



नई दिल्ली
NEW DELHI

याचिका संख्या./ Petition No. 189/MP/2019

कोरम/ Coram:

श्री आई. एस. झा, सदस्य/ Shri I. S. Jha, Member

श्री अरुण गोयल, सदस्य/ Shri Arun Goyal, Member

श्री पी. के. सिंह, सदस्य / Shri P. K. Singh, Member

आदेश दिनांक/ Date of Order: 23rd December , 2022

IN THE MATTER OF:

Petition under Section 79 (1) (b), Section 79(1)(f) and Section 79(1) (k) of the Electricity Act, 2003 read with Article 11 of the power purchase agreements entered into between Solar Energy Corporation of India and Parampujya Solar Energy Private Limited seeking directions to Solar Energy Corporation of India to act in accordance with Article 11 of the PPA accepting the impact of Force Majeure Events and extend the timeline for fulfillment of Conditions Subsequent and Scheduled Commissioning Date of the Petitioner's project.

AND

IN THE MATTER OF:

Parampujya Solar Energy Private Ltd.,

Adani House, Shantigram, S. G. Highway,

Ahmedabad-382421, Gujarat

...Petitioner

Versus

1. Solar Energy Corporation of India Ltd. (SECI)

1st Floor, A-Wing, 0-3,

District Centre, Saket,
New Delhi- 110017

2. Maharashtra State Electricity Distribution Company Limited (MSEDCL)

Prakashgad, plot No G-9, A K Marg, Bandra (East) ,
Mumbai,
Maharashtra - 400051

...Respondents

Parties Present: Shri Sanjay Sen, Advocate, PSEPL
Shri Nitish Gupta, Advocate, PSEPL
Ms. Nipun Sharma, Advocate, PSEPL
Ms. Mandakini Ghosh, Advocate, PSEPL
Shri Ruth Elvin, Advocate, PSEPL
Ms. Neha, Advocate, PSEPL
Shri M. G. Ramachandran, Sr. Advocate, SECI
Ms. Anushree Bardhan, Advocate, SECI
Ms. Tanya Sareen, Advocate, SECI
Shri Aneesh Bajaj, Advocate, SECI
Shri Akshay Goel, Advocate, MSEDCL
Shri Anup Jain, Advocate, MSEDCL

आदेश/ ORDER

The Petitioner, Parampujya Solar Energy Pvt. Ltd. (PSEPL) is a generating company and is primarily engaged in the business of setting up of solar power plants and generation of electricity. The Petitioner has been selected as a successful bidder by Solar Energy Corporation of India (SECI) for development of solar power project for a cumulative capacity of 20 MW in the State of Maharashtra. The Petitioner has filed the present petition mainly for a direction to SECI to act in accordance with Article 11 of the PPA by way of accepting the impact of Force Majeure Events and extend the timeline for fulfillment of Conditions Subsequent and Scheduled Commissioning Date (SCoD) of the Petitioner's project

2. The Respondent No.1, Solar Energy Corporation of India (SECI), is a Central Public Sector Undertaking. Under the State Specific Bundling Scheme of the National Solar Mission, SECI is responsible for implementation of scheme of Ministry of New and Renewable Energy (MNRE) for setting up Solar Power Plants.

3. The Respondent No. 2, Maharashtra State Electricity Distribution Company Limited (MSEDCL) is a wholly owned corporate entity under the Maharashtra Government. MSEDCL is the distribution company of State of Maharashtra.
4. The Petitioner has made the following prayers
- a) *Declare that the Petitioner was prevented from performing its obligation under the PPA due to occurrence of Force Majeure events affecting it and due to act/omissions of the Respondent and Government Instrumentalities;*
 - b) *to condone the inadvertent delay caused for the reasons beyond the control of the Petitioner due to Force Majeure events and act/omissions of the Respondent and Government Instrumentalities affecting it in achieving the Scheduled Commissioning Date of the Project.*
 - c) *Direct the Respondent to allow time extension in scheduled commissioning date.*
 - d) *Direct the Respondent to refund the amount deducted as Liquidated Damages by encashing the Bank Guarantees along with interest on the same as per the PPA.*
 - e) *Direct Respondent to pay tariff at the rate agreed in the PPA and pay the differential tariff from the date of commissioning till date along with the interest as per the PPA.*
 - f) *Pass such other order/s including an order as to costs, to meet the ends of justice and equity.*

Brief Background:

5. SECI under the MNRE Guidelines, issued a Request for Selection (RfS) document dated 24.02.2016 for the selection of Solar Power Developer for the development of 50 MW of grid connected Solar Photo Voltaic Power Projects on “Build Own Operate” Basis in the State of Maharashtra. M/s Adani Green Energy Limited was declared as a successful bidder in the bid process and on 16.06.2017, SECI issued Letter of Award (LoI). M/s Adani Green Energy Limited formed a Project Company, PSEPL (the Petitioner) within the provisions of the RfS, for the purposes of setting up of Solar Power Project selected under JNNSM Phase-II, Batch-III based on Photo Voltaic technology of 20MW Solar capacity at Village Kilaj, Tehsil Tuljapur, District Osmanabad, Maharashtra. The Petitioner and SECI have executed Power purchase Agreement on 19.07.2016. As per the terms and conditions of the PPA, the Petitioner had furnished two bank guarantees for a total of Rs. 6.00 Cr. (Rs. 1.20 Cr. + Rs. 4.80 Cr.). A

VGF Securitization Agreement was also executed between the Petitioner and Respondent on 19.06.2016 wherein the Petitioner was eligible to receive VGF support to the extent of Rs. 26.07 Cr. As per the PPA, Scheduled commissioning date of the Project was 16.08.2017. The Petitioner, by its preliminary synchronization notice dated 05.06.2017 as well as final synchronization notice dated 17.07.2017, updated the Respondent and its intent to carry out synchronization/commissioning of the plant to the Grid System by 10.08.2017. However, development of the project was affected due to various Force Majeure events viz. *the effect of Demonetization, introduction of GST Laws, enquiry conducted by the Sub-divisional officer (SDO) Osmanabad*. SECI invoked Bank Guarantee amounting to Rs. 6 crores on 01.03.2018 due to delay in commissioning of the project by PSEPL and revised the tariff to Rs. 4.16/unit. On 20.06.2018, MNRE issued a notification with respect to extension in SCoD of Solar Power Plants, on account of GST related issues and approved extension of 62 days. On 21.01.2019, SECI granted an extension of 46 days to PSEPL (from 01.07.2017 to 15.08.2017) and extended the SCoD from 16.08.2017 to 01.10.2017.

6. Aggrieved by the act of SECI, PSEPL filed the instant Petition seeking issuance of directions to Respondent No. 1 SECI to act in accordance with Article 11 of the PPA accepting the impact of Force Majeure Events and extend the Scheduled Commissioning Date of the Petitioner's project. Hence, this present Petition.

Submission of the Petitioner:

7. The Petitioner has submitted as under:
 - a) Subsequent to the signing of PPA, owing to various unforeseeable events and circumstances, the development and setting up Project was materially and adversely affected. These Force Majeure events viz. introduction/ modification of Central laws/ policies, including but not limited to GST; enquiry conducted by SDO, Osmanabad (Force Majeure Events) and demonetization which resulted in delay in achieving SCoD as specified in the PPAs.

Re. Introduction of GST and Challenges in equipment supplies from India/abroad

- b) After the coming into force of the Central Goods & Services Tax Act, 2017 on 01.07.2017 (GST Law), there was a slow-down from July 2017 to September 2017 in the manufacturing as well as service industry across the country. MNRE vide its Office Memorandum dated 20.06.2018 granted 62 days extension in SCoD of Solar Power

Plants pursuant to which the Petitioner issued letters dated 28.06.2018 and 31.07.2018 to SECI requesting to grant the extension of time for 62 days to SCoD. Vide another letter dated 31.07.2018, the Petitioner submitted few documents proving that the vendors are genuinely facing difficulties in supplying the material due to which works at the project received a huge setback. SECI considering the above referred OM of MNRE dated 20.06.2018, vide its letter dated 21.01.2019, granted 46 days' time extension in scheduled commissioning date of the project and the same was extended till 01.10.2017. It was also informed that the tariff has been reduced to INR 4.16/Unit.

Re. Enquiry conducted by SDO, Osmanabad

- c) The Petitioner vide its letters dated 05.06.2017 and 17.07.2017, had intimated SECI of its intention to synchronize the project on 10.08.2017.
- d) Meanwhile, the Petitioner, received the SDO Order on 14.08.2017, directing the Petitioner to immediately suspend all work at the Project site. The Petitioner intimated SECI of the SDO's order by an email of even date, and further addressed a letter dated 16.08.2017.
- e) SECI was also informed that permission from Gram Panchayat and Non-agricultural Conversion of Land for the Project was unnecessary in view of Clause 6.6 of the Maharashtra Solar Policy, which grants deemed agricultural land status to land acquired for solar power projects.
- f) The Petitioner sought extension of time as per Clause 4.5 of the PPA, for a period of at least 15 days as immediate relief till the matter gets resolved
- g) SECI, in its reply via email dated 28.08.2017, stated that "*any delay in Commissioning of Projects shall be dealt as per Provisions of RfS/PPA*".
- h) The Petitioner continued to pursue the matter and routinely updated SECI regarding the same, as is evident from the letter dated 22.11.2017, with the objective of obtaining vacation of the SDO order and ensuring timely commissioning of the Project.
- i) SECI vide letter dated 29.11.2017, acknowledged receipt of the correspondences addressed by the Petitioner but denied the Petitioner's claim, stating that the events as described by the Petitioner did not qualify as 'Force Majeure' within the provisions of Article 11 of the PPA, since the obligation to obtain all necessary Consents, Permits and Clearances required for the construction of the Project and supply of power to SECI was solely on the Petitioner.

- j) SECI, whilst observing that the SDO order seemed to state that the Petitioner had undertaken “unauthorized” construction work for the Project, directed the Petitioner to furnish, within 7 days, true certified copy of all permits, clearances etc. along with true English translation of the SDO order as well as the measures taken by the Petitioner for addressing the concerns raised in the SDO order. The Petitioner submitted that it furnished the documents along with letter dated 06.12.2017.
- k) Pursuant to the SDO Order on 14.08.2017, the Petitioner vide letter dated 12.12.2017 furnished information/clarification to the concerned Tehsildar, regarding concerns raised by villagers that the construction work was carried out without proper permission from respective Government and impact of solar project on crops and water availability. The Petitioner also clarified that there was no crop cultivated in the disputed area during the construction work and further the disputed land is uncultivable and barren land.
- l) After pursuing further investigation, the Tehsildar submitted report dated 22.12.2017 to the SDO, confirming that all work executed by the Petitioner was authorized and approved by SECI and MSEDCL and that apprehensions of the villagers were unfounded. Based on the aforesaid report, the Tehsildar issued a letter to the Petitioner, finally allowing the Petitioner to resume work on the Project with effect from 23.12.2017.
- m) The vide letter dated 23.12.2017 apprised SECI of the steps taken by it , pursuant to the SDO Order.
- n) Delay due to the afore-stated restriction was of 130 days. However, Respondent has refused to recognize this event as a force-majeure event.
- o) Thereafter, the Project plant was synchronized with the grid on 21.02.2018 in the presence of MSEDCL officials. Immediately thereafter, a final meeting dated 22.02.2018 was held on project site, whereby all technical parameters including physical verification of equipment and joint meter reading were completed in the presence of officials of the Respondent as well as officials of MSEDCL, MSETCL and MEDA. The Petitioner’s Project was commissioned since 22.02.2018 and is supplying power since then. The Maharashtra Energy Development Agency (MEDA) issued Commissioning Certificate to the 20 MW Solar Power Project commissioned on 22.02.2018 vide its letter dated 23.03.2018.
- p) However, abruptly and without any notice, SECI fraudulently and with *mala fide* intentions of unlawful enrichment at the Petitioner’s expense, invoked the Bank Guarantees maintained with Yes Bank amounting to Rupees Six Crores vide letter

01.03.2018. The letter dated 01.03.2018 issued by SECI is issued solely with the objective of unjustly enriching itself at the cost of the Petitioner's hard work and investment.

Re. Demonetization

- q) Project also suffered delay due to demonetization as there was disruption in banking system and limitation on withdrawal of cash, making payment towards labour work, procurement of equipment and materials etc. for its project in the rural area difficult.

Hearing dated 05.09.2019:

8. The Commission admitted the Petition and directed SECI to file its reply by 30.09.2019 with an advance copy to the Petitioner who may file its rejoinder by 11.10.2019.

Submissions of SECI:

9. SECI filed its Reply on 31.10.2019 and had submitted as under:

Re: Demonetization

- a) Demonetization is neither force majeure nor change in law for grant of relief under the PPA. The PPA does not expressly provide or otherwise cover the demonetization as either Force Majeure or Change in Law within the scope of Articles 11 and Article 12 of the PPA.
- b) Demonetization has been specifically excluded under Article 11.4 dealing with Force Majeure exclusion. Article 11.4.1(e) expressly states that '*insufficiency of finances or funds or the agreements becoming onerous to perform*' falls under Force Majeure exclusions.
- c) No relief is admissible to the Petitioner on account of demonetization outside the scope and contours of the provisions of the PPA as alleged or otherwise.

Re: Introduction of GST laws

- d) The Office Memorandum (dated 20.06.2018) recognized that disruption due to GST Laws to have occurred for the period 01.07.2017 to 30.08.2017. In order to be eligible for extension for the said period, the project should have been at a stage between Financial Closure and SCoD during the above-mentioned period. The Office Memorandum enlists various situations of extension of time. The full extension of two months i.e. 62 days may be eligible for Projects having date of Actual Financial Closure

(AFC) / Scheduled Financial Closure (SFC) (whichever was later), before 01.07.2017 and having scheduled commissioning date (SCOD) after 31.08.2017. In a case, where the concerned project's Scheduled Commissioning Date (SCOD), was on or before 31.08.2017, the eligible extension gets reduced by the number of days such SCOD was before 01.09.2017.

- e) In the instant case, the Actual Financial Closure Date was achieved on 04.03.2017 i.e. before 01.07.2017. The SCoD was before 31.08.2017 i.e. on 16.08.2017. The eligible extension of time was reduced by number of days the SCoD was before 01.09.2017 i.e. by sixteen (16) days. Therefore, admissible extension of time on account of GST Laws based on the Office Memorandum dated 20.06.2018 comes out to be 46 days. The Petitioner is therefore not entitled to claim any further or other extension of time.
- f) SECI duly followed the decision of MNRE in the Office Memorandum dated 20.06.2018 for granting extension of 46 days in scheduled commissioning date of the Petitioner's project on account of GST Laws.

Re. Delay due to enquiry conducted by Sub-Divisional Officer, Osmanabad

- g) On 05.06.2017, the Petitioner had sent to SECI, advance preliminary notice under Article 5 of the PPA. It was informed that the Petitioner is planning synchronization of 20 MW solar power project by 05.08.2017. On 17.07.2017, the Petitioner sent to SECI, advance final notice under Article 5 of the PPA. It was informed that the Petitioner was planning synchronization of 20 MW solar power project by 10.08.2017. There is no explanation as to why the synchronization was not done by 10.08.2017 as stated by the Petitioner.
- h) On 14.08.2017, the Petitioner informed SECI that a letter has been issued by Sub-Divisional Officer, Osmanabad directing the Petitioner to temporarily suspend the work at the project site till further Orders on account of complaint received from the villagers that the construction of project is illegal and the crops and water level is getting affected. However, there is no letter on record from the Petitioner to the Tehsildar or the Sub-Divisional Officer against letter dated 14.08.2017.
- i) On 16.08.2017, the Petitioner issued Force Majeure notice to SECI, in relation to stoppage of work by Sub-Divisional Officer at Petitioner's 20 MW solar power project and sought extension of time in the SCoD.

- j) On 28.08.2017, SECI vide email intimated the Petitioner that any delay in commissioning of Projects shall be dealt as per provisions of RfS/PPA. On 29.11.2017, SECI informed the Petitioner that the claim of occurrence of the Force Majeure events in relation to work stoppage by Sub-Divisional officer does not fall within the scope of the provisions of the PPA for reasons stated in the said letter. SECI also requested for submissions of certain details/documents for further review and examination. On 06.12.2017, the Petitioner submitted certain documents with SECI
- k) On 12.12.2017, the Petitioner clarified to the Tehsildar regarding routing of transmission line through their purchased land. Further, there was no crop cultivated in the mentioned area during the construction of above-mentioned line and that the land was non-cultivable/barren land as of that date.
- l) On 22.12.2017, the Tehsildar, Tuljapur (Land Acquisition Department) informed Petitioner that his office has made enquiry through concerned Circle Officer and has sent the report to Sub-Divisional by letter dated 22.12.2017. Further, the Petitioner may resume the Project activities as per directions of the Sub Divisional Officer, Osmanabad.
- m) On 01.02.2018, SECI wrote a letter to District Collector, Osmanabad requesting for confirmation of authenticity of letter of Sub-divisional Officer Osmanabad, seeking clarification of the circumstances under which Sub-Divisional Officer had passed his order etc. in order to enable SECI to take decision with respect to Petitioner's claim of Force Majeure Event and for relief from payment of liquidated damages.
- n) On 07.02.2018, the Collector, Osmanabad informed SECI that *"None of officials of M/s Parampujya Solar Energy Pvt. Limited (PSEPL) briefed about scheduled commissioning of project on 16/08/2017. They purposely hid the facts. Officials of M/s Parampujya Solar Energy Pvt. Limited (PSEPL) also assured to resolve issues in 2-3 days, however no such action was taken as per their promise till 12/12/2017. In mean time, no representative from M/s Parampujya Solar Energy Pvt. Limited (PSEPL) approached or presented their side to Tahsil Office/ Sub divisional Office or this Office about the settlement of issue. M/s Parampujya Solar Energy Pvt. Limited (PSEPL) vide letter dated 12/12/2017 mentioned that land is barren land and no crop is cultivated in that area. Even if this fact is known to officials, they did not explain on 13/08/2017, rather took nearly 4 months, for this explanation. Earlier Tehsildar and Sub divisional Office sorted out issues of ROW in the interest of this project of national importance on*

request of officials. Timing of compliant and request to stop work temporarily with suppressing facts about commissioning of project and period of nearly 4 months to give explanation of known facts is indeed suspicious, intentional and dubious.”

- o) On 22.02.2018, the Petitioner achieved Actual Commissioning of the power project.
- p) The alleged delay does not fall within the scope and ambit of the Force Majeure provisions of the PPA as sought for or otherwise for the following reasons:
 - (i) Article 11.3.1 of the PPA dealing with scope of Force Majeure enlists events or circumstances which can be considered as Force Majeure events. In terms of the said provision, such events or circumstances should not be within the reasonable control (directly or indirectly) of the Affected Party and should be such that they could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices. Article 11.6 of the PPA casts a duty upon the Affected Party to take reasonable efforts to mitigate the effect of any Force Majeure as soon as practicable.
 - (ii) The above event of delay on account of enquiry conducted by the Sub-Divisional Officer does not fall within the scope of the events of Article 11.3 of the PPA.
 - (iii) The events or circumstance which are within the reasonable control of the parties, non-performance caused by or connected with Affected Party's (i) negligent or intentional acts, errors or omissions (ii) breach of or default under the PPA, agreement becoming onerous to perform etc. are recognized as Force Majeure Exclusions under Article 11.4 of the PPA.
 - (iv) There was negligence by the Petitioner in as much as the Petitioner did not take any steps for nearly four months with regard to the communication dated 14.08.2017 of the sub-divisional officer, the inaction of the Petitioner has been specifically noted by the District Collector in the Letter dated 07.02.2018, serious doubts have been raised on the Petitioner's conduct and the fact that the letter dated 14.08.2017 has been procured by the Petitioner itself in order to hide its own delays and defaults, no measures have been taken by the Petitioner to mitigate the effect of the above event. This is demonstrated by the fact that although the officials of the Petitioner assured to resolve the issue in 2-3 days, the Petitioner neither approached the office of Tehsildar or Sub-Divisional Officer nor addressed any communication to the above officials providing explanation in

response to letter dated 14.08.2017 or setting out the urgency of the matter or otherwise.

- (v) As is evident from the District Collector's letter dated 07.02.2018, the Petitioner's insistence on temporary stoppage of work until the issues raised by the complaints are resolved, suppression of material facts such as scheduled commissioning date on 16.08.2017, period of four month to provide explanation of known facts resulted in non-performance of the obligations assumed by the Petitioner under the PPA on account of acts and omissions on the part of the Petitioner. The Petitioner did not provide the complete documents/details by letter dated 06.12.2017 as sought by SECI vide its letter dated 29.11.2017 for further examination and review of the matter. The Petitioner did not provide any document or information with regard to the measures taken for addressing the issues raised in letter dated 14.08.2017 of the Sub-Divisional Officer.
- (vi) The delay in commissioning is not attributable to the stoppage of work as claimed by the Petitioner. Even after being able to resume the work on 20.12.2017, the Petitioner could not synchronize until 21.02.2018. There is no reason or rationale provided in the Petition for such delay of two months. If the Petitioner was allegedly ready on 14.08.2017 for commissioning by 16.08.2017, it could not have taken the Petitioner two months to commission the project after 12.12.2017.
- q) The reliance placed by the Petitioner on the Hon'ble Supreme Court decision in *Dhanrajmal Gobindram -v- Shamji Kalidas and Co*, AIR 1961 SC 1285 is misconceived as the said decision is distinguishable on the facts and circumstances of the case. The decision itself states that conditions of Force Majeure can be ascertained from the evidence of the Force Majeure clause which was in contemplation of the parties. In the present case, the PPA provided for a Force Majeure provision under Article 11.
- r) The reliance placed by the Petitioner on the decision of *Alopi Parshad & Sons Ltd. -v- Union of India* 1960 (2) SCR 793 is also misplaced. The Petitioner is entitled to claim relief of Force Majeure only as per the Force Majeure clause provided in the PPA and not otherwise.
- s) Reliance by the Petitioner on the letter dated 28.07.2017 of MNRE, is misplaced and it has no application to the present case. The letter dated 28.07.2017 itself provides that extension (if any) can be granted strictly as per the contractual agreement.

- t) Accordingly, the extension (if any) to be granted to any Solar Power Developer including Petitioner has to be necessarily in terms of the contractual Agreements executed between the parties i.e. the PPA in the present case.

Re: Liquidated damages are not admissible without proof of actual loss is contrary to settled principles

- u) In terms of Article 3.17 of RfS and Article 4.6 of the PPA, SECI is entitled to the payment of liquidated damages from the Petitioner for the delay in commencement of supply of power and for delay in making the contracted capacity available for dispatch by the SCoD (01.10.2017).
- v) SECI has suffered a legal injury/loss on account of non-availability of power from the scheduled commissioning date entitling SECI to the recovery of liquidated damages in terms of Article 4.6 of the PPA. The Liquidated damages is to be deposited in a separate fund maintained by SECI under the guidance of MNRE.
- w) With regard to the objection of MSEDCL regarding jurisdiction of the Commission, it is submitted that Tribunal vide decision dated 15.09.2022 in Appeal No.256 of 2019 in *Parampujya Solar Energy Private Limited –v- Central Electricity Regulatory Commission and Others* has upheld the jurisdiction of the Central Commission in respect of JNNSM Scheme.

Hearing dated 28.06.2022:

10. In the hearing, this Commission directed the Petitioner to implead MSEDCL as party to the Petition and file revised memo of party within a week. MSEDCL was directed to file its reply to the Petition, if any, within three weeks after serving copy of the same to the Petitioner, who may file its rejoinder.
11. Accordingly, the Petitioner filed the amended Memo of Parties on 05.07.2022.

Hearing dated 29.09.2022:

12. During the course of hearing held on 29.09.2022, Learned counsel for the Respondent No.2 stated that the dispute between the Petitioner and SECI in this matter does not concern the Respondent No. 2 and for the dispute between the Respondent No. 2 and SECI, Respondent No. 2 had filed a Petition before Maharashtra Electricity Regulatory Commission and the matter is now pending in appeal before the Tribunal. Considering the requests of the learned senior counsel and learned counsel for the parties, the Commission permitted all the parties to

file their respective written submissions within two weeks with copy to the other side. Subject to the above, the Commission reserved the matter for Orders.

13. The Petitioner and the Respondent No.1, SECI filed written submissions on 14.10.2022 and 01.10.2022 respectively. The averments made by the Petitioner and Respondent No.1 in their Written Submissions are already covered in the plaint, so the same is not being reproduced here.

Written Submissions dated 03.10.2022 of MSEDCL:

14. MSEDCL has submitted as under:
- a) No relief has been sought against the answering Respondent. Hence, the submission herein is limited to the role of MSEDCL having PSA with SECI.
 - b) MSEDCL entered into a Power Sale Agreement (“PSA”) with SECI on 04.11.2016 to fulfill their RPO Obligation on back to back basis. The scheduled commissioning date for Batch-III projects were 10.05.2017 for Open (450 MW) and 16.08.2017 for Domestic Content category requirement (DCR) (50 MW) category projects respectively.
 - c) The SCoD of the project was 16.08.2017 and the COD of the project is achieved on 21.03.2018. Hence, SECI has encashed the PBG and reduced the tariff of the project as per PPA provisions.
 - d) The obligation to supply complete agreed quantum of power to Respondent No. 2 under the PSA was of SECI.
 - e) In the instant matter, the Petitioner has not raised any claim against MSEDCL. However, CERC vide order dated 28.06.2022 directed to implead MSEDCL as party on request of SECI, since MSEDCL is the buying entity with whom the back-to-back Power Sale Agreement has been entered into by SECI for re-sale of electricity from the Petitioner’s solar project.
 - f) As per the PSA, the compensation payable under PSA and PPA is broadly categorized as Short supply of committed energy, Performance Bank Guarantee encashment and reduction in tariff rate of Solar Project. MSEDCL issued letter on 12.04.2019 and 04.10.2019 requested for compensation as per relevant provisions under PSA and PPA to SECI.
 - g) SECI vide letter dated 29.04.2019 and 11.10.2019 has rejected the request by stating that MSEDCL cannot claim any remedy or compensation which is not provided in the PSA.

- h) MSEDCL had filed petition (**Case No. 346 of 2019**) before MERC seeking compensation as per Power Sale Agreement dated 04.11.2016 and 01.12.2016 executed with SECI on account of short supply of power owing to delay in achieving the Scheduled Commercial Operation Date (SCoD) by SPDs under the respective PPAs with SECI. MERC vide its order dated 12.02.2021 disposed of Case No. 346 of 2019.
- i) SECI filed an appeal vide No. 130 of 2021 before APTEL against MERC order. Similar cases seeking extension on account of force majeure events and restraining SECI from encashment of PBGs were filed before CERC bearing no. 19/MP/2018 and 27/MP/2018. CERC had passed order dated 11.12.2019 and 08.11.2019 respectively in Petition No. 19/MP/2018 and 27/MP/2018 against the said orders. Appeals are pending before APTEL which are sub judice at present.
- j) Obtaining all the statutory clearances is the responsibility of the SPD as per the RfS and PPA. Hence, SECI has rightly forfeited the bank guarantee as per the PPA.
- k) In view of the aforesaid averments and submissions in the present petition, the grievance of the Petitioner is against the Respondent No. 1, and not against the Answering Respondent No. 2 herein. This is on account of the fact that the entire transaction between the Petitioner, Respondent No. 1 and the Respondent No. 2 was a back-to-back transaction and as such the Answering Respondent No. 2 had a limited role.

Analysis and Decision:

- 15. We have heard the learned counsels for the Petitioner and the Respondents and have carefully perused the records.
- 16. From the submissions of the parties, the following issues arise for adjudication:

Issue No. 1: *Whether the Petitioner was prevented from performing its obligation under the PPA due to occurrence of Force Majeure events affecting it and due to act/omissions of the Respondent and Government Instrumentalities?*

Issue No. 2: *Whether inadvertent delay caused for the reasons beyond the control of the Petitioner due to Force Majeure events and act/omissions of the Respondent and Government Instrumentalities affecting it in achieving the Scheduled Commissioning Date of the Project should be condoned?*

Issue No. 3: *Whether the time extension in scheduled commissioning date should be allowed?*

Issue No. 4: *Whether the Respondent should be directed to refund the amount deducted as Liquidated Damages by encashing the Bank Guarantees along with interest on the same as per the PPA?*

Issue No. 5: *Whether the Respondent should be directed to pay tariff at the rate agreed in the PPA and pay the differential tariff from the date of commissioning till date along with the interest as per the PPA?*

17. We now discuss and analyze the issues one by one.

Issue No. 1: *Whether the Petitioner was prevented from performing its obligation under the PPA due to occurrence of Force Majeure events affecting it and due to act/omissions of the Respondent and Government Instrumentalities?*

Issue No. 2: *Whether inadvertent delay caused for the reasons beyond the control of the Petitioner due to Force Majeure events and act/omissions of the Respondent and Government Instrumentalities affecting it in achieving the Scheduled Commissioning Date of the Project should be condoned?*

And

Issue No. 3: *Whether the time extension in scheduled commissioning date should be allowed?*

18. Since Issue No. 1, Issue No. 2 and Issue No. 3 are juxtaposed, they are taken together for discussion. We note that the Petitioner has submitted that it has executed Power Purchase Agreement on 19.07.2016. As per the terms and conditions of the PPA, the Petitioner was required to achieve commissioning of the Project within 13 months from the effective date of PPA, i.e. by 16.08.2017. On 05.06.2017, the Petitioner issued preliminary synchronization notice and on 17.07.2017, the Petitioner issued final synchronization and updated SECI that it intends to carry out synchronization/commissioning of the plant to the Grid System by 10.08.2017. However, according to the petitioner, development of the project affected due to the following Force Majeure events:

- (i) Demonetisation
- (ii) Introduction of GST Laws
- (iii) Enquiry conducted by Sub-Divisional Officer (SDO) Osmanabad

Re. Delay on account of the effect of demonetization

19. The Petitioner has submitted that there was delay in commissioning of the project due to demonetization on 08.11.2016 as the banking system was disrupted and there was limitation on withdrawal of cash as a result payment towards labour work, procurement of equipment,

materials etc. in the rural area became difficult. *Per contra*, SECI has submitted that the PPA does not expressly provides for demonetisation as Force Majeure event within the scope of Article 11 of the PPA. Article 11 is a restricted clause. Article 11.4.1 (e) of the PPA expressly states that insufficiency of finances or the agreements becoming onerous to perform falls under Force Majeure exclusions, hence, *Demonetization* is covered under Force Majeure exclusions. SECI has placed its reliance on this Commission's order dated 06.04.2022 in Petition No. 149/MP/2019 in the matter of *Parampujya Solar Energy Private Limited v. Solar Energy Corporation of India* and submitted that MNRE has not provided any relief for extension in time for achieving financial closure on account of *Demonetization* and no relief is admissible in terms of O.M. of MNRE where extension was only allowed till 31.01.2017 for those projects whose financial closure was falling before 31.01.2017 of the PPA.

20. The Commission observes that on 08.11.2016, the Government of India declared *Demonetization* of certain denominations of Indian Currency notes. As per the O.M. No.29/5(6)/2011-12/JNNSM(ST) dated 02.12.2016 the MNRE, Government of India decided to extend the time for complying with the requirements of Financial Closure without penalty till 31.01.2017, considering the practical problems due to demonetization, without affecting the SCoD as per the respective PPAs. We observe that in the instant case, the Petitioner achieved the Actual Financial Closure on 04.03.2017 . Further, as per Article 11.3.1 of the PPAs, 'Force Majeure' means any event or circumstance or combination of events viz. act of God, act of war, radioactive contamination or an event of Force Majeure identified under SECI-Buying Utility PSA, that wholly prevents in the performance of its obligations. It is observed that *Demonetization* is not covered under any of these events. Rather, as per Article 11.4.1 (e) of the PPAs, insufficiency of finances or funds is specifically excluded from Force Majeure. In view of above, the Commission holds that no relief can be extended to the Petitioner on this count.

Re. Delay on account of introduction of GST laws

21. The Petitioner has submitted that on account of the introduction of the GST Laws, there was slow-down from July-September 2017. MNRE vide its O.M. dated 20.06.2018 granted 62 days extension in SCoD of the Solar Power Projects. The Petitioner vide its letters dated 28.06.2018 and 31.07.2018 requested SECI to grant extension in time for 62 days to SCOD. *Per-contra* SECI has submitted that the admissible extension of time on account of GST Laws based on

the O.M. dated 20.06.2018 works out to be 46 days. SECI has placed reliance on MNRE's OM dated 20.06.2018.

22. We observe that O.M. dated 20.06.2018 of MNRE stipulates as under:

(4) (i) Applying the above principles, following situations for extension would arise:

(a) Full Extension of two months (62 days) may be eligible for Projects having date of Actual Financial Closure (AFC) / Scheduled Financial Closure (SFC) (whichever was later), before 1.7.2017, AND having scheduled commissioning date (SCOD) after 31.8.2017.

(For example, if the date of AFC/SFC (whichever was later) was 30.06.2017, and SCOD was 1/9/17 the project will become eligible for Full Extension of two months (62 days) under this.)

.....
(c) In case, for a project for which the Scheduled Commissioning Date (SCOD), was on or before 31/8/2017, the eligible extension gets reduced by the number of days such SCOD was before 1.9.2017.

(For example, if the date of AFC/SFC (whichever was later) was 1.06.2017 and SCOD was 1/8/17, the extension admissible would be 31 days less than full extension of 62 days.)

23. From the above, we observe that full extension of two months (62 days) is eligible for Projects having date of actual financial closure/ scheduled financial closure (whichever was later), before 01.07.2017, and having SCoD after 31.08.2017. In case the SCoD is on or before 31.08.2017, the eligible extension gets reduced by the number of days such SCoD is before 01.09.2017.

24. We observe that in the instant case, the SCoD was before 31.08.2017 i.e. on 16.08.2017. Accordingly, the eligible extension of time gets reduced by number of days the SCoD is before 01.09.2017 i.e. by sixteen (16) days. We are of the concerned view that the Respondent No.1 has rightly reduced the eligible extension by 16 days. We observe that the Petitioner is entitled for eligible extension in time only for 46 days. In view of above, the Commission holds that no more relief can be extended to the Petitioner on this count.

Re: Delay on account of enquiry conducted by SDO Osmanabad

25. The Petitioner has submitted that there was 130 days delay in achieving its SCoD due to the enquiry conducted by the SDO which constitutes a Force Majeure event. The Petitioner placed reliance on the letter dated 14.08.2017 issued by the SDO directing PSEPL to temporarily suspend the work at the project site till further orders on account of complaint received from

villagers regarding illegal works and the crops and water level getting affected and the letter dated 22.12.2017 issued by the Tehsildar to the Petitioner informing them to resume its project activities as per directions of SDO. The Petitioner has sought extension for the remaining period of 84 days as delay of 46 days was condoned by SECI. *Per contra*, SECI has submitted that the delay sought by the Petitioner does not fall within the ambit of the Force Majeure provisions of the Article 11 of the PPA. The Petitioner failed to provide any reasons regarding measures taken by the Petitioner and they took no efforts for four (4) months to approach the appropriate authorities in this regard.

26. We observe that relevant Articles of the PPA dated 19.07.2016 stipulate as under:

3.2 Consequences of non-fulfillment of conditions subsequent

- 3.2.1 In case of a failure to submit the documents as above, SECI shall encash the Performance Bank Guarantee submitted by the SPD, terminate this Agreement and remove the Project from the list of the selected Projects by giving a notice to the SPD in writing of at least seven (7) days unless the delay is on account of delay by Government or Force Majeure. The termination of the Agreement shall take effect upon the expiry of the 7th day of the above notice.*
- 3.2.2 An extension without any impact on the Schedule Commissioning Date, can however be considered, on the sole request of SPD on payment of Rs. 10,000/- per day per MW to SECI.*

4.5 Extensions of Time

4.5. In the event that the SPD is prevented from performing its obligations under Article 4.1 by the Scheduled Commissioning Date due to:

- a) any SECI Event of Default; or*
 - b) Force Majeure Events affecting SECI, or*
 - c) Force Majeure Events affecting the SPD,*
- the Scheduled Commissioning Date and the Expiry Date shall be deferred for a reasonable period but not less than 'day for day' basis, to permit the SPD or SECI through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the SPD or SECI, or till such time such Event of Default is rectified by SECI.*

11.3 Force Majeure

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

- a) Act of God, including, but not limited to lightning, drought, fire and explosion (to the extent originating from a source external to the site), earthquake,*

volcanic eruption, landslide, flood, cyclone, typhoon or tornado if and only if it is declared / notified by the competent state / central authority / agency (as applicable);

- b) any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action if and only if it is declared / notified by the competent state / central authority / agency (as applicable); or*
- c) radioactive contamination or ionising radiation originating from a source in India or resulting from another Force Majeure Event mentioned above excluding circumstances where the source or cause of contamination or radiation is brought or has been brought into or near the Power Project by the Affected Party or those employed or engaged by the Affected Party.*
- d) An event of Force Majeure identified under SECI-Buying Utility PSA, thereby affecting delivery of power from SPD to Buying Utility.*

27. From the above, we observe that in case of delay by Government or in case of happening of force majeure event(s), the timelines of fulfillment of conditions subsequent can be extended. Whereas, in case of SCoD, extension of time is given only in case of Force Majeure events, not within the reasonable control, directly or indirectly.

28. In the instant case, we observe that as per letter dated 14.08.2017, Sub-Divisional Officer, Osmanabad wrote to Tehsildar, Tuljapur as under:

Subject: Regarding Construction Work/Solar Project to be carried out on behalf of M/s Parampujya Solar.

Reference:

- 1. Letter of Sarpanch, Grampanchayat, Kilaj, Tal-Tuljapur, Dist-Osmanabad.*
- 2. Application of Manik Sambhaji Shinde and Somnath Nagnath Kuthar dated 8/8/2017.*

With reference to the subject above you are hereby informed that, the complaint application of Shri. Manik Sambhaji Shinde and Somanth Naganth Kuthar Residing at Kilaj is received to this office stating therein that, the construction of Solar Power Project is going on very rapidly at village Kilaj, Tal. Tuljapur through M/s Parampujya Solar Company, Ahmedabad. Further it is stated that the said construction work is going on illegally and due to said Solar Power Project the adjacent crops and available water level can be affected.

Hence, you hereby informed that you make urgent and detailed enquiry in the matter and to submit the Enquiry Report to this office urgently. Further you are informed to temporarily stop the above work till the enquiry and repealing of the above complaint.

29. On 12.12.2017, the Petitioner provided clarification on Tehsil office letter: O.N.2017/Land Acquisition/Kavi-854 as under:

Subject: Clarification on Tehsil office letter: O.N.2017/Land acquisition/Kavi-854

.....
This is in reference to the subjected letter received from your office regarding routing of transmission line through the land of farmer named Shree Nivruti Yadavarao Shinde and non-disbursement of compensation against the same.

This is to bring to your notice that we are developing 33 kV D/C line from Belwadi to Naldurg S/S on poles. We have 1.2 Hectares of land in the mentioned Ghut number 47. As per our best knowledge, we have routed the line through our purchased land only. There was no crop cultivated in the mentioning area during the construction of above mentioned line. Additionally, this land is non-cultivable/barren land at present. We hope above given information is in line with the query raised by you.

30. On 07.02.2018, the Collector, Osmanabad responded to SECI with regard to stoppage of work for Petitioner's 20 MW solar power project in reference to SECI's letter dated 01.02.2018. The extract of the letter reads as under:

Sub: Stoppage of work for 20 MW Solar PV Project under National Solar Mission (NSM) of M/s Parampujya Solar Energy Pvt. Limited.

Ref. Do. No. SECI/MD/20MW/ Dated 01st Feb., 2018

With reference to above mentioned subject and letter (Do. No. SECI/MD//20MW/ dated 01st Feb, 2018) this office sought explanation of Subdivisional Officer Osmanabad and Tehsildar, Tuljapur regarding authenticity of letter and circumstances under which Subdivisional Officer and Tehsildar issued letter.

We have received report of Subdivisional Officer, Osmanabd dated 02/02/2018. In report it is mentioned that Subdivisional Officer received complaints of Sarpanch of village Panchayat and other villagers on 28/07/2017 and 08/08/2017 about damages incurred due to heavy transportation, contamination of adjoining water bodies and effect on crops due to project.

On 13/08/2017 Mr. Venugopal Nadeemappli Deputy General Manager, M/s Parampujya Solar Energy Pvt. Limited (PSEPL) and other official visited Subdivisional Office along with Sarpanch, Kilaj Tal. Tuljapur Dist. Osmanabad and other villagers Mr. Venugopal Nadeemappli Deputy General Manager, M/s Parampujya Solar Energy Pvt. Limited (PSEPL) assured to resolve issues in 2-3 days and he himself requested to stop work temporarily till the issue is resolved.

*Accordingly, Subdivisional Officer, Osmanabad instructed Tehisldar, Tuljapur to take necessary action. **None of officials of M/s Parampujya Solar Energy Pvt. Limited (PSEPL) briefed about scheduled commissioning of project on 16/08/2017. They purposely hid the facts Officials of M/s Parampujya Solar Energy Pvt. Limited (PSEPL) also assured to resolve issues in 2-3 days, however no such action was taken as per their promise till 12/12/2017. In mean time, no representative from M/s***

Parampujya Solar Energy Pvt. Limited (PSEPL) approached or presented their side to Tahsil Office Subdivisional Office or this Office about the settlement of issue.

*M/s Parampujya Solar Energy Pvt. Limited (PSEPL) vide letter dated 12/12/2017 mentioned that land is barren land and no crop is cultivated in that area. **Even if this fact is known to officials, they did not explained on 13/08/2017, rather took nearly 4 months, for this explanation. Earlier Tehsildar and Subdivisional Office sorted out issues of ROW in the interest of this project of national importance on request of officials.***

Timing of compliant and request to stop work temporarily with suppressing facts about commissioning of project and period of nearly 4 months to give explanation of known facts is indeed suspicious, intentional and dubious.

This office also reprimanded Tehsildar and Subdivisional Officer to refrain from issuing any kind of such directions in future without bringing to my notice in project of National importance.

31. From the above we observe that, the Petitioner approached the Tehsildar only on 12.12.2017 intimating them that the project is on the Petitioner's land and no crop was cultivated during the construction work. The submissions of the Petitioner are not sufficient to show that they had taken appropriate steps to vacate the SDO order dated 14.08.2017. The Petitioner had sufficient time to get the SDO Order vacated, but they chose to do so only on 12.12.2017 by approaching the Tehsildar. It was only after this letter that the Tehsildar submitted its report to the SDO intimating him that there were no complaints against the Petitioner and in pursuance of which a go ahead was given to the Petitioner to resume its project. The Collector, Osmanabad vide letter dated 07.02.2018 had categorically informed SECI that *None of officials of M/s Parampujya Solar Energy Pvt. Limited (PSEPL) briefed about scheduled commissioning of project on 16/08/2017. They purposely hid the facts Officials of M/s Parampujya Solar Energy Pvt. Limited (PSEPL) also assured to resolve issues in 2-3 days, however no such action was taken as per their promise till 12/12/2017. In mean time, no representative from M/s Parampujya Solar Energy Pvt. Limited (PSEPL) approached or presented their side to Tahsil Office Subdivisional Office or this Office about the settlement of issue.* Further, the Petitioner only vide letter dated 12/12/2017 mentioned that land is barren land and no crop is cultivated in that area. This fact was not explained to the authorities even on 13.08.2017, rather the Petitioner took nearly 4 months, for this explanation. We observe that the delay in explanation is not on records. Had the Petitioner adopted rational approach and taken suitable steps to get the SDO order dated 14.08.2017 vacated, then there would not had been delay of four months.

32. We are of the view that the alleged delay on account of enquiry conducted by the SDO Osmanabad does not constitute a Force Majeure event in terms of the PPA dated 16.06.2016 and as such the Petitioner is only entitled for the extension of 46 days already granted due to implementation of GST. Therefore, the contention of the Petitioner for further extension of 84 days on account of stoppage of work by the SDO does not sustain. In view of above, the Commission holds that no relief can be extended to the Petitioner on this count.

Issue No. 4: Whether the Respondent should be directed to refund the amount deducted as Liquidated Damages by encashing the Bank Guarantees along with interest on the same as per the PPA?

AND

Issue No. 5: Whether the Respondent should be directed to pay tariff at the rate agreed in the PPA and pay the differential tariff from the date of commissioning till date along with the interest as per the PPA?

33. In view of the findings of the Commission on Issue No. 1, Issue No. 2 and Issue No. 3, no relief is made out for the Petitioner under Issue No. 4 & Issue No. 5.

34. The Petition no. 189/MP/2019 is disposed of in terms of the above.

Sd/-
पी. के. सिंह
(सदस्य)

Sd/-
अरुण गोयल
(सदस्य)

Sd/-
आई. एस. झा
(सदस्य)