



नई दिल्ली
NEW DELHI

याचिका संख्या./ Petition No. 427/MP/2019

कोरम/ Coram:

श्री आई. एस. झा, सदस्य/ Shri I. S. Jha, Member
श्री अरुण गोयल, सदस्य/ Shri Arun Goyal, Member
श्री पी. के. सिंह, सदस्य / Shri P. K. Singh, Member

आदेश दिनांक/ Date of Order: 16th of November, 2022

IN THE MATTER OF:

Petition filed under Section 79(1)(f) read with Section 79(1)(k) of the Electricity Act, 2003 seeking indulgence of the Hon'ble Central Electricity Regulatory Commission to direct NTPC Vidyut Vyapar Nigam Limited to extend the SCOD Generation Project based on the Notifications dated 02.11.2011, 09.01.2013, 03.01.2014 and 17.12.2014 issued by Government of Andhra Pradesh, whereunder, the government has notified the project area as drought affected area for the period June 2011 – September 2011, June 2012 – September 2012, June 2013 – September 2013 and June 2014 – September 2014.

AND IN THE MATTER OF:

M/s Megha Engineering & Infrastructures Limited,
S2- Technocrat Industrial Estate,
Balanagar, Hyderabad,
Telangana-500037

...Petitioner

VERSUS

- 1. Ntpc Vidyut Vyapar Nigam Limited,**
NTPC Bhawan, Core 7, Scope Complex,
7 Institutional Area, Lodhi Road
New Delhi-110003.
- 2. Ministry of New & Renewable Energy,**
Through: Chairman & Managing Director
Block-14, CGO Complex,
Lodi Road, New Delhi – 110003.
- 3. Punjab State Power Corporation Limited,**
Through: Chairman & Managing Director
SLDC Building, 220kV Grid Sub-Station,
PSPCL, Ablowal, Patiala – 147001
- 4. Central Power Distribution Company of Andhra Pradesh Ltd.**
Through: Chairman
Mint Compound,
Hyderabad-500063
- 5. Eastern Power Distribution Company of Andhra Pradesh**
Through: Chairman
Corporate Office, P&T Colony,
Seethammadhara, Vishakhapatnam-530013
- 6. Northern Power Distribution Company of Andhra Pradesh Ltd.**
Through: Chairman
H.No.1-1-478, 503 &504 Opposite Nit Petrol Bunk,
Chaitnayapuri, Kazipet, Warrangal-506004
- 7. Chattisgarh State Power Distribution Company Ltd.**
Through: Chairman
Fourth Floor, Vidyut Seva Bhawan,
Dangania, Raipur (Chattisgarh)- 492013
- 8. Maharashtra State Electricity Distribution Company Ltd.**
Through: Chairman
5th Floor, Anant Knekar Marg,
Bandra (East), Mumbai-400051.
- 9. Ajmer Vidyut Vitran Nigam Ltd.**
Through: Chairman

Old Power, Hathi Bhata,
Ajmer – 305001

- 10. Jaipur Vidyut Vitran Nigam Limited**
Through: Chairman
Jaipur-302005.
- 11. Jodhpur Vidyut Vitran Nigam Limited**
Through: Chairman
New Power House, Industrial Area,
Jodhpur-342003.
- 12. U.P. Power Corporation Ltd.**
Through: Chairman
14thfloor, Shakti Bhawan,
Ext.14, Ashok Marg, Lucknow - 226001.
- 13. Assam Power Distribution Company Ltd.**
Through: Chairman
Bijulee Bhawan, Paltanbazar,
Guwahati - 781001.
- 14. Bangalore Electricity Supply Corporation Power Purchase**
Through: Chairman
K.R. Circle, Bangalore-560001.
- 15. Damodar Valley Corporation**
Through: Chairman
DVC Towers, VIP Road,
Kolkata - 700054.
- 16. GRIDCO Ltd.**
Through: Chairman
Janpath, Bhuluteswar – 751022
- 17. Tamil Nadu Generation And Distribution Company Ltd.**
Through: Chairman
144, Anna Salai, Chennai-600002
- 18. West Bengal State Electricity Distribution Company Ltd.**
Through: Chairman
Vidyut Bhawan, 7th Floor,
Block-Dj, Sector-II, Bidhannagar,
Kolkata - 700091.

Parties Present: Shri Sakya Singha Chaudhuri, Advocate, MEIL
Ms. Shreya Dubey, Advocate, MEIL
Ms. Anushree Bardhan, Advocate, NVVNL
Ms. Surbhi Kapoor, Advocate, NVVNL

आदेश/ ORDER

The Petitioner, M/s Megha Engineering & Infrastructures Limited is a company incorporated under the Companies Act, 1956 and is a generating company and has established a 50 MW solar thermal power project near Nagalapuram, Peddavaduguru Mandal in the Anantapur district, Andhra Pradesh. The Petitioner is seeking extension of the Schedule Date of Commissioning (SCOD) of its Project based on the Notifications dated 02.11.2011, 09.01.2013, 03.01.2014 and 17.12.2014 issued by the Government of Andhra Pradesh, whereunder, the Government has notified the project area as drought affected area.

2. The Respondent No. 1, NTPC Vidyut Vyapar Nigam Limited, (NVVN) is an inter-State trading licensee and is the nodal agency vested with the power to execute agreements for sale and purchase of power under Jawaharlal Nehru National Solar Mission (JNNSM).
3. The Respondent No. 2, Ministry of New and Renewable Energy (MNRE) is the nodal Ministry for promotion and development of renewable energy technologies (including solar energy).
4. The Petitioner has made the following prayers:

(a) Direct NTPC Vidyut Vyapar Nigam Limited to consider and allow the extension of SCOD based on the Notifications dated 02.11.2011, 09.01.2013, 03.01.2014 and 17.12.2014 issued by Government of Andhra Pradesh, whereunder, the government has notified the project area as drought affected area for the period June 2011 – September 2011, June

2012 – September 2012, June 2013 – September 2013 and June 2014 – September 2014, respectively.;

- (b) Direct NTPC Vidyut Vyapar Nigam Limited to stay from taking any coercive measures pursuant to the terms of the PPA, till the time the dispute in regard to the extension of SCOD is settled by this Commission;*
- (c) Pass such other order(s) and grant relief(s) that this Commission deems fit in the interest of justice and equity.*

Brief background:

5. MNRE had issued Guidelines for Selection of New Grid Connected Solar Power Projects (hereinafter ‘Guidelines’) in July 2010 in order to provide the necessary policy framework for development of projects under the JNNSM through a competitive bidding route. In accordance with the Guidelines, NVVN issued a Request for Selection (RfS) dated 18.08.2010. On 21.09.2010, the Petitioner submitted the bid with a quoted tariff of Rs 11.31/kWh. NVVN accepted the Petitioner’s bid and issued a Letter of Intent dated 11.12.2010 in favour of the Petitioner for setting up a solar power project based on advanced technology of 50 MW capacity in the State of Andhra Pradesh. Pursuant to issue of the LOI, the Petitioner entered into a PPA dated 10.01.2011 and Supplementary Agreements dated 23.01.2012, 30.10.2013 and 27.09.2016 for procurement of solar power for a period of 25 years from the commercial operation date of the 50 MW Generating Project. As per the terms of the PPA, the Scheduled date for Commercial Operation (SCoD) was 09.05.2013. The MNRE subsequently gave a general extension of 10 months and revised the SCoD to be 38 months i.e. 09.03.2014 instead of 28 months from the date of signing of the PPA. The Petitioner achieved CoD of its Generation Project on 04.11.2014 i.e. with a delay of about 240 days.

Submissions of the Petitioner:

6. The Petitioner has submitted as under:
 - a) On 27.04.2012, the Petitioner informed NVVN referring to the Government of AP G.O.Ms 22, dated 02.11.201, detailing the Force majeure event of drought, and its effect.

During the drought, the local authorities restricted the drawl of water at its usage effecting Petitioner's ability to implement the Project.

- b) The Commission vide its Order dated 11.10.2017 in Petition No. 16/MP/2014 declared that the incident of 'drought' was squarely covered as Force Majeure event under Clause 11.3.1(a) of the PPA and restrained NVVN from invoking the performance bank guarantees submitted by the solar power developers. The relevant extract from the Order dated 11.10.2017 in Petition 16/MP/2014 is set out as under:

“206. The Commission is of the view that on 9th January, 2013, Government of Andhra Pradesh had declared the area in which the project was situated to be drought affected area and the same was brought to the notice of the Respondents by MEIL on 2nd February, 2013. This incident is squarely covered as Force Majeure event under Clause 11.3.1(a) of the PPA. Accordingly, the prayer for extension of Scheduled Commercial Operation Date or the SCoD of the 50 MW project of MEIL for the period during which the drought persisted is allowed. The Respondent No.1 (NVVNL) is directed to ascertain the duration of the drought based on the necessary notification/circular issued by the Government of Andhra Pradesh and revise the SCOD of this project accordingly.”

“241.As per Article 4.6 of the PPA, the Respondent 1 has the right of invoking the Bank Guarantee against these plants for the number of days delayed beyond the period extended by MNRE i.e. beyond revised SCOD. Therefore, the Commission is of the view that except in the case where the delay is covered under force majeure as approved by the Commission, there is no embargo on MNRE to take appropriate measures in terms of the respective PPAs, subject to our observations in para 242 of this order.

242. Clause 3.3.3 of the PPA stipulates that if the SPD fails to commence supply of power from the Scheduled Commissioning Date specified in this Agreement, subject to conditions mentioned in Article 4.5, NVVN shall have the right to invoke the Performance Bank Guarantee without prejudice to the other rights of NVVN under this Agreement... .. The Commission observes that three of the Petitioners namely, M/s GGEL, M/s MEIL and M/s RSTPL have commissioned the projects despite facing similar challenges. This demonstrates their commitment and intent to set up the solar thermal plants, which the Commission appreciates. In their cases, we request the Central Government to consider their cases for extension of SCOD on the basis of their representations which are under consideration of the Central Government. Till the decision of the Central Government for extension of SCOD, their bank guarantees shall not be invoked. These generators are directed to maintain the bank guarantee.”

- c) From the above it is clear that the Commission has already held that the delay has been covered under Force Majeure clause under the PPA and the SCoD ought to be revised to such extent. NVVNL was also directed to ascertain the duration of the drought based on the necessary notification/circular issued by the Government of Andhra Pradesh and revise the SCOD of this project accordingly.
- d) Government of Andhra Pradesh vide its Notifications dated 02.11.2011, 09.01.2013, 03.01.2014 and 17.12.2014 has notified the project area as drought affected area for the period June 2011 – September 2011, June 2012 – September 2012, June 2013 – September 2013 and June 2014 – September 2014, respectively. However, NVVN refused to consider the aforementioned notification while computing/ascertaining the duration of drought.
- e) The Petitioner once again on 28.11.2017 and 22.12.2017 wrote to NVVN providing year wise explanation and evidence of the drought and the period during which the timely development of the Project was impacted. However, NVVN failed to consider the period of drought as per the CERC Order and did not revise the SCoD.
- f) The Petitioner again approached this Commission (i.e. by way of Petition No. 100/MP/2018) to direct NVVN to consider all the necessary drought notifications issued by Government of Andhra Pradesh and allow the extension of SCoD. The Commission in its proceedings dated 07.02.2019 noted as under:

“3. After hearing the learned counsel for the parties, the Commission observed that vide order dated 11.10.2017, the Commission had held the incident of drought as a force majeure event and had directed the Respondent to compute the period of delay on the basis of necessary notification/circular issued by the govt of Andhra Pradesh. The Commission directed the Petitioner to amend the Petition and place on record all the four notifications of drought issued by Govt. of Andhra Pradesh.”

- g) The Petitioner pursuant to the directions of this Commission filed the amended petition and placed on record all the four notifications issued by the Govt. Andhra Pradesh and impleaded all the distribution companies. The Commission during the hearing dated 24.09.2019 in Petition No. 100/MP/2019, observed that only one notification dated 09.01.2013 was on record in Petition No.16/MP/2014. Other notifications were not part

of the record in 16/MP/2014. Since Petition 100/MP/2019 is an implementation petition of 16/MP/2014, consideration of additional documents was beyond the scope of 100/MP/2019. As such, the Petitioner was granted liberty to file a separate petition. NVVN was also restrained from encashing the bank guarantee.

- h) In compliance to the order passed by this Commission on 24.09.2019 in Petition No. 100/MP/2019, the Petitioner filed the current Petition seeking extension of SCoD of the project based on the fact that the project area where the project is situation is a drought effected area and the Government of Andhra Pradesh vide its Notifications dated 02.11.2011, 09.01.2013, 03.01.2014 and 17.12.2014 has notified the project area as drought affected area for the period June 2011 – September 2011, June 2012 – September 2012, June 2013 – September 2013 and June 2014 – September 2014, respectively.

Hearing dated 05.03.2020:

7. After hearing the Learned counsel for the Petitioner, the Commission admitted the Petition and directed to issue notice to the Respondents. The Commission further directed the Petitioner to keep the Bank Guarantee valid till the disposal of the present Petition. The Commission directed the Petitioner to serve copy of the Petition on the Respondents immediately, if not served already. The Respondents were directed to file their replies, by 24.03.2020, with an advance copy to the Petitioner, who may file its rejoinder, if any, by 31.03.2020.

Hearing dated 11.08.2020:

8. During the hearing, the learned senior counsel for the NVVN sought permission to file its reply. Accordingly, the Commission directed NVVN to file its reply on e-filing portal and the Petitioner was directed to file its rejoinder. The Commission further directed the Petitioner to keep the Bank Guarantee valid till the disposal of the present Petition and the Respondents not to encash the performance Bank Guarantee till the disposal of the present Petition.

Submission of NVVN:

9. NVVN filed its reply on 11.08.2020 vide which it has submitted as under:

- a) NVVN has preferred Appeal no. 4 of 2018 against the order dated 11.10.2017, wherein NVVN has disputed the claim of the Petitioner in regard to drought vis a vis notification dated 09.01.2013.

Re: Scope of the present petition, Order 2 Rule 2 and Section 11 of the CPC, 1908

- b) Vide letters dated 17.10.2017, 28.11.2017 and 22.12.2017, the Petitioner apart from the notification of the Government of Andhra Pradesh dated 09.01.2013, has also relied on notifications dated 02.11.2011, 03.1.2014 and 17.12.2014 issued by the Government of Andhra Pradesh declaring drought. Against each of these notifications, the Petitioner has claimed 4 months of delay to be condoned as force majeure events.
- c) In Petition no. 16/MP/2014 in which the Order dated 11.10.2017 has been passed by the Commission, the Petitioner had claimed relief on account of force majeure event (drought) vis-a-vis the notification dated 9.1.2013 only. No relief was claimed by the Petitioner against the notifications dated 02.11.2011, 03.01.2014 and 17.12.2014 passed by the Government of Andhra Pradesh declaring drought, despite that these notifications have been in existence at the time of the proceedings. In view of the above, the principles enshrined under Order 2 Rule 2 of the Code of Civil Procedure, 1908 prohibit the Petitioner from seeking the remedy vis-a-vis the other three notifications dated 02.11.2011, 03.01.2014 and 17.12.2014 by way of a subsequent separate petition. The Petitioner cannot claim directly or indirectly by way of the present Petition what it had failed to claim at the relevant time of filing Petition No. 16/MP/2014. Having not claimed relief with regard to the alleged force majeure events due to the notifications dated 02.11.2011, 03.01.2014 and 17.12.2014 in the first instance, it is not open for the Petitioner to claim the same by way of the present Petition.

Re: Notice under force majeure Article 11.5 of the PPA

- d) The Petitioner has not given due notice of the occurrence of Force Majeure Event on account of the notifications dated 02.11.2011, 03.01.2014 and 17.12.2014 as required in terms of Article 11.5 of the PPA i.e. within 7 days of the occurrence of force majeure event. The issue of the notice as mentioned in the Article 11.5 is a pre-condition for claiming any relief.

e) On 27.04.2012, the Petitioner for the first time appraised NVVN of the drought situation as per the notification dated 02.11.2011 issued by the Government of Andhra Pradesh. NVVN vide its letter dated 29.05.2012 stated that the letter dated 27.04.2012 of the Petitioner is after a delay of almost 5 months from the date of the notification dated 02.11.2011. With regard to the other two notifications dated 03.01.2014 and 17.12.2014, there is no notice of force majeure given to NVVN as per the Article 11.5 of the PPA. The Petitioner has placed its reliance on order dated 27.06.2016 in the matter of *Raichur Sholapur Transmission Company Limited v. Power Grid Corporation of India Limited* in Petition No. 419/MP/2014 read with Order dated 24.01.2019 passed in Review Petition No. 4/RP/2018. The Commission has denied the relief for force majeure as the requirement of issue of notice under agreement had not been complied with. In the absence of due notice of the alleged force majeure events in the manner provided in the Article 11.5 of the PPA, the claim of the Petitioner is liable to be rejected.

Re: Event of force majeure in terms of Article 11.3 of the PPA

- f) The Petitioner has not shown as to how the requirement provided in Article 11.3 of the PPA to constitute a force majeure is satisfied in the present petition. The petitioner has not established as to how the notifications dated 02.11.2011, 03.01.2014 and 17.12.2014 have affected the completion and execution of the solar power plant. The claim for extension of the SCoD for alleged force majeure events is not admissible as there is no material or factual data to show that the said notifications have in any manner affected the completion of the solar power plant.
- g) The Petitioner was aware that the area where the solar power was being developed is a drought prone area and the Petitioner was required to construct a storage tank as directed by the authorities for usage of water etc. for disruption of project activities. NVVN vide its letter dated 25.03.2013 and 05.04.2013 to the Petitioner sought information on the action taken by the Petitioner for construction of water storage facility in line with the Order no. GO.Ms No. 37 dated 4.7.2011 and the steps, plan and actions undertaken by the Petitioner at the time of the commencement of the project to avoid disruption of project activities. In view of the

above letters, it is submitted the Petitioner has not given any justification regarding why the storage tanks for storage of water during non-drought season to enable use of the same for construction and operation of the Power plant during drought season was not established by the Petitioner even though the same was provided for by the Government of Andhra Pradesh in its communication dated 04.07.2011. It is submitted that the area in which the power project has been constructed has been declared as a drought area by the Government of Andhra Pradesh consistently in the past years also and therefore, was clearly an anticipated event and not an unforeseen event to constitute a Force Majeure. It is well settled that any event which is anticipated at the time of finalization of the contract, cannot be claimed as a Force Majeure when the event occurs.

Re: Whether further extension of SCoD can be granted when 10 months general extension has already been granted once

- h) As per the Amendment Agreement no. 2 dated 30.10.2013, the date of scheduled commercial operation which was earlier defined as 09.05.2013 as per the PPA dated 10.01.2011 was extended by 10 months and revised to 09.03.2014. The said extension was granted after various Solar Power Developers including the petitioner approached MNRE raising various concerns including variation in DNI affecting the engineering and procurement activities, non-availability of heat transfer fluid (HTF) etc. In view of the above extension of scheduled commercial operation date by 10 months in the past, the claim of the petitioner ought to be rejected.

Rejoinder by the Petitioner:

10. The Petitioner vide its rejoinder dated 27.08.2022 has reiterated the submissions already submitted in the plaint as such the same are not being reproduced herewith for the sake of brevity. Additionally, the Petitioner has submitted as under:
- a) The Appellate Tribunal for Electricity till date has not passed any Order staying the operation of the Order passed by this Commission on 11.10.2017 in Petition No. 16/MP/2014 and NVVN in compliance of the said order is required to ascertain the

period of delay which the Petitioner encountered on account of drought and is required to accordingly extend the Scheduled Commissioning Date mentioned under the PPA.

- b) The Commission vide its order dated 24.09.2019 in Petition No. 100/MP/2018 has granted liberty to the Petitioner to file a separate Petition claiming relief on account of remaining GoAP drought notifications: G.O.M.s 22, dated 02.11.2011; G.O.M.s 1, dated 03.01.2014; and G.O.M.s 17, dated 17.12.2014, the stand taken by NVVN pertaining to bar of proceedings under Order 2 Rule 2 of the CPC is of no relevance and the same is required to be rejected.
- c) The Petitioner vide its letter dated 27.04.2012 has informed the Respondent No. 1 that the Government of Andhra Pradesh vide its G.O.M.s 22, dated 02.11.2011 has declared the project area as a drought affected area. In response NVVN vide its letter dated 29.05.2012 has abruptly refused to consider drought as a force majeure cover under the PPA.
- d) Subsequently, the Petitioner vide its letter dated 02.02.2013 once again intimated NVVN about the occurrence of force majeure event (i.e. drought) which was notified by the Government of Andhra Pradesh vide the G.O.M.s 1, dated 09.01.2013. Further, the Petitioner vide its letter dated 07.02.2013 explained the following to NVVN:
- i. That the construction at the project site could not be resumed because there is no water available from any alternative source;
 - ii. That the farmers from surrounding villages are staging several protests for drawing up water stating that water tables would further go down;
 - iii. That apart from the fact that there is no water for construction purpose, even for drinking purposes also, the water at the project site is in scarcity;
 - iv. That the permission obtained from the ground water department, Government of Andhra Pradesh for construction of power plant is subject to the condition of normal rainfall situation. Since lack of rainfall in various districts in the State of Andhra Pradesh has contributed to drought situation, the Petitioner in line with the permission obtained from the ground water department cannot extract ground water for construction purposes.

- e) Aggrieved by the decision of NVVN to not consider drought as a force majeure event, the Petitioner was left with no option but to file a petition before this Commission i.e. Petitioner No. 16/MP/2014, claiming extension of SCoD on account of certain force majeure event including drought. Further, the Government of Andhra Pradesh, vide its drought notifications G.O.M. 1, dated 03.01.2014 and G.O.M. 17, 17.12.2014 declared the project area as a drought affected area for the period of June, 2013 – September, 2013 and June, 2014 – September, 2014 respectively.
- f) The Petitioner vide its letter dated 22.12.2017 intimated MNRE that this Commission vide its Order dated 11.10.2017 in Petition No. 16/MP/2014 has considered drought as a force majeure event. Since, NVVN till date, despite specific directions of this Commission, has failed to consider and allow extension of commissioning date on account of prevailing drought situations at the project site, the Petitioner vide the said letter requested MNRE to intervene and allow extension of time upto 31.12.2014.
- g) On account of the aforementioned facts, it is wrong on the part of NVVN to state that the Petitioner has not notified them about the occurrence of drought in the project site in compliance of the PPA, and to this extent the reply filed by NVVN is of no merit and is required to be rejected.
- h) The Commission during the proceedings in Petitioner No. 16/MP/2014 has in detail examined such notification and has declared the project site to be a drought affected area and the same is required to be considered as force majeure event in compliance with the PPA. Therefore, the stand taken by NVVN at this belated stage is of no relevance and is required to be rejected.
- i) The stand taken by NVVN that since MNRE vide its letter dated 08.05.2013 has already granted universal extension of 10 months to all the solar power developers selected in the bidding process under JNNSM scheme, no further extension on account of force majeure event shall be allowed beyond such period, is of no merits. NVVN while making submissions in its reply before this Commission has failed to understand the fact that the universal extension allowed by MNRE was subject to ‘variation in DNI reading at the ground level’ and the MNRE by granting such extension has not considered drought

situation being encountered by the Petitioner at the project site. Further, it is important to note that this Commission vide its order dated 11.10.2017 in Petition No. 16/MP/2014 has already considered and dealt with the said issue.

- j) The bank guarantee was submitted in order to ensure/protect the Respondent No. 1 from any losses or damages which it may encounter on account of default on the part of the Petitioner. Since, delay on account of drought has already been considered as force majeure event by this Commission, the same cannot be concluded as a default on the part of the Petitioner and cannot allow the Respondent No. 1 to claim any damages by invoking bank guarantee. The Order passed by this Commission on 11.10.2017 in Petition No. 16/MP/2014 is self-explanatory and the Respondent No. 1 is not entitled to claim any damages / losses from the Petitioner on account of non-supply of electricity, specifically considering the fact that delay in commissioning of the project was due to drought and the same has already been considered as an event of force majeure by this Commission. Moreover, no loss has been shown by NVVN on this account.

Hearing dated 05.08.2022

11. The petition was listed for hearing on 05.08.2022. As per ROP, the Commission made the following observations:

*“2. During the course of hearing, learned counsel for the Petitioner made the detailed submissions in the matter. Learned counsel pointed out that the Commission vide order dated 11.10.2017 in Petition No.16/MP/2014 filed by the Petitioner seeking extension of Scheduled Commercial Operation Date (SCOD) of its Solar Thermal Power Project on the ground of various force majeure events viz. variation in DNI, drought, fire, re-organization of State of Andhra Pradesh etc., did not consider the fire as force majeure event and consequently, extended the SCOD only upto 9.7.2014 as against the actual COD on 4.11.2014 (i.e. delay of 240 days). However, subsequently, in an appeal filed by the Petitioner against the said order, the **Appellate Tribunal for Electricity (APTEL) vide its judgment dated 26.7.2022 in Appeal No.373 of 2018 and Ors., has allowed the fire as force majeure event under the agreement. Accordingly, in addition to the extension sought by the Petitioner on account of drought on the basis of subsequent notifications of Govt. of Andhra Pradesh, the entire delay in achieving SCOD also covered under force majeure event of fire in terms of judgment of APTEL and consequently, the claim of the Respondent, NVVNL for liquidated damages does not survive.**”*

3. Learned counsel for the Respondent, NVVNL made detailed submissions and, *inter-alia*, submitted that **from the judgment of APTEL, the period covered under the fire incident is not clear.** Learned counsel further submitted that it is for the Petitioner to quantify and demonstrate the period for which its claims are to be affected by the force majeure event of fire. Learned counsel added that the Petitioner's claim of drought on the basis of the subsequent notifications of the Govt. of Andhra Pradesh as relied upon in the present Petition has not been examined by this Commission or the APTEL.

4. In response, the learned senior counsel for the Petitioner referred to the **Commission's order dated 11.10.2017 in Petition No.16/MP/2014 and submitted that in the said order, it has been clearly recorded that the period for which the Petitioner was affected due to the incident of fire was 116 days.**

5. In response to the specific query of the Commission as to whether the period for which the Petitioner was affected by the fire incident ran concurrently with the period of drought for which the Commission already extended the SCOD in the order dated 11.10.2017, learned counsel sought liberty to place on record the requisite details in this regard.

6. After hearing the learned counsels for the parties, the Commission directed the Petitioner to file its written submissions, which will also include the details regarding period for which the Petitioner was affected by the incident of fire, within two weeks with copy to the Respondents, who may file their written submissions, if any, within two weeks thereafter. The interim protection granted by the Commission vide its earlier Record of Proceedings shall be continued till the final order of the Commission in the matter.

7. Subject to the above, the Commission reserved the matter for order.

Written Statement of the Petitioner:

12. The Petitioner filed its written statement on 20.08.2022 vide which it has, *inter-alia*, submitted as under:

- a) The SCOD stands extended by a period of 238 days on account of drought during the year 2012 under notification dated 09.01.2013 allowed by the Commission and fire incident during the year 2013. The two incidents did not overlap and therefore, the entire period under both force majeure incidents is entitled for extension. The table is as under:

	Period when delay occurred	No. of days	SCOD
SCOD as per PPA dtd 10.01.2011			09.05.2013
Delay on account of variation in DNI affecting the engineering and procurement	10 months 10.01.2011 –		09.03.2014 (Revised

activities, non-availability of HFT. This Period has been extended by agreement of parties vide the Supplementary Agreement to the PPA dated 30.10.2013	09.11.2011		SCOD)
Delay on account of Drought under Notification dtd 09.01.2013 allowed by CERC and upheld by APTEL	4 months June -Sept 2012	122	09.07.2014
Delay on account of Fire Accident allowed by APTEL	Fire incident on 06.09.2013 and upto January 2014	116	02.11.2014
Total period of delay allowed by CERC and APTEL		238	
Actual Commissioning date		240	04.11.2014
Balance period of Delay		2	
Period covered under <u>notifications dated 02.11.2011, 03.01.2014 and 17.12.2014 (discussed in detail herein after) – claimed in present petition</u>	12 months June - Sept 2011 June - Sept 2013 June - Sept 2014	366	05.11.2015

Re: Period of delay covered by notifications dated 02.11.2011, 03.01.2014 and 17.12.2014

- b) The present petition No. 427/MP/2019 came to be filed before this Commission for direction to NVVN to extend the SCoD based on notifications dated 02.11.2011, 09.01.2013, 03.01.2014 and 17.12.2014. Out of the four notifications, extension of four months has already been granted under notification dated 09.01.2013. As far as the other notifications are concerned, they provided for drought for the following periods:

Notification dated 02.11.2011 – June to September 2011

Notification dated 03.01.2014 – June to September 2013

Notification dated 17.12.2014 – June to September 2014

- c) Thus, the cumulative period of drought faced by the Petitioner's project under these notifications is 12 months.
- d) Article 4.5.1 of the PPA provides for a minimum extension on day to day basis for delay on account of force majeure. The Petitioner is thus entitled to a minimum of 238 days on

account of drought and fire incidents already allowed by APTEL. However, even after such extension, a period of two days remains (240 days – 238 days) that is entitled to be covered as reasonable delay beyond the period of force majeure. In the drought situation lasting for four months, the project site was considerably hampered leading to all activities coming to a standstill. The Commission has already held that the event of drought affected the project implementation and NVVN was directed to ascertain the duration of drought and revise the SCoD of the project.

- e) The same rationale will apply for all the notifications for drought issues during the period of execution of the project and the period covered under such notifications are to be treated as force majeure conditions.

Re: Respondent not entitled to claim liquidated damages on facts and the claim of the Respondent has been decided by this Commission as well as APTEL

- f) This Commission also vide its order dtd 11.10.2017 categorically observed that “*NVVN failed to bring on record proof of any 'legal injury' in the sense of some loss or damage having been sustained on account of breach i.e. short supply of the power energy to the DISCOMS*”. This observation was made by the Commission after a holistic consideration of the relevant provisions under the PPA and appreciating the principles of law on “claims for liquidated damages”.
- g) Drought and fire being undisputed Force Majeure events affecting the Petitioner SPD, and beyond the control of the Petitioner SPD thus cannot be a ground to impose damages. On this account itself, the Bank Guarantee submitted by the Petitioner to the extent of Rs.71.41 Crs must be directed to to be returned, which has been unreasonably withheld by the Respondent since the last 10 years.

Re: Without prejudice to the above, even as per the PPA between the parties, Respondent is entitled to invoke Bank Guarantee to the extent of 10% of the Bank Guarantee amount only

- h) As per 2nd PPA Amendment dated 30.10.2013 executed between the parties to record

extension of SCoD of the project by 10 months upon the recommendation of the MNRE, it is pertinent to note that along with the extension of the SCOD of the project, the Liquidated Damages clause was also revised as under :

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

4.6.1 If the SPD is unable to commence supply of power to NVVN by the scheduled commissioning Date other than for the reason specified in Article 4.5.1, the SPD shall pay to NVVN Liquidated 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 following:

a) Delay upto one (1) month. NVVN will encash 10% of the total performance Bank Guarantee..”

- i) In view of the amendment, even assuming, though not admitting, that NVVN is entitled to encash the Bank Guarantee submitted by the Petitioner for delay in commencement of supply of power, even in that case, NVVN is at the maximum entitled to encash the Bank Guarantee to the extent of 10 % only for a delay of 2 days. The withholding of the entire BG submitted by the Petitioner since January 2011 till date is completely unjust and arbitrary.

Re: Respondent vide its reply is re agitating the same objections, which have already been considered and disposed of on merits by this Commission as well the APTEL in appeal proceedings

- j) None of the objections taken by the Respondent in its Reply dtd 28.07.2020 are maintainable and a perusal of the Reply would indicate that the Respondent has re-agitated the same objection again and again before this Commission as well as in appeal proceedings.
- k) The Respondent has taken the preliminary objection of maintainability under Order 2 Rule 2 of the Code of Civil Procedure ,1908 to contend that the Petitioner is barred from claiming any relief on account of the force majeure notifications dated 02.11.2011, 03.01.2014, 17.12.2014 which were not part of petition no.16/MP/2014. The bar of Order 2 Rule 2 applies to claims that have not been raised with regard to the same cause of

action. In the present case, each of the notifications have been issued at different points of time and give rise to separate causes of action. The filing of petition against one of the notifications does not debar the Petitioner from raising claims against the other notifications.

- 1) In view of above, the delay of 2 days may be condoned as reasonable extension of time.

Analysis and Decision

13. We have heard the learned counsels for the Petitioner and the Respondents and have carefully perused the records.
14. The brief facts of the petition are that the Petitioner entered into a PPA dated 10.01.2011 and Supplementary Agreements dated 23.01.2012, 30.10.2013 and 27.09.2016 for procurement of solar power of the 50 MW Project for a period of 25 years from the commercial operation date. As per the terms of the PPA, the SCoD was 09.05.2013. The MNRE subsequently gave a general extension of 10 months and revised the SCoD to be 38 months i.e. 09.03.2014, instead of 28 months from the date of signing of the PPA.
15. Subsequently, the Commission vide Order dated 11.10.2017 in Petition No.16/MP/2014 held that *“variation between assessment of DNI by the Petitioner vis-à-vis actual DNI, fluctuation in foreign exchange rate and fire from an internal source are not Force Majeure events. Hence, no compensation can be awarded to the Petitioners under the provisions of the PPA. However, the drought in Andhra Pradesh that affected the project of MEIL is covered as Force Majeure event under Clause 11.3.1(a) of the PPA and accordingly, SCOD of the project shall stand extended by the period of actual drought after ascertaining from the Government of Andhra Pradesh.”* Accordingly, the Commission further extended the SCoD up to 09.07.2014. The Petitioner achieved COD on 04.11.2014. Subsequently, the Petitioner preferred an appeal against the Order dated 11.10.2017 with the APTEL.

16. The Petitioner vide the instant petition is now seeking extension of SCoD based on notifications dated 02.11.2011, 03.01.2014 and 17.12.2014. The cumulative period of drought faced by the Petitioner's project under these notifications is 12 months.
17. During the course of hearing held on 05.08.2022, it was brought to the notice of this Commission that, APTEL vide its judgement dated 22.07.2022 in the A.No.373 of 2018 has considered Fire as an event of Force Majeure.
18. Meanwhile, APTEL vide its judgment dated 26.07.2022 in Appeal No.373 of 2018 and Ors., has held that *"it is clear that fire, to the extent originating from a source external to the site, is covered under Force Majeure Event. It has already been observed in the foregoing paragraphs that Article 11.3.1 is an inclusive clause. Therefore, "fire", an act of God is a force majeure event"*. The duration of Force Majeure due to fire has been provided to be between 06.09.2013 till beginning of January, 2014 which is a duration of 116 days. Accordingly, after factoring the relief of 116 days as granted by APTEL, the SCoD further gets extended to 02.11.2014. Since, the actual date of commissioning stands at 04.11.2014, therefore there is delay of two (2) days in achieving SCoD.
19. The Petitioner in its written submission under the present petition has requested to condone the delay of the two (2) days in achieving SCOD. The Petitioner has further submitted that, even otherwise, as per Article 4.6.1 of the 2nd PPA Amendment dated 30.10.2013 NVVN is entitled to encash the Bank Guarantee to the extent of 10 % only for a delay of 2 days. The withholding of the entire BG submitted by the Petitioner since January 2011 till date is completely unjust and arbitrary.
20. We observe that the Commission under its Order 16/MP/2014 has accepted drought as the Force Majeure event and the APTEL in its order dated 26.07.2022 has upheld the views of the Commission. Thus, the only issue before this Commission to adjudicate is:

Whether the request of the petitioner, for extension of the SCoD of the project on the basis of notifications dated 02.11.2011, 03.01.2014 and 17.12.2014 issued by the Government of

Andhra Pradesh (GoAP), declaring the project site where the project of the Petitioner is located in Anantapur District as drought effected areas, can be allowed or the impugned notifications are barred by the principle of Constructive Res-judicata as also submitted by NVVN?

21. We observe that Section 11 of the Code of Civil Procedure, 1908 stipulates as under:

“11. Res judicata— No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I.—The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II.—For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III.—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV.—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI.—Where persons litigate bona fide in respect of public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Explanation VII.—The provisions of this section shall apply to a proceeding for the execution of a decree and reference in this section to any suit, issue or former suit shall be construed as references, respectively, to proceedings for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII.—An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.”

22. The Commission observes that Order II Rule 2 of the Code of Civil Procedure, 1908 stipulates as

under:

“ORDER II- FRAME OF SUIT

...

2. Suit to include the whole claim—

(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim—Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs—A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.”

23. From the above, we observe that Section 11 of the Code of Civil Procedure, 1908 mandates that any suit or issue in which matter directly and substantially in issue has been heard and finally decided on merits by the competent Court, it cannot be tried again by any Court provided the matter directly and substantially in issue is same between the same parties to the suit. The Rule of constructive res judicata is engrafted under Explanation IV of Section 11 of the Civil Procedure Code, 1908. It is observed that whereas, res judicata basically prohibits suit which has already been decided by a competent court, constructive res judicata prohibits raising issues which ought to be raised in the previous suit. It provides that if a plea could have been taken by a party in a proceeding between him and his opponent, he should not be permitted to take that plea against the same party in a subsequent proceeding with reference to the same subject-matter. Further, Order II Rule 2 of the Code of Civil Procedure, 1908 mandates that the suit filed should include the whole claim.

24. We further observe that the object underlying Section 11 of the Code of Civil Procedure, 1908 is that if the proceeding originally instituted is proper, the decision given therein is binding on all the persons on whom the right or interest may devolve. Further, it also prohibits raising issues which ought to be raised in the previous suit with reference to the same subject-matter. The doctrine of res-judicata is conceived in the larger public interest that all the litigation must, sooner than later come to an end. Similarly, the object of Order II Rule 2 of the Code of Civil

Procedure, 1908 is to ensure that no defendant is sued or vexed twice with regard to the same cause of action and second to prevent a plaintiff from splitting claims and remedies based on the same cause of action. The effect of Order II Rule 2 of CPC is to bar a plaintiff who had earlier claimed certain remedies with regard to a cause of action, from filing a second suit with regard to other reliefs based on the same cause of action. The Commission observes that Section 11 the Code of Civil Procedure read with Order II Rule 2 of the Code of Civil Procedure bars the subsequent suit on the same cause of action but does not however bar a subsequent suit based on a different and distinct cause of action.

25. In the instant petition, the Petitioner is seeking extension of SCoD based on notifications as under:

- a) Notification dated 02.11.2011 – June to September 2011
- b) Notification dated 03.01.2014 – June to September 2013
- c) Notification dated 17.12.2014 – June to September 2014

26. We observe that the Petitioner has filed the Petition No. 16/MP/2014 before this Commission on 04.02.2014 i.e. after the issuance of the notification dated 02.11.2011, Notification dated 09.01.2013 and Notification dated 03.01.2014. In Petition No. 16/MP/2014 the Petitioner has preferred to place on record only the Notification dated 09.01.2013 and the Commission has already granted relief of grant in extension of SCoD as per GoAP notification dated 09.01.2013 and had revised SCoD to 09.07.2014. We are of the view that Notification dated 02.11.2011 (for drought between June, 2011 to September, 2011) and Notification dated 03.01.2014 (for drought between June, 2013 to September 2013) are barred by the principle of constructive res judicata enshrined under Section 11, Explanation IV, CPC and Order 2 Rule 2 CPC which prohibits the petitioner to seek the remedy separately. The Petitioner could have placed on record the notifications dated 02.11.2011 and dated 09.01.2012 in Petition 16/MP/2014 itself since the Petition was filed on 04.02.2014. Hence the relief under notification date 02.11.2011 and 03.01.2014 is not allowed.

27. Further, we observe that notification dated 17.12.2014 (for drought between June, 2104 to

September, 2014), was issued by the Government of Andhra Pradesh, post filing of the petition number 16/MP/2014, by the Petitioner. We observe the period covered under 17.12.2014 (for drought between June, 2104 to September, 2014) comes to four months. The Petitioner has submitted that since NVVN had refused to consider drought as a force majeure event under the PPA and considering the fact that the Petition No. 16/MP/2014 was filed before this Commission, seeking declaration that drought is a force majeure event under the PPA, there was no occasion for the Petitioner to separately notify force majeure against subsequent notifications including G.O.M.s 17, dated 17.12.2014, pending the decision of the Commission in Petition No. 16/MP/2014. Subsequently, the Commission vide its order dated 11.10.2017 declared drought as a force majeure event under the PPA and accordingly, the Petitioner vide its letters dated 17.10.2017, 28.10.2017 and 22.12.2017 notified NVVN that the Petitioner has encountered drought situation at the project site which fact was fortified by the Government of Andhra Pradesh drought Notifications including G.O.M.s 17, dated 17.12.2014. We accept the submissions of the Petitioner. We hold that the period of draught of four months as per Government of Andhra Pradesh Notification dated 17.12.2014 (for drought between June, 2014 to September, 2014) is covered under Article 11.3.1(a) (Force Majeure) and accordingly the SCoD of the project stands extended from 09.07.2014 to 04.11.2014 (Actual day of Commissioning). We also direct NVVN to not hold/encash the Bank Guarantee and return the same to the Petitioner at the earliest.

28. The Petition no. 427/MP/2019 is disposed of in terms of the above.

Sd/-

पी. के. सिंह
(सदस्य)

Sd/-

अरुण गोयल
(सदस्य)

Sd/-

आई. एस. झा
(सदस्य)