

No. N/378/17

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,
No.16, C-1, Millers Tank Bed Area, Vasanth Nagar, Bengaluru-560 052.

Dated: 30.12.2021

Shri Shambhu Dayal Meena	: Chairman
Shri H.M. Manjunatha	: Member
Shri M.D. Ravi	: Member

O.P. No. 203/2017

BETWEEN:

Mytrah Advait Power Private Limited,
An SPV of Mytrah Energy (India) Private Limited,
Registered under the Companies Act, 2013
Having its Registered Office at
8001, Sl. No. 109, Q-City,
Nanakramgudda, Gachibowli,
Hyderabad-560 032, Telangana.

....PETITIONER.

(Represented by Sri Gurudas Kannur, Senior Counsel &
Ms. Poonam Patil, Advocate)

AND

- 1) Hubli Electricity Supply Companies Limited (HESCOM)
Having its Registered Office
At Navanagar, P.B. Road,
Hubli-580 025, Karnataka.
(Represented by its Managing Director)
- 2) Karnataka Renewal Energy Development Limited (KREDL),
A Company Registered under the provisions
of the Indian Companies Act, 1956 having
its Registered Office at
No.39, Shanti Gruha,
Bharath Scouts & Guides Building,
Palace Road, Gandhinagar,
Bengaluru-560 001.
(Represented by its Managing Director)

- 3) Karnataka Power Transmission Corporation Limited,
Incorporated under Companies Act, 1956
Having its Registered Office at
Kaveri Bhavan,
Bangalore-560001.
(Represented by its Managing Director)

... **RESPONDENTS.**

(Respondent No. 1 & 3 represented by
Sri P. Chinnappa, Advocate,
Sri Guruprasad Reddy, Advocate,
Ms. Sahana Devanathan, Advocate,
Ms. Drishya Shetty, Advocate &
Ms. Rithika Ravikumar, Advocate
For M/s Induslaw Advocates, and
Respondent No. 2 represented by Ms. Latha Advocate).

ORDERS

1. This Petition is filed under Section 86(1)(f) of the Electricity Act, 2003 by the Petitioner praying for the following reliefs to;
 - a) Pass an order granting extension of time to the Petitioner for fulfilling its obligations under the PPA and consequently extend the SCOD by reasonable period but not less than 120 days from the effective date as stipulated in the PPA.
 - b) Direct the Respondent No. 1 to enter into a Supplementary Power Purchase Agreement with the Petitioner immediately with the extended SCOD.
 - c) Pass any such further order(s) as this Commission may deem fit and proper in the facts and circumstances of the case.
2. The brief facts set out in this petition are as under:
 - a) The Petitioner Company, is a 99.9% owned subsidiary and SPV of Mytrah Energy (India) Private Limited, incorporated under the Company's Act

2013. The Respondent No. 1 is the Distribution Licensee and the Respondent No. 2 is the nodal Agency of the Government of Karnataka for facilitating the development of Renewable energy in the State of Karnataka, the Respondent No. 3 is vested with the responsibility of transmitting power all over the state and construction and maintenance of sub-stations and transmission lines of 66 KV and above.

- b) The Government of Karnataka had resolved to undertake development of 1200 MW of Solar Power in Karnataka to be implemented in 60 Taluks through a private sector participation. In pursuance of the same, the Respondent No. 2 had invited proposals by its Request for Proposal (RfP) dated 20.11.2015 containing terms and conditions for selection of bidders in respect of the proposed project.
- c) The parent company of the Petitioner, i.e., Mytrah Energy (India) Private Limited had placed a bid for setting up of 11 projects in the State of Karnataka and 3 bids came to be accepted by the Respondent No. 2. The present Petition filed by the Petitioner concerns the project at Hungund Taluk, Bagalkot District for development of a 15 MW capacity solar power plant. Accordingly, KREDL issued a letter of award and allotment letter (Annexure-B) dated 16.05.2016 to the parent Company.
- d) A power purchase agreement came to be signed between the Petitioner and the Respondent No. 1 on 15.07.2016 (Annexure-D) and it was approved by the KERC on 17.10.2016 (Annexure-E). The copy of the said approval was received by the Petitioner on 28.10.2016. As per the terms of the PPA the effective date is the date of execution by getting

concurrence from KERC on the PPA. Article 8.5 stipulates that the Petitioner shall commission the project within 12 months from the effective date i.e., within 17.10.2017 in the present case.

e) The Petitioner has been working continuously on the project and has been able to achieve the following mile stones towards the completion of the project.

- 1) On 06.12.2016- applied for power evacuation approval (Annexure-F) but the same came to be granted only on 12.05.2017 i.e., after 157 days from the date of application was made.
- 2) The demand for processing fee for evacuation approval was raised (Annexure-G) on 28.12.2016 by KPTCL and the same was paid on 11.01.2017.
- 3) On 20.01.2017- appointed land aggregator and entered into a land procurement and development agreement (Annexure-H) with a private company for procurement of lands.
- 4) On 20.03.2017- obtained NOC from village Gram Panchyats (Annexure-J).
- 5) On 12.05.2017- the Petitioner received the power evacuation approval after 157 days of making an application for the same. It is pertinent to note that vide letter (Annexure-K) dated 19.01.2017 the CE of planning KPTCL Bengaluru asking the CE KPTCL Bagalkot for an inspection report, however the same was sent by CE, KPTCL Bagalkot (Annexure-L) on 18.02.2017 after a considerable delay. Further even

after, the report of CE KPTCL Bagalkot there was a considerable delay to provide regular evacuation approval as per Annexure-M.

- 6) On 30.05.2017- Entered into Engineering and Services Agreement (Annexure-N) and Agreement for Construction (Annexure-N1) with the EPC Contractor and Agreement for BOP and Agreement for Module Supply (Annexure-N2).
 - 7) May 2017- The Petitioner only after receiving the evacuation approval entered into agreements to purchase lands for the 15 MW Power Plant, the data with respect to the land procured for the power plant is as per Annexure-P.
 - 8) On 05.06.2017- The Petitioner filed an application (Annexure-Q) under Section 109.
 - 9) On 12.06.2017- Obtained financial assistance from Bank. The delay in obtaining of financial closure was on account of the delay in getting evacuation approval. The copy of the letter dated 12.06.2017 issued by the Bank is as per Annexure-R.
 - 10) Placed Purchase orders dated 11.07.2017 (Annexure-S) for various equipments.
- f) It is stated that the Petitioner applied for power evacuation approval on 06.12.2016, but the same was issued to the Petitioner by the KPTCL only on 12.05.2017 i.e., after 150 days from the date of application.
- g) In the meanwhile, the Government of India by way of notification dated 08.11.2016 withdrew the legal tender status of INR 500/- and INR 1,000/- denominations of Bank notes. Demonetization has had a domino effect

from 08.11.2016 to the end of January 2017, on the land acquisition and other project activities which were delayed considerably for the following reasons as stated in Amended Petition filed on 25.10.2018: -

- 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 view of old notes and did not issued DD's, receive challans towards stamp duty, registration charges etc.
 - Land owners 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.
 - Encumbrances created over land by way of loans taken by the land owners could not be settled as Banks could not process loan repayments in time making it impossible for developers to proceed for registration.
- h) It is stated the delay in acquiring land resulted in a delay in achieving financial closure as per the time lines provided in the PPA. This delay, attributable to a Government Policy, has also been acknowledged by the Ministry of New and Renewable Energy (MNRE) by way of its office memorandum (Annexure-S1) dated 02.12.2016. Thus, on account of demonetization there was a further delay of about 84 days in acquisition of land and execution of the project.

- i) Additionally, on account of the cash crunch as stated above, the contractors/suppliers/vendors were unable to complete purchase orders and were consequently delaying their contracts. This resulted in a further delay in setting up the project. The letter dated 08.12.2016 issued by one of the Petitioner's vendors is as per Annexure-S2.
- j) However, the Petitioner could not have proceeded with land registrations and applying for S-109 permission or have obtained financial closure, until they obtained a regular evacuation approval, which was obtained only on 12.05.2017. So also, activities like bay erection, finalization of plant design, procurement of critical solar power plant components had to be kept in abeyance since these are dependent on power evacuation approval. These were taken up and proceeded only after obtaining the regular power evacuation approval.
- k) The State of Karnataka experienced excessively heavy rainfall in the months of June 2017 till October 2017, going beyond the regular monsoon season. These rains were unprecedented and as such could not be predicted by the Solar Power Project developers. That incessant rains have resulted, inter alia, in flooding of project sites, idling labour and equipment at project sites and severely hampering construction works. Further the Petitioner took all possible steps such as deploying several pumps to drain water from the project site, relaying of the damaged roads etc., to mitigate the impact of rainfall. Thus this Force Majeure event resulted in a delay of 46 days. The rainfall data obtained from the Karnataka State Natural Disaster Monitoring Centre is as per Annexure-S3.

- l) After receiving the power evacuation approval on 12.05.2017, the Petitioner was working with all earnest to complete the project and achieve the SCOD, however, due to unprecedented rains in the region and due to certain local issues, the Petitioner was unable to achieve the SCOD of 17.10.2017.
- m) The Petitioner had substantially complied the condition precedents and wrote a letter (Annexure-T to the main Petition) to Respondent No. 1 on 16.06.2017 seeking extension of time.
- n) On 01.07.2017 the Government of India introduced the Central Goods and Services Tax Act, 2017 (GST Law) which brought about fundamental structural changes in the prevailing tax regime in the Country. There was a slowdown from July 2017 to September 2017 in the manufacturing as well as service industry across the country. This slowdown during the period of July 2017 to September 2017 was acknowledged by Finance Minister during his speech on 21.12.2017 in the Parliament on Supplementary demands for grants for 2017-18. The GST law had the following implications and developers of solar projects.
- Contractors/suppliers were delaying contracts due to lack of clarity on tax structure.
 - Contractors/suppliers had to revamp their systems amend and reissue purchase orders to align them as per the GST regime/ to make them GST law complaint.

- Lack of clarity on GST percentage applicable on inverters contributed to delay in supply of material required for setting up of projects and
 - Introduction of GST law resulted in confusion regarding MNRE 'Certificate for Concessional Customs Duty' which was kept on hold from June 2017, further resulting in delay in supply of key equipment.
- o) It is pertinent to note that the MNRE after examining the impact of GST law, issued official memorandum (Annexure-T1 to the Amended Petition) dated 20.06.2018 where in it has extended SCOD for the solar projects for a period of 62 days from 01.07.2017 to 31.08.2017, by way of the said official memorandum, MNRE has considered the disruption of business and consequent delay in commissioning of the projects on account of introduction of GST law.
- p) The Petitioner subsequently addressed a communication (Annexure-U to the main Petition) to the Respondent No. 1 on 07.10.2017 seeking extension of the SCOD in the circumstances explained but there has been no response to the same.
- q) The delay in issuing evacuation of approval, demonetization, introduction of GST law and heavy rainfall all constitute Force Majeure Events beyond the control of the Petitioner. On account of the same the Petitioner was unable to commission the project as per SCOD i.e., 17.10.2017, hence the Petitioner seeking for extension of time under the following grounds: -

GROUND

- 3) The delay caused by the Respondent No. 3 in issuing the power evacuation approval belatedly has resulted in having a huge adverse impact on the Petitioner company commencing major project activities like finalization of locations and land, finalization of plant design, bay of erection and procurement of critical solar power plant, components effecting the very commissioning of the project on time. In the instant case the Petitioner applied for evacuation approval on 06.12.2016, the Respondent No. 3 has taken 157 days to issue the evacuation approval.
- 4) The Ministry of New and Renewable Energy has issued a communication addressed to all the State Governments wherein it has directed the competent state authorities to consider the case of extension of time if there are delays of any kind on the part of the State Government Authorities/PSU's like land allotment, transmission/evacuation facilities, connectivity permission or Force Majeure.
- 5) The Respondent No. 1 has breached its obligation under Clause 6.1.3(a) and (d) wherein it is required to support and assist the developer in procuring applicable permits required from any Governmental Agencies for implementation and operation of the project and to support, co-operate with and facilitate the developer in the implementation and operation of the project in accordance with the provisions of the agreement.

- 6) It is stated that without evacuation approval the Petitioner could not have proceeded with applying for S-109 application and activities like bay erection, finalization of plant design, procurement of critical solar power plant components, had to be kept in abeyance since these are dependent on power evacuation of approval. Section 109 approval has not been granted to the Petitioner company which has in turn resulted in non-registration of land in Petitioner company's name till the date. The total delay suffered by the Petitioner's project owing to the said Force Majeure events is 283 days.
- 7) Due to the delay in receiving the evacuation approval the Petitioner company had to carry out all its activities on the project site in the monsoon. This coupled with the fact that the project area received unprecedented rains thereby the work of the Petitioner was adversely impacted causing delay in achieving the SCOD of 17.10.2017. Despite the delay of 283 days on account of the said Force Majeure events, the Petitioner with all its best and committed efforts, commissioned the project on 09.02.2018 with a delay of 115 days from the SCOD as per PPA i.e., 17.10.2017. Thereby, in the light of said Force Majeure events the project has been commissioned well within time. Under these circumstances he prays to allow the Petition as prayed for in the interest of justice and equity.
- 8) Upon notice, the respondents appeared through their counsel, and filed statement of objections separately as follows:

- (a) The First Respondent/HESCOM in its statement of objections stated that the Petition filed by the Petitioner is bad in law and facts thereby, the Petitioner is not entitled to any relief and the Petition is liable to be dismissed in limine.
- (b) Further stated that this Respondent has entered into a Power Purchase Agreement with the Petitioner on 15.07.2016. The PPA was approved by the Commission on 17.10.2016. As per the terms of the PPA the effective date is the date of getting concurrence from the Commission i.e., 17.10.2016. The Petitioner was to complete the Conditions Precedent (CP) within 8 months from the effective date and commission the project within 12 months of the effective date. These facts are not in dispute.
- (c) It is stated that this Respondent has taken all possible measures and steps to cooperate and work with the Petitioner to ensure that the Petitioner could complete the Conditions Precedent and meet the SCOD which was to be achieved as on 17.10.2017. It is stated that despite these efforts the Petitioner has admittedly failed to meet the SCOD and has delayed that the commencement of production of energy to the answering Respondent by 115 days. The Petitioner has failed to provide any cogent reasons for the failure to meet the Conditions Precedent and the delay in the commissioning of the project.
- (d) The Petitioner has taken defense for extension of time seeking relief on the ground of Force Majeure. Clause 14 of the PPA defines Force Majeure to include certain circumstances that are enumerated in Clause 14.3.1 (a to e). Further Clause 14.4 provides the exception to Force Majeure

Events in clause 14.4.1 (a to f). The provisions for Force Majeure in the PPA specifically provides in Clause 14.5 that an event for Force Majeure must be notified to the answering Respondent within 7 days of the alleged Force Majeure Event. This requirement under PPA is a mandatory condition, affected party shall give notice to the other party of any event of Force Majeure as soon as possible, but not later than 7 days after the date on which such party comes to know of or reasonably have known of the commencement of the event Force Majeure. Therefore, the notice under this Clause of PPA shall be a precondition to the affected party's entitlement to claim relief under the agreement. This was not done by the Petitioner at the time of the alleged Force Majeure Event and it not only further goes to indicate that it is now cited as an afterthought to exempt the Petitioner from its liability for its failure to meet the Conditions Precedent and further explained its delay in the commissioning of the project. Since, the notice has not been served by the Petitioner in relation to Force Majeure, the claims regarding the same are liable to be dismissed.

- (e) The Petitioner has taken another ground of demonetization for seeking extension of time from the hands of the Commission. The ground of demonetization does not qualified for a Force Majeure Event and cannot be regarded as Force Majeure Event under the PPA dated 15.07.2016. Firstly, the event of demonetization was a temporary event and not a permanent change in the law or circumstances so as to severely hamper the Petitioner or the completion of the project. It did not envisage a period

where there was a complete lack of funds in the economy, it only affected the immediate liquid currency and moreover only the currency note of INR 500/- and INR 1,000/-. During this period Bank transactions were permitted by several moods of transfer and at the most was a period of inconvenience for the business community. Under Clause 14.5.1 (e) of the PPA it specifically states that "insufficiency of finances or funds or the agreement becoming onerous to perform" does not qualify as a Force Majeure Event. The Petitioner did not at any point of time write to the answering Respondent intimating the difficulties it was facing at the time of demonetization with respect to implementing the contract. The Petitioner failed to notify the Respondent in a timely manner of the alleged Force Majeure Event that it now claims. Therefore, the Petitioner is not entitled to any reliefs with regard to extension of time or change in Tariff.

- (f) The Petitioner has cited office memo dated 02.12.2016 (page 298 of the Petition) which summarizes the minutes of meeting dated 29.11.2016 related to solar power projects. Point 3 deals with demonetization with regard to difficulty in complying with the requirements of financial closure and conditions subsequent. It was agreed that "given the practical problems in the short run, time would be granted until 31.01.2017, without penalty, for complying with the requirements of financial closure, may be allowed. However, it shall have no effect on the effective date of financial closure or the scheduled commissioning date as per PPA".
- (g) It is stated that the committee does not state that the entire period of demonetization is exempted and hence can be said to only start as on

date of the meeting which is 29.11.2016 and exempted until 30.01.2017. Secondly, the Petitioner has failed to state that it has faced any difficulty on account of demonetization at the time of demonetization or notify the answering Respondent within reasonable time of knowing of the alleged Force Majeure Event. Thirdly, the OM itself states that the only relief that can be claimed (if applicable) is that the developer might be given exemption until 31.01.2017 without penalty and that no extension would be granted to the date of financial closure or SCOD. The Petitioner cannot pick and choose the aspects of OM dated 02.12.2016 that are in its favour and the reject portions that are not. Therefore, the Petitioner is not entitled for exemption on account of demonetization.

- (h) The Petitioner has taken another ground of excessive rainfall for extension of time. He has claimed that the region of Bagalkot District for the period between June 2017 and October 2017 has experienced 11 days of excess rainfall. It is stated that the project was affected by the rainfall for a period of 21 days, despite this the Petitioner seeks an extension of 120 days of the SCOD. However, in the petition, the Petitioner has sought for an exemption of a total number of 46 days. No explanation or reasons are stated for the discrepancy or the exaggeration of the number of days sought to be exempted. No record is placed to prove that the Petitioner suffered any inconvenience at the project site and was hence delayed in the commissioning of the project. Even the Petitioner failed to notify the answering Respondent on the alleged event of Force Majeure at the time

of the alleged event or even within a reasonable time of the alleged event. Thereby, he is not entitled for any relief under this ground.

- (i) The Petitioner has taken another ground of introduction of GST for extension of time. The Petitioner has not made any grounds for the exemption of the delay on account on GST. The Petitioner has failed to provide any record to show that it had suffered any delay or inconvenience on account of GST with regard to the implementation of the project or any reasons or manner in which the project was directly affected by the event of GST. He failed to notify the answering Respondent on the alleged event of Force Majeure and hence cannot claim the same to be a Force Majeure Event.
- (j) The Petitioner failed to meet the Conditions Precedent within the time stipulated by the PPA. While the Petitioner claims by letter dated 12.06.2017 that it has achieved financial closure, by the same letter the Petitioner states that "financial closure was taking a longer than expected" and seeks 2 months extension to achieve the Conditions Precedents. Hence the discrepancies in the statements regarding the date of achieving financial closure by the Petitioner itself, disentitles the Petitioner to any equity or any reliefs before this Commission. The Petitioner is deliberately and knowingly misleading this Commission.
- (k) The Petitioner has further relied on the Office Memorandum dated 20.06.2018 which examined the issue of extension of time for solar power project on account of GST. It was decided by the Ministry for New and Renewable Energy that projects only whose period between financial

closure COD overlapped within the period between 01.07.2017 and 31.08.2017 would be entitled to 62 days extension on account of temporary disruption. It is important to note that the OM specifically states that for the purpose of financial closure the scheduled financial closure or the actual financial closure, whichever is later is considered. It is also important to note that the OM in point (e) states that if any extension is granted for any reason other than GST induced disruptions between 01.07.2017 and 31.08.2017, the same should be granted in such a manner that it will not have the effect of a double extension and the overlapping days would be required to be reduced from the already extension of time. Despite this the Petitioner has claimed an extension of time on both counts. The Petitioner is deliberately seeking to mislead the Commission, thereby he is not entitled for any relief.

- (l) It is further stated that it is an undisputed fact that the Petitioner has delayed the commissioning of the solar power plant and the plant stands commissioned as on 09.02.2018 with a delay of 115 days. Hence the Petitioner is not entitled to the tariff under the PPA and has no right in equity or law to claim that the tariff be granted at the rate of Rs. 5.50 as per the PPA when the Petitioner is clearly in violation of terms of PPA dated 15.07.2016 approved by the Commission as on 17.10.2016. The Petitioner cannot approbate and reprobate in the same breath. Thereby, the Petitioner is not entitled for any relief and the petition has to be dismissed in the interest of justice and equity.

- (m) The Second Respondent has filed statement of objections stating that the Petitioner is not entitled for any relief as claimed by him, as the Petitioner was aware of the stipulated time and since he has agreed, there cannot be any further extension of time, thereby, the petition is liable to be dismissed.
- (n) Further stated that this Respondent being the nodal agency of the Government of Karnataka for facilitating the development of renewable energy in the State of Karnataka had called for the request for proposal for the development of 1200 MW Solar power projects to be implemented in the 660 Taluks vide RfP dated 13.11.2015. However, this Respondent has issued letter of allotment to the successful bidders and also in favour of the Petitioner.
- (o) Further stated the Petitioner has entered into a Power Purchase Agreement with the First Respondent therefore, it is for the Respondent No. 1 & 3 herein to counter the Petitioner allegations made against them. This Respondent is not a necessary party to this petition. Thereby, prays to dismiss this petition against Respondent No. 2 in the interest of justice and equity.
- (p) The Third Respondent has filed statement of objections stating that the Petitioner entered into the Power Purchase Agreement with Respondent No. 1/HESCOM on 15.07.2016. The PPA was approved by the Commission on 17.10.2016. Despite this the Petitioner requested for evacuation approval only on 06.12.2016 which is about 50 days from the date of the approval of the PPA. This delay is unexplained by the Petitioner and is

solely attribute to the actions of the Petitioner. The Petitioner fails to account for his own actions and has conveniently sought to falsely attribute the delay to the actions of the answering Respondent.

- (q) This Respondent was specifically directed by letter (Annexure-1) dated 03.08.2016 issued by Respondent No. 2 to ensure that the payment of facilitation fees which has to be paid by the developer to the Respondent No. 2 before issuing or communicating the evacuation approvals. Respondent No. 3 sent reminders to the Petitioner requesting the Petitioner for proof of having remitted the facilitation fees. However, the Petitioner did not provide the same to the answering Respondent on request. In order to ensure that the Petitioner could meet its deadlines and commission the project as scheduled by the PPA, this Respondent provided a conditional tentative evacuation scheme (Annexure-2) on 20.04.2017 to the Petitioner, on the condition that the application for regular evacuation would be considered only after proof of having paid facilitation fees to the Respondent No. 3. The receipts for the facilitation fees were furnished to the answering Respondent as late as on 26.04.2017 upon which the process of issuing regular evacuation scheme was considered immediately by the Respondent No. 3 and granted on 12.05.2017. The grant of regular evacuation scheme was hence delayed by the Petitioner itself and cannot be attributed to the Respondent No. 3 on any account. The copy of the letter dated 26.04.2017 issued by the Petitioner regarding the remittance of the facilitation fee is as per

Annexure-3 and copy of the regular evacuation scheme dated 12.05.2017 is as per Annexure-4.

- (r) Further it is stated that the Petitioner has taken false contention in the Petition stating that the alleged delayed evacuation scheme was the reason that the land acquisition proceedings were delayed. The grant of the evacuation scheme on one hand and land conversion on the other are completely different and independent processes undertaken by completely independent authorities. The Petitioner misleading the Commission on this account also. On this ground also the petition is liable to be dismissed. This is further evidenced by the letter dated 25.10.2016 issued by the Government of Karnataka which states that KPTCL is to consider applications for evacuation without examining issues concerning land of the project proponent, issue of the project etc.
- (s) This Respondent has denied the allegations made in Re-para 9 to 12, 15 to 26 as false. Further stated, the Petitioner has alleged that the project site can be freezed only after receipt of the evacuation approval. If this is true then the Petitioner should have ensured that it had immediately filed the application for evacuation after the approval of PPA was accorded by the Commission. Instead, the Petitioner has caused a delay of 50 days. This act of the Petitioner has attributed to the delay in the grant of the evacuation and could have been prevented by the Petitioner if it had been diligent and if it had taken reasonable measures to ensure that the timelines were followed. Further after filing the application the Petitioner delayed in remitting the fee towards the facilitation it owed to KREDL.

KREDL requested KPTCL to ensure that this payment was remitted before communicating approval regarding evacuation. Despite several reminders the Petitioner delayed providing these details and hence the regular evacuation scheme could not be considered. This delay is solely attributed to the acts of the Petitioner. For all these the Petitioner is not entitled for any relief and the petition is liable to be dismissed with cost in the interest of justice and equity.

9) Heard the arguments, perused the written submissions on both sides and the records.

10) At this stage the below mentioned issues arise for our consideration.

1. **Issue No. 1:** Whether the Petitioner proves that he is entitled for extension of time on the grounds of Force Majeure events as claimed in the Petition?
2. **Issue No. 2:** For what relief the Petitioner is entitled to?
3. **Issue No. 3:** What Order?

11) **Issue No. 1:** Whether the Petitioner proves that he is entitled for extension of time on the grounds of Force Majeure events as claimed in the Petition?

12) During the course of arguments, the Learned Counsel for the Petitioner has submitted that the present petition concerns the project at Hungunda Taluk, Bagalkot District for development of a 15 MW capacity solar power plant. KREDL issued a letter of award and allotment dated 16.05.2016, a Power Purchase Agreement came to be signed between the Petitioner and the 1st Respondent on 15.07.2016, the Commission gave its approval for the PPA on

17.10.2016, therefore the SCOD of the project is 17.10.2017. The Petitioner has commissioned the project on 09.02.2018 with a delay of 115 days.

- 13) The Petitioner has commissioned the plant within 120 days of the effective date and therefore as per Clause 5.8.3 of the PPA which provides for maximum time for commissioning the plant as 16 months from effective date with payment of liquidated damages mentioned therein, the Petitioner is well within the time provided under the PPA.
- 14) The Respondents have illegally reduced the tariff of the Petitioner placing reliance on Clause 12.2 of the PPA which provides for levy of tariff fixed by the Commission in its generic tariff order applicable on the date of commissioning. The Petitioner cannot be saddled with levy of liquidated damages and also reduced tariff at the same time which is why the PPA under Clause 5.8.3 provides for a maximum of 16 months of extension of time with levy of liquidated damages as per Clause 5.8.2 which provides for levy of huge sum of damages to the tune of Rs. 50,000/- per MW per day. Even otherwise, the present project having been awarded under the bid route (Under Section 63 of Electricity Act 2003), the tariff fixed in exercise of powers conferred under Section 62 for determination of generic tariff, which in the present case is Rs. 4.36 as per generic tariff order dated 12.04.2017, is in-applicable to the Petitioner. The said position has been affirmed by the Hon'ble APTEL in the case of Uttar Haryana Bijili Vitran Nigam Limited & Another Vs Central Electricity Regulation Commission. The Hon'ble APTEL has also held at Para 143 in the said decision that the tariff determined under Section 63 cannot be reopened except on the grounds provided under the

PPA such as Force Majeure or change in law. Clause 12.2 of the PPA which is against the statute is therefore void and unenforceable for the parties cannot contract against statute as held by Hon'ble APEX Court in the matter of AVM Sales Corporation Vs Anuradha Chemicals Private Limited. Since the said Clause is against the statute, it is not incumbent upon the Petitioner to seek a specific declaration to that effect or challenge the said Clause which due to its inapplicability requires to be read down. Therefore, the contention of the Respondents that the Petitioner has not made any specific prayer for retention of PPA tariff of Rs. 5.50 per unit and that therefore, the Petitioner is not entitled for the PPA tariff is untenable. If this Commission were to allow the Petition by granting extension of time as sought for by the Petitioner, the obvious corollary to the extension of time would be that the Petitioner is entitled for the PPA tariff since the very effect of extension of time would be entitlement of the Petitioner to the PPA tariff.

- 15) Further submitted that, the Petitioner has sought for extension of time to commission the project on the ground of the following 4 Force Majeure events.

Sl. No.	Description of FM Event	From – To	Number of days delay
1.	Demonetization	08.11.2016 to 31.01.2017	84
2.	Introduction of GST	01.07.2017 to 31.08.2017	62
3.	Rainfall	June 2017 to October 2017 (June (8), July (3), Aug (7), Sept (16), Oct (12) days)	46
4.	Delay in granting Evacuation approval	06.12.2016 to 12.05.2017	157
Total			349 days

Total delay suffered by the Petitioner's project owing to the afore stated Force Majeure Events duly considering overlapping events is 283 days (08.11.2016 to 12.05.2017 and June (8), 01.07.2017 to 31.08.2017, September (16), October (12) days).

- 16) So far as the delay on the ground of demonetization and GST is concerned, apart from placing reliance on the MNRE notifications in this regard, these 2 grounds are upheld by the Commission as Force Majeure events in OP No. 15/2018 M/s. Adani Green Energy (UP) Ltd. Vs HESCOM and OP 29/2018 M/s. Adani Green Energy (UP) Ltd. Vs HESCOM. Therefore, the Petitioner is entitled for extension of time on these grounds. It could be seen that MNRE notifications ought to be considered because it has been upheld by the Hon'ble APTEL in the matter of Chennamangathihalli Solar Power Project Vs BESCOM.
- 17) Further submitted, the contention of the Respondents that the Petitioner has not issued notice for notifying Force Majeure events is false and denied. Infact, the Respondents have failed to respond to the notices (Annexure-T and Annexure-U filed along with Petition) issued by the Petitioner, therefore, the contention of the Respondents holds no water.
- 18) Further submitted that, the Respondent has contended that the Petitioner has made contrary statements about the financial closure having been achieved on 12.06.2017 in the communication dated 16.06.2017. In as much as under the said communication itself the Petitioner has stated "financial closure was taking a longer than expected". In the light of the documentary evidence at Annexure-R (to the Amended Petition), wherein the RaboBank

has sanctioned loan facility to the Petitioner on 12.06.2017 which has not been disputed by the Respondents, the financial closure date remains 12.06.2017.

- 19) Further submitted that, the contention of the Respondent that land approvals are not required for evacuation approval is false in as the Conditions Precedent under Clause 4(e) makes it mandatory to provide documentary evidence of having the clear title and possession of the land required for the project in the name of the developer. Foot note 1 to the said Clause also makes it mandatory to provide land conversion approvals. It could be seen that without having clarity on the patch of the land on which evacuation approval would be granted, the Petitioner cannot finalize lands for the project and therefore, the contention of the Respondent that there is no nexus between land and evacuation approval is false.
- 20) Further submitted, it could also be seen that the contention of the Respondents, that the Petitioner has applied for evacuation approval only after 50 days from the date of approval of the PPA by this Commission and hence there was a delay by them in issuing evacuation approval is false because it could be seen that the approval dated 17.10.2016 of this Commission was received by the Petitioner on 28.10.2016 and within a span of 5 weeks, the Petitioner applied for evacuation approval i.e., on 06.12.2016 the fees was demanded on 28.12.2016 and the same was paid by the Petitioner on 11.01.2017, KPTCL asked its Engineer to conduct a field inspection on 19.01.2017 the same was done only on 18.02.2017, Tentative

Evacuation was granted on 20.04.2017, accepted the same on 21.04.2017 and Regular evacuation approval was granted on 12.05.2017.

- 21) Further submitted, that contention of the Respondents that the delay in communicating payment of facilitation fees to KREDL by the Petitioner led to delay in issuing evacuation approval is also patently false. It could be seen that the Respondents were well aware of the payment of fees by the Petitioner to the KREDL all along since the tentative evacuation approval was granted on 20.04.2017 much before the fact of payment of fees to KREDL was communicated by the Petitioner to the Respondents on 26.04.2017. This goes to show that the Respondents are taking undue advantage of the document dated 26.04.2017 as an afterthought since they had already issued the tentative evacuation approval even before the written communication dated 26.04.017 was issued to them.
- 22) The judgements produced by the Respondents are not relevant for the facts of the present case because the judgements produced by the Respondents are subsequent to the orders passed by the Commission in OP 188/2017 (Cambria Solar Pvt. Ltd., Vs GESCOM in which the Commission placing reliance on the Hon'ble APTEL's decision in the case of Chennammangathihalli Solar Power Project vs BESCO, has allowed the extension of time on the ground of delays by the Governmental agencies which is also the case in the present matter.
- 23) Further submitted, the delay in issuing evacuation approval, demonetization introduction of GST law and heavy rainfall all constitute Force Majeure events beyond the control of the Petitioner. In support of his contention the

Petitioner has produced rainfall data obtained from the Karnataka State Natural Disaster Monitoring Centre (Annexure-S3 to the Amended Petition). Therefore, the Petitioner was unable to commission the project within SCOD i.e., 17.10.2017. Further he relied upon the judgement of Hon'ble APTEL in the case of Gujarat Urja Vikas Nigam Limited Vs GERC and Others in Appeal No. 123/2012. Further submitted that, despite of delay of 283 days on account of the said Force Majeure events, the Petitioner with all its best and committed efforts commissioned the project on 09.02.2018 with a delay of 115 days from the SCOD as per PPA i.e., 17.10.2017 thereby, the Learned Counsel for the Petitioner submitted to allow the petition as prayed for in the interest of justice and equity.

- 24) During the course of arguments, the Learned Counsel for Respondent No. 1 & 3 have filed common written submissions on their behalf and submitted that, at the outset the petition filed by the Petitioner is bad in law without valid grounds and approached this Commission with unclean hands in order to make illegal gains from the Respondents thereby, the petition is liable to be dismissed.
- 25) Further submitted that, the Respondent No. 2 granted letter of award on 16.05.2016 to the Petitioner. As per the terms of the LOA the Petitioner was required to execute PPA within 60 days from the date of LOA i.e., 15.07.2016. It is pertinent to note that it was only on the very last day of the expiry of the time period to enter into PPA that, the PPA dated 15.07.2016 came to be executed between Petitioner and the Respondents. Furthermore, as per Clause (c)(i) of the LOA, a special purpose vehicle (SPV) had to be

incorporated as a pre-requisite before the executing PPA. The Petitioner created SPV only on 16.06.2016 nearly a month after the date of LOA. This clearly establishes that the lax attitude of the Petitioner company. Had the Petitioner being diligent in carrying out its functions they would not wait until the last date to execute the PPA with the Respondent No. 1. Thus, the actions of the Petitioner clearly established that from the very beginning they lacked prudence and diligence in securing approvals and completing tasks within time.

- 26) Further it is argued that, the PPA was approved by the Commission on 17.10.2016 which as per Article 3.1 of the PPA is the effective date. However, despite receiving concurrence from the Commission the Petitioner applied for evacuation approval only on 06.12.2016 i.e., after 50 days. Even, according to the Petitioner's contention that the approved PPA was received only on 28.10.2016 is to be accepted, there is still a delay of 39 days, which has not been explained by the Petitioner.
- 27) It is further argued that, as per letter dated 03.08.2016 (Annexure-1 to statement of objections of Respondent No. 3) issued by the Respondent No. 2 KREDL to Respondent No. 3 could not issue evacuation approval until the Petitioner furnished details of the facilitation fees paid to the Respondent No. 2. It is pertinent to note that the Petitioner was well aware of this requirement and as Respondent No. 3 had informed the Petitioner of the same by its letter dated 28.12.2016 (Annexure-G to the Petition) Respondent No. 3 had made it explicitly clear that the Petitioner's request for evacuation can be processed further only after this requirement was met. However,

despite being aware of the same, the Petitioner failed to furnish details of the facilitation fee paid to Respondent No. 2. Though the Petitioner has admitted to paying the processing fee on 11.01.2017, has not produced any document evidencing the payment of facilitation fee. Despite, not having details of the payment made to Respondent No. 2, Respondent No. 3 acting with prudence in an attempt to provide evacuation approval at the earliest to the Petitioner sent a request vide letter dated 19.01.2017 (Annexure-K to the Petition) to the concerned transmission zone requesting for the field report. The field report was submitted by the Respondent No. 3 vide letter dated 18.02.2017 (Annexure-L to the Petition).

- 28) Further argued that, in the interest of time and to extend cooperation to the Petitioner, the field investigation was carried out without having any proof of payment of facilitation fees having been paid from the Petitioner. Despite, these difficulties the field report was ready within a months time by 19.02.2017. Thereafter, the Respondent No. 3 went the extra mile and even furnished the tentative evacuation approval to the Petitioner on 20.04.2017 (Annexure-2 to the statement of objections of Respondent No. 3) subject to the confirmation of payment of facilitation fee. Once again, Respondent No. 3 intimated the Petitioner that evacuation will be regularized only on furnishing details of payment of facilitation fees to the Respondent No. 2. Hence, it was only when the Petitioner intimated Respondent No. 3, that the facilitation fees had been paid to Respondent No. 2 vide receipt dated 15.07.2016, thus, there was a delay of 285 days from the date of payment of facilitation fees to the Respondent No. 2 to the date of furnishing details of

the payment to the Respondent No. 3 and delay of 119 days from the date of demand from the Respondent No. 3 for details regarding facilitation fee to the date of furnishing the same. Thereafter, the Respondent No. 3 immediately began processing the regular evacuation approvals which was granted on 12.05.2017. This issuance of regular evacuation scheme approval was hence issued within 16 days from the date of grant of tentative evacuation. Thereby, it is not possible to hold that there was delay in granting regular evacuation scheme on the part of the R3.

- 29) Further argued that, the Government of Karnataka vide letter dated 25.10.2016 addressed to the Respondent No. 3 had made it clear that in order to speedup the process of granting evacuation approval, the Respondent need not take into consideration whether the developer had procured lands on which the project is to be established. It is the contention of the Petitioner that until evacuation approval is granted by the Respondent No. 3, the Petitioner will not able to identify the lands over which it must construct the power project. But this contention is false. The prudent power generator has to take up steps in securing title and possession of land and approvals soon after receiving the letter of allotment and need not to wait until receiving the concurrence of the PPA from this commission. Hence the contention taken by the Petitioner that he had to wait until evacuation approval was received to initiate steps to secure land is wholly unfounded, baseless and lacks merit.
- 30) Further argued that, as per 4.2 of the PPA the Petitioner was required to submit environmental clearance and documents establishing title over the

property by 17.06.2016. However, the Petitioner has failed to furnish the same to Respondent No. 1 and even to this date has not provided any information regarding the same. In fact, as per letter of the Petitioner (Annexure-T to the Petition) dated 16.06.2017, the Petitioner informed Respondent No. 1, that it was yet to procure title over the property and was awaiting approval of its Section 109 application. No explanation has been provided as to why there was a delay in procuring environmental clearance or land approvals.

- 31) Further argued that, the Petitioner though claiming Force Majeure event as the cause for delay has not complied with the mandatory requirements under the Force Majeure Clause (Article 14 of the PPA) i.e., providing notice to Respondent No. 1 of the Force Majeure events within 7 days from the date of such event. In addition, the PPA itself under Article 18 has provided for amicable settlement of disputes between the parties to the PPA however, in complete disregard to the PPA provisions the Petitioner has approached this Commission with this petition seeking untenable reliefs.
- 32) Further argued that, the Petitioner has taken another ground of demonetization, which does not qualify for a Force Majeure event and cannot be regarded as Force Majeure event under the PPA dated 15.07.2016. Because the event of demonetization was temporary event and not a permanent change in the law or circumstances so as to severely hamper the Petitioner or the completion of the project. Further, it only affected the immediate liquid currency and moreover only the currency note of INR 500/- and INR 1,000/-. During this period Bank transactions were permitted by several modes. Thereby this contention taken by the Petitioner

does not come under the meaning of Force Majeure event. This aspect has been decided by the Commission in its order dated 15.09.2020 in OP 2/2018 M/s Adani Green Energy (UP) Limited Vs BESCO. In the same lines the CERC Delhi also passed orders in Petition No. 19/MP/2018 Talettutayi Solar Projects Four Private Limited Vs Solar Energy Corporation of India Ltd. & Others and also in Petition No. 27/MP/2018 Krishna Wind Farms Developers Private Limited Vs Solar Energy Corporation of India Ltd. & Others.

- 33) Further argued that, the Petitioner claimed that the region of Bagalkot District for the period between June 2017 and October 2017 experienced heavy rainfall. The Petitioner has claimed through its letter dated 07.10.2017 that it experienced 11 days of excess rainfall as result the project was affected for a period of 21 days. However, the Petitioner has sought for an exemption of total number of 46 days. No explanation or reasons are stated for the discrepancy or the exaggeration of the number of days sought to be exempted. No record is placed to prove that the Petitioner suffered any inconvenience at the project site and was hence delayed in the commissioning of the project. The photographs produced by the Petitioner do not bear the date and time even they do not reveal any drastic damage that could not have been mitigated by the Petitioner by using reasonable efforts such as using pumps to drain the excess water.
- 34) Further argued that, it is settled position of law that the Force Majeure clause under PPA must be strictly interpreted. This has been dealt by the Commission in OP No. 202/2017 M/s. Maytrah Advait Power Private Limited Vs BESCO and in OP No. 183/2017 Blister Solar Energy Private Limited Vs BESCO and in

OP No. 148/2017 Sri Ughrappa Solar Private Limited Vs BESCO, KPTCL & KREDL. For all these reasons, since the Petitioner was unable to commission the plant within the SCOD, he is not entitled for any relief as prayed in the Petition, hence Respondent No. 1 & 3 prays to dismiss the Petition in the interest of justice and equity.

35) The Respondent No. 2 has not submitted any written arguments but orally argued that he has issued Letter of Allotment dated 16.05.2016 in favour of the Petitioner. Thereafter, the Petitioner has entered in to a Power Purchase Agreement with the Respondent No. 1 therefore, it is for the Respondent No. 1 & 3 to counter the allegations of the Petitioner made in the Petition. However, he has denied all the allegations made in the Petition, further stated that he is not necessary party to this Petition, thereby, prayed for dismissal of the Petition in the interest of justice and equity.

36) In the present Petition, the Petitioner has relied upon the four following events or circumstances as Force Majeure Events for claiming the extension of time:-

- i) Delay in granting evacuation approval.
- ii) Unprecedented rainfall.
- iii) Demonetization and;
- iv) Introduction of GST.

In PPA (Annexure-D to the Amended Petition) the Force Majeure is described as under: -

"ARTICLE 14: FORCE MAJEURE

14.3 Force Majeure

14.3.1 A 'Force Majeure' means any event or circumstances or combination of events including those stated below which wholly or partly prevents or unavoidably delays an Affected Party in the performance of the 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, epidemic, extremely adverse weather conditions, lightning, earthquake, landslide, cyclone, flood, volcanic eruption, chemical or radioactive contamination or ionizing radiation, fire or explosion (to the extent of contamination or radiation or fire or explosion originating from a source external to the Site);*
- b) *an act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, riot, insurrection, terrorist or military action, civil commotion or politically motivated sabotage;*
- c) *compulsory acquisition in national interest or expropriation of any Project Assets or rights of the Developer or of the Contractors;*
- d) *any judgement or order of any court of competent jurisdiction or statutory authority made against the Developer in any proceedings for reasons other than (i) failure of the Developer to comply with any Applicable Law or Applicable Permit, or (ii) on account of breach of any Applicable Law or Applicable Permit or of any contract, or (iii) enforcement of this Agreement, or (iv) exercise of any of its rights under this Agreement by the Government or*
- e) *unlawful or unauthorized or without jurisdiction revocation of, or refusal to renew or grant without valid cause, any clearance, license, permit, authorization, no objection certificate, consent, approval or exemption required by the Developer or any of the Contractors to perform their respective obligations under this Agreement and the Project Agreements; provided that such delay, modification, denial, refusal or revocation did not result from that Developer's or any Contractor's inability or failure to comply with any condition relating to grant, maintenance or renewal of such clearance, license,*

authorization, no objection certificate, exemption, consent, approval or permit.

14.4 Force Majeure Exclusions

14.4.1 Force Majeure shall not include (i) any event or circumstance which is within the reasonable control of the Parties and (ii) the following conditions, except to the extent that they are consequences of an event of Force majeure:

- a) Unavailability, late delivery, or changes in cost of the plant, machinery, equipment, materials, spare parts or consumables for the Power Project;
- b) Delay in the performance of any Contractor, sub-Contractor or their agents;
- c) Non-performance resulting from normal wear and tear typically experienced in power generation materials and equipment;
- d) Strikes at the facilities of the Affected Party;
- e) Insufficiency of finances or funds or the agreement becoming onerous to performs and
- f) Non-performance caused by, or connected with, the Affected Party's:
 - I. Negligent or intentional acts, errors or omissions;
 - II. Failure to comply with an Indian Law; or
 - III. Breach of, or default under this Agreement.

14.5 Notification of Force Majeure Event

14.5.1 The Affected Party shall give notice to the other Party of any event of Force Majeure as soon as reasonably practicable, but not later than seven (7) days after the date on which such Party knew or should reasonably have known of the commencement of the event of Force Majeure. If an event of Force Majeure results in a breakdown of communications rendering it unreasonable to give notice within the applicable time limit specified herein, then the Party claiming Force Majeure shall give such notice as soon as reasonably practicable after reinstatement of communications, but not later than one (1) day after such reinstatement.

Provided that such notice shall be a pre-condition to the Affected Party's entitlement to claim relief under this Agreement. Such notice shall include full particulars of the event of Force Majeure, its effects on the Party claiming relief and remedial measures proposed. The Affected Party shall give the other Party regular (and not less than monthly)

reports on the progress of those remedial measures and such other information as the other Party may reasonably request about the Force Majeure Event.

14.5.2 The Affected Party shall give notice to the other Party of (i) the cessation of the relevant event of Force Majeure; and (ii) the cessation of the effects of such event of Force Majeure on the performance of its rights or obligations under this Agreement, as soon as practicable after becoming aware of each of these cessations.

37) Basing on the above clauses, this Commission has to decide whether the contentions taken by the Petitioner fall within the meaning of Force Majeure events and whether the number of days of existence of Force Majeure Event for which to allow the extension of time.

38) The first contention of the Petitioner is, delay in granting evacuation approval:

a) It is the case of the Petitioner that, he has applied for granting evacuation scheme approval with the 3rd Respondent KPTCL on 06.12.2016 and the 3rd Respondent in turn issued the regular evacuation scheme approval only on 12.05.2017, thereby, there is enormous delay of 157 days in granting evacuation approval.

The different events along with dates in obtaining regular evacuation scheme approval is as detailed below: -

Sl. No.	Date	Details	Annexure
1.	06.12.2016	The date of application filed by the Petitioner for grant of evacuation approval.	"F"
2.	28.12.2016	The corporate office issued intimation to the Petitioner to pay processing fee and to furnish copy of PPA and also copy of receipt for having paid the facilitation fee to the 2 nd Respondent.	"G"

3.	11.01.2017	The date on which the Petitioner paid the processing fee.	Para 9 (ii) of the Petition
4.	19.01.2017	The date on which letter written by Chief Engineer (Ele), Planning and Coordination, Corporate Office, KPTCL, Bengaluru, to the Chief Engineer (Ele), Transmission Zone, KPTCL Bagalkot (Zonal Office) requesting to furnish field/inspection report.	"K"
5.	18.02.2017	The date on which letter written by Chief Engineer (Ele), Transmission Zone, KPTCL Bagalkot (Zonal Office) to the Chief Engineer (Ele), Planning and Coordination, Corporate Office, KPTCL, Bengaluru, enclosing field inspection report.	"L"
6.	10.04.2017	Office note approved by the Director (Technical) Corporate Office for recommending for issue of regular evacuation scheme approval.	As per Reference No. 13 in Regular Evacuation Scheme Approval in Annexure "M"
7.	20.04.2017	The date on which tentative evacuation scheme approval issued.	Annexure "A-2" furnished by Respondent No. 3
8.	21.04.2017	The date on which the Petitioner has communicated its acceptance to the terms and conditions mentioned in the tentative evacuation scheme approval and requested to issue the regular evacuation scheme approval.	As per Reference No. 15 in Regular Evacuation Scheme Approval in Annexure "M"
9.	26.04.2017	The date on which letter written by the Petitioner to the Chief Engineer (Ele), Planning and Coordination, Bengaluru, enclosing copy of the PPA and copy of receipt for having paid facilitation fees.	Annexure "A-3" furnished by Respondent No. 3
10.	12.05.2017	The date on which regular evacuation scheme approval issued by the KPTCL, Corporate Office.	"M"

- b) The 1st and 3rd Respondents have contended that, there is no delay on the part of the officials of the 3rd Respondent in granting evacuation approval and the said officials of 3rd Respondent have acted diligently. Further contended that soon after issuance of LoA dated 16.05.2016, the Petitioner should have identified the lands for the project and atleast it should have been done by the time that the Commission has approved the PPA dated 17.10.2016, but the Petitioner has applied for issuance of the evacuation scheme approval with the delay of 55 days and he has not given any explanation to this extent. Further contended there is contributory negligence on the part of the Petitioner in obtaining evacuation scheme approval.
- c) On perusal of the documentary evidence produced by the Petitioner, it is true that the Petitioner has applied for evacuation approval (Annexure-F to the Amended Petition) on 06.12.2016 i.e., after 49 days from the effective date i.e., 17.10.2016, which is detailed as below under: -

Sl. No.	Period	Days
1.	17.10.2016 to 31.10.2016	14 days
2.	November 2016	30 days
3.	01.12.2016 to 05.12.2016	5 days
Total		49 days

But the Petitioner stated he has received the copy of the evacuation approval only on 28.10.2016. This contention is not disputed by the Respondents. Thereby, if it is calculated then it comes that the Petitioner has applied for evacuation approval after 38 days from the effective date as shown in PPA, which is detailed as below under: -

Sl. No.	Period	Days
1.	28.10.2016 to 31.10.2016	3 days
2.	November 2016	30 days
3.	01.12.2016 to 05.12.2016	5 days
Total		38 days

- d) Thereafter, he has received a letter from KPTCL (Annexure-G to the Amended Petition) dated 28.12.2016 for remittance of processing fee and furnishing documents for the proposed 15 MW Solar Power Project in Hunagund Taluk, Bagalkot District. Accordingly, he has remitted the required fee on 11.01.2017. In the meanwhile, the Petitioner has entered into Solar Power Project Land Development Agreement (Annexure-H to the Amended Petition) dated 20.01.2017 with Paras Infra Developers for procurement of land and obtaining all requisite Government and Non-Government approvals in respect of the project and also undertaking field level activities related to the project. The Petitioner has received No Objection Certificate (Annexure-J to the Amended Petition) dated 20.03.2017 from PDO, Herebadawadagi Gram Panchayathi, Hungunda Taluk, Bagalkot District for construction of project in the lands coming under Chittawadagi Village of Hungunda Taluk, Bagalkot District. The Chief Engineer (Ele), Planning & Co-ordination, KPTCL, Bengaluru has written a letter to the Chief Engineer (Ele), Transmission Zone, KPTCL, Bagalkot (Annexure-K to the Amended Petition) dated 19.01.2017 requesting to furnish field/inspection report of the proposed project in respect of the request made by the Petitioner. Thereafter, as per the letter (Annexure-L to the Amended Petition) dated 18.02.2017 Chief Engineer (Ele), Planning & Co-ordination, KPTCL, Bengaluru has received

field/inspection report from Chief Engineer (Ele), Transmission Zone, KPTCL, Bagalkot in respect of the proposed project of the Petitioner. After receiving this report, the 3rd Respondent/KPTCL has issued Tentative Evacuation on 20.04.2017 and on the acceptance on 21.04.2017, the regular evacuation scheme approval was issued in favour of the Petitioner (Annexure-M to the Amended Petition) dated 12.05.2017. All these documents clearly show that the Petitioner has not kept quite silently after submitting application for evacuation scheme approval. The 3rd Respondent has taken 157 days in granting regular evacuation scheme approval in favour of the Petitioner as detailed above. Thereby, only on the ground that the Petitioner has applied for evacuation scheme approval with delay of 38 days, his prayer cannot be brushed aside.

- e) Here, it is pertinent to note that, the Government of India by way of notification dated 08.11.2016 withdrew the legal tender status of INR 500/- and INR 1,000/- denominations of the Bank notes. This demonetization had effect from 08.11.2016 to the end of January 2017 i.e., in between the period of effective date under PPA, and to the date of application filed by the Petitioner for evacuation approval. Though the Petitioner has not specifically contended this point under the head of alleged delay in applying for evacuation approval but he has contended in his petition that he could not commission the SCOD within time limit as specified in the PPA due to the effect of demonetization also without adducing cogent material to prove the due to

demonetization has affected the progress of the project, this contention of the Petitioner cannot be accepted.

- f) The Respondent No. 2/KREDL has not made any claim regarding the payment of facilitation fees in their objections or oral submissions, whereas KPTCL raised to contention in their statement of objections, KPTCL cannot act as an agent of KREDL and legally such a submission is not sustainable. The defense of KPTCL cannot be accepted and has to be construed as delay on account of Force Majeure Event.
- g) This view of ours is supported by the observations made by Hon'ble Appellate Tribunal for Electricity in Appeal No. 351/2018 in the matter of Chennamangathihalli Solar Power Project LL. P Vs BESCO & another in which it is held as: -

“8.15)it is also crystal clear that the approvals/ clearances from various Government instrumentalities were accorded after considerable delays (of 7-8 months) which in turn attributed to delay in commissioning of the solar projects as these approvals were beyond the control of the Appellants, the State Government and 1st Respondent have rightly considered them as an event of Force majeure and accordingly granted approval for COD extension”.

- h) We have gone through the orders passed by the Hon'ble APTEL, NewDelhi, in Appeal No. 328/2018 in the matter of Basaragi KM Solar Power Project LL. P & Sri Channaraj Hattiholi Vs HESCO & KERC dated 12.08.2021, in this order the Hon'ble Appellate Tribunal for Electricity has held and observed as follows: -

“81) Having regard to the fact that securing these approvals from various instrumentalities of the Government/ Government officer, 18 months period was envisaged to complete the project. Having regard

to the fact that there could be circumstances or events which could delay the happening of COD within the original time slot, six months' time for extension of commissioning the project at the level of concerned distribution licensee was envisaged. For events beyond that, they had to approach the Respondent Commission."

"82) The above procedure was envisaged keeping in mind that possibility of delay happening on account of laches on the part of the offices of Governmental Instrumentalities, though Solar Developer or SPV do not contribute to such delay. Unforeseen happening could possibly delay commissioning of the project, therefore force majeure event clauses were introduced in the terms of PPA as stated above. These force majeure clauses definitely take within its fold, the delay caused by offices of the Government or Governmental Instrumentalities."

"83) Arguments of the Respondent HESCOM that KPTCL is no a party to the PPA, therefore, the delay on their part cannot come to the aid of the Appellant cannot be accepted. KPTCL is also a public utility and instrumentality of the Government. Therefore, even if the project is delayed on account of KPTCL, in not issuing approval for evacuation of power and grid connectivity within a reasonable time, it amounts to event of Force majeure."

"85) The Respondent HESCOM contends that there was delay in submitting applications to various departments by the Appellant. One has to analyze the circumstances in a holistic approach is whether there was negligence on the part of the Developer to approach and obtain these approvals? It cannot be said that the considerable time lapsed in obtaining these approvals from various instrumentalities of the Government was at the instance of the Appellants."

"86)Having invested huge amounts taking loans from Banks/financial institutions, one cannot even imagine that the Developer will be negligent in pursuing his project."

"91)However, the same set of Force Majeure Events could not convince the Respondent Commission. The Respondent Commission being a neutral body is expected to discharge its functions in a judicious

manner. If delay has occurred on account of reasons beyond the control of the Appellant, the Appellant cannot be punished. The intention of the Government to assist to the farmers should not become otherwise a weapon to punish them."

- i) We have gone through the orders passed by the Hon'ble APTEL, NewDelhi, in Appeal No. 322/2018 in the matter of Madamageri Solar Power Project LL. P & Smt. Girija B. Hattiholi Vs HESCOM & KERC dated 12.08.2021, in this order the Hon'ble Appellate Tribunal for Electricity has held and observed as follows: -

"118) In terms of guidelines issued by State Government to set up solar plants several sanctions/approvals/ clearances had to be obtained by the farmers like land conversion, grid connection and power evacuation approvals, plant safety approval from chief electrical inspector etc. Apparently, right from the date of signing of the PPA, the Appellant was running from office to office to secure these approvals/sanctions as stated above. If time was taken for getting these approvals as stated above, we note that considerable time was lapsed. Definitely it was not on account of the Appellants' negligence or lethargic approach."

"119) We are of the opinion that the time taken to obtain the above-mentioned approvals would definitely become impossible for the Appellants to achieve COD of the solar plant within SCOD of the PPA."

"120) In fact, as stated above, the HESCOM taking into consideration all these facts and in line with the terms of PPA extended time for COD within the extended SCOD. This action of the HESCOM has support from the fact that the State Government also, after due diligence and prudence, accorded extension of COD by six months. On account of such extension, the SCOD automatically get postponed by six months."

"121) Apart from that, in terms of Clause 10.5 of PPA, it says despite complying with the legal requirements to obtain, renew or maintain require licensee or legal

approval will also amount to Force Majeure Event. Therefore, we are of the opinion that if at all there was delay in receiving various clearances/approvals by the State Government and its instrumentalities which are beyond the control of the Appellants, the same has to be treated as event of force majeure, since the same would directly and seriously affect the implementations of the solar project."

Under these circumstances, as per the findings given by the Hon'ble APTEL, Delhi, the contention taken by the Respondents that the Petitioner is not diligent in getting evacuation approval at earliest stage holds no water. Hence, the contention taken by the Petitioner that there had been some delay in granting evacuation approval which was not in his control has to be accepted. Accordingly, Petitioner is entitled for condonation of delay under Force Majeure Event for 102 days.

- 39) The second contention of the Petitioner is, unprecedented rainfall: - It is the case of the Petitioner that, during the months of June 2017 till October 2017 the State of Karnataka experienced excessively heavy rainfall, which went beyond the regular monsoon season. These rains were unprecedented and as such could not be predicted by the solar power project developer. Thereby, these incessant rains have resulted, inter alia in flooding of project sites, idling of labour and equipment at project sites and severely hampering construction works. Thereby, the Petitioner could not proceed with commissioning of SCOD, however, he took all possible steps such as deploying several pumps to drain water from the project site relaying of the damaged roads etc., to mitigate the impact of the rainfall. In support of his contention, he has furnished

monthly report on rainfall, Agriculture situation and crop condition in Bagalkot District June 2017 to October 2017 issued by Karnataka State Natural Disaster Monitoring Centre (Annexure-S3) in which daily weighted average rainfall in Bagalkot District is shown. This contention taken by the Petitioner is not seriously disputed by the Respondents apart from that they have not produced any documentary evidence to reject the prayer of the Petitioner in this regard. The claim for considering condonation of delay of about 21 days is allowed under Force Majeure.

40) The third contention of the Petitioner is, demonetization: -

a) It is the case of the Petitioner that, after obtaining approval from KERC i.e., dated 17.10.2016 he had to apply for evacuation approval, meanwhile, Government of India by way of notification dated 08.11.2016 withdrew the legal tender status of INR 500/- and INR 1,000/- denominations of Bank notes, this demonetization has had a domino effect from 08.11.2016 to the end of January 2017 on the land acquisition and other project activities thereby, there was a delay in commissioning the SCOD. In support of his arguments, he has produced purchase order dated 11.07.2017 (Annexure-S) which shows the Petitioner has placed orders for supply of PV Module 320 WP with Risen Energy Company Limited and another document i.e., Office Memorandum issued by Scientist-C of Ministry of New & Renewable Energy, New Delhi, Government of India (Annexure-S1) in which it shows minutes of meeting dated 29.11.2016 to discuss issues related to

solar PV power projects. In that meeting the participants were informed that several developers have represented MNRE/NTPC/SECI regarding the difficulties being faced by the solar project developers in fulfilling with the requirements of “financial closure” and “conditions subsequent” due to the demonetization order of Government of India and that sometime has been requested by the Solar developers for fulfilling with the said requirements. It was agreed that considering the practical problems in the short run due to demonetization, time till 31st January 2017, without penalty for complying within the requirements of financial closure, may be allowed. However, it shall have no effect on the effective date of financial closure or the scheduled commissioning date as per the respective PPA.

- b) The Petitioner has produced another document that is a letter issued by Pioneer Nuts & Bolts Private Limited (Annexure-S2) dated 08.12.2016 in favour of the Petitioner stating that due to demonetization the company was unable to adhere to the production targets as per purchase orders given to it, because of demonetization its suppliers have clogged their supplies, man power available have been become non attending for the reason of currency submission to the Banks. Also, several labour payment have got accumulated with them which could not be paid thereby the said company requested to cooperate and grant more time to supply requisite materials.
- c) The Petitioner has produced a letter written by him on 16.06.2017 to HESCOM (Annexure-T) in which it is stated that as: -

“The Government demonetized INR 1000 and INR 500 notes with little notice. This unforeseeable move has severely affected the liquidity of money in the entire system. Since there were no markets that were functioning, even the farmers were unwilling to do any transactions during that time. Clearing any encumbrances on the title of the land is an integral part of the land acquisition. These are typically in the form of loans/claims that are tied to the title of the land. To dispel any potential future litigation, we clear/pay out these encumbrances by opening accounts and making payments to the concerned parties. The banks which were overburdened with the chaos arising from the demonetizing move were unable to cater time to opening new accounts and as a result have slowed down our activities. In addition to this, farmers from who the land was to be acquired were unwilling to sell their land that was to be used for cultivation which would generate liquid cash to companies who would transfer money to their accounts which they could not withdraw and use. Owing to the aforementioned and to non-availability of cash in both the banks and the market, our ability to procure land has been severely crippled and has slowed down other activities as well.”

All these documents clearly supports the contention taken by the Petitioner that delay is caused in commissioning the project due to demonetization. The Respondents though disputed this contention taken by the Petitioner but not denied the contents of the documentary evidence relied by the Petitioner.

41)The fourth contention of the Petitioner is, introduction of GST: -

a) It is the case of the Petitioner that, on 01.07.2017 the Government of India introduced the Central Goods and Services Tax Act 2017 (GST Law) which brought about fundamental structural changes in the prevailing tax regime in the country. There was a slowdown from July 2017 to September 2017 in the manufacturing as well as service industry across the country. There were certain implications due to the

GST Law on the developers of solar projects i.e., (1) Contractors/suppliers were delaying contracts due to lack of clarity on tax structure. (2) Contractors/suppliers had to revamp their systems amend and reissue "purchase orders" to align them as per the GST regime/to make them GST law Complaint (3) Lack of clarity on GST percentage applicable on invertors contributed to delay in supply of material required for setting up of projects (4) and introduction of GST Law resulted in confusion regarding MNRE Certificate for Concession Customs Duty which was kept on hold from June 2017 further resulting in delay in supply of key equipment. The MNRE after examined the impact of GST Law, issued Official Memorandum dated 20.06.2018 wherein, it has extended the SCOD for the solar projects for a period of 62 days. By way of said Official Memorandum (Annexure-T1 to the Amended Petition) dated 20.06.2018. MNRE has considered the disruption of business and consequent delay in commissioning of the projects on account of introduction of GST Law. For all these reasons the Petitioner could not commission within the SCOD.

- b) In this regard, the Petitioner has written a letter to the General Manager, Technical, HESCOM, (Annexure-T to the Amended Petition) dated 16.06.2017 and requested to consider, the Petitioner's intent and capability in commissioning the project and the progress made so far as and to grant an extension of 2 months to satisfy the Conditions Precedent set forth in Clause 4 of the PPA, within which the Petitioner surely comply with all such Conditions Precedent.

c) In Annexure-T (to the Amended Petition) it is stated as: -

“The Goods and Services Tax has been actively debated at various levels of the government, public forums and the media. This tax, though might benefit the nation as a whole has had some opposition comprising of groups/individuals some of whom oppose the idea itself and other oppose the proposed tax slabs. Due to the uncertainty in both the timelines of implementation and the tax slabs under which a particular industry might fall have posed difficulties to implementation of solar power projects in the nation.”

d) Though the Respondents have received the notice (Annexure-T to the Amended Petition) but they have not given any reply to that. Of course, they have denied this contention of the Petitioner but they have not produced any evidence to contradict the contention taken by the Petitioner.

e) In this regard we would like to rely upon the judgement order OP No. 28/2018 dated 28.08.2018 between M/s Mytrah Abhinav Power Private Limited Vs Southern Power Distribution Company of Telangana Limited and Others, passed by the Hon'ble Telangana Electricity Regulatory Commission (TERC), Hyderabad, wherein it is held as under: -

“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) of PPAs 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 which the affected party could not have prevented by prudent utility practices of, 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 GOT 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 244 days as events termed as force majeure. The petitioner had no control or domain over the incidents mentioned causing delay in completing the project and therefore the delay cannot be totally attributable to the petitioner."

Having regard to the facts of the case on hand, we rely on aforesaid order of Hon'ble TERC and we are of the considered opinion that Demonetization and Goods and Services Tax have an impact on implementation and commissioning of the project. This decision is aptly applicable to the case of the Petitioner.

- 42) The Respondent No. 1 & 3 during the course of arguments have taken contention that, the Petitioner was to complete the Conditions Precedent within 8 months from the effective date as per PPA (Annexure-D to the Amended Petition) and commission the project within 12 months of the effective date. But the Petitioner failed to fulfill the terms of the PPA, despite, the Respondents have taken all possible measures and steps to co-operate and work with the Petitioner. Thereby the Respondent contents that, the Petitioner is not entitled for any relief.
- 43) We have perused Article 4 CONDITIONS PRECEDENT of PPA which reads as follows: -

ARTICLE 4: CONDITIONS PRECEDENT

4.1 Conditions Precedent

Save and except or expressly provided in Articles 4, 14, 18, 20 or unless the context otherwise requires, the respective rights and obligations of the Parties under this Agreement

shall be subject to the satisfaction in full of the conditions precedent specified in this Clause 4 (the "Conditions Precedent") by the Developer within 8 (eight) months from the Effective Date, unless such completion is affected by any force majeure event, or if any of the activities is specifically waived in writing by HESCOM.

4.2 Conditions Precedent for the Developer

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

- a) obtained all Consents, Clearances and permits required for supply of power to HESCOM as per the terms of this Agreement;
- b) achieved Financial Closure and provided a certificate to HESCOM from the lead banker to this effect;
- c) made adequate arrangements to connect the Power Project switchyard with the interconnection Facilities at the Delivery Point;
- d) obtained power evacuation approval from Karnataka Power Transmission Company Limited ("KPTCL")/ HESCOM, as the case may be;
- e) produced as per the requirements set out in Schedule 1, the documentary evidence of having the clear title and possession of the land required for the Project in the name of Developer;
- f) fulfilled Technical Requirements for [Solar PV ground mount Project] as per the format provided in Schedule 2 and also provides the documentary evidence for the same;
- g) delivered to HESCOM from (the Consortium Members, their respective) confirmation, in original, of compliance with the equity lack-in condition set out in 5.2²; and
- h) delivered to HESCOM a legal opinion from the legal counsel of the Developer with respect to the authority of the Developer to enter into this Agreement and the enforceability of the provisions thereof.

- 44) The Petitioner in order to support his contention that he has followed the terms of PPA has produced Solar Power Project Land development agreement

(Annexure-H to the Amended Petition) dated 20.01.2017 showing that he had entered into the said agreement with Paras Infra Developers for procurement of land and obtaining all requisite Government and Non-Government approvals in respect of the project and also undertaking field level activities related to the project. The Petitioner has received No Objection Certificate (Annexure-J to the Amended Petition) dated 20.03.2017 from PDO, Herebadawadagi Gram Panchayathi, Hungunda Taluk, Bagalkot District for construction of 15 MW (AC) Solar Power Project in the lands coming under Chittawadagi Village of Hungunda Taluk, Bagalkot District. After receiving the regular evacuation approval (Annexure-M to the Amended Petition) dated 12.05.2017, the Petitioner has entered into four agreements i.e., Engineering and Services Agreements, Construction Agreement, Agreement for Module Supply and Agreement for BOP Supply (Annexure N, N1, N2 and N3 to the Amended Petition) dated 30.05.2017 with Mytrah Energy (India) Private Limited. He has produced copy of the data with respect to the land procured for the power plant (Annexure-P to the Amended Petition). The copy of the application produced by the Petitioner (Annexure-Q to the Amended Petition) dated 05.06.2017 shows that he has applied for exemption under Section 109 of Karnataka Land Reforms Act, 1961 for 81 Acres and 10 Guntas for setting up 15 MW Solar Power Project in Hungunda Taluk at Village Chittawadi before Deputy Commissioner, Navanagar, Bagalkot. The copy of the sanction letter (Annexure-R to the Amended Petition) dated 12.06.2017 sent by Rebobank to the Petitioner shows that the Petitioner was sanctioned INR loan facility. All these documents establish that, the Petitioner was enough diligent in following

the terms of Conditions Precedent as per PPA. Thereby, the contention taken by the Respondent 1 & 3 that, the Petitioner was not diligent in following terms of PPA cannot be accepted.

- 45) The further contention of the Respondent No. 1 that, Clause 14.4 provides the exception to Force Majeure Events in Clause 14.4.1 (a to f), the provisions Force Majeure in the PPA specifically provides in Clause 14.5 that an event for Force Majeure must be notified to the answering Respondent within 7 days of the alleged Force Majeure Event. This requirement is mandatory under PPA. Therefore, notice under this Clause shall be a precondition to the affected parties entitlement to claim relief under the PPA, but the Petitioner has not given notice to the Respondent at time of the alleged Force Majeure Event and not taken any steps for mitigation of the effect of Force Majeure events. Thereby, he failed to follow the mandatory condition, hence, not entitled for any relief.
- 46) This contention of the 1st Respondent cannot be accepted as because, the Petitioner has produced copy of the letter (Annexure-T to the Amended Petition) dated 16.06.2017, written in favour of 1st Respondent with a request for extension 2 months to satisfy the Conditions Precedent set forth in Clause 4 of PPA, narrating the difficulties arose in commissioning the project due to demonetization and introduction of GST Law. Another request letter (Annexure-U to the Amended Petition) sent by the Petitioner to the 1st Respondent in the month of October 2017 shows that, the Petitioner has narrated the progress of work as on that date, as well the difficulties faced by him in further executing the project work due to heavy rainfall in certain days

in the month of September 2017, further requested due to this Force Majeure Event he could not complete the project within time, thereby, prayed for extension of time atleast 120 days. This letter has been received by the 1st Respondent on 07.10.2017.

47) On plain reading of these two letters, it appears that the Petitioner has notified the first Respondent with regard to the Force Majeure events as required under Article 14.5.1. Further as per Annexure-U (to the Amended Petition) the Petitioner has taken steps to mitigate Force Majeure event i.e., on 5th & 6th September 2017 he used pumps to remove water from the site, small stones and murrum layer laid to make access internally in the site. Further on 8th to 10th September 2017 Petitioner used pumps continuously to remove water and repaired damaged approach road to provide access inside the site. Again from 13th to 16th September 2017 the Petitioner taken measures to restore site access were affected due to repeated rains, this restoration works took 6 days. From 23rd & 24th September 2017 pumps used to remove water from the site. These contents of Annexure - T & U (to the Amended Petition) are not disputed by the Respondents. It is not the case of the 1st Respondent that he had visited the site in which the solar power project was under commission at any point of time for verification and found that suitable steps are not taken by the Petitioner to mitigate the effect of Force Majeure.

48) We have perused the judgement passed by the Hon'ble APTEL, New Delhi in Appeal No. 38/2019 dated 12.08.2021 between Hirehalli Solar Power Project LL.P & Another Vs BESCO & Another, in which the Hon'ble APTEL has held in para 50 as: -

“50) It is also submitted that, this Tribunal in “Chamundeshwari Electricity Supply Company Ltd. Vs Saisudhir Energy (chitradurga) Pvt. Ltd” reported in 2018 SCC On Line APTEL 65 had held that no formal issuance of Notice is required in cases of force majeure events.”

49) We have perused the judgement passed by the Hon'ble APTEL, New Delhi, Appeal No. 322/2018 in the matter of Madamageri Solar Power Project LL. P & Smt. Girija B. Hattiholi Vs HESCOM & KERC dated 12.08.2021, in which the Hon'ble APTEL has given findings as below: -

“127) It is relevant to point out the conduct of the HESCOM, during the entire process of securing these approvals by the Appellants, the Solar Developer has brought to the notice of the HESCOM the obstacles faced and no point of time, there was any note of caution or objecting finding fault with the pace at which the Solar Developer was pursuing the execution of the solar plant. In fact, after accepting the reasons for the delay being force majeure event in terms of PPA, the HESCOM did extend time for commissioning of the plant by six months. Subsequently, the conduct of the HESCOM is very surprising. It started finding fault with the Appellant contesting the matter seriously questioning the reasons for delay as force majeure event. We are of the opinion that the Respondent HESCOM cannot approbate and reprobate.”

The observations made by the Hon'ble APTEL and in the facts and circumstances of the case, the contention taken by the Respondent No. 1, that the Petitioner has not issued mandatory notice as required under Article 14.5.1 and has not taken any steps to mitigate the effect of Force Majeure events cannot be accepted.

50) During the course of arguments, the Learned Counsel for the 1st and 3rd Respondents have relied upon the following orders in: -

1. OP 2/2018 (KERC)– Messers Adani Green Energy (UP) Limited Vs BESCOM dated 15.09.2020.

2. OP 14/2018 (KERC) - Messers Adani Green Energy (UP) Limited Vs BESCOM dated 15.09.2020.

51) The Respondents stated that, this Hon'ble Commission has negated the prayer of the Petitioners therein by holding that the Petitioners have not produced any documentary evidence in support of their claim to establish that their projects were actually affected due to any GST induced disruption for a period of 3 to 4 months and also further held the Petitioners except vague averments in their rejoinder and written arguments no definite instances are mentioned to demonstrate as to how the progress of the projects were affected due to demonetization therefore, for want of adequate proof it is unable to accept that the introduction of GST as well as demonetization adversely affected the progress of the projects of the Petitioners thereby, dismissed the Petitions.

52) Further he relied upon the following orders passed in: -

1. OP 202/2017 (KERC) – Mytrah Advait Power Private Limited Vs BESCOM dated 29.05.2020.
2. Op 148/2017 – Sri Ugrappa Solar Private Limited Vs BESCOM & 2 Others.

53) Further submitted that, in the above orders the Hon'ble Commission has observed that "the Petitioners therein, have not produced any guidelines or other statutory provisions disclosing the period within which the evacuation scheme approval is to be issued, further held that the Conditions Precedent states that the Petitioner has to obtain the evacuation scheme approval within 8 months from the date of approval of the PPA, the issuance of regular evacuation scheme approval takes certain time for study of evacuation

feasibility and to ascertain the terms and conditions to be imposed while issuing the regular evacuation scheme, in the absence of any specific timeline prescribed it is not possible to hold that there was delay in granting regular evacuation scheme approval subsequent to filing the application for grant of the same". Further, submitted in the order passed in OP 202/2017 (KERC), the Hon'ble Commission has also observed that the Petitioner has not proved that the demonetization and introduction of GST have adversely affected the progress of the project, thereby, dismissed the Petition.

54) Further he relied upon the following orders passed in: -

1. OP 183/2017 – Blister Solar Energy Private Limited Vs BESCO.
2. OP 157/2017 – S G Arakeri Solar Power Private Limited Vs HESCO & Others.

and submitted that, in these orders, the Hon'ble KERC has held that, it is settled law, the Force Majeure Clause in PPA has to be strictly interpreted. No notice, as contemplated under the Clause is stated to be issued by the Petitioner to the 1st Respondent, none of the reasons or event cited by the Petitioner, for delay in commissioning of its project would fall under the Force Majeure events mentioned in the PPA thereby, the Hon'ble Commission held that the Petitioner is not entitled to the extension of time.

55) Further he relied upon the orders passed in: -

1. Petition No. 19/MP/2018 – Solar Projects Four Private Limited Vs Solar Energy Corporation of India Limited & Others.

and submitted the Hon'ble CERC, New Delhi has found that, there was a delay of 1 (one) day in the above case, thereby directed the Respondent No. 1, therein, to downward revise the tariff strictly as per PPA.

56) Further he relied upon another order passed in: -

1. Petition No. 27/MP/2018 – Krishna Windforms Developers Private Limited Vs Solar Energy Corporation of India Limited & Others.

and submitted in that case the Hon'ble CERC, New Delhi has observed that it was incumbent on Petitioner to issue a notice of Force Majeure as pre-condition for claiming relief, further held the Petitioner therein has failed to prove the delay in completion of the Conditions Precedent and achieving financial closure under PPA was on account of Force Majeure events thereby, the alleged delay was not on account of Force Majeure events.

57) We have gone through the decisions relied by Respondent No. 1 & 3. At this stage they are not helpful to the case of the Respondents as because after passing the orders by KERC in the cited judgements as detailed supra, it came to the notice of the Commission that the orders passed by the Hon'ble APTEL in Appeal No. 351/2018 in the matter of Chennamangathihalli Solar Power Project LL. P Vs BESCOM & another case, dated 14.09.2020, in which the Hon'ble APTEL has observed as: -

“8.10) Regarding force majeure events, Clause 8.3 of PPA, it is noted that under sub-clause (vi), it is provided that “inability despite complying with all legal requirements to obtain, renew or maintain required licenses or legal approvals” will also attribute to force majeure. In view of these provisions under the PPA, we are of the opinion that the delay in receiving various approvals / clearances by the Govt. and its instrumentalities which were beyond the control of the

Appellants should also be treated as an event of force majeure under sub-clause (vi) of clause 8.3 which has directly and severely affected the execution of the solar projects. To be more specific, if the approval for land conversion is received on last day of September, 2016, it becomes extremely difficult to achieve COD on 03.01.2017 as envisaged under the PPA. Moreover, the grant of extension of the Scheduled COD was accorded by Govt. of Karnataka and in turn, by first Respondent after complying with due procedures and applying its diligence and prudence under the four corners of the PPA and not beyond."

"8.15) In view of the above, we are of the considered opinion that considering facts and circumstances of the matter, the 1st Respondent was justified in extending COD up-to 6 months as per the relevant provision (Clause 2.5) of the PPA. Besides, it is also crystal clear that the approvals/ clearances from various Government instrumentalities were accorded after considerable delays (of 7-8 months) which in turn attributed to delay in Commissioning of the Solar Projects. As these approvals were beyond the control of the Appellants, the State Government and 1st Respondent have rightly considered them as an event of Force Majeure and accordingly granted approval for COD extension."

"9.1) Having regard to the deliberations and our analysis, as stated supra, we are of the opinion that there was nothing wrong on the part of KERC to Suo motto interfere in the matter. As being a State Regulator, it has jurisdiction to look into affairs of ESCOMS in purchase and supply of powers in the larger interest of Consumers. However, as the COD extension was granted under the signed PPA between the parties and after applying, due diligence in the matter considering all prevailing facts and matrix of events, the State Commission ought to have considered the same and approved so as to meet the ends of justice. Needless to mention that the PPA' Terms & Conditions were duly approved by the State Commission which crystallized the rights of the parties."

- 58) Under these circumstances, the decision of Hon'ble Appellate Tribunal for Electricity, New Delhi, referred supra and also as per the observations made by

the Hon'ble Appellate Tribunal for Electricity, New Delhi, in the orders passed in Appeal No. 328/2018 in the matter of Basaragi KM Solar Power Project LL. P & Sri Channaraj Hattiholi Vs HESCOM & KERC dated 12.08.2021 and in Appeal No. 322/2018 in the matter of Madamageri Solar Power Project LL. P & Smt. Girija B. Hattiholi Vs HESCOM & KERC dated 12.08.2021 (discussed supra), the KERC has passed orders dated 11.11.2020 in OP No. 15/2018 between Messers Adani Green Energy (UP) Limited Vs BESCO and in OP No. 29/2018 dated 11.11.2020 between Messers Adani Green Energy (UP) Limited Vs HESCOM and allowed the Petitions by extending time. Hence, the orders relied by the Learned Counsel for Respondent No. 1 & Respondent No. 3 in OP No. 2/2018, OP No. 14/2018, OP No. 202/2017, OP No. 148/2017, OP No. 183/2017 and OP No. 157/2017 are not relevant in these circumstances.

- 59) We have perused the order passed in Petition No. 19/MP/2018 – Solar Projects Four Private Limited Vs Solar Energy Corporation of India Limited & Others and Petition No. 27/MP/2018 – Krishna Windforms Developers Private Limited Vs Solar Energy Corporation of India Limited & Others. The contention of the Respondent No. 1 & 3, the Petitioner has not issued a notice of Force Majeure as pre-condition for claiming relief as per Clause 14.5.1 of PPA. As already discussed in the above paragraphs the Petitioner has produced Annexure-T & U (to the Amended Petition), the letters written by him to the 1st Respondent narrating the difficulties arose in Commissioning the project within SCOD as well as the steps taken by him to mitigate the effect of Force Majeure Events. Though the 1st Respondent has received these letters it appears that he has not given any reply, nor visited the spot. Even, during the course of arguments, the

Learned Counsel appearing for the Respondents has not denied the contents of Annexures - T & U (to the Amended Petition), thereby, the contention taken by the Respondents that the affected party shall give notice to the other party of any event of Force Majeure as soon as reasonably practicable, cannot be accepted. Hence, the referred decisions will not come to the defense of the Respondents.

- 60) In view of the discussions made above and also in Para 15, the table discloses the time taken for each event of delays for consideration, the prayer of the Petitioner falls within the parameters as discussed under Force Majeure events and in the present case on hand though the Petitioner has suffered delay in issuing evacuation approval, demonetization, introduction of GST Law and heavy rainfall has commissioned the project on 09.02.2018. As per observations made herein above judgements relied by the Counsel for the Petitioner and the grounds urged by the Petitioner in the Petition, the grounds urged fall under the Clause of Force Majeure as described in the PPA.
- 61) The Petitioner in his Petition has sought for granting extension of time not less than 120 days for commissioning the project from the effective date as stipulated in the PPA and also prayed to issue the directions to the 1st Respondent to enter into Supplementary Power Purchase Agreement with the Petitioner immediately with the extended SCOD. But as per discussion made herein above, the Petitioner has commissioned the project with a delay of 115 days from 17.10.2017, which is detailed as follows: -

Sl. No.	Period	Days
1.	17.10.2017 to 31.10.2017	15 days
2.	November 2017	30 days

3.	December 2017	31 days
4.	January 2018	31 days
5.	01.02.2018 to 09.02.2018	8 days
Total		115 days

62) The Extensions of Time as per Clause 5.7 of PPA (Annexure-D), reads as follows:-

“5.7 Extension of Time

- i. In the event that the Developer is prevented from performing its obligations under Clause 5.1 by the Scheduled Commissioning Date due to:*
- a) any HESCOM Event of Default; or*
 - b) Force Majeure Events affecting HESCOM; or*
 - c) Force Majeure Events affecting the Developer,*

the Scheduled Commissioning Date and the Expiry Date shall be deferred, subject to the limit prescribed in Clause 5.7.2 and Clause 5.7.3 for a reasonable period but not less than 'day for day' basis, to permit the Developer or HESCOM through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the Developer or HESCOM, or till such time such Event of Default is rectified by HESCOM.

- ii. In case of extension occurring due to reasons specified in Clause 5.7.1(a), any of the dates specified therein can be extended, subject to the condition that the Scheduled Commissioning Date would not be extended by more than 6 (six) months.*
- iii. In case of extension due to reasons specified in Article 5.7.1(b) and (c), and if such Force Majeure Event continues even after a maximum period of 3 (three) months, any of the Parties may choose to terminate the Agreement as per the provisions of Article 16.*

If the Parties have not agreed, within 30 (thirty) days after the affected Party's performance has ceased to be affected by the relevant circumstance, on the time period by which the Scheduled Commissioning Date or the Expiry Date should be deferred by, any Party may raise the Dispute to be resolved in accordance with Article 18.

- iv. As a result of such extension, the Scheduled Commissioning Date and the Expiry Date newly determined shall be deemed to be the Scheduled*

Commissioning Date and the Expiry Date for the purposes of this Agreement."

- 63) As per the above Clause in case of extension occurring due to reasons specified in Clause 5.7.1 any of the dates specified therein, can be extended subject to the condition that the Scheduled Commissioning date would not be extended by more than 6 months. In the present case on hand, the Petitioner has taken 4 major contentions i.e., delay in getting evacuation approval, the Demonetization, unprecedented incessant rainfall as well as introduction of GST. The orders passed by Hon'ble APTEL in Appeal No. 351/2018 in the matter of Chennamangathihalli Solar Power Project LL. P Vs BESCO & another case, dated 14.09.2020, the KERC as being a State Regulator it has jurisdiction to look into affairs of ESCOM in purchase and supply of powers in the larger interest of Consumers, therefore, the KERC can Suo Motto interfere in the matter which is in dispute between the parties. In the present case the Petitioner has invested substantial amount in commissioning of Solar Power Project. Taking into consideration, all these facts and circumstances of the case as well as guidelines given by Hon'ble APTEL, this Commission found that the Petitioner is entitled for extension of 115 days due to delayed approval of Evacuation Schedule by 101 days and 16 days rain disruption delay from 17.10.2017 as stipulated in PPA. Though the Petitioner in the prayer has sought for granting extension of time not less than 120 days, there is no necessity to extend the time not below 120 days as prayed for and also there is no necessity to give direction to the 1st Respondent to enter into Supplementary PPA with the Petitioner. Hence, we are of the opinion that the Petitioner is entitled for the relief of

extension of 115 days as he had commissioned the project on 09.02.2018. With this we answer Issue No. 1 in affirmative by holding that the Petitioner is entitled for extension of 115 days from 17.10.2017.

- 64) **Issue No. 2:** For what relief the Petitioner is entitled to?
- 65) As per discussions made herein above paragraphs, and also answering issue No. 1 in affirmative by holding that the Petitioner is entitled for extension of time of 115 days from 17.10.2017, he is entitled for the tariff as agreed in PPA dated 15.07.2016. As per the findings given by the Hon'ble APTEL in its judgement dated 28.02.2020 in Appeal No. 340/2016 between Azure Sunrise Private Limited Vs Chamundeshwari Electricity Supply Corporation Limited, wherein the tribunal has held that "once extension of Scheduled Commissioning Date is approved by the concerned DISCOM question of reduced tariff does not arise". Hence, the Petitioner is entitled for Rs. 5.50/kWh tariff. Upon extension of SCOD by 115 days, time allowed for commissioning the project also gets extended and no damages/LD is liable to be paid by the Petitioner. Accordingly, this Issue No. 2 is answered.
- 66) **Issue No. 3:** What Order?
- 67) In view of the foregoing reasons, we pass the following: -

ORDER

- a) The Petition is allowed.
- b) The delay of 115 days is condoned in commissioning of Solar Power Project in Hunugunda Taluk, Bagalkot District. Consequently, the SCOD is extended till 09.02.2018, at the rate of Rs. 5.50/kWh tariff as agreed in PPA (Annexure-D).

- c) Respondent No. 1/HESCOM is directed to execute SPPA with the extended date in the SPPA forthwith and no further approval is required from the Commission.

sd/-
(SHAMBHU DAYAL MEENA)
Chairman

sd/-
(H.M. MANJUNATHA)
Member

sd/-
(M.D. RAVI)
Member