

No. N/55/2020

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,**No.16, C-1, Millers Tank Bed Area, Vasanth Nagar, Bengaluru-560 052.****Dated: 09.11.2021**

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

O.P. No.17/2020**BETWEEN:**

M/s Izra Solar Energy Private Limited,
A Company Registered under the
Companies Act, 2013 having its Registered
Office at 138, Ansal Chambers II,
Bikaji Cama Palace,
Delhi-110 066.

....PETITIONER

(Represented by Sri Sanjay Sen, Senior Advocate for
Sri A.M. Shodhan Babu, Advocate for Law Offices
of Panag & Babu)

AND

1) Chamundeshwari Electricity Supply Corporation Limited,
(Wholly owned Government of Karnataka undertaking)
A Company Registered under the provisions of the
Indian Companies Act,1956 having its Registered Office
at CA-29, Vijaynagar 2nd Stage, Hinkal,
Mysore -570 001.
(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,
Bengaluru-560 001.

... RESPONDENTS

(Represented by its Managing Director)

(Respondent No.1 represented by Sri Shahabaaz Husain,
Advocate for Precinct Legal & Respondent No.2
represented by Sri Murugesh V Charati Advocate)

ORDERS

1. This petition filed by the Petitioner under Section 86 (1) (f) of the Electricity Act, 2003, praying for the following reliefs to:

- a) Declare that the delay in commissioning the Solar Power Project at Gokak Taluk was due to reasons outside the control of the Petitioners and therefore, amount to Force Majeure as defined under Article 14 of the PPA;
- b) Condone the delay of 5 (Five) days in commissioning the Solar Power Project at Gokak Taluk caused to Force Majeure event affecting the Petitioner;
- c) Grant extension of the Schedule Commissioning Date under the PPA in accordance with Article 5.7 of the PPA; and
- d) Pass such other order(s) including an order as to costs, to meet the ends of justice.

2. The brief facts set out in this petition are as under:

- a) The Petitioner Company, Izra Solar Energy Private Limited, is a Special Purpose Vehicle (SPV) of ReNew Solar Power Private Limited, a Solar PV Power Project Developer with extensive experience in developing and operating renewable power projects throughout India. The Petitioner Company is a generator as defined under the provisions of the Electricity Act, 2003.
- b) The 2nd Respondent vide its Request for Proposals (RfP) dated 07.12.2017, invited proposals for establishing, operating and maintaining Solar PV Power Plants in Karnataka. The project was to be implemented in 43 Taluks. ReNew Solar Power Private Limited emerged as successful bidder in 8

Taluks in Karnataka to establish 20 MW (AC) capacity of Solar PV Ground Mount Projects in each of the 8 Taluks including Gokak Taluk. The Gokak Project was awarded to ReNew Solar Power Private Limited by the 2nd Respondent through a letter of award and allotment (Annexure-A) dated 08.02.2018. As per the terms of allotment letter, ReNew Solar Power Private Limited, was required to enter into a Power Purchase Agreement (PPA) with 1st Respondent through a SPV within 30 days of the letter of award. The present petition pertains to the 20 MW capacity Solar Power Plant at Gokak Taluk in Belgaum District, in which ReNew Solar Power Private Limited emerged as the successful bidder and is executing the same through its SPV i.e., the Petitioner.

c) ReNew Solar Power Private Limited notified the Petitioner as the SPV vide its letter dated 16.03.2018 (Annexure-B), which shall undertake the performance of the obligations under letter of award dated 08.02.2018. Pursuant to the allotment letter the Petitioner entered into a PPA (Annexure-C) dated 24.03.2018 with the 1st Respondent. The PPA was for a period of 25 years at the Tariff of Rs.3.24 per unit. The Scheduled Commercial Operation date under the PPA was 18 months from the effective date. The effective date of the PPA was 04.05.2018 i.e., the date on which KERC has approved PPA as per Annexure-D.

d) Under Article 5 of the PPA, the Petitioner unless affected by the Force Majeure events was required to commence supply of power by Scheduled Commission dated 03.11.2019 within a period of 18 months

from the effective date. The PPA provided for downward revision of Tariff and liquidated damages in the event of delay in commissioning the project for reasons other than Force majeure events as provided under the PPA.

e) There was incessant rainfall in the Northern Region of Karnataka during the monsoon season as well as post monsoon of 2019. Especially during the month of July 2019 and between 01.08.2019 to 09.08.2019. There was incessant rain in the North Region of Karnataka due to which many areas in the Belgaum District including Gokak Taluk were flooded. The Government of Karnataka vide Government Order No. RD 87 TNR 2019, Bengaluru (Annexure-E) issued on 10.08.2019, declared 80 Taluks in 19 Districts in the State of Karnataka as flood affected areas between 01.08.2019 and 09.08.2019. Many areas in Belgaum District including Gokak Taluk were notified as a flood affected areas.

f) The project site of the Petitioner is located in Gokak Taluk. Due to the heavy rainfall beginning from 10.07.2019 the project site was submerged under water. Thereby, the Petitioner could not carry out construction work on the site due to incessant rain and flooding until the Petitioner carried out dewatering and road strengthening to restore the road and the project site to a fit state for recommencing construction work on the site. The Petitioner could not undertake any construction or other activity for a period of 30 days as a result of the excessive rain and the flooding. The Petitioner was prevented from undertaking any work from 05.07.2019 till

22.07.2019, and 30.07.2019 to 13.08.2019. The Petitioner after taking active mitigating steps to continue the work invoked the Force Majeure Clause under the PPA. The Petitioner could not undertake any work from 05.08.2019 due to which the Petitioner invoked the Force Majeure Clause by sending a Force Majeure notice on 12.08.2019 within 7 days of the complete stoppage of work. Moreover, the project site was not accessible by road as the access roads to the project site was also sub-merged under the water due to floods. The Petitioner has taken steps to mitigate the damage and the delays by actively resorting to dewatering and road strengthening. The photographs (Annexure-F) of the project site and flooded areas around the site are produced.

g) The Petitioner informed the 1st Respondent about heavy rainfall and consequent flood at the project site vide letter (Annexure-G) dated 12.08.2019. Thereby he has complied the Article 14 of the PPA with the requirement of sending a notice within 7 days from the occurrence of the Force Majeure Event. In response, the Respondent No.1 vide its mail (Annexure-H) dated 20.08.2019 addressed to the Petitioner, sought a report from competent Authority of the Revenue Department regarding the rain damage in the project areas and also the google coordinates of the affected area.

h) The Petitioner vide its letter (Annexure-J) dated 12.09.2019 provided a copy of the report issued by Tehsildar Gokak Taluk specifying the details of incessant rain from 05.07.2019 to 22.07.2019 and 30.07.2019 to 13.08.2019.

The Petitioner provided data reports from Indian Meteorological Department which specifically stated that Belgaum region in North interior Karnataka had received "Excess" rainfall for the period between from 01.06.2019 till 09.09.2019. The Petitioner could not transport the required heavy materials, such as Modules, MMS materials, cables, Transformer, E-house and switchyard related materials to the project site due to the primary access to the project site being inaccessible. Before the heavy rainfall affected the project execution the Petitioner had completed bush cleaning and constructed an office setup, 50% of the boundary wall and civil works for electrical equipment foundation work initiated. There was no other point of access through which the materials could be safely transported to the project site. The Petitioner also provided google coordinates of the project site as sought by the 1st Respondent.

- i) The Petitioner was shocked and surprised to receive a letter (Annexure-K) dated 16.09.2019 from the 1st Respondent stating that the material provided by the Petitioner does not show that the damage had occurred in the project site/area. The photographs provided by the Petitioner showing actual condition of the Project Site were sought to be discredited on a frivolous ground of not having the date on the print. Similarly, the report from the Competent Authority about the damage caused due to heavy rain in Gokak Taluk was sought to be discredited on the ground that it does not specifically mentioned the project site. The 1st Respondent did not make any site visit and has sought to discredit the bona-fide notice

sent under Article 14 of the PPA without any application of mind. The details of the excessive rainfall and the floods was widely known, reported, and acknowledged in official reports and newspapers through the state of Karnataka.

- j) The 1st Respondent's letter dated 16.09.2019, was misconceived. The report from the Competent Authority about the quantum of rainfall in Gokak Taluk was branded unreliable on the ground that it does not specifically mention the Project Site. The Petitioner, during the time of a flood or otherwise, cannot request the Competent Authority to make a special visit to its site to ascertain the nature of the project site. In fact, the 1st Respondent has failed to make a site visit and has resorted to mechanically discrediting the Petitioner's bona-fide contentions. The Respondent No. 1 in its letter dated 16.09.2019 (Annexure-K) has not denied that the entire region was flooded due to excessive rainfall.
- k) The Petitioner despite the difficulty in carrying out the work at the project site issued advanced preliminary written Commissioning Notice (Annexure-L) dated 24.09.2019 to the 1st Respondent as required under Article 8 of the PPA. The Petitioner in the said notice undertook to make all endeavors to commission the project by 25.10.2019.
- l) The Petitioner was facing difficulty after the effect of the floods in completing the work at the project site. The access roads and a bridge leading to the Project site were completely submerged, severely damaged and inaccessible for carrying construction material to the project site. The

issue of accessibility to the project site also affected the logistics arrangement of workmen at the project site. In these circumstances, the Petitioner vide its letter (Annexure-M) dated 21.10.2019 sought extension of the SCOD by 60 days i.e., from 03.11.2019 till 02.01.2020 due to Force Majeure event which was completely beyond the Petitioner's control. The reasons for delay were (a) extremely adverse weather conditions; (b) floods; and (c) damage to access roads due to which construction material could not be transported. The Petitioner has provided (a) photographs of the project site and the flood affected area around the project site; (b) reported by Tahsildar, Gokak taluk, Gokak reporting damage due to heavy rain; and (c) IMD reports showing excess rainfall in north interior part of Karnataka during the months of June to August. The 1st Respondent did not respond to the Petitioner's letter dated 21.10.2019 (Annexure-M) seeking extension of Scheduled Commercial Operation Date.

m) The Petitioner had sought an extension of 60 days since he was prevented from carrying out any work for a period of 30 days and efforts had to be made to bring the project site to a condition where work could be re-commenced. The Petitioner despite these difficulties made all efforts to complete the work and commission the project as soon as possible. The Petitioner commissioned the project (Annexure-N) on 08.11.2019 as reflected in the minutes of meeting. Thereafter, on 21.11.2019 Hubli Electricity Supply Company issued Commissioning Certificate to the

Petitioner (Annexure-P). As such there was a delay of about 5 days in commissioning the project as the SCOD of the project was 03.11.2019 and the project was commissioned on 08.11.2019.

n) The Petitioner has sent a Force Majeure Cessation Notice (Annexure-Q) dated 18.12.2019 as required under Article 14.5.2 of the PPA. This notice set out the dates on which the Force Majeure Event ceased. The dates set out were 14.08.2019, 12.10.2019 and 29.10.2019. The Force Majeure Cessation Notice also set out the steps taken by the Petitioner to mitigate the effects of the Force Majeure events. The delay is due to Force Majeure conditions, which have been brought to the notice of Respondent No.1. As per Article 5.7.1 of the PPA, in case of delay in commissioning of the Solar Project due to Force Majeure Event affecting the Developer, the Developer shall commission the project and thereafter seek approval for condonation of delay before this Commission by filing a petition under following grounds:

- (i) The Project site of the Petitioner is in Gokak Taluk which was severely affected due to excessive rainfall resulting in floods during monsoon season and unseasonal heavy rainfall thereafter. The heavy rainfall, and the floods caused widespread damage to govt. and public property in Gokak Taluk including affecting access to the Project Site and water logging in the Project Site.
- (ii) The roads and bridges leading to the Project site were severely damaged and were inoperable between July and August and

intermittently in September and October due to which the Petitioner faced logistical issues and could not transport construction or other material to the Project Site. The Petitioner could not undertake any construction activity for a period of 60 days due to the excessive rainfall, water logging and flooding which comes under within the definition of Force Majeure under Article 14 of PPA, since these factors are completely outside the control of the Petitioner. The Petitioner has also taken steps to mitigate the effects of the Force Majeure Events.

(iii) The Petitioner has duly complied with the process prescribed in Article 14.5.1 of the PPA and had notified the Respondent No.1 about occurrence of the Force Majeure event along with supported documents within time. The Government of Karnataka has acknowledged that there was heavy rainfall and floods from 01.08.2019 to 09.08.2019. The Petitioner has communicated the occurrence of the Force Majeure event for the first time on 12.8.2019, which is within the 7 days' period provided for under the PPA.

(iv) The existence of Force Majeure events has also been acknowledged by the Government of Karnataka through the various reports from the Competent Authority, Revenue

Department regarding the damage caused as a result of the excessive rainfall in the region.

- (v) The Petitioner despite the obstacles faced due to force majeure event, demonstrated utmost commitment and professionalism and completed the project with a minor delay of 5 days. Even though the Petitioner could not undertake any construction activity for a period of 60 days and took considerable time to bring the project site back to a conditions in which work could be continued.
- (vi) The Petitioner has taken active steps to dewater the site and strengthen the road leading to the project site which were severely affected by the torrential rains and flooding in the region. The Petitioner could commission the project with a minor delay of 5 days due to the steps taken to mitigate the effects of the Force Majeure Events.
- (vii) The intention behind providing exemption from liability for Force Majeure events is to ensure that the Developer has the benefit of the complete 18 months from the effective date, for developing the project in accordance with the terms of PPA, and the Petitioner in the present instance was prevented from working on the project site for a period of about 60 days but has managed to commission the Project with a minor delay of eight days, and is hence entitled to receive the benefit of the

Force Majeure provision in the PPA. In view of the above the Petitioner prays to allow the Petition as prayed for in the interest of justice and equity.

3. Upon notice, the Respondents appeared through their Counsel and filed statement of objections separately.
4. The 1st Respondent in his objections statement has submitted that it is true to say as stated in the Petition, that the Petitioner has entered into PPA with the 1st Respondent on 24.03.2018. As per PPA the Petitioner is under an obligation to commission the project within 18 months from the effective date. As per letter dated 04.05.2018 written by the Commission (Annexure-D to the petition) to the Respondent/HESCOM, the approval to PPA was accorded on 04.05.2018, wherefore, the SCOD of the project was 18 months from 04.05.2018 i.e., 03.11.2019, but the Petitioner was not able to commission the project within 18 months on the grounds of Force Majeure. In this regard the Petitioner has written a letter dated 12.08.2019 to the 1st Respondent as required under PPA. In response to the Petitioner's letter dated 12.08.2019, the Respondent issued a letter dated 19.08.2019, requesting the Petitioner to send a report of the Revenue Department regarding the damage caused by the rains to the project area. Further the Petitioner was also requested to provide the Google coordinates of the affected area at the earliest. On 12.09.2019 the Petitioner sent a report of the Revenue Department to the Respondent which stated that the rainfall commenced on 01.07.2019 to and lasted until 31.08.2019. The Petitioner requested for additional 30 days to

commission the project on account of relentless rains from 01.07.2019. But the Respondent issued a letter dated 16.09.2019 to the Petitioner denying such extension of time request on the grounds that: (a) The photographs enclosed were not dated; (b) the google co-ordinates were not specified to ensure that damage has been occurred in the project area itself; (c) the news article did not mention the actual location of the project site; and (d) there was no record from authorized Competent Authority to indicate that damage has occurred in the project area.

5. On 24.09.2019, the Petitioner wrote to the Respondent stating that the project would be commissioned within 25.10.2019. However, upon realizing that the project could not be completed within the stipulated time, the Petitioner sent another letter seeking for an extension of time of 30 days by providing the same documents. The Respondent had already rejected the request made earlier and as such saw no merit in considering the same documents again.
6. Further it is stated that, on 21.10.2019, the Petitioner sent another letter to the Respondent No.1, communicating their failure to commission the project on account of incessant rainfall. The Petitioner had further attached photographs and news report allegedly conveying the impact of such rainfall. The Petitioner once again requested for extension of 60 days to commission the project despite all its promises in the letter dated 24.09.2019. The Petitioner has thereafter sent a Force Majeure cessation notice dated 18.12.2019, the project was commissioned only on 08.11.2019. The Petitioner in its cessation notice stated that effect of Force Majeure ceased from 16.08.2019 and

31.10.2019. However, the Petitioner has sent the notice of cessation only on 18.12.2019 after a delay of about one and half months.

7. It is pertinent to note that the Petitioner states that the rainfall commenced on 14.08.2019 in its cessation notice (Annexure-Q of the Petition). Further in its letter dated 12.09.2019 the Petitioner claims that the rainfall began on 05.07.2019. However, the Government of Karnataka's order dated 10.08.2019 explicitly states that the heavy rainfall commenced only on 01.08.2019 and ceased on 09.08.2019. There is a stark contradiction in the statements of the Petitioner throughout the Petition. Such contrary statements of the Petitioner indicate lack of credibility of the Petition. Now he has approached the Commission for condonation of delay of 5 days in commissioning the project.
8. The Petitioner has averred that the SCOD could not be achieved on account of incessant rainfall in the Northern Region of Karnataka and at the project site at Gokak Taluk during the months of July 2019 to October 2019. The Government of Karnataka vide Government Order dated 10.08.2019 declared Gokak Taluk as a flood affected area among 80 other Taluks in Karnataka. The Petitioner in its letter dated 12.09.2019 (Annexure-J to the Petition) has stated that the report of the Revenue Department states that heavy rainfall started on 1st of July 2019. Wherefore, it is clear that the Petitioner had knowledge of such rainfall and floods from July 2019.
9. The Respondent No.1 has received a notice dated 12.08.2019 from the Petitioner stating that the rainfall under flooding has caused a massive impact on the project site, barring all the access points to the said site and thus

hindering the labour intensive activities at the project site. The Petitioner in the said notice has claimed this to be a Force majeure notice as per Article 14 of PPA. But this contention is vehemently opposed by the Respondent No.1 because as per Article 14.5 of PPA the notice has to be sent within 7 days from the date on which the affected party reasonably knew or should reasonably have known of the commencement of the event of Force Majeure. The Petitioner had knowledge about the alleged floods in July 2019, but has delayed by 1 month 12 days in issuing the Force Majeure Notice to the Respondent. Thereby, on this ground also the request of the Petitioner cannot be accepted on the ground that the notice being an incomplete one.

10. The Petitioner had annexed photographs of the site along with a news report dated 08.08.2019. But he failed to adduce any concrete or detailed explanation in furtherance of such notice. He ought to have produced a report issued by Competent Authority regarding the impact of the alleged floods. Moreover, the photographs produced by the Petitioner consisted of no relevant details about the date, Google co-ordinates of the project site. Thereby, no inference could be drawn from the photographs about the rainfall impacting the project site. The contention taken by the Petitioner that requirements for issuing Force Majeure Notice as per Article 14.5 and 14.5.2 of PPA are not binding and are merely of a suggestive nature is highly misleading and false in toto. It is common knowledge that every clause of the contract is binding and mandatory in nature. The Petitioner cannot unilaterally decide to waive the requirement of Force Majeure Notice.

11. The Respondent vehemently objects to the Petitioner's claim that Article 14.5.1 and 14.5.2 need not be interpreted strictly. The fact that the PPA in Article 14.5.2 subjects any reliefs under the agreement to the Force majeure Notice clearly establishes the importance of such Force Majeure notice. The PPA explicitly provides for notice as a precondition to any relief under the Force majeure clause. This contention of the Petitioner is hit by the Doctrine of Approbate and Reprobate. The Hon'ble Supreme Court in Shyam Telelink Limited Vs. Union of India in 2010 (10) SCC 165 stated that a person cannot accept and reject the same instrument.

12. The Petitioner entered into the PPA with full knowledge that the project site was prone to incessant rainfall and floods. The Petitioner had taken such risks with complete knowledge of the weather conditions at Gokak Taluk, Belgaum District. In the year 2020, Belgaum was identified as region highly vulnerable to floods by the Government of Karnataka, which fact was known to the Petitioner before entering into the PPA. Under these facts and circumstances of the case that the Force Majeure clause cannot be invoked if the Petitioner possessed knowledge regarding the weather condition of the project site. The rainfall at Belgaum was not an unprecedented situation and it is only just and reasonable that the Petitioner should have taken due care in commissioning the project by assessing all the probable risks associated with commissioning the project. The Petitioner had knowingly undertaken the risk of establishing a project in an area prone to flooding. In M/s Alopi Parshad & Sons Limited Vs. Union of India, the Hon'ble Supreme

Court of India, has held that the parties' obligations under the contract cannot be excused especially if the event allegedly barring them from performing any obligation under the contract could be anticipated.

13. The Petitioner had averred that 5 days' delay was on account of flooding at the project site, however, he has not produced any proofs showcasing the refusal of labourers or transporters of construction materials from delivering the construction materials. Moreover, he has not produced any proof to indicate that the delay has not been caused on account of its own negligence in applying to various approvals with the Government Authorities. Under these circumstances the 1st Respondent prays to dismiss the petition in its entirety in the interest of justice and equity.
14. The 2nd Respondent has filed objections to the Petition stating that, at the outset the Petitioner is not entitled for any of the reliefs claimed as the Petitioner was aware of the stipulated time for the commencement of the project. Even otherwise the petition is liable to be dismissed against the 2nd Respondent since there is no prayer against him.
15. The 2nd Respondent KREDL invited the proposals for selection of bidders for undertaking development of Solar PV ground mount power plants in Karnataka to be implement through private sectors participation. Further stated that request for proposal for the development of 860 MW Solar Power projects to be implemented in 43 Taluks in the State of Karnataka was invited vide notification dated 07.12.2017. The RfP specifies the technical, commercial terms and the conditions for selection of the bidders.

The obligation on the part of the bidders and the successful developers is also mentioned. After conducting the bid process, this Respondent KREDL issued a letter of allotment to the successful bidders for implementation of 860 MW capacity solar power projects. The 2nd Respondent has issued letter of allotment dated 08.02.2018 in favour of M/s ReNew Solar Power Private Limited for commissioning of solar power plant of 20 MW (AC) in Gokak Taluk, Belgaum District. The Petitioner is SPV to M/s. ReNew Solar Power Private Limited. Pursuant to the issuance of letter of allotment from the 2nd Respondent, the Petitioner had to execute PPA with CESC as such PPA was executed with the 1st Respondent on 24.03.2018 which is approved by KERC on 04.05.2018.

16. As per Article 4.2 of PPA, the selected bidder is required to achieve financial closure and furnish the documentary evidence as per Schedule-I A in the case of solar PV project and documentary evidence for the required land for project development as per the details set out in Appendix-I Annex-II of PPA. As per Article 8.5 of the PPA the developer shall commission the project within 18 months from the effective date in the present case the scheduled commissioning date was 03.11.2019 and the project was commissioned on 08.11.2019. it is relevant to state that the procurement of the land and seeking appropriate approval was to be done by the Petitioner only. It was not the obligation on the part of the 2nd Respondent.

17. The Petitioner is not entitled to the extension of time to commission the project for not complying with the time lines for conditions precedent and

commissioning of the project as mentioned in the PPA. The Petitioner is required to pay damages for such delay as per the Articles 5.8 of the PPA. Thereby the Petitioner is liable to pay damages stipulated in the PPA. As per PPA terms and conditions the developer has not achieved commissioning of the project within SCOD. The PPA does not make a distinction between marginal and other delay. It only contemplates revision of tariff in the event of delay along with liquidated damages. Admittedly the Petitioner has delayed the execution of the project for reasons which do not fall under the Force Majeure events so far as CESC is concerned. Hence liquidated damages and applicable tariff are as per PPA terms and conditions.

18. This Respondent is not a necessary party to this petition, the other Respondents have to counter the averments made in the petition by the Petitioner. Hence, he prays to dismiss the petition against 2nd Respondent in the interest of justice and equity.

19. The Petitioner has filed rejoinder to the statements of objection separately filed by the Respondents reiterating the contents of the Petition, and stated that despite of all the difficulties the Petitioner showed utmost commitment and professionalism and commissioned the project with a minor delay. Under these circumstances, the Petitioner prays to allow the Petition as prayed for in the interest of justice and equity.

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

21. At this stage, the below mentioned Issues arise for our consideration.

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?

Issue No. 2: For what relief the Petitioner is entitled to?

Issue No. 3: What Order?

22. 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?

a) The Learned Counsel for the Petitioner has submitted that, the Petitioner is a SPV of ReNew Solar Power Private Limited, a Solar PV Power Project Developer. The Gokak project awarded to ReNew Solar Power Private Limited by 2nd Respondent KREDL. As per the terms of the allotment letter issued by the 2nd Respondent, the ReNew Solar Power Private Limited was required to enter into a Power Purchase Agreement with Respondent No.1 through its SPV that is the Petitioner within 30 days from the date of Letter of Award (Annexure-A). M/s ReNew Solar Power Private Limited vide letter dated 16.03.2018 nominated the Petitioner i.e., IZRA Solar Energy Limited as the entity to undertake the performance of the Obligations under allotment letter. Accordingly, PPA (Annexure-C) was entered between the Petitioner and the 1st Respondent on 24.03.2018, the effective date of the PPA was 04.05.2018 i.e., the date on which KERC approved the PPA. The SCOD under PPA was 18 months from the effective date. Under Article 5 of PPA, unless affected by Force Majeure events the Petitioner was required to

commence supply of power by scheduled commission dated 03.11.2019 i.e., within period of 18 months from the effective date.

b) The Petitioner submitted that the project of the Petitioner was delayed only by 5 days due to Force Majeure events such as excessive rainfall and flooding of many Taluks in North Karnataka Region including the project site at Gokak Taluk. The excessive rainfall led to flooding and damaged roads and a bridge leading to the project site making it impossible to access the project site for transport of equipment and other construction material.

c) As per PPA (Annexure C) Article 14.3 Force majeure reads as follows: -

“14.3 Force Majeure

14.3.1 A 'Force Majeure' means any event or circumstance or combination of events 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.*

14.5 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.

14.6 Duty of Perform and Duty to Mitigate

14.6.1 To the extent not prevented by a Force Majeure Event pursuant to Article 14.3, the Affected Party shall continue to perform its obligations pursuant to this Agreement. The Affected Party shall use its reasonable efforts to mitigate the effect of any Force Majeure Event as soon as practicable.

d) Further he submitted that all these aspects were brought to the notice of the 1st Respondent through Force Majeure notices dates 12.08.2019, 12.09.2019, 21.10.2019 and 18.12.2019. He also provided photographs of the project site, Google co-ordinates of the project site, report from Competent Authorities to demonstrate the extent of excessive rainfall over a period of 3 months and report of Competent Authority on the damage caused to the public roads and bridges leading to the project work. Further he also provided reports of Competent Authority detailing the work undertaken for repairing damaged roads and bridges. The

Government of Karnataka in Order No.RD 87 TNR 2019 dated 10.08.2019 notified 8 Taluks in Belgaum District including Gokak Taluk.

- e) The Learned Counsel for the Petitioner has submitted that, as per Article 14.3.1 of PPA a Force Majeure event has to satisfy 2 conditions. The 1st condition is that it has to be an event which is outside the control of the parties and the 2nd condition is that it has to affect the obligations of a party under the PPA. Heavy and incessant rains are squarely covered under Article 14.3.1. The timelines specified in the PPA for notification of a Force Majeure event, commence from the date on which the performance of the Petitioner's obligations were affected due to the Force Majeure event. The Petitioner has clearly stated that the excessive rains continued for a period of 3 months and resulted in flooding of the entire North Interior Karnataka Region, access roads and bridges leading to the project site and the Petitioner's project site as well. As per Article 14.5.1 of PPA the party affected by the Force Majeure event is required to give notice of occurrence of such a Force Majeure event within 7 days of the event i.e., outside the control of the party to the PPA affecting the obligations of the party to the PPA. The Petitioner has complained with this provision by issuing Force Majeure notices dated 12.08.2019, 12.09.2019, 21.10.2019, and Force Majeure cessation notice dated 18.12.2019 to the 1st Respondent.
- f) The Learned Counsel for the Petitioner has submitted that, as per Article 14 of PPA which recognizes extreme weather condition as an

independent Force Majeure Event regardless of whether there were floods on the project site or not. But in the present case on hand the Petitioner was affected by both excessive rainfall and floods. The Petitioner could not have reasonably foreseen or avoided, either the excessive rainfall for a period of 3 months and the resulting floods. Therefore, the excessive rainfall and the floods both constitute the Force Majeure event as contemplated in Article 14 of PPA. Further he submitted that despite the obstacles faced due to Force Majeure event which took place over a period of 3 months i.e., monsoon season, the Petitioner demonstrated utmost commitment and professionalism and completed the project with a minor delay of 5 days.

- g) The Learned Counsel for the Petitioner has submitted that, the 1st Respondent herein never contested the occurrence of excess rainfall and flood at Gokak Taluk and on the other hand he did not conduct site inspection or independently verify the Petitioner's claims before dismissing contention of the Petitioner and directing it to complete the project as per SCOD. Further he submitted that for the first time the 1st Respondent has taken contention that the photographs of the flood affected project site which are submitted by the Petitioner were without time stamp and therefore cannot be relied upon. But the 1st Respondent neither sought for photographs with time stamp during the correspondence between the Petitioner and himself during August to October 2019 nor there is such requirement mentioned in the PPA.

Further he submitted the 1st Respondent, doubted the validity of the Google co-ordinates of the Petitioner's project site but he failed to deny the validity of the Google co-ordinates in his letter dated 16.09.2019 and also in their statement of objections. Thereby, he cannot take up this ground to reject the prayer of the Petitioner. Further he submitted that despite of all these difficulties faced by the Petitioner he has shown utmost commitment and professionalism and commissioned the project with a minor delay of 5 days. The Petitioner could not undertake any construction activity for a period of 60 days and took considerable time to bring the project site back to a condition in which work could be continued. The Petitioner has done its level best to mitigate the effects of the Force Majeure events. As per the Article 5.7.2 and 5.7.3 of the PPA expressly provides for granting of extension of schedule commissioning date for Force Majeure events.

"5.7. Extensions of Time

5.7.2 After hearing the Parties and considering the merits of the grounds urged, KERC may condone the delay in commissioning of the Project on any of the grounds stated by the Developer.

5.7.3 In case KERC condones the delay, the scheduled commissioning date and the expiry date shall be deemed to be extended by the period for which the delay is condoned by KERC."

However, the Petitioner has commissioned the project with a minor delay of 5 days, hence he is entitled to receive extension of the schedule commissioning date in accordance with Article 5.7.1 of the PPA. With all these the Learned Counsel prays to allow the Petition as

prayed for in the interest of justice and equity. In support of his arguments, he has relied upon the below citations: -

1. *Nabha Power Limited Vs Punjab State Power Corporation Limited (PSPCL) and Anr. (2018) 11 SCC 508*
2. *Union of India Vs M/s D.N. Revri and Co. and Ors. (1976) 4 SCC 147.*
3. *Dhanrajamal Gobindram Vs Shamji Kalidas and Co. (1961) 3 SCR 1020: AIR 1961 SC 1285.*
4. *Satya jain (through LRs) Vs Anis Ahmed Rushdie (through LRs) (2013) 8 SCC 131*
5. *State of Gujrat Vs Vijay Mistry Construction & Anr. 2013 SCC OnLineGuj 1088.*

Basing on these decisions the Learned Counsel for the Petitioner prayed to allow the Petition as prayed for in the interest of justice and equity.

- h) During the course of arguments, the Learned Counsel of 1st Respondent has submitted that, it is the claim of the Petitioner that there was incessant rain during the monsoon season of 2019, specifically during the period between 01.08.2019 to 09.08.2019 and that time due to the rain many areas in the Belgaum District were allegedly flooded including Gokak Taluk. It is the claim of the Petitioner that the Force Majeure event took place on 01.08.2019. The site of the project is prone to rainfall, the lack of a time stamp, creates a reasonable doubt that the damage shown could be a result of the Petitioner's negligence in taking necessary steps and that the Petitioner is using the sudden floods in the area as veil to conceal its negligence thereby, the photographs produced by the Petitioner cannot be accepted.

- i) Apart from the photographs the Petitioner has produced rainfall reports, reports from the meteorological society and newspaper articles, these documents are not in dispute, but it is pertinent to note that the area of the site has not been specified in the documents provided by the Petitioner. The PPA clearly establishes that it is the duty of the Petitioner to provide documents to show that the Force Majeure event has occurred in the site location, but he has not produced any such documents.
- j) The Petitioner has also contended that the bridge has collapsed due to the rainfall and has provided photographs and report from the relevant authorities but he has failed to show how the damage to the bridge has directly impacted on all routes to the project site. The Petitioner cannot claim that due to the damage to the bridge/road no work was capable of being done. Further, the Petitioner has also failed to provide the accurate Google co-ordinates to show that the project site was affected. Thereby, he has failed to discharge his duties as per PPA.
- k) According to the Petitioner the Government of Karnataka vide Government Order dated 10.08.2019 declared Gokak Taluk as a flood affected area among 80 other Taluks in Karnataka. In this order the Taluks mentioned have been affected by flood from 01.08.2019 to 09.08.2019. Further the Petitioner has stated that Gokak Taluk faced heavy rainfall including floods during July 2019 to October 2019. Therefore, it is clear that the Petitioner had knowledge of such rainfall

and floods from July 2019. The 1st Respondent has received notice from the Petitioner on 12.08.2019 stating that the rainfall and flooding had caused a massive impact on the project site, and the petitioner has claimed in the said notice to be a Force Majeure notice as per Article 14 of PPA. Therefore, the Petitioner possessed knowledge about the alleged floods in July 2019, therefore, he has delayed 1 month 12 days in issuing the Force Majeure notice to the Respondent.

- l) The Respondent vehemently objects the Petitioner's claim that Article 14.5.1 and 14.5.2 need not be interpreted strictly. The PPA explicitly provides for notice as precondition to any relief under Force Majeure clause thereby, here the doctrine of Approbate and Reprobate comes into play as the Petitioner is seeking for a relief under the Force Majeure clause. In this regard the Learned counsel for the 1st Respondent relied upon a Supreme Court decision in *Shyam Telelink Ltd V/s Union of India* reported in SCC 2010 (10) page 165 stated that a person cannot accept and reject the same instrument. Further he relied upon another decision reported in *M/s. Alopi Parshad & Sons Limited Vs. Union of India* in which the Supreme Court held that the parties' obligations under the contract cannot be excused, especially if the event allegedly barring them from performing any obligation under the contract could be anticipated.
- m) The Petitioner has stated that there is only 5 days' delay on account of flooding at the project area. But the Petitioner has not produced any

proof showing the refusal of laborers or transporters of construction material from delivering the construction materials, moreover the Petitioner has not produced any proof to indicate that the delay has not been caused on account of its negligence in applying to various approvals with the Government Authorities. Therefore, the Learned Counsel for the 1st Respondent has prayed for dismissal of the Petition in its entirety in the interest of justice and equity.

- n) The Learned Counsel for the 2nd Respondent has not filed written submissions before this Commission but he has orally submitted his arguments in the same lines of its objection statement and finally submitted for refusal of the petition.
- o) We have gone through the relevant materials on this issue placed before us. It is not in dispute that the ReNew Solar Power Private Limited was successful bidder as its bid had been accepted by the 2nd Respondent (KREDL) for Gokak project and subsequently issued allotment letter and letter of award, Petitioner executed Power Purchase Agreement who is the SPV of ReNew Solar Power Private Limited.
- p) The contention taken by the 1st Respondent is that one of the most important conditions of the Force Majeure clause is to issue notice of Force Majeure event. Article 14 of the PPA clearly states that if a party wishes to claim protection under Force Majeure Event then such party must notify the other party within 7 days after the date on which such

party knew or should reasonably have known of commencement of the event of Force Majeure. Though the Petitioner in its notice for occurrence of Force Majeure event under Article 14 of the PPA (Annexure-J) dated 12.09.2019 has stated that the report of the Revenue Department states that heavy rainfall started on 01.07.2019 but issued notice with a delay of 1 month 12 days. Therefore, he has not followed the Article 14.5.1, thereby he is not entitled for any relief.

- q) On perusal of the materials placed by the Petitioner, the Petitioner himself and the 1st Respondent have entered into PPA on 24.03.2018 which is approved by the KERC on 04.05.2018, thereby the effective date is 04.05.2018. The Petitioner ought to have commissioned the project on or before 03.11.2019 i.e., within 18 months from effective date of that PPA. The defence taken by the Petitioner is that due to heavy rainfall and flooding there was delay in SCOD. The rainy season in Karnataka is from the month of June to September. According to Government Order (Annexure-E) issued by Government of Karnataka dated 10.08.2019 in the monsoon season of 2019 from 1st of August to 9th August due to heavy rainfall in Karnataka State and due to flow of water from Krishna Dam of Maharashtra State the flood caused in various parts of Karnataka and caused heavy damage to the public properties crop and life. Thereby the Executive Committee meeting held on 09.08.2019 under the Chairmanship of the Chief Secretary to the Government, has identified 80 Taluks of 17 Districts in the State of

Karnataka as flood affected areas out of which Gokak Taluk is also one of them. This document is also not disputed or controverted by the 1st Respondent. The Petitioner has produced copy of the photographs (Annexure-F) of the project site and flooded areas around the site. Annexure-G is the copy of the letter written by the Petitioner to the 2nd Respondent with a request to treat the letter as a formal notice for occurrence of Force Majeure event at project site which may lead to delay in commissioning of the project. Further it is stated that the Petitioner will continue to take mitigation measures to minimize the effect of the Force Majeure Event and also keep 2nd Respondent apprised of the progress. The Petitioner has produced copy of the letter (Annexure-J) dated 12.09.2019 issued to the 1st Respondent in response to the Respondent's E-mail (Annexure-H), by providing details of the Force Majeure event. Further a copy of the Google Map image of the damaged site is produced by the Petitioner which shows Google Map image of the project site.

- r) All these photographs and other materials establish that there was heavy rainfall and flooding in the project site area, the access roads and bridges were sub-merged under water and that the Petitioner was prevented from carrying out the construction work during the period i.e., July 2019 to October 2019. Further the Petitioner has produced copy of some portion of the News Paper i.e., New Indian Express dated 08.08.2019 in which it is stated as "Karnataka: Pounded by rain, swept

away by flood – Many towns and villages in North Karnataka marooned; rain batters several other parts of State; major road links cut off”. Further stated about the situation “that was worsening and so far, claimed 7 lives in Belagavi District alone even as the army is battling to rescue stranded people in many places. The water level has increased and over flowing Krishna River drastically on Wednesday with the release of more than 6 Lakhs cusecs of water from Maharashtra's reservoirs, making it difficult to evacuate the affected people. The army has kept its helicopters ready for rescue operations, but they could not take off due to inclement weather. As per the Karnataka State Natural disaster monitoring centre forecast Belagavi District is most likely to receive very heavy rain at isolated places over the next one or two days. Further it is stated that the infrastructure in Belagavi has collapsed. As per initial estimates, the heavy rain and flooding has damaged 1,048 Km of road, 140 bridges and check dams, 6 Government buildings and 2751 electricity polls”. Further the Petitioner has produced photographs in Annexure-M showing severe water logging in the areas around project site. He has produced meteorological report showing Daily Mean Rainfall – North Interior Karnataka – North East Monsoon 2019 upto 21.10.2019 and he has produced Minutes of meeting (Annexure-N) held between representatives of KPTCL and HESCOM with Petitioner on 110 KV reference at 110 KV Yadawad KPTCL Sub-station. This document further speaks that the 20 MW Solar Power plant was commissioned on 08.11.2019 and 1.39 MW of peak power generation was witnessed on

09.11.2019. All these documents and materials are not controverted by the 1st Respondent. Though the Petitioner has written letters to the 1st Respondent by providing details of the Force Majeure event on 12.08.2019 (Annexure-G); 12.09.2019 (Annexure-J); dated 21.10.2019 (Annexure-M); but the 1st Respondent has not chosen to visit or inspect the project site at any relevant point of time. Though the Petitioner has noticed the date in Annexure-J that the heavy rainfall started on 1st July 2019 but he could issue notice only when on the date on which Petitioner should reasonably have known of the commencement of the event of Force Majeure so that he could not complete the commissioning of project work within SCOD. Therefore, Force Majeure notice dated 12.08.2019 issued to Respondent No.1 is in accordance with the Article 14.5.1 of PPA.

- s) It is the contention of the 1st Respondent that, as per Article 14.6.1 the Force Majeure clause cannot be invoked if the Petitioner possessed knowledge regarding the weather of the project site. The rainfall at Belgaum was not an unprecedented situation and it is only just and reasonable that the Petitioner should have taken due care in commissioning the project by ascertaining all the probable risks associated with commissioning the project. And the Petitioner would have used its reasonable efforts to mitigate the effect of any Force Majeure event as soon as practicable. But this contention of the 1st Respondent cannot be accepted as because the news published in

newspaper i.e., New India Express dated 08.08.2019, due to flood fury many roads across North Karnataka are closed to traffic, the Belagavi-Goa State Highway was closed while NH-4A also remains closed due to submersion of Ghataprabha bridge in Khanapur. The bridges on Belagavi outskirts over flowing, the local administration has appealed to people to avoid driving on bridges. People atop houses wait to be rescued, water gushed into several Bungalows/houses, most of the low-lying localities, creating panic, several bridges and roads were under water even the district administration has announced holiday for schools and colleges. The Authorities concerned were struggling to evacuate people affected by floods. The Petitioner has taken steps to mitigate the effect of the Force Majeure event as required under PPA, has carried out dewatering, taken steps to restore connectivity to the project site, without which the project could not have completed with a short delay of 5 days. Apart from that the contents of report published in newspaper as referred supra is not disputed by the 1st Respondent and he has not furnished any material to show that the contention taken by the Petitioner is false. Under these circumstances we hold that the arguments addressed by the 1st Respondent in this regard holds no water.

- t) Another contention taken by the 1st Respondent is that the photographs (Annexure-F) produced by the Petitioner consisted of no relevant details about the date or location. The coverage of effect of floods in

local newspapers and project site photographs taken out from Google produced by the Petitioner not specifying the location therefore, these materials cannot be taken into consideration to grant relief to the Petitioner as prayed for. But this contention cannot be accepted as because it is not in dispute that ReNew Solar Power Private Limited emerged as successful bidder in 8 Taluks in Karnataka to establish 20 MW (AC) capacity of Solar PV ground mount projects in each of the 8 Taluks including Gokak Taluk which is known as Gokak Project, the present Petitioner is a SPV to the ReNew Solar Power Private Limited and has taken up commissioning of the project work, the project site of the Petitioner is located in Gokak Taluk and there is a road connecting from Gokak to project site submerged under water, there was no alternative access point to the project site. When such is the situation, the contention taken by the 1st Respondent, that the coverage of effect of floods in local newspapers and project site photographs taken out from Google produced by the Petitioner not specifying the location before this Commission cannot be accepted.

u) We have perused the citations referred by Learned Counsel for the Petitioner, he relied upon the decision reported in Nabha Power Limited Vs Punjab State Power Corporation Limited (PSPCL) and Another (2018) 11 SCC 508 in which the Hon'ble Supreme Court has observed that as:

“BOWEN, L.J. - ... Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or an express warranty, really is in all cases founded on the presumed intention of the parties, and

upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe [that] if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men; not to impose on one side all the perils of the transaction, or to emancipate one side all the failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chance."

Further he relied upon another decision reported in Satya jain (through LR) Vs. Anis Ahmed Rushdie (through LR) (2013) 9 SCC 131:

1. *"The principle of business efficacy is normally invoked to read a term in an agreement or contract so as to achieve the result or the consequence intended by the parties acting as prudent businessmen. Business efficacy means the power to produce intended results. The classic test of business efficacy was proposed by Bowen, L.J. in Moorcock. This test requires that a term can only be implied if it is necessary to give business efficacy to the contract to avoid such a failure of consideration that the parties cannot as reasonable businessmen have intended. But only the most limited term should then be implied --the bare minimum to achieve this goal. If the contract makes business sense without the term, the court will not imply the same. The following passage from the opinion of Bowen, L.J., in Moorcock sums up the position:*

"... In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are businessmen; not to impose on one side

all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances."

In order to verify the veracity of facts mentioned in Force Majeure notices issued by the Petitioner, the Respondent could have taken a pragmatic view in this matter, before rejecting the extension of time sought for by the Petitioner. In the instant case, the Petitioner could not able to commission the project within SCOD due to heavy rainfall and flooding which led to break down of a bridge connecting to project site. Moreover, in spite of issuing notices to the Respondent, the Respondent had not chosen to visit the project site. To this effect the Article 14.3.1 of PPA is extracted here once against for further clarity in the matter.

"14.3 Force Majeure

14.3.1 A 'Force Majeure' means any event or circumstance or combination of events 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.*

By plain reading of Article 14.3.1 of PPA, one can understand that a Force Majeure means any event and circumstance or combination of event which wholly or partly prevents and unavoidably delays on affected party in the performance of its obligation under this agreement is covered under Force Majeure Event. Therefore, the claim made by the

Petitioner cannot be discarded, hence in our opinion these citations are applicable to the case of the Petitioner.

v) During the course of arguments, the Learned Counsel for the 1st Respondent has relied upon the decision reported in M/s. Alopi Parshad & Sons Limited Vs. the Union of India and submitted that the Hon'ble Supreme Court held in this decision that the parties' obligations under the contract cannot be excused especially if the event allegedly barring them from performing any obligation under the contract could be anticipated. This decision is not helpful to the case of the 1st Respondent, as because in the said decision the Hon'ble Supreme Court of India, has referred Section 56 of the Indian Contract Act, 1872 which provides a contract to do an Act which, after the contract is made, becomes impossible, or by reason of some event which the promiser could not prevent or unlawful becomes void when the act becomes impossible or unlawful. In the present case on hand though the monsoon season in State of Karnataka particularly in Gokak Taluk, Belgaum District was from the month of June to September 2019, but it cannot be said that the Petitioner could anticipate due to incessant rainfall and the road leading to project site from Gokak gets submerged under water resulting movement of vehicle will be restricted. Therefore, this decision is not helpful to the 1st Respondent.

w)The Learned Counsel for the 1st Respondent has relied upon another decision reported in Shyam Telelink Limited Vs. Union of India and

submitted a person cannot accept and reject the same instrument. The Petitioner herein is seeking a relief under the Force Majeure clause but refusing to comply with the requirements of such clause. We have gone through the decision in our opinion it is not helpful to the case of the Respondent No.1 as because the Petitioner never refused to comply with the requirements of clauses mentioned in PPA. Soon after coming to the notice of the Petitioner that the bridge which was leading to his project site area got damaged and also Government Order is issued as per Annexure-E dated 10.08.2019, immediately he has written a letter to the 1st Respondent on 12.08.2019 narrating all inconveniences in commissioning the project within SCOD as agreed in PPA and also prayed for extension of time. Even thereafter, he has issued notices to the 1st Respondent on 12.09.2019, 21.10.2019 and also Force Majeure cessation notice dated 18.12.2019. Thereby he has complied the Article 14.5.1 and 14.5.2 of PPA. The occurrence of the events as stated supra was not in the hands of the Petitioner and it is all beyond the control of the Petitioner.

x) The Learned Counsel for the 1st Respondent, has also relied upon decision of Hon'ble Appellate Tribunal for Electricity in Uttar Haryana Bijili Vitran Nigam Limited and Another Vs. CERC and others in Appeal No. 100/2014 and submitted that the burden of proof is on the person asserting a fact. In the present case on hand the burden lies on the Petitioner to prove that he could not commissioned the project within

SCOD due to Force Majeure event as alleged in the Petition. But he failed in producing materials in proof of it. Therefore, the contention of the Respondent that, the Petitioner is not entitled for any relief. As already discussed above the Petitioner had written a letter on 12.08.2019 to the 1st Respondent soon after coming to know the Government Order (Annexure-E) dated 10.08.2019, that the project work could not be continued due to heavy rainfall and also damage caused to the bridge which leads to project site area. Further it is evident from the other materials placed by the Petitioner that such occurrence or circumstances were not within the control of the Petitioner. Thereby, we are of the opinion that the decision relied by the Learned Counsel for 1st Respondent is not helpful.

y) Considering all these facts and circumstances of the case and the materials placed before this Commission, the Commission has verified all the relevant documents which related to the Force Majeure Event as stated supra and also the contents made therein has been taken into consideration along with the oral arguments submitted by the Petitioner and arrived that there is a prima facie, the Petitioner was prevented by doing his project work in spite of best efforts to mitigate the circumstances and to overcome the burden on both sides and commissioned the project only with 5 days delay. On the other hand, the Respondent has agreed that the notices issued by the Petitioner is not in contravention with the provision of Force Majeure Clause. Except that

they have not taken any steps to visit the site or produced any documentary evidence to show that they have come to the conclusion that the Petitioner would have commissioned the project within SCOD in terms of the PPA. Having noticed the difficulty faced by the Petitioner and also action taken to mitigate Force Majeure Events for completion of the project, mere averments made in objection statements of the Respondents do not hold any water. Hence, we are of the opinion that Petitioner has proved that there was Force Majeure Event as defined under Article 14 of PPA.

z) Accordingly, the Issue No.1 is answered in affirmative.

23. Issue No. 2: For what relief the Petitioner is entitled to?

As the Issue No.1 is held in affirmative, we are of the opinion that the Petitioner has proved that delay in commissioning the Solar Power Project at Gokak Taluk was due to Force Majeure event as defined under Article 14 of PPA, therefore, the Petitioner is entitled for condonation of delay of 5 days in commissioning the Solar Power Project as prayed in the Petition. Hence this issue is answered accordingly.

24. Issue No. 3: What Order?

In view of the foregoing reasons, we pass the following:

ORDER

- a) The petition is allowed.
- b) The delay of 5 days is condoned in commissioning of Solar Power Project in Gokak Taluk, Belgaum District. Consequently, the SCOD is extended till 08.11.2019.

sd/-

(SHAMBHU DAYAL MEENA)
Chairman

sd/-

(H.M. MANJUNATHA)
Member

sd/-

(M.D. RAVI)
Member