



नई दिल्ली
NEW DELHI

याचिका संख्या /Petition No.: 27/MP/2018

कोरम/Coram:

श्री पी. के. पुजारी, अध्यक्ष/Shri P. K. Pujari, Chairperson
डॉ. एम. के. अय्यर, सदस्य/ Dr. M.K. Iyer, Member
श्री आई. एस. झा, सदस्य/ Sh. I.S. Jha, Member

आदेश दिनांक /Date of Order: 8th of November, 2019

IN THE MATTER OF:

Petition under Section 79 (1) (f) read with Section 79 (1) (b) of the Electricity Act, 2003 in relation to the disputes arising out of the Power Purchase Agreement dated 03.08.2016 between Krishna Wind farms Developers Private Limited and Solar Energy Corporation of India Limited.

AND IN THE MATTER OF:

M/s Krishna Windfarms Developers Pvt. Ltd.
B-1402, 14th Floor, Plot No.211,
Dalamal Tower, Free Press Journal Marg,
Nariman Point,
Mumbai 400 021

...Petitioners

Versus

1. Solar Energy Corporation of India Ltd.

1st Floor, A-Wing, D-3,
District Centre, Saket
New Delhi 110017

2. Maharashtra State Electricity Distribution Company Ltd.
"Prakashgad", Plot No. G-9, Bandra (E),
Mumbai- 400051

...Respondents

Parties Present: Shri Madhavan Srivatsava, Advocate, KWFDPL
Shri Puneet Singh Bindra, Advocate, KWFDPL
Shri Sanampreet Singh, Advocate, KWFDPL
Ms. Ankita Bafna, Advocate, KWFDPL
Shri M.G. Ramachandran, Senior Advocate, SECI
Ms. Poorva Saigal, Advocate, SECI
Shri Shubham Arya, Advocate, SECI
Ms. Tanya Sareen, Advocate, SECI

आदेश/ ORDER

The Petitioner, Krishna Wind Farm Developers Pvt Ltd. is a generating company and is a subsidiary of MITCON group. It has set up a Solar Photo Voltaic (PV) project of 10 MW capacity in the State of Maharashtra (hereinafter referred to as "the Project"). The Petitioner has filed petition under Section 79 (1) (f) read with Section 79 (1) (b) of the Electricity Act, 2003 in relation to the disputes arising out of the Power Purchase Agreement (hereinafter referred to as "PPA") dated 03.08.2016.

2. The Respondent No.1, Solar Energy Corporation of India Limited (hereinafter referred to as "SECI") is a Government of India enterprise under the administrative control of the Ministry of New and Renewable Energy (hereinafter referred to as "MNRE"). SECI has been designated as the nodal agency for implementation of MNRE schemes for developing grid connected solar power capacity through Viability Gap Funding (VGF) mode in India.
3. The Respondent No. 2 is Maharashtra State Electricity Distribution Company Ltd, (hereinafter referred to as "MSEDCL") is a distribution utility created with the principal object of engaging in the business of distribution and supply of electricity across all districts in the State of Maharashtra.

4. The Petitioner has made the following prayers through amended petition:

- a) *Declare that the Project has been commissioned on 11.08.2017, which is prior to the Scheduled Commercial Operation Date (being within 13 months from the date of signing of the PPA 03.08.2016) as per Article 5.1.5 of the PPA & MNRE approval letter dated 04.08.2015;*
- b) *Declare that the delay in completion of the Conditions Subsequent under Article 3.1 of PPA was on account of force majeure events and delay attributable to Government, its agencies and instrumentalities;*
- c) *Declare that letter of invocation of Bank Guarantee dated 29.09.2017 issued by the Respondent as illegal and non-est in terms of the PPA;*
- d) *Direct the Respondent to return Rs. 3 Crores along with interest (1.25% per month as per PPA clause 10.3.3) as retained by it from deducting the equivalent amount from the invoices raised by the Petitioner from supply month of September, 2017 to January, 2018;*
- e) *Declare that the downward revision of tariff by 1.5 paise by the Respondent is violative of the terms and conditions of the PPA, hence unenforceable;*
- f) *Declare that the Petitioner is not liable to make any payment towards extension of timeline as approved by the Respondent from time to time;*
- g) *Direct the Respondent to refund Rs. 56,00,000/- paid by the Petitioner to the Respondent towards extension of timeline from 31.01.2017 to 27.03.2017, along with interest;*
- h) *Restrain the Respondent from terminating the PPA or removing the project from the list of selected projects or further downward revision in tariff; and*
- i) *Pass such other and further order or orders as the Commission deems appropriate under the facts and circumstances of the present case.*

BACKGROUND

5. In August 2015, the Government of India issued Jawaharlal Nehru National Solar Mission (hereinafter referred to as “JNNSM”) Guidelines for setting up of 2000 MW Grid-connected Solar PV Power Project under Batch-III, State specific VGF Scheme.

6. On 27.08.2015, SECI invited proposals from various Solar Power Developers by Request for Selection (hereinafter referred to as “RfS”) Document for development of cumulative capacity of 500 MW in the State of Maharashtra on the basis of Build-Own-Operate through e-reverse auction process.
7. On 10.03.2016, SECI issued Letter of Intent (hereinafter referred to as “LoI”) in favour of the Petitioner for development of solar power project, generation and sale of solar power. In terms of the RfS and the LoI, the Petitioner was required to execute the PPA after fulfilment of the prescribed pre-conditions within a period of one month from the date of issue of LoI i.e. by 10.04.2016.
8. On 08.04.2016, SECI informed the Petitioner about signing the PPA by 10.04.2016.
9. On 05.07.2016, SECI again reminded the Petitioner regarding execution of the PPA.
10. On 08.07.2016, the Petitioner furnished two irrevocable and unconditional Performance Bank Guarantees (hereinafter referred to as “PBG”) for a total amount of Rs.3 Crores.
11. On 03.08.2016, the Petitioner executed a PPA with SECI.
12. On 31.10.2016, SECI informed the Maharashtra State Electricity Transmission Corporation Limited (hereinafter referred to as “MSETCL”) that the Petitioner has sought to change the sub-station from 132/33kV substation, Kaij, District Beed to 132/33kV substation at Kharda, District Ahmednagar to which the Project was to be connected.
13. On 08.11.2016, Government of India declared demonetisation of certain denominations of Indian Currency notes.
14. On 23.11.2016, the Petitioner informed SECI about the delay caused in the execution of the project for the reasons beyond the control of the Petitioner including demonetisation and on account of the execution of PSA by SECI.

15. On 29.11.2016, the Petitioner and other Solar Power Developers (hereinafter referred to as “SPD”) facing difficulties in completion of the project made representations to the MNRE, and the MNRE agreed in the meeting that “*time till 31st January, 2017, without penalty, for complying with the requirements of Financial Closure, may be allowed. However, it shall have no effect to the Effective Date of Financial Closure or the Scheduled Commissioning Date as per the respective PPAs*”.
16. On 30.11.2016, SECI informed the Petitioner and other SPDs about extending the date of financial closure from 10.11.2016 to 31.01.2017 (i.e. period of 82 days) for completion of financial closure for the project without levy of any penalty on the Petitioner.
17. On 02.02.2017, SECI informed the Petitioner that as it had failed to fulfil the conditions, the Petitioner needs to seek an appropriate time extension after depositing an amount of Rs. 10,000 per MW per day, as per the provisions of PPA.
18. On 07.02.2017, the Petitioner sought further extension of time i.e. till 20.02.2017 from SECI for fulfilling the conditions subsequent.
19. On 13.02.2017, a letter was sent by *Jamkhed Taluka Tahsildar* in reference to the compliances for land clearance, informing that the reasons for the delay were not attributable to the petitioner.
20. On 28.02.2017, the Petitioner informed SECI the reasons for delay in compliances relating to land requirements and financial closure.
21. On 04.05.2017, the Petitioner informed SECI about the progress that was made in execution of the project and requesting for an extension upto 30.06.2017 to commission its project without levying liquidated damages for such delay.
22. On 12.05.2017, SECI informed the Petitioner about extending the time limit for completion of the financial closure by the Petitioner till 27.03.2017 on account of receiving the sum of Rs. 56,00,000 payable in terms of Article 3.2.2 of the PPA.
23. On 11.08.2017, the Project was actually commissioned by the Petitioner.

24. On 20.09.2017, the Petitioner informed the Government of Maharashtra that the project has been delayed due to force majeure events and requested the Government of Maharashtra to advise SECI to not take any punitive actions as stipulated in the PPA for delay in fulfilment of the obligations stated in the PPA.
25. On 29.09.2017, SECI invoked two PBGs of the Petitioner totalling an amount of Rs. 3 Crores (Rs 2.4 Crores + Rs 0.60 Crore) vide letter dated 29.09.2017.
26. On 05.10.2017, SECI informed the Petitioner that the tariff to be paid for the energy generated and supplied by the Petitioner has been reduced by 1.5 Paise as per the provisions of the RfS/PPA.
27. On 06.10.2017, the Petitioner requested the Bank Manager of Bank of India to hold the encashment because the invocation was illegal.
28. On 07.10.2017, the Petitioners approached the Hon'ble Delhi High Court under Section 9 of the Arbitration and Conciliation Act, 1996 for restraining the Respondent from invoking the said Bank Guarantee. The Hon'ble High Court, vide its order dated 07.10.2017, ordered to maintain the status quo and further restrained the banks to make payments to SECI with respect to encashing the said Bank Guarantees. The Petitioner informed the Branch Manager of Bank of India vide email to hold the said guarantee amount in compliance to the order of the Hon'ble Delhi High Court.
29. On 11.10.2017, Bank of India liquidated the FD of the Petitioner to an equivalent amount as that of the PBG (three Crores) and remitted the amount to SECI.
30. On 07.02.2018, the Petitioner filed the petition with the Commission.
31. On 21.02.2018, by way of an interim arrangement, a consent order was passed by the Hon'ble High Court of Delhi and agreed upon by the parties whereby the bank guarantees involved in the petition filed before it shall be released back in the favour of the Petitioner and not be encashed by SECI.

32. On 25.07.2018, the Petitioner sought leave of this Commission to amend the pleadings and the same was duly allowed vide order of this Commission. The amendment was primarily done to insert the specific prayer for refund of the amount of Rs. 3 crores along with interest (1.25% per month as per PPA clause 10.3.3) by SECI to the Petitioner.
33. On 28.08.2018, amended petition was filed by the Petitioner which was allowed and the respondent filed its reply to the amended petition as well.

SUBMISSIONS OF THE PETITIONER IN THE PLEADINGS AND HEARINGS

A) The Petitioner commissioned the Project on 11.08.2017 i.e. well within the prescribed period of 13 months from the date of signing of the PPA (being 03.08.2016)

34. The Petitioner has submitted that it signed the PPA with SECI on 03.08.2016 and in accordance with Clause 5.1.5, the PPA was to be effective from the date of signing of the same. The time period specified for the Financial Closure and SCoD was 7 months and 13 months respectively from the date of signing of the PPA.
35. The Petitioner has submitted that, it is a well settled principle that the doctrine of ‘*Contra Proferentum*’ finds application where there are ambiguous terms in the contract. A perusal of Article 2.1, prescribes that the Agreement shall come into effect from 10.04.2016 and is referred to as the Effective Date. On the contrary, PPA has been signed on 03.08.2016 and as per Article 5.1.5 of the PPA, the SCoD shall be within 13 months from the date of signing the agreement and therefore in terms of the PPA, the SCoD shall be 03.09.2017 only. Reading Article 5.1.5 of the PPA harmoniously with Article 4.5.1, it is established that there shall be newly extended dates for SCoD and the dates prescribed under Article 2.1 are subject to change. Further, there can be no Estoppel against the contract itself. Any ambiguity with respect to any correspondence between the Petitioner and the Respondent has to be read in respect of the PPA. The Petitioner has placed its reliance on the judgment of *Bank of India v K. Mohandas and Ors.* 2009 (5) SCC 313 for explaining the doctrine of “*Contra Proferentum*”.
36. The Petitioner has submitted that the revised Effective Date is 03.08.2016 and the newly determined SCoD is 03.09.2017. The project was commissioned on 11.08.2017, which is

almost a month prior to the actual SCoD. Therefore, the commissioning has been done by the Petitioner within the prescribed time and therefore SECI cannot levy any amount towards liquidated damages by invocation of bank guarantee and withholding the same.

37. The Petitioner has submitted that due to the aforesaid possibility of two possible versions of the SCoD, an interpretation which is more favourable to the Petitioner must be adopted since the Petitioner does not have any opportunity to negotiate the terms of the Contract which has been pre-drafted by SECI itself.

B) SECI has not suffered any loss on account of the alleged delay of CoD and therefore liquidated damages cannot be levied.

38. The Petitioner has submitted that it is a well settled principle of law of damages that no party to a contract can seek compensation by way of damages from the other contracting party where the party seeking compensation fails to plead and establish loss being suffered by it. Admittedly, SECI has failed to plead and/or prove any legal injury/loss being caused to it and hence, cannot be permitted to unjustly enrich itself by invoking the Liquidating Damages clause under the PPA. SECI has not filed any counter claim nor sought any relief of set off or for forfeiture of the amounts from any court. It is only after such claims (assuming they existed) were adjudicated by a Court, could SECI withhold any amounts. The amount encashed by SECI has been kept by it under the guise of invoking the Liquidating Damages clause and has not transferred the same to MSEDCL/DISCOM especially when admittedly SECI has not suffered any loss. It is an admitted case that SECI has neither received any claim from DISCOM nor is there any averment in the reply filed by SECI that the DISCOM is affected due to the said delay in commissioning the project by the Petitioner.

39. The Petitioner has submitted that the DISCOM was impleaded as a Co-respondent (at the instance of SECI) which failed to appear and/or file its response to the present petition despite several opportunities. In view of the aforesaid, it would not be wrong to suggest that DISCOM has no reasons to oppose the present petition, as the DISCOM has not suffered any loss on account of delay in commissioning of the project. The DISCOM has neither raised any claims against SECI under the Power Sale Agreement nor does it have any claims against the present Petitioner. The Petitioner has placed its reliance upon the judgment of the

Commission in the case of *M/s Godawari Green Energy Limited (GGEL) v NTPC Vidyut Vyapar Nigam Limited* decided on 11.10.2017, the judgement of the Hon'ble Supreme Court of India in *Kailash Nath Associates v Delhi Development Authority and Another* (2015) 4 SCC 136.

C) Grant of extension in Financial Closure without levy of penalty entitles the Petitioner for an equitable extension in SCoD

40. The Petitioner has submitted that in accordance with the terms of the PPA, the Financial Closure was to be completed within a period of 7 months from the date of signing of the PPA. However, on account of various reasons beyond the control of the petitioner including the event of demonetisation which was duly acknowledged as an event akin to *force majeure*, SECI granted extension of time in completion of financial closure without levy of penalty upto 31.01.2017 and further granted extension in Financial Closure upto 27.03.2017 on payment of penalty of INR 56,00,000/- under protest. Immediately on receipt of the communication granting extension of financial closure with levy of penalty (without extending the SCoD), the Petitioner objected to the same by intimating SECI that in terms of the PPA, the Petitioner was entitled to an equitable extension in the SCoD besides extension of Financial Closure. The contents of the letter being contrary to the specific provisions of the PPA are wrong and void and cannot be given effect to, and the same would amount to a unilateral amendment to the PPA at the sole instance of SECI to the grave prejudice to the petitioner. Further, assuming whilst denying that the extension is attributable to the Petitioners, there will still be a mandatory extension of 56 days because the said extension has been given by levy of Rs. 56 lacs. Such a retrospective extension granted is in the nature of ratification on the part of SECI. Also, the sum paid by the petitioner is nothing but a coerced payment being fraudulently levied since the reasons for the said extensions are attributable to the respondent itself. The contents of the Minutes of Meeting dated 29.11.2016 as well as the contents of the letter granting extension without levy of penalty is an admission and acknowledgment on part of SECI to consider *demonetisation* within one of the three Articles of 3.1 of PPA and the same is treated as an event deserving extension in financial closure and SECI cannot be permitted to retract from its position.

41. The Petitioner has submitted that in terms of the Article 4.5 of the PPA, SECI was empowered to grant extension only in cases contemplated under the Article. SECI by conduct, having acknowledged *demonetisation* as an event within Article 11 of PPA as akin to *Force Majeure* and SECI having granted extension without levy of penalty is estopped from retracting from the same. In accordance with Article 3.2.5, the Petitioner is entitled to an equitable extension in the scheduled commissioning date and extension in the date of financial closure.
42. The Petitioner has submitted that assuming whilst denying the delay of 93 days in CoD is attributable to the Petitioner, since SECI has already granted an extension of 82 days in Financial Closure till 31.01.2017, SECI was under an obligation in accordance with Article 3.2.5 of PPA to provide for an equitable extension of equal number of days in commissioning for the project. Further SECI having granted another extension of 56 days with penalty and the amounts already paid by the Petitioner, there cannot be any delay in SCoD. Rather, since SECI granted extension of 138 days viz. 82 days + 56 days, and the alleged delay was only 93 days, the Petitioners are entitled to seek refund of INR 45 Lakhs out of the already deposited Rs 56 Lakhs and further return of the entire amount of Rs. 3 crores along with interest (1.25% per month as per Article 10.3.3 of the PPA) being charged as Liquidated Damages.

D) Delay in Commissioning of the Project is for the reasons attributable to SECI especially on account of delay in execution of PSA between SECI and DISCOM

43. The Petitioner has submitted that in accordance with Article 3.14.4 of the RfS, SECI was under an obligation to execute the PSA with the DISCOM back-to-back with the PPA. Since the PPA was signed on 03.08.2016, the PSA ought to have been signed and executed either before or simultaneously with the PPA, However, SECI had signed the PSA only on 04.11.2016 i.e. with a delay of almost 3 months. Hence, there was failure on part of SECI to duly sign the PSA with the concerned DISCOM. Schedule I of the PSA reads as “*List of SECI-SPD PPAs*” and further says that the list is “*to be filled after selection of Projects through the provisions of RfS...*”. Thus, it clearly shows that PPAs were to be entered with the SPDs after the execution of PSA between SECI and the Buying entity. The same is also in consonance to the MNRE Guidelines which mandates for simultaneous signing of the PSA (i.e. no later than within 30 days from PPA) is sine qua non for entering into the PPA. SECI’s

failure to undertake its obligation of entering into a PSA cannot be attributed to the Petitioner.

44. The Petitioner has submitted that SECI maintained complete silence on the delay in execution of the PSA by it and despite being under the obligation. Also, it did not even communicate and inform the Petitioners about such delay. The timely execution of the PSA as provided in the RfS would have ensured smooth co-ordination between the Developers and the relevant DISCOM. Also, from the definition of “PSA” in PPA, there seems an underlying interpretation that a PSA has already been executed.

E) Delay in commissioning of the Project was for other reasons beyond the control of the Petitioner

45. The Petitioner has submitted that due to announcement of ‘*Demonetisation*’ on 08.11.2016, there was scarcity of funds in the market. ‘*Demonetisation*’ impacted land levelling, land development activities that require daily labour to be paid in cash. In accordance with the Article 11, ‘*Demonetisation*’ falls within the ambit of *force majeure* since the Petitioner was in no control of the same and thus, financial closure could not be reached.
46. The Petitioner has submitted that in addition to the above, continuous requests were being made by the Petitioner from time to time for the extension of time for financial closure on account of various other reasons as well. On 23.11.2016, the Petitioner informed SECI that there was an inevitable delay for the reasons constituting *force majeure* within the meaning of Article 11 of PPA and the same was solely attributable to the Government and its agencies and instrumentalities including procedural delays in the implementation of the Government Resolutions in accordance with the Bombay Tenancy and Agricultural Land Act. On 28.02.2017, SECI was further informed of the delay in compliance of the land requirements and financial closure on account of the intervening election and subsequent three official holidays. The Petitioner had to complete additional obligations which were not part of PPA. However, there were mandatory requirements for implementation of the project viz. Installation of STU meter, Registration with MEDA etc. In view of the aforesaid mentioned, it is evident that the said delay was attributable to SECI and also *force majeure* and

acknowledging the same, an extension was granted by SECI without any levy of Liquidated Damages.

47. The Petitioner has submitted that SECI has admitted to grant of extension of the time in financial closure for the reasons acknowledged by itself including the event of demonetization declared by the Government of India and having acknowledged that the event of demonetization is worth grant of extension in terms of the PPA, SECI could not have granted the extension in financial closure on the condition that such extension shall not extend the date of SCoD. The extensions are governed by the agreement between the parties i.e. PPA and no party to the contract can unilaterally change the terms of the agreement. The PPA specifically provides that terms of the PPA can only be amendment if both the parties agree in writing. The Petitioner never agreed to change in terms of the PPA in writing or otherwise.
48. The Petitioner has submitted that the Commission vide its order dated 31.01.2019 impleaded Respondent No. 2 i.e. MSEDCL as a party to the present proceedings. However, MSEDCL filed a reply before this Commission in the two connected matters only on 26.04.2019. The present reply has been filed as an afterthought with an ulterior motive to delay conclusion of proceedings and to frustrate the Petitioner and deprive it of all its legitimate dues as claimed under the Petition. The DISCOM has not sought any relief for condonation of delay nor sought any prayers for opposing the present petition.
49. The Petitioner has further submitted as under:
 - a. Even assuming for a moment that the reply filed by the DISCOM was to be taken on record and considered, the contents of the reply do not oppose any of the reliefs sought by the Petitioner in the present petition. DISCOM only seeks certain indemnification from SECI and those cannot be adjudicated in the present petition.
 - b. The failure of the DISCOM to produce any evidence of raising a claim at any time before the invocation of the Bank Guarantee by SECI makes the invocation of the Bank Guarantee bad and illegal and, therefore, the equivalent amounts withheld by SECI itself

is not permissible and ought to be immediately refunded to the Petitioner along with interest.

- c. The DISCOM has purportedly attempted to show that it has a claim against SECI in terms of the PSA. However a careful reading of the PSA would show that there is no clause in the PSA which prescribes a deadline for commencement of supply of power and therefore, there is no provision of claim for delay even in terms of the PSA. Even assuming whilst denying there is a delay attributable to SECI because of the delay caused by the Petitioner, the DISCOM has not annexed a single piece of evidence to show that it has incurred any amount or losses due to such delays.
- d. The DISCOM has merely made averments on shortfall. However, it has failed to annex any evidence in support of such averments.
- e. Even assuming whilst denying that DISCOM had failed to fulfil its committed energy supply on account of the Petitioner, the Petitioner cannot be solely held liable for the same and given that the Petitioner had only set up the Power plant for 10 MW capacity out of the total commissioned capacity of 500 MW, the share of the Petitioner to compensate the DISCOM would be miniscule amounting to a few lacs of rupees.
- f. The REC rate for the FY 2017-18 was Rs. 1,000/- and has been wrongly assumed and mentioned as Rs. 1,900/- by MSEDCL.

SUBMISSION OF RESPONDENT NO. 1 IN THE PLEADINGS AND HEARINGS

50. The Respondent No.1 (SECI) submitted that the Effective Date of the PPA as defined in Article 1 of the PPA read with Article 2.1 of the PPA was 10.04.2016 and the SCoD was 10.05.2017. The actual date of commissioning being 11.08.2017, there was a delay of 93 days. SECI has made submissions in regard to claims of the Petitioner which are as under:

- A) ***The Petitioner's contention that it commissioned the Project on 11.08.2017 i.e. well within the prescribed period of 13 months from the date of signing of the PPA being 03.08.2016. Selective reliance is being placed on Article 5.1.5 of the PPA and letter dated 04.08.2015 of***

MNRE.

51. The Respondent No.1 has submitted that the Petitioner has contended that for the purpose of SCoD, 13 months are to be counted from the date of the signing of the PPA i.e. 03.08.2016 and not from 10.04.2016 (Effective Date as defined in Article 2.1 of the PPA) is an after-thought and is contrary to records.
52. The Respondent No.1 has submitted that the PPA was to be executed by the Petitioner after fulfilling the prescribed pre-conditions within the stipulated period of one month from the date of execution of Letter of Intent (10.03.2016) i.e. by 10.04.2016, as per the provisions of the Guidelines, the RfS and the Letter of Intent. Further, even before the actual signing of the PPA on 03.08.2016, SECI had clarified the matter and Petitioner had accepted that the period of 13 month will be counted from 10.04.2016. SECI had written letters dated 08.04.2016 and 05.07.2016 to the Petitioner reminding it with regard to signing of the PPA. The Petitioner did not at the relevant time dispute the above issue. The parties acknowledged that the execution of the PPA got delayed solely at the instance of the Petitioner. Therefore, the term Effective Date as defined in Article 2.1 of the PPA was 10.04.2016 notwithstanding that the date of execution of the PPA was on 03.08.2016. In terms of Article 3.1 of the PPA, the conditions subsequent specified therein were required to be fulfilled within a period of 7 months from the Effective Date i.e. by 10.11.2016. The thirteen months period for achieving the commissioning was, therefore, to be computed with reference to 10.04.2016 and not from the date of the execution of the PPA and hence, the SCoD as per the PPA is 10.05.2017. The reliance placed by the Petitioner on MNRE Letter dated 04.08.2015 to contend that the Petitioner had duly commissioned the project before the prescribed date of commissioning is misplaced. In this regard, the relevant part of the Letter dated 04.08.2015 reads that “*The Solar PV Projects shall be installed and commissioned within 13 months from the date of signing of their Power Purchase Agreements (PPAs) subject to provisions of the PPAs and guidelines of the scheme.*”
53. The Respondent No.1 has submitted that reliance placed by the Petitioner on the definition of Effective Date in the RfS to contend that it means the date of execution of the PPA i.e. 03.08.2016 is misconceived. The said definition of Effective Date was provided in RfS with reference to the stipulation contained in other provisions of RfS namely Article 3.11 and

Article 3.14 wherein it has been categorically stated that the PPA is to be executed within one month from the date of the issue of Letter of Intent. It is settled principle of interpretation and construction of a document that a document of contract has to be read as a whole for arriving at the true scope and meaning of the provisions contained in it. It is not permissible for the Petitioner to selectively refer to a few provisions of the document in isolation and in ignorance of the other provisions contained in the document. The Respondent No.1 has placed its reliance on the judgment given by the Hon'ble Supreme Court of India in the case title *Bihar State Electricity Board v. Green Rubber Industries (1990) 1 SCC 731*.

54. The Respondent No.1 has submitted that the Petitioner is attempting to take advantage of a general stipulation contained in Article 5.1.5 taken from the Standard Document. It is not permissible for the Petitioner to selectively refer to some provisions of the contract in isolation and in ignorance of other provisions contained in the contractual document. Further, the Petitioner has written the letter dated 07.02.2017 to SECI through which the Petitioner had unconditionally represented that the delay in fulfilment of the conditions subsequent, for which extension was being sought by the Petitioner, will not in any manner affect the commissioning date as mentioned in the PPA i.e. 10.05.2017. Vide another letter dated 20.09.2017, the Petitioner had itself acknowledged to the Government of Maharashtra that the commercial operation date was 10.06.2017 which is contrary to the plea being pleaded in the instant Petition that the scheduled commercial operation date should be considered as 03.09.2017. Therefore, the Petitioner was well aware of the timelines mentioned in the PPA including that the SCoD as per PPA was 10.05.2017 and the consequences of non-compliance thereof.
55. The Respondent No.1 has submitted that the delay in execution of the PPA being solely attributable to the Petitioner, it is not permissible for the Petitioner to now contend that Effective Date of the PPA should be considered as 03.08.2016 or otherwise. By doing so, the Petitioner is seeking to take advantage of its own wrong which the Hon'ble Supreme Court has repeatedly held to be not permissible. The Respondent No.1 has placed its reliance on various judgments of the Hon'ble Supreme Court in the case of *Kushweshwar Prasad Singh –v- State of Bihar and Others (2007) 11 SCC 447; Union of India –v- Major General Madan Lal Yadav 1996 (4) SCC 127; B.M. Malani –v- Commissioner of Income Tax and Anr. 2008 (10) SCC 617; Nirmala Anand –v- Advent Corporation (P) Ltd (2002) 5 SCC 481; Ashok*

Kapil –v- Sana Ullah (1996) 6 SCC 342;Eureka Forbes–v- Allahabad Bank (2010) 6 SCC 193;Panchanan Dhara –v- Monmatha Nath Maity (Dead) through LRs. (2006) 5 SCC 340.

56. The Respondent No.1 has submitted that in the facts and circumstances mentioned hereinabove, the Petitioner is not entitled to any indulgence from this Commission for deciding the Effective Date of the PPA being either 03.08.2016 or any other date except 10.04.2016 as incorporated in Article 2.1 of the PPA.

B) The Petitioner’s contention that extension of time granted on account of demonetisation should extend to the extension of time for commissioning

57. The Respondent No.1 has submitted that the Office Memorandum dated 02.12.2016 issued by the Government of India dictated that “*considering the practical problems in the short run, due to Demonetization, time till 31st January, 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 the respective PPAs*”. Accordingly, SECI had granted additional time till 31.01.2017 to the Petitioner to fulfil the conditions subsequent provided under Article 3.1 of the PPA. The letter itself specifically and unequivocally stated that the extension of time on account of Demonetisation is only for fulfilment of the conditions subsequent and not for the SCoD. The Petitioner acted upon the specific e-mail dated 12.05.2017 by which SECI had allowed extension of time upto 27.03.2017. Therefore, it is now not open to the Petitioner to contend that part of the stipulation contained in the e-mail dated 12.05.2017 is not to be made applicable while taking advantage of the extension of time for fulfilling the conditions subsequent. It is well-settled law that a document is required to be accepted as a whole and it is not open to a party to take advantage of part of the document while terming the remaining part as non-est. The Respondent No. 1 has placed its reliance upon *Para 40 of ONGC Ltd. – v- Saw Pipes Ltd. (2003) 5 SCC 705; Super Poly Fabriks Ltd. -v- CCE, Para 8 of (2008) 11 SCC 398.*

58. The Respondent No.1 has submitted that in terms of Article 3.1.1 and Article 17.3 of the PPA, SECI is entitled to waive in writing, in part or in full the fulfilment of conditions subsequent. It is therefore, open to SECI to waive only the time for fulfilling the conditions

subsequent for the specified period i.e. until 31.01.2017 and not the commissioning date or the commencement of the supply of power. It is also open to SECI to provide for a condition that the waiver shall be restricted to the time for fulfilment of the conditions subsequent and shall not be considered as waiver for the time in regard to the commissioning of the power project. It is also not necessary that if SECI waives the time for fulfilling the conditions subsequent that it should necessarily also waive the time for the SCoD. Thus, there is a legal basis for both the Government of India and SECI to have allowed a further period of time for fulfilling condition subsequent without generally extending the time for all purposes, particularly, for the commissioning of the units after the SCoD. The Respondent No.1 has placed its reliance on the following judgements : *All India Power Engineer Federation v. Sasan Power Ltd. (2017) 1 SCC 487; Talwandi Sabo Power Limited –v- Punjab State Power Corporation Limited; Sikkim Subba Associates -v- State of Sikkim, (2001) 5 SCC 629.*

59. The Respondent No.1 has submitted that in view of the above, the attempt made by the Petitioner to place its claim for extension of time for achieving the commissioning on grounds of demonetisation and the decision of SECI to extend the time for fulfilling the conditions subsequent is misconceived and is liable to be rejected.
60. ***Demonetisation is neither Force Majeure nor ‘Change in Law’***: Respondent No.1 has submitted that the PPA does not expressly provide or otherwise cover demonetisation as either Force Majeure or Change in Law within the scope of Articles 11 and Article 12 of the PPA. Article 11 of the PPA dealing with the Force Majeure is a restricted clause. In fact, Article 11.4.1 (e) expressly states that ‘insufficiency of finances or funds or the agreements becoming onerous to perform’ falls under Force Majeure exclusions. In so far as the Change in Law is concerned, the Commission in its decision dated 29.03.2019 passed in Petition No. 238/MP/2017 in the matter of *Darbhangha-Motihari Transmission Company Limited –v- Bihar State Power transmission Company Limited and Ors.* has inter-alia held as under:

“54. We are of the view that the event of ‘Demonetization’ does not fall within the definition of ‘Change in Law’ event as it does not constitute any enactment, coming into effect, adoption, promulgation, amendment, modification or repeal of any law, including rules and regulations framed pursuant to such Law” and was temporary in nature and therefore cannot be considered an event of Change in Law as per Article

12 of TSA. Hence, the claim of the petitioner on account of event of demonetization is rejected.”

61. The Respondent No.1 has submitted that demonetization neither being a Force Majeure nor a Change in Law event, there is no remedy provided under the PPA for either extension of time or otherwise a relief from the fulfilment of any condition.
62. ***Parties can mutually agree on substitution of a term of a contract:*** The Respondent No.1 has submitted that quite apart from the waiver, it is always open to the contracting parties to mutually agree on deviation from the terms of the PPA as per Section 62 of the Indian Contract Act. In terms of the communication dated 12.05.2017 from SECI which was acted upon by the Petitioner, the parties had specifically agreed that due to demonetization, the time for fulfilment of the conditions subsequent only be extended without there being any effect on the SCoD. The Petitioner is bound by the said agreement and is entitled to the benefit only to the extent provided in the said communication.
63. The Respondent No.1 has submitted that in view of the above, it is patently erroneous on the part of the Petitioner to proceed on the basis that SECI and the Government of India having waived the time limit for fulfilling the conditions subsequent by extending the date from 10.11.2016 to 31.01.2017 should automatically be taken as having waived the corresponding time for achieving the commissioning of the power plant.

C) The Petitioner’s claim of delays attributable to the Government Instrumentalities and other reasons

64. The Respondent No.1 has submitted that the Petitioner did not make any attempt to deal with the specific aspects of the alleged delay on the part of the Government Instrumentalities and other alleged Force Majeure events including as to the impact of the said delays on the execution of the power project. Articles 3 and Article 4 of the PPA provide that the SPDs shall be responsible for applying and obtaining all the consents, approvals, permissions etc. SECI has no obligation in regard to the same. In any event, there is no Force Majeure Event within the scope and meaning of Force Majeure as provided in Article 11.3 of the PPA delaying the Petitioner from implementing the projects and, therefore, the aforementioned

delays cannot be a ground for extension of time. Furthermore, in terms of Article 11.5, it was incumbent on Petitioner to issue a notice of Force Majeure as a pre-condition for claiming relief. However, no notice of Force Majeure was issued.

D) The Petitioner's contention that Liquidated Damages are not admissible without proof of actual loss is contrary to settled principles

65. The Respondent No.1 has submitted that the Petitioner has mixed up the issues on compensation payable for shortfall in generation during the operation period (which is to the benefit of the buying utility) and the liquidated damages payable for the delay in the commissioning, which is to the account of the Payment Security Mechanism Fund maintained by SECI as per the Central Government's directions contained in the Guidelines dated 04.08.2015. The PPA broadly contains three distinct and independent provisions for the monetary compensation to SECI to be paid by the Petitioner. These are as under:

- a. Compensation to be paid for the delay in the fulfilment of the Conditions Subsequent as provided in Article 3.2 of the PPA;
- b. Liquidated Damages to be paid to SECI for the delay in the commissioning of the power project as provided in Article 4.6 of the PPA. The Liquidated Damages provided in Article 4.6.1 of the PPA is a specific ascertained sum of money;
- c. After the commissioning of the power project and during the operation period, the compensation for the shortfall in the generation to be paid to buying utilities (MSEDCL) as provided in Article 4.4 of the PPA.

66. The Respondent No.1 has submitted that in the present case, there were delays on the part of the Petitioner in:

- a. fulfilling the conditions subsequent provided in Article 3 of the PPA;
- b. the obligations with respect to construction and development of the project as provided in Article 4 of the PPA;
- c. in achieving the SCoD.

67. The Respondent No.1 has submitted that in terms of Article 3.17 of RfS and Article 4.6 of the PPA dated 03.08.2016, SECI is entitled to the payment of Liquidated Damages from the

SPD for the delay in commencement of supply of power and for the delay in making the contracted capacity available for dispatch by the SCoD i.e. by 10.05.2017 (13 month from the effective date i.e. 10.04.2016). The Petitioner commissioned the project only on 11.08.2017. There was, therefore, a delay from 10.05.2017 to 11.08.2017 i.e. 93 days and the Petitioner is required to pay the Liquidated Damages to SECI for such delay in terms of Article 4.6 of the PPA. As stated hereinabove, the utilisation of the liquidated damages is for a specific public interest directed by the Government of India as a part of the applicable JNNSM Guidelines.

68. The Respondent No.1 has submitted that it has suffered a legal injury/loss entitling itself to the recovery of liquidated damages on account of non-availability of power from the SCoD till the actual Commercial Operation Date.

Settled principles with regard to liquidated damages

69. The Respondent No.1 has submitted that as per settled law, a stipulation of Liquidated Damages could either be a genuine pre-estimate of damages or by way of penalty depending on the nature of the provision. If it is a genuine pre-estimate of damages, there is no requirement to prove damage or loss. If it is a penalty, there is a requirement to establish loss for getting a reasonable compensation. Secondly, the issue whether the liquidated damages specified falls under the category of being a genuine pre-estimate of the loss that will be suffered or whether it is by way of penalty, has to be decided with reference to the time when the contract was entered into and based on circumstances then prevalent. If at the time of execution of the contract, the non-defaulting party acted in terrorem or unreasonably and imposed an exorbitant burden on the other party at the time when the contract was executed, it could be held to be a penalty. Thirdly, if the sum named as liquidated damages is not by way of penalty, there is no necessity to enquire into actual loss and the agreement reached between the parties stipulating the sum is binding and is payable. In other words, no actual loss or damages need to be established. What is required to be established is the legal injury, which is distinct from the quantum of loss to be proved. Fourthly, the onus of proving that no loss whatsoever was suffered by the non-defaulting party as a result of the breach is on the defaulting party. It is for the defaulting party who wishes to avoid payment of liquidated damages to assume the burden of establishing that no loss has been suffered whatsoever.

70. The Respondent No.1 has submitted that, when the claim for liquidated damages is in the field of regulatory regime such as Electricity Sector, the actual loss caused in monetary terms cannot be assessed and therefore it falls within the exception as provided in *Maula Bux case (1969) 2 SCC 554 [Para 6]*, *Kailash Nath –v- Delhi Development Authority (2015) 4 SCC 136 [Para 43.6]*; *BSNL case (2011) 1 SCC 394 [Para 53]*; *PTC case 2014 ELR (APTEL) 1243 [Paras 48-53]* and *Lanco case 2015 ELR (APTEL) 755 [Paras 48-55]*.
71. The Respondent No.1 has submitted that the Appellate Tribunal has already examined the issue of the liability to pay liquidated damages. The Tribunal has considered the difficulty in calculating the actual loss and held that since the compensation payable has been pre-estimated and is not penal in nature, there is no need to provide evidence of actual loss incurred. The Respondent No.1 has placed its reliance on judgment in *PTC India Limited -v- Gujarat Electricity Regulatory Commission and Anr 2014 ELR (APTEL) 1243 (Paras 43-53)* and *Lanco Kondapalli Power Ltd. -v- Andhra Pradesh Electricity Regulatory Commission 2015 ELR (APTEL) 755*.
72. The Respondent No.1 has submitted that the Hon'ble High Court of Delhi has also recognized that liquidated damages as specified in the PPA should be awarded. In *Dalmia Solar Power Ltd. –v- NTPC Vidyut Vyapar Nigam Ltd vide Order dated 14.03.2017 in OMP (COMM) 120/2017* it is held that the Liquidated Damages provided in the Agreement are payable unless the Court finds the specified compensation amount as liquidated damages in the Agreement to be unreasonable. The decision dated 14.03.2017 passed by the Hon'ble High Court of Delhi arises out of the proceedings initiated under Section 34 of the Arbitration and Conciliation Act, 1996 challenging an award. In that case, it was argued that it was incumbent on the Court to determine what reasonable compensation was. However the Hon'ble High Court held that the Petitioner therein did not adduce any evidence to show that the amount was unreasonable. The Hon'ble High Court held that the burden of proof is on the person committing the breach to show that no loss was suffered by the other party or that the amount specified was not reasonable. Further, in *Bharat Sanchar Nigam Ltd. -v- Reliance Communication Ltd. (2011) 1 SCC 394* dealing with the regulated industry, the Hon'ble Supreme Court held that liquidated damages ought not to be interfered with particularly in regulatory regime. In *ONGC –v- Saw Pipe Limited (2003) 5 SCC 705*, the Hon'ble Supreme

Court has held that if the compensation named is a genuine pre-estimate of loss, then there is no question of providing the loss. In *Construction and Design Services -v- Delhi Development Authority*, AIR 2015 SC 1282 (decided subsequent to *Kailash Nath Case*), the Hon'ble Supreme Court again considered the issue of Liquidated Damages, proof required etc. in the light of the earlier decision of the Hon'ble Supreme Court in *Oil and Natural Gas Corporation Ltd -v- Saw Pipes (2003) 5 SCC 705* and held that if the sum is named as liquidated damages then it is payable and the burden for showing that there has been no loss or injury is on the Appellant.

73. The Respondent No.1 has submitted that in view of the above, the settled law is that if the sum named as liquidated damages is not by way of penalty but is genuine pre-estimate of the loss that will be suffered, then there is no necessity to enquire into actual loss and the agreement reached between the parties stipulating the sum is binding and is payable. The agreement between the parties estimating the damage would itself be the evidence. In the present case, the liquidated damages are not a penalty but a genuine pre-estimate of damages, the same being evident from the terms of bidding documents and the PPA wherein the parties having agreed that in case of breach of the terms of the PPA on account of non- adherence to the Scheduled commissioning Date/ delay in commencement of supply of power, SECI is entitled to encash the Performance Bank Guarantee which is a pre estimate of loss. The Petitioner cannot now claim that the liquidated damage is not reasonable or genuine pre-estimate or that the Respondents are required to prove any loss.
74. The Respondent No.1 has submitted that the reliance placed by the Petitioner on the decision dated 11.10.2017 passed by this Hon'ble Commission in the matter of *M/s. Godawari Green Energy Limited -v- NTPC Vidyut Vyapar Nigam Limited* is misplaced. In the above matter, the Liquidated Damages claimed by the Respondent from the Petitioner was on account of shortfall in generation and supply of electricity. It is a well-settled principle that applicability of a decision depends upon facts of that case and a little difference in facts may lead to a different conclusion. Further, it is a settled principle that the binding effect of a decision on a case has to be considered in light of the questions which arose for consideration in that decision. (Ref: *Delhi Administration (Now NCT of Delhi) v. Manohar Lal (2002) 7 SCC 222*; *Arnit Das vs. State of Bihar (2000) 5 SCC 488*; *Govt. of Karnataka v. Gowramma, (2007) 13 SCC 482*).

E) Miscellaneous Issues

75. With regard to the issue of refund of sum of Rs. 56,00,000/-, the Respondent No.1 has submitted that the same was paid by the Petitioner to SECI in terms of Article 3.2.2 of the PPA for the extension of the date for fulfilment of Conditions Subsequent from 31.01.2017 till 27.03.2017. In this regard, e-mail dated 12.05.2017 written by SECI to the Petitioner is relevant. In the said communication it was also mentioned that the said extension for compliance of Financial Closure in terms of Article 3 of the PPA will not change the SCoD as prescribed in the PPA. Thus, in the facts and circumstances, the Petitioner is not entitled to seek refund of the above mentioned sum which has been paid in accordance with the provisions of the PPA namely Article 3.

SUBMISSION OF RESPONDENT 2 (MSEDCL)

76. The Respondent No. 2 has submitted that there was delay in commissioning of project of M/s Krishna Windfarms Developers Ltd. Presently the Petitioner has commissioned its project viz. 10 MW solar PV project on 11.08.2017.
77. The Respondent No. 2 has submitted that SECI could not supply the power as committed in PSA (due to delay in commissioning of projects by the Petitioners herein) resulting in shortfall in fulfilment of RPO obligations set by the MERC (Maharashtra Electricity Regulatory Commission). The Petitioner has commissioned the project on 11.08.2017. Thus, the commissioning of the project has got delayed by 3 months as per SCoD. The resultant delay in SCoD has adversely affected the power procurement planning of MSEDCL to meet RPO obligation as set by the MERC. MSEDCL is in shortfall of about 1476 MUs for FY 2017-18 due to delay in supply of committed energy by SECI. Hence as per the provisions of PSA, MSEDCL is liable for seeking compensation from SECI. SECI, in turn, is seeking compensation from the Petitioner whereas it is MSEDCL who suffered due to delayed commissioning / non- commissioning of such projects.
78. The Respondent No. 2 has submitted that SECI is eligible for only 0.07 paisa/ KWh trading margin and hence SECI shall also pass on other compensations (by virtue of PPA) to MSEDCL. Hence, SECI is liable to pay compensation as set out in PSA and PPA, (towards

encashment of PBGs and reduction in tariff) as the PSA and PPA is a back to back arrangement.

79. The Respondent No. 2 has submitted that the PSA and PPA are on back to back basis. The sale and delivery of power by SECI to MSEDCL is on terms and conditions contained in the PSA and are enforceable on back to back basis of the terms and conditions in the PPA. Hence, MSEDCL is also eligible for compensation as per provisions under PPA.
80. The Respondent No. 2 has submitted that as per the above provisions of PSA and PPA, the compensations payable by Respondent No. 1/SECI to Respondent No.2/MSEDCL are as under:

i) For Short supply of committed energy:

As per Clause 6.8.2 of PSA dated 04.11.2016, if for a contract year Respondent No.1/SECI has not been able to supply minimum committed energy till 10 years i.e. 861.108 MUs, then such non-compliance make Respondent No.1/SECI liable to pay compensation to Respondent No.2/MSEDCL at the rate of RECs. During the first contract year, Respondent No. 1/SECI was supposed to supply for 11 months only (considering 10.05.2017 SCD). The shortfall in minimum committed energy during contract year 2017-18, considering MUs on pro-rata basis, is calculated as under:

Contract Year	Contracted capacity	Minimum Energy Committed during Contract year (MUs) till 10 years	Minimum Committed Energy during Contract year on pro-rata (MUs)	Actual Energy Supplied during Contract year (MUs)	Short fall in Minimum Energy supplied in MUs
FY 2017-18	500 MW	861.108	766.74	414.614	352.126

The Respondent No.2/MSEDCL is in shortfall of meeting solar RPO for FY 2017-18 and have to mitigate this shortfall by way of purchase of RECs. Hence Respondent No.2/MSEDCL is eligible for compensation towards shortfall in supply of energy at the rate of REC i.e. Rs. 1900/ MWh (max. clearing price for REC purchase in exchange) which is

estimated to Rs. 66.90 Crores (for Batch-III).

ii) Encashment of Performance Bank Guarantee of SPDs:

It is to state that, as per clause 4.6.1 of PPA, Respondent No.1/SECI is liable to recover liquidated damages from SPD in terms of encashment of Performance Bank Guarantee (PBG) for delay in commencement of supply of power to Respondent No.1/SECI up to 3 (Three) months from Scheduled Commissioning Date (SCD). Accordingly, Respondent No.1/SECI is entitled to recover an estimated Rs 128.40 Crores from SPD's through encashment of PBGs for delay in commissioning of Batch-III projects. Thus, Respondent No.2/MSEDCL is also liable to get benefit of PBG amount so collected (**around 128.40 Cr**).

iii) Reduction in tariff rate of Solar projects:

As per clause 4.6.1 of PPA, if the project is delayed beyond three months, the pre-fixed tariff shall be reduced at the rate of half paisa (0.5 paisa) per kWh per day of delay for the remaining capacity of the project which is not commissioned. Accordingly, Respondent No.1/SECI should have revised the tariff for the projects delayed beyond three months of Scheduled Commissioning Date (SCD). However Respondent No.1/SECI has claimed the pre-fix tariff even for such delayed projects from Respondent No.2/MSEDCL. Hence, Respondent No.2 MSEDCL is liable to recover around INR Rs. 13.26 Cr. towards reduction of tariff rate of Solar projects by SECI.

81. The Respondent No. 2 has submitted that since MSEDCL is the buying utility and has already suffered heavy losses and therefore SECI should indemnify MSEDCL as per the provisions of the PSA and PPA as enumerated above.

ANALYSIS AND DECISION:

82. The Petition was admitted on 09.03.2018 and was listed for hearing on 09.03.2018, 26.04.2018, 25.07.2018, 31.01.2019, 19.03.2019 and 16.04.2019. The Petitioner had filed an I.A. No. 99 of 2018 before the Commission for seeking permission to amend the original petition. On 25.07.2018, the request of the Petitioner was allowed by the Commission. The

Petitioner filed the amended petition on 30.08.2018. We have carefully perused the records. The brief facts of the case are as under:

83. The Respondent No.1 (SECI) invited proposals from various SPDs by way of RfS Document for development of cumulative capacity of 500 MW in the State of Maharashtra on the basis of Build-Own-Operate through e-reverse auction process. On 10.03.2016, SECI issued LoI in the favour of the Petitioner (M/s Krishna Windfarms Developers Pvt. Ltd.) for development of solar power project and generation and sale of solar power. In terms of the RFS and the LoI, the Petitioner was required to execute the PPA after fulfilment of the prescribed pre-conditions within a period of one month from the date of issue of LoI i.e. by 10.04.2016. However, the Petitioner executed the PPA with SECI on 03.08.2016. The Project was actually commissioned by the Petitioner on 11.08.2017. On 29.09.2017, SECI invoked two PBGs of the Petitioner totalling an amount of Rs. 3 Crores vide Letter dated 29.09.2017. On 05.10.2017, SECI reduced the tariff to be paid for the energy generated and supplied by the Petitioner by 1.5 Paise/unit. The Petitioner approached the Hon'ble Delhi High Court under Section 9 of the Arbitration and Conciliation Act, 1996 for restraining the Respondent from invoking the said Bank Guarantee by way of a temporary injunction. The Hon'ble High Court, vide its order dated 04.10.2017, ordered to maintain the status quo and further restrained the banks to make payments to SECI with respect to encashing the said Bank Guarantees. On 11.10.2017, Bank of India, liquidated the FD of the Petitioner to an equivalent amount as that of the PBGs, and remitted the amount to SECI. A consent order was passed by the Hon'ble High Court of Delhi on 21.02.2018 whereby the bank guarantees involved in the petition filed before it were released back in the favour of the Petitioner. On 25.07.2018, the Petitioner sought leave of this Commission to amend the pleadings and the same was duly allowed vide order of this Commission. The amendment was primarily done to insert the specific prayer for refund of the amount of Rs. 3 Crores along with interest (1.25% per month as per PPA clause 10.3.3) by SECI to the Petitioner.
84. The Petitioner has submitted that the delay in completion of the Conditions Subsequent under Article 3.1 of PPA was on account of force majeure events and delay attributable to Government. It had commissioned the project on 11.08.2017, which is prior to the SCoD (being within 13 months from the date of signing of the PPA of 03.08.2016) as per Article 5.1.5 of the PPA & MNRE approval letter dated 04.08.2015. Therefore, neither can the

project be removed from the list of selected projects nor can the PPA be terminated. The Petitioner has further submitted that invocation of PBGs dated 29.09.2017 was illegal and non-est in terms of the PPA and the Respondent should return Rs. 3 Crores along with interest (1.25% per month as per PPA clause 10.3.3) as retained by it from deducting the equivalent amount from the invoices raised by the Petitioner for supply of power for the months of September, 2017 to January, 2018. The Petitioner has further submitted that the downward revision of tariff by 1.5 paise by the Respondent is violative of the terms and conditions of the PPA, hence unenforceable. The Petitioner has submitted that it is also not liable to make any payment towards extension of timeline as approved by the Respondent from time to time and hence Rs.56,00,000/- paid by the Petitioner to the Respondent towards extension of timeline from 31.01.2017 to 27.03.2017 was not payable, and the same may be refunded along with interest.

85. **Per Contra**, the Respondents have submitted that as defined in Article 1 of the PPA read with Article 2.1 of the PPA the Effective Date of the PPA is 10.04.2016 and the SCoD is 10.05.2017. The actual date of commissioning was only 11.08.2017 hence there was a delay of 93 days. In view of the above, the Petition may be dismissed on all counts.

86. From the submissions of the parties, the following issues arise before this Commission:

***Issue No. 1:** Whether the Scheduled Date of Commissioning of the Project is to be considered within thirteen months from the date of signing (03.08.2016) of the PPA as per Article 5.1.5 of the PPA or the Scheduled Date of Commissioning of the Project is to be considered within thirteen months from the effective date (10.04.2016) of the PPA as defined in Article 1 of the PPA read with Article 2.1 of the PPA?*

***Issue No. 2:** Whether the delay in completion of the Conditions Subsequent under Article 3.1 of PPA was on account of force majeure events and delay attributable to Government, its agencies and instrumentalities and whether the delay in achieving Conditions Subsequent needs to be condoned?*

***Issue No. 3:** Whether the Petitioner is not liable to make any payment towards extension of timeline as approved by the Respondent from time to time and whether the Respondent may be directed to refund Rs. 56,00,000/- paid by the Petitioner to the Respondent towards extension of timeline from 31.01.2017 to 27.03.2017, along with interest?*

***Issue No.4:** Whether the letter of invocation of Bank Guarantee dated 29.09.2017 issued by the Respondent is illegal and non-est in terms of the PPA and the Respondent No.1 may be directed to return Rs. 3 Crores along with interest (1.25% per month as per PPA clause*

10.3.3) as retained by it from deducting the equivalent amount from the invoices raised by the Petitioner from supply month of September, 2017 to January, 2018?

Issue No. 5: Whether the downward revision of tariff by 1.5 paise by the Respondent is violative of the terms and conditions of the PPA, hence unenforceable?

87. No other issues were pressed or claimed.

88. We now discuss the issues one by one:

Issue No. 1: Whether the Scheduled Date of Commissioning of the Project is to be considered within thirteen months from the date of signing (03.08.2016) of the PPA as per Article 5.1.5 of the PPA or the Scheduled Date of Commissioning of the Project is to be considered within thirteen months from the effective date (10.04.2016) of the PPA as defined in Article 1 of the PPA read with Article 2.1 of the PPA?

89. The Petitioner has submitted that the PPA with SECI was executed on 03.08.2016 and in accordance with Clause 5.1.5 the PPA is to be effective from the date of signing of the same and accordingly the SCoD is 03.09.2017. The project was commissioned on 11.08.2017, which is almost a month prior to the SCoD. Therefore, the commissioning of the project was done within the prescribed time and no amount towards liquidated damages can be claimed by SECI. **Per Contra**, the Respondents have submitted that as per Article 2.1 of the PPA the effective date has been defined as 10.04.2016, therefore, the SCoD is 10.05.2017.

90. Relevant provisions of the RfS document dated 27.08.2015 stipulates as under:

“Effective Date” shall mean the date of execution of Power Purchase Agreement (PPA) by both the parties;

.....

3.14.1 SECI shall enter into Power purchase agreement (PPA) with Bidders selected based on this RfS. A copy of standard Power Purchase Agreement to be executed between SECI and the selected SPD will be made available on www.tcil-india-electronictender.com. The PPA shall be signed within 01 month from the date of issue of Letter of Intent (LoI) (for e.g. if the LOI is dated 07-10-2015, then the last date of signing of PPA shall be 07-11-2015). PPA will be executed between SECI and selected bidder for each Project. The PPAs shall be valid for a period of 25 years as per provisions of PPA.”

91. The relevant provisions of the LoI document dated 10.03.2016 stipulates as under:

“2.0 You are requested to make it convenient for signing of Power Purchase Agreement (PPA) on or before 10/04/2016 failing which provisions as per clause 3.11 of the RfS shall be applicable”

92. Clause 3.11 of the RfS states as under:

“3.11. Earnest Money Deposit (EMD) and Performance Bank Guarantees (PBG)

- i) Earnest Money Deposit (EMD) of Rs.10 Lakh / MW per Project in the form of Bank Guarantee according to Format 6.3A and valid for 09 months from the Techno commercial bid opening date, shall be submitted by the Bidder along with their bid failing which the bid shall be summarily rejected.*
- ii) Performance Bank Guarantee (PBG): Bidders selected by SECI based on this RfS shall submit Performance Guarantee for a value of @ Rs 30 Lakh / MW within 15 days of issuance of Lol and before signing of PPA. It may be noted that successful Bidders shall submit the Performance Guarantee according to the Format 6.3B for a value @ Rs 30 Lakh/MW/Project with a validity period of 21 months from the date of signing of PPA. The Performance Bank Guarantee shall be submitted in the ratio of 20% & 80%. For e.g. in case the total PBG required for the project is Rs. 15 Crores, then the SPD shall submit 2 Bank Guarantees, the first one being for Rs. 3 Crores and the other one being for Rs. 12 Crores. On receipt and after successful verification of the total Performance Bank Guarantee in the acceptable form, the BG submitted towards EMD shall be returned by SECI to the successful Bidder.*
- iii) All Bank Guarantees shall be submitted separately for each Project.*
- iv) The Bidder shall furnish the Bank Guarantees from any of the Banks listed at Annexure-D to SECI. Bank Guarantees issued by foreign branch of a bank from bank list given in Annexure-D is to be endorsed by the Indian branch of the same bank or State Bank of India.*
- v) The format of the Bank Guarantees prescribed in the Formats 6.3 A (EMD) and 6.3B (PBG to be submitted by the selected bidder) shall be strictly adhered to and any deviation from the above Formats shall result in rejection of the EMD/PBG and consequently, the bid. In case of deviations in the formats of the PBGs the corresponding PPA shall not be signed.*
- vi) The SPDs of the Projects selected based on this RfS are required to sign PPA with SECI within 1 month after the issue of LOI. In case, SECI offers to execute the PPA with the Selected Bidder and if the Selected Bidder does not submit the requisite documents as per Clause 3.14 or does not meet eligibility criteria upon submission of documents or does not execute the PPA within the stipulated time period, then the Bank Guarantee submitted towards EMD shall be encashed by SECI and the selected Project(s) shall stand cancelled.*
- vii) The Bank Guarantees have to be executed on non-judicial stamp paper of appropriate value as per Stamp Act relevant to the place of execution. The Bank Guarantees have to be in the name of the Bidding Company / Lead Member of Bidding Consortium.*
- viii) All expenditure towards execution of Bank Guarantees such as stamp duty etc shall be borne by the Bidders.*
- ix) In order to facilitate the Bidders to submit the Bank Guarantee as per the*

prescribed format and in line with the requirements, checklist at Annexure-C has been attached. Bidders are advised to take note of the above checklist while submitting the Bank Guarantees.

- x) *After the bidding process is over, SECI shall release the Bank Guarantees towards EMD of the unsuccessful Bidders within 15 days after the issue of Letter of Intents (LOIs) to the successful Bidders. The PBG of SPDs shall be returned to the SPD within 30 days after declaration of COD of their projects, after taking into account any liquidated damages due to delays in commissioning as per Clause 3.17.*

93. Vide email letter dated 05.07.2016, the Respondent No.1, informed the Petitioner as under:

“This has reference to the Letter of Intent (LOI) issued by SECI vide LOI number SECI/JNNSM/LOI/P2B3T1-KWFDPL-B-1MH-1V dated 10.03.2016 for setting up of 10 MW Solar PV Project in Maharashtra. As per the LOI, you were required to furnish all the required documents latest by 31.03.2016 and sign the PPA and VGFSAs on or before 10.04.2016. In this regard, reminder mail was sent on 08.04.2016 seeking clarifications regarding not meeting the criteria for signing of PPA and it was asked to submit all the supporting documents by 14:00 Hrs., 11.04.2016 (10.04.2016 being a holiday at SECI). In reply you had submitted a letter dated 08.04.2016 seeking time till 15.04.2016 to submit all the required documents.

In this regard, it is to be mentioned that no further communication has been received from you and hence you are requested to submit all the necessary documents complying all the requirements (including submission of PBG, demonstration/infusion of equity) as mentioned in the LOI latest by 11.07.2016 (14:00 Hrs.) and sign the PPA and VGFSAs on or before 11.07.2016 failing which the provisions as per clause 3.11 of the RfS shall be applicable.

It may be noted that the effective date of PPA and VGFSAs shall remain 10.04.2016 and the due date of Financial Closure and scheduled date of Commissioning shall remain firm as 07 months and 13 months from the effective date of PPA respectively.

This is issued without prejudice to the terms and conditions of the MNRE guidelines and RfS issued by SECI.”

94. The relevant provisions of the PPA document executed on 03.08.2016 stipulates as under:

*“1.1 Definitions
Scheduled Commissioning Date ; shall mean 10.05.2017;”*

*“2.1 Effective Date
2.1.1 This agreement shall come into effect from 10.04.2016 and such date shall be referred to as the Effective Date.”*

*“2.2 Term of Agreement
2.2.1 This Agreement subject to Article 2.3 and 2.4 shall be valid for a term from*

the Effective Date until the Expiry Date. ...”

“3.1 Satisfaction of conditions subsequent by the SPD

The SPD agrees and undertakes to duly perform and complete all of the following activities at SPD’s own risk and cost within seven (7) 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 SECI:....

*.
.*

The SPD shall submit to SECI the relevant documents as stated above, complying with the Conditions Subsequent, within seven (7) months from the Effective Date”

“3.2 Consequence of non-fulfilment of conditions subsequent

3.2.2 An extension without any impact on the Scheduled Commissioning Date, can however be considered on the sole request of SPD on payment of Rs. 10,000/- per day per MW to SECI.

...

3.2.4 In case of inability of the SPD to fulfil any one or more of the conditions specified in Article 3.1 due to any Force Majeure event, the time period for fulfilment of the Conditions Subsequent as mentioned in Article 3.1, shall also lead to an equal extension in the Scheduled Commissioning Date.”

“3.3 Performance Bank Guarantee

3.3.3 If the SPD fails to commence supply of power from the Scheduled Commissioning Date specified in this Agreement or any further extension thereof granted by SECI, subject to conditions mentioned in Article 4.5, SECI shall encash the Performance Bank Guarantee without prejudice to the other rights of SECI under this Agreement.”

“4.5 Extension of Time

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

- a) any SECI Event of Default, or*
- b) Force Majeure Events affecting SECI, or*
- c) Force Majeure Events affecting the SPD,*

the Scheduled Commissioning Date and the expiry Date shall be deferred for a reasonable period but not less than day to day basis, to permit the SPD or SECI through the use of due diligence to overcome the effects of the Force Majeure Events affecting the SPD or SECI or till such Event of Default is rectified by SECI”.

“5.1 Synchronisation, Commissioning and Commercial Operation

5.1.5 The SPD shall commission the Project as detailed in “Scheduled 6: Commissioning Procedure” within thirteen (13) Months of the date of signing of PPA.”

95. The Commission observes that vide letter dated 07.02.2017, the Petitioner submitted to the Respondent No.1 as under:

“...However, since confirmation about fulfilment of the conditions is still awaited from you, we request you to kindly extend the due date against payment of penalties upto 20th February. We have already paid the penalty amount of Rs. 23 Lakhs and based on the examination from your end you may decide the date of compliance of the conditions and accordingly charge penalties until that date and refund the balance due to us. Thereafter, we further would like to assure you that this will not affect the commissioning date as per mentioned in PPA.”

96. The Commission observes that vide email letter dated 12.05.2017, the Respondent No.1 informed the Petitioner as under:

“It is confirmed that an amount of Rs. 56,00,000/- (Rupees Fifty Six Lacs Only) has been received till date in SECI's Bank Account. Therefore, in line with your request, the timeline has been extended upto 27.03.2017. Accordingly you are requested to complete the compliance for Financial Closure by this date. However, this extension will not change the scheduled commissioning date given in the PPA. Any delay in commissioning will be dealt in line with provisions of PPA.”

97. From the above, the Commission observes that as per clause 3.14.1 of the RfS dated 27.08.2015 the PPA was to be signed within one month from the date of issue of LoI i.e. 10.03.2016. Further, the LoI stipulated that the Petitioner had to sign the PPA on or before 10.04.2016 failing which provisions as per clause 3.1.1 of the RfS were to be initiated. The Petitioner failed to execute the PPA within the stipulated date i.e. 10.04.2016 and sought time from the Respondent No.1. The Respondent No.1 vide email letter dated 05.07.2016 informed the Petitioner that it may submit all the necessary documents complying all the requirements (including submission of PBG, demonstration/ infusion of equity) as mentioned in the LOI latest by 11.07.2016 (14:00 Hrs.) and sign the PPA and VGFSAs on or before 11.07.2016. Further, the instant letter stipulated that ‘effective date’ of PPA and VGFSAs will remain unaltered i.e. 10.04.2016 and the due date of Financial Closure and SCoD will remain firm as 07 months and 13 months from the ‘Effective Date’ of PPA respectively. The Petitioner executed the PPA on 03.08.2016 with ‘Effective Date’ as 10.04.2016 and the ‘SCoD’ specifically mentioned as 10.05.2017.

98. The Commission further observes that as per Article 2.2 of the PPA, the term of PPA was to be valid for a term of twenty-five years from the ‘Effective Date’ until the Expiry Date. As per Article 3.1 of the PPA, the SPD agreed to complete all the activities related to ‘Conditions Subsequent’ within seven (7) months from the ‘Effective Date’ and in case of any delay, the Petitioner was also allowed an option to seek extension for completing ‘Conditions

Subsequent' without impacting SCoD on payment of Rs. 10,000/- per day per MW to Respondent No.1. As per Article 3.2.4 of the PPA, the SPD shall be allowed an extension in the SCoD as well as for fulfilment of Conditions Subsequent in case of Force Majeure events. As per Article 3.3.3 of the PPA, if the SPD failed to commence supply of power from the SCoD specified in the PPA, SECI was empowered to encash the Performance Bank Guarantee.

99. The Commission observes that vide letter dated 07.02.2017, the Petitioner paid the penalty amount of Rs. 23 Lakhs for delay in compliance of conditions subsequent and assured Respondent No.1 that the commissioning date as per mentioned in PPA will not be impacted. The Respondent No.1 acknowledged the payment of Rs. 56,00,000/- (Rupees Fifty Six Lacs Only) in line with the Petitioners request and extended the timeline for compliance of the Financial Closure upto 27.03.2017. However, the Respondent specifically stipulated that the extension in compliance of Financial Closure will not change the SCoD given in the PPA and any delay in commissioning will be dealt in line with provisions of PPA.
100. The Petitions has placed reliance on provisions of Article 5.1.5 of the PPA according to which SCoD is within 13 months from the signing of the PPA i.e. 03.08.2016. In our view, the delay in signing the PPA is attributable to the Petitioner and it cannot be allowed to take advantage of its own fault keeping in view that there is specific provision in PPA that SCoD shall be 13 months from effective date of PPA i.e. 10.04.2016 (Article 2.1 of the PPA).
101. From the harmonious construction of the clause 3.14.1 of RfS, Clause 2.0 of the LoI, email dated 05.07.2016, Article 1.1 & Article 2.1 of the PPA, letter dated 07.02.2017 and letter dated 12.05.2017, the Commission is of the view that the 'Effective Date' and the 'Scheduled Date of Commissioning' are sacrosanct with respect to PPA. Ostensibly, the 'Effective Date' is defined as 10.04.2016 in the PPA whereas the SCoD is defined as 10.05.2017 i.e. 13 months from the date of 'effective date' of the PPA.
102. The Commission observes that the Article 1.1 of the PPA specifically defines that "*Scheduled Commissioning Date; shall mean 10.05.2017;*" whereas the Article 5.1.5 of the PPA is generic in nature and stipulates "*The SPD shall commission the Project as detailed in "Scheduled 6: Commissioning Procedure" within thirteen (13) Months of the date of signing of PPA.*" The Commission is of the view that in a contract, specific clause has to be given precedence over general clause. It is an established principle of interpretation that general

provisions should make way to specific provisions in case of any inconsistency between them; and that the later provisions usually modify and prevail upon the preceding ones. In the instant case, Article 5.1.5 of the PPA is generic in nature whereas Article 1.1 and Article 2.1 of the PPA are specific in nature. Therefore, the Commission holds that the 'Effective Date' of the PPA is to be considered as 10.04.2016 and the SCoD is 10.05.2017 i.e. 13 months from the date of 'effective date' of the PPA. The Issue is decided accordingly.

103. Issues No. 2, 3 and 5 are interlinked, therefore, they are taken up together for discussions.

Issue No. 2: *Whether the delay in completion of the Conditions Subsequent under Article 3.1 of PPA was on account of force majeure events and delay attributable to Government, its agencies and instrumentalities and whether the delay in achieving Conditions Subsequent needs to be condoned?*

AND

Issue No. 3: *Whether the Petitioner is not liable to make any payment towards extension of timeline as approved by the Respondent from time to time and whether the Respondent may be directed to refund Rs. 56,00,000/- paid by the Petitioner to the Respondent towards extension of timeline from 31.01.2017 to 27.03.2017, along with interest?*

AND

Issue No. 5: *Whether the downward revision of tariff by 1.5 paise by the Respondent is violative of the terms and conditions of the PPA, hence unenforceable?*

104. The Petitioner has submitted that due to announcement of 'Demonetisation' on 08.11.2016, there was scarcity of funds in the market. In accordance with the Article 11, 'Demonetisation' falls within the ambit of *force majeure* since the Petitioner was in no control of the same and thus, financial closure could not be reached. Further, in accordance with Article 3.14.4 of the RfS, SECI was under an obligation to execute the PSA with the DISCOM in back-to-back arrangement with the PPA. Since the PPA was to be signed on 10.04.2016, the PSA ought to have been signed and executed either before or simultaneously with the PPA. However, SECI had signed the PSA only on 04.11.2016 i.e. with a delay of almost 7 months vis-a-vis the effective date of the PPA. Hence, there was failure on part of SECI to duly sign the PSA with the concerned DISCOM on a back to back arrangement. On 23.11.2016, the Petitioner informed SECI that there was an inevitable delay for the reasons constituting *force majeure* within the meaning of Article 11 of PPA and the same was solely attributable to the Government and its agencies and instrumentalities including procedural delays in the implementation of the Government Resolutions in accordance with the Bombay Tenancy and Agricultural Land Act. SECI was further informed of the delay in compliance of land requirements and financial closure on account of the intervening election and

subsequent three official holidays. The Petitioner had to complete additional obligations which were not part of PPA. However, there were mandatory requirements for implementation of the project viz. Installation of STU meter, Registration with MEDA etc. and delayed delivery. In view of the aforesaid mentioned, it was evident that the said delay was attributable to SECI and also due to *force majeure* events. SECI had acknowledged the same and also granted an extension without any levy of Liquidated Damages. In terms of the Article 4.5 of the PPA, SECI was empowered to grant extension only in cases contemplated under the Article. SECI has acknowledged *demonetisation* as an event within Article 11 of PPA as akin to *Force Majeure* and had granted extension without levy of penalty. In accordance with Article 3.2.5, the Petitioner is entitled to an equitable extension in the SCoD and extension in the date of financial closure. Since SECI has already granted an extension of 82 days in Financial Closure till 31.01.2017, SECI was under an obligation in accordance with Article 3.2.5 of PPA to provide for an extension of equal number of days in commissioning for the project. Further, SECI having granted another extension of 56 days with penalty and the amounts already paid by the Petitioner, there cannot be any delay in SCoD. Rather, since SECI granted extension of 138 days viz. 82 days + 56 days, and the alleged delay was only 93 days, the Petitioner is entitled to seek refund of INR 45 Lakhs out of the already deposited Rs 56 Lakhs and further return of the entire amount of Rs. 3 crores along with interest (1.25% per month as per Article 10.3.3 of the PPA) being charged as Liquidated Damages.

105. **Per Contra**, the Respondent No.1 has submitted that due to '*demonetisation*', it has granted additional time till 31.01.2017 to the Petitioner to fulfil the conditions subsequent provided under Article 3.1 of the PPA in view of the Office Memorandum dated 02.12.2016 issued by the Government of India. Further, the PPA does not expressly provide or otherwise cover the '*demonetisation*' as either Force Majeure or Change in Law within the scope of Articles 11 and Article 12 of the PPA. In the absence of '*demonetisation*' being a Force Majeure or Change in Law, there is no remedy provided under the PPA for either extension of time or otherwise a relief from the fulfilment of any condition. Further, the Petitioner did not make any attempt to deal with the specific aspects of the alleged delay on the part of the Government Instrumentalities and other alleged Force Majeure events including as to the impact of the said delays on the execution of the power project. Articles 3 and Article 4 of the PPA provide that the SPDs shall be responsible for applying and obtaining all the

consents, approvals, permissions etc. Furthermore, in terms of Article 11.5, it was incumbent on Petitioner to issue a notice of Force Majeure as a pre-condition for claiming relief. However, no notice of Force Majeure was issued. Hence the Petition may be dismissed.

106. The Respondent No. 2 has submitted that SECI could not supply the power as committed in PSA (due to delay in commissioning of projects by the Petitioner) resulting in shortfall in fulfilment of RPO obligations set by the SERC. MSEDCL is in shortfall of about 1476 MUs for FY 2017-18 due to delay in supply of committed energy by SECI and hence as per the provisions of PSA, MSEDCL is eligible for seeking compensation from SECI. SECI is seeking compensation from the Petitioners herein whereas it is MSEDCL who suffered due to delayed commissioning / non- commissioning of such projects. SECI is eligible for only 0.07 paisa / KWh trading margin and hence SECI has to pass on other compensations to MSEDCL.

107. The Commission observes that the relevant provisions of the PPA executed on 03.08.2016 stipulates as under:

“3.1 Satisfaction of conditions subsequent by the SPD

The SPD agrees and undertakes to duly perform and complete all of the following activities at SPD’s own risk and cost within seven (7) 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 SECI:

.
.

The SPD shall submit to SECI the relevant documents as stated above, complying with the Conditions Subsequent, within seven (7) months from the Effective Date”

“3.2 Consequence of non-fulfilment of conditions subsequent

3.2.2 An extension without any impact on the Scheduled Commissioning Date, can however be considered on the sole request of SPD on payment of Rs. 10,000/- per day per MW to SECI.

...

3.2.4 In case of inability of the SPD to fulfil any one or more of the conditions

specified in Article 3.1 due to any Force Majeure event, the time period for fulfilment of the Conditions Subsequent as mentioned in Article 3.1, shall also lead to an equal extension in the Scheduled Commissioning Date.”

108. The Commission observes that the relevant extract of O.M. No.29/5(6)/2011-12/JNNSM(ST) dated 02.12.2016 stipulated as under:

“3- Demonetization:

The participants in the meeting 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 some time has been requested by the solar power 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 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 the respective PPAs.”

109. The Commission further observes that Article 11 of the PPA stipulates as under:

“11. ARTICLE 11: FORCE MAJEURE

11.1 Definitions

11.1.1 In this Article, the following terms shall have the following meanings:

11.2 Affected Party

11.2.1 An affected Party means SECI or the SPD whose performance has been affected by an event of Force Majeure.

11.3 Force Majeure

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

- a) Act of God, including, but not limited to lightning, drought, fire and explosion (to the extent originating from a source external to the site), earthquake, volcanic eruption, landslide, flood, cyclone, typhoon or tornado if and only if it is declared/ notified by the competent state/ central authority/ agency (as applicable);*
- b) any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or*

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

110. The Commission further observes that Article 11.4.1 (e) of the PPA stipulates as under:

“11.4 Force Majeure Exclusions:

11.4.1 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 even of the Force Majeure:

...

e) insufficiency of finances or funds or the agreements becoming onerous to perform”

111. The Commission observes that it has already been held in the discussion above that the ‘Effective Date’ for the PPA is 10.04.2016. Therefore, as per Article 3.1, the Petitioner was supposed to comply with the ‘Conditions Subsequent’, within seven (7) months from the Effective Date i.e. 10.11.2016. However, on 08.11.2016, the Government of India declared ‘demonetisation’ of certain denominations of Indian Currency notes. As per the O.M. No.29/5(6)/2011-12/JNNSM(ST) dated 02.12.2016 the Ministry of Power, Government of India decided that “*considering the practical problems in the short run, due to demonetization, till 31st January, 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 the respective PPAs.*” Therefore, in view of the above, the last date for achieving the Financial Closure stood extended by 82 days i.e. from 10.11.2016 upto 31.01.2017 without impacting the SCoD. It is pertinent to note that as per Article 11.4.1 (e), insufficiency of finances or funds is not covered as Force Majeure event. In our view that event of demonetization was not a ‘force majeure’ event in terms of the PPA.

112. The Commission observes that even after extending the last date for achieving the Financial Closure by 82 days i.e. (from 10.11.2016 upto 31.01.2017) the Petitioner vide letter dated 07.02.2017 requested the Respondent No.1 “to extend the due date against payment of penalties upto 20th February”. Vide email letter dated 12.05.2017 the Respondent No.1 considered the request of the Petitioner and confirmed “that an amount of Rs. 56,00,000/- (Rupees Fifty Six Lacs Only) has been received till date in SECI’s Bank Account. Therefore, in line with your request, the timeline has been extended upto 27.03.2017. Accordingly you are requested to complete the compliance for Financial Closure by this date. However, this extension will not change the scheduled commissioning date given in the PPA.” Therefore, the last date for achieving the Financial Closure was again extended upto 27.03.2017 (01.02.2017 to 27.03.2017) by the Respondent on payment of penalty. This extension was again allowed by the Respondent No.1 without impacting the SCoD.

113. The Commission observes that the Petitioner has pleaded inevitable delay in compliance of the land requirements and financial closure on account of the intervening election, subsequent three official holidays as the reasons constituting force majeure within the meaning of Article 11 of PPA. However, the Petitioner failed to bring on records any documentation to deal with the specific aspects of the alleged delay on the part of the Government Instrumentalities and other alleged Force Majeure events. The Commission also observes that in terms of Article 11.5, it was incumbent on Petitioner to issue a notice of Force Majeure as a pre-condition for claiming relief. However, no notice of Force Majeure was issued. The Commission is of the view that the Petitioner has failed to prove that the delay in completion of the Conditions Subsequent and achieving Financial Closure under Article 3.1 of PPA was on account of force majeure events. Therefore, the Commission holds that there was total delay of 138 days in achieving Financial Closure and the said delay was not on account of any Force Majeure events or attributable to Government, its agencies and instrumentalities. Of this delay a total of 82 days was allowed by the Respondent No.1 on basis of MNRE letter dated 02.12.2016 for remaining 56 days extension was granted on payment of Rs. 56 Lakhs.

114. The Commission observes that Article 4.6 of the PPA stipulates as under:

“4.6 Liquidated Damages for delay in commencement of supply of power to SECI

4.6. If the SPD is unable to commence supply of power to SECI by the Scheduled Commissioning Date other than for the reasons specified in Article 4.5.1, the SPD shall pay to SECI, damages for the delay in such commencement of supply of power and making the Contracted Capacity available for dispatch by the Scheduled Commissioning Date as per the following:

- 1. Delay upto one(1) months - SECI will encash 20% of the total Performance BG on per day basis and proportionate to the Capacity not Commissioned.*
- 2. Delay of more than one (1) month and upto three (3) months - SECI will encash the remaining Performance BG on per day basis and proportionate to the Capacity not Commissioned.*

In case the commissioning of the Project is delayed by more than 3 months after the scheduled Commissioning Date, the pre-fixed tariff given in the Article 9.1 shall be reduced at the rate of half paisa (0.50) per kWh per day of delay for the delay in such remaining capacity which was not commissioned.”

115. The Commission observes that Article 4.6.1 of the PPA stipulates that, in case the commissioning of the Project is delayed by more than three (3) months after the SCoD, the pre-fixed tariff given in the Article 9.1 shall be reduced at the rate of half paisa (0.50) per kWh per day of delay for the delay in such remaining capacity which was not commissioned. As per PPA the SCoD was 10.05.2017. In order to enjoy the protection of retaining the pre-fixed tariff, the Petitioner was to commission its project within three months i.e. 10.08.2017 from the date of SCoD i.e. 10.05.2017. However, the Petitioner failed to commission the project before or on 10.08.2017 and the project was commissioned on 11.08.2017. Therefore there was a delay of just one (1) day. In light of above, the Commission directs the Respondent No.1 to downward revise the tariff strictly as per Article 4.6.1 of the PPA.

116. The Respondent No.2 (MSEDCL) has submitted that Respondent No.1 failed to supply the power as committed in PSA resulting in shortfall in fulfilment of RPO obligations set by the SERC. The Commission observes that the issue relates to the Power Sale Agreement between Respondents. The relief being sought by Respondent No. 2 is qua Respondent No.1 which is not the subject matter of the instant petition. The Commission feels no decision on the same can be given in the instant petition.

Issue No. 4: Whether the letter of invocation of Bank Guarantee dated 29.09.2017 issued by the Respondent is illegal and non-est in terms of the PPA and the Respondent No.1 may be directed to return Rs. 3 Crores along with interest (1.25% per month as per PPA clause

10.3.3) as retained by it from deducting the equivalent amount from the invoices raised by the Petitioner from supply month of September, 2017 to January, 2018?

117. In view of the discussions in Issues 1, 2, 3 & 5, the Commission holds that the Respondent is well within its rights to encash the Performance Bank Guarantee in view of Article 3.3.3 and 4.6.1 of the PPA.

118. Accordingly, the Petition No. 27/MP/2018 is disposed of in terms of the above

Sd/-
आई. एस. झा
सदस्य

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डॉ एम. के. अय्यर
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पी. के. पुजारी
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