miscellaneous Application No.21 of 2022 in Suo Moto Writ Petition(C) No.3 of 2020, has, whilst excluding the period from 15.03.2020 till 28.02.2022 for the purposes of limitation, directed that in cases where the limitation would have expired during the period between 15.03.2020 till 28.02.2022, notwithstanding the actual balance period of limitation, all persons shall have a

limitation period of 90 (ninety) days from 01.03.2022. The relevant excerpts of the said order are reproduced hereinbelow for ready reference:

“I. The order dated 23.03.2020 is restored and in continuation of the subsequent orders dated 08.03.2021, 27.04.2021 and 23.09.2021, it is directed that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings.

... ..

III. In cases where the limitation would have expired during the period between 15.03.2020 till 28.02.2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 01.03.2022. In the event, the actual balance period of limitation remaining, with effect from 01.03.2022 is greater than 90 days, that longer period shall apply.”

aj. It is stated that meaning thereby, that for all matters where the period of limitation would have expired between 15.03.2020 till 28.02.2022 such as the present case, where the limitation period would have expired on 19.04.2021, the Hon'ble Supreme Court has effectively granted a carte blanche extension of limitation period for 90 (ninety) days from 01.03.2022, i.e., till 30.05.2022. In view of the aforementioned unambiguous directions passed by the Hon'ble Supreme Court, the petition was duly filed by the Petitioner on 30.05.2022. Accordingly, it is submitted that the petition has been filed by the petitioner within the prescribed period of limitation and does not suffer from any bar of limitation.

ak. It is stated that in this regard, it is also pertinent to highlight that the cause of action for filing the petition was a continuing one which, as highlighted hereinabove, first arose on 19.04.2018, (i.e., the next day from the arbitrary and unlawful encashment of the petitioner's PBG by the respondent) and thereafter, in March 2019, when the amount of Rs.53,00,000/- was deducted by the respondent from the energy bill issued by the petitioner for the supply of electricity for the month of March 2019. Accordingly, in terms of the Limitation Act, 1963, the limitation period of 3 (three) years expired only in March 2022 and therefore, the petition has been filed by the petitioner within the prescribed period of limitation and does not suffer from any bar of limitation. Therefore, it is stated that the respondents contentions in the counter are erroneous, fallacious, and baseless, and are thus, liable to be dismissed by the Commission.

- al. It is stated that in response to the counter, it is denied that there has been any default on part of the petitioner or delay attributable to the petitioner in the synchronization of the project with the grid, as alleged. It is reiterated that during the relevant period, the development and execution of many solar power projects across the State of Telangana was materially and adversely affected due to various unforeseeable events and circumstances that were clearly in the nature of Force Majeure events. The said Force Majeure events (which have been explained in detail hereinabove), which had state-wide ramifications in multiple sectors, were entirely beyond the reasonable control of power developers, including the petitioner, and could not have been avoided even with Prudent Utility Practices or the exercise of reasonable skill and care. It is reaffirmed that the said events duly qualify as Force Majeure events in the terms of Article 9 of the PPA and the same has already acknowledged by the Commission vis-a-vis the various events.
- am. It is stated that the contents of the counter are vehemently and ardently denied as being grossly erroneous, wholly misconceived and untenable. It is vehemently denied that there has been any delay in commissioning of the project, or that the respondent is entitled to encash the petitioner's PBG or levy any liquidated damages on the petitioner, as alleged. As explained hereinabove, since the petitioner was prevented from fulfilling its obligations qua the commissioning of the project by the SCOD on account of Force Majeure events and therefore, it is entitled to extension of time on account of such events. Further, from a combined reading of the PPA as a whole, it becomes clear that the consequences for the delay in commissioning of the project as stipulated in Article 10.5 of the PPA are only applicable in the absence of extension of time under Article 9.2 of the PPA. In the present case, the petitioner is duly entitled to extension of the SCOD under Article 9.2 of the PPA. In any case, it is settled law that the obligations of the parties get suspended during the period of impact on account of Force Majeure events. Therefore, the question of any delay in commissioning of the project does not arise, let alone any delay being attributable to the petitioner. Accordingly, the respondent does not have any right or legal or tenable basis for levying liquidated damages/ penalties upon the petitioner.

- an. It is stated that the petitioner also denies that the amount of Rs.45,00,000/- has been deducted by the respondent, as alleged. It is reiterated that an amount of Rs.53,00,000/- and not Rs.45,00,000/- was deducted by the respondent from the energy bill issued by the petitioner for the supply of electricity for the month of March 2019.
- ao. It is stated that the contents of the counter are vehemently and ardently denied as being grossly erroneous, wholly misconceived and untenable. It is vehemently denied that the events inter alia including Sada Bainamas, district reorganization, demonetization and/or unprecedented incessant rains, which affected the project, as detailed hereinabove, are not covered under Article 9 of the PPA, as alleged. It is further denied that the contentions of the petitioner with regard to the delay in the commissioning of the project on account of Force Majeure events are untenable or the same cannot be accepted, alleged. It is vehemently denied that the petitioner is avoiding performance of its obligations under the PPA, or that it is citing reasons to gain extension of SCOD of the project on the pretext of alleged Force Majeure events, as alleged. It is ardently denied that the petitioner has arbitrarily declared the happening or cessation of any Force Majeure events, as alleged. It is denied that the petitioner is trying to gain time under the guise of Force Majeure, or that any of the reasons cited by the petitioner do not deserve consideration, as alleged.
- ap. It is stated that it is reiterated that the respondent has not even bothered to substantiate or even explain the said contention(s), in any manner, whatsoever and therefore, the same ought to be completely disregarded by the Commission. It is stated that all of the events as detailed hereinabove, that affected the petitioner and consequently, led to the delay in the commissioning of the project, were entirely outside/beyond the reasonable control of the petitioner and could have not been foreseen by the petitioner, in any manner, whatsoever. It is further stated that the said events could not have been prevented by the petitioner. Therefore, it is stated that the said events duly qualify as Force Majeure events in the terms of Article 9 of the PPA. As per Article 9.2 of the PPA stipulates that in the event the petitioner is prevented from fulfilling its obligations due to Force Majeure events, then the SCOD is to be deferred for a reasonable period not less than day-to-day basis for the said delay. Accordingly, it is stated that the petitioner is entitled to extension of time

due to the occurrence of the Force Majeure events stated/explained hereinabove.

- aq. It is stated that the petitioner craves leave of the Commission to refer to and rely upon the contents of the preliminary submissions and objections made hereinabove as well as the petition and the I.A., as the same are not being repeated herein for the sake of brevity and to avoid prolixity. All averments to the contrary are denied and disputed.
- ar. It is stated that the contents of the counter are vehemently and ardently denied as being grossly erroneous, wholly misconceived and untenable. It is denied that there has been any default on the part of the petitioner in failing to inform the respondent of the stalling of the execution of the work of the project due to Force Majeure events, as alleged. It is reiterated that Article 9 of the PPA does not stipulate any requirement of a Force Majeure notice to be sent by the petitioner to the respondent in case of the occurrence of a Force Majeure event under Article 9 of the PPA and therefore, the same cannot be extrapolated into the PPA.
- as. It is stated that the contents of the counter are vehemently and ardently denied as being grossly erroneous, wholly misconceived and untenable. It is denied that there has been any failure on the part of the petitioner in filing a petition before the Commission, as alleged. It is vehemently denied that there has been any lapse on the part of the petitioner in seeking extension of SCOD, or that the petitioner is not entitled to seek refund of the penalty amount for any reason, as alleged. It is reiterated that the respondent by way of making such submissions is attempting to obfuscate the issue in order to mislead the Commission and the same ought to be disregarded by the Commission as the present petition has been filed by the petitioner with the period of limitation, particularly in light of the Hon'ble Supreme Court's order dated 10.01.2022. Therefore, since the claims of the petitioner are not barred by limitation, therefore there is no rhyme or reason for the respondent to make such submissions before the Commission. Even otherwise, it is stated that as such, there was no last date communicated to the petitioner for filing of the petition before the Commission in the respondent's letter dated 03.02.2018 and presumably in the Commission's letter dated 30.11.2017.

- at. It is stated that notwithstanding and without prejudice to the above, it is humbly submitted that even otherwise, the non-filing of a petition at the time of the issuance of the Commission's letter dated 30.11.2017, cannot take away the petitioner's substantive right to seek reliefs by way of the present petition, which is in accordance with the law and is within the period of limitation. Therefore, it is stated that the contentions of the respondent are liable to be rejected by the Commission.
- au. It is stated that the contents of the counter are vehemently and ardently denied as being grossly erroneous, wholly misconceived and untenable. It is denied that the petitioner's PBG was encashed or that the liquidated damages were deducted from the payment due to the petitioner in terms of Article 10.5 of the PPA, as alleged. It is further denied that the PPA does not provide for any clause for refund of the amount of Rs.10,53,00,000/- as alleged. It is also denied that any of amounts claimed by the petitioner are barred by limitation, as alleged.
- av. It is stated that the petitioner also denies that the amount of Rs.45,00,000/- has been deducted by the respondent, as alleged. It is reiterated that an amount of Rs.53,00,000/- and not Rs.45,00,000/- was deducted by the respondent from the energy bill issued by the petitioner for the supply of electricity for the month of March 2019.
- aw. It is stated that in response to the counter, it is denied that the petitioner is not entitled to seek refund of the penalty amount as per the Limitation Act, 1963, as alleged. It is reaffirmed that the petition is within the period of limitation.
- ax. It is stated that in response to the contents of the counter, it is stated that the respondent has admitted that the cause of action for filing the present petition of the petitioner arise on 19.04.2018, which is the next day from the arbitrary and unlawful encashment of the petitioner's PBG by the respondent. Accordingly, the period of limitation of 3 (three) years from 19.04.2018 would have expired on 19.04.2021, as per Article 113 of the Limitation Act, 1963.
- ay. It is stated that the respondent has deliberately chosen not to highlight that the Hon'ble Supreme Court *inter alia* way of its order dated 10.01.2022, has, whilst excluding the period from 15.03.2020 till 28.02.2022 for the purposes of limitation, directed that in cases where the limitation would have expired during the period between 15.03.2020 till 28.02.2022, notwithstanding the actual

balance period of limitation, all persons shall have a limitation period of 90 (ninety) days from 01.03.2022. Meaning thereby, that for all matters where the period of limitation would have expired between 15.03.2020 till 28.02.2022, such the present case, where the limitation period would have expired on 19.04.2021, the Hon'ble Supreme Court has effectively granted a carte blanche extension of limitation period for 90 (ninety) days from 01.03.2022, i.e., till 30.05.2022. In view of the aforementioned unambiguous directions issued by the Hon'ble Supreme Court, the petition was duly filed by the petitioner on 30.05.2022. Accordingly, it is stated that the petition has been filed by the petitioner within the prescribed period of limitation and does not suffer from any bar of limitation.

az. It is stated that it is also pertinent to highlight that the cause of action for filing the petition was a continuing one which, as highlighted hereinabove, first arose on 19.04.2018 (i.e., next day from the arbitrary and unlawful encashment of the petitioner's PBG by the respondent) and thereafter, in March 2019, when the amount of Rs.53,00,000/- was deducted by the respondent from the energy bill issued by the petitioner for the supply of electricity for the month of March 2019. Accordingly, in terms of the Limitation Act, 1963, the limitation period of 3 (three) years expired only in March 2022 and therefore, the petition has been filed by the petitioner within the prescribed period of limitation and does not suffer from any bar of limitation.

ba, It is stated that In view of the facts and submissions made hereinabove, it is prayed that the Commission may be pleased to: (i) reject the counter filed by the respondent and (ii) allow the petition by inter alia allowing the prayers therein.

7. The Commission has heard the counsel for petitioner and the representative of the respondent and also considered the material available to it. The submissions on various dates are noticed below, which are extracted for ready reference.

Record of proceedings dated 22.08.2022:

"... .. The counsel for petitioner stated that the petition is filed for extension of SCOD of the power project. The counter is yet to be filed in the matter. The representative of the respondent stated that the counter affidavit is being filed today. The Commission observed that a copy of the counter affidavit be served on the counsel for petitioner and the counsel for petitioner may file rejoinder, if

any by the next date of hearing duly serving a copy of the same on the respondent. In view of the request of the parties, the matter is adjourned.”

Record of proceedings dated 12.09.2022:

“... .. The counsel for petitioner stated that the petition is filed for extension of SCOD of the power project. The counter affidavit is yet to be filed in the matter. The representative of the respondent stated that the counter affidavit is being filed today. The Commission observed that a copy of the counter affidavit be served on the counsel for petitioner and the counsel for petitioner may file rejoinder, if any, by the next date of hearing duly serving a copy of the same on the respondent. In view of the request of the parties, the matter is adjourned.”

Record of proceedings dated 30.09.2022:

“... .. The counsel for petitioner stated that the pleadings in the matter are complete, however, the senior counsel appearing in the matter is not available and therefore, he requests further time for arguments. The representative of the respondent has no objection. Considering the request of the parties, the matter is adjourned.”

Record of proceedings dated 17.10.2022:

“... .. The counsel for petitioner stated that the pleadings in the matter are complete, however, the senior counsel appearing in the matter is not available and therefore, he requests further time for arguments. The representative of the respondent has no objection. Considering the request of the parties, the matter is adjourned.”

Record of proceedings dated 21.11.2022:

“... .. The counsel for petitioner stated that the pleadings in the matter are complete, however, the senior counsel appearing in the matter is not available and therefore, he requests further time for arguments. The representative of the respondent has no objection. Considering the request of the parties, the matter is adjourned.”

Record of proceedings dated 12.01.2023:

“... .. The advocate representing the counsel for petitioner stated that the petitioner had entered into PPA on 03.02.2016 and the period of 15 months would expire on 02.05.2017. The actual COD had taken place on 11.10.2017. There is a delay of 162 days. Consequently, the respondent had invoked the bank guarantees on 10.04.2018. The present petition was filed for extending the SCOD of the project from 02.05.2017 to 11.10.2017 and to refund the bank guarantee invoked by the respondent. Though the bills have been paid by the respondent pursuant to synchronization of the plant, the issue of encash the bank guarantee remained unresolved.

The advocate representing the counsel for the petitioner stated there were several conditions which constituted Force Majeure events which have been recognised by the Commission. These included demonetisation, implementation of GST, reorganisation of districts and heavy rainfall. Owing to the same reasons the project got delayed. The advocate representing the counsel for petitioner stated that the petitioner is aware of the decision of the Commission in an earlier matter refusing to extend the SCOD and consequently the bank guarantees. The dates under reference for calculating the limitation for filing the present petition would fall in the time period of the pandemic and the Hon'ble Supreme Court allowed extension of time for considering the limitation period upto 90 days beyond 28.02.2022. Thus, the present petition is

well within the time of three years required under Article 114 of the Limitation Act.

The advocate representing the counsel for petitioner stated that the petitioner is conscious of the dates mentioned by the Commission in its order refusing SCOD in respect of other cases. Though, dates taken by the Commission may constitute the start and end points of limitation, the case of the petitioner would fall within the extended limitation granted by the Hon'ble Supreme Court from 15.03.2020 to 28.02.2022 plus 90 days assuming that the respondent had required the petitioner to file a petition before the Commission 03.02.2018 or the encashment of bank guarantee on 10.04.2018. The finding arrived at by the Commission in the earlier case would not be sustainable in view of the fact that the Hon'ble Supreme Court had itself extended the timeline upto 28.02.2022 along with the grace period of 90 days. Therefore, the Commission may consider extending the SCOD and order for refund of bank guarantee invoked by the respondent with interest to the petitioner.

The representative of the respondent stated that the petitioner has not complied with the required conditions as mentioned in the PPA. The petitioner ought to have completed the project within the timelines as specified in the PPA. In the absence of compliance of the provisions of the PPA, the petitioner cannot claim the benefit of extension of SCOD as was considered by the Commission. In fact, the Commission required the licensee to inform every generator for filing a proper petition before the Commission for extension of time. The petitioner has failed to do so and this belated stage after more than 3 years is seeking refund of bank guarantee as well as extension of SCOD to the date when the plant was synchronised. Nothing prevented the petitioner from approaching the respondent and informing of the delay in the project and in complying with the directions of the Commission. The petitioner has absolutely not made out any case for interference. The reliance placed on the orders of the Hon'ble Supreme Court neither relevant nor appropriate to the facts of this case.

Having heard the submissions of the parties, the matter is reserved for orders.”

8. Before advertent to the contentions of the petitioner in this case, it is trite to notice that the Commission had in similar circumstances, in the matter of “*M/s Suraj Kiran Solar Technologies Private Limited Vs. Southern Power Distribution Company of Telangana Limited & Anr.*” order dated 17.10.2022 in O. P. No. 52 of 2021, considered the contentions, which were similar to the present submissions and held that the petitioner therein is not entitled to the relief. For better appreciation, the relevant portion of the said order is reproduced below.

“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 Durgaiiah 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		
<u>Case History</u>				
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/-*

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/-*
 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.”*

9. In the present case, the petitioner and the respondent entered PPA on 03.02.2016 for establishing 50 MW solar power project located at K.M.Pally Village, Nalognda District, inter connection at 220/132 kV K.M.Pally substation and for sale of the electricity generated therefrom to the respondent at the tariff of Rs.5.3719/unit for a period of 25 years from the COD of the project. As per the terms of PPA, the

petitioner has to commission (SCOD) its solar power project within 15 months from the date of signing of the PPA i.e., by 02.05.2017. However, the solar power project of the petitioner was synchronized to the grid (COD) on 11.10.2017.

10. While things stood thus, the respondent had invoked the performance bank guarantee of Rs.10 crore as seen from the submissions made by the petitioner and also imposed and collected liquidated damages of Rs.53 lakh, Be that as it may, the petition filed before the Commission is with reference to dual remedies of extension of SCOD to 11.10.2017 and directions to respondent to return/refund to the petitioner an amount of Rs.10,53,00,000/-, which was deducted by the respondent from the petitioner.

11. From the record, it is noticed that the issue arose as early as 11.10.2017 when the respondent confirmed the synchronisation of the project, further petitioner had never replied to any of the letters written by the respondent be it letter dated 15.09.2017 requirement of amending the PPA due to extension of SCOD granted by the Government of Telangana or letter No.1512/17 dated 03.02.2018 from the respondent requiring petitioner to file a petition before the Commission furnishing the reason for extension of time within the framework of the PPA. These would emphatically make it clear that the limitation ran out by 02.02.2021.

12. The Commission is constrained to observe that the petitioner conveniently slept over the matter for more than four (4) years either way and filed a petition before the Commission only in the year 2022. 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. In the absence of there being no due diligence on the part of the petitioner, any amount of relaxation/condonation of its lapses cannot be accepted. For this reason, the extension of limitation granted by the Hon'ble Supreme Court in M. A. No. 665 of 2021 which was in peculiar circumstances arising out of the spread of pandemic COVID-19 cannot be extended in favour of the petitioner, where the petitioner is not diligent in pursuing his grievance in a timely manner. Further, it is clear from the observations of the Hon'ble Supreme Court in the 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 that a claim may survive but the remedy may not survive if it is barred by limitation.

13. The petitioner ostensibly perceived a notion that the respondent was in error by encashing the PBGs and imposing liquidated damages as the project got delayed due to Force Majeure conditions. All the decisions rendered and now relied upon by the petitioner would emphasize that there were certain technical and financial difficulties which were akin to the respective generators. Such acceptance had been considered keeping in views of the specific facts and circumstances. Therefore, all such contentions cannot be termed as generic contentions.

14. No doubt, the Commission had earlier in several cases, extended its compassion and obviated the need for encashment of PBGs and levy of liquidated damages by taking into consideration, the extension of time granted by the Government of Telangana. It is appropriate to state that several of the generators have approached the Commission in a timely manner and got appropriate relief. But the Commission is not persuaded to exercise the same benefit in the matter of the petitioner. Laxities on the part of the petitioner would not ensure that it has a right to claim and take benefit of the earlier dispensation made by the Commission.

15. For these reasons and the findings set out in the earlier order as extracted above, the Commission is of the view that the petitioner cannot be favoured with the reliefs sought thereof. Accordingly, the petition stands dismissed, but in the circumstance, no costs. However, the Interlocutory Application (I.A.No.52 of 2022) seeking to amend the original petition and to replace the original petition with the amended petition having been accepted.

This order is corrected and signed on this the 20th day of October, 2023

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