



नई दिल्ली
NEW DELHI

याचिका संख्या./ Petition No. 605/MP/2020

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: 06th September, 2022

IN THE MATTER OF:

Petition under Sections 79 of the Electricity Act, 2003 and the statutory framework governing the procurement of power through competitive bidding and Article 11 read with Article 13.5 and Article 3.4.5 of the Power Purchase Agreement dated 22.11.2018 executed between the Solar Energy Corporation of India Limited and Arina Solar Power Limited seeking direction to restrain SECI from invoking the bank guarantees and for returning the bank guarantees

AND IN THE MATTER OF:

Arina Solar Private Limited,
Through its authorized signatory,
SP Centre, 41/44, Minoo Desai Marg,
Colaba, Mumbai

...Petitioner

Versus

1. Solar Energy Corporation of India,
5th Floor, D-3, A wing,
Prius Platinum Religare Building District Centre,
Saket, New Delhi

2. Jharkhand Bijli Vitran Nigam Limited,
Engineers Building,
Dhurwa, Ranchi

...**Respondents**

Parties Present: Shri Sujit Ghosh, Advocate for the Petitioner
Shri MohdMunis Siddique, Advocate for the Petitioner
Shri M.G. Ramachandran, Senior Advocate, SECI
Ms. Tanya, Advocate, SECI
Shri Manas Ranjan Mishra, SECI
Ms. Neha Singh, SECI
Shri Piyush Gupta, SECI

आदेश/ ORDER

The Petitioner, Arina Solar Private Limited is a special purpose vehicle set up by Shapoorji Pallonji Infrastructure Capital Company Private Limited for developing and commissioning 250 MW ISTS connected Solar Power Project in Tamil Nadu (Project). The Petitioner has filed the petition under Section 79 of the Electricity Act, 2003 and the statutory framework governing the procurement of power through competitive bidding and Article 11 read with Article 13.5 and Article 3.4.5 of the Power Purchase Agreement (PPA) dated 22.11.2018 seeking direction to restrain SECI from invoking the bank guarantees and for returning the bank guarantees.

2. The Respondent no. 1, Solar Energy Corporation of India Limited (SECI) is a Government of India enterprise under the administrative control of the Ministry of New and Renewable Energy (MNRE). It is an inter-State trading licensee and has been designated as the nodal agency for implementation of MNRE schemes for developing grid connected solar power capacity in India.
3. The Respondent no. 2, Jharkhand Bijli Vitran Nigam Limited (JBVNL) is the electricity distribution company for the State of Jharkhand.
4. The Petitioner has sought the following reliefs:

- (a) Direct SECI to return the Bank Guarantee dated 09.03.2020 submitted by the Petitioner on account of the termination of the PPA dated 22.11.2018 which is in accordance with Article 4.5.3 read with Article 13.5 of the PPA dated 22.11.2018;
- (b) In the interim, injunct SECI from encashing the Bank Guarantee dated 09.03.2020 or taking any other coercive steps detrimental to the interest of the Petitioner; and
- (c) Pass any such other and further reliefs as this Hon'ble Commission deems just and proper in the nature and circumstances of the present case.

Background:

5. On 03.08.2017, Ministry of Power issued 'Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects'. SECI issued a request for selection (RfS) on 30.01.2018 for development of cumulative capacity of 2000 MW. In response to the same, Shapoorji Pallonji Infrastructure Capital Company Private Limited submitted its bid and was declared as a successful bidder on 27.07.2018. Subsequently, Shapoorji Pallonji Infrastructure Capital Company Private Limited set up project company M/s Arina Solar Private Limited within the provisions of the RfS for development of ISTS-connected Solar Power Developer (SPD) for setting up a solar power project based on photo voltaic technology of 250 MW capacity in the State of Tamil Nadu.

Submissions of the Petitioner:

6. The Petitioner has made the following submissions in its Petition:
- a) The Petitioner entered into a PPA with SECI on 22.11.2018, and the Scheduled Commissioning date (SCoD) as per PPA was fixed at 25.10.2020.
- b) On 23.07.2019, the Petitioner issued Letter of Award (LoA) for construction of the Project:
- (i) LoA dated 23.07.2019 to Shapoorji Pallonji Infrastructure Capital Company Private Limited (SP Infra) for composite supply of goods which are required for setting up the Project
- (ii) LoA dated 23.07.2019 to Shapoorji Pallonji Solar Holdings Private Limited (SPSH) for the services and works required for setting up the Project.

- c) The supplier of the Petitioner entered into negotiations with overseas module suppliers viz. JA Solar and Wuxi Suntech for obtaining cost effective as well as efficient modules for the Project for delivery of photovoltaic modules between the first week of April 2020 and second week of June 2020.
- d) The Petitioner received detailed communications from its module/ inverter suppliers in China informing them about the outbreak of Corona Virus and its consequent impact on the manufacturing facility and supply chain, and subsequently, the Government of India, through Ministry of Finance, Department of Expenditure, Vide Office Memorandum No. F.18/4/2020-PPD (O.M. dated 19.02.2020) notified that the outbreak of corona virus in China or any other country would be considered as a case of natural calamity and that the Force Majeure clause may be invoked wherever appropriate.
- e) In view of the same, the Petitioner informed SECI about triggering of Force Majeure events, anticipating a delay of about 3 months in achieving the SCoD vide its communication dated 11.02.2020, 27.02.2020 & 18.03.2020.
- f) In response to this, SECI sought information from the Petitioner regarding the Schedule of Supply/Agreement with the Supplier, date of intended supply and extent to which supply stands disrupted on 19.03.2020.
- g) In light of the spread of the Covid-19 pandemic across the country, the following office memorandums were issued which affected the Petitioner's project:
 - (i) On 20.03.2020, MNRE vide its Office Memorandum no. 283/18.2020- GRID SOLAR dated 20.03.2020 (OM dated 20.03.2020) directed that all Renewable Energy implementing agencies to treat delay on account of disruption of supply chains due to the spread of coronavirus in China or in any other country, as a Force Majeure event.
 - (ii) On 25.03.2020, Ministry of Home Affairs, Government of India vide Order No. 40-3/2020-DM-1(A) imposed complete lockdown within the country. Further, Revenue and Disaster Management (D.M.II) Department, Tamil Nadu vide G.O. (Ms.) No. 172 also imposed complete lockdown in the State of Tamil Nadu.
 - (iii) On 17.04.2020, MNRE vide Office Memorandum No. F. No. 283/18/202- GRID SOLAR (OM dated 17.04.2020) directed that (i) all Renewable Energy implementing agencies will treat the period of Lockdown due to Covid-19 as a Force Majeure (ii) the Agencies shall grant extension of time for the entire period

of lockdown plus 30 days for normalization (iii) it will be a blanket extension, with no requirement for any kind of evidence (iv) the extension on account of disruption in supply of RE Equipment prior to lockdown shall be dealt with separately. Further, the Petitioner again informed SECI that due to the declaration of nation-wide lockdown, the offices of the Petitioner as well as the Supplier are closed and thereby inhibiting finalization and placement of orders for equipment and services.

- h) On 29.04.2020, SECI requested the Petitioner to intimate the tentative commissioning date of the Project.
- i) In response to the same, the Petitioner, vide its communication dated 30.04.2020, informed that it anticipates significant delay in project timelines and that the SCoD may occur in the first half of the Financial year in 2021-22.
- j) In consonance with this, on 21.05.2020, SECI extended the date of commissioning from 25.10.2020 to 17.01.2021. It was also declared that any claim for extension of time prior to or beyond the period between 25.03.2020 to 17.05.2020 can be requested for, along with supporting documents.
- k) As documentary evidence in support of the request for an extension of the timelines under the PPA, the Petitioner submitted a detailed account of the events that would qualify as Force Majeure, namely, the disruption of supply of solar modules, ensuing nation-wide lockdown due to Covid-19, and the normalisation period of 30 days.
- l) In response to the Petitioner's submission, on 29.06.2020, SECI requested for the following information:
 - (i) Revised delivery schedule of modules and other equipment along with documentary evidence.
 - (ii) Exact disruption period after 17.05.2020 along with documentary evidence.
- m) On 30.06.2020, MNRE vide Office Memorandum F. No. 283/18/2020-GRID SOLAR dated 30.06.2020 (OM dated 30.06.2020) clarified that the period of lockdown is to be treated from 25.03.2020 to 31.05.2020.
- n) In an attempt to commence the construction of the Project, in view of the easing restrictions, the, the Petitioner sought permission of the concerned Tahsildar, Ettyapuram for mobilisation of labour, supervisors, material, construction equipment, etc. vide its letters dated 13.05.2020 and 29.05.2020 and on 13.07.2020. However,

the Tahsildar, Ettypuram refused permission for mobilisation at site on all the three occasions.

- o) Meanwhile, on 17.07.2020, SECI extended the date of commissioning from 25.10.2020 to 31.01.2021, thereby declaring an extension of time of 98 days.
- p) However, on 31.07.2020, Revenue and Disaster Management (D.M.II) Department, Tamil Nadu vide G.O. (Ms.) No. 396 extended complete lockdown in the State of Tamil Nadu until 31.08.2020.
- q) In view of the cumulative delays in the Project and the right available to the Petitioner under Article 4.5.3 read with Article 13.5 of the PPA dated 22.11.2018, the Petitioner terminated the PPA on 07.08.2020.
- r) The Petitioner is now seeking return of the Bank Guarantee dated 09.03.2020 on account of the termination of the PPA dated 22.11.2018.

7. The Petitioner has made the following arguments in support of the relief sought:

Re.: Out-break of corona virus and ensuing pandemic is a Force Majeure event

- a) The outbreak of Covid-19 and resultant lockdown across China qualifies as a Force Majeure Event under the PPA. As per OM dated 19.02.2020 issued by the Ministry of Finance, the outbreak of corona virus in China or any other country would be considered as a case of natural calamity and the Force Majeure clause may be invoked wherever appropriate. Thus, it is clear that the outbreak of corona virus in China was notified as an 'Act of God'. The term 'Force Majeure' and procedure and consequences in relation to the same have been defined under Article 11 of the PPA. Article 4.5 of the PPA provides for extension of time in the event that the Petitioner is prevented from performing its obligations under Article 4.1 by the SCoD due to occurrence of a Force Majeure events and Article 13.5 of the PPA deals with Termination on account of Force Majeure.
- b) As per Article 11.3.1 (a) of the PPA, an Act of God is an event of Force Majeure if the same is declared/ notified by the competent State/ central authority/ agency as applicable. Thus, the OM issued by Ministry of Finance which considers out-break of corona virus as a natural calamity would qualify as a notification/declaration of the corona virus as an Act of God within the precepts of Article 11.3.1 (a) of the PPA.
- c) The outbreak wholly prevented the procurement of the modules and consequently impacted the performance of the obligations of the Petitioner under the PPA. Further,

this situation was wholly out of control of the Petitioner as is evident from various communications received by the Petitioner from its module and inverter suppliers.

- d) It has issued appropriate notices to SECI vide email dated 11.02.2020, i.e. within seven days of the Petitioner coming to know about the details of the adverse effect on the project due to the spread of corona virus in China from its contractors. Periodic updates were also provided by the Petitioner after the intimation of force majeure events on 11.02.2020 and 27.02.2020, and prior to the commencement of the lockdown on 25.03.2020, on 18.03.2020 appropriate communication updating the status was provided by the Petitioner.
- e) In accordance with OM dated 20.03.2020, the outbreak of corona virus qualifies as a Force Majeure event, commencing from at least 11.02.2020 (i.e. the date of intimation of corona virus outbreak by ASPL) and extending until the commencement of lockdown.

Re.: Nation-wide Lockdown imposed by the Ministry of Home Affairs

- f) In accordance with Article 11.4.1 of the PPA, since the lockdown was a direct consequence of the Force Majeure event (pandemic caused by corona virus), the same would also qualify as an event of force majeure as it was imposed by the Government and lead to immediate cessation of the activities related to the project, as it prevented access to office effecting engineering & design activities, stoppage of manufacturing activities, disruption of logistics, unavailability of man and material etc.
- g) The entire period of lockdown i.e. from 25.03.2020 to 31.05.2020 was declared as a ‘Force Majeure Event’ vide OM dated 30.06.2020.
- h) Apart from the period of lockdown, OM dated 30.06.2020 also grants an extension of 30 days for normalization post the period of lockdown, which is 30 days from 31.05.2020.

Re. Effect of Force Majeure post the period of lockdown

- i) Even after period of lockdown, the Petitioner was still unable to commence construction of the Project and operations of the Company. Thus, even though the OM dated 30.06.2020 defines Force Majeure as the period of lockdown and grants an extension for the period of lockdown plus 30 days, the combined impact of the lockdown and

outbreak of corona virus continued to impact the Petitioner leading to severe delay in the commencement of the Project.

- j) The Petitioner has submitted (alongwith documentary evidence) that even after the period from 25.03.2020 to 17.05.2020 there would be need for time extension on the following grounds:
- (i) Sealing of the area where the project is located. The Tahsildar, Ettyapuram refused permission for mobilisation at site.
 - (ii) Unavailability of migrant labourers
 - (iii) Compulsory quarantine of 14 days.
 - (iv) The letter of the Tehsildar, wherein there was no certainty on the date by which proper and sufficient mobilization of men and equipment would be permitted for the project.
- k) Thus, in view of the above, the aforementioned Force Majeure events continued beyond the period of three months which have been detailed below:

Period	Period
Pre-Lockdown (both days inclusive)	11.02.2020 to 24.03.2020 i.e. 42 days
Lockdown (both days inclusive)	25.03.2020 to 31.05.2020 plus 30 days for normalization i.e. 68 days
Normalization	30 days (however, the actual normalization period owing to restrictions, which is a consequence of the lockdown, is much more as evidenced in the earlier communications submitted by the Petitioner to Respondent SECI). Hence, presently this period has not been considered for computing the total period of Force Majeure
Post nation-wide Lockdown (although Tamil Nadu has extended the lockdown till 31.08.2020)	63 days and counting 01.06.2020 to 13.07.2020 and continuing
Total no. of days during which FM or its effect has continued	173 days and counting

- l) SECI has itself declared 98 days (i.e. more than 3 months) as being covered under Force Majeure and its effects.
- m) Since, the Force Majeure and its effects lasted for a period exceeding 3 months, Article 13.5.1 gave the Petitioner the right to terminate the PPAs.
- n) Accordingly, the Petitioner has validly terminated the PPAs in accordance with Article 4.5.3 read with Article 13.5.1 of the PPA. Once the said right was validly exercised, no liability survives of either party. It is noteworthy that the Termination Notice was issued in terms of the provisions of the PPAs and in compliance thereof.
- o) The bank guarantees dated 09.03.2020 provided by the Petitioner to SECI ought to be returned as the PPAs stand validly terminated under Article 13.5.1 read with Article 4.5.3 and no further liability of the Petitioner survive towards SECI.
- p) Invocation of Performance Bank Guarantee for failing to perform an impossible act would be untenable in law. Invocation of Performance Bank Guarantee when a Force Majeure Event is subsisting is violative of Article 11.7.1 (d) of the PPAs, which specifically provides that no payment shall be made by either party affected by Force Majeure as long as the Force Majeure event continues.
- q) The purpose of Performance Bank Guarantee is to ensure timely commissioning of the Project inasmuch as Article 3.4.1 of the PPA provides that the Performance Bank Guarantee shall be returned immediately after successful commissioning of the Project. Once the PPA stand terminated in accordance with the provisions of the PPA, the purpose of the Bank Guarantees does not survive.
- r) Accordingly, in view of the foregoing submissions, SECI ought to be directed to return the Bank Guarantees to the Petitioner.

Hearing dated 20.08.2020

- 8. After hearing the learned counsel for the Petitioner and the learned senior counsel for the Respondent, SECI, the Commission admitted the Petition. The Commission directed the Petitioner to implead JBVNL as party to the Petition and to file revised memo of parties by 28.8.2020. The Commission allowed the Petitioner to file an additional affidavit for correction of certain typographical errors that have crept into the Petition. The Petitioner informed that it has filed IA No. 57/2020 restraining the Respondent, SECI from invoking/ encashing the PBG of Rs.50 crore furnished in terms of PPA till final disposal of the Petition and had also filed IA No. 58/2020 for urgent listing of the matter. SECI submitted that it

does not intend to invoke/ encash the PBG furnished by the Petitioner at this stage subject to the Petitioner keeping the PBG valid. The Commission directed SECI not to invoke/ encash the PBG furnished by the Petitioner till the next date of hearing and the Petitioner was directed to keep the PBG valid. Accordingly, the Commission disposed of the IA No. 57/2020 and IA No. 58/2020.

Submissions of the Respondent No. 1 (SECI):

9. SECI has submitted as under:

a) In terms of Article 11.2, the affected party has been defined to cover only the Petitioner and/or SECI whose performance is affected by the events of force majeure. The definition of Affected Party under this Article 11.2 does not cover any contractor or sub-contractor or agents etc. The above is distinguishable from the other contracts, wherein the scope of the parties is extended to other contractors as well, the parties in the present PPA have agreed to a restricted scope, as given below:

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

b) Article 11.3 enlists specific events which can only be considered for the purpose of Force Majeure under the PPA. The above event alleged by the Petitioner is not covered under Article 11.3 dealing with scope and meaning of Force Majeure. Article 11.3.1 of the PPA uses the word ‘means’ while enumerating the events or circumstances or combination of events stated therein as amounting to Force Majeure. It is a settled law that the use of the word ‘means’ indicates that the definition is restrictive and not exhaustive and no other meaning can be assigned to the expression than what is put down in the definition. In any event, it is settled principle that Force Majeure clauses are to be narrowly construed. SECI places reliance on the following decisions: *NTPC Vidyut Vyapar Nigam Limited –v- Precision Technik Private Limited; Energy Watchdog –v- Central Electricity Regulatory Commission (2017) 14 SCC 80; Halliburton Offshore Services Inc –v- Vedanta Limited &Ors.; M/s. Ram Abhoshan–v- M/s. PEC Limited 2018 SCC OnLine Del 10553.*

c) Article 11.4 of the PPA dealing with Force Majeure exclusions, includes within its scope, ‘*Unavailability, late delivery, or changes in cost of the plant, machinery, equipment, materials, spare parts or consumables for the Power Project; Delay in the performance of any contractor, sub-contractor or their agents*’ and ‘*..... or the*

- agreements becoming onerous to perform*’. Accordingly, it is not open for the Petitioner to claim any relief based on the events affecting the supplier of equipment, material etc.
- d) It is entirely the obligation of the Petitioner to have arranged its affairs with regard to procurement of modules and equipment for establishing and setting up the solar power project by the SCoD which had been awarded to Petitioner in pursuance of it being declared as successful bidder in the competitive bidding process.
 - e) It was always open to Petitioner to arrange for the plant, machinery etc. from any source other than China. The choice of sourcing the equipment for the power project are matters within the discretion of the bidder and not specified in the bidding documents or the PPA.
 - f) In terms of Article 11.5 of the PPA, the Affected party i.e. the Petitioner was required to give Notice to SECI for the alleged event of Force Majeure as soon as reasonably practicable, but not later than seven (7) days after the date on which such party knew or should reasonably have known of the commencement of event of Force Majeure.
 - g) The Petitioner has stated that Shapoorji Pallonji Infrastructure Capital Company Private Limited (Group Company of the Petitioner), the EPC Contractor, started receiving information since 25.01.2020 from its Module/ Inverter Suppliers about the outbreak of coronavirus and consequent delay in performance of work. Shapoorji Pallonji Infrastructure Capital Company Private Limited, by letter dated 04.02.2020, informed the Petitioner about the Force Majeure event of disruption in in supplies on account of outbreak of Coronavirus in China for the project. Under Article 11.5 of the PPA, Force Majeure Notice was not issued by the Petitioner until 27.02.2020.
 - h) It is well settled that issue of notice of force majeure, as required by the provisions of the agreement is a pre-condition for claiming any relief, particularly, when the same is stated so in the PPA.
 - i) SECI by its letter dated 19.03.2020 had requested the Petitioner to submit all the documents including but not limited to the Schedule of Supply/Agreement with the Supplier, the date of intended supply, the extent to which the supply stands disrupted in light of the outbreak of Corona Virus etc. to merit consideration of its claim of Force Majeure as per the provisions of PPA and RfS specifically to Article 11 of the PPA. However, the Petitioner has not provided the requisite documents to enable SECI to consider the request for extension in the commissioning date of the project under the PPA for the above period.

- j) The Petitioner has also not given SECI regular (and not less than monthly) reports on the progress of remedial measures and such other information regarding the alleged force majeure event in terms of Article 11.5.2 of the PPA. In absence of submitting requisite documents, the alleged event of disruption of supply chain prior to the notification of lockdown by Government of India is specifically excluded from the scope and ambit of Force Majeure.
- k) Consistent with the above O.M. dated 17.04.2020 and with regard to communications dated 27.02.2020, 18.03.2020, 17.04.2020, 30.04.2020 of the Petitioner for extension of time, SECI by its letter dated 21.05.2020 has duly extended the timeline of the SCoD under the PPA from 25.10.2020 to 17.01.2021.
- l) The Petitioner vide its letter dated 02.06.2020 responded to letters dated 19.03.2020 of SECI and 21.05.2020 and had purportedly provided certain documents in compliance of the letters of SECI for seeking extension of time. In response thereof, SECI by email dated 29.06.2020 sought for certain details such as revised delivery schedule of modules and other equipment with documentary evidence and exact disruption period after 17.05.2020 with documentary evidence. However, the Petitioner failed to provide the above details and documents to the satisfaction of SECI.
- m) Consistent with the O.M. dated 30.06.2020, SECI vide its letter dated 17.07.2020, had duly extended the timeline of the SCoD upto 31.01.2021 under the PPA. SECI had also stated that *“If you have any further claim w.r.t extension of time prior to or beyond the above-mentioned period, you may submit supporting documents along with your claim”*.
- n) O.M. dated 20.03.2020, 17.04.2020 and 30.06.2020 of the Government of India have recognized the disruption in supply chain on account of Covid-19 prior to the Lockdown period and imposition of Lockdown by Government of India for the purpose of granting extension of time to the Renewable Power Developers to commission their projects. To the contrary, the Petitioner is wrongly reading the said communication in a misplaced manner for the purpose of purportedly terminating the PPA.
- o) The Petitioner has wrongly alleged that even after the period of lockdown, the Petitioner is unable to commence construction of the project on account of sealing of the area where the project is located, unavailability of the migrant labourers, compulsory quarantine of 14 days and that the same qualifies as force majeure event for termination of the PPA. The above events do fall not with the scope of Force Majeure provision of

the PPA i.e. Article 11. Further, Article 11.4 dealing with Force Majeure exclusions includes within its ambit 'agreement becoming onerous to perform'.

- p) As per O.M. dated 13.08.2020, the Petitioner can apply for any further extension of time for commissioning of the power project.

Re: Purported Termination of PPA

- q) The Petitioner instead of providing the requisite documents in support of the purported claim of Force Majeure due to Covid-19 prior to lockdown and after having been granted extension in accordance with the O.M. dated 17.04.2020 and 30.06.2020 of the Government of India, has now purported to unilaterally terminate the PPA on 07.08.2020 in terms of Article 13.5 of the PPA.
- r) In the present case, the PPA was signed on 22.11.2018. The Commission approved the procurement of power at the tariff discovered through competitive bid on 28.02.2020 in Petition No.187/AT/2020 and the Petitioner had to complete the project by 2021. The import of the plant, machinery etc. from any source can be at any time till December, 2020 and there can be an extension of time given by SECI even thereafter, if there are circumstances justifying the same. In these circumstances, the Petitioner cannot construe that there is a force majeure which prevents or unavoidably delays the Petitioner from performing the obligations under the PPA.
- s) If the Petitioner was not in a position to source the plant and machinery till July, 2020, the same cannot be considered as the Petitioner being prevented or unavoidably delayed in the performance of the obligation. In this regard, it is settled law that force majeure clauses have to be construed strictly.
- t) As per Article 16.2.1, there is a requirement to issue a written notice to the other party, the opportunity to the other party to deal with and reply to the notice including raising any counter-claim, an attempt to amicably resolve the dispute and in the event of the party failing to resolve the dispute amicably over a period of 30 days, the dispute to be referred for adjudication of the Appropriate Commission under Article 16.3. Further, in terms of Article 16.4, notwithstanding the existence of any dispute or difference referred to the Appropriate Commission, the parties are required to perform their respective obligations which are not in dispute under the agreement.
- u) Relying on Section 50 of the Indian Contract Act, 1872, it is incumbent on the parties to follow the above process of issue of notices, consideration of reply and counter-claim

by the other party, an attempt to amicably resolve over a period of 30 days etc. as a pre-condition before invoking the adjudication process of the Appropriate Commission.

- v) The conduct of the Petitioner clearly establishes that it is wrongly repudiating the PPA on the pretext of sustained force majeure. The ulterior purpose to avoid execution of the power project and the attempt to wriggle out of the PPA can be attributed to the lower tariff quoted for the power project i.e. Rs.2.52/kWh or that the subsequent competitive bidding process have discovered higher tariff.
- w) Allowing termination of PPA by the Petitioner for setting up the 250 MW Solar Power project, in the facts and circumstances of the case, is not in National interest and defeats the primary object of the Electricity Act, 2003 as well as the schemes and policies of Government of India which envisage promotion of renewable power including solar power.
- x) By letter dated 07.09.2020, SECI had disputed the purported termination of the PPA by Petitioner on ground of existence of Force Majeure due to delay on account of Covid-19 and the resultant lockdown.

Re: Return of Performance Bank Guarantees

- y) Performance Bank Guarantee was furnished by the Petitioner under the PPA for guaranteeing the commencement of the supply of power upto the Contracted Capacity within the time specified under the PPA. Under the PPA, the obligation of SECI to return/release the Performance Bank Guarantees is only after successful commissioning of the project after taking into account any liquidated damages/penalties due to delays in commissioning is as per the provisions in PPA and further, such return/release of the Performance Bank Guarantees is stipulated to be without prejudice to other rights of SECI under the PPA.
- z) Accordingly, the Petitioner having failed to perform its obligations under the PPA is not entitled to claim any relief including the return of Performance Bank Guarantees. In any event, the release of the Performance Bank Guarantee before the scheduled commissioning date cannot be linked, when SECI is disputing the validity of the termination purported to be done by the Petitioner and is seeking specific performance of the obligations of the Petitioner under the PPA.

Submissions of the Petitioner vide Rejoinder:

10. The Petitioner vide Rejoinder has reiterated its submissions made through plaint and as such the same has not been reproduced herewith for the sake of brevity. Additionally, the Petitioner has submitted as under:

Re: The outbreak of Covid-19 and imposition of Nation-wide lockdown have already been declared as Force Majeure by MNRE and Respondent SECI itself and therefore the same cannot be disputed at this stage

11. The outbreak of Covid-19 and Nation-wide lockdown has already been declared as an event of Force Majeure by MNRE and has been well acknowledged by SECI through various communications. Accordingly, the averments of SECI that the outbreak of Covid-19 and Nation-wide lockdown is not an event of Force Majeure is wholly contrary to the entire factual position as also contradictory to the detailed communications issued by Respondent SECI.

Re: Outbreak of Covid-19

12. SECI being a Renewable Implementing Agency was directed by MNRE to treat delay on account of disruption of the supply chains due to spread of coronavirus in China or any other country as Force Majeure.

Re: Nation-wide Lockdown

13. In light of the OMs dated 20.03.2020, 17.04.2020, 30.04.2020 and 13.08.2020, SECI has specifically extended the timelines for commissioning on the basis of the directions of MNRE which declared the outbreak of Covid-19 and Nation-wise lockdown as Force Majeure. Hence, it cannot be gainsaid on the part of SECI to aver that the outbreak of Covid-19 is not an event of Force Majeure.

Re.: The Petitioner has a unilateral right to terminate the PPA if the Force Majeure or its effects continue to be present beyond a period of three months

14. It is a settled principle of law that where an agreement is determinable, i.e. a contract which contemplates termination, then such an agreement is not capable of specific performance. In this regard, reference is made to decision of the Delhi High Court in the case of ***Rajasthan Breweries Ltd. v. The Stroh Brewery Company Limited, AIR 2000 Del 450***. Accordingly, once the Petitioners have terminated the PPA, the Respondents cannot compel the Petitioner to specifically perform its obligations under the PPA.

Hearing dated 07.06.2022

15. Learned counsel for the Petitioner submitted that the Petition has been filed seeking direction to the SECI to return Performance Bank Guarantee (PBG) dated 09.03.2020 of Rs. 50 crores as a consequence of the termination of the PPA, whereas, SECI referred to the pleadings and note of arguments and made detailed submissions in the matter. Considering the request of contracting parties, the Commission permitted the parties to file its written submissions of not more than three pages and reserved Orders in the matter.
16. In compliance to the Order dated 07.06.2022 , SECI filed written submissions on 20.06.2022 and the Petitioner filed written submissions on 04.07.2022.

Written submissions by SECI on 20.06.2022

17. SECI has reiterated its submissions made through reply and as such the same has not been reproduced herewith for the sake of brevity. Additionally, SECI has submitted as under:
 - a) COVID-19 is not ipso facto an event of force majeure under Article 11. It has been held by the Hon'ble High Court of Delhi in the decision dated 29.05.2020 in OMP (I) (COMM) No. 88 of 2020 in *Halliburton Offshore Services Inc -v- Vedanta Limited &Ors.* that whether COVID-19 would justify non-performance or breach of a contract has to be examined on the facts and circumstances of each case. The conduct of the parties prior to the outbreak, the deadlines that were imposed in the contract, the steps that were to be taken, various compliances that were required to be made will have to be considered. In the present case, the Petitioner was responsible for arrangement, procurement of equipment, plant etc. for setting up the solar power project by the SCoD i.e. 31.01.2021. The Petitioner had therefore sufficient time both before and after the said COVID-19 period to arrange for import of the plant, machinery, material and therefore was not prevented by any force majeure event in the performance of obligations.
 - b) It is well settled that occurrence of commercial difficulty, inconvenience, hardship in performance of the conditions agreed to in contract, agreement becoming onerous to perform is not to be treated as Force Majeure and cannot provide justification to wriggle out of the contract.
 - c) The Petitioner has not given Notice as per Article 11.5 read with Article 17 of the PPA to the designated officer and more importantly within seven (7) days after the date of

the commencement of event of Force Majeure. Such notice as per the said Article 11.5 is a pre-condition for claiming any relief.

- d) Even assuming but not admitting that there was force majeure, the total period admissible in any event is limited to 68 days and not a sustained period of more than three months, for the reasons mentioned herein.

Re: Covid-19: Pre-Lockdown Period

- e) The Petitioner has claimed 43 days i.e. from 11.02.2020 (date of intimation of Covid-19) to 24.03.2020 (until commencement of lockdown in India) in respect of the Pre-lockdown period. As per OM dated 20.03.2020, the SPDs claiming disruption were to give all the documentary evidence in support of their claim to the satisfaction of SECI for SECI to decide if the developers were actually affected due to disruption in chain on account of Covid-19. The Petitioner has not provided the requisite documents in terms of the said communications of SECI and the OM dated 20.03.2020 of MNRE. Accordingly, implications of Covid-19 for the period 11.02.2020 to 24.03.2020 cannot be considered as Force Majeure under Article 11 of PPA.

Re: Covid-19: Lockdown in India and Post- Lockdown Period

- f) SECI had granted extension of SCD to the Petitioner in terms of various O.Ms of MNRE relating to disruption due to lockdown on account of Covid-19.
- g) During the hearing on 07.06.2022, it was wrongly stated by the Petitioner that it had never sought any extension of time from SECI on account of Covid-19. In this regard, Paras 2, 18, 19 of letter dated 05.06.2020 of Petitioner clearly demonstrate that the Petitioner has acknowledged the extension of time granted vide SECI's letter dated 21.05.2020 and has sought for further extension of time for the period prior to lockdown in India.
- h) MNRE in its OM dated 30.06.2020 issued clarification regarding the period of lockdown for purpose of Office Memorandum dated 17.04.2020 as 25.03.2020 to 31.05.2020 i.e. 68 days and the period of normalization i.e. 30 days referred in OM dated 17.04.2020.
- i) The termination of the PPA by the Petitioner vide its letter dated 07.08.2020 on grounds of sustained force majeure is not sustainable. By letter dated 07.09.2020, SECI

has disputed the purported termination of the PPA by the Petitioner on ground of non-existence of sustained Force Majeure (for a period of more than 3 months) due to delay on account of Covid-19 and the resultant lockdown.

- j) SECI had clarified that in terms of the OMs dated 17.04.2020 and 30.06.2020 of MNRE, extension has been granted to the developers to commission their projects. It is always open to MNRE to provide extension of time and parties to mutually agree for extension and these need not be for the specific aspects given under Article 4.5.1 of PPA. MNRE provides for such extension of time in the interest of development of RE projects independent of force majeure conditions.
- k) In the absence of sustained force majeure, the purported termination by the Petitioner is illegal and the failure of the Petitioner to perform the obligations entitles SECI to encash the performance bank guarantee.
- l) The reliance placed by Petitioner on OM dated 13.08.2020 of MNRE is misplaced as the Petitioner did not invoke the relief viz. extension of time available under the said OM.
- m) The alleged events of sealing the area where the project is located, unavailability of the migrant laborers, compulsory quarantine of 14 days does not fall within the scope of Article 11 of the PPA. The said events are in fact excluded from being considered as Force Majeure as per Article 11.4 of the PPA dealing with Force Majeure exclusions including within its ambit 'agreement becoming onerous to perform'.
- n) The relief claimed by the Petitioner for return of the performance bank guarantee is not therefore admissible. The performance bank guarantee can be returned only after the Petitioner has fulfilled its obligations as provided in Article 3.4 of the PPA.
- o) It is a settled principle of law that a party in breach cannot terminate the contract and it is for the non-defaulting party to decide on whether to terminate the contract or proceed with the same.
- p) It has suffered a legal injury/loss on account of non-availability of power from the SCoD for supply to Respondent No.2- Jharkhand Bijlee Vitaran Nigam Limited under PSA dated 07.08.2018 entitling SECI to the recovery of liquidated damages in terms of Article 4.6 of the PPA which has been agreed to between the parties as a genuine pre-estimate of such damages. SECI has also raised a counter-claim in its reply filed on 15.09.2020 for the Petitioner to be in fundamental breach of the PPA dated 22.11.2018 and the material obligations contained in the PPA.

Written Submissions by the Petitioner on 04.07.2022

18. The Petitioner vide written submissions has reiterated its submissions made through plaint as such the same has not been reproduced herewith for the sake of brevity. Additionally, the Petitioner has submitted as under:

- a) Even if it is assumed for the sake of arguments without admission on part of the Petitioner that the Petitioner's email dated 11.02.2020 is not construed as a notice of Force Majeure, even then, the letter dated 27.02.2020 has to be construed as a Force Majeure notice in complete consonance with the terms of the PPA. Thus, the averment of SECI that the Petitioner has not given notice of Force Majeure is whimsical and untenable.
- b) OM dated 13.08.2020 directed that all RE projects be given a blanket time extension of 5 months from 25.03.2020 to 24.08.2020 without any case to case examination, which proves that Force Majeure and its effects continued for 5 months, which is more than the period of 3 months prescribed in Article 4.5.3 of the PPA for any Party to exercise its right to terminate the PPA.

Re: Once PPA is terminated as per Article 13.5 read with Article 4.5.3, no further liability for either party from the date of termination

- c) In terms of Article 13.5 of the PPA *"If the Force Majeure Event or its effects continue to be present beyond a period as specified in Article 4.5.3, either party shall have the right to cause termination of the Agreement. In such an event this Agreement shall terminate on the date of such Termination Notice without any further liability to either Party from the date of such termination"*. The Petitioner had to the best of its ability tried to fulfil its obligations under the PPA which is evident from the numerous exchanges with SECI and the Tehsildar. It is only when the regulatory uncertainty arose viz., delay on procurement of the modules, uncertainty with respect to Force Majeure Event i.e., COVID-19, etc. did the Petitioner validly terminate the PPA vide its letter dated 07.08.2020.
- d) As per the terms of the PPA, SECI is not entitled to challenge or question the termination notice issued by the Petitioner. The phrase *"without any further liability to either party from the date of such termination"* supports the case of the Petitioner

and as such, the reply to the termination notice holds no merit and on this very ground, the Counter Claim filed by SECI is liable to be dismissed.

- e) Once the PPA stands validly terminated, the Petitioner is not liable to fulfil the obligations specified under the PPA since the PPA has become non-est. Any claim arising out of the PPA after the date of termination holds no merit insofar as encashment of bank guarantee is concerned and SECI is liable to return the Bank Guarantee to the Petitioner.

Re: Specific denials of various arguments raised by the Respondent

- f) The Respondent during the final hearing and in its written submissions stated that the Force Majeure event lasted only for 68 days. However, the Force Majeure event and its effect have lasted for more than 3 months i.e. effectively 90 days.
- g) The Respondent during the final hearing and in its written submissions informed that the Petitioner has wrongly stated that it never sought any extension from SECI on account of Covid-19. Even otherwise, if the Petitioner has sought extension, it is a right arising out of the PPA, and thereafter the grant of such extension will not be fatal to right of the Petitioner to terminate the PPA in light of Article 13.5 & 4.5.3, which provide that even if there is extension, any Party has the right to terminate the PPA if the Force Majeure Event continues after 3 months. Any extension sought or granted does not waive the right to terminate once the requirement to terminate the PPA is met.
- h) The Respondent during final hearing and in its written submissions stated that the extensions have been granted to commission their projects and not for the specific aspects given under Article 4.5.1 of the PPA. The said averment of the Respondent is in complete ignorance of their own correspondences vide letter dated 21.05.2020, letter dated 17.07.2020 and OM dated 13.08.2020, wherein SECI and MNRE have themselves admitted that the extensions are being given on account of lockdown due to Covid 19 – a Force Majeure event permitted by Ministry of Finance, MNRE and SECI. Pertinently, prior to filing its reply on 15.09.2020, Respondent has never disputed the Force Majeure notices issued by the Petitioner. Hence, SECI cannot contend that extensions were not being given on account of Force Majeure i.e. under Article 4.5.1. of the PPA.

- i) The Respondent during final hearing and in its written submissions stated that the effects of Force Majeure Event on contractor/supplier are not covered under the scope of Article 11. The delay in the performance of any contractor or agent which is a result of Force Majeure Event or its effects is well covered under Article 11.4 of the PPA. Accordingly, the averments of the Respondent are in complete ignorance to the clauses of the PPA.
- j) The Petitioner denies the grounds raised and the judgments relied upon by the Respondent and the Petitioner is differentiating the judgments relied upon by SECI and its inapplicability in the present case.

Analysis and Decision:

19. We have heard the learned counsels for the Petitioners and the Respondents and have carefully perused the records.
20. The primary issues that arise for consideration before the Commission in the present matter are as under:

Issue No. 1: *Whether the events claimed by the Petitioner as Force Majeure events qualify as Force Majeure events as per Article 11.3 of the PPA dated 22.11.2018?*

Issue No. 2: *Whether these events remained operative over the time period of 3 months, as stipulated in Article 4.5.3 of the PPA, so as to validate the termination of the PPA dated 22.11.2018? and*

Issue No. 3: *Whether SECI can be directed to return the Bank Guarantee dated 09.03.2020 submitted by the Petitioner on account of the termination of the PPA dated 22.11.2018 in accordance with Article 4.5.3 read with Article 13.5 of the PPA dated 22.11.2018?*

21. We now take issues one by one for discussion.

Issue No. 1: *Whether the events claimed by the Petitioner as Force Majeure events qualify as Force Majeure events as per Article 11.3 of the PPA dated 22.11.2018?*

AND

Issue No. 2: *Whether these events remained operative over the time period of 3 months, as stipulated in Article 4.5.3 of the PPA, so as to validate the termination of the PPA dated 22.11.2018?*

22. Since Issue No. 1 & Issue No. 2 are juxtaposed, hence are taken together for discussion. The Petitioner has cited the following events as Force Majeure events during three time-periods:

- a) Outbreak of corona virus
- b) Imposition of nation-wide lockdown
- c) Continuation of Force Majeure events post lockdown

Event	Period	Days
Pre-Lockdown (both days inclusive)	11.02.2020 - 24.03.2020	43 days
Lockdown (both days inclusive)	25.03.2020 - 31.05.2020	68 days
Normalization		30 days
Post Nation-wide Lockdown (although Tamil Nadu had extended lockdown till 31.08.2020)	01.06.2020 - 13.07.2020 and counting	43 days and continuing
Total no. of days during which Force Majeure or its effect continued	154 days and (excluding normalization period)	continuing

23. The Commission observes that relevant Articles of the PPA dated 22.11.2018 are as under:

“ARTICLE 11: 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 Buyer-Buying Entity(ies) PSA, thereby affecting delivery of power from SPD to Buying Entity(ies).*

Pre-lockdown period

24. The Petitioner has placed reliance on the OM dated 19.02.2020 issued by the Ministry of Finance mandating that the outbreak of corona virus in China or any other country would be considered as a case of natural calamity and the Force Majeure clause may be invoked wherever appropriate. The said OM dated 19.02.2020 was also cited and relied upon in the OM dated 20.03.2020 issued by MNRE, which provided that the disruption of supply chain due to coronavirus shall be considered a case of natural calamity and Force majeure clause may be invoked in such cases as per due process. The relevant extract is given below:

- (a) *All Renewable Energy implementing agencies of the Ministry of New & Renewable Energy (MNRE) are hereby directed to treat delay on account of disruption of the supply chains due to spread of coronavirus in China or any other country, as Force Majeure.*
- (b) *The Renewable Energy implementing agencies may grant suitable extension of time for projects, on account of coronavirus, **based on evidences / documents produced by developers in support of their respective claims of such disruption of the supply chains due to spread of coronavirus in China or any other country.***
- (c) *Further, all project developers claiming aforesaid disruption and desirous of time extensions, **shall make, a formal application to SECI/ NTPC/ other implementing agencies, giving all documentary evidence(s) in support of their claim. SECI/ NTPC/ Implementing agencies shall examine the claim objectively and grant appropriate Extension of Time (EoT) based on facts. While considering the requests for grant of extension of time on account of disruption of the supply chains due to spread of coronavirus in China or any other country, SECI/NTPC/any other implementing agency may fully satisfy itself that the claimants were actually affected due to disruption of the supply chains due to spread of coronavirus in China or any other country in the period for which extension of time has been claimed.** The implementing agencies shall also ensure that no double relief is granted due to overlapping periods of time extension granted for reasons eligible for such relief.*

25. From the above, we observe that the OM dated 19.02.2020 stipulates that all SPDs claiming disruption of the supply chains due to spread of coronavirus in China or any other country have to make a formal application to SECI/ NTPC/ other implementing agencies, giving all documentary evidence(s) in support of their claim. The implementing agencies will examine the claim objectively and grant appropriate Extension of Time based on facts. The implementing agency is duty bound to fully satisfy itself that the claimants were actually affected due to disruption of the supply chains on account of spread of coronavirus in China or any other country in the period for which extension of time has been claimed. The implementing agency has to also ensure that no double relief is granted due to overlapping periods of time extension granted for reasons eligible for such relief.

26. We have considered the submission and perused the annexures placed before us. The Petitioner is heavily relying upon the said O.M. issued by MNRE for taking shelter of Force Majeure. From plain and simple reading of Annexure 14 dated 17.04.2020, it is apparent that the same with the subject titled "*Time Extension in Scheduled Commissioning date of RE projects considering disruption due to lock down due to Covid-19*" was a general time extension. Similar extensions were subsequently given by MNRE to facilitate the RE project builders. The intention of the MNRE and its Nodal Agency is clear and even if time was the essence of the contract, its essence was being waived as the intention of the parties was to ultimately bring the project. Thus, even if it is an event beyond the control of the parties, it was temporary in nature and the Government has carved out such period by way of extension. Reliance is placed on the judgment of the Hon'ble Supreme Court in the case titled *Mugneeram Bangur & Co. Vs. Sardar Gurbachan Singh (AIR 1965 SC 1523)*.

.....
"In our judgment if time is of the essence of the contract or if time for performance is set out in the contract it may be that the contract would stand discharged even though its performance may have been rendered unlawful for an indeterminate time provided unlawfulness attached to the performance of the contract at the time when the contract ought to have been performed. Thus, where the performance of a contract had been rendered unlawful by reason of some subsequent event the contract would stand discharged but such discharge will take place not necessarily from the date on which the further performance was rendered unlawful, unless further performance was rendered unlawful for all time. If the performance of the contract is rendered unlawful either for a determinate period of time or for an indeterminate period of time the contract would not stand discharged unless the ban on its performance existed on the day or during the time in which it has to be performed"

...
"In other words, the parties intended to exclude from the computation of reasonable time such time as was taken up in procuring the necessary material which was not easy to obtain and such as may be taken up if the land were requisitioned by government."

In the cited case the respondent had entered into a contract for purchase of a plot land in a scheme. It was to be completed in a month. Afterwards the land was requisitioned by the government under the Defence of India rules and the company was therefore unable to undertake development work during the continuance of the war. In the Supreme Court it was contended on behalf of the company that the contract was discharged by reason of frustration.

...

27. Further, Section 56 of the Contract Act, 1872 reads as:-

... "**Contract to do an act afterwards becoming impossible or unlawful:-** A contract to do an act which, after the contract is made, becomes impossible, or, by any reason

of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.”

28. In the given facts and circumstances, the act to be performed has not become impossible, rather it was not possible to perform in a given time frame, which has been duly extended by the Nodal agency and the Government.
29. SECI has submitted that the Petitioner has not provided the requisite documents in terms of the letter dated 19.03.2020 of SECI and the O.M. dated 20.03.2020 of the Government of India to enable SECI to consider the request for extension in the commissioning date of the project under the PPA for the above period. In response, the Petitioner vide its letter dated 02.06.2020 had submitted certain documents and sought extension of time for filing documentary evidence in support of its claims for extensions. SECI vide its email dated 29.06.2020 sought for certain details such as revised delivery schedule of modules and other equipment with documentary evidence and exact disruption period after 17.05.2020 with documentary evidence.
30. The Petitioner has failed to prove on record sufficient documents regarding delay in supply of equipment/suspension/revocation of the supply contract by the suppliers of the Petitioner or documents as mandated in the OM dated 19.02.2020 issued by the Ministry of Finance. The Petitioner has merely relied upon its detailed submission dated 05.06.2020 without attaching any documentary evidence regarding the same. We observe that the correspondence which exchanged between the parties showed that the petitioner's attitude towards the completion of the project was half-hearted and alternated between inclination and disinclination. It is common principle of contract law that the Doctrine of Impossibility cannot be applied in a manner in which it will weaken the sanctity of a contract. The plea of impossibility is not to be entertained if in spite of intervening supervening events the object and purpose of parties is not rendered useless and the contract can be performed substantially in accordance with the agreement. It was held that the court will not apply the doctrine to assist a party which does not want to fulfil its obligations of the contract and willing to take the shelter of impossibility to back out of it. The doctrine of impossibility, which is based on equity and common sense cannot be permitted to become a device for destroying the sanctity of the contract. (reliance placed AIR 1963, All, 201 to 204) Since the Petitioner has failed to place on record sufficient documentary evidence justifying the

extension sought under the aforementioned OM/Notification, the Commission holds that, the pre-lockdown period of 43 days cannot be construed as Force Majeure and hence declined.

Lockdown period and extended-lock down period

31. The Petitioners have submitted that the imposition of Lockdown by Ministry of Home Affairs till 31.05.2020 and subsequent extension of lockdown till 31.08.2020 by the State of Tamil Nadu is covered as an event of Force Majeure. *Per contra*, SECI has submitted that the Petitioner first contended that it could not proceed to implement the project on account of Covid-19 affecting the supply of plant and machinery and at the same time it is claiming that the construction of the project has not been possible on account of certain restrictions imposed by the Government of India/ Government of Tamil Nadu. The petitioner is taking inconsistent and vague approaches. It is incorrect to say that the industrial activities or the construction activities had come to a stand-still on account of Covid-19.

32. The Ministry of Home Affairs, vide its notifications dated 24.03.2020, 15.04.2020, 01.05.2020 & 17.05.2020, had imposed a nation-wide lockdown from 25.03.2020 to 31.05.2020, throughout the country in order to curb the spread of coronavirus. Subsequently, the MNRE vide its O.M. dated 17.04.2020 dealing with time-extension in Scheduled Commissioning Date of Renewable Energy Projects considering disruption due to lockdown on account of Covid-19, had stipulated as under:

“Sub.: Time Extension in Scheduled Commissioning date of RE projects considering disruption due to lock down due to Covid-19”

- (1) MNRE, vide its O.M. No. 283/18/2020-GRID SOLAR dated 20.03.2020, with the approval of Hon’ble Minister, had inter-alia, issued directions to SECI, NTPC and Addl. Chief Secretaries / Pr. Secretaries / Secretaries of Power / Energy / Renewable Energy (RE) Departments of State Governments/ UT Govts./ Administrations, to treat delay on account of disruption of the supply chains due to spread of coronavirus in China or any other country, as Force Majeure and that they may grant suitable extension of time for projects, on account of coronavirus, based on evidences / documents produced by developers in support of their respective claims of such disruption of the supply chains due to spread of coronavirus in China or any other country.*
- (2) Now, RE developers have represented to this Ministry that they may be granted extension on account of lockdown (due to COVID-19) and additional time required for normalization after such lockdown.*
- (3) This issue has been examined in the Ministry and it has been decided that:*
 - (a) All Renewable Energy implementing agencies of the Ministry of New & Renewable Energy (MNRE) will treat lockdown due to COVID-19, as Force Majeure.*

- (b) *The Renewable Energy implementing agencies may grant extension of time for RE projects, on account of lockdown due to COVID-19, equivalent to the period of lockdown and additional 30 (thirty) days for normalisation after end of such lockdown. Thus, the extension will be for the period of lockdown plus 30 (thirty) days. This will be a blanket extension - there will be no requirement of case to case examination. There will be no need to ask for any evidence for extension due to lockdown*
- (d). *The extension on account of disruption in supply of RE equipment prior to lockdown shall be dealt separately for additional Extension of Time as per para 1 above.”*

33. Pursuant to the aforementioned O.M. and in response to the Petitioner’s requests for extension of time dated 27.02.2020, 18.03.2020, 17.04.2020, and 30.04.2020, SECI vide its letter dated 21.05.2020 duly extended the timeline of the SCOD under the PPA. The relevant extract of the letter has been reproduced as under:

“This has reference to your communications w.r.t extension of your 250 MW Solar PV Project’s timelines on account COVID-19 pandemic & associated lockdown. We would like to intimate you that Ministry of New and Renewable Energy vide its OM dated 17.04.2020 (Ref-2) has considered the Lockdown period as Force Majeure Event and an extension equivalent to Lockdown period plus 30 days may be granted.

In view of this, Lockdown period for your project is being considered between 25.03.2020 & 17.05.2020 (both the dates inclusive), accordingly the timelines for various milestones of your projects are being extended as follows

<i>Project ID: SPD-ISTS-T1-SPICCPL-P1-250TN</i>			
<i>Sl. No.</i>	<i>Milestones</i>	<i>Original Due Date</i>	<i>Extended Due Date</i>
<i>13.</i>	<i>Commissioning</i>	<i>25-10-2020</i>	<i>17-01-2021</i>

If you have any further claim w.r.t extension of time prior to or beyond the abovementioned period, you may submit supporting documents along with your claim. This letter is without any prejudice to the provisions of PPA (Ref-i).”

34. Subsequently, MNRE issued another OM on 30.06.2020 dealing with time-extension for Renewable Energy Projects considering disruption due to lockdown on account of COVID-19, which inter-alia, stipulated as under:

“Sub.: Time Extension for Renewable Energy (RE)Projects considering disruption due to lock down due to Covid-19”

.....

“2. The MNRE, vide its O.M. of even no. dated 17.04.2020, had directed all RE implementing agencies of the MNRE to treat lockdown due to COVID-1 9, as Force Majeure and that they may grant extension of time for RE projects equivalent to the

period of lockdown and additional 30 (thirty) days for normalisation after end of such lockdown. States/UTs were also requested to treat lockdown due to COVID-19, as Force Majeure and to consider granting appropriate time extension on account of such lockdown.

3. It is hereby clarified that for the purpose of the MNRE's said OM Dated 17.04.2020:

- a) In line with Ministry of Home Affairs Order Nos. 40-3/2020-DM-1(A) dated 15th April, 17th May and 30th May, 2020, the period of lockdown is to be treated from 25th March, 2020, when the lockdown started, to 31st May, 2020.*
- b) All projects through RE Implementing agencies designated by the MNRE and the projects under various schemes of the MNRE are covered under the said OM.*
- c) The timelines for intermediate milestones of a project may also be extended within the extended time provided for commissioning as per paragraph 2 above.*
- d) The Developers, of the projects covered under 3(b) above, may also pass on the benefit of such time-extension, by way of granting similar time-extensions, to other stakeholders down the value chain like Engineering Procurement Construction (EPC) contractors, material/ equipment suppliers, Original Equipment Manufacturers (OEMs), etc.”*

35. We note that SECI vide its letter dated 17.07.2020, duly extended the timeline of the SCoD upto 31.01.2021 under the PPA.

“This has reference to our earlier letter ref. I, w.r.t. extension in timelines of PPA on account of nationwide lockdown to covid-19 pandemic.

MNRE vide ref. 2 clarifies period of lockdown to be treated from 25.03.2020 to 31.05.2020. In accordance with MNRE O.M. the time lines for various milestones of your Projects are being extended as follows:

<i>Project ID: SPD-ISTS-T1-SPICCPL-P1-250TN</i>			
<i>Sl. No.</i>	<i>Milestones</i>	<i>Original Due Date</i>	<i>Extended Due Date</i>
<i>13.</i>	<i>Commissioning</i>	<i>25-10-2020</i>	<i>31-01-2021</i>

36. We observe that the lockdown was extended in the State of Tamil Nadu for the following dates:

- a) On 25.03.2020, Revenue and Disaster Management (D.M.II) Department, Tamil Nadu vide G.O. (Ms.) No. 172 imposed complete lockdown in the State of Tamil Nadu in consonance with Ministry of Home Affairs, Government of India Order No. 40-3/2020-DM-1(A).
- b) On 31.05.2020, Revenue and Disaster Management Department (D.M.II) Department, Tamil Nadu, vide G.O. (Ms.) No. 262, extended State lockdown from 31.05.2020 to 30.06.2020.

- c) On 30.06.2020, Revenue and Disaster Management Department (D.M.II) Department, Tamil Nadu, vide G.O. (Ms.) No. 324, extended the State lockdown from 30.06.2020 to 31.07.2020.
- d) On 31.07.2020, Revenue and Disaster Management Department (D.M.II) Department, Tamil Nadu, vide G.O. (Ms.) No. 396, extended the State lockdown till 31.08.2020.

37. It has been submitted that the directives of the OMs dated 17.04.2020 and 30.06.2020 issued by MNRE treat the time period of lockdown from 25.03.2020 to 31.05.2020 i.e. the period of 68 days as Force Majeure. It is further stipulated that SECI may grant extension of time equivalent to the period of lockdown and additional 30 (thirty) days for normalisation after end of such lockdown. As per letter dated 17.07.2020, SECI had considered time period between 25.03.2020 and 31.05.2020 as a period of lockdown and extended the time lines for various milestones from 25.10.2021 till 31.01.2021. The Commission is of the view that since SECI has not disputed the treatment of the period of 68 days from 25.03.2020 to 31.05.2020 extended by MNRE and has considered the period from 25.03.2020 to 31.05.2020 for extension of SCoD, the same is treated as resolved and agreed between the parties.
38. We observe that 30 days period for normalization is also provided for in various OMs. We are of the view that the extension of 30 days period subsequent to 68 days period of lockdown was given to facilitate the RE project builders in commissioning of Projects. We are of the view that this 30 days period for normalisation was given for facilitating SPDs in commissioning the projects. This 30 days period cannot be counted towards the Force Majeure Clause to excuse SPDs for non-performance. Hence, the claim of the Petitioner to treat the normalisation period of 30 days as Force Majeure is declined.
39. We observe that the Petitioner preferred to terminate the PPA on 07.08.2020 i.e. much before the original SCoD i.e. 25.10.2020. Whereas, as already discussed in the preceding paragraphs, even if there was a force majeure, it was temporary in nature and the commissioning of the project had not become impossible. For the time period, the commissioning of the project became impossible, the SCoD has been duly extended by 98 days i.e. till 31.01.2021 by SECI. It is pertinent to mention here that as per various GOs brought on record by the Petitioner, it is no-where mentioned that construction activities were completely prohibited. We have anxiously perused the Revenue and Disaster

Management Department GO (Ms) No 396 dated 31.07.2020 as placed before us. It restricted movement in places such as cinema halls, public gatherings, worship in public places, schools, colleges etc. However, the E-pass system was continuing and guests up to 50 were allowed in marriages. Thus, necessary activities were allowed and other activities were allowed with restrictions. It is not out of place to mention that every Power Project is an Infrastructure Project and special treatment has been provided by the legislature in the Specific Relief Act to such projects. Furthermore, green energy acquires top importance as per the government policies as it is cheaper and eco-friendly Further, from various letters of the concerned Tehsildar, Ettyapuram, it is clear that the mobilization of only workers from outside the State and District was not allowed. Even otherwise, we observe that the extended lock down period by the State of Tamil Nadu gets subsumed in the extension of SCoD (from 25.10.2020 to 31.01.2021) allowed by SECI. Further, the Petitioner has not placed any records after February 2020 to prove that it was facing problems in implementation/ commissioning of the project but rather elected to opt out of the project by invoking Article 13.5 read with Article 4.5.3 of the PPA.

40. We observe that the Petitioner vide letters dated 11.02.2020, 27.02.2020 & 18.03.2020 informed SECI about triggering of Force Majeure events and anticipating a delay of about 3 months in achieving the SCoD. In response to this, SECI sought information from the Petitioner regarding the Schedule of Supply/Agreement with the Supplier, date of intended supply and extent to which supply stands disrupted on 19.03.2020. From the above it can be inferred that the Petitioner intended to seek time extension of SCoD. Further, we observe that in compliance with the OMs dated 17.04.2020 and 30.06.2020, SECI allowed time extension in SCoD for the Petitioner's project (considering disruption due to lock down due to Covid-19) vide letter dated 21.05.2020 and 17.07.2020 and the SCoD was extended till 31.01.2021. Thus, the total time extension was given for 98 days. However, the Petitioner preferred to terminate the PPA on 07.08.2020. We are of the view that sufficient time was available with the Petitioner to implement the project. The Petitioner has failed to sufficiently justify on records that in spite of having 203 days (from 13.07.2020 to 31.01.2021) for commissioning of the project, which factors forced him to terminate the PPA on 07.08.2020. In view of the above, we are of the view that no relief can be given to the Petitioner for invocation of Article 11.3 of PPA dated 22.11.2018. Hence, the issues are decided in line with the above discussion.

41. The issues are decided accordingly.

Issue No. 3: Whether SECI can be directed to return the Bank Guarantee dated 09.03.2020 submitted by the Petitioner on account of the termination of the PPA dated 22.11.2018 in accordance with Article 4.5.3 read with Article 13.5 of the PPA dated 22.11.2018?

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

43. Accordingly, Petition no. 605/MP/2020 is disposed of.

Sd/-
पी. के. सिंह
(सदस्य)

Sd/-
अरुण गोयल
(सदस्य)

Sd/-
आई. एस. झा
(सदस्य)