ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION

4th Floor, Singareni Bhavan, Red Hills, Hyderabad 500004

TUESDAY, THE NINTH DAY OF MARCH
TWO THOUSAND AND TWENTY ONE

:Present:
Justice C.V. Nagarjuna Reddy, Chairman
Sri P. Rajagopal Reddy, Member
Sri Thakur Rama Singh, Member

O.P.No.62 of 2019

Between:

M/s. Waneep Solar Pvt. Ltd.,
Represented by its Authorised Signatory
Mr. M. Sridhar .. Petitioner

And

1. Government of Andhra Pradesh,
   Represented by Special Chief Secretary - Energy,
   Department of Energy, Secretariat, Amaravathi,
   Velagapudi.

2. Southern Power Distribution Company of
   Andhra Pradesh Ltd., represented by its
   Chairman & Managing Director, Tirupathi.

3. The Chief General Manager (PMM & IPC),
   APSPDCL, Tirupathi.

4. The Chief Engineer (IPC),
   A.P.P.C.C., Vijayawada.

5. The General Manager,
   A.P.P.C.C., Vijayawada.

6. New & Renewable Energy Development
   Corporation of Andhra Pradesh Limited (NREDCAP),
   (A State Government Company), Tirupathi .. Respondents

The Original Petition No. 62 of 2019 had been heard on 02-12-2020 in the presence of Sri Challa Gunaranjan, learned Counsel for the petitioner and Sri P. Shiva Rao, learned Standing Counsel for the Utilities. After carefully considering the material available on record and after hearing the arguments of the learned counsel for both the parties, the Commission passed the following:

ORDER:

This Original Petition has been filed by M/s. Waneep Solar Pvt. Ltd. (for short "the petitioner") feeling aggrieved by imposition of liquidated damages and invocation of bank guarantees for the alleged delay in achieving the commercial operation date (SCOD). The petitioner sought for the following prayers :

(a) Declare the revised SCOD of the 25 MW solar power project as 29-09-2016 due to Force Majeure Events as envisaged in the PPA.

(b) Consequently, declare that the petitioner is not liable to pay any penalties as per the PPA or as demanded in Letter No.GM/APPCC/SAO(PP&S)/D.No.202/19, dated 6-8-2019 issued by respondent No.5 and to direct the respondents to refund the amounts adjusted towards penalty amounting to Rs.18,74,70,000/- (Rupees Eighteen crores seventy four thousand and seventy thousand) and adjusted bank guarantees invoked amounting to Rs.6.36 crores.

(c) Grant such order, further relief(s) in the facts and circumstances of the case as this Commission may deem just and equitable in favour of the petitioner.

The brief facts forming the background to the present case are summarized hereunder.

With a view to harness solar power generation potential in the State of Andhra Pradesh, the Southern Power Distribution Company of Andhra Pradesh Ltd. – respondent No.2, floated tenders for purchase of 500 MW solar power on "build, own and operate" basis. The New and Renewable Energy Development Corporation of Andhra Pradesh (NREDCAP) – respondent No.6, was the designated nodal agency for facilitating and obtaining permission and approvals required for setting up of renewable energy projects in the State of Andhra Pradesh. The petitioner offered to set up 50 MW capacity solar power project at two locations i.e., 41 MW at Palamaneru and 9 MW at Rompicherla, both in Chittoor District. The petitioner was one among the 23 selected bidders to supply power at a quoted tariff of Rs.5.76/KWh for the 1st year subject to an escalation of 3% every year upto the 10th year and the 11th year tariff shall continue upto 25th year. On 6-12-2014, the petitioner entered into a Power Purchase Agreement (PPA) with respondent No.2. As per

the terms of the said PPA, the petitioner shall commission the project within 12 months if it is connected at 33 KV voltage to the Grid and within 15 months if it is connected to 132 KV voltage to the Grid. Having regard to the said terms, the SCOD was fixed as 5-3-2016 i.e., 15 months after the PPA was entered into (SCOD was later extended till 31-03-2016). Nearly two months after the execution of the PPA, the petitioner vide its letter dated 4-2-2015 requested the respondents to permit splitting of locations of the project into two or more locations. By its another letter dated 11-2-2015, the petitioner requested for revision of its capacities by changing their locations viz., 24 MW at Gurramkonda, 16 MW at Somala, both in Chittoor District and 10 MW at Jammalabanda, Anantapur District. By another letter dated 12-2-2015, the petitioner requested for further change of locations viz., 24 MW at Gurramkonda, 16 MW at Somala and 10 MW at Jammalabanda. The petitioner however reiterated its request made on 12-2-2015 through its letter dated 13-3-2015 for setting up the plants at Gurramkonda and Somala. Respondent No.4 agreed for such a change vide its letter dated 30-3-2015. It appears that there was further change of locations with Nagari substituting Somala with which the Commission is not concerned in the present case as the dispute in this O.P. is confined

to the Gurramkonda location only. Suffice it to note that due to multiple changes of locations, the PPAs were amended as many as three times.

In pursuance of the change of capacities, the petitioner furnished revised performance bank guarantees dated 28-4-2015 and 29-4-2015 for a total sum of Rs.12.50 crores for Gurramkonda and Nagiri locations. On 4-6-2015, the first amendment to PPA was made with regard to the revised capacities only, with the other conditions remaining the same. The respondents have in purported exercise of their right under Clause 10.5(c) of the PPA, invoked performance bank guarantees at the rate of 20% upto 1 month's delay, 40% upto 2 months' delay and the balance 40% uptó 3 months' delay. As the alleged total delay in commissioning of the project was 181 days, the respondents have levied liquidated damages for the remaining 91 days @ Rs.1 lakh per MW/day in respect of 20.83 MW, which works out to Rs.18,95,53,000/-. It is this action which is assailed in this O.P.

Briefly summarized, the case of the petitioner is that due to change of locations, and in obtaining the approvals the petitioner lost six months' time and this delay was beyond the control of the petitioner; that being a partly Government owned Company which is required to follow due

process in inviting bids for awarding turnkey (EPC) contract of solar power projects at the approved two sites, it had to follow the due process in entrusting the contract; that accordingly bids were called for through nation-wide paper publications; that as only a single bid was received in the first attempt, fresh bids were invited on 29-6-2015 and that after independent scrutiny of the bids received, EPC contract was awarded to Waaree Energies Ltd., in respect of 25 MW Unit at Gurram Konda on 25-8-2015. That a period of six months had elapsed in acquiring the land for the project due to restrictive land status and defects in the title of a part of the land, DKT lands, lack of availability of revenue records, as a result of which various sites were to be abandoned by the petitioner leading to the further delay of the petitioner's project including financial closure, evacuation approvals and finalization of land which are also beyond the control of the petitioner and that detailing these problems, the petitioner addressed letter dated 5-9-2015 to respondent No.4. That the petitioner also faced enormous difficulties in obtaining land revenue records which are not upto date, due to which further delay was caused in the process of acquisition of land. That respondent No.6 has guided the petitioner to the District Collector for resolution of the issues vide Minutes of the meeting dated 12-6-2015; that as the officials concerned

did not help the petitioner in resolving the issues, the petitioner was able to identify suitable lands for the project by entering into an Land Aggregator Agreement (LAA) with M/s. Solar King International Pvt. Ltd. for aggregation of land acreage to an extent of Ac.128-15 of contiguous land required for the project and that finally the petitioner was able to procure the target land by October 2015 which was accordingly informed to respondent No.4 vide letter dated 23-10-2015. That respondent No.4 was also informed through the said letter that the petitioner is continuing with the balance land requirements, civil contractor has been finalized and that it will commence construction work at the site. That due to the above mentioned constraints, 7 to 8months have lapsed which is again beyond the petitioner's control. That as a result of the failure of the respondents to provide a single window clearance system as envisaged under G.O.Ms.No.8, Energy, Infrastructure & Investment (PR.II) Department, dated 12-02-2015 and as per the Solar Power Policy 2015 for the approvals required for the power projects, further delays have been caused. That as per the said G.O., DISCOMS have to dispose of the proposals and permissions within 14 days from the date of receipt of such applications, but they have failed to do so and as such further delay was caused in setting up of the petitioner's project. That respondent

No.6 failed to establish an online system for acceptance of applications with login access to the solar developers for tracking the status updates on approvals/clearances which shall be disposed of within 30 days from the date of registration, due to which the petitioner was unable to get all the approvals within the prescribed time lines as per the Power Purchase Agreement (PPA).

That after the commencement of construction of the project, due to torrential rainfall and downpour at the petitioner's project site in the month of December 2015, the petitioner had to stop the construction of project as the site was damaged making it difficult to approach the project site due to damage of the project roads and demobilization from the project site;that the petitioner's site had become too wet for resuming the operations which was informed to respondent No.4 vide letter dated 7-12-2015 with a request to extend the timeline of commission of the project by two months by enclosing the site photographs and weather data and that the delay of two months in that regard was beyond the reasonable control of the petitioner. That the petitioner also faced difficulty in setting up of solar plant with revised capacity of 25 MW at Nagari, Chittoor District and suffered huge loss due to reduction of tariff by Rs.2.02 ps. and that the petitioner has further suffered loss of interest

on investments, opportunity cost for over 18 months including invocation of bank guarantee by the respondents to an extent of Rs.6.88 crores which was ordered to be refunded without interest in four equal instalments by this Commission vide its letter dated 14-06-2018 in O.P.N.16 of 2017.

That due to change of locations, the petitioner could not adhere to Scheduled Commercial Operation Date (SCOD) and that this was totally beyond the petitioner's control. That eventually, the petitioner managed to synchronize 1.35 MW out of 25 MW on 19-05-2016, 4.17 MW on 24-05-2016 and the remaining 16.83 MW on 28-07-2016. That though the entire 25 MW capacity at Gurramkonda was ready for synchronization with effect from 28-07-2019, synchronization could not be done due to delay of two months in inspection which has taken place only on 29-09-2016 which is attributable to the respondents/DISCOMS. That the erection work of 132 KV DC/SC Line from 132 KV Sub-Station at Gurramknda and all the works related to the petitioner's project were completed and the Executive Engineer, A.P. Transco, Tirupathi has addressed letter dated 7-5-2016 to the Divisional Engineer, A.P. Transco, Chittoor informing that all the works related to the petitioner's project were completed and requested for statutory inspection of the

petitioner's project and issuance of final certificate, but, however the commissioning of the petitioner's entire 25 MW was done on 29-9-2016 along with 132 KV transmission line with interconnection point at Gurramkonda Sub-Station successfully. That vide its letter dated 12-11-2016, respondent No.4 was requested to consider 28-7-2016 as the Commercial Operation Date (COD) of the petitioner's project since the petitioner had synchronized its total capacity as on the said date; that the further delay was caused by respondent No.4 in inspecting and issuing the final commissioning certificate and that respondent No.3 has issued the synchronization certificate on 9-11-2016 declaring the COD as 29-9-2016.That the petitioner is injecting power to the Grid starting from 19-5-2016 and duly submitting the invoices every month; that the power so injected aggregated to 31,71,800 Units upto 30-09-2016 and that till the date of filing of the petition, the total injected power aggregated to 9,43,14,372 Units; that the respondents have stopped payments to the tune of Rs.18,74,70,000/- for the period from June 2018 to July 2019; that vide his letter dated 18-12-2018, respondent No.2 levied liquidated damages on the petitioner for a sum of Rs.18,74,70,000/- for the delay in commissioning the project beyond three months and directed the General Manager, APPCC to recover the

same from the payments due to the petitioner on account of sale of power to the DISCOMS; that the petitioner has duly replied vide its letter dated 14-1-2019 and that despite the same respondent No.3 had encashed the bank guarantee submitted by the petitioner to the extent of Rs.6.36 crore for Gurramkonda project and Rs.6.88 crore for Nagari project apart from withholding the amounts payable to the petitioner for supply of power. The petitioner accordingly prayed for grant of the reliefs as mentioned supra.

A detailed counter has been filed on behalf of respondent Nos.2 to 5 wherein all the material allegations have been denied. The respondents have pleaded that the terms and conditions of the tender submitted for procuring 1000 MW Solar Power clearly notified that the bidder shall build, own and operate the project and supply power to the DISCOMS; that the respondents are absolutely unconnected with the process of establishment of the project until it reaches the stage of commissioning after getting necessary approvals by the developer from the competent authorities including respondent Nos.1 to 6;that only after reaching the stage of commissioning of the project, the answering respondents are required to constitute a committee to inspect the project and to state whether or not the project is eligible for commissioning and

that except the said obligation on the answering respondents, there is absolutely no other obligation under the PPA on them.

That the petitioner was one among the 23 selected bidders whose offer was accepted for establishment of 50 MW capacity of solar power project and to supply power at the quoted rate. That the bidders were invited to quote their price depending upon the geographical location since radiation of the Sun varies from District to District and land values also differ besides the difference in component of length of line to connect to the nearest Grid Sub-Station; that keeping the above aspects in view, invitation of bids was made location-specific; that if there are more than one bidder for the same location/Sub-Station area with different quoted rates, the bidder who offers to supply power at the lowest rate will be declared as the selected bidder and that in compliance of the said terms, the petitioner was declared as the selected bidder to supply power as mentioned above. That the petitioner has agreed to establish the project at two locations with different capacities, namely, 41 MW at Palamner and 9 MW at Rompicherla, Chittoor District; that the petitioner has entered into PPA on 6-12-2014 with respondent No.2, the terms of which inter alia stipulated that the petitioner shall commission the project within 12 months if it is connected to 33 KV level

to the Grid and within 15 months if it is connected to 132 KV level to the Grid of A.P. Transco; that as the onus of commissioning was totally on the petitioner, it should have been well conversant with the aspects of availability of land for the project and all other requirements including necessary approvals to be obtained from the respondents and other competent authorities including CEIG, but the petitioner instead of adhering to its own agreed terms of the bid and the PPA, went on changing the locations of the project and the stated capacities; that the petitioner has requested for change of locations and capacities as many as three times which necessitated amendments to the PPA dated 6-12-2014 on as many occasions and that this fact itself clearly establishes that without having necessary paraphernalia and wherewithal, the petitioner has entered into the PPA and thus could not commission the project as per SCOD. That ultimately the petitioner could commission only 4.17 MW capacity initially out of the proposed 25 MW capacity at Gurramkonda location with a delay of 25 days beyond the extended period which was accepted by respondent No.2; that the petitioner has commissioned the balance quantity out of the total 25 MW on 29-9-2016 with a delay of 181 days and therefore as per clause 10.5(c) of the PPA the performance bank guarantees (PGBs) submitted

by the petitioner for the first 90 days were invoked as per the proportionate percentages i.e., 20% of the PGB upto 1 month's delay, 40% of PGB upto 2 months' delay and the balance 40% of PBG upto 3 months' delay; that for the remaining 91 days delay, liquidated damages at the rate of Rs.1 lakh per MW per day in respect of the balance capacity i.e., 20.83 MW was levied and the said liquidated damages work out to Rs.18,95,53,000/- which was duly recovered; that as per the GST (Goods and Services Tax) law in force, the amount of Rs.3,41,19,540/-was also recovered along with the above said liquidated damages and that the recovery of said amount is in absolute compliance of the PPA terms.

The respondents also made averments regarding location of the project at Nagari. As the said location is not the subject matter of the present O.P., it is not necessary to refer to those pleadings. The respondents also raised the plea of laches and acquiescence as the petitioner has not raised any demur either on 29-9-2016 or even thereafter as regards the commission of the project. The respondents also pleaded that none of the causes for the delay falls within the *force majeure* terms specified in the PPA. The respondents also denied each averment which allegedly constituted default on their part. Referring to

the delay in the acquisition of land, the respondents averred that all the issues connected to the acquisition of the lands could have been foreseen by the petitioner prior to submitting its bid, that the petitioner being aware of the policies of the Government of Andhra Pradesh on land allotment ought to have taken suitable steps if it wanted to acquire the land through the process of the Government and that many other developers who were declared as selected bidders in the same bidding process have acquired the land and complied with the projects well within the time. With regard to the alleged torrential rains, while denying the said allegation, the respondents averred that the photographs submitted by the petitioner are not concerned to the project site and that those are got up to suit the petitioner's purpose. As regards synchronization, the respondents maintained that except the averments that 4.17 MW synchronized was on 24-05-2016, all other allegations are baseless and false. The respondents specifically denied the petitioner's claim that it had synchronized 16.85 MW on 28-7-2016. Refuting the delay in the inspection of project by the synchronization committee, the respondents averred that on 20-9-2016 the petitioner has submitted a letter to respondent No.2 stating that the Chief Electrical Inspector of the Government (CEIG) has still not given safety certificate in respect of the

balance capacity of 20.83 MW and that CEIG has promised to undertake such inspection in that weekend. While asserting that CEIG is not connected with APSPDCL, the respondents averred that the said letter dated 20-9-2016 is proof positive of the fact that till that time the petitioner's project was not ready for synchronization. In support of this stand, the respondents averred that till completion of inspection by the CEIG and issuance of certificate on the safety of equipment and readiness with project, the answering respondents have no obligation to undertake the inspection. Adverting to the claim of the petitioner that it has injected power from 19-5-2016 upto 30-9-2016, the respondents have relied upon Regulation 2 of 2016 which clearly envisage that the power injected from the date of synchronization until the date of COD shall be treated as "inadvertent power" and cannot be accounted for and that consequently the petitioner is precluded from claiming the alleged injection of some quantum of power prior to the date of COD as the basis to claim relief in the case. The respondents also averred that the levy and recovery of Rs.18,95,53,000/- was made after considering the representations of the petitioner in terms of the PPA.

The petitioner has filed rejoinder reiterating the averments in the original petition which will be adverted to if and when necessary during further discussion.

Sri Challa Gunaranjan, learned Counsel for the petitioner and Sri P. Siva Rao, learned Counsel for the respondents, advanced their submissions in tune with the respective pleadings of the parties. After the hearing was completed and orders were reserved, the counsel for the respondents filed an I.A. for reopening of the O.P. for making further submissions. The Commission, having felt that no further oral submissions were needed, however permitted the respondents to file written submissions on the point on which they intended to make oral submissions. Accordingly, written submissions were filed by the respondents on 12-01-2021. The petitioner was given two weeks' time for filing its reply submissions. The petitioner filed its reply submissions on 8-3-2021.

Having regard to the respective pleadings of the parties and the submissions of the counsel representing them, the following Points arise for adjudication:

1. Whether the grounds raised by the petitioner constituting delay in execution of the project fall within the definition of *force majeure* under Clause 9.1 of the PPA dated 6-12-2014, as amended from time to time ?

2. Whether the petitioner is entitled to the relief of revising the SCOD?

3. Whether the petitioner is entitled to consider 28-07-2016 as the COD in respect of 25 MW of Gurramkonda location ?

4. Whether the action of respondent Nos.2 to 5 in invoking bank guarantees and imposing liquidated damages and recovering the same from the petitioner is legal, proper and valid ?

5. Whether the levy and recovery of GST on the liquidated damages is proper, legal and valid ?

Re Point Nos.1 to 3: As noted hereinbefore, the petitioner has put-forth five reasons for the delay in achieving the COD. They are: (i) delay in change of locations; (ii) delay in acquiring the land; (iii) torrential rains; (iv) losses suffered due to reduction of tariff for Nagari plant apart from invocation of bank guarantees furnished for that plant; and (v) delay in inspection of the plant and the network.

Before analysing the reasons for the delay putforth by the petitioner, it is useful to refer to and discuss the case law relied upon by the respective parties.

The petitioner relied upon the Judgments in **Dhanrajmal Govindram Vs. Shamji Kalidas & Co.[1], Gujarat Urja Vikas Nigam Limited Vs. Gujarat Electricity Regulatory Commission and others[2]** and **M/s. Lanco Anpara Power Limited Vs CMD, U.P. Power Corporation and others[3].**

In Dhanrajmal Govindram (1-supra), an issue arose as to whether the term relating to *'force majeure'* in the contract was vague and thereby the contract was void under Section 29 of the Indian Contract Act. The relevant term of the contract in the said case reads "Subject to the usual force majeure clause". It was argued that what constituted force majeure events was not specified by the contract and that therefore the contract is void. While dealing with this issue, the Hon'ble Supreme Court, on a perusal of the encyclopedia of Forms and Precedents containing a number of force majeure clauses observed that they were different from each other and that even the number of rulings the Court was taken through have not expounded the extent or definite meaning of 'force majeure'. In the absence of a definite definition or detailed narration of 'force majeure' events, the Hon'ble Supreme Court had relied upon certain precedents and observed that difficulties have arisen in the past as to what could legitimately be included in 'force

majeure' and that an analysis of rulings on the subject shows that where reference is made to 'force majeure', the intention is to save the performing party from the consequences of anything over which he has no control. The Hon'ble Supreme Court however added a rider that that was the widest meaning that can be given to the 'force majeure'.

In **Gujarat Urja Vikas Nigam Ltd., (2-supra),** the Hon'ble Appellate Tribunal for Electricity confirmed the finding of GERC that having regard to the term relating to the *force majeure* events in the PPA and in the light of the facts on record, the project was delayed on account of force majeure events, such as delay in granting statutory approvals and permissions. In that case, the Solar Power Policy of 2009 of the State Government of Gujarat has charged the nodal agencies with the task of undertaking several activities which included the identification of suitable locations for solar projects, preparation of land bank, facilitation of arranging right of way, water supply and obtaining clearances and approvals etc. Further, one of the force majeure events was inability despite complying with the requirements to obtain, renew or maintain the required licenses or legal approval. Based on those terms of contract, the Hon'ble APTEL held that the delay in the project developer obtaining approvals under the Bombay Tenancy and

Agriculture Land (Vidharba Region and Kutch Area) Act 1958 and for water source under the Environment (Protection) Act 1986 and CRZ Regulations or the statutory obligations and legal approvals under the PPA which are the statutory requirements, constituted '*force majeure'* events.

The respondent relied upon the Judgment in **Energy Watchdog Vs. Central Electricity Regulatory Commission and others[4]** wherein the Hon'ble Supreme Court succinctly discussed the doctrine of *force majeure.* After copious reference to Chetty on Contracts, 31st Edition, at para-14.151 and some English Case Law, it has laid emphasis on the words in the PPA before it viz., "any event or circumstance which is within the reasonable control of the parties" and also changes in the cost of fuel etc., and held that they do not constitute force majeure. In holding so, the Supreme Court applied the test whether the fundamental basis of the contract was dislodged or there was any frustrating event.

In order to ascertain whether the above discussed case law comes to the aid of the petitioner, it is necessary to discuss Clause 9.1 of the PPA. The said Clause reads as under:

(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 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 ("Direct Political Events").

As could be seen from the above definition, in order to attract *force majeure*, the following requirements have to be satisfied: (a) Any event or circumstance or combination of events or circumstances that affect performance of its obligations under the agreement by a party; (b) such events and circumstances are not within the affected party's reasonable control and were not reasonably foreseeable; and (c) the affected party could not have prevented such effects by Prudent Utility Practices. Some instances of *force majeure* have also been indicated, such as, acts of God in the nature of natural calamities like storm, flood, drought, lightning, earthquake etc; acts of war, war sabotage, terrorism or act of public enemy etc; and direct political events such as Government Agencies' or DISCOM's unlawful or discriminatory delay or revocation of any required permit.

In the present case, the expression 'force majeure' has been defined and described in detail. When there is a definite definition of the term in the contract, the Courts or any Forum has to necessarily interpret the term strictly based on the definition and they cannot adopt the widest

meaning of the term when its definition is restrictive under the agreement. The contract in the case before the Hon'ble Supreme Court did not define the term ‘force majeure’, the Supreme Court understood the said term in its widest terms based on the past precedents. As the contract in the present case has clearly defined ‘force majeure’, the reasons assigned by the petitioner are required to be tested on the anvil of the definition of the term under the contract unlike in **Dhanrajmal Govindram (1-supra)** where the contract has not defined the term ‘force majeure’**.**

As regards the decision of the Hon’ble APTEL, it has turned on the language of the specific term of the contract which defined ‘force majeure’ events. As held by the Hon'ble Supreme Court in **Dhanrajamal Gobindram (1-supra),** the interpretation of the term ‘force majeure’ depends upon how it is defined in each contract. Unless the definition in a given case is identical to that in another case to which the decision is sought to be applied, the previous decision cannot be relied upon as a precedent. In the instant case, the definition of ‘force majeure’ is different from the one in the case before the Hon’ble APTEL.

Therefore, the said Judgment which turned on its own facts cannot be applied to the case on hand.

With regard to the order of U.P. Electricity Regulatory Commission, Lucknow in **M/s. Lanco Anpara (3-supra)**, the same does not have any precedential value as it is a forum of equal status. In any event, in the said case, the respondents did not dispute the plea of the petitioner therein that the reasons for the delay constituted 'force majeure' events.

We shall now deal with the reasons for delay assigned by the petitioner to examine whether they or any of them constitute *force majeure event(s)*.

(i) <u>Delay in change of locations:</u>

It is the admitted case of the petitioner that it offered to set up 50 MW capacity Solar Power Projects at two locations viz., 41 MW at Palamner and 9 MW at Rompicherla, both in Chittoor District. On considering the bids, initially a letter of intent (LOI) was issued on 7-11-2014 in favour of the petitioner. A perusal of this LOI shows that the petitioner's bids for 41 MW at Palamner and 9 MW at Rompicherla were accepted. It is also stated in the LOI that under any circumstances change of location shall not be allowed till signing of PPA and that such

change of location will be considered after signing of PPA subject to Clause 4.1.3(b)(14) of Request for Supply (RfS) document. In pursuance of the LOI, the petitioner entered into separate PPAs for the aforementioned two locations on 6-12-2014. The PPA defined 'effective date' as the 'date of its signing by both the parties'. Under Clause 10.5 of Article 10, the project shall be completed within 15 months from the effective date since the Units are proposed to be connected to 132/220 KV. Under Clause 6.1(viii) of Article 6, the solar power developer shall be responsible for achieving the COD within the time lines submitted for SCOD as per the PPA. Clause 9.1 of Article 9 defines *force majeure* which will be discussed in detail at the appropriate stage. Under Clause 9.2, in the event of delay in COD due to *force majeure* events affecting the solar power developer, the COD shall be deferred for a reasonable period but not less than 'day-for-day' basis subject to a maximum period of six months from the SCOD. Neither party has filed a copy of RfS - bid document. However, on the directions of the Commission, its office has secured a copy thereof from the respondents. A perusal of this document shows that District-wise specific locations have been notified for a capacity of 500 MW. The bids were invited on "build, own and operate" basis with location(s) specific projects. The tariffs are based on

the intensity of radiation which varies from location to location. The solar power developer has to choose locations and shall set up the entire project including the transmission network upto the interconnection point at its own cost. Under Clause 4.1.3 (B)(2), qualified bidders will be invited for allocation of location(s) in the order of Quoted Tariff. The qualified bidders corresponding to the lowest Quoted Tariff falling in the first rank shall be given first priority to select the capacity with location(s). Maximum allowable capacity at each location(s) after deducting the capacity allocated to prior successful bidder(s) shall be made known to the qualified bidders at the time of allocation of capacity and finalization of location(s). If the maximum allowable capacity at all the locations is less than the offered capacity of the qualified bidder under consideration, then the qualified bidder shall opt for either developing the project(s) at a reduced capacity equal to the Maximum Allowable Capacity at all the location(s) or select alternative location(s) where the Maximum Allowable Capacity is greater than or equal to the offered capacity for developing the projects. After undergoing the above mentioned process, the authorized representative shall issue LOI to the authorized representative of the successful bidder. The parties thereafter shall enter into PPA.

From the Clauses of RfS as discussed above, it is evident that change of locations, if any, shall take place before the issue of LOI. However, as noted above, the LOI has reserved consideration of change of locations post signing of the PPA. The Commission fails to understand as to how the change of locations should be permitted once the LOI was issued and the PPA entered into, more so, the when the basis of selection is location specific and tariff is also fixed on location basis. Be that as it may, in support of the first request of change of location by splitting the capacities of the project in two or more locations, the petitioner advanced a vague plea i.e., “due to economical and technical feasibilities of the allocated capacities”. Assuming that the left-over capacity was only 50% of the PTR capacity allocations as pleaded by the petitioner, no reasons have been putforth by the petitioner for the subsequent requests for change of locations as evident from the letters dated 12-2-2015 and 2-4-2015. It is also surprising to note that the then Transco management was ever willing to accept the change of locations without even eliciting reasons for the second and subsequent changes. The petitioner appears to have been chosen for a favoured treatment by the management of the day by acting contrary to the RfS which specifically banned change of locations after entering into

the LOI. As could be seen from the material on record, precious time of almost four months was lost due to change of locations which time could have been usefully utilized in setting up the plants had the petitioner not indulged in change of locations evidently for the reasons solely attributable to it.

The establishment of a power project, it is trite, is a specialized activity. Unless the developer has required capacities, wherewithal and infrastructure, it cannot even think of entering the field. Every bidder is therefore expected to reasonably foresee the pitfalls and adopt Prudent Utility Practices to prevent adverse events or circumstances which are likely to cause delay in the completion and commissioning of the project. The casual manner in which the petitioner has changed the locations discloses that it has miserably failed to show any diligence or prudence in establishing the plants. The petitioner, by no means can say that the change of locations was not within its control. Even for the first request of change, it would have known the available capacities based on the tariff quoted by it, on finalization of bid process. If the left-over capacities were not sufficient, it should not have entered into the PPA at all. However, the petitioner was a beneficiary of the 'magnanimity' shown by the then management by permitting multiple number of changes of

locations and capacities. The petitioner ran short of any explanation for seeking the second and further change of locations. Even if the pleadings of the petitioner are taken on their face value, it cannot be held that the change of locations was not reasonably foreseeable and their effects could not have been prevented by the petitioner by Prudent Utility Practices. As noted above, except for the first request of change, the petitioner has not even offered reasons for the subsequent requests. The petitioner, for its own reasons, obviously dilly-dallied with the locations and unnecessarily wasted four months precious time in the name of change of locations. For all these reasons, the Commission has no hesitation to hold that the change of locations is solely attributable to the petitioner that by prior planning and exhibiting commercial prudence, it could have avoided change of locations and consequent delay arising out of the same. This purported reason, therefore, does not constitute *force majeure.*

(ii) <u>Delay in procurement of land:</u> The petitioner pleaded that more than six months of time had elapsed in acquiring the land "due to restrictive land status towards ready registration of the identified technically feasible lands by the petitioner and due to defects in the title of the part of the land, DKT lands and lack of availability of revenue

records various sites were abandoned by the petitioner which led to the further delay of the petitioner's project including financial closure, evacuation approvals and finalization of land which are beyond the control of the petitioner".

The admitted facts are that as far back as 7-11-2014, LOI was issued in favour of the petitioner for locating the projects at Palamner and Rompicherla. The PPAs were entered into on 6-12-2014. The petitioner went on seeking change of locations from then onwards and got the locations changed on as many as three occasions. While the project was to be synchronized within a maximum period of 15 months and commercial operations commenced from 5-3-2016, the petitioner could not finalize the process of acquiring the land till the end of October 2015. These undisputed facts clearly show that for almost one year from the date of issue of LOI, the petitioner was groping in the dark in acquiring the land.

It is undeniable that land is the prime requirement for establishment of a solar power project, for, without sufficient extent of land for placing the solar panels, a solar power project cannot be conceived. Under Clause 3.4 of the RfS document, the Solar Power

Developer shall set up the Solar PV projects including the transmission network upto the interconnection points on its own cost and in accordance with the provisions of the RfS document. Annexure-D of the RfS document clearly notified the locations along with the sub-stations to which the plants need to be connected District-wise. Being in control of the land before filing the bids by the Solar Power Developer is thus a *sine qua non*. It is wholly incomprehensible that without any idea of finally identifying the location and acquiring the land situated thereat, the petitioner could have ventured to offer its bids indicating specific locations and even enter into the PPAs, agreeing *inter alia* for achieving the SCOD within the stipulated time and failing which to pay the penalties by way of liquidated damages. Neither the PPAs nor any other document, based on which the LOI was issued and the PPAs were entered into, places any obligation whatsoever on respondents Nos.2 to 5 to provide land to the petitioner. On the contrary, the project being an EPC, based on build, own and operate model, it is entirely the responsibility of the petitioner to acquire the land and establish the project. The petitioner however relied upon G.O.Ms.No.8, dated 12-2-2015. When the petitioner has filed its bids and also when the LOI was issued and PPAs were entered into, this G.O. was not in existence.

The petitioner cannot therefore legitimately contend that it was guided by the said G.O. when the above mentioned critical events have taken place. Even otherwise, sub-clause (n) of Clause 4 of the said G.O. has clearly spelt out that it is the responsibility of the project developer to acquire the land required for the project and that in the case of land owned by the Revenue Department, the land allotment shall be done as per the prevailing Government policy. Under the said G.O., respondent No.6 is appointed as the Nodal Agency which shall facilitate in the Solar Power Developer's obtaining the revenue land wherever it is required and acquiring certain facilities such as securing power evacuation and/or open access, water allocation from the concerned Department, availing subsidy for solar roof top systems and to coordinate with MNRE/SECI/AP Transco/Discom(s) and any other Central/State agencies in obtaining necessary clearances, approvals and subsidies. The averments in the petition show that the petitioner was unable to acquire the lands due to various problems such as defects in the title of the part of the land, lands covered by DKT, lack of availability of revenue records etc. It is not as if these problems are peculiar to the petitioner alone. In any event, the petitioner cannot blame the respondents for these problems.

The material filed by the petitioner shows that almost nine months after entering into the PPA, it has addressed a letter on 5-9-2015 to the Chief Engineer/IPC & PS, APPCC, Vidyuth Soudha, Hyderabad wherein it has referred to the problems allegedly encountered by it in the matter of acquisition of the land. Being a commercial entrepreneur, the petitioner cannot claim naivety on the existence of problems in the acquisition of lands. In the absence of any assurance or promise by respondents Nos.2 to 5 that they will solve the petitioner's problems in acquiring the lands, the petitioner cannot look to the respondents in overcoming the said problems. As noted earlier, the petitioner is not expected to file its bid without first identifying the availability of hassle-free lands at the specified locations and much less enter into PPAs unequivocally undertaking to comply with the conditions stipulated therein. This conduct of the petitioner shows that it was least prepared to ground and complete the project and achieve the SCOD as per the terms of the PPAs. On the contrary, the filing of the bid and entering into the PPAs without any idea of availability of the land, which constitutes basic infrastructure, reflects the intention of the petitioner to somehow snatch the opportunity to establish the solar power plant with zero preparedness. After securing the orders from the respondents, the

petitioner has started the process of identifying the suitable locations and acquiring the infrastructure such as land. Thus, if the petitioner has suffered penalties by way of liquidated damages, it is to blame itself and not anyone else. The reasons putforth by the petitioner as discussed above do not even remotely fall within the definition of '*force majeure'.* Indeed the respondents have pleaded and the petitioner has not disputed that except in the case of the petitioner, no other successful bidder has faced the problems allegedly encountered by the petitioner and that no one delayed the SCOD as subsequently altered by the respondents.

While the petitioner has lost more than four months in changing the locations, it has taken almost one year from the date of LOI and eleven months from the date of PPA to acquire the land. Therefore, the petitioner has to squarely blame itself for not foreseeing the problems by observing the Prudent Utility Practices and in not exercising reasonable skill, care and diligence. Therefore, by no stretch of imagination, the reasons put forth by the petitioner for the delay in acquisition of land falls within the definition of '*force majeure'* as provided in the PPAs*.* The petitioner also pleaded that being a Governmental agency, it had to follow the prescribed procedure in finalizing the bids for EPC contract. In

the opinion of the Commission, this hardly constitutes any reason for treating the same as a part of *force majeure.* This is an easily foreseeable aspect as it is not as if the petitioner's status has changed as a Government agency after entering into the PPA with the respondents. The petitioner should have taken the time needed for this process into consideration, before entering into the PPA.

(iii) <u>Torrential rains:</u> The petitioner averred that after commencing the development of the project in the month of November 2015, due to torrential rainfall and downpour at the petitioner's project site in the month of December 2015, it had to halt the construction of the project as it had become difficult to approach the project site due to damage of the project roads and demobilization from the project site. The petitioner, vide its letter dated 7-12-2015 addressed the officials of respondent No.4 requesting them to extend the timeline of commissioning of the project by two months by enclosing the site photographs and weather data. In their counter, the respondents have denied any hindrances to the execution of work on the stated ground. While disputing the claim of the petitioner that there was torrential rainfall, the respondents have averred that the photographs filed by the petitioner do not belong to the project site concerned. In support of their pleadings, the petitioner relied upon

letter dated 7-12-2015 and the photographs. A perusal of the said letter addressed to respondent No.4 shows that due to torrential rains, the site was damaged to such an extent that the project completion will be delayed by two months. As noted above, the respondents have strongly denied the said claim. They have even gone to the extent of alleging that the photographs do not relate to the site in question. When the claim of the petitioner was denied in such strong terms, the petitioner is expected to adduce evidence such as the report of the Meteorological Department and also the required material to show that the photographs pertain to their project site. No such effort has been made by the petitioner. Instead, in the reply affidavit, the petitioner just reiterated averments made it in the Petition. When the petitioner wants to ward-off the liability of liquidated damages, the burden lies heavily on it to prove the existence of the fact constituting *force majeure* by adducing unimpeachable evidence. Without making any such effort, the petitioner is rest content with the mere pleadings and the documents such as photographs which are seriously disputed. The project is located in a drought prone rain shadow area in one of the Rayalaseema Districts. Ordinarily, torrential rains preventing execution of works for as long as two months shall be considered as a rare occurrence, more so at a place

such as Gurramkonda. Such being the case, the burden heavily lies on the petitioner to prove the said fact. The petitioner, however, miserably failed in this regard. Moreover, had the petitioner been circumspect and prompt in the establishment of the project, even such occurrence also would not have impeded the progress of the works, as by that time it would have completed the civil works if the project had been grounded as envisaged under the contract. For the above mentioned reasons, the Commission does not find any merit in the plea of the petitioner that the alleged torrential rains have delayed the execution of its project by two months and that the same constitutes *force majeure* event.

(iv) <u>Losses suffered due to reduction of tariff for Nagari plant apart from invocation of Bank Guarantees furnished for that period:</u>

The reasons putforth by the petitioner under this head relate to Nagari project which is not the subject matter of the present dispute. Hence, they have no relevance and are extraneous to the case on hand. They need not therefore be discussed.

(v) <u>Delay in inspection of the plant and network:</u> The petitioner averred that it has managed to synchronize 1.35 MW out of 25 MW on 19-5-2016, 4.17 MW on 24-5-2016 and the remaining 16.83 MW on

28-7-2016. It has further averred that despite such synchronization of the entire project at Gurramkonda by 28-7-2016, the inspection of the project was not carried out till 29-9-2016 and thereby a delay of two months was caused by the respondents. The learned Counsel relied upon letter dated 7-5-2016 addressed by the Executive Engineer, A.P. Transco, Tirupati to the Divisional Engineer, A.P. Transco, Chittoor, informing that all the works relating to the petitioner's project are completed and a request for statutory inspection of the project was made. The petitioner also referred to letter dated 4-9-2016 requesting to depute a team for final verification of its project in this regard. In the letter dated 12-11-2016, addressed to respondent No.4, referred to and relied upon by the respondents, the petitioner requested to consider 28-7-2016 as the COD.

In their counter, the respondents have strongly denied the above mentioned averment except to the extent of the petitioner's claim that it has synchronized 4.17 MW on 24-5-2016. The respondents have specifically denied that the petitioner had synchronized 16.83 MW on 28-7-2016 as baseless. The respondents have also denied inspection of the project by the Synchronization Committee on 29-9-2016. They have relied upon letter dated 20-9-2016 addressed to respondent No.2 stating

that the CEIG has not yet given safety certificate in respect of the balance quantity of 20.83 MW and that he has promised to undertake such inspection during that week-end. The respondents have accordingly pleaded that the said letter is proof positive to show that the petitioner was not ready even as on the date of the said letter and that therefore the petitioner's claim that the project was ready on 28-7-2016 is baseless and false. Referring to letter dated 4-9-2016 relied upon by the petitioner, the respondents stated that in the absence of completion of the project in all respects including the statutory inspection by the CEIG certifying the safety of the equipment of the project and its readiness, such letters have no sanctity in law. As regards the claim of the petitioner that it has injected power from 19-5-2016 upto 30-9-2016, the respondents have relied upon the provisions of Regulation No.2 of2016 which envisaged that the power injected from the date of synchronization until the COD shall be treated as "inadvertent power" and that the same cannot be accounted for. The respondents have accordingly pleaded that mere injection of power does not advance the date of COD.

The Commission has carefully considered the respective submissions with reference to the material on record.

Under Article 6 of the PPA, the Solar Power Developer shall be responsible, inter alia, for complying with the provisions of the Grid Code, performance standard, protection and safety as required as per the Rules and the Regulations in force as applicable from time to time in the State of Andhra Pradesh for achieving the COD within the timelines stipulated for the SCOD as per the agreement and for seeking approval of the A.P. Transco and the Discom in respect of the interconnection facilities with the Grid Sub-Station and synchronization of the project with the Grid. Article 1 defined 'commercial operation date' as 'the date on which the project is declared by the Solar Power Developer to be operational, provided that the Solar Power Developer shall not declare a generating unit to be operational until such generating unit has met the conditions of Clause 3.10. The sub-clauses of Clause 3.10 read as under:

3.10.1. The Solar Power Developer shall give a written notice to the concerned SLDC and DISCOM, at least sixty (60) days in advance to the date on which it intends to synchronize the Project to the grid system.

3.10.2. The Project may be synchronized by the Solar Power Developer to the grid system when it meets all the connection conditions prescribed

in applicable Grid Code then in effect and otherwise meets all other Indian legal requirements for synchronization to the grid system.

3.10.3 The synchronization equipment shall be installed by the Solar Power Developer at its generation facility of the Project at its own cost. The Solar Power Developer shall synchronize its system with the Grid System only after the approval of synchronization scheme is granted by the head of the concerned sub-station/grid system and checking/verification is made by the concerned authorities of the grid system.

3.10.4. The Solar Power Developer shall immediately after synchronization/tripping of generator, inform the sub-station of the grid system to watch the Project is electrically connected in accordance with applicable Grid Code.

3.10.5. The Solar Power Developer shall commission the Project within timelines defined for Scheduled COD as per this Agreement, and any delay of the same is subject to the penalties stated in Clause 10.5 of the Agreement.

A perusal of the above noted terms of the PPA shows that the expressions “synchronization”, “commissioning” and “commercial operation” have different connotations. A Project cannot be treated as having been commissioned and achieved the commercial operation unless it is properly synchronized. As envisaged under Clause 3.10.3 supra, synchronization of the Grid system can be done only after the Synchronization Scheme is granted by the head of the concerned sub-station/grid system and checking/verification is made by the

concerned authorities of the Grid system. As regards the 4.17 MW, a team of officials concerned with the Grid system issued a certificate stating that the plant to the extent of 4.17 MW was commissioned as per the A.P. Discoms/A.P. Transco's guidelines and that the performance of the plant is satisfactory. They have also certified the date of synchronization of the plant as 24-5-2016 at 15.15 Hours. The same team of officials have certified that the remaining part capacity of 20.83 MW, totalling 25 MW was synchronized to the Grid in the presence of the officials of the A.P. Discoms, Transco and the Developer on 29-9-2016. Interestingly, the said certificates show that for 4.17 MW, CEIG granted approval on 2-5-2016 and for the balance capacity i.e., 20.83 MW, the CEIG's approval is dated 27-9-2016. No doubt, in the letter dated 7-5-2016, the Executive Engineer, Construction Division, A.P. Tansco, Tirupati informed the Divisional Engineer, O&M, A.P. Transco, Chittoor that the works of erection of 132 KV DC/SC Line from 132 KV SS Gurramkonda to M/s. Waneep Solar Plant and 1 No. 132 KV Bay at pooling station for Gurramkonda feeder in Chittoor District were completed. He therefore requested for arranging of statutory inspection. It is also not in serious dispute that the petitioner was injecting 1.35 MW power from 19-5-2016, 4.17 MW from 24-5-2016 and 16.83 MW from

28-7-2016. As rightly contended by the respondents, the acts of physical completion of the network system, connecting the system to the grid and injection of power by themselves do not constitute synchronization, commissioning and commercial operation within the meaning of the PPA. Unless all the required formalities including statutory inspection by the CEIG are completed, the petitioner cannot claim to have completed the synchronization, commissioning and commercial operation in the true sense of these words.

Indisputably, inspection by the CEIG is a *sine qua non* for declaring synchronization, commissioning and commercial operation. When admittedly, the CEIG's approval for 20.83 MW capacity was issued on 27-9-2016, the petitioner cannot with any legitimacy claim that it has achieved the COD on 28-7-2016. It is not in dispute that the CEIG is an independent functionary not under the control of either the Transco or the Discoms. When admittedly it is the responsibility of the petitioner to get all the statutory inspections made and secure the required statutory clearances/approvals, it cannot blame respondent Nos.2 to 5 for its inability to obtain the CEIG's approval. The fact remains that within two days of the petitioner obtaining the CEIG's approval, the team of officials concerned with the synchronization and commissioning of the

Project inspected and granted the certificate. In the light of these undeniable facts, the petitioner cannot claim that it has achieved the COD any time earlier than 29-9-2016, much less, on 28-7-2016.

Point Nos.1 to 3 are accordingly held against the petitioner.

Point No.4: Clause 10.5 of Article 3 mandates that the Solar Power Developer shall commission the project within the time lines defined for the Scheduled COD as per the agreement and that any delay of the same is subject to the penalties mentioned under Clause 10.5 of the Agreement. This Clause reads as under :

Penalties in case of delayed Commissioning:

Under normal circumstances the Project has to be commissioned within Twelve (12) months for the projects where Delivery Voltage is 33 kV and within Fifteen (15) months for the projects where Delivery Voltage is 132 KV and 220 kV – from the Effective Date. In case of failing to achieve this milestone, DISCOM shall encash the Performance Bank Guarantee which was submitted by Solar Developer to the DISCOM before signing of the PPA, in the following manner:

Contracted Capacity commissioned but with delay:

(a) Delay upto one (1) month – DISCOM will encash 20% of Performance Bank Guarantee (INR 5 lakh/MW) on per day basis proportionate to the Capacity not commissioned.

(b) Delay of more than one (1) month and upto two months – DISCOM will encash 40% of the Performance Bank Guarantee (INR 10 lakhs/MW) on per day basis proportionate to the Capacity not commissioned.

(c) Delay of more than two months and upto three months – DISCOM will encash the remaining 40% of the Performance Bank Guarantee on per day basis proportionate to the Capacity not commissioned.

(d) In case the commissioning of Power Project is delayed beyond three (3) months from the Scheduled Commissioning Date, the SPD shall pay to DISCOM, the Liquidated Damages at rate of Rs.1,00,000/- per MW per day of delay for the delay in such remaining Capacity which is not commissioned. The amount of liquidated damages would be recovered from the SPD from the payments due on account of sale of solar power to DISCOM.

(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 six (6) months from the Scheduled COD as per this Agreement. In case, the commissioning of the Power Project is delayed beyond six (6) months from the Scheduled COD as per 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 six (6) months from the Scheduled COD as per this Agreement and the PPA for the balance Capacity will stand terminated.

(f) For all other cases of Solar Power Developer Event of Default, procedure as provided in Clause 10.3 shall be applicable.

The petitioner has not disputed the computation of liquidated damages. However, it has questioned the entitlement of the respondents to levy and collect liquidated damages.

The PPA is a bilateral contract. The petitioner has signed the contract with its eyes wide open. Having failed to convince this Commission that the reasons for the delay constituted force majeure

events, the petitioner is bound by the terms of the contract and liable for penalties envisaged thereunder. The action of the respondents in stipulating and recovering the named sum of penalty is sanctioned by Section 74 of the Indian Contract Act 1872. No exception can therefore be taken to the action of the respondents in levying and recovering the penalties by invoking the Bank Guarantees and deducting from the tariff payable to the petitioner towards liquidated damages.

Point No.5: The petitioner has stated in the rejoinder that GST is not applicable. In the instant case, the PPA was entered into and the project was commissioned much prior to the coming into force of the Goods and Services Tax Act 2017 (GST Act) and that therefore the respondents cannot levy GST based on the subsequent event of commencement of the GST Act. Since this issue was raised for the first time in the rejoinder, the respondents did not have the opportunity of meeting the same in their counter. However, though the respondents have availed the opportunity of filing the written submissions on “main points”, they have not adverted to the aspect of GST. Admittedly, the GST Act came into force much after execution of the contract and SCOD. The parties have therefore not contemplated payment or recovery of GST as the case may be. Unless the contract provided for such recovery, the

respondents cannot saddle any liability on the petitioner. It is not even pleaded by the respondents that they have in fact paid GST. Even if they have so paid, the petitioner cannot be mulcted with the said liability. Therefore, to the extent of recovery of GST on liquidated damages, the action of the respondent Nos.1 to 5 is declared as illegal and unauthorized. This Point is accordingly answered.

In the result, the O.P. is dismissed, except to the extent of recovery of GST by the respondents. Respondent No.1 is directed to refund the GST component to the petitioner within one month.

Sd/-	Sd/-	Sd/-
Thakur Rama Singh	**Justice C.V. Nagarjuna Reddy**	**P.Rajagopal Reddy**
Member	**Chairman**	**Member**

[1] AIR 1961 SC 1285

[2] Appeal No.123 of 2012 & I.A.No.396 of 2012, dated 4-2-2014

[3] Petition No.822 of 2012, dated 9-11-2012

[4] (2017) 14 SCC 80