



TELANGANA STATE ELECTRICITY REGULATORY COMMISSION
5th Floor, Singareni Bhavan, Red Hills, Lakdi-ka-pul, Hyderabad 500 004

O. P. No. 6 of 2020

Dated 29.12.2021

Present

Sri T. Sriranga Rao, Chairman
Sri M. D. Manohar Raju, Member (Technical)
Sri Bandaru Krishnaiah, Member (Finance)

Between:

M/s Satec Envir Engineering (India) Private Limited,
C Wing, 102, Waterford Building,
Juhu Lane, C D Barfiwala Marg,
Andheri West, Mumbai – 400 058.

... Petitioner.

AND

1. Southern Power Distribution Company of Telangana Limited,
6-1-50, Mint Compound, Hyderabad-500 063.
2. Special Chief Secretary, Department of Energy,
Government of Telangana State, Secretariat,
Hyderabad.

... Respondents.

The petition came up for hearing on 22.02.2020, 18.02.2021, 15.03.2021, 22.03.2021, 09.06.2021, 28.06.2021 and 07.07.2021. Sri P. Srinivasa Rao, Advocate for petitioner has appeared on 22.02.2020, 18.02.2021, 15.03.2021, 22.03.2021, 09.06.2021, 28.06.2021 and 07.07.2021, Sri Y.Rama Rao, Advocate along with Sri Vamshi Krishna, Advocate for respondents have appeared on 22.02.2020, Sri Mohammad Bande Ali, Law Attaché for respondents has appeared on 18.02.2021, 15.03.2021, 22.03.2021, 09.06.2021, 28.06.2021 and 07.07.2021. The matter having been heard and having stood over for consideration to this day, the Commission passed the following:

ORDER

M/s. Satec Envir Engineering India Private Limited (petitioner) has filed a petition under sec 86 (1) (f) & (k) of the Electricity Act, 2003 (Act, 2003) seeking extension of Scheduled Commercial Operation Date (SCOD) and granting further time for completing the solar power project being established by it. The averments of the petition are as below:

- a. The petitioner stated that the Government of Telangana State (GoTS) by way of letter dated 18.03.2015 directed Transmission Corporation of Telangana Limited (TSTRANSCO) and Telangana State Power Coordination Committee (TSPCC) to initiate a bidding process for purchase of 2000 MW solar power through competitive bidding route with a maximum cut off rate of Rs.6.45 per unit on behalf of distribution companies (TSDISCOMs).
- b. The petitioner stated that the TSTRANSCO and TSPCC by way of letter dated 31.03.2015, instructed Southern Power Distribution Company Limited of Telangana (TSSPDCL) to initiate the competitive bidding process on behalf of TSDISCOMs for purchase of 2000 MW solar power. In furtherance thereof, TSSPDCL issued '*Request for Selection (RfS) document for selection of Solar Power Developers in the Telangana State for procuring 2000 MW through tariff based competitive bidding process*' on 01.04.2015 to invite proposals for setting up grid connected Solar PV Projects in Telangana on 'Build Own Operate' (BOO) basis for an aggregate capacity of 2000 MW.
- c. The petitioner stated that st respondent TSSPDCL by way of letter No. 41 / 15 dated 07.04.2015, submitted a proposal before the Commission for procurement of 2000 MW solar PV power on long term basis under the competitive and reverse bidding model with a maximum cut off rate of Rs.6.45 from Solar Power Developers willing to set up new solar power projects at pre- identified locations (TSSPDCL proposal). The TSSPDCL has also submitted the RfS and draft PPA and sought the Commission's approval with regard to certain modifications thereto.
- d. The petitioner stated that the Commission by way of letter dated 02.05.2015, accorded approval to the TSSPDCL proposal. Subsequently on 08.06.2015 after considering comments and

suggestions from all stakeholders the Commission had also approved the model Power Purchase Agreement (Model PPA) and RfS after making certain modifications to the draft PPA. The revised and approved model PPA and RfS were uploaded on the e-procurement platform and TSSPDCL's website on 09.06.2015.

- e. The petitioner stated that further to the competitive bidding process, it was declared as successful bidder against the RfS for a capacity of 8 MW. The TSDISCOM issued Letter of Intent (LoI) to amongst other successful bidders, MEIPL for development of solar power project for generation and onward sale of solar power to the TSDISCOMS. It is stated that, pursuant to issuance of LOI, dated 16.12.2015, whereby it agreed to purchase for 8 MW, for 25 years, an agreement in NCE solar PPA No. 2000 / 01 / 2016 was entered with TSSPDCL for a period of 25 years from SCOD. The relevant clauses of PPA for supply of power from its generating station are as follows:

“2.1 All the delivered energy, as mentioned in schedule 1, 2, 3 & 4 at the interconnection point for sale to DISCOM will be purchased at the Tariff provided for in clause 2.2 from and limited to capacity of the project only after the date of Commercial Operation of the project and title to Delivered Energy purchased shall pass from the Solar Power Developer to the DISCOM at the interconnection point.

2.2 The DISCOM shall pay a Tariff of Rs.5.58 per unit to the Solar Power Developer as per the Tariff quoted by the Solar Power Developer in the bid. The quoted Tariff by the Solar Power Developer shall be the tariff for the entire term of the Agreement.

Explanation: The tariff is firm and is Rs.5.58 per unit for period of 25 years from the date of COD as per the definition of Delivered Energy. Any energy delivered in excess of 25% CUF during the year shall be purchased by APDISCOMS at Rs.2.79 per kWh, i.e., at 50% of the tariff.

2.3 For Delivered Energy corresponding to less than or equal to 25% CUF, the applicable tariff shall be as per Article 2.2 of this Agreement. For Delivered Energy beyond 25% CUF, the

applicable tariff shall be equal to the 50% of the Quoted Tariff specified for that Tariff Year. The calculation of CUF shall be done on a yearly basis i.e., over the Tariff Year.”

- f. The petitioner stated that the Commission by way of order dated 15.02.2016 in O. P. No. 3 of 2016, in exercise of its power under section 63 of the Act, 2003, adopted the tariffs discovered by TSSPDCL through the tariff based competitive bidding process. The above said PPA was subsequently followed by certain events including representation by Solar Power Developers regarding default of developers and to continue PPA by mutual discussion and it is deemed to have been amended in the event of conclusions reached by the parties.
- g. The petitioner stated that subsequent to the signing of PPA, owing to various unforeseeable events and circumstances, the development and setting up of all solar power projects across the State of Telangana was materially and adversely affected. The said events, which had State-wide ramifications across sectors, were entirely beyond the reasonable control of power developers including the petitioner and could not have been prevented even by employing Prudent Utility Practices or by exercise of reasonable skill and care and as such, fall within the definition of Force Majeure events in terms of Article 9 of PPA. It stated that the material and adverse effect of these Force Majeure events was felt by the Solar Power Developers at various stages of development and setting up of solar power projects viz., land acquisition, funding from the bank / investors, equipment supplies from India / abroad and project site construction. The Force Majeure events which occurred across the State of Telangana and delayed the commissioning of it's solar power project.
- h. The petitioner stated that the State of Telangana in tune with the policies of the solar power sector, keeping in view the interest of the developers of solar plants, have extended the scheduled commercial operation date (SCOD) by an order dated 21.04.2017. Even before expiry of this extension period granted by the State Government, 1st respondent had invoked the Bank Guarantee of the first one for the tune of Rs.24 lakhs. Further the SCOD by the solar plants was a subject matter of due deliberations and pursued the cause for extension of time of SCOD for

further period by the Solar Power Plants Association in the whole of the State. The matter went upto government and the Hon'ble Chief Minister considered the issue and was pleased to extend the SCOD upto 30.06.2017 without any penalties in the interest of sector and the benefit was extended in general to all the solar power projects in the State.

- i. The petitioner stated that in the light of the above developments and the decision taken at Government level, consequent upon that the TSSPDCL, in CGM (IPC & RAC) vide letter No. CGM (IPC & RAC) / SE (IPC-1) / F / D.No.897/17, dated 15.09.2017, called upon it to give their consent for the extended period and the consent was conveyed by it vide its letter dated 28.09.2017. However, its plant has not commenced the commercial production within the SCOD schedule. It is stated that it made best efforts to meet the above object, which could unfortunately not materialize and the project could not commence the production as per the SCOD stated above, primarily due to the following factors which are beyond its control.

The practical difficulties and major Force Majeure intervened in the matter are set out in the following paragraphs.

- j. District Reorganization: The petitioner stated that GoTS by way of notification in G.O.Ms.No.236, in exercise of its powers under section 3 of the Telangana Districts (Formation) Act, 1974 and in the interest of better administration and development of State of Telangana, notified new districts and reorganized boundaries of existing districts, revenue divisions, mandals / tehsils and villages with effect from 11.10.2016. This involved overhauling of the existing revenue machinery since land revenue records were moved from existing to newly created districts and mandals. The district reorganization process, inter alia, involved:

- i) Change of circle rates, causing land owners to re-negotiate / renege on land sale agreements;
- ii) Shift of revenue records from old district to the new district;
- iii) Non-availability of proper revenue records in the tehsil offices; and

- iv) Non-availability of contiguous land parcels since some land owners who were willing to offer land for development of projects, changed their decision post reorganization;
- k. The petitioner stated that the above district reorganization process initiated by GoTS made it practically difficult for it as there was an utter confusion state of administrative affairs in the offices of the revenue authorities regarding the jurisdiction of villages, mandals etc., the chaos resulted in delay in both the stage of land acquisitions and further processing conversion application of the project lands for permission to put to Non-Agricultural purposes into Industrial use and other clearances under the single window clearance through the Commissioner of Industries. This also slowed down the pace of the site mobilization and delayed site handover to the EPC contractor for setting up the project. Even it had got order from the RDO for conversion of land into Non-Agricultural use on 19.08.2017.
- l. Demonetisation: The petitioner stated that the Government of India (GOI) by way of notification dated 08.11.2016 withdrew the Legal Tender status of INR 500 and INR 1,000 denominations of banknotes (Demonetisation). Demonetisation has had a domino effect on land acquisition and other project activities which were delayed considerably for the following reasons:
 - i) The country witnessed a major cash crunch as 86% of the currency under circulation was rendered invalid and new currency distribution was curtailed. Banks were busy handling cash disbursements in lieu of old notes and did not issue DDs, receive challans towards stamp duty, registration charges etc;
 - ii) The landowners were not keen to sell their land as payments would be made to them by cheque and proceeds from such sale of land could not be withdrawn from the banks due to acute shortage of cash in semi urban and rural banks; and
 - iii) The encumbrances created over land by way of loans taken by the landowners could not be settled as banks could not process loan repayments in time, making it impossible for developers to proceed for registration;

The delay in acquiring land resulted in a delay in achieving Financial Closure as per the timelines provided in PPA. This delay, attributable to a Government policy has also been acknowledged by the Ministry of New and Renewable Energy (MNRE) by way of its office memorandum dated 02.12.2016.

Force Majeure events affecting equipment supplies from India/Abroad:

m. Introduction of GST: The petitioner stated that all solar power projects have to be set up in terms of the strict timelines provided in PPAs and generally have to be commissioned within 12 -13 months from the date of signing of PPAs. The setting up of every solar power project is highly dependent on Indian manufacturing sector as the entire Balance of Plant components like fabricated structures, inverters, batteries, transformers, cables, switch yard equipment, electrical hardware, safety components etc., are manufactured locally by thousands of small and medium scale enterprises. After the coming into force of the Central Goods and Services Tax Act, 2017 on 01.07.2017 (GST Law), which brought about fundamental structural changes in the prevailing tax regime in the country, there was a slowdown from July 2017 to September 2017 in the manufacturing as well as service industry across the country. This slow down during the period of July, 2017 to September' 2017 was acknowledged by Hon'ble Finance Minister during his speech on 21.12.2017 in the Parliament on supplementary demands for grants for 2017–18. The GST law had the following implications on developers of solar projects:

- i) Contractors / suppliers were delaying contracts due to lack of clarity on tax structure;
- ii) Contractors / suppliers had to revamp their systems, amend and reissue 'Purchase Orders' to align them as per the GST regime/to make them GST Law compliant;
- iii) Lack of clarity on GST percentage applicable on invertors contributed to delay in supply of material required for setting up of projects; and
- iv) Introduction of GST Law resulted in confusion regarding MNRE 'Certificate for Concessional Customs Duty' which was kept on

hold from June 2017, further resulting in delay in supply of key equipment.

- n. Module Suppliers Reneging on Orders: The petitioner stated that the Solar Power Developers had entered into contracts for purchase of equipment required for setting up of solar power projects, from India and abroad. However, developers faced issues on the supply front for reasons beyond their control from module manufacturers. These issues on the supply front can be attributed, inter alia, to
- i) an increase in internal targets by the Government of China for year 2017;
 - ii) reduction in anti-dumping duty by the European union; and
 - iii) exponential purchases by US based IPPs;

It is pertinent to point out that owing to the afore-stated reasons, module manufacturers ceased to honour their commitments and started renegotiating on the contractual price, even after opening of LCs. Further, module manufacturers refused to supply even at higher rates and extended timelines and the developers had no option but to either agree on increased rates and amend the LCs, which resulted in increase in capital costs or look at alternate suppliers, which resulted in further delays. It is stated that the afore-stated developments and subsequent negotiations immensely delayed equipment supplies and project timelines.

- o. Module Reclassification Issue: The petitioner stated that the Solar Photo Voltaic Modules (SPV Modules), major component of a solar power project are imported by all Solar Power Developers in India. In India, Photovoltaic cells, whether or not assembled into modules/ panels, have been classified under Harmonized System of Nomenclature (HSN) chapter sub heading 8541 for which of BCD, CVD, etc., was zero. However, since September 2017, the customs authorities have been wrongly classifying the SPV Modules under CTSH chapter sub heading 8501 which attracts BCD @ 7.5%. In furtherance thereof, the customs authorities seized the SPV modules of all developers including it and directed the developers to pay the difference amount by way of bank

guarantees. It stated that this delay in the release of SPV modules is beyond its control and qualifies as a Force Majeure event.

p. The petitioner stated about Force Majeure events affecting site execution:

i) Unprecedented Incessant Rains: The State of Telangana experienced excessive rains in the months of June, 2017 till October, 2017 going beyond the regular monsoon season. These rains were unprecedented in the past 100 years and as such could not be predicted by the solar power project developers. It stated that the incessant rains have resulted in flooding of project sites, idling of labour and equipment at project sites and severely hampering construction works.

ii) In view of the Demonetization which led to further delays in site execution and implementation of project timelines. It stated that due to unavailability of cash and the requirement of paying labour in cash on a daily basis, contractors/suppliers refused to provide any services pending cash payments thereby seriously affecting and delaying the project development activities.

iii) Protest by the local people: The local people were instigated against the beneficial scheme of the Government to encourage Alternate Renewable Source of Power by vested interests. People's protest for the Solar Power Projects with the instigation of political and non-political organizations for environmental pollution in the name of hazards like radiation and others, caused delays for the establishment of project.

iv) It is stated that in spite of the above it was able to make progress in completing certain civil works by spending huge amounts, the finance cost incurred by it was also high and also placed orders worth almost 20% of the total value of the project towards design and purchased the material required for the project. The commercial operations date (COD) set forth to it as per PPA was 31.01.2017. The petitioner in spite of facing the above problems and difficulties could achieve the following requirements such as

a) laying of access road to the land;

- b) setting up of transmission lines;
 - c) installation of transformers and CTBT at the sub-station;
 - d) land levelling / development work; and
 - e) all civil works at the site;
- q. The petitioner further stated that these above works have been completed by it and the entire equipment for installation of the plant has been ordered, whose delivery is expected shortly. However, in the meanwhile the TSSPDCL extended the time upto 31.10.2017 vide date 15.09.2017 and further dated 03.02.2018. The extended time was not sufficient due to the reasons stated in this affidavit. At present the plant status is as follows:

Sl. No.	Description of material	Status
1.	Modules	Advance paid part material ready with Vendors.
2.	Inverters & Accessories	Advance paid, material ready with.
3.	Trackers & Allied activities	Purchased, ready lying at factory.
4.	Galvanized Iron	Purchased ready lying at Factory.
5.	Cable and accessories	Advance paid, material ready with Vendors.
6.	AC Equipments	Purchased ready for delivery/installation.
7.	Control	Purchased ready for delivery/installation.
8.	Misc. Equipments	Advance paid part of material delivered and the balance is ready for delivery.

- r. The petitioner stated that in view of the same, it has made representations to the TSSPDCL requesting for an extension of SCOD vide letters 26.12.2016, 06.02.2017, 06.07.2017, 26.05.2017, 14.06.2017 and 14.07.2018. The petitioner has a genuine case for seeking extension for compliance of the commercial operation date, in view of the above said circumstances. It is stated that in view of the above changed set of facts, circumstances and the developments that

have taken place between it and the TSSPDCL, it is necessary to bring the same on record before the Commission and get the necessary approval under the statute as per the clauses enumerated under PPA, including date of extension for SCOD. The change in law necessitated to file the petition before the Commission. For better appreciation the clauses in PPA Article definition of 'Change in Law' as per Article-1.12 of PPA is produced hereunder:

“Change of Law” shall mean any change or amendment to the provision of electricity law in force, regulations, directions, notifications issued by the competent authorities and Government of India (GoI), Government of Telangana State (GoTS) including the erstwhile Government of Andhra Pradesh (GoAP) from time to time.”

Thus, the petitioner company seeks extension of SCOD as provided in PPA.

- s. The petitioner stated that as per Article 6.5 (iv) and Article 6.5 (v) of PPA, non-fulfilment of clauses in Article 6 of PPA can be condoned, including inability to achieve the Commercial Operation Date within 12 months from PPA. Article 6.5(iv) & (v) expressly provides that the petitioner shall be provided extension of period for fulfilment in the event of occurrence of any Force Majeure event, including the extension of Commercial Operation Date by it as put forth in PPA. Article 9 of PPA deals with the various circumstances which constitute Non-Political events and Direct Political events under the Force Majeure clause, which includes labour difficulties, modification by Government agencies and change of law, all relevant and applicable in its case. Demonetisation impacted the supply of labour and created other labour related difficulties. Similarly, reorganization of districts by GoTS caused delays in processing of various applications submitted before the revenue authorities and in land procurement by it for the project. Thus, it was adversely impacted by both Non-Political and Direct Political events. Further, Article 9.2 of PPA provides that, an event of delay in the Commercial Operation Date owing to occurrence of a Force Majeure event, can be deferred to permit it to overcome the effects of Force Majeure events or till such event of default

is rectified, whichever is earlier. Thus, the circumstances in its case squarely fell within the Non-Political and Direct Political events covered under the Force Majeure clause. Therefore, it has a genuine case for seeking extension for compliance of the Commercial Operation Date. The relevant paras of PPA are quoted at appropriate places.

- t. The petitioner stated that as per Article 9 of PPA, matters related to Force Majeure events are clarified as under:

“9.1(b) Force majeure circumstances and events shall include the following events to the extent, that they or their consequences satisfy the above requirements (i.e. as per 9.1 (a) which inter alia states “Force Majeure” shall mean any event or circumstances or combination of events or circumstances that materially and adversely affects the performance by either party (the “Affected Party”) of its obligations pursuant to the terms of this Agreement (including by preventing, hindering or delaying such performance), but only if and to the extent that such events and circumstances are not within the Affected Party’s reasonable control and were not reasonably foreseeable and the effects of which the Affected Party could not have prevented by Prudent Utility Practices or in the case of construction activities, by the exercise of reasonable skill and care. Any event or circumstances meeting the description of Force Majeure which have the same effect upon the performance of any of the Solar Power Project setup in accordance with the solar policy announced by Government of Telangana State (GoTS) under the competitive bidding route and which therefore materially and adversely affect the ability of the Project or as the case may be, the DISCOM to perform its obligations hereunder shall constitute Force Majeure with respect to the Solar Power Developer or the DISCOM respectively).

9.1(b) (i) Non-Political events such as acts of GOD including but not limited to any storm, flood, drought, lightning, earthquake or other natural calamities, fire, accident, explosion, strikes, labour

difficulties, epidemic, plague or quarantine, air crash, shipwreck, train wrecks or failure (“Non Political Events”).

9.1(b)(ii) Indirect Political events such as acts of war sabotage terrorism or act of public enemy, blockades, embargoes, civil disturbance, revolution or radioactive contamination (“Indirect Political Events”).

9.1(b)(iii) Direct Political Events such as any Government Agencies or DISCOM’s unlawful or discriminatory delay, modification, denial or refusal to grant or renew, or any revocation of any required permit or Change of Law (Direct Political Events).”

- u. The petitioner stated that Article No.11 of PPA provides that in case of Dispute Resolution between the parties arising under PPA shall be authorized to resolve any dispute in an equitable manner. The said Article is extracted hereunder:

Article 11. “Disputes Resolution”:

“11.1 Each party shall designate in writing to the other party a representative who shall be authorized to resolve any dispute arising under this Agreement in an equitable manner.”

It is stated that Article 9.2 of PPA clearly provides that in case of Force Majeure events affecting the Solar Power Developer, the SCOD shall be deferred for a period commensurate with the period of delay attributable to the Force Majeure events subject to a maximum period of 12 months. Article 9.2 of PPA is reproduced herein below:

“9.2 In the event of a delay in COD due to:

(a) Force Majeure Events affecting the Solar Power Developer;

or

(b) DISCOM event of default as defined in 10.2, the scheduled COD shall be deferred, for a reasonable period but not less than, day-for-day basis subject to a maximum period of 12 months, to permit the Solar Power Developer or to overcome the effects of the Force Majeure events affecting the Solar Power Developer or DISCOM or till such time such event of default is rectified by the Solar Power Developer or the DISCOM, whichever is earlier:

Provided further that, the validity of performance bank guarantee shall be extended suitably covering the extended period.”

In view of the afore quoted Article 9.2, it is entitled to an extension of SCOD of its solar power projects on account of the delay caused by the Force Majeure events. This extension is in terms of the provisions of PPA and does not amount to an amendment of PPA.

- v. The petitioner stated that it has taken up matter with the TSSPDCL to resolve the issue. Thereafter, it had filed a petition before the Commission on 05.05.2018, who vide letter No. RO. / SI. 42 / OSD (Legal) / D. No. 308 / 2018 dated 14.05.2018 sought further details to be included in the petition. Accordingly, the present petition is submitted.
- w. The petitioner stated that in the existing PPA, the changes have to be made on occurrence of the subsequent events and the revised schedule for SCOD as follows: As per the present, PPA dated 01.02.2016, the construction period for project execution was considered as 12 months that is upto 31.01.2017. Now, the extended date of SCOD that is sought to be approved as 6 months from the date of revised PPA providing extension. The reason for seeking the extension of time is that, it has to approach and explain to the concerned authorities as to completion of project, after which technical persons such as engineers would test the facilities, before they can permit it go ahead for synchronization of the facilities to the grid. Hence, the present request is made for extension of time sufficiently so as to conclude the transaction, without any further extension of time.
- x. The petitioner stated that, in this background above said and in accordance with section 86(1)(b)&(k) of the Act, 2003 r/w Commission's Conduct of Business Regulation No.2 of 2015, it is filing the present petition which is also required as per the terms and conditions of the original PPA, including for extension of SCOD date. The standing clauses under the original PPA dated 01.02.2016 will have to be amended so as to permit revised SCOD date as 6 months from the date of revised PPA providing extension. These clauses are being brought to the notice of the Commission and approval is sought for the same from the Commission to enforce the terms of the existing PPA, thereby the

parties to PPA that is the petitioner and the TSSPDCL will comply and discharge their obligations, liabilities that are mandated as per the clauses of PPA.

- y. The petitioner stated that the details of the bidding process 2015–16 are beneficial and therefore it is approaching the Commission for extension of SCOD date by 6 months from the date of revised PPA providing extension for approval or that may be approved by the Commission under the provisions of the Act, 2003 and the regulations in force.
- z. The petitioner stated that it has entered into PPA on 01.02.2016 with the TSSPDCL and have made all reasonable efforts so as to comply with the terms of PPA as obligated. Due to the aforementioned reasons and factors beyond its control that have intervened in the matter, particularly demonetization led into the financial crunches further led to several problems that were faced by it, including the reorganization of districts and formation of new districts in securing the relevant statutory permissions. At last, the State Government intervened in the matter and was pleased to resolve the issue amicably by extending the period of SCOD by 30.06.2017 and further period of 4 months. In addition, unless the benefit of extension of SCOD for 6 months from the date of revised PPA providing extension is granted to it, it would not be in a position to fulfil its obligation and achieve the objects for SCOD in tune with the existing PPA.
- aa. The petitioner stated that the present amendment of PPA relating to extension of SCOD date in tune with proposed changes which have taken place at the State level and the SCOD may be extended to it also. Hence, the changes have to be incorporated by placing the relevant material on record in tune with the 'Change in Law' and seek approval from the Commission which occurred after the cut-off date and the present opportunity was provided by the State in the interest of it as it made huge investment by raising the necessary funds from the banks, financial institutions and other sources at a higher rate of interest. The Change in Law broadly covered any enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal of any law or any other changes that have taken place as per the orders passed by

the Commission or the Government. Therefore, the Commission has Jurisdiction to decide and pass appropriate orders to recognize all such changes that have taken place as per the provisions of the Act, 2003 as well the regulations in force governing the issue in the petition.

- ab. The petitioner stated that it is pertinent to note and not out of place to state that in an identical set of facts and circumstances as the present case parties have approached the Commission for recognition of SCOD amendment and the Commission after elaborate consideration of the issue was pleased to accord approval for the same. It is further stated that, it is just and necessary to direct the TSSPDCL to keep the amount of collected under the bank guarantees invoked to the tune of Rs.1.60 crore in a separate account without appropriation pending disposal of this petition. It is stated that unless the prayers made below are granted in favour of it, it shall suffer irreparable loss and harm to its business which also affects the viability and feasibility of the project.
- ac. The petitioner stated that the present petition is well within period of limitation and the Commission has the jurisdiction to adjudicate on the issue raised by it in the petition. The letter dated issued by the Commission under vide letter Lr. No. R / O. Sl. 42 / OSD (Legal) / D. No. 308 / 2018, dated 14.05.2018 is also herewith enclosed and filed as material document for consideration of issue with regard to the limitation and for amicable resolution of settlement of the issue of SCOD.
- ad. The petitioner stated that it is not out of place to mention that, it came to know that similarly placed generating plants have approached the Commission and the Commission after elaborate consideration of the issue was pleased to order accordingly thereby granted extension of SCOD to such petitioners / generating plants. It is also claiming same party and stands on par with those petitioners.
- ae. The petitioner stated that in the light of the facts and circumstances set out in the aforementioned background, it is necessary that the TSSPDCL be directed to file an amended draft PPA duly incorporating the relevant clauses and/or through an Addendum and that the above OP is disposed of on merits, granting relief to it, in so far as on non-grant, it will suffer irreparable loss and prejudice.

2. The petitioner has sought the following prayer in the petition:
“In view of the above, hence it is therefore prayed that this Hon’ble Commission may be pleased -
- a. *To approve the SCOD extension for 6 months from the date of revised PPA providing extension;*
 - b. *To direct the respondent/DISCOM to amend PPA incorporating the relevant clauses and/or create Addendum to PPA dated 01.02.2016;*
 - c. *To direct the respondent DISCOM to submit the draft Amended to the existing PPA dated 01.02.2016 for grant of consent of the Commission;*
 - d. *To direct the respondent / DISCOM to provide all the necessary assistance with suitable mechanism for synchronization of power project as required to draw the power produced by the petitioner plant, on completion of the project;”*
3. The 1st respondent has filed counter affidavit and the averments of it are as below:
- a. It is stated that the respondent TSSPDCL has entered into a PPA with the petitioner on 01.02.2016 for purchase of 8 MW solar power from their solar power project connecting at 33/11 Nawabpet substation, Mahabubnagar District. As per the terms of PPA, the petitioner had to commission its solar power project within 12 months from the date of signing of PPA that is 31.01.2017.
 - b. It is stated that the events such as land acquisition, funding from the bank / investors, equipment supplies from India/abroad and project site construction, do not fall under the head of Force Majeure covered by Article 9 of PP. Therefore, the contention of the Petitioner that the delay in commission of the project occurred due to Force Majeure event, becomes untenable and hence deserve to be rejected. The reasons cited by the petitioner are to avoid performance of its obligations under PPA and to gain extension of time for SCOD on the pretext of alleged Force Majeure event. The events of districts reorganization in State of Telangana and demonetization of high value currency in India do not fall within the definition of Force Majeure. Further, the petitioner cannot arbitrarily declare an event or circumstance a ‘Force Majeure’ and also

cannot arbitrarily declare its cessation. It is stated that the petitioner is trying to gain time under the guise of Force Majeure. Hence, the reasons cited by the petitioner do not deserve consideration.

- c) It is stated that GoTS, Energy Department vide letter dated 29.06.2017 has given extension for SCOD upto 30.06.2017 to the solar power projects in the State, who have concluded PPAs with TSDISCOMs without any penalty duly following all the technical requirement as required under CEA and TSTRANSCO guidelines. The Commission vide letter dated 18.08.2017 has in principle approved the extended SCOD upto 30.06.2017 for solar power projects of competitive bidding 2015 with a condition to re-fix the tariff. Further, the Commission in its letter 18.08.2017 has directed the respondent to file proper petition for amending PPAs in respect of penalties and re-fixation of tariff. As per the directions of the Commission, the respondent had filed the petition on 11.10.2017 before the Commission for amending PPA duly incorporating the SCOD as 30.07.2017 on the same tariff to the solar power projects commissioned beyond SCOD, who have entered PPAs with respondent under competitive bidding 2015. The said petition was returned by Receiving Officer of the Commission vide letter dated 21.10.2017 with certain objections/remarks and defects in the petition directing to comply with the defects and to file the same for allowing the Commission to proceed further in the matter. The respondent had resubmitted the petition on 29.11.2017 to the Commission duly attending the remarks raised by the Commission. Again, the Secretary of the Commission vide letter dated 23.02.2018 had returned the petition filed by the respondent with certain remarks. Further, the respondent had resubmitted the same petition on 31.03.2018 to the Commission with certain modification suggested by the Commission and the date regarding hearing of the petition before the Commission is yet to be scheduled. It is stated that GoTS by letter dated 23.08.2017 has given further extension of additional four (4) months in the SCOD that is 31.10.2017 to the solar power projects in the State, who have participated in bidding 2015.
- d. It is stated that the SCOD of the petitioner's project as per PPA is 31.01.2017. Goods and Service Tax (GST) Act came into effect from

01.07.2017. Therefore, it is clear that the event of enactment of GST law had occurred after the SCOD of the petitioner's project. As such, the delay in commissioning of the project occurred on the alleged grounds of introduction of GST Law as contended by the petitioner becomes false and incorrect. The petitioner seeking extension of SCOD under Change in Law is contrary to provisions of PPA.

- e. It is stated that in spite of extensions being granted to commission solar power plants by Government, the petitioner failed to achieve the SCOD. Hence, in terms of Article 10 of PPA, a default notice had been issued vide letter dated 06.09.2018 for not commissioning the project in time. In this regard, there was no response from the petitioner on the aforesaid default notice issued by the respondent. After lapse of conciliation period as per PPA, a termination notice was issued to the petitioner vide letter dated 21.01.2020 terminating the NCE PPA No.2000 / 01 /2016 dated 01.02.2016.
- f. It is stated that in view of termination of PPA, the relief sought by the petitioner to amend the terminated PPA incorporating the extension of SCOD as 6 months from the date of revised PPA, becomes infructuous. The petitioner did not turn up for conciliation after receiving default notice and allowed the respondent to terminate PPA dated 01.02.2016. In view of termination of PPA dated 01.02.2016, the petition undue reply has to be dismissed.
- g. It is stated that the Act, 2003, which is the governing law for the power sector in the country, mandates the DISCOMs to procure power on least cost principle from cheaper and economical sources for safeguarding the consumer's interest and the benefit will be passed onto the consumers ultimately. Further, the National Tariff Policy, 2016 (NTP) stipulates that power procurement shall be done under competitive bidding process from all renewable energy based projects like solar, wind projects except waste to energy based projects. Clause 6.4 (2) of the NTP notified by the Ministry of Power, Gol under section 3 of the Act, 2003 is extracted as below.

“States shall endeavour to procure power from renewable energy sources through competitive bidding to keep the tariff low, except from the waste to energy plants.”

- h. In the light of the aforesaid facts and circumstances, it is prayed the Commission to dismiss the petition.
4. The petitioner has filed rejoinder to the counter affidavit filed by the respondent and the pleadings of the same are as below:
- a. At the outset the petitioner herein filed the above petition under 86 (1) (f) and (k) of the Act, 2003 read with Article 9.2 of power purchased agreement dated 01.02.2016 and Commission's (Conduct of Business) Regulation No.2 of 2015 seeking extension of SCOD under competitive bidding route 2015-16 for procurement of 8 MW solar power in terms of PPA dated 01.01.2016.
 - b. It is stated that 1st respondent herein has filed the counter / reply affidavit contending inter alia several contentions most of them are borne as a matter of record. Therefore, the petition placed the following true facts in a nutshell which are necessary to resolve the dispute amicably in light of the various orders referred herein further.
 - c. It is stated that the petitioner has been making representations from time to time to 1st respondent / DISCOM seeking for extension of schedule commercial operation date SCOD on 26.12.2016, 16.02.2017, 06.05.2017, 06.12.2017 and 14.07.2018. All along the petitioner has been requesting for extension of SCOD in view of the uncontrollable factors that arose, circumstances prevalent at the relevant time and the obstacles that have occurred in the execution of works so as to declare the SCOD. The respondent had not considered and granted time but it has been stated that they have communicated to the Commission for taking decision and granting approval for the same as per their letter dated 13.09.2017. The petitioner after receipt of it, in fact has given consent for the extension as well as the fee amount to be paid before the Commission as per regulations in terms of the letter dated 15.09.2017 the respondent / DISCOM. In response to it the petitioner has promptly

gave their consent through a letter dated 25.09.2017 stating that the petitioner is ready and willing avail the extension of SCOD.

- d. It is stated that the petitioner has invested huge amounts for procurement of land and development of infrastructure towards establishment of solar power plant, by raising funds from banks and financial institutions. Further it was ready and willing to go ahead and complete the project on getting extension of time for SCOD as per intended purpose. Further to the averments made in the counter affidavit the respondent/DISCOM (at para No.6), without prejudice any proof that may exist about of service of alleged communication of the respondents, they have never served the said letters to the petitioner as stated. Most of the averments and the denials of the respondent in their counter are vague and contrary to the events that have set in during the course of execution of work such as GST, demonetization and the district re-organisation in the State are the problems and difficulties having impact across the nation and State wide as such the respondent DISCOM cannot deny these facts borne which are a matter of fact including the labour problem in addition to the monetary difficulties faced by the petitioner. The same contention was advanced by several of the generating plant entrepreneur before the Commission which was accepted in favour of the generators and orders were passed extending the SCOD. At any rate bare denial by the respondent/ DISCOM do not have basis or bearing on the issue under consideration by the Commission without there being substantive reasoning to come to conclusion otherwise, as was done in similar matters on entrepreneurs on the earlier occasion. The petitioner in this petition is seeking the similar benefit to be extended as matter of parity as the petitioner also stands on the same footing.
- e. It is stated that on receipt of the letter dated 03.02.2018 from the respondent / DISCOM, the petitioner had filed a petition before the Commission on 08.05.2018 and thereafter the same was under process. However due to forum non-exist, the same could not move forward. The petitioner even wrote a letter dated 14.07.2018 to the respondent / DISCOM seeking extension of SCOD upto 31.07.2019 so as to enable it to complete the project and was ready to commence the operation. None

the less, there is no reply nor any intimation as on date and on the other hand now it has alleged several contentions before the Commission in the counter, which respondent may be put to strict proof. All these averments have been regularly raised by the respondent/DISCOM and the Commission was pleased to consider the same several times and it was negated. So, the respondent having suffered with the orders of the Commission and those orders have become final cannot brow beat the same contentions. The said contentions may be rejected by the Commission.

- f. It is stated that the Commission has earlier considered several of the generators cases who have approached the Commission which this petitioner has stated in the main petition about those orders and once again the petitioner is reiterating the same request. It is not out of place and it is pertinent to submit since 2019 to till date even recently on 09.03.2021 the Commission has considered the same issue of extension of SCOD and granted the same.
- g. Hence, under the above circumstances, it is respectfully prayed the Commission to grant extension of SCOD to the petitioner plant so as to complete the project and commence its operations for production of power duly taking into consideration of the difficulties stated in the petition as well in light of the directives of the Commission made in several other cases as well the recent one vide order dated 09.03.2021.

5. The petitioner has filed memo, which is as below:

- a. It is stated that this petitioner has filed the O. P. No. 6 of 2020 and also rejoinder to the counter affidavit filed by the respondent before this Hon'ble Commission. The petitioner has pleaded about the force measures such as GST, demonetization and district reorganisation and both could not be filed as copies.
- b. The petitioner secured the copies of the G. O. Ms. No. 241 of Revenue (DA-CMRF) Department pertaining to reorganization of Mahabubnagar District, Telangana dated 11.10.2016, DCM (Plg) No. 1226 / 10.27.00 / 2016-17 of demonetization dated 08.11.2016 and GST Notification

No. 9 / 2017 dated 28.06.2017 which have been pleaded, may be placed to receive on record and for passing orders.

6. The petitioner has filed additional rejoinder to the counter filed by 1st respondent and the averments of the same areas under:

- a. It is stated that the petitioner having gone through the counter affidavit filed by 1st respondent / DISCOM and hereby deny all the averments except which are specifically admitted herein under. At the outset the petitioner herein filed the above under 86 (1) (i) and (k) of the Electricity Act, 2003 read with Article 9.2 of power purchased agreement dated 01.02.2016 Telangana State Electricity Regulatory Commission (Conduct of Business) Regulation No. 2 of 2015 seeking extension of SCOD under competitive bidding route 2015-16 for procurement of 8 MW solar power in terms of PPA dated 01.01.2016.
- b. It is stated that during the course of hearing, the Commission was pleased to direct the petitioner to file the relevant case law regarding the service of notice to the averments made in the counter affidavit of the respondent / DISCOM (at paragraph No.6). As there is no proof of service of default notice dated 06.09.2018 and the notice of termination dated 21.01.2020. Hence, these notices were not communicated to the petitioner as the respondents are relying upon mere postal receipts enclosed to the memo dated 24.04.2021, filed by the respondents. These two letters said to have been issued by the respondents are posted to two different addresses. The first one dated 06.09.2018 was posted to old address, also, an e-mail was said to be sent by the respondents on thorough checking, any such mail was not received by the petitioner. The second one is not yet received till date. Therefore, the Commission may be pleased to consider the following submissions, which stands and contentions advanced by the respondents are inconsistent.
 - A. Letter dated 21.01.2020 without there being any communication of change of address by petitioner, the respondent/DISCOM have issued notice for termination. The same was not received by the petitioner.

- B. Whereas in memo/counter dated 24.04.2021, filed by the respondents (at paragraph No.2), they have stated the address of service as mentioned under Clause 8.3 of PPA.
- C. Hence it contradicts the stand taken by respondent on the issue, taken before the Commission.
- D. Even the stand of termination of PPA is unsustainable the reason being-
- (i) the counter affidavit paragraph (4) it was stated that the respondent have approached the Commission for getting approval for amendment of PPA by extension of SCOD.
 - (ii) Without waiting / inviting an order for sanction or refusal from the Commission they have again stated in preliminary letter dated 06.09.2018, at any rate, it was not communicated, as it was not received by the petitioner.
 - (iii) The crucial facts which are relevant for consideration of the Commission is 05.05.2018 the above O. P. was originally filed before this Hon'ble Commission.
 - (iv) The above O.P. was returned by the Commission on 14.05.2018. The petition was resubmitted on 09.07,2019. The counter affidavit of the respondent it was stated that the issue of SCOD for PPA's entered with DISCOM's, the approval for incorporating the fresh SCOD after the commission returning originally on 21.10.2017 and lastly, it was resubmitted on 31.03.2018 and the issue was pending and was yet to fix the schedule date of hearing.
 - (v) The letter in 2021 was never communicated. This does not assist the respondent to develop their case into a different dimension to justify their action for termination. In view of the pending consultation before the Commission, in general. If not a specific case of petitioner presented the O. P. initially on 05.05.2018 and returned with office objection.
- c. In that view of the matter the respondent/DISCOM cannot independently issue notices for default and termination, to the petitioner. At any rate

these notices were never communicated, and the presumption shall not be drawn by applying the General Clauses Act, 1897, as it could be subjected to rebuttal. The stands taken in the very same O. P. are inconsistent and the same shall not be allowed to stand judicially. Hence the following are the case laws for consideration of the Commission.

- d. Completion of serving of notice: Decision reported in AIR 1966 SC 330 in the case of "*K. Narasimhaiah Vs. H.C.Singiri Gowda & Ors.*" in para 10 and 11.
- e. In, "*Joint Action Committee of Air Line Pilots Assn. of India Vs. DG. of Civil Aviation*" -2011 (5) SCC 435, the Hon'ble Division Bench, at para 2, held that- parties should not blow hot and cold by taking inconsistent stands.
- f. The above principle was again followed and reiterated by Full Bench of the same Hon'ble Apex Court in the case of "*Suzuki Parasrampuriah Suitings Pvt. Ltd. Vs. Official Liquidator of Mahendra Petrochemicals Ltd. (In Liquidation) and Others*" - (2018) 10 SCC 707, at para No.12 & 13. It was held that, a litigant cannot take contradictory stand in same case.
- g. Hence, under the above circumstances, it is prayed the Commission to grant extension of SCOD to the petitioner so as to complete the project and commence its operations for production of power, in the light of the directives of the Commission made in several other cases as well the recent one vide order dated 09.03.2021.

7. The Respondents also filed a Memo as per the direction of the Commission dated 22.03.2021 as below:

- a. The Commission during the case of hearing on 22.03.2021 has directed to furnish acknowledgement of the default notice dated 06.09.2018 and termination notice dated 21.01.2020 served to the petitioner.
- b. It is stated that the default notice and termination notice were communicated to the petitioner by registered post and through e-mail to the address mentioned in PPA (Article 8) entered between the petitioner and TSSPDCL.

- c. The acknowledgement of the registered post for the default notice dated 06.09.2018 and screenshot of the e-mail of termination notice dated 21.01.2020 to the petitioner is enclosed.
- d. Further it is stated that the representative of the petitioner had personally taken a photocopy of said notices from this office. In spite of the said events, the petitioner with an intention to get the relief sought by him is trying to mislead the Commission by suppressing and misrepresenting the facts.

8. The Commission has heard the counsel for the petitioner and the representative of the respondents thoroughly on six occasions. It has perused the material available on record. The material submission are as below.

Record of proceedings on 22.02.2020

"... .. The counsel for the petitioner stated that the matter is coming up for the first time and counter affidavit has to be filed in the matter. The standing counsel requested for time to file counter affidavit."

Record of proceedings on 18.02.2021

"... .. The counsel for the petitioner stated that the matter is relating to extension of SCOD of the project. The counter affidavit in the matter, though, has been filed long back, however, the copy of the same has not been received by him till the other day. He requested for grant of time for obtaining instructions as also filing reply, if any, in the matter"

Record of proceedings on 15.03.2021

"... .. The counsel for the petitioner stated that he needs time to file rejoinder in the matter as he has noted the date of filing rejoinder as 17.03.2021 instead of 07.03.2021. The representative of the respondents stated that the counter affidavit had already been filed and he has no objection for granting time to file rejoinder by the petitioner."

Record of proceedings on 22.03.2021

"... .. The counsel for the petitioner stated that the matter involves the extension of SCOD of the project. The petitioner has sought extension of SCOD as was done in the earlier cases decided by the Commission relying on the Force Majeure conditions. He thoroughly explained the dates and events, which resulted in SCOD being not declared till date. He also stated that the

respondents have stated several facts about sending letters including default notice to the petitioner, which have not been received by the petitioner. He pointed out that the reply is filed denying such communication made by the licensees.

The Commission sought to know why a pleading of change in law is made. In reply, the counsel for the petitioner pointed out that action taken by the respondents as also the policy adopted by the government do constitute change in law. It is his case that the facts and circumstances tend more towards the Force Majeure events than that of change in law and as such, this contention may be considered in that context only.

The representative of the respondents stated that the petitioner ought to have completed the project in 12 months and at best by 30.06.2017, which the government had allowed and the Commission had accepted. Despite several letters by the respondents to the petitioner to avail the benefit of extended SCOD, the petitioner was not forthcoming to comply with the same and to complete the project. The licensees had no option to invoke the bank guarantee and terminate the agreement. The said action was also communicated to the petitioner. Now at this belated stage, the petitioner is not entitled to the relief sought for having not completed the project as yet.

The counsel for the petitioner pleaded for allowing the petition and granting 6 months time to achieve the SCOD. At the same time, he was emphatic that the petitioner is not in receipt of any communication on the aspect of bank guarantee default notice and termination of PPA. The Commission required the licensees to place the relevant proof of serving of the alleged letters to the petitioner, as it is not sufficient to state in the counter affidavit. The matter is adjourned for sole purpose.”

Record of proceedings on 09.06.2021

“... .. The counsel for the petitioner stated that the matter involves the extension of SCOD of the project. On the earlier date hearing the Commission directed the respondent licensee to place before it the proof of service of notice regarding termination of the agreement and invoking of bank guarantees. The respondent have filed a memo enclosing the letters issued in the year 2018 and in January 2020 along with postal acknowledgement cards. While the earlier

letter was sent to the old address as mentioned in PPA, the latest letter has been sent to the new address.

The counsel for petitioner stated that the petitioner had changed the address as also the electronic communication address for email. The notices purported to have been sent in both physical and electronic form have not been received by the petitioner. The proof filed by the respondent thus not disclosed the receiver's signature. Therefore, it cannot be said that proper service has taken place. The respondent initially sent the correspondence to the address in PPA and subsequently to the changed address. At this stage the counsel for petitioner made a concession that there is a mistake on part of the petitioner that it did not comply with the provisions of PPA regarding intimation of change of address both physical and electronic form.

The counsel for petitioner however would endeavour to submit that the distribution licensee acted contrary to the provisions of PPA. While its initial notice was sent to the address in PPA, the subsequent notice after failing of the notice has been addressed the new address. This act of licensee speaks about the intention of the DISCOM. Moreover the DISCOM itself in its counter affidavit stated that it had approached the Commission about extension of SCOD of the projects commissioned under bidding of 2015 but the said petition had not been taken up by the Commission. Having approached the Commission, it was not correct on part of the DISCOM to invoke bank guarantee and subsequently issue termination notice also. Thus mistake has occurred on both sides in the matter.

The counsel for petitioner relied on the judgement of the Hon'ble Supreme Court to emphasise that mere issuance of notice is no notice at all, but the said notice should actually be served on the person to whom it is issued. Reference is made to the judgement reported in AIR 1966 SE 330 between Sri K. Narasimhiah Vs. Sri H.C. Singri Gowda. He also relied on a judgement of 2018 about the said aspect. It is his case that the petitioner had originally filed the petition in the year 2018 and it met with return on two occasions in the year 2018 and also in the year 2019 due to procedural and filing defects. Ultimately the petition was filed on 09.07.2019. Though the matter could not have been taken up due to various reasons including absence of Members, the notice of

the year 2020 cannot be pressed in to service as been matter in dispute has been seized by the Commission.

The counsel for petitioner stated that the issue of extension of SCOD has been decided by the Commission in several petitions and it has considered the same issue in a recent decision also which is filed along with the reply. It is the endeavour of the counsel for petitioner that change of address both physical and electronic form have not been communicated which is a mistake on part of the petitioner, but the changed address has been brought in to existence with communication to the Ministry of Micro Small and Medium Enterprises. After filing of the documents, he had require the petitioner to restore the earlier email address and verify whether any email has been received from DISCOM. According the oral instructions no such mail on relevant dates had been received from the DISCOM.

Having submitted all the details the counsel for the petitioner would urge the Commission to consider allowing the petition. On other hand the representative of the respondent sought some more time to make submissions in the matter and also verify the applicability of the judgements relied upon by the petitioner. In these circumstances, having heard the matter substantially, the petitioner and respondent shall complete the filing of the documents and replies by making available of the same either side with due acknowledgement filed before the Commission and the matter will be finally heard on next date of hearing. No further adjournment will be granted. Parties are at liberty to file written arguments by the next date of hearing.”

Record of proceedings on 28.06.2021

“... .. The counsel for the petitioner stated that the Commission directed the petitioner to file documents and judgments being relied upon immediately on the last occasion. However, the same have been sent to him only yesterday, which he emailed the same to the Commission. Further, he is filing the physical set of papers today and therefore, sought adjourned of the matter by a week while confirming the service of the papers on the respondents. He also expressed regret over inconvenience caused to the Commission and the other party. Considering the request of the petitioner,...”

Record of proceedings on 07.07.2021

“... .. The counsel for petitioner stated that the arguments in the case relating to facts have been concluded. On the last occasion, he sought time for enabling service of the judgments relied upon by him to the respondents and placing the same on the file of the Commission. Now they have been served and placed on the file of the Commission. He has relied on the judgments filed in the memo dated 28.06.2021 and explained the contents thereof by reading the relevant paragraphs in the said judgments. The import of the judgment is that 1966 judgment is on the issue of service of notice while the judgments of 2011 and 2018 are relating to contradictory stands taken by a party in a proceeding. It is his case that a party may change its contention in different proceedings but cannot approbate and reprobate in one proceeding itself. The attendant facts and events in this case show the same about the action of the respondents in this case. It is also his case that service of notice as explained above have been clearly decided by the Hon’ble Supreme Court and in the instant case the respondents have not followed the same.

The representative of the respondents stated that the matter involves extension of SCOD of the project. The petitioner did not complete the project in time. Also the petitioner changed the address for communication, but did not care to inform the DISCOM, which is a party to the agreement. He pointed out the relevant letters, which were sent to the known address of the petitioner. The same have been served and acknowledgment is received as has been filed before the Commission. At this stage, the Commission pointed out that the matter is heard as regards the facts of the case already and the arguments should be limited to service of notice only.

The representative of the respondents stated that the service of notice is provided in the Act, 2003 itself and readout the provision. It is stated that the respondents have adopted the method of service as enumerated in the Act, 2003. He relied on a judgment of the Hon’ble Supreme Court reported in AIR 1981 SC 1234, which mandated that service of notice has to be interpreted in terms of the provisions contained in the relevant statute and for that purpose section 27 of the General Clauses Act is relevant. Reliance is placed on section 114 of the Evidence Act also to state that service of notice is complete when acknowledgment of post is received. The representative of the respondents

further relied on clause 10.3 of PPA that termination notice is to be given 60 days before actual termination of the agreement and the respondents have given more than that time before actually terminating the agreement. Encashment of BGs as submitted by the counsel for petitioner is the consequence of termination of agreement. Therefore, the Commission may not grant any relief to the petitioner.

The counsel for petitioner stated that the Commission may consider the balance of convenience as also the huge investments made by the petitioner to the project. The Commission had already considered extension of SCOD in several cases as recently as in the month of March, 2021 also, which is cited by him. The petitioner may not be put to any hardship in refusing the relief, as the investments are made based on financial borrowing with the banks. The counsel for petitioner stated that the matter may be considered favourably....”

9. On the strength of pleadings and upon hearing the submissions both sides, the following issues arise for consideration:

- a. Whether the petitioner is entitled to the reliefs sought for?
- b. Whether the termination of PPA dated 01.02.2016 is valid and sustainable as contended by 1st respondent?

10. The learned counsel for the petitioner would submit that, the petitioner constrained to seek for the extension of SCOD for the solar power project being established by it on account of Force Majeure events and due to Change of Law and the Commission earlier in other cases viz O.P.No.65 of 2018, O.P.No.58 of 2018 and in O.P.No.28 of 2020 ordered the extension of SCOD by relying on the Force Majeure events and by taking a note of huge investments made in to the project by the petitioner by borrowing the amounts from financial institutions, the Commission may be pleased to consider the case of the petitioner by allowing the petition.

11. On the contrary the representative of respondents would submit that, no such extension of SCOD can be ordered as sought by the petitioner for the reason the petitioner failed to complete the project within time period and the case of the petitioner cannot be equated with the facts and circumstances of the cases over which the petitioner relied upon wherein the Commission has ordered the extension of SCOD, which cannot be a ground for reliefs when the petitioner was and is not diligent in

completing the project within the stipulated time and the petition is liable for dismissal.

12. For better appreciation the relevant clauses of PPA are extracted hereunder:

1.12 *“Change in Law” means any change or amendment to the provisions of electricity law in force, regulations, directions, notifications issued by the competent authorities and Government of India (GoI), Government of Telangana State (GoTS) including the erstwhile Government of Andhra Pradesh (GoAP) from time to time.*

1.13 *“Commercial Operation Date”/ “Date of Commercial Operation” (“COD”) means the date on which the project is declared by the Solar Power Developer to be operational (which means project is able to inject power to grid), provided that the Solar Power Developer shall not declare a generating unit to be operational until such generating unit has complied with the conditions of the Clause 3.8 of this Agreement.*

... ..

1.43 *“Scheduled Commercial Operation Date (SCOD) or Scheduled date of Commercial Operations” means the date whereupon the SPD is required to start injecting power from the power project to the Delivery Point i.e., and shall mean twelve (12) months from the Effective Date for projects connecting at 33 kV level and shall mean fifteen (15) months from the Effective Date for projects connecting at 132 kV or 220 kV level;*

... ..

3.8.1 *The Solar Power Developer shall give a notice in writing to the SLDC and DISCOM, at least (15) days before the date on which it intends to synchronize the Project to the grid system.*

... ..

3.8.5 *The Solar Power Developer shall commission the Project within timelines specified in this agreement i.e., twelve (12) months from the effective date for projects connected at 33 kV level and fifteen (15) months from the effective date for projects connected at 132 kV or 220 kV, and any delay in commissioning of the project shall be subject to the penalties as stipulated in Clause 10.5 of this Agreement. After commissioning of the project, the SPD shall invariably register the project with SLDC.*

... ..

ARTICLE 6. UNDERTAKING

6.1 *The solar power developer shall be responsible:*

... ..

(xv) Obligations specified in RFS shall be applicable in addition to the obligations specified in this PPA.

6.5 *Consequences of non-fulfilment of conditions subsequently specified in Clause 6.1:*

... ..

(iv) In case of inability of the SPD to fulfil any of the conditions specified in Article 6.1(xv) due to any Force Majeure event, the time period for fulfilment of the conditions subsequently as mentioned in Article 6.1(xv) shall be extended for the period of such Force Majeure event.

(v) Provided that due to the provisions of Article 6.5 of this Agreement, any increase in the time period for completion of conditions subsequent mentioned under Article 6.1(xv), shall also lead to an equal extension in the Scheduled Commissioning Date.

ARTICLE 9. FORCE MAJEURE

Definition of Force Majeure:

a) *"Force Majeure" shall mean any event or circumstance or combination of events or circumstances that materially and adversely affects the performance by either party (the "Affected Party) of its obligations pursuant to the terms of this Agreement (including by preventing, hindering or delaying such performance), but only if and to the extent that such events and circumstances are not within the Affected Party's reasonable control and were not reasonably foreseeable and the effects of which the Affected Party could not have prevented by Prudent Utility Practices or, in the case of construction activities, by the exercise of reasonable skill and care. Any events or circumstances meeting the description of Force Majeure which have the same effect upon the performance of any of the Solar Power Project setup in accordance with solar policy announced*

by Govt. of Telangana State (GoTS) under the competitive bidding route and which therefore materially and adversely affect the ability of the Project or, as the case may be, the DISCOM to perform its obligations hereunder shall constitute Force Majeure with respect to the Solar Power Developer or the DISCOM, respectively.

(b) Force Majeure circumstances and events shall include the following events to the extent, that they or their consequences satisfy the above requirements.

(i) Non Political Events such as acts of GOD including but not limited to any storm, flood, Drought, Lightning, Earthquake or other natural calamities, fire, accident, explosion, strikes, labour difficulties, epidemic, plague or quarantine, air crash, shipwreck, train wrecks or failure ("Non Political Events").

(ii) Indirect Political Events such as acts of war sabotage, terrorism or act of public enemy, blockades, embargoes, civil disturbance, revolution or radioactive contamination ("Indirect Political Events").

(iii) Direct Political Events such as any Government Agencies' or the DISCOM's unlawful or discriminatory delay, modification, denial or refusal to grant or renew, or any revocation of any required permit or Change in Law (Direct Political Events).

9.2 In the event of a delay in COD due to:

(a) Force Majeure Events affecting the Solar Power Developer;

or

(b) DISCOM Event of Default as defined in 10.2, the scheduled COD shall be deferred, for a reasonable period but not less than 'day for-day' basis subject to a maximum period of 12 months, to permit the Solar Power Developer or to overcome the effects of the Force Majeure events affecting the Solar Power Developer or DISCOM, or till

such time such event of default is rectified by the Solar Power Developer or the DISCOM, whichever is earlier. Provided further that, the validity of Performance Bank Guarantee shall be extended suitably covering the extended period.

EVENTS OF DEFAULT AND TERMINATION

10.1 Solar Power Developer Event of Default:

10.1.1 The occurrence and continuation of any of the following events, unless any such event occurs as a result of a Force Majeure event or a breach by DISCOM of its obligations under this Agreement, shall constitute a Solar of Power Developer Event of Default.

(i) if

... ..

(ii) if

... ..

(v) the Solar Power Developer delays the commissioning of the Project by more than 5 months from the Scheduled COD, in which case the procedures of Clause 10.5 shall be followed; or

... ..

10.3 Procedure for cases of Solar Power Developer Event of Default

10.3.1 Upon the occurrence and continuation of any Solar Power Developer Event of Default under Clause 10.1, DISCOM shall have the right to deliver to the Solar Power Developer, with a copy to the representative of the lenders to the Solar Power Developer with whom the Solar Power Developer has executed the Financing Agreements, a notice stating its intention to terminate this Agreement (“DISCOM Preliminary Default Notice”), which shall specify in reasonable detail, the circumstances giving rise to the issue of such notice.

10.3.2 Following the issue of a DISCOM Preliminary Default Notice, the Conciliation Period of sixty (60) days or such longer period as the parties may agree, shall apply and it shall be the responsibility of

the parties to discuss as to what steps shall be taken with a view to mitigate the consequences of the relevant Solar Power Developer Event of Default having regard to all the circumstances.

10.3.3 During the Conciliation Period, the parties shall continue to perform their respective obligations under this Agreement.

10.3.4 After a period of seven (7) working days following the expiry of the Conciliation Period unless the parties shall have otherwise agreed to the contrary or the Solar Power Developer Event of Default giving rise to the Conciliation Period shall have ceased to exist or shall have been remedied, DISCOM shall give a further notice to the Lenders, requiring the curing of such default within a period of 90 (ninety) days (Lender's Cure Period) from the date of issue of such notice by exercising the rights of the Lenders provided herein including but not limited to rights assignment / substitution / subrogation / novation. Upon expiry of Lender's Cure Period, unless otherwise the Solar Power Developer Event of Default has been cured, the DISCOMs may terminate this Agreement by giving a written Termination Notice of thirty (30) days to the Solar Power Developer and the same shall be communicated to the lenders concurrently.

... ..

10.5 Penalties in case of Delayed Commissioning

Under normal circumstances the Project has to be commissioned within 12 months from the date of signing of this Agreement. In case of failing to achieve this milestone, the DISCOM shall encash the Performance Bank Guarantee which was submitted by the solar developer to the DISCOM at the time of entering this Agreement, in the following manner:

... ..

(e) The maximum time period allowed for commissioning of the full Project Capacity with encashment of Performance Bank Guarantee and payment of Liquidated Damages shall be limited to eighteen (18) months/ twenty one (21)

months from the Effective Date of this Agreement. In case, the commissioning of the Power Project is delayed beyond eighteen (18) months for the project connected to 33 / 11 kV substation and twenty one (21) months for the projects connected to 132 / 33 kV or 220 / 132 kV or 400 / 220 kV substation from the Effective Date of this Agreement, it shall be considered as an SPD Event of Default and provisions of Article 10 shall apply and the Contracted Capacity shall stand reduced / amended to the Project Capacity Commissioned within 18 months / 21 months from the effective date of this Agreement and the Agreement for the balance Capacity shall stand terminated.

- (f) *For all other cases of Solar Power Developer Event of Default, procedure as provided in Clause 10.3 shall apply.”*

ISSUE No.1: Whether the petitioner is entitled to the reliefs sought for?

13. The petitioner sought as many as four (4) reliefs in this petition and the first three (3) reliefs are interlinked with each other and the last one (1) is subject to outcome of the first three reliefs. By mingling all the first three (3) reliefs it can be said that the contention of the petitioner is for amending PPA dated 01.02.2016 by incorporating the SCOD as six (6) months from the date of revised PPA. It is a fact that the project of the petitioner had been conceived pursuant to the solar policy of 2015 announced by GoTS under which 1st respondent upon the directions of the 2nd respondent initiated steps for procurement of 2000 MW of solar power capacity in the year 2015 and thus, the petitioner is one of the Solar Power Developer, who has been awarded with 8 MW solar power project. In pursuance of that the petitioner has entered into a Power Purchase Agreement (hereinafter referred as PPA) on 01.02.2016 with 1st respondent.

14. PPA entered by the petitioner with 1st respondent is dated 01.02.2016 and as per 6th point of preamble in page 2 of PPA, the petitioner was supposed to achieve the Commercial Operation Date (COD) within 12 months from the date of signing of PPA i.e., by the date 31.01.2017 and in default thereof, the Solar Power Developers

Performance Bank Guarantee shall be liable for forfeiture and the agreement shall be liable for termination as per other provisions of the agreement, and it appears the petitioner could not achieve COD by that date and even by the dates of extension of SCOD granted by GoTS without penalty i.e., 30.06.2017 and 31.10.2017. Upon perusal of the documents placed by the petitioner it is appearing that the petitioner made representations to 1st respondent by addressing letters dated 26.12.2016, 06.02.2017, 26.05.2017, 14.06.2017, 06.07.2017 with a request to extend the SCOD. Needless to add that the petitioner had the benefit of extension of SCOD granted by GoTS upto 31.10.2017 without any penalty irrespective of the response of 1st respondent to those letters.

15. In relation to the extension of SCOD granted by GoTS upto 30.06.2017, 1st respondent by addressing the letter dated 15.09.2017 asked the petitioner to submit the acceptance / consent for availing extension of time upto 30.06.2017 within a week time from the date of receipt of that letter to enable the TSSPDCL to file a petition before the Commission for amending PPAs in respect of the penalties and re-fixation of tariff for the projects who have given the consent for availing the extension upto 30.06.2017. The petitioner informed the consent / acceptance for availing the benefit of extension of SCOD upto 30.06.2017 by addressing a letter dated 28.09.2017.

16. The Commission, as response to the request made by TSDISCOMs during Sep'2017 for extension of SCOD for Solar Power Projects in the State who have participated in bidding of 2015, has communicated through letter dated 30.11.2017 that as per the ratio laid down by the Hon'ble Supreme Court in Civil Appeal No.6399 of 2016 in *Gujarat Urja Vikas Nigam Ltd. Vs. Solar Semiconductor Power Company (India) Pvt. Ltd. and Others*, no general order can be issued for extension of time and further stated for extension of time, each Solar Power Developer has to be examined with reference to the terms of PPA, by following the principles of natural justice. And as such, each Solar Power Developer has to file a petition before the Commission furnishing the reasons for extension of time, which can be examined within the framework of PPA.

17. In relation to the extension of SCOD granted by GoTS upto 31.10.2017, 1st respondent addressed a letter dated 03.02.2018 to the petitioner and asked to file a petition before the Commission regarding extension of SCOD and determination of

tariff duly furnishing the facts in respect of the project for extension of time. It appears the petitioner who is in receipt of this letter and in furtherance of that letter filed the petition on 05.05.2018 with a request to extend SCOD by condoning the delay, though the project was not completed and not ready for synchronization / commissioning. The petitioner addressing the letter dated 14.07.2018 to 1st respondent, wherein the petitioner put forth several reasons due to which the project was said to be delayed and extension of SCOD was appears to be an afterthought and the outcome of one of the office objections of the Commission dated 14.05.2018 under which the petition filed on 05.05.2018 was returned along with a letter by granting seven (7) days to comply with the objections from the date of receipt of that letter .The petitioner instead of resubmitting the petition by answering or complying the objections within seven days granted time has filed the instant petition on 09.07.2019 i.e., more than one year after the return of the petition, by changing the prayer and by adding the plea of Force Majeure events and Change of Law. Admittedly the petitioner had not completed the project even by the date of filing the instant petition before the Commission in the year 2019 and even at that time of final hearing of this petition, there is no whisper as to what is the present status of the project.

18. It is said by the Counsel for the petitioner that, the Commission granted extension of SCOD to several other projects to complete and to commence the operations by issuing orders and such extension of SCOD can be ordered to the petitioner also so as to complete and to commence its project .In support of this saying the learned counsel for the petitioner relied on the Orders passed by the Commission in O. P. No. 65 of 2018 dated 18.12.2018, O. P. No. 58 of 2018 dated 02.01.2019 and O. P. No. 28 Of 2020 dated 09.03.2021. It is true that the Commission on earlier occasions condoned the delay in achieving the SCOD only in such cases where the synchronisation took place (except in O. P. No. 65 of 2018).

19. In O. P. No. 65 of 2018, the case of the petitioner therein was considered, extended SCOD and a direction to the respondent of that petition was given to amend PPA within 90 days for achieving SCOD from the date of signing PPA with the tariff fixed @ Rs.5.52 per unit for a period of 25 years despite the issuance of termination notice on 23.03.2018 and termination of PPA on 20.07.2018 by respondent, for the reason of petitioner approaching GoTS and obtaining extension of SCOD by 90 days

with reduced PPA tariff of Rs. 5.72 per unit for a period of 25 years vide letter No. 1250 / PR. A1 / 2017, dated 05.09.2018 and GoTS making such extension of SCOD as a onetime measure and as a last chance. In the instant case the situation is not like that as that of O. P. No. 65 of 2018. Whereas there is no such extension for SCOD from GoTS as a onetime measure in favour of the petitioner to consider its case. Therefore, the Order of O. P. No. 65 of 2018 do not have any persuasive effect.

20. In O. P. No. 58 of 2018, the case of the petitioner therein, who reported ready for commissioning and for synchronization of the project by addressing letter to 1st respondent was considered by the Commission and the delay of 176 days in synchronization of the project was condoned by holding the delay was on account of administrative and regulatory challenges. Such consideration of the case of the petitioner was made by following the ratio laid down by the Hon'ble APTEL in Appeal No. 123 of 2012 and I. A. No. 396 of 2012 filed by the Gujarat Urja Vikas Nigam Limited (GUVNL) against the ruling of the Gujarat State Electricity Regulatory Commission.

21. The Gujarat State Electricity Regulatory Commission in the case of Gujarat Urja Vikas Nigam Limited (GUVNL) and Cargo Solar, a project developer, has examined the provisions of PPA dated 30.04.2010 entered between the parties and the Commission held that *“the delay caused due to obtaining the permission/approval for land, water, etc., are prerequisite for the project and fall under the category of Force Majeure Events. Accordingly, the State Commission decided that the period of delay in obtaining such clearances, it is required to be suspended or excused and to that extent the period of commercial operation date, date of construction default and scheduled commercial operation date are to be extended.”*

22. The Hon'ble APTEL in its judgement dated 04.02.2014 concluded that;

“(i) The approvals under Bombay Tenancy and Agriculture Land (Vidharba Region and Kutch Area) Act, 1958 and for water source under the Environment (Protection) Act, 19986 and CRZ Regulations sought by Cargo Solar are the statutory / legal approvals under PPA. The delay in obtaining these approvals by the Government instrumentalities by Cargo Solar would fall in the category of Force Majeure Events under Article 8.1 (a) (v) of PPA. As such the period of such delay is required to be suspended or excused and to that extent the period of Commercial

Operation Date, Date of Construction default and Scheduled Commercial Operation Date are to be extended in terms of PPA.

(ii) The findings of the State Commission and the consequential relief granted to Cargo Solar are correct and therefore, upheld.”

23. In the instant case the petitioner herein not made the project ready for commissioning and for synchronization even after the lapse of more than three (3) years period from SCOD as per the terms of PPA and no allegations are attributed against 1st respondent as responsible for the delay. Therefore, the Order of O.P.No.58 of 2018 do not have any persuasive effect.

24. In O. P. No. 28 of 2020 the case of the petitioner therein, who not only completed the project but also synchronised it with grid within time extended by GoTS, was considered by the Commission by holding the SCOD of the project of the petitioner as 31.03.2017 i.e., within the generic extension granted by the Government which was accepted by the Commission and ordered for the refund of the penalty collected by the licensee to the petitioner therein by following the decision of Hon'ble Supreme Court in “*M.P. Power Management Company Ltd., Vs. Renew Clean Energy Pvt. Ltd., & Others*” reported in AIR 2018 SC 3632. In paragraph 11 of this Judgement, the Hon'ble Supreme Court observed the following:

“The delay in commissioning the project appears to be due to unavoidable circumstances like resistance faced at the allotted site in Rajgarh District and subsequent change of location of the project. These circumstances, though not 7 of 9 a Force Majeure event, time taken by respondent no.1 in change of location and construction of the plant have to be kept in view for counting the delay. Having invested huge amount in purchasing the land and development of the project at Ashok nagar district and when the project is in the final stage of commissioning, the termination of the contract is not fair.”

25. In paragraph 12 of this Judgement, the Hon'ble Supreme Court further observed the following:

“The High Court observed that the delay in completing the project was only for sixteen days. But according to the appellant, respondent No.1 was granted time period of 210 days to complete the conditions subsequent after which the penalty was leviable for the delay and if the delay exceeded more than nine

months, the appellant could terminate the contract. According to appellant, the delay was not of sixteen days; but the said delay of sixteen days is beyond the period of nine months permissible under PPA. In the light of our observations above, we are not inclined to go into the merits of this contention. Suffice to note that in cases of delay, Articles 2.5 and 2.6 provide for levy of penalty. As observed by the High Court, since the contract permits imposition of penalty, respondent No.1 is liable to pay penalty in terms of clause 2.5.1 of PPA for the delay. But the action of the appellant in terminating the contract is arbitrary and was rightly set aside by the High Court”

26. The facts and circumstances of the case of the petitioner are totally different from the facts and circumstances of O. P. No. 28 of 2020. The petitioner without completing the project sought for amending PPA for extension of time to complete the project on the premise of Force Majeure events and Change of Law. The ratio lay down in above stated decision of the Hon'ble Supreme Court and the Order of the O. P. No. 28 of 2020 cannot have any application to the case of the petitioner.

27. The petitioner ought to have completed the project and got it synchronized to the grid within stipulated time, but it could not do so. The petitioner having entered into an agreement with 1st respondent is required to fulfil its obligations arising thereof. No equities are found in favour of the petitioner to consider its case for extending the SCOD for six (6) more months by permitting necessary amendments in PPA as sought by the petitioner, when the project of the petitioner is yet to be completed.

28. For the above stated reasons, this issue No.1 is answered against to the petitioner.

ISSUE No.2: Whether the termination of PPA dated 01.02.2016 is valid and sustainable as contended by 1st respondent?

29. The representative of respondents would contend that in spite of granting extensions to commence the solar power plants by GoTS, the petitioner failed to achieve the SCOD within that extended time and in the given circumstances, in terms of Article 10 of PPA, a default notice had been issued through letter dated 06.09.2018 for not commissioning the project within time and when the petitioner failed to respond to that default notice then, after the lapse of conciliation period a termination of PPA

notice was issued to the petitioner on 21.01.2020 by terminating PPA dated 01.02.2016 and the petitioner did not challenge that termination of PPA, therefore it has to be said that the termination of PPA as valid and sustainable.

30. As a response to the above contention, the learned counsel for the petitioner would submit that, the alleged termination of PPA is invalid and unsustainable for the reason that the respondents approached the Commission for getting approval for amendment of PPA for extension of SCOD by filing a petition and without waiting/inviting an order for sanction or refusal from the Commission on that petition they have issued Preliminary Default Notice dated 06.09.2018 which notice at any rate was not communicated to the petitioner and not received by the petitioner and the crucial fact is that by 05.05.2018 the petitioner filed a petition before the Commission for extension of SCOD which was returned by the Commission on 14.05.2018 and the petition was resubmitted on 09.07.2019 and during the pendency of the petition the alleged termination notice dated 21.01.2020 was issued under which the termination of PPA was made unilaterally, arbitrarily and that alleged termination notice of PPA was also not communicated to the petitioner and no presumption shall be drawn by applying the General Clauses Act, 1897 with regard to service of Preliminary Default Notice dated 06.09.2018 and termination of PPA notice dated 21.01.2020 and the presumption of service of notices are subject to rebuttable. It is also contended by the learned counsel for the petitioner that, when it is said about filing of the petition before the Commission for amending the penalties and re-fixation of tariff by the respondents as per the directions of the Commission through the letter dated 18.08.2017 and when that petition is said to be pending for consideration of the Commission then, the issuance of Preliminary Default Notice dated 06.09.2019 and the termination of PPA notice dated 20.01.2020 amounts to blowing hot and blowing cold, taking of inconsistent stands and the respondents are precluded to take inconsistent, contradictory stands to the detriment of the petitioner.

31. For answering this issue, it is necessary to examine the provisions of PPA. As per Article 1.13 of PPA the COD means the date on which the project declared by the SPD to be operational i.e., the project is able to inject power to grid and such declaration shall be made by the SPD only after complying the conditions of Article 3.8 of PPA. As per Article 1.43 of PPA the Scheduled Commercial Operations Date

(SCOD) means the date whereupon the SPD is required to start injecting power from the power project to the delivery point i.e., and shall mean twelve (12) months from the effective date for the projects connecting at 33 kV level. As per Article (vii) of PPA it is the responsibility of SPD for achieving the COD within twelve (12) months from the effective date of agreement and in case of inability of SPD to fulfil any of the conditions specified in Article 6.1(xv) of PPA due to any Force Majeure event the time period for fulfilment of conditions shall be extended for the period of such Force Majeure event, provided that due to the provisions of Article 6.5 of PPA any increase in time period for completion of conditions subsequent mentioned under Article 6.1(xv), shall lead to an equal extension in the SCOD. As per Article 9.2 of PPA in the event of a delay in COD due to Force Majeure events affecting the SPD or DISCOM event of default as defined in Article 10.2 of PPA, the COD shall be deferred, for a reasonable period but not less than day-to-day basis subject to a maximum period of twelve (12) months, to permit the SPD or to overcome the effects of the Force Majeure events affecting the SPD or DISCOM, or till such time such event of default is rectified by the SPD or the DISCOM, whichever is earlier. Relating to *'Events of Default and Termination'*. Article 10.1 of PPA speaks about 'Solar Power Developer (SPD) Event of Default' and Article 10.3 of PPA says about the 'procedure for cases of SPD Event of Default' and Article 10.5 of PPA says about 'Penalties in case of Delayed Commissioning'.

32. Since the counsel for petitioner time and again contended that the petitioner has not been served / received either the Preliminary Default Notice dated 06.09.2018 or notice of termination of PPA dated 21.01.2020 issued by 1st respondent, now the same has to be examined.

33. In PPA, the address of the petitioner shown as M/s Satec Envir Engineering (India) Private Limited, 601/2/2, "B" wing, Fairlink Center, Near Monginis Factory, Off Link Road, Andheri (W), Mumbai 400053 (herein after called as "previous address" for convenience sake). In the cause title of the instant petition the address of the petitioner shown as M/s Satec Envir Engineering (India) Private Limited having its Corporate Office at C Wing, 102, Waterford Building, Juhu lane, C D Barfiwala Marg, Andheri West, Mumbai 400058 (herein after called as "present address" for convenience sake). In the petition filed on 05.05.2018 at first instance before the Commission for extension

SCOD, in the cause title of the petition the previous address of petitioner is mentioned. The letter under which the representation dated 26.12.2016 sent to 1st respondent for extension of COD, the previous address of the petitioner is found. The letter under which the representation dated 06.02.2017 sent to 1st respondent for extension of SCOD, the present address of the petitioner is found. The letter under which the representation dated 26.05.2017 sent to 1st respondent for extension of COD, the previous address of the petitioner is found. The letter under which the representation dated 14.06.2017 sent to 1st respondent for extension of SCOD, the present address of the petitioner is found. The letter under which the representation dated 06.07.2017 sent to 1st respondent for extension of COD, the previous address of the petitioner is found. The letter under which the representation dated 14.07.2018 sent to 1st respondent wherein the petitioner detailed alleged Force Majeure incidents and sought for extension of SCOD, the present address of the petitioner is found. The letter dated 28.09.2017 under which the petitioner confirmed the acceptance for extension of SCOD till 30.06.2017 as asked by 1st respondent through letter dated 15.09.2017 is containing the present address. The letters addressed by 1st respondent dated 15.09.2017 and 03.02.2018 to the petitioner containing the previous address of the petitioner. It is not in dispute that, that the petitioner has not received these two letters dated 15.09.2017 and 03.02.2018. The correspondence made by the petitioner from time to time with 1st respondent on different dates as mentioned above and addresses mentioned in the cause titles of the petition dated 05.05.2018 and 09.07.2019 giving a clue to say the petitioner operated from both i.e. previous and present addresses as per convenience and did not abandon the previous address to which 1st respondent sent DISCOM Preliminary Default Notice dated 06.09.2018.

34. The Article 8 of PPA deals with Notices. The Article 8.1 of PPA containing the previous address of the petitioner and also contains email I.D of petitioner as contact@satec.co.in; amaragarwasl@satec.co.in. The Article 8.3 of PPA says that any party, may by written notice, change the address and or addresses to which such notices and communications to it or to be delivered or mailed. The Article 8.1 of PPA says further that, except as otherwise expressly provided in this Agreement, all notices or other communications which are required or permitted hereunder shall be in writing and sufficient if delivered personally or sent by registered post or faxed or emailed to the address given. Article 8.2 of PPA says all notices or communication given by fax

or email shall be confirmed by depositing a copy of the same in the post office in an envelope properly addressed to the appropriate party for delivery by registered post and all notices shall be deemed to have been delivered upon receipt, including notices given by fax or mail regardless of the date of the acknowledgement of such notice. Admittedly, the petitioner has not intimated in writing about the change of address of the petitioner from previous one to present one to 1st respondent as per Article 8.3 of PPA. This lapse on the part of the petitioner shall not be ignored or overlooked in view of the peculiar facts and circumstances of the case.

35. The Preliminary Default Notice dated 06.09.2018 was sent to the previous address of the petitioner. It appears that it was sent through RPAD. The 1st respondent submitted the postal receipt of it dated 07.09.2018 and the postal acknowledgment. The termination of PPA Notice dated 21.01.2020 was sent to the present address of the petitioner not only through RPAD but also through mail. The postal receipt dated 22.01.2020 of this termination notice and email message copy are submitted by 1st respondent for perusal of the Commission. All the while it is the say of the petitioner that these notices were not communicated or received, and the postal receipts filed by 1st respondent are not sufficient to say about the service of notices or communications. In the additional reply filed by the petitioner dated 27.06.2021 at Para 2 of page no 2 it is said there is no proof of service of default notice dated 06.09.2018 and the notice of termination dated 21.01.2020 and the first one dated 06.09.2018 was posted to old address and an email was said to be sent and on checking any such mail was not received and the second one is not yet received. The petitioner in support of the contention that mere issuing notices and filing of postal receipts does not amount to service relied on a citation reported in AIR 1966 SC 330 in between “*K. Narsimmaiah Appellant Vs. H. C. Singri Gowda and others Respondents*” wherein at Para 11 is observed that

“Giving of anything ordinarily in the English language is not complete unless it has reached the hands of the person to whom it has to be given. In the eyes of law however “giving” is complete in many matters where it has been offered to a person but not accepted by him. Tendering of a notice is in law therefore giving of notice though the person to whom it is tendered refuses to accept it. We can find however no authority or principle for the proposition that as soon as the person with a legal duty to give the notice despatches the notice to the

address of the person to whom it has to be given, the giving is complete.”

36. The observations made the above citation are not going to come to the rescue of the petitioner mainly for the reason that, the Article 8.1 of PPA says further that, except as otherwise expressly provided in this Agreement, all notices or other communications which are required or permitted hereunder shall be in writing and sufficient if delivered personally or sent by registered post or faxed or emailed to the address given. Article 8.2 of PPA says all notices or communication given by fax or email shall be confirmed by depositing a copy of the same in the post office in an envelope properly addressed to the appropriate party for delivery by registered post and all notices shall be deemed to have been delivered upon receipt, including notices given by fax or mail regardless of the date of the acknowledgement of such notice.

37. The representative of respondents would submit that postal receipt and acknowledgement of Preliminary Default Notice dated 06.09.2018 and the postal receipt of Termination of PPA notice dated 21.012020 are filed and the email sent copy of termination notice is also filed and it has to be presumed as per Section 114(f) the Evidence Act, 1872 and as per Section 27 of General Clauses Act, 1897 the addressee i.e., the petitioner has received them. In support of this submission he relied on the decision of Hon'ble Supreme Court reported in AIR1981 SC 1248 in between "*Harcharan Singh Vs. Shiv Rani And Ors*" wherein it is observed that

“Section 27 of the General Clauses Act, 1897 deals with the topic 'Meaning of service by post' and says that where any Central Act or Regulation authorises or requires any document to be served by post, then unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting it by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post. The section thus arises a presumption of due service or proper service if the document sought to be served is sent by properly addressing, pre-paying and posting by registered post to the addressee and such presumption is raised irrespective of whether any acknowledgement due is received from the addressee or not. It is obvious that when the section raises the presumption that the service shall be deemed to have been effected it means the addressee to whom the

communication is sent must be taken to have known the contents of the document sought to be served upon him without anything more. Similar presumption is raised under Illustration (f) to Section 114 of the Indian Evidence Act where under it is stated that the Court may presume that the common course of business has been followed in a particular case, that is to say, when a letter is sent by post by pre-paying and properly addressing it the same has been received by the addressee. Undoubtedly, the presumptions both under Section 27 of the General Clauses Act as well as under Section 114 of the Evidence Act are rebuttable but in the absence of proof to the contrary the presumption of proper service or effective service on the addressee would arise.”

38. As observed by the Hon'ble Supreme Court in the above cited Judgement as per the provisions of Section 114 illustration (f) of the Evidence Act and Section 27 of General Clauses Act there shall be a presumption that the addresses has received the letter sent by registered post. However, this presumption is a rebuttable on a consideration of highest standard and fault less evidence. It is open to the party concerned to place evidence to rebut the presumption by showing that the address mentioned on the cover was incorrect or the postal authorities never tendered the registered letter to him or that there was no occasion for him to refuse the same. The burden to rebut the presumption lies on the party, challenging the factum of service. The burden of proof means that a party has to prove an allegation before he is entitled to judgement in his favour. Section 103 of the Evidence Act provides that the burden of proof as to any particular lies on that person who wishes the court to believe in its existence, unless it provided by any special law that the proof of that fact shall lie on any person particular person . The reading of Section 103 of the Indian Evidence Act makes it clear that the burden of proof lies on the person who asserts the affirmative of the facts in issue.

39. The 1st respondent has not only filed the copy of the Preliminary Default Notice dated 06.09.2018 issued to the petitioner, but also, filed its postal receipt and postal acknowledgement. The petitioner did not challenge them, except saying that the default notice was sent to previous address. The postal receipt of Termination notice dated 20.01.2020 which was sent to the present address of the petitioner and the email

message copy also filed to apprise about the service of the termination of PPA. There is no force in saying of the petitioner that the notices dated 06.09.2018 and 20.01.2020 and the email of termination of PPA was not received. The reason is that the petitioner continued to operate from previous and present addresses as enumerated supra and the email I.D. of the petitioner remained same all along. Except making bare denial, the petitioner has not made any attempts to rebut the presumption of service of Preliminary Default Notice dated 06.09.2018 and Termination notice dated 20.01.2020 issued by 1st respondent, though the burden to rebut the presumption lying upon the petitioner as stated above. Therefore, there is no hesitation to hold that the petitioner is in receipt of Preliminary Default Notice dated 06.09.2018 and Termination of PPA notice dated 21.01.2020 issued by the 1st respondent.

40. Now coming to the contention of the learned counsel for the petitioner in relation to alleged taking of inconsistent stands by the respondents. The learned counsel would submit that when the petition filed by the respondents for amending the penalties and re-fixation of tariff as per the directions of the Commission through the letter dated 18.08.2017 pending for consideration of the Commission then, the issuance of Preliminary Default Notice dated 06.09.2019 and the termination of PPA notice dated 20.01.2020 amounts to blowing hot and blowing cold as well as taking of inconsistent stands and the respondents are not supposed to take inconsistent, contradictory stands. In support of this contention he relied on two decisions reported in:

(1) *(2011) 5 Supreme Court Cases 435 in between Joint Action Committee of Air line Pilots" Association of India and others Appellants Vs. Director General of Civil Aviation and others Respondents.*

(2) *(2018) 10 Supreme Court Cases 707 in between Suzuki Parasrampura Suitings Pvt. Ltd. Vs. Official Liquidator of Mahendra Petrochemicals Ltd. (in Liquidation) and others Respondent.*

41. In the above said first citation it is held that parties should not blow hot and blow cold by taking inconsistent stands and in the second citation it is held that the litigant cannot take contradictory stand in same case.

42. As pointed out by the petitioner, in counter affidavit of 1st respondent, it is said about filing of the petition before the Commission for amending the penalties and re-

fixation of tariff, as per the directions given on 18.08.2017 by the Commission, for approving the extended SCOD upto 30.06.2017 for solar power projects of competitive bidding 2015. The 1st respondent filed petition on 11.10.2017 and was firstly returned on 21.10.2017 for complying of certain objections and its was resubmitted on 29.11.2017 without complying the objections and again its was returned on 23.02.2018 for complying objections and it was resubmitted on 31.03.2018 without complying the objections and finally it was returned on 07.06.2018 along with letter and thereafter that petition was not resubmitted by the respondent probably for the reason of giving directions by the Commission i.e., on 30.11.2017 by addressing a letter to TSDISCOMs wherein it was directed for filing of individual petitions by each of the Solar Power Developer for extension of SCOD to enable the Commission to examine each case separately with reference to the provisions in PPA of each of the Solar Power Developer by following the principles of natural justice. On the other hand, petitioner filed petition, at the first instance, on 05.05.2018 before the Commission for extension of SCOD, which was returned with office objections on 14.05.2018 and of which, 1st respondent had no knowledge. The petitioner instead of resubmitting the petition by complying the objections within time granted, filed the instant petition on 09.07.2019 i.e., after more than one (1) year from the return of the petition filed at first instance, by changing the prayer and by adding the plea of Force Majeure events and Change of Law. As such, on the date of issuance of Preliminary Default Notice dated 06.09.2018 to the petitioner by 1st respondent, no petition of any kind filed by either 1st respondent or the petitioner, was pending before the Commission, therefore it cannot be said that 1st respondent has taken inconsistent or contradictory stand.

43. As per the provisions of PPA, the 1st respondent is entitled to take recourse to deal with the non-fulfilment obligations/responsibilities by the Petitioner and to issue a Preliminary Default Notice as per Article 10.3.1 of PPA by expressing the intention of 1st respondent to terminate PPA and after the lapse of conciliation period as per Article 10.3.2 of PPA to cause a termination notice. In the given circumstances, 1st respondent rightly issued Preliminary Default Notice on 06.09.2019 and termination of notice of PPA dated 20.01.2020 which stands good and which is valid and sustainable.

44. For the above stated reasons, the Issue No.2 is in favour of the respondents.

45. In view of answering the Issue No.1 against to the petitioner and Issue No.2 in

favour of the respondents, the petitioner is not entitled to any reliefs. In the result, the petition is dismissed without costs.

This order is corrected and signed on this the 29th day of December, 2021.

Sd/- (BANDARU KRISHNAIAH) MEMBER	Sd/- (M. D. MANOHAR RAJU) MEMBER	Sd/- (T. SRIRANGA RAO) CHAIRMAN
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