

**BEFORE THE GUJARAT ELECTRICITY REGULATORY COMMISSION**  
**GANDHINAGAR**

**Petition No.1364/2013.**

**In the Matter of:**

**Petition under section 86(1) (f) of the Electricity Act, 2003 for declaring (i) 5 MW Solar Photo Voltaic (PV) power project set-up by the Petitioner commissioned on 31<sup>st</sup> March, 2013 instead of 8<sup>th</sup> August, 2013, (ii) Petitioner is entitled to receive tariff at the rate of Rs. 11.25/kWh instead of Rs. 10.40/kWh paid by the Respondent No. 2 GUVNL and direct the Respondent to pay an amount of Rs. 2,69,86,837 for supply of electricity by the Petitioner from 31<sup>st</sup> March 2013 to 8<sup>th</sup> August, 2013 for supply of 23,98,830 kWh and interest on the same as per the Power Purchase Agreement (PPA).**

Petitioner : M/s. Taxus Infrastructure & Power Projects Pvt. Ltd.,  
804 – A, Arcadia, South City – II, Gurgaon- 122018,  
Haryana.

Represented By : Learned Senior Advocate Shri D.R.Chaudhari with  
Advocate Ms. Anuradha Paul and S/Shri Satyen Sharma  
and Puneet Rana.

V/s.

Respondent No. 1 : Gujarat Electricity Development Authority,  
4<sup>th</sup> Floor, Block No. 11 & 12,  
Udhyog Bhavan, Sector- 11,  
Gandhinagar – 382017, Gujarat.

Represented By : Shri S.B. Patil.

Respondent No. 2 : Gujarat Urja Vikas Nigam Limited,  
Sardar Patel Vidyut Bhavan,  
Race Course Circle, Vadodara-390007.

Represented By : Learned Advocate Shri Anand Ganesan alongwith Shri V.T.  
Patel.

Respondent No. 3 : Gujarat Energy Transmission Corporation Limited,  
Sardar Patel Vidyut Bhavan,  
Race Course Circle, Vadodara-390007.

Represented By : Learned Advocate Shri Anand Ganesan alongwith Ms. Venu Birappa.

Respondent No. 4 : The Chief Electrical Inspector,  
6<sup>th</sup> Floor, Block No. 18, Udhog Bhavan,  
Sector – 11, Gandhinagar, Gujarat.

Represented By : Nobody was present.

Respondent No. 5 : State Load Despatch Centre,  
132 Kv Gotri Sub Station Compound,  
Gotri Road, Near TB Hospital,  
Vadodara – 390021, Gujarat.

Represented By : Shri D.N. Shah.

**CORAM:**

**Shri Pravinbhai Patel, Chairman**

**Dr. M. K. Iyer, Member (Finance)**

**Date: 30/03/2015.**

**ORDER**

1. The present petition has been filed by the petitioner seeking the following reliefs:
  - i) To quash and set aside the certificate of commissioning issued by Respondent No. 1, GEDA on 17.08.2013 stating the date of commissioning with effect from 08.08.2013 onwards and to declare that the solar power plant was commissioned on or before 31.03.2013 and direct GEDA to issue the certificate of commissioning with effect from 31.03.2013.

- ii) To declare that the Petitioner is entitled for the payment of tariff for the energy generated and injected into the grid from 31.03.2013 to 8.8.2013 which is recorded in the energy meter and received by the Respondent No. 2,
- iii) Pending adjudication and disposal of this Petition the Commission may direct the Respondent No. 2 to immediately pay to the Petitioner all outstanding bills towards supply made with interest at the rate of 18% per year,
- iv) To declare that GUVNL is not entitled to claim for any liquidated damages from the Petitioner by virtue of the PPA Agreement and such claim of GUVNL is illegal, void and not maintainable and as such the Petitioner is entitled to get refund of Rs. 4.5 Crores including the amount of bank guarantee furnished by the Petitioner which is held by GUVNL wrongfully;
- v) To declare that GUVNL is bound to return the bank guarantee of Rs.2.5 Crores submitted on behalf of the Petitioner by its banker towards commissioning of the power plant, as the power plant has been duly commissioned and hence the purpose of bank guarantee has lost its force;
- vi) To direct GUVNL to pay interest at the rate of 18% p.a. over and above the invoice amount in respect of supplies made and enjoyed by GUVNL for not making payment within 30 days from the date of submission of invoices as per terms of PPA Agreement;

- vii) To declare that the Petitioner is entitled to get all the benefits of the original commissioning date as the Petitioner is not responsible in any manner for delay in commissioning of the project as stipulated to be commissioned on or before 31.12.2011 as the same was occasioned due to force majeure circumstances exempted under the PPA agreement;
- viii) To direct GUVNL to pay the full amount of the invoices received for the supplies made from the period of 1.4.2013 till 7.8.2013 which has been wrongfully withheld by GUVNL in breach of the contract;
- ix) To direct GUVNL to pay additional compensation for its wrongful actions in not making payment of the invoices raised with effect from 1.4.2013 till date by way of other consequential losses suffered by the Petitioner;
- x) To condone the delay of commissioning and making available the power plant on 31.03.2013 instead of 31.12.2011 in view of the facts and circumstances which were beyond the control of the Petitioner and are covered under the force majeure clause of the PPA and Grant all consequential reliefs in fixing the rates of supplies and pass appropriate orders on GUVNL.

2. The facts mentioned in the petition in brief are stated below:

2.1. Originally, the petitioner had filed the petition on 19.11.2013. During the hearing of the said petition on 10.01.2014, the Commission passed a daily order dated 23.01.2014 and directed the respondent GUVNL to pay the tariff for the period

from 08.08.2013 onwards for energy supplied by the petitioner. The said order of the Commission was challenged by the respondent GUVNL before the Hon'ble Gujarat High Court by filing SCA No. 2406 of 2014. The petitioner had also filed SCA being SCA No. 2492 of 2012 before the Hon'ble Gujarat High Court. In both SCAs, after hearing both the parties, the Hon'ble Gujarat High Court passed an order dated 26.02.2014 based on the settlements arrived between the parties. The Hon'ble Gujarat High Court directed the Commission to decide the issues raised in the original petition and also the issues which may be raised in future by way of an amendment petition. As per the Hon'ble High Court's order, the petitioner filed an amended petition dated 29.03.2014 before the Commission. The facts mentioned in the aforesaid amended petition are stated below.

- 2.2. The petitioner is company registered under the Companies Act, 1956 and has set up 5 MW Solar Photo Voltaic (PV) Power Project at Village Rapar-Khokhara, Taluka Anjar, Dist. Kutch, Gujarat. Thus, it is a generating company within meaning of the Electricity Act, 2003.
- 2.3. The Respondent No. 1 is a State Nodal Agency for promotion of Renewal Energy based generation in the State of Gujarat. The Respondent No. 2 is an unbundled entity from erstwhile GEB and procuring the electricity in bulk on behalf of the distribution licensees of the State and supplying the same to the distribution licensees. The Respondent No. 3 is the State transmission utility and transmitting the power in the State through intra-state network setup by it. The Respondent No. 4 is an entity to verify the safety aspect of the electricity equipments and energization of it. Moreover, the same is an authority to approve the drawings and

grant the approval for energization of the electricity generation project. The Respondent No. 5 is an entity carrying out the real time operation of the grid in the State and also carries out the energy accounting work in the State.

- 2.4. A Letter Of Intent (LOI) was issued by the E & P Department, Government of Gujarat on 14.10.2010 allowing the petitioner company to establish a 5 MW Solar Power Project in the State of Gujarat. Based on the LOI issued by the State of Gujarat, the petitioner and the Respondent No. 2 GUVNL entered into the PPA on 8.12.2010.
- 2.5. The petitioner further submitted that the Government of Gujarat came out with Solar Power Policy, 2009 appointing GEDA and GPCL as Nodal agency for facilitation and implementation of Solar Power Policy, 2009. Clause 21 of the said policy provides that the Nodal Agency will facilitate to the Project developer in identification of suitable location for solar projects and prepare a land bank and requirement of creation/up gradation of transforming the infrastructure project site.
- 2.6. The Commission had passed an Order No. 1 of 2010 dated 29.1.2010 wherein it has decided the tariff payable by the distribution licensee to the Solar Power Project Developers. It is also provided that the control period of the order is two years and order shall come into force from 29.1.2010, and it will remain effective up to 28.1.2012.
- 2.7. The petitioner submitted that as per the PPA dated 08.12.2010 between the parties, it was agreed in Article 5.2 of the PPA that the Solar Power Project would

receive the tariff at the rate of Rs. 15 per Kwh for initial 12 years starting from the date of commercial operation of the project and Rs. 5 per Kwh from the 13<sup>th</sup> year to 25<sup>th</sup> year. In case of delay in commissioning of the project and if the project is commissioned during the subsequent control period, the tariff payable by the respondent GUVNL will be the tariff determined by the Commission for the subsequent period or the tariff as agreed above, whichever is lower.

2.8. It was agreed between the parties that the petitioner is required to commission the project by 31/12/2011. It was also agreed between the parties that in case of delay in commissioning of the project, the Project Developer is liable to pay the liquidated damages as agreed between the parties in terms of the PPA.

2.9. After signing of PPA dated 08.12.2010, the petitioner approached the EPD, Government of Gujarat on 10.01.2011 to grant the permission to execute the Solar PV Power Project through SPV which was denied on 01.04.2011 by the Government of Gujarat without assigning any reasons for the same. The E & P Department, Government of Gujarat had allowed many Solar Project developers to execute the power project through SPV, while in case of the petitioner, the Government of Gujarat authorities have denied the same after about 3 months, which created uncertainty for execution of the project because its approval, the land for the project and loan for the project was required to be obtained in the name of the SPV. The delay in denial of SPV by the Government of Gujarat had created uncertainty in setting up the plant by the petitioner. The petitioner submitted that the period of non-granting the SPV by the E & P Department, Government of Gujarat is to be

construed as Force Majeure Event because in absence of clarity on the status of the petitioner, the petitioner was unable to obtain the land and loan.

2.10. The petitioner arranged the land through MOU dated 28.3.2011 and 29.3.2011 by signing MOUs with the farmer for land Survey No. 141, 141/1, 141/2, 135 and 143 of village-Rapar, Village-Khokhara, Taluka: Anjar, Dist. Kutch.

2.11. The petitioner, thereafter, proceeded to get the Sale Deeds for the lands executed and registered. However, the same was delayed due to the uncertainty created by the Gujarat's Government Resolution (GR) No. STP-12209-769-11-H-1 dated 31.03.2011 through which the Government of Gujarat revised the Jantri rates to about 300% of existing Jantri rate for procurement of the land. The said GR did not specify the revised Jantri rate applicable to the non-agricultural land. It led to uncertainty in Sale Deeds of the agricultural lands purchased by the petitioner. The Government of Gujarat had further revised the Jantri rate and reduced the revised Jantri rate as 50% after agitations throughout the State vide GR No. STP-12209-854-11-H-1 dated 18.04.2011. In the said GR, Government decided to revise the Jantri rate and reduced the same in comparison to the Jantri rate proposed in the original GR dated 31.03.2011. However, even at this stage, the new rates for non-agricultural land were not declared. As such, though the petitioner had purchased the required land for its project, it could not register the land in its name due to above reasons.

2.12. Subsequently, on 11.5.2011, the provisional mechanism for registration of title deeds with respect to industrial land was issued by the Government of Gujarat. The

said circular provided that the conveyance deeds may be accepted/registered by the concerned authority subject to following conditions:

- (a) Conveyance deeds were required to be submitted with an affidavit to the effect that upon notification of *Jantri* rates 2011 for non agricultural purposes, the appropriate value shall be paid by the concerned parties;
- (b) Until such notification, conveyance deeds will be kept pending;
- (c) The above mentioned arrangement will continue for the period till *Jantri* 2011 comes into effect for non agricultural purposes.

2.13. In view of the above, though the petitioner had approached the concerned authority for registration of land in April, 2011, the title of the land could be registered in the name of petition only on 28.11.2011.

2.14. The petitioner submitted that the Sale/purchase deed of the land was carried out by the petitioner and submitted to the Sub-Registrar at Anjar, District Kutch for registration. After purchase of the agricultural land for the project, the petitioner applied for approval of the Collector to utilize the agricultural land for industrial purpose u/s. 89 (1) (A) of Bombay Tenancy and Agricultural Land (Vidarbha Region and Kutch Area) Act, 1958 on 18.10.2011. The above approval is a statutory approval which is necessary prior to procurement and utilization of agriculture land for non-agriculture purpose i.e. industrial purpose. The petitioner applied to the Deputy Collector, Kutch on 18.10.2011 to obtain the approval u/s. 89 (1) (A) of

the Bombay Tenancy and Agricultural Land (Vidarbh Region and Kutch Area) Act, 1958. However, the same was delayed up to 18.02.2012 which is beyond the control of the petitioner.

2.15. Based on the above, the petitioner submitted that the time period elapsed between signing of MOU dated 28.03.2011 and receiving the approval under section 89 (1) of Bombay Tenancy and Agricultural Land (Vidarbh Region and Kutch Area) Act, 1958 is force majeure event in terms of PPA and the petitioner is eligible to get relief for the force majeure period as per the terms of the PPA.

2.16. The petitioner submitted that he had applied for obtaining the loan for the project from the IREDA. The loan of Rs. 44.30 Crores was sanctioned by the IREDA, but was not disbursed to the petitioner as the petitioner was not able to produce documentary evidence to establish that he has procured the land for the project and the same was delayed due to reasons stated in the above para. The loan was also delayed due to the revisions in tariff by the Commission in its Order No. 1 of 2012 dated 27/01/2012. The Commission in the said Order determined the tariff payable to the Solar PV Power Project Commission during the control period from 28/01/2012 to 31/03/2015. In the said Order, the Commission revised the tariff which is lower than the tariff decided by the Commission in its Order No. 2 of 2010 dated 29/01/2010. Due to reduction in tariff, the IREDA had re-considered the sanctioned loan amount and reduced it from Rs. 44.30 Crores to Rs. 37.10 Crores, out of which only Rs. 28 Crores have been released.

2.17. Based on the above submissions, the petitioner submitted that a force majeure event has occurred in the petitioner's case due to non-receiving approval from Government officials, statutory approvals of the concerned authorities and also non-release of sanctioned loan amount by IREDA due to delay in registration of land which affected the completion of the project and uncertainty about tariff receivable by the petitioner.

2.18. The petitioner had filed Petition No. 1145 of 2011 before the Commission for extension of the control period specified in the Order No. 2 of 2010 dated 29/01/2010. The said petition was dismissed by the Commission and rejected the prayer of the petitioner. The said Order of the Commission dated 27/01/2012 was challenged by the petitioner before the Hon'ble High Court of Gujarat by filing Special Civil Application being SCA No. 2942 of 2012. The said SCA was pending for decision before the Hon'ble High Court of Gujarat. Therefore, uncertainty about the decision of the Hon'ble High Court of Gujarat and the tariff receivable by the petitioner arose. Hence, the IREDA did not disburse the loan sanctioned.

2.19. The petitioner further contended that the SCA No. 2942 of 2012 filed by the petitioner against the order dated 27.01.2012 in Petition No. 1145 of 2011 and SCA No. 2406 of 2014 filed by GUVNL against the order dated 23.01.2014 in Petition No. 1364 of 2013 before the Hon'ble Gujarat High Court, it was decided by the Hon'ble Gujarat High Court vide order dated 26.02.2014. Therefore, during the pendency of the aforesaid petitions, the uncertainty about the various issues which are the subject matter of the present petition continued. Hence, the period of litigation before the Hon'ble Gujarat High Court in above petitions may be considered as the

condition beyond the control of the petitioner and the same may also be treated as force Majeure Event.

2.20. Article 8 of the PPA relates to the Force Majeure Events in case of the project. Article 8.1 of the said PPA defines about the Force Majeure Event. Article 8.2 describes about the events which do not qualify as Force Majeure Event. Article 8.3 state about the effect of the Force Majeure Event.

2.21. The petitioner submitted that the period elapsed in (i) denial of SPV, (ii) delay in registration of sale/purchase of agricultural land, and relevant approval for it, (iii) delay in release of sanctioned loan by IREDA though all necessary formality was completed by the petitioner, and (iv) period of litigation before the Hon'ble Gujarat High Court, qualifies as Force majeure Event in terms of Article 8 of the PPA. Therefore, the petitioner is eligible to receive the relief in terms of Article 8 and other relevant portion of the PPA.

2.22. Article 4.3 of the said PPA state about the liquidated damages payable by the project developers in case of delay in achieving the Scheduled Commercial Operation Date of the project. The said Article sets out the terms and conditions for levy of liquidated damages, its quantum and the maximum period for levy of liquidated damages. It also states the consequences of delays and conditions under which the liquidated damages will not be payable. The article provides that the liquidated damages shall not be payable if the delay in commissioning of the project is due to Force Majeure Events.

- 2.23. The petitioner completed all activities of its project and the project was ready for commissioning on 18.3.2013. The petitioner approached the Respondent No. 4 CEI on 18.03.2013 to grant the energization of the plant. In response to above, the Dy. CEI inspected the petitioner's Power Project on 29.03.2013 and the certificate for energization was issued on 03.04.2013.
- 2.24. On 19/03/2013, the petitioner informed the GEDA that the plant of the petitioner is ready for commissioning.
- 2.25. On 30.03.2013, the ABT meters with CT/PT etc, were installed at the petitioner's plant and the transmission line from the petitioner's plant to GETCO sub-station was completed and charged by GETCO authorities. Thereafter, the said transmission line was switched off from the GETCO's sub-station. Therefore, it transpires that on 30.03.2013, the power plant of the petitioner and the transmission lines for evacuation of power was ready for commissioning in all technical aspects. However, the transmission line was switched off from GETCO sub-station by the GETCO authorities.
- 2.26. On 31.03.2013, the representative of the GEDA visited the petitioner's plant to verify the installation of the equipments at the petitioner's place as well as for issuing necessary commissioning certificate of the plant after verification at the plant. They verified the installation of Solar PV Power Plant, transformer and other associate equipments and informed that the transmission lines which was switched off on 30.03.2013 be charged so that the power generation and injected into the grid be registered in the energy meter and necessary certificate may be issued by

the GEDA. However, the transmission line, which was switched off on 30.03.2013, could not be charged up to 16.35 hours of 31.03.2013. Thereafter, the line was charged at 4:35 P.M. and Ring Main Unit was charged at 06:20 P.M. Though the power project was ready, it was unable to generate power due to insufficient solar radiations by the time the evacuation facility was made available by the Respondent No. 3, the GETCO.

2.27. However, on 01.04.2013 about 08.45 hours, when necessary sun radiation was available at petitioner's plant, the plant started electricity generation and injected the energy into the grid which was recorded in energy meter installed at the petitioner's plant as well as GETCO sub-station. Moreover, the said energy generation data was transferred to SLDC through RTU installed and communication link provided from the petitioner plant.

2.28. The petitioner plant continued electricity generation from 1.4.2013 to till date which includes the period 1.04.2013 to 8.8.2013 on which date the respondent GEDA issued certificate for commissioning of the plant. The above certificate was issued by GEDA without further visits and verification of the Power Plant equipments and without assigning any reasons, the plant was declared as commissioned on 8/8/2013 and not 31.03.2013 though it was ready for commissioning and injected the energy into the grid from 1.04.2013.

2.29. The petitioner further submitted that the denial of payment of the tariff for the energy generated and injected into the grid from 1.04.2013 to 8/8/2013 by the GUVNL is illegal and against the provision of the PPA. Moreover, the energy

injected into the grid by the petitioner's project was supplied, by the respondent GUVNL to its consumer and earned revenue from it, but did not pay any amount to the petitioner who invested huge amount in the Renewable Energy Power Project.

2.30. The petitioner, therefore, requested that as non-availability of GETCO transmission network though the petitioner's plant was ready for commissioning and generated the electricity and injected into the grid, the petitioner's plant may please be declared as deemed to be commissioned on the ground of non-availability of transmission network but plant was ready for generation.

2.31. Based on the above facts, the petitioner contended that

- (i) Since, the delay in commissioning the project was solely due to Force Majeure Event, it is not liable to pay the liquidated damages.
- (ii) The petitioner's project was ready for commissioning on 18.03.2013 and the GEDA representative visited the project on 31.03.2013 to certify commissioning of the project but the project could not attain SCOD by 31.03.2013 due to unavailability of the evacuation facility to be made available by GETCO. As such, the petitioner's project may be declared to have been commissioned on 31.03.2013, and the petitioner is entitled to consequential benefits like payment for the energy generated and injected into the grid w.e.f. 01.04.2013 and tariff as agreed to in the PPA, viz, the tariff applicable for the control period of Order No. 2 of 2010 dated 29.01.2010.

3. The Respondent No. 3 GETCO filed a reply contending inter alia that 66 Kv D/C Kaniyabe- Taxus Solar lines and 2 nos. of 66 Kv feeder bays for the said line under the Anjar construction division of GETCO was ready and GETCO had approached the CEI on 20.2.2013 including depositing fees of Rs.15000/- for inspection. Therefore, the delay in commissioning of the project and charging of the line was on account of petitioner whose project, sub-station and associated equipment facilities were not ready by 31.03.2013 and for no reason or factor attributable to GETCO.
  - 3.1. The inspection of 66 Kv transmission line from Kaniyabe sub-station to 66 Kv Taxus Solar Project was carried out on 20.02.2013 by CEI.
  - 3.2. The inspection of 66 Kv feeder bays at GETCO S/S was carried out by assistant electrical inspector on 22/2/2013. As the petitioner was not in position to complete the work up to switchyard as on 16.03.2013 and therefore stringing was not possible and it was informed to Chief Engineer GETCO on 16.03.2013.
  - 3.3. The line, though, inspected by the office of CEI, could not be charged, as approval letter was not received from the office of CEI. GETCO had requested CEI on 28.03.2013 to issue the necessary certificate so that the line could be charged. Moreover, as per the minutes of meeting dated 30.3.2013, the ABT meters were installed at the premises of petitioner and line was charged at 18.50 hours and it stood ok.
  - 3.4. The petitioner did not submit the work completion record of 5 MW Solar Power Plant to the GETCO office and also the compliance of pending works that were to be

completed as per the joint inspections of GETCO officials in the petitioner's premises. As per the request of the petitioner the work was still under progress in switchyard and therefore the line was switched off. On 31.03.2013, when the communication received from the petitioner that all the works relating to pre-commissioning and testing of the protection scheme, rectification work in ABB make panel, isolator final alignment were completed, the line was charged at 16.25 hours and the reading of ABT meter from 31.03.2013 submitted with the reply. Despite the line of GETCO being available the project of the petitioner was not commercially available for the reasons attributable to the petitioner.

- 3.5. The letter dated 31.03.2013 of the GETCO was only with regard to commissioning of transmission line of GETCO and in no manner for the commissioning of the project of the petitioner. GETCO has no role in certifying or declaring the project of the petitioner being commissioned or declared as commission.
4. The Respondent No. 1 GEDA filed a reply stating that the delay in commissioning of the petitioner power plant is not attributable to the GEDA. It is submitted that the terms and condition set out by the GEDA, it is pre-requisite for the project developer to submit the certificate of GETCO regarding completion and charging of transmission line, installation and ceiling of ABT meter, certificates of CEI towards inspections and granting permission for charging of solar plant, sub-station and valid Power Purchase Agreement (PPA) besides others documents related to land and lay out map of the solar plant to GEDA to enable it to take up the work of the commissioning of the Solar Power Plant. The letter dated.19.03.2013 submitted by the petitioner had not provided any of above details. Moreover, the petitioner vide

its letter dated 20.03.2013 again requested for taking necessary action for commissioning of 5 MW solar power plant, but did not submit any of the documents as stated above. In the same letter, the petitioner accepted that its 66 Kv sub-station is yet to be connected with GETCO 66 Kv sub-station. Thus, it is clear that the respondent GEDA could not carry out the commissioning activity. Moreover, the petitioner has been informed vide letter dated 22.3.2013 that 5 MW solar plant could be taken up for commissioning only after compliance with relevant document as per the commissioning check list provided earlier. Subsequent to above letter, the petitioner vide its letter dated 28.03.2013 informed that the PPA extension letter shall be handed over on 28.03.2013, ABT meter was being installed and CEI inspection is underway. Further, vide letter dated 29.03.2013, the petitioner informed the respondent that they have installed 4.93 MW solar power plant instead of 5 MW and the same could be commissioned on receipt of the report of Chief Electrical Inspector and GETCO approval for line charging. The above facts indicate that the petitioner was unable to submit the relevant certificate/document till 29.3.2013 to enable the respondent GEDA to take up the commissioning of the power plant. Therefore, it is not true that the respondent delayed the commissioning of the Solar Power Plant of the petitioner.

- 4.1. On receipt of relevant documents from the petitioner, the respondent had taken up the commissioning activity on 31.03.2013. On reaching the petitioner plant, it was found that the transmission line connecting from the Solar Power Plant and GETCO sub-station was not charged. The representative of the petitioner was informed to get in touch with GETCO authorities for charging of the line, immediately. The

respondent GEDA inspected the entire installation of the petitioner's power plant in terms of numbers and make of solar PV modules, rating of inverter installed and connected, the switchyard of the solar substation and other related technical aspects. The transmission line was charged at 16.35 hours, the transformer at 17.55 hours and 11 Kv feeder and RMU was charged at 18.20 hours and subsequently all the 7 inverters were charged but owing to inadequate sun radiation, the plant could not go into generation mode. Hence, recording of the power was not possible and hence the 4.93 MW solar plants could not be commissioned.

- 4.2. The respondent contended that as the petitioner himself agreed that the permission/approval for charging of 66 Kv D/c line from GETCO 66 Kv Kaniyabe sub-station to solar switchyard was granted by GETCO on 30.3.2013 and as such the plant was not ready for commissioning before 30.3.2013.
5. The respondent GUVNL filed a reply contending inter-alia that the petitioner's project was inordinately delayed and could not be commissioned even after expiry date of SCOD specified in the PPA. The respondent agreed to extend the SCOD provided the petitioner pays the necessary liquidated damages specified in the PPA. It was also agreed by the petitioner that he will receive the tariff which will be prevailing on the date of commissioning declared by GEDA.
- 5.1. The petitioner has given a specific undertaking on 28.03.2013 stating that he agreed to tariff of Rs. 9.98/- per unit for first 12 years from the date of commissioning of the project and Rs. 7 per unit for 13 years, which was the tariff

determined by the Commission for the projects availing the benefit of Accelerated Depreciation. Thus, the claim of the petitioner for higher tariff on account of not availing Accelerated Depreciation benefit is contrary to the specific undertaking given by the petitioner.

5.2. The GEDA issued certificate dated 17.8.2013 to the effect that the project of the petitioner was commissioned and available for commercial operation on 08.08.2013. Thus, in terms of PPA and specific undertaking given by the petitioner, the petitioner is liable to pay liquidated damages from SCOD date i.e. 31.12.2011 to 8.8.2013. The liquidated damage works out to Rs. 3.95 Crores. The petitioner in the present petition challenged the commissioning certificate dated 17.08.2013 issued by GEDA stating that the plant was commissioned on 31.03.2013 and not on 8.8.2013. It is stated that it is not open to the petitioner to challenge the same before the Commission, under section 86 (1) (f) of the Electricity Act, 2003. The certificate issued by the GEDA is final and binding and it cannot be challenged by the petitioner in these proceedings.

5.3. Based on the certificate of the commissioning, the commercial operation of generating station started on 8.8.2013 and the applicable tariff for solar power project of the petitioner is second year tariff prevalent during FY 2013-14 and there is no justification for the petitioner to claim the 1<sup>st</sup> year tariff as applicable for the financial year 2012-13.

5.4. It is submitted that GEDA is public authority and has based on site verification and examination decided that the petitioner plant was commissioned and commercially

operational only 8.8.2013. The petitioner filed the present petition under section 86 (1) (f) of the Electricity Act, 2003 against the GEDA, which is not permissible.

- 5.5. The claim of the petitioner that project was ready for commissioning in the month of March 2013 is misconceived because CEI issued certificate on later date i.e. on 03.04.2013 granting permission to energize solar panels and associate equipments, and substations equipments of the project.
- 5.6. It is illegal on part of the petitioner to energize the generating station and inject the energy into the grid on commercial basis prior to 3.4.2013 as the energization permission was granted by the CEI only on 3.4.2013. It is not open to the petitioner to claim that the plant was commissioned and under commercial operation by 31.03.2013 and to claim the tariff as applicable during FY 2012-13.
- 5.7. In terms of the specific undertaking given by the petitioner the extension of time was granted by the respondent. Moreover, the petitioner agreed that he will pay the liquidated damages for delay in commissioning of generating station. Hence, it is not open to the petitioner to avoid this obligation given in undertaking.
- 5.8. It is incorrect on part of the petitioner to rely on interim order passed by the Hon'ble Gujarat High Court to refuse to pay the liquidated damages. The interim order says only not to take coercive steps. The interim order of Hon'ble Gujarat High Court did not in any manner restrict the petitioner voluntarily agreeing to pay liquidated damages. The specific undertaking was given by the petitioner when the interim order of Hon'ble Gujarat High Court was in force. The respondent has legal

right to recover the liquidated damages payable by the petitioner to the respondent.

6. In pursuance to the directions of the Hon'ble Gujarat High Court, the matter was kept for hearing on 01.03.2014, 29.03.2014, 13.05.2014, 31.05.2014, 23.07.2014, 07.08.2014 and finally on 28.08.2014.
  7. Learned Advocate Shri D.R.Chaudhari, on behalf of the petitioner, reiterated the facts as stated in para 2 above.
- 7.1. The Petitioner submitted that the Solar Power Policy, 2009 notified by the Government of Gujarat as a public policy to meet the need of the people and industry for cleaner and renewable solar power. In pursuance to this policy, the Respondent No. 2 GEDA was given the power to act as nodal agency and implement the policy. Government of Gujarat allowed various agencies to submit their proposal for setting up Solar Power Plant in the State of Gujarat. The petitioner i.e. Taxus Infrastructure and Power Projects Private Limited, one of such agencies, had requested for allotment to establish a Solar Power Plant of 5.5 MW at Village: Rapar-Khokhara, Taluka: Anjar, District: Kutch and pursuant such allotment, the petitioner had entered into PPA with GUVNL on 08.10.2010.
  - 7.2. The Commission had vide its order dated 29.01.2009, fixed two tier tariff and control period within which the plant to be established and the supplies of power to GUVNL. The Commission vide order dated 27.01.2012 fixed the tariff for the control period for the project to be commissioned subsequent to 29.01.2012.

7.3. The petitioner also mentioned that the Commission had also passed common order in various petitions of Solar Power Producers on extension of control period and subsequent reliefs and disposed of around 30 petitions including the present petitioner.

7.4. The petitioner was prevented from performing the contract owing to circumstances beyond its control and mainly due to government rules, regulations, actions and indications and various latches on which the petitioner had no control and it amounts to force majeure. Article 4 of the PPA provides that the liquidated damages shall not be payable by the petitioner in following situation:

- (a) The project cannot be commissioned by SCOD because of force majeure event, or
- (b) The petitioner prevented from performing its obligations because of material default on part of GUVNL, or
- (c) The SCOD was not achieved due to delay in establishment of necessary of transmission facility system for reasons solely attributable to GETCO, and other government officials.

7.5. He submitted that the petitioner was unable to achieve the SCOD specified in the PPA due to Force Majeure Event. He referred Article 8 of the PPA and submitted that on conjoint reading of 'force majeure event' and exclusion and the word "include" will mean that where failure occurred in completion of project inspite of having made best efforts due to circumstances "beyond control of party" would not

amount to breach, and force majeure circumstances period shall be excluded in computing the contract period.

7.6. The petitioner further submitted that the word “includes” stated in force majeure and the words force majeure exclusion are required to be harmoniously construed as per the settled principal of law as declared by Hon’ble Supreme court.

7.7. The petitioner further submitted that he had filed SCA No. 2942 of 2012 challenging the order dated 27/1/2012 passed by the Commission in Petition No. 1145 of 2011 and prayed for various reliefs. The said petition was filed on 05.03.2012 and finally the same was disposed by Hon’ble Gujarat High Court vide order dated 26.02.2014. The period of litigation before the Hon’ble High Court be excluded while determining the period for SCOD/Liquidated Damages applicable to the petitioner.

7.8. The petitioner further submitted that he was prevented from performing the contract for 402 days due to circumstances beyond his control which comes under the force majeure event as agreed and defined in PPA between the parties. The period for computation of force majeure stated by the petitioner is given in table below:

Sr. No.	Description	Date of start	Date of end	Delay in days
01.	Delay due to delay in permission in grant of Purpose Vehicle (SPV) company	10.01.2011	01.04.2011	79
02.	Delay due to non registration of land sale deed	01.04.2011	22.11.2011	236
03.	Delay due to delay in granting statutory approval	18.10.2011	18.02.2011	122

There is 35 days over lapping in the above period. Total delay is of 402 days.

7.9. The petitioner submitted that the Force Majeure conditions are excluded as per the PPA, in accordance with the law in computing the time prescribed for SCOD of the project, the petitioner should be deemed to have completed the project within time prescribed in the PPA and the Commission should consider the same and order accordingly as the delay of 402 days are required to be excluded from SCOD.

7.10. The petitioner, further relied on the following propositions of law:

7.10.1. The world acclaimed author Hudson's Building and Engineering Contracts Vol 1 1995 at page 657, the term "Force Majeure" does not have any precise meaning, nor does it gives rise to any special legal doctrine or consequences in English Law, although it is well known expression and a considerably more developed concept in French and other civil law system. It is only significance in English Law will depend on its use in and express contractual term, and its intended effect and operation must be found within the express or implied terms or the matrix of the particular contract. Thus, the use of the term subject to Force Majeure Conditions".

*"the one minimum and common factor is that the event in question must be beyond the control of the party relying on it, and the contractual purpose of an express clause may be variously to release or excuse a party from performance of one or more obligation in the contract either temporarily or permanently, or even to avoid the contract completely. Whether an event qualifies for the intended purpose can only be ascertained in the light of the journal background and terms of contract using the expression."*

7.10.2. The Commission in the case of M/s. Cargo Solar Power Gujarat Private Limited V/s. GUVNL & others in Petition No. 1125 of 2011, in para 8.19, and 8.30 decided as under:

*“.....8.19. Article 8.1(a) (iv) of the PPA provides that any inability despite complying with all legal requirements to obtain or maintain license or legal approval which leads to delay or failure in the performance of obligation by the party concerned of the PPA be considered as ‘Force Majeure’ event. Both the petitioner and the respondent No.1, consciously agreed that any delay in obtaining legal approval is to be considered as a Force Majeure event. As stated above, it is obligatory on the part of the petitioner to obtain permission from the collector/ authorized officer by the state government for the procurement of the agricultural land for which MoUs were executed by the petitioner for utilization for non agricultural purpose as provided in clause 4 of the schedule 3 which is statutory in nature.*

*8.30. Now we deal with issues ‘e’ and ‘f’ together. As stated above, the petitioner is unable to obtain the permission/ approval for the land and water which are pre-requisite for the project. The said delays fall in the category of Force Majeure event in terms of the PPA read with the provisions of (i) the Bombay Tenancy and Agriculture Act (Vidharbh Region and Kutch) Act, 1958, (ii) the Environment (Protection) Act, 1986 and (iii) the CRZ Regulations. Due to Force Majeure event as stated above, the petitioner is unable to achieve the (i) date of (construction) default (ii) Commercial Operation Date and (iii) Scheduled Commercial Operation Date as specified in the PPA. In terms of Article 8.2 of the PPA when any party is unable to fulfill his obligation in terms of the agreement, due to Force Majeure event, delay, if any, shall not be construed as a breach of its obligations. As such, period of such delay is required to be suspended or excused in respect of such party and to that extent the period of Commercial Operation Date, Date of Construction default and Scheduled Commercial Operation Date are to be extended.*

7.10.3. The Commission in case of M/s. Kindle Engg. & Const. Private Limited V/s.

TPL in Petition No. 1200 of 2012 in para 13.6, 13.12, 14, 14.3, 14.5, and

14.6 decided as under:

*“.....13.6. ....In the absence of availability of land and necessary approvals it would not be possible for any project developer to achieve the financial closure.....”*

*13.12.....Also, in the absence of clear title of land in favour of petitioner, financial closure cannot be achieved and the connection agreement is also not possible without knowing the location of the plant.....”*

*14. ....The petitioner had sought an extension of PPA dated 20.01.2011 for a period of 11 months due to the delay in approval by Government of Gujarat...”*

*14.3 .....However, before deciding the issue, we have to consider the intents behind incorporating the Force Majeure Clause in the PPA. Force Majeure clause is included in any contract to absolve a party from its liability for delay or failure to perform its obligations under the contract due to any event or circumstance beyond the reasonable control of the party concerned. It should be appreciated that all the events to be covered under Force Majeure clause cannot be visualized and included in the definition. Thus, as a normal practice, besides listing some foreseeable events under Force Majeure, a clause viz., “beyond reasonable control of the party” is generally included.....”*

*14.5 Thus, a combined reading of Article 8.1- ‘Force Majeure Events’ and Article 8.1.2- ‘Force Majeure Exclusions’ of the instant PPA makes us to conclude that Article 8.1 is ‘Inclusive’, and not ‘exhaustive’.*

*14.6 Further, in the PPAs signed by the GUVNL, the list of Force Majeure events also include a clause, which reads as “inability to despite complying with all legal requirements to obtain, renew or maintain required licenses or legal approvals”.....”*

7.10.4. The Commission also in case of M/s. Solar Semi Conductor Power Company (I) Private Limited V/s. GUVNL & Others in Petition No. 1188 of 2012 decided in para 11.34 decided as under:

*“.....11.34. We also observe that the acquisition of land was delayed due to reasons beyond the control of the petitioner and the actual possession could be taken by the petitioner only in October, 2011. Thereafter, the petitioner installed 8.68 MW capacity by 1.02.2012 and another 1.40 MW by 21.02.2012. These have been established through the certificates issued by the Chief Electrical Inspector. Thus, the petitioner was able to commission 10.08 MW capacity in about 4 months’ time, as against a time period of 6 months considered by the*

*Commission in its order dated 29.01.2010. Hence, there is a sufficient reason to waive off the delays of 24 days in commissioning of 10.08 MW of capacity of the project.....”*

7.10.5. The Hon’ble APTEL in Appeal No. 54 of 2013 in case of GUVNL V/s. GERC & Others has observed in para 7 that the appellate has to decide whether time taken in obtaining statutory and Government clearances towards land etc, for setting up of solar power plant was due to Force Majeure event as defined in the PPA and consequently extending the period of SCOD for completion of the project....”

7.10.6. The Hon’ble APTEL in Appeal No. 123 of 2012 in case of GUVNL V/s. GERC and Others observed in para 25 that delay because of 89 (A) falls under Article 8.1 (a) (v) of the PPA and hence Force Majeure Event. In para 35 of the said order, the appellate further states that the delay in getting the legal approval for land is beyond the control of the developer and is squarely covered under Force Majeure event under Article 8.1 (a) (v) of the PPA. In para 44 also, it mentioned that the arguments of GUVNL that developer should have put his project in area other than Kutch is not tenable. The project developer has freedom to select appropriate land and technology as per State Government Policy and State Commission’s order dated 29.01.2010.

7.10.7. The petitioner also relied on the following judgement to prove Force Majeure:

- (i) Seaboard Lumber Com. And Capital Development Com. V/s. United States 308 F.3d 1283, Relevant para 40-61 and 96;
- (ii) Ocean Tramp Tankers Corporation V/s. V/o Soveracht (1964) 1 ALL E.R. 161, Relevant pages 166 to 167;
- (iii) Construction Co. Limited V/s. State of Madhya Pradesh (1988) 3 SCC 82, Relevant para 5 and 8 to 11;
- (iv) Travancore Devaswom Board V/s. Thanath International (2004) 13 SCC 44, Relevant para 11 to 14;
- (v) Eacom's Controls (India) Limited V/s. Bailey Controls Co. and Others AIR 1998 Delhi 365, Relevant para 24 to 25 and 28 to 29;
- (vi) Satyabrata Ghose V/s. Mugneerram Bangur and Co. and Anr. AIR 1954 SC 44;
- (vii) Govindbhai Gordhanbhai Patel and Others V/s. Gulam Abbas Mulla Allibhai and Others AIR 1977 SC 1019;
- (viii) Mohan Lal and Anr. V/s. Grain Chamber Limited AIR 1968 SC 772;
- (ix) The Naihati Jute Mills Limited V/s. Khyaliram Jagannath, AIR 1968 SC 522;
- (x) Mugneeram Bangur & Co. V/s. Sardar Gurbachan Singh (1965) 2 SCR 630;
- (xi) Davis Contractors V/s. Fareham U.D.C. (1956) 2 All E.R. 145;
- (xii) Ostime V/s. Duple Motor Bodies Limited (1961) 2 All E.R.;
- (xiii) Suresh Narain Sinha V/s. Akhauri Balbhadra Prasad and Ors, AIR 1957 Patna 256;
- (xiv) Alopi Prasad V/s. Union of India (1960) SCR 793;
- (xv) Gambhirmull Mahabir Prasad V/s. Indian Bank Limited, AIR 1963 Calcutta 163;
- (xvi) Ved Prakash Gupta V/s. Shishu Pal Singh AIR 1984 Allahabad 288;
- (xvii) BSNL V/s. Reliance Communication, 2010 (12) Scale 586, 2011 (1) SCC 394, Para 10;
- (xviii) SAIL V/s. Gupta Brothers, AIR 2009 SCW 7191, Para 15;
- (xix) AIR 1999 SC 3804, Para 16;

(xx) AIR 1998 (9) SCC 555.

7.11 The petitioner submitted that GUVNL is relying upon a purported undertaking procured from the petitioner on 28.03.2013. The said purported undertaking is *void-ab-initio* having been obtained by coercion under threat of non extension of PPA and subsequent non certification of commercialization of power plant by GEDA. Under the law as settled by the Hon'ble Supreme Court of India, anything obtained under coercion, threat or undue influence is void-ab-initio. Section 19 of the Contract Act is reproduced below:

*"When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused."*

This argument is supported by order passed by the Hon'ble Gujarat High Court in SCA No. 2942 of 2012, in which the Hon'ble Court passed an interim order directing the GUVNL not to take any coercive steps against the petitioner.

7.12 The Hon'ble Supreme Court in several of its judgements has propounded the law that the documents marked without prejudice cannot be used as evidence and bind the writer of such documents. The Hon'ble Supreme Court in AIR 1967 SC at Page 878 and AIR 1963 SC page 1203 defined as to when a transaction is vitiated by coercion or fraud. Thus, applying the same principle, the undertaking is *void-ab-initio* and is of no consequences. The petitioner also cited another judgements of the Hon'ble Supreme Court in this regard as under:

- (i) AIR 1978 SC 1244, Para 6, 7, 9, and 10.
- (ii) Superintendent (Tech I) Central Excise, IDD Jabalpur and Others V/s. PratapRai, AIR 1978 SC 1244;

(iii) Tarapore & Co. V/s. Cochin Shipyard Limited (1984) 2 SCC 680.

7.13 The petitioner submitted that as far as law of Waiver and Estoppels is concerned, even after expiry of the Commercial Operation date, it was permitted by GUVNL to go ahead with the correction, erection and commissioning of the Power Plant and therefore, such conduct of GUVNL amounted to GUVNL. Thus, the claim of liquidated damages as alleged by GUVNL, cannot be made as a part from other infirmities, GUVNL elected to go ahead with the establishment of Power Plant Project. By allowing the petitioner to go ahead with the project and ultimately by giving certificate of commencement and commercial operation date, GUVNL has elected to waive all the period that has been lost due to force majeure situation. Therefore, right of election was exercised by GUVNL in favor of going ahead with the contract and not find fault or to terminate the contract. The moment such right of election has been exercised by GUVNL, the right to claim LD, apart from not being applicable in the present case because of force majeure conditions, GUVNL cannot under the law claim any LD.

7.14 Moreover, in the instant case GUVNL having been receiving the electricity supplied from the plant has, inter-alia, waived its right to claim for liquidated damage. The Hon'ble Supreme Court in several of its judgments has propounded the law on waiver.

Some of citation are as under:

- (i) State of Bihar V/s. PP Sharma 1992 Supp (1) SCC 222;
- (ii) H P Transport Corporation V/s. K C Rahi (2008) 11 SCC 502;
- (iii) M C Mehta V/s. Union Of India (1999) 6 SCC 237;
- (iv) Mohammad Jamal V/s. Union of India (2014) 1 SCC 201;

- (v) Mangal Amusement Park Pvt. Limited V/s. State of MP (2012) 11 SCC 713;
- (vi) State of Kerala V/s. K. Prasad, (2007) 7 SCC 140;
- (vii) BSNL V/s. Subash Chandra Kanchan, (2006) 8 SCC 279;
- (viii) Dodsal Private Limited V/s. Delhi Electric Supply Undertaking (2001) 9 SCC 339;
- (ix) Narayan Prasad Lohia V/s. Nikunj Kumar Lohia (2002) 3 SCC 572;
- (x) Booz Allen & Hamilton Inc V/s. SBI Home Finance Limited (2011) 5 SCC 532;
- (xi) Aurohill Global Commodities Limited V/s. Maharashtra STC Limited, (2007) 7 SCC 120;
- (xii) The law of election has been defined by the Hon'ble Supreme Court in following cases:
  - (a) AIR 1994 (2) SCC 647;
  - (b) AIR 1983 (3) SCC 75 at para 28;
  - (c) AIR 1980 (3) SCC at 47;
  - (d) AIR 1978 SC 1765.

The Hon'ble Supreme Court of India held that a person cannot take a contradictory or inconsistent position, either go ahead with the contract or to terminate the contract. A person cannot blow hot and cold in the said breath. Thus, by going ahead with the contract and by receiving the supplies, the respondent No.2 GUVNL has also forfeited its right to claim for liquidated damages apart from the fact that LD cannot be applicable in the present case being hit by Force Majeure conditions. The law of waiver has been well defined by the Hon'ble Supreme Court in AIR 1964SC 1300, the said principle has been followed by the Hon'ble Supreme Court till date.

7.15. The petitioner submitted that the Commission in Petition No. 1235 of 2012, in case of M/s. ACME Solar Technologies Gujarat Private Limited V/s. Energy & Petrochemical Department, Government of Gujarat & Others, decided the principle relating to delay in transmission network created by GETCO when the project of the Solar Developer is ready for commissioning and the issue of LD applicability in

such case. The same is also applicable in the present case. He further relied on the decision of the Hon'ble APTEL in Appeal No. 54 of 2013.

7.16. The petitioner also submitted that the Commission decided law relating to unequal bargaining in Petition No. 1020 of 2010, in case of the Kutch Salt and Allied Industries Limited V/s. Paschim Gujarat Vij Company Limited & Others and submitted that the respondents are in dominant position and dictated the terms of the agreement/undertaking. The petitioner had invested huge amount in the project and was ready for commissioning. Therefore, the petitioner had no other option, except to sign the undertaking/agreement which having contrary conditions against the order of the Commission. Therefore, the same is required to be declared as void.

8. Learned Advocate Shri M.G. Ramchandran, on behalf of GUVNL and GETCO, reiterated the facts as stated in para 3 and 5 above and submitted as under:

8.1. The present petition has been filed by the petitioner for adjudication of the dispute between the petitioner and the respondent with regard to various terms of PPA signed between the petitioner and GUVNL. The PPA was entered between the parties pursuant to the tariff order dated 29.1.2010 passed by the Commission and Letter of Intent (LOI) issued by Government of Gujarat.

8.2. It was agreed between the parties that the tariff payable by the GUVNL shall be as per order dated 29.1.2010 passed by the Commission subject to the petitioner's project is commissioned up to 28.1.2012. In case of failure to achieve SCOD by

28.1.2012, the petitioner is eligible to receive the tariff at the rate determined by the Commission for the subsequent control period after the Order No. 2 of 2010 dated 29.1.2010 or the tariff agreed between the parties in the PPA, whichever is lower.

- 8.3. The tariff agreed to in the PPA was as decided by the Commission in Order No. 1 of 2010 wherein the benefit of accelerated depreciation was accounted for.
- 8.4. Since the generating station of the Petitioner was getting delayed and the Petitioner was not in a position to establish the generating station within the control period of the tariff order dated 29/01/2010, the Petitioner claimed extension of control period citing force majeure conditions including non-availability of approval under Section 89 (1) (a) of the Bombay Tenancy Act, 1998, non-availability of the Jantri rates, floods and adverse weather conditions etc. For the above purpose, the Petitioner had filed a petition being Petition No. 1145 of 2011 before the Commission.
- 8.5. In the said petition, the Petitioner had raised the issues regarding depreciation of rupee and cost of establishment going up, non-registration of land due to increase in Jantri rate and non-availability of Jantri rate, leading to delayed registration of conveyance deed and delay in availability of physical possession of land, flooding on the land, denial of permission to form SPV, payment of liquidated damages under the PPA, time difference between Phase 1 and phase 2 etc. The Petitioner claimed extension of control period and applicability of the tariff in terms of the

order dated 29/01/2010 passed by the Commission. The above petition filed by the Petitioner was dismissed by the Commission by order dated 27/01/2012.

- 8.6. The above order was challenged by the Petitioner before the Hon'ble Gujarat High Court in SCA No. 2942 of 2012 wherein the Petitioner sought the relief of quashing and setting aside the order dated 27/1/2012 and 29/01/2010 passed by the Commission. In the said petition, the Petitioner also raised various issues which were raised by the Petitioner in the Petition No. 1145 of 2011 including Jantri rates, non-availability of land for registration, possession of land etc.
- 8.7. Thereafter, issues arose between the Petitioner and GUVNL particularly with regard to the claim of GUVNL for payment of liquidated damages due to delay in establishment of project which was to be adjusted by GUVNL against the tariff payments to be made and the claim of tariff payments by the Petitioner without adjustment of liquidated damages. The separate petition being SCA No. 2406 of 2014 was filed by GUVNL before the Hon'ble Gujarat High Court.
- 8.8. In the matter of SCA No. 2942 of 2012 & SCA No. 2406 of 2014, the parties arrived at a settlement and in view of the same, both the SCAs filed by the Petitioner as well as GUVNL were disposed of by the Hon'ble Gujarat High Court vide order dated 26.02.2014, in the following terms:

*".....The contesting party, namely, Taxus Infrastructure and Power Projects Pvt. Limited and Gujarat Urja Vikas Nigam Limited has arrived at an amicable solution, which reads as under:*

- (i) That as per interim order dated 23.01.2014 of GERC passed in Petition No. 1364 of 2013, total amount payable of Gujarat Urja*

*Vikas Nigam Ltd. (GUVNL) to Taxus Infrastructure and Power Projects Pvt. Ltd. ("the Company" for short) under its invoices for the energy supplied to GUVNL during the period from 08.08.2013 to 31.01.2014, comes to the tune of Rs.2,16,19,776/-, whereas remaining amount of Rs.2 Crores will be adjusted by GUVNL against its claim of outstanding liquidated damages to the tune of Rs.3,94,50,000/- without prejudice to the rights and contentions of both the parties and subject to the outcome of the said petition No. 1364 of 2013;*

- (ii) Pending before GERC, further, GUVNL will start paying energy charges to the Company regularly for the supply of electricity from 01.02.2014 onwards;*
- (iii) That the performance bank guarantee of Rs.2.5 Crores submitted by the Company to GUVNL under PPA, shall not be encashed and shall be retained by GUVNL and the Company will keep on renewing the same from time to time till the Petition No.1364 of 2013 filed by the Company is decided.*
- (iv) Taxus Infrastructure and Power Projects Pvt. Limited shall be at liberty to challenge the order dated 29.01.2010 as well as the order dated 27.01.2012 passed by the GERC which are under challenge in the Writ Petition being Special Civil Application 2942 of 2012 before the Appellate Tribunal of Electricity, New Delhi. GUVNL shall not raise any objection with regard to delay in preferring the appeal since the company had availed an alternative remedy by way of writ petition being Spl. C.A. No. 2942 of 2012 before this Court and interim protection was granted by this court.*

*5. Considering the settlement arrived at between the parties, the following order is passed:*

*(i) The parties shall abide by the aforesaid consensus which is reflected here-in-above.*

*(ii) The Gujarat Electricity Regulatory Commission is hereby directed to decide the petition, being Petition No.1364 of 2013 filed by Taxus Infrastructure and Power Projects Pvt. Ltd., as expeditiously as possible, preferably within a period of four months from today and shall decide the issue which are raised therein and which may be raised in future by way of an amendment application including the issue relating to the*

*claim of GUVNL for liquidated damages as well as the claim of Taxus regarding payment of tariff.*

6. *In view of the settlement arrived at between the parties, the Appellate shall decide the appeal only on merits through the appeal may be filed at the belated stage.*
7. *In view of the aforesaid observations both the petitions, being Special Civil Application No. 2942 of 2012 filed by the Company Taxus Infrastructure and Power Projects Pvt. Limited as well as the Special Civil Application No. 2406 of 2014 filed by the Gujarat Urja Vikas Nigam Pvt. Ltd., are disposed of accordingly. Notice in Special Civil Application No. 2942 of 2012 shall stand discharged. Ad interim relief, if any, granted earlier shall stand vacated.*
8. *Since the main petition, being Special civil Application No. 2942 of 2012 is disposed of, consequently, Civil Application No. 2406 of 2014 also stands disposed of....”*

8.9. The respondent contended that the following issues cannot be claim by the petitioner in the present petition with regard to (a) Non-registration of land due to revision/re-revision in Jantri rates, (b) delayed in registration of land due to delay in permission under section 89 (1) (a) of Bombay Tenancy Act, 1958, (c) Denial of SPV permission, and (d) payment of liquidated damages under the PPA, since the above issues were part of the earlier Petition No. 1145 of 2011 filed by the petitioner on which the Commission has issued an order dated 27.1.2012 and rejected the petition of the petitioner. Thereafter, the petitioner filled SCA before Hon’ble High Court of Gujarat being SCA No. 2942 of 2012 in which the same issue were raised. The Hon’ble Gujarat High Court decided the said petition and directed the petitioner that the issue raised against order dated 27.1.2012 of the Commission be challenged before Hon’ble APTEL by filing an appeal, if the

petitioner desires. The petitioner has choose not to file an appeal therefore the petitioner is now not permitted to raise the same issue in the present petition because the earlier decision of the Commission has taken finality.

8.10. One of the claims of the Petitioner in the present petition is against the action of GEDA in regard to commissioning certificate issued by GEDA to the Petitioner that the project had attained COD on 08.08.2013. The present petition has been filed by the Petitioner under section 86 (1) (f) of the Electricity Act, 2003. Under Section 86 (1) (f), the Commission is vested with the jurisdiction of adjudication of disputes between a generating company and licensee. In the present case, the disputes have been raised by the Petitioner inter-alia with GEDA. GEDA is neither a generating company nor license with regard to the dispute raised by the Petitioner. Hence, the present petition is not maintainable.

8.11. In any event, as per the provision of PPA between the parties, the date of COD shall be reckoned from the certificate to be issued by GEDA. It is the responsibility of the petitioner to procure all the relevant approvals/consents/certificates including the certificate of commissioning from GEDA for deciding the date of commissioning of project. The GEDA certificate clearly states that the plant was commissioned and commercially available from 8.08.2013.

8.12. In terms of PPA as well as specific undertaking given by the petitioner requesting for extension of time, the petitioner is entitled to the tariff as applicable on date of commissioning of the project as per the certificate issued by GEDA. Further, the

petitioner is liable to pay liquidated damages to GUVNL for the period of delay from SCOD to actual date of commissioning as certified by GEDA.

8.13. One of the contentions raised by the Petitioner in the present petition is that generating station of the Petitioner was ready in all respects in the month of March, 2013 and all necessary approvals had been obtained by the Petitioner. It is the claim of the Petitioner that the commissioning was delayed beyond March 2013 due to wrongful actions on the part of the Respondents and therefore the generating station should be taken as being commissioned in the month of the March 2013 and the tariff that is applicable to the Petitioner should be as applicable in the month of March, 2013.

8.14. He has submitted that these contentions raised by the Petitioner are misconceived. Firstly, as submitted earlier, the PPA states that the tariff would be as applicable on the date of commissioning of project per the certificate issued by GEDA. Therefore, it is not open to the Petitioner to claim that the date of commissioning is otherwise than as provided in the certificate issued by GEDA and claim the tariff on that basis. In any event, it was not possible for the Petitioner to claim commissioning for the generating station in March 2013 when the permission of the Chief Electrical Inspector for energization of the project including the switchyard of petitioner was granted only on 03/04/2013.

8.15. As per the provision of PPA, the approvals/certificate to be obtained from the concerned authority is the sole obligation of the Petitioner. Further, the said certificate of the Chief Electrical Inspector is statutory certificate without which it is

not possible on the part of the Petitioner to claim commissioning of the generating station. In case the Petitioner seeks to declare energization, commissioning and commercial operation of the generating station without the statutory approval of the Chief Electricity Inspector, it would be illegal.

8.16. The petitioner has also contended that even though project was ready on 31/03/2013, it could not be commissioned on the same day since GETCO had “switched off “ the transmission line and had “switched on” the said line only at the later part of the day when solar radiation was not sufficient to generate electricity. The above, contention on the part of the petitioner is without any merit and baseless. The communications relied on by the Petitioner do not establish the commissioning of the generating station in the month of March 2013 as claimed. On the other hand till 03/04/2013, the Petitioner was not even permitted in law to energize the solar panels and transformers. In the circumstances, there can be no question of the generating station being commissioned or declared for commercial operation in the month of March, 2013.

8.17. It is also not correct that the Petitioner is being penalized on account of the in actions on the part of the Respondents, GETCO as claimed. It is stated that the 66 KV D/C Kaniyabe – Taxus solar project tower line and 2 nos. of 66 KV feeder bays for the said line under the Anjar Construction Division of GETCO was ready. The delay in commissioning of the project and charging of the line was on account of the reasons solely attributable to the Petitioner namely in regard to the connectivity with the project of Petitioner as Petitioners’ sub-station and associated equipment facilities were not ready by 31.03.2013 and not for any reason or factor

attributable to GETCO. Despite the line of GETCO being available, the project of the Petitioner was not commercially available for the reasons attributable to the Petitioner. The generating station was not ready in March, 2013 is also established by the fact that there was no generation of electricity from the entire generating capacity till 2<sup>nd</sup> April 2014 which is contrary to the claim of the petitioner that the project was ready in all respect on 31.03.2013.

8.18. In any event, the Petitioner was required to deal with the Gujarat Energy Transmission Corporation Limited in regard to establishment of evacuation facilities for conveyance of power from the Solar Power Project. The Petitioner was, therefore, to arrange for synchronization of the commissioning of the power project with the availability of the evacuation line. It was responsibility of the petitioner to undertake the erection, construction and completion of the generating project to enable its commissioning certified by GEDA and GUVNL has assumed no responsibility/ obligation in this regard.

8.19. In the circumstances, it is submitted that there is no case for the Petitioner to claim that the generating station should be considered as deemed to be commissioned in the March 2013.

8.20. It is submitted that the contention of the petitioner regarding the liquidated damages are misconceived and is a clear attempt on the part of the Petitioner to wriggle out of its binding obligations. The PPA was entered into between the parties on 08/12/2010. In terms of the PPA, generating station was to be

established by the Petitioner by 31/12/2011, which was the agreed scheduled commercial operation date.

8.21. In terms of Article 4.3 of the PPA, for any delay in the commissioning of the project beyond the Scheduled Commercial Operation Date would result in payment of liquidated damages on the terms as provided in Article 4.3. The said clause further provides that in case the delay is more than one year, GUVNL has no obligation under the PPA and is entitled to terminate the PPA.

8.22. In terms of the above, when the generating station was not commissioned by the Petitioner by 31/12/2012, which was the period of one year from the Scheduled Commercial Operation Date, there was no obligation whatsoever on the part of GUVNL to continue the PPA or to give any extension thereof.

8.23. The proceedings before the Hon'ble Gujarat High Court was also only in regard to the extension of the control period claimed by the Petitioner. The interim order of the Hon'ble Gujarat High Court was not to take coercive actions, which was in terms of not to invoke/en-cash the bank guarantee given by the Petitioner to recover the liquidated damages. There was no prohibition or any mandatory injunction for GUVNL to continue the PPA or to given extension to the Petitioner beyond 31/12/2012.

8.24. However, during the pendency of the writ petition, the Petitioner had approached the GUVNL to extend the term of the PPA with the specific representation that the petitioner will bring the project by 31/03/2013 and also agreeing to the tariff of Rs. 9.98 per unit for the first 12 years and Rs. 7 for the next 13 years as decided by the

Commission in its tariff order No. 1 of 2012 dated 27/01/2012 taking into the benefit of accelerated depreciation. It was also specifically stated by the Petitioner that it agrees to pay the liquidated damages from the Scheduled Commercial Operation Date agreed in the PPA up to the date of commissioning of the solar project, which was in lieu of the period extended by GUVNL as a special case. Thus, there were mutual obligations and considerations for this understanding arrived.

8.25. Though it is now sought to be claimed that this undertaking was given under coercion and was forced by GUVNL in violation of the interim order of the Hon'ble High Court and various other allegations has sought to be made against GUVNL, the same are baseless. The said undertaking was given voluntarily and to secure a financial benefit for the Petitioner in the extension of the period by GUVNL even though, in terms of PPA, GUVNL was not under any obligation to extend the same beyond one year from SCOD i.e. beyond 31.12.2012. Otherwise, if the undertaking was sought to be given under coercion or in violation of the order of the Hon'ble Gujarat High Court, the Petitioner would have approached the Hon'ble Gujarat High Court in contempt proceedings or otherwise against GUVNL. This was particularly when the proceedings in the SCA No. 2942 of 2012 were pending before the Hon'ble Gujarat High Court.

8.26. It was clearly understood by the Petitioner itself that it wanted a benefit to be extended by GUVNL and in consideration of the same the Petitioner had voluntarily and consciously agreed to pay the liquidated damages and also be entitled to the tariff at Rs. 9.98/- per unit which was the tariff taking into account the accelerated

depreciation benefit in terms of the Order No. 1 of 2012 dated 27/01/2012 of the Commission.

8.27. The Petitioner has sought to place substantial reliance on the word 'without prejudice' stated in the top of the undertaking dated 28/03/2013. The contentions raised on behalf of the Petitioner that the undertaking was without prejudice to the rights of the Petitioner and therefore the Petitioner is now entitled to avoid its obligations assumed is misplaced.

8.28. The undertaking stated 'without prejudice' in view of the fact that the Petitioner had undertaken obligations in view of GUVNL agreeing to extend the term of the commissioning under the PPA as a special case. The word "without prejudice" would mean that so long GUNVL did not extend the term as a special case for the Petitioner, the Petitioner did not have any obligation in terms of the undertaking. But however as GUVNL has acted in terms of the offer made by the Petitioner and extended the term, it is then not open to the Petitioner to claim that its obligations under the said document are not to be enforced but GUVNL will have to abide by its obligation of extension of the term. The extension of term was a subsequent obligation and in consideration of the Petitioner agreeing to pay the liquidated damages and claim tariff at Rs. 9.98/- per unit which the tariff was taking into account the accelerated depreciation benefit in terms of the Order No. 1 of 2012 dated 27/01/2012 of the Commission.

8.29. It is only in this context that the "without prejudice" appears, as would appear in any offer for settlement made between two parties who are under litigation. When

the parties have acted upon the settlement, it is then not open to one party to claim that its offer being without prejudice, it will not abide by the terms agreed by it and resile from the same whereas the other party is bound by its obligations in the same agreement.

8.30. In case the contention of the Petitioner is that it will not abide by its obligations under the undertaking, there is also no corresponding obligation of GUVNL to extend the term. The parties had undertaken certain obligations, for mutual consideration.

8.31. It is further submitted that the liquidated damages provided are a pre-estimated quantum of damages under PPA which the party in breach is liable to pay to the other party. The concept of liquidated damages particularly in a regulatory regime is that it may be impossible for assessment of actual damages and in the circumstances the parties pre-estimate the damages and provide for liquidated damages in the PPA. It is then not correct to assume that the liquidated damages are not payable or seek to go into whether there is actual damages or not.

8.32. The concept of liquidated damages is well settled in this regard. Reference in this regard may be had to the decisions of the Hon'ble Supreme Court in the cases of Bharat Sanchar Nigam Limited v. Reliance Communications Limited, (2011) 1 SCC 394, para 47 to 53; Oil and Natural Gas Corporation Limited v. Saw Pipes Limited, (2003) 5 SCC 705 at para 46 to 52.

8.33. The Petitioner had consciously and voluntarily agreed to the terms of the PPA and the terms of the order dated 29/01/2010 passed by the Commission. The

Petitioner had also agreed to the tariff considering the accelerated depreciation benefit which was the only tariff determined by the Commission in the order dated 29/01/2010. The Petitioner did not claim a project specific tariff or there was no issue raised whatsoever by the Petitioner at any point of time till the filing of the present petition claiming that the Petitioner is entitled to the tariff without considering the accelerated depreciation benefit. In fact even in the present case, the Petitioner is seeking to apply the tariff as per the tariff order dated 29/01/2010 which is considering the accelerated depreciation benefit.

8.34. As stated earlier, since the Petitioner has chosen not to challenge the order dated 29/01/2010 and 27/01/2012 of the Commission and has fully accepted the said orders, it is not open to the Petitioner at this stage to raise any of the issues that were earlier raised by the Petitioner in Petition No. 1145 of 2011 and rejected the same by the Commission through order dated 27/01/2012.

8.35. The Petitioner has however sought to amend the present petition filed before the Commission and once again raised the same issues which were raised earlier in Petition No. 1145 of 2011. These include the issues of non-registration of land, revision and re-revision in Jantri rates, flooding, and payment of liquidated damages under the PPA etc.

8.36. This goes against the specific order of the Hon'ble High Court pursuant to the settlement arrived at between the parties that the issues raised in Petition No. 1145 of 2011 which are rejected by the Commission by order dated 27/01/2012

could only be raised before the Hon'ble Tribunal and GUVNL shall not raise any issue in regard to delay in preferring the appeal before Tribunal at belated stage.

8.37. The order dated 27/01/2012 passed by the Commission in the Petition No. 1145 of 2011 of the Petitioner having attained finality, it is not open to the Petitioner to approach the Commission itself once again to raise the same issues. The issues having been settled between the parties and the orders having attained finality, the principles of res-judicata and constructive res-judicata squarely apply to the present case.

8.38. It is submitted that a similarly placed project developer, M/s. Yantra eSolar had also sought to challenge the order of the Hon'ble Commission dated 27.01.2012 on the very same issues being sought to be raised by the Petitioner herein. The said appeal came to be dismissed by the Hon'ble Appellate Tribunal on the question of delay and the second appeal before the Hon'ble Supreme Court also came to be dismissed.

8.39. The contentions of the Petitioner herein if allowed would result in a situation, wherein every project developer would be free to challenge the issues raised earlier and which were not considered/allowed in the order dated 27.01.2012, again before the Commission, despite the fact that the order dated 27.01.2012 has attained finality and may not be entertained in appeal by the Hon'ble Tribunal or the Hon'ble Supreme Court. This cannot be the position.

8.40. The only contention of the Petitioner to this argument is that the Hon'ble High Court has given liberty to the Petitioner to amend the Petition and raise all issues

and therefore these issues can also be gone into. This contention is misconceived. The Hon'ble High Court had allowed all issues to be raised, which can be raised in terms of law. This includes the question of liquidated damages claim of the GUVNL and the payment of tariff after adjusting the claim of GUVNL towards the liquidated damages. The Hon'ble High Court itself granted liberty to the Petitioner to challenge the order of the Hon'ble Commission before the Hon'ble Tribunal with a direction to GUVNL that the issue of limitation shall not be raised. Despite such specific liberty, the Petitioner chose not to file an appeal. The Petitioner having taken the voluntary and conscious decision, cannot seek to raise in the present proceedings the issues against the order dated 27.01.2012 or the issues raised in the Petition No. 1145 of 2011 which came to be rejected.

8.41. In the circumstances, it is submitted that the issues being sought to be raised by the Petitioner which were raised in the previous Petition No. 1145 of 2011 before the Commission cannot be raised by the Petitioner and the present petition is not maintainable and liable to be dismissed as such.

8.42. In the facts and circumstances mentioned above, the present petition is misconceived and liable to be dismissed the exemplary cost.

9.0. Based on the above submissions made by the parties, the following issues emerged for decision of the Commission:

1. Whether the claim of the petitioner to declare that its power plant was commissioned on 31/03/2013 is legal and valid?

2. Whether Force Majeure Event occurred in the present case? Whether the petitioner is eligible to get the relief in terms of Force Majeure Event as per the terms of the PPA?
3. Whether the petitioner is liable to pay the liquidated damages or not? If liable to pay liquidated damages, what will be amount of the liquidated damages?
4. Is the petitioner liable to pay liquidated damages for the period from 31.03.2013 and also eligible to receive the tariff @ of Rs. 9.98 per Unit as per the undertaking given by him on 03.06.2013? Is the undertaking given by the petitioner is void-ab-initio or not?
5. Is the petitioner eligible to receive the tariff for the energy injected into the grid from 31/03/2013 to 08/08/2013?
6. What tariff eligible to receive by the petitioner with consideration of commissioning of its project?
7. Whether the principle of Res-judicata provided under CPC, 1908 is applicable in the present case?
8. Whether the Commission has jurisdiction to adjudicate the dispute between the parties?
9. Is the energization of plant by the petitioner is without the approval of authorities concerned?

10.0. We have carefully considered the submissions made by the parties. In the present case, it is undisputed between the parties that the petitioner and the Respondent GUVNL have signed the Power Purchase Agreement on 08/12/2010 for sale/purchase of energy generated from 5 MW Solar PV Power Project set up by the petitioner. It was also agreed between the parties a tariff payable by the Respondent GUVNL @ Rs. 15/- per unit for initial 12 years and Rs. 5/- for remaining 13 years of the Power Project. It is also agreed between the parties that the petitioner shall require to commission the project on or before 31/12/2011. However, with consideration of control period specified in Order No. 2 of 2010 dated 29/01/2010, the petitioner could commission the project on or before 27/01/2012 to receive the tariff as stated in Article 5.2 of PPA. It is also undisputed between the parties that in case of delay in commissioning of the project beyond 27/01/2012, the petitioner is eligible for the tariff determined by the commission for the next control period with consideration of tariff determined by the Commission in its Order No.2/2010 dated 29/01/2010 by considering the lower tariff between the above two tariffs.

10.1. The petitioner had filed a Petition No. 1145 of 2011 for extension of control period decided by the Commission in its Order No. 2 of 2010 dated 29/01/2010. The said petition was dismissed by the Commission by its Order dated 27/01/2012. The Order dated 27/01/2012 of the Commission in Petition No. 1145 of 2011 was challenged by the petitioner by filing Special Civil Application No. 2942 of 2012 before the Hon'ble High Court of Gujarat.

10.2. During the pendency of the said SCA, the petitioner had filed the present petition before the Commission on 19.11.2013 praying to declare that the 5 MW Solar PV Power Plant of the petitioner was commissioned on 31/03/2013 instead of 08/08/2013 declared by the GEDA i.e. the Respondent No. 1. The petitioner had also claimed the tariff payable to it as per Order No. 1 of 2012 dated 27/01/2012 passed by the Commission in which the Commission had determined the tariffs for the projects availing the benefit of accelerated depreciation as well as those not availing these benefit. Control period of this order was 29.01.2012 to 31.03.2015. Later on, the petitioner filed an amendment petition and claimed the tariff @ Rs. 15 per Unit for initial 13 years and Rs. 5 per Kwh for remaining 12 years. The petitioner had also claimed the payment for the energy generated and injected into the grid for the period 31/02/2013 to 08/08/2013. The petitioner had also challenged the liquidated damages recovered/claimed by the Respondent to GUVNL.

10.3. During the pendency of the present petition, the Commission passed a daily order dated 23.01.2014 and decided that the petitioner is eligible to receive the payment for energy supplied by it from 08.08.2013 onwards in terms of the Article 6 of the PPA. The Commission had also decided and directed to the Respondent GUVNL to pay the amount as per the Order dated 27/01/2012 passed by the Commission for the energy supplied by the petitioner for the period 08/08/2013 onwards to the Respondent GUVNL.

10.4. The daily Order dated 23.01.2014 passed by the Commission in the present petition was challenged by the Respondent GUVNL before the Hon'ble High Court of Gujarat to declare that the said Order is illegal and invalid.

10.5. The Hon'ble High Court of Gujarat had after hearing the SCA No. 2942 of 2012 filed by the present petitioner and SCA No. 2406 of 2014 filed by the Respondent GUVNL, passed an Order dated 26.02.2014, based on the consensus agreements arrived between the parties. The relevant part of the decision of the Hon'ble High Court of Gujarat in the above petitions which is relevant in the present case is reproduced below:

*“4. The contesting party, namely, Taxus Infrastructure and Power Projects Pvt. Limited and Gujarat Urja Vikas Nigam Limited has arrived at an amicable solution, which reads as under:*

- (i) That as per interim order dated 23.01.2014 of GERC passed in Petition No. 1364 of 2013, total amount payable by Gujarat Urja Vikas Nigam Limited (GUVNL) to Taxus Infrastructure and Power Projects Pvt. Limited (“the Company” for short) under its invoices for the energy supplied to GUVNL during the period from 08.08.2013 to 31.01.2014, comes to the tune of Rs. 2,16,19,776/-, whereas remaining amount of Rs. Crores will be adjusted by GUVNL against its claim of outstanding liquidated damages to the tune of Rs.3,94,50,000/- without prejudice to the rights and contentions of both the parties and subject to the outcome of the said petition No. 1364 of 2013, pending before GERC. Further, GUVNL will start paying energy charges to the Company regularly for the supply of electricity from 01.02.2014 onwards.*
- (ii) That the performance bank guarantee of Rs. 2.5 Crores submitted by the Company to GUVNL under PPA, shall not be encashed and shall be retained by GUVNL and the Company will keep on renewing the same from time to time till the Petition No. 1364 of 2013 filed by the Company is decided.*

(iii) *Taxus Infrastructure and Power Projects Pvt. Limited shall be at liberty to challenge the order dated 29.01.2010 as well as the order dated 27.01.2012 passed by the GERC which are under challenge in the Writ Petition being Special Civil Application 2942 of 2012 before the Appellate Tribunal of Electricity, New Delhi. GUVNL shall not raise any objection with regard to delay in preferring the appeal since the company had availed an alternative remedy by way of writ petition being Spl. C.A. No. 2942 of 2012 before this Court and interim protection was granted by this court.*

5. *Considering the settlement arrived at between the parties, the following order is passed:*

- (i) *The parties shall abide by the aforesaid consensus which is reflected here-in-above.*
- (ii) *The Gujarat Electricity Regulatory Commission is hereby directed to decide the petition, being Petition No. 1364 of 2013 filed by Taxus Infrastructure and Power Projects Pvt. Limited, as expeditiously as possible, preferably within a period of four months from today and shall decide the issue which are raised therein and which may be raised in future by way of an amendment application including the issue relating to the claim of GUVNL for liquidated damages as well as the claim of Taxus regarding payment of tariff.*

3.0. *In view of the settlement arrived at between the parties, the Appellate Authority shall decide the appeal only on merits though the appeal may be filed at the belated stage.*

4.0. *In view of the aforesaid observations both the petitions, being Special Civil Application No. 2942 of 2012 filed by the Company Taxus Infrastructure and Power Projects Pvt. Limited as well as the Special Civil Application No. 2406 of 2014 filed by the Gujarat Urja Vikas Nigam Limited, are disposed of accordingly. Notice in Special Civil Application No. 2942 of 2012 shall stand discharged. Ad interim relief, if any, granted earlier shall stand vacated.*

*5.0. Since the main petition, being Special Civil Application No. 2942 of 2012 is disposed of, consequently, Civil Application No. 1491 of 2014 also stands disposed of."*

In the above decision, the Hon'ble Gujarat High Court allowed that the petitioner to approach the Hon'ble Appellate Tribunal for Electricity, if the petitioner wanted to challenge the Order dated 27/01/2012 in Petition No. 1145 of 2011 passed by the Commission and the Hon'ble Tribunal may grant the condonation for the time elapsed before the Hon'ble Gujarat High Court. It is also held that the petitioner is eligible to raise the dispute pertaining to tariff and other issues which may be related to PPA disputes between the parties before the Commission. It is also held that the GUVNL may raise the disputes pertaining to liquidated damages claimed by it.

10.6. In terms of the Order dated 26.02.2014 by the Hon'ble High Court of Gujarat in the aforesaid SCA, the petitioner requested the Commission to allow the amendment in the petition filed by him. The Commission allowed the same. Thereafter, the petitioner filed the amendment petition with the prayers as stated in para 1 above on 29.03.2014.

10.7. During the hearing, the issues emerged for the decision of the Commission with consideration of submissions made by the parties are enumerated in para 9 above.

**Commissioning Date of the project:**

10.8. We note that there is dispute between the parties pertaining to correct date of commissioning of the project as to whether it should be 31.03.2013 instead of

08.08.2013. We also note that the issues of force majeure period, SCOD, Commercial Operation date of project, liquidated damages, tariff receivable by the petitioner, amount for energy supplied during 31.03.2013 to 08.08.2013 from 5 MW Solar PV Power Projects are dependent on this issue. Hence, we decide this issue first.

10.9. In the present case, we note that the petitioner vide its letter dated 15/03/2013, informed the Chief Electrical Inspector (CEI), that its plant was ready for commissioning and requested the CEI to inspect the plant and grant permission for energization of the power plant. The relevant portions of the letter dated 15.03.2013 are reproduced below:

“.....

***TAXUS's Letter***

*Date: 15/03/2012*

***To  
The Chief Electrical Inspector,  
Government of Gujarat,  
Block No. 18, 6<sup>th</sup> Floor,  
Udhyog Bhavan, Sec-11,  
Gandhinagar***

*Sub: Approval for DC Solar Modules & Electrical installations of 5MWp. 70.0VmppDC solar panels comprising 37105 Nos. each having capacity of 95 Wp & 82.4 Vmpp DC solar panels comprising 15668 Nos. modules, each having capacity of 90Wp, 3 x 1.25 MVA 375V/11kv Transformers & 1 x 630 KVA 375V/11kv Transformer, 7 x 630KVA invertors along with associated equipment for 5MW Solar Power Plant of M/s Taxus infrastructure & Power Projects Pvt. Ltd., at Village – Rapar Khokra , Taluka – Anjar, Dist. Kutchh.*

*Dear Sir,*

*With reference to above, we would like to inform you that we are developing a solar PV Power plant at Rapar Khokhara, Anjar, Kutchh having capacity of 5MW.*

*We are ready with the 5 MW setup. The details of the equipment are given in the Annexure – A enclosed, forming part of this letter.*

*We request you to kindly approve the drawings and confirm the schedule of your visit, to our plant for verification and approval at your earliest....”*

10.10. From the above letter, it is apparent that the petitioner had informed the CEI through its letters dated 15.03.2013 about the readiness of its plant.

10.11. Pursuant to the above, the petitioner’s plant was inspected by the Dy. CEI on 29.03.2013 and the certificate for energization was issued vide letter No. CEI/T-1/P-2/SPP/0133/13/3654 dated 03/04/2013, which clearly implied that the petitioner’s 5 MW Solar Power Plant was ready for energization on 29.03.2013. The said letter reads as under:-

“.....

***Office of the Chief Electrical Inspector's Letter***

*CEI/T-1/P-2/SPP/0133/133/3654*

*Date: 03.04.2013*

*Sub: Initial inspection of Electrical Installation of 4.935095 MW Solar Power Plant comprise 15668 Nos Solar Modules having capacity of 90 Wp. 37105 Nos Solar Modules having capacity of 95 Wp and 7x 630 KWp 1000 VDC/375 VAC Inverters & 3 x 1250 KVA 375 -375V/11KV & 1 x 630 KVA 375-375 V/11 Kv inverter Transformers alongwith associated equipment for 5MWp Solar Power Plant of M/s. Taxus Infrastructure & Power Projects Private Limited, at Vill.- Rapar Khokhara, Ta.- Anjar, Dist: Kutch.*

*Ref: 1) This office letter no.: CEI/T1/P2/SOLAR/0133/13/2781 dated 16.03.2013.*

- 1) Your letter No. : UPPL/CEIG/049/05 dated 21.03.2013.*
- 2) Letter No. DCEI/MEH/SOLAR/917 dated 30.03.2013*

Sir,

Initial inspection of Electrical Installation of 4.935095 MW Solar Power Plant comprise 15668 Nos Solar Modules having capacity of 90 Wp. 37105 Nos Solar Modules having capacity of 95 Wp and 7x 630 KWp 1000 VDC/375 VAC Inverters & 3 x 1250 KVA 375 -375V/11KV & 1 x 630 KVA 375-375 V/11 Kv inverter Transformers alongwith associated equipment for 5MWp Solar Power Plant of M/s. Taxus Infrastructure & Power Projects Private Limited, at Vill.- Rapar Khokhara, Ta.- Anjar, Dist: Kutch has been carried out by the Dy. Chief Electrical Inspector, North Zone, Mehsana on 29.03.2013. The details of the same are as below:

- Solar PV Cells

Particulars	Solar PV Cells (Modules)	Solar PV Cells (Modules)
Make	QS Solar	QS Solar
Capacity	90 Wp	95 Wp
No. of Modules	15668	37105
Capacity	1.410120 MW	3.524975 MW

- 7 x 630 KW 1000 VDC/375 VAC Inverters

Particulars	Inverter
Make	Schneider Electric
Capacity	630 KW
Voltage	100 VDC/375 VAC
Sr. No.	7804213 to 7804219 {Total 7(Seven)}

- (3x1250 KVA & 1 x 630 KVA) 375-375 V/11 KV Inverter Transformers

Particulars	Transformer	Transformer
Capacity	1250 KVA	630 KVA
Make	Sudhir	Sudhir
Rated Voltage	375-375 V/11 KV	375-375/11 KV
Sr. No.	BO-12-273-1, BO-12-273-2, BO-12-273-3, {Total 3 (Three)}	BO-12-272

As provided in the Regulation 32 & 43 of Central Electricity Authority (Measures Relating to Safety & Electric Supply) Regulations, 2010, permission is hereby granted to energize the above Solar Panels & Transformers alongwith the associated equipments.....”

10.12. The above letter certifies that the Dy. CEI had visited the petitioner's 5 MW Solar PV Power Plant and observed that the Solar Panel and associate equipments were ready for energization on 29.03.2013 at the Petitioner's Power Plant and

accordingly the Chief Electrical Inspector had granted the approval of Solar Power Plant energization.

10.13. We also note that the Petitioner informed to the Respondent No.1 GEDA on 19.03.2013 that the Petitioner's 5 MW Solar Power Project was constructed and ready for commissioning and commercial operation. The said letter reads as under

:-

“.....

**TAXUS's Letter**

*March 19, 2013*

***The Dy. Director,  
Gujarat Energy Development Agency,  
4<sup>th</sup> Floor, Block No. 11/12, Udhyog Bhawan,  
Gandhinagar - 382017***

*Sub: REQUEST FOR COMMISSIONING OF 5MW SOLAR POWER PROJECT*

*Sir,*

*With reference to above we wish to inform you that our 5 MW Solar Power Project located at Village – Rapar Khokhara, Taluka - Anjar, Dist. Kutch, Gujarat is completed and is ready for commissioning. We have already applied for CEI Inspection, the acknowledgement copy of same is enclosed herewith.....”*

10.14. Subsequently, the petitioner vide its letter no. TAXUS/GEDA/2012-13/001 dated 20.03.2013 to the Director GEDA reiterated that its plant was ready for commissioning and necessary equipments of the plant were installed. However, the petitioner's sub-station was yet to be connected with GETCO sub-station, for which approval of concerned authorities for charging the same was expected by 25.03.2013. The petitioner had requested to the director of GEDA to visit the plant

and grant the approval for the same. Contents of the said letter is reproduced as under:

“.....

**TAXUS's Letter**

Date: 20.03.2013

To,  
The Director,  
Gujarat Energy Development Agency,  
4<sup>th</sup> Floor, Block No. 11/12, Udhog Bhavan,  
Gandhinagar.

*Sub: Document submission toward Requisition for commissioning of Solar Power Plant.*

*Dear Sir,*

*With reference to the subject cited above, that we have installed 5 MW capacity SPP at Village Rapar Khokhara, Anjar, Kutchh on privately owned land bearing survey No. 141,141/P1, 141/P2, 135/143/140/3. The project companies of 15668 numbers of modules of thin film make of Q solar rating 90 W each and 37105 Numbers of modules of Thin Film make of Sungen rating 95W each and 7 numbers of inverters of Schediners-xanterx make each of rating 630 KW rating as details given in enclosed table.*

*Our SPP is connected to the site substation at Kaniyabe bay Through 66 Kv Transmissions line as approved by the Electrical Inspector during his visit carried on 18.02.2013.*

*Our project site 66 KV substation is yet to be connected to GETCO 66 KV substation as we have applied for the permission to the concerned authority. As regards charging of 66 Kv site substations we have applied for the same and it is expected to be inspected on 25.03.2013. The same will be submitted to you before 31.03.2013 at your office or will be handed over to you at GEDA site visit.*

*We now intend to commission our SPP on 25.03.2013 we therefore request you to commissioning of our SPP on 25.03.2013 during which our officer shall also remain present.....”*

10.15. Further, the Respondent No. 3, GETCO, vide a letter dated 20/03/2013 informed the Chief Electrical Inspector that 66 KV D/C Kaniyabe – M/s. Taxus Solar Project tower line and 02 nos. of 66 KV feeder bay at 66 KV Kaniyabe sub-station were ready for commissioning and requested the CEI's approval to charged the same. The content of the said letter are reproduced below :-

“ .....

**GETCO's Letter**

12-13/DN/ANJAR/PRJ/TECH/S-13/5621

Date: 20.03.2013

To,  
The Chief Electrical Inspector,  
Office of the Chief Electrical Inspector,  
Block No. 18, 6<sup>th</sup> Floor, Udhog Bhavan,  
Sector 11, Gandhinagar – 382017.

.....

Respected Sir,

*With reference to the subject above it is to inform you that GETCO has erected 66 KV Kaniyabe – Ms/. Taxus Solar Project line and 02 nos. of 66 KV feeder bay at 66 KV Kaniyabe s/s. This office has submitted proposal for approval vide above ref. no. 1 & 2. We have received drawing approval vide above ref no. 3 & 4. This office has received demand note for the inspection of said line & feeder bays vide above ref. no. 5.*

*Accordingly this office has deposited inspection fee vide above ref. no. 6 & 7. You are requested to give your kind approval for the charging of the 66 KV D/C Kaniyabe – M/s. Taxus Solar Project tower line & 02 nos. of 66 KV feeder bay at 66 KV Kaniyabe s/s. Please issue same as early as possible for further process from our end.....”*

*EE (Construction)  
GETCO Anjar.....”*

10.16. The transmission system associated with the power plant was energized on 30/03/2013 and they were switched off from the GETCO sub-station at 19:20 Hours as stated in letter No. 12-13/DN/ANJ/PRJ/Tech/9-13/5843 dated 30.03.2013 from the Executive Engineer (Const), GETCO, Anjar to the Superintending Engineer, Circle Office, GETCO, Anjar. The content of said letter are as under:

“ .....

*Sub: Erection of D/C panther tower line on ACSR dog conductor from 66 KV Kaniyabe to solar plant M/s. Taxus Infrastructure Power Project Pvt. Limited, Ta: Anjar, Dist: Kutch – To charge the line in test condition thereof.*

*With reference to the subject above it is to inform you that D/C panther tower line on ACSR dog conductor from 66 KV Kaniyabe substation to solar plant M/s. Taxus Infrastructure Power Project Pvt. Limited, Ta: Anjar, Dist: Kutch was charged today i.e. on dated 30.03.2013 at 18:55 hours and stood ok. The line is charged up to gantry of solar power plant Limited. The details are as under:*

- 1) Name of line: D/C panther tower line on ACSR dog conductor from 66 KV Kaniyabe substation to solar plant M/s. Taxus Infrastructure Power Project Pvt. Limited.*
- 2) Length of line: 2 x 2 2.310 km*
- 3) Date & Time of charging: 30.03.2013 at 18:50 & 18:55 Hours respectively*
- 4) Date & Time of Switch off: 30.03.2013 at 19:20 Hours....”*

10.17. In response to the letters dated 19.3.2013 and 20.03.2013 of the petitioner, the officials of Respondent No. 1 GEDA visited the Petitioner’s project on 31.03.2013. However, when they reached at project site at about 10:30 a.m., they found that the D/C transmission line from the project site to 66 KV Kaniyabe S/S of GETCO, which

was charged at 6:55 p.m. on dated 30.3.2013, was switched off on 7:20 p.m. by GETCO. The said line was again charged by GETCO only at 4:35 p.m. and transformer and Ring Main Unit (RMU) were charged at 6:20 pm on 31.3.2013. Due to inadequate sun radiation, the Solar PV Plant could not go into generation mode and the recording of power in the energy meter was not possible.

10.18. From the above, it is established that

- (i) The petitioner had been approaching the CEI and GEDA for approval of its project since 18.03.2014.
- (ii) The CEI inspected the plant on 29.03.2013, and it is evident from its letter dated 03.04.2013, the plant was ready in all respect on 29.03.2013.
- (iii) The 66 KV line connecting the petitioner's plant to the nearby GETCO sub-station, which was the responsibility of GETCO, was also ready on 20.03.2013.
- (iv) The said 66 KV lines were charged at 18.50 and 18.55 hours on 30.03.2013.
- (v) The 66 KV line was switch off by GETCO at 19.20 hours on 30.03.2013.
- (vi) The GEDA official visited the project site on 31.03.2013, and observed that the 66 KV was not charged.
- (vii) The GETCO could charge the line only at 16.35 hours and the RMU was charged at 18.20 hours.
- (viii) By this time, the solar radiation had reduced to the extent that the solar plant could not generate power on 31.03.2013.

10.19. We are, therefore, of the view that though the petitioner’s plant was ready for charging, it could not be commissioned by 31.03.2013 due to the reasons not attributable to it at all.

10.20. We also note that the plant of the petitioner had injected the energy into the grid from 1.4.2013 onwards continuously which is recorded in the ABT complaint meter installed at the petitioner plant and the same was continued up to 8.8.2013, which was not disputed by the respondents. Some of the data from the data submitted by GETCO regarding the generation of energy from the petitioner’s plant are stated in table below:

“ .....

		<i>Line - 1</i>	<i>Line - 2</i>	<i>Total</i>
	<i>TIME</i>	<i>6TXS-KBE-</i>	<i>6TXS-KBE-</i>	<i>INJ TAXUS</i>
	<i>BLOCK</i>	<i>1M</i>	<i>2M</i>	<i>SOLAR</i>
<i>31/3/2013</i>	<i>73</i>	<i>0</i>	<i>-0.00144</i>	<i>-0.00144</i>
	<i>74</i>	<i>0</i>	<i>-0.00144</i>	<i>-0.00144</i>
	<i>75</i>	<i>0</i>	<i>-0.00252</i>	<i>-0.00252</i>
	<i>76</i>	<i>0</i>	<i>-0.00252</i>	<i>-0.00252</i>
	<i>77</i>	<i>0</i>	<i>-0.00288</i>	<i>-0.00288</i>
	<i>78</i>	<i>0</i>	<i>-0.00252</i>	<i>-0.00252</i>

.....

		<i>Line - 1</i>	<i>Line - 2</i>	<i>Total</i>
	<i>TIME</i>	<i>6TXS-KBE-</i>	<i>6TXS-KBE-</i>	<i>INJ TAXUS</i>
	<i>BLOCK</i>	<i>1M</i>	<i>2M</i>	<i>SOLAR</i>
<i>31/3/2013</i>	<i>93</i>	<i>0</i>	<i>-0.00252</i>	<i>-0.00252</i>
	<i>94</i>	<i>0</i>	<i>-0.00252</i>	<i>-0.00252</i>
	<i>95</i>	<i>0</i>	<i>-0.00216</i>	<i>-0.00216</i>
	<i>96</i>	<i>0</i>	<i>-0.00252</i>	<i>-0.00252</i>
<i>31/3/2013 Total</i>		<i>0</i>	<i>-0.05832</i>	<i>-0.05832</i>

.....

		<i>Line - 1</i>	<i>Line - 2</i>	<i>Total</i>
--	--	-----------------	-----------------	--------------

	<i>TIME</i>	<i>6TXS-KBE-</i>	<i>6TXS-KBE-</i>	<i>INJ TAXUS</i>
	<i>BLOCK</i>	<i>1M</i>	<i>2M</i>	<i>SOLAR</i>
<i>1/4/2013</i>	<i>1</i>	<i>0</i>	<i>-0.00252</i>	<i>-0.00252</i>
	<i>2</i>	<i>0</i>	<i>-0.0018</i>	<i>-0.0018</i>
	<i>3</i>	<i>0</i>	<i>-0.0018</i>	<i>-0.0018</i>
	<i>4</i>	<i>0</i>	<i>-0.00216</i>	<i>-0.00216</i>
	<i>5</i>	<i>0</i>	<i>-0.00216</i>	<i>-0.00216</i>

.....

		<i>Line - 1</i>	<i>Line - 2</i>	<i>Total</i>
	<i>TIME</i>	<i>6TXS-KBE-</i>	<i>6TXS-KBE-</i>	<i>INJ TAXUS</i>
	<i>BLOCK</i>	<i>1M</i>	<i>2M</i>	<i>SOLAR</i>
<i>1/4/2013</i>	<i>36</i>	<i>0</i>	<i>0.01332</i>	<i>0.01332</i>
	<i>37</i>	<i>0</i>	<i>0.04716</i>	<i>0.04716</i>
	<i>38</i>	<i>0</i>	<i>0.6156</i>	<i>0.6156</i>
	<i>39</i>	<i>0</i>	<i>0.07992</i>	<i>0.07992</i>
	<i>40</i>	<i>0</i>	<i>0.07308</i>	<i>0.07308</i>

.....

		<i>Line - 1</i>	<i>Line - 2</i>	<i>Total</i>
	<i>TIME</i>	<i>6TXS-KBE-</i>	<i>6TXS-KBE-</i>	<i>INJ TAXUS</i>
	<i>BLOCK</i>	<i>1M</i>	<i>2M</i>	<i>SOLAR</i>
<i>1/4/2013</i>	<i>71</i>	<i>0</i>	<i>0.08928</i>	<i>0.08928</i>
	<i>72</i>	<i>0</i>	<i>0.05508</i>	<i>0.05508</i>
	<i>73</i>	<i>0</i>	<i>0.03672</i>	<i>0.03672</i>
	<i>74</i>	<i>0</i>	<i>0.02088</i>	<i>0.02088</i>
	<i>75</i>	<i>0</i>	<i>0.01908</i>	<i>0.01908</i>

.....

		<i>Line - 1</i>	<i>Line - 2</i>	<i>Total</i>
	<i>TIME</i>	<i>6TXS-KBE-</i>	<i>6TXS-KBE-</i>	<i>INJ TAXUS</i>
	<i>BLOCK</i>	<i>1M</i>	<i>2M</i>	<i>SOLAR</i>
<i>1/4/2013</i>	<i>92</i>	<i>0</i>	<i>- 0.00576</i>	<i>- 0.00576</i>
	<i>93</i>	<i>0</i>	<i>-0.054</i>	<i>-0.054</i>
	<i>94</i>	<i>0</i>	<i>-0.00504</i>	<i>-0.00504</i>
	<i>95</i>	<i>0</i>	<i>-0.0054</i>	<i>-0.0054</i>
	<i>96</i>	<i>0</i>	<i>-0.00468</i>	<i>-0.00468</i>
<i>1/4/2013 Total</i>			<i>6.99624</i>	<i>6.99624</i>
		<i>Line - 1</i>	<i>Line - 2</i>	<i>Total</i>
	<i>TIME</i>	<i>6TXS-KBE-</i>	<i>6TXS-KBE-</i>	<i>INJ TAXUS</i>
	<i>BLOCK</i>	<i>1M</i>	<i>2M</i>	<i>SOLAR</i>
<i>7/4/2013</i>	<i>1</i>	<i>-0.00216</i>	<i>-0.00216</i>	<i>- 0.00432</i>

	2	-0.00252	-0.00216	-0.00468
	3	-0.00252	-0.00216	-0.00468
	4	-0.00252	-0.0018	-0.00432
	5	-0.00216	-0.00144	-0.0036

.....”

From the above, it is established that on 01.04.2013, the plant started generation at about 09:00 hours and continued to generate till about 18:45 hours.

From the above, it is evident that the plant was ready for commissioning on 29.3.2013, as confirmed by Respondent No. 4, CEI in its certificate dated 3.4.2013. Based on inspection dated 29.3.2013 due to delay in charging of transmission lines (charged at 16:35 Hours) and RMU (charged at 18:20 Hours), the petitioner’s plant could not generate any power on 31.03.2013 due to inadequate solar radiation. This fact was confirmed even by Respondent No. 2 GUVNL in its Letter No. GUVNL/Com/Solar/991 dated 30.5.2013 written to the petitioner, which is reproduced below:

*“As conveyed by GEDA through letter dated 3<sup>rd</sup> May, 2013, the project of M/s. Taxus could not be commissioned on extended time limit of 31<sup>st</sup> March, 2013. As on 31<sup>st</sup> March, 2013, the project capacity of 4.93 MW (out of 5 MW) was ready in all respect. The transmission line charged on 31.3.2013 at 16.35 Hrs. and thereafter transformer and RMU Charged at 18.20 Hrs. Owing to inadequate sun radiation, the plant could not go into generation mode and hence recording of power was not possible and hence the plant could not be commissioned on or before 31.3.2013.”*

10.21. The Chief Electrical Inspector and the representative of GETCO have also admitted that the plant was ready for commission on 29.3.2013 and 30.3.2013. From the

verification of documents on record and letters of representative of CEI and letters of representative of GETCO and the energy recorded in the energy meters submitted by the GETCO with its reply dated 26.02.2014, it is clear case that the petitioner's plant was ready for commissioning on 31.03.2013. However, the respondents have relied on the Certificate No. GEDA/SOLAR/TAXUS/2013/08/2495 dated 17.8.2013 issued by the GEDA declaring that the petitioner plant was commissioned on 8.8.2013.

10.22. We now examine the validity of the said certificate. The GEDA, in its affidavit, has confirmed the fact that its representative visited the project site for witnessing and verifying commissioning of the power project. However, when their team reached the site, the transmission line connecting the power project to the GETCO S/S was not charged. The petitioner was asked to contact GETCO authorities to charge the line, and in the meantime, the commissioning team inspected the entire installation of the solar power plant, including the solar modules, invertors, switchyard and the sub-station. The transmission line was charged at 16.35 hours, the transformers at 17.55 hours and the 11 KV feeder and RMS was charged at 18.20 hours. Subsequently, all the seven investors were also charged, but the plant could not go into generation mode due to inadequate solar radiation. As such, the power plant could not be commissioned on 31.03.2015.

10.23. However, the GEDA has failed to explain the inordinate delay in issuing the commissioning certificate upto 17.08.2013 that too after the petitioner's representation dated 10.05.2013 requesting for the Commissioning certificates.

10.24. In the present case, we observe and note that the GEDA which is the State Nodal Agency for promotion of Renewable Energy Sources failed to perform the duty cast upon it. In the present case, the representative of the GEDA though visited on 31<sup>st</sup> March 2013 and found that the plant was not able to generate the electricity on 31<sup>st</sup> March 2013 due to lower solar radiation and non connectivity of the transmission system with the power plant, no effective step was taken by it. The GEDA has also not taken any effective action against the representation made by the petitioner on 10.05.2013 and to declare that its plant was commissioned on 31.03.2013. There is no reply of GEDA on above submissions made by the petitioner who invested huge amount in the solar energy project, which is Renewable Energy Source Project. There is no explanation of GEDA on which ground and on which reasons they have issued the commissioning certificate on 8.8.2013 without any subsequent visit to the project. The GEDA has further refused to the guidelines issued by it for setting up the Solar Power Plant, which it has prescribed certain pre-requisites for commissioning of the solar plants. But, the fact that the GEDA team visited and inspected the petitioner's plant on 31.03.2013, proves that either all the pre-requisites were either fulfilled or were waived. Thus, the whole litigation arose in the present case due to negligent performance and failure to fulfill duty cast upon GEDA by the State as well as the Commission in various provisions of orders and regulations. We therefore, direct to GEDA to act as per the provision of orders of the Commission in future scrupulously, without fail.

10.25. We note that the energy generated from the 5 MW of the Solar Power Project of the petitioner w.e.f. 01.04.2013 and injected into the grid was supplied to the GUVNL.

This energy which was supplied by the GUVNL through its subsidiary companies viz, PGVCL, DGVCL, MGVCL, and UGVCL to the consumers of licensees and earned revenue from it during the period from 01.04.2013 to 08.08.2013. Therefore, the petitioner is eligible to receive payment for this energy at the tariff decided in the present petition for the period from 31.03.2013 to 08.08.2013.

10.26. Based on the above observations, we decide that the petitioner is entitled to declare its plant commissioned on 31.03.2013. The energy injected from the plant from 01.04.2013 as recorded in the ABT complaint meter at the petitioner place and also reflected in the Energy Accounting done by the SLDC be treated as sale of energy to the respondent GUVNL.

10.27. Having decided that the petitioner's plant is deemed to have been commissioned on 31.03.2013 and in view of the fact that actual energy generation started for 01.04.2013,

10.28. The Commission passed the Order No. 2 of 2010 dated 29.01.2010 in which the Commission has decided that it is the duty of the Power Procurer and GETCO to create the necessary transmission network from the Power Producer i.e. Solar Power Project to the GETCO's Sub-Station for evacuation of power. Thus, the duty has been cast upon the GETCO to crate necessary infrastructure of transmission line for evacuation of power generated from the power plant. Any delay in providing necessary transmission system for evacuation of power can, therefore, be not allowed to adversely affect the interests of the power producer. In the present case, we note that the petitioner's plant was ready for commissioning/energization as per the CEI inspection, however, the

same was not energized for commission on 31.03.2013 due to non-availability of transmission system.

10.29. We also note that in Petition No. 1126 of 2011 and allied matter, the respondent GUVNL admitted that in case of the plant is ready for commissioning but if the transmission system is not available in that eventuality, it is deemed that the plant is commissioned and the plant developer is eligible to receive the tariff prevailing on the respective date. Relevant portion of the said order dated 27.01.2012 of the Commission in the above petition reproduce below:

*“.....During the hearing Shri M.G. Ramchandran on behalf of GUVNL had assured that those projects ready for commissioning but not commissioned due to non-availability of evacuation system could be entitled to the existing tariff. In the order of the Commission dated 27.1.2011, the following details are recorded: “..... as regards the non-availability of evacuation facility by GETCO, learned advocate Shri M.G. Ramchandran, on behalf of the respondent, assured during the hearing on 30.9.2011 that if any solar project is ready for commissioning, but could not be commissioned due to non-availability of evacuation system, it shall be entitled to the tariff determined by the Commission in its order No.2 of 2010 dated 29.1.2010. However, such tariff shall be applicable to only those projects that have applied to GETCO for construction of evacuation system and the evacuation facility is not made ready by GETCO. This shall also be available to such projects who have been asked to create evacuation system by GETCO, but could not complete the same due to reasons not attributed to the project developers. He suggested that such developers should contact GEDA for completion certificate.”*

10.30. We therefore, decide and declare that the respondent GUVNL is required to pay the tariff as prevailing on 31.03.2013. We allow the petitioner to raise bill/invoice to the respondent GUVNL for the energy as recorded in the ABT complaint meter and as also reflected in the energy accounting carried out by the SLDC. We also decide and direct

the respondent GUVNL to make the payment of the bills/ invoices raised by the petitioner within 15 days from the receipt of the bills issued by the petitioner.

10.31. The next issue is regarding claim of the respondent on liquidated damages. The respondents have claimed the liquidated damages from the petitioner for delay in commissioning of the petitioner's power project, a part of which the respondents have already recovered from the bills raised by the petitioners. On the other hand, the petitioner has claimed that the delay in commissioning of the plant was due to Force Majeure events, and hence, it is not liable to pay any liquidated damages. As such, the primary issue required to be decided by the Commission is as to whether in terms of PPA any force majeure event has occurred in the present case.

10.32. The petitioner has submitted that the delay in commissioning of its project was due to the following reasons, which constitutes the force majeure conditions in terms of the PPA:

- (i) Delay in Government of Gujarat's permission for implementation of the project through a Special Purpose Vehicle (SPV).
- (ii) Delay in registration of land sale deeds,
- (iii) Delay in granting statutory approval under Section 89 A of the Bombay Tenancy and Agriculture Lands (Vidarbha Region and Kutch Area) Act, 1958.

10.33. The petitioner has submitted that all the above events constitute the force majeure events and as such the delay of 402 days, which is due to the above events, may be ignored while deciding the SCOD of the project. In order to decide this issue, it is necessary to refer the relevant provisions of the PPA, which are discussed below:

***“....Article 8 of the PPA***

### **8.1 Force Majeure Events:**

*(a) Neither Party shall be responsible or liable for or deemed in breach hereof because of any delay or failure in the performance of its obligations hereunder (except for obligations to pay money due prior to occurrence of Force Majeure events under this Agreement) or failure to meet milestone dates due to any occurrence of any of the following:*

- (i) acts of God;*
- (ii) typhoons, floods, lightning, cyclone, hurricane, drought, famine, epidemic, plague or other natural calamities;*
- (iii) acts of war (whether declared or undeclared), invasion or civil unrest;*
- (iv) any requirement, action or omission to act pursuant to any judgment or order of any court or judicial authority in India (provided such requirement, action or omission to act is not due to the breach by the Power Producer or TPL of any Law or any of their respective obligations under this Agreement);*
- (v) inability despite complying with all legal requirements to obtain, renew or maintain required licenses or legal approvals;*
- (vi) earthquakes, explosions, accidents, landslides; fire;*
- (vii) expropriation and/or compulsory acquisition of the Project in whole or in part by Government Instrumentality;*
- (viii) chemical or radioactive contamination or ionizing radiation; or*
- (ix) damage to or breakdown of transmission facilities of GETCO / TPL;*
- (x) exceptionally adverse weather condition which are in excess of the statistical measure of the last hundred (100) years.*

### **(b) Force Majeure Exclusions:**

*Force Majeure shall not include the following conditions, except to the extent that they are consequences of an event of Force Majeure:*

- 2. Unavailability, Late Delivery or Change in cost of plants and machineries, equipment, materials, spares parts or consumables for the project;*
- 3. Delay in performance of any contractor / sub contractor or their agents.*
- 4. Non performance resulting from normal wear and tear experience in power generation materials and equipments*
- 5. Strike or Labour Disturbances at the facilities of affected parties*
- 6. In efficiency of finances or funds or the agreement becoming onerous to perform, and*
- 7. Non performance caused by, or concerned with, the affected party's'*

- I. *Negligent and intentional acts, errors or omissions;*
- II. *Failure to comply with Indian law or Indian Directive; or*
- III. *Breach of, or default under this agreement or any Project agreement or Government agreement.....”*

.....

8.2. *Available relief for a force majeure event:*

*No party shall be breach of its obligation pursuant to this agreement to the extent that the performance of its obligations was prevented, hindered or delayed due to a force majeure for avoidance of doubt neither parties obligation to make payments of money due and payable prior to occurrence of the force majeure event under this agreement, shall be suspended for excuses due to occurrence of force majeure event in respect of such party.....”*

**FORCE MAJEURE EVENT:**

10.34. The Approvals defined in Article 1 as under:

*“... Approvals mean the permits, clearances, licensees and consents as are listed in Schedule 3 here to and any other statutory approvals...”*

The above definition state that the approval means the permit, clearances, licensees and consents which are listed in Schedule 3 in the PPA or any other statutory approvals.

10.35. The Commercial Operation Date, is defined in the PPA as under :-

*“...Commercial operate date ‘with respect to the project shall mean the date on which the Solar Photovoltaic Grid Interactive Power Plant is available for commercial operation (certified by GEDA) and such date as specified in a written notice given at least 10 days in advance by the power producer...”*

The above provision states that the Commercial Operation Date (COD) is the date on which the power project is available for commercial operation as certified by the GEDA.

10.36. The construction default, is defined in the PPA as under:

*“...Construction default shall mean failure to begin commercial operation by 31.12.2011 or failure to commence construction within 6 months following execution of this agreement...”*

The construction default is defined as the failure of the power producer if fail to begin the commercial operation by 31.12.2011 or to commence construction within 6 months following execution of the agreement.

10.37. The force majeure event is defined in the PPA as under:

*“... Force Majeure Event shall have meaning set forth in Article 8...”*

Thus, meaning of the force majeure event is to be derived from the provisions of the Article 8.

10.38. It is also necessary to refer scheduled COD which reads as under :-

*“Scheduled COD or Scheduled Commercial Operation Date means 31/12/2011”*

The above definition state that the Scheduled Commercial Operation Date which was agreed between the parties was 31/12/2011. On combined reading of Commercial Operation Date and Scheduled Commercial Operation Date, it transpires that parties to the PPA agreed that the Solar PV Power Plant of the

petitioner should achieve the Commercial Operation Date as per schedule up to 31/12/2011.

10.39. Article 2 of the PPA which relates to Licenses, Permits and Conditions Precedent and relevant portion of this Article reads as under:

“.....Article 2: Licenses, Permits and Conditions Precedent:

2.1. *The Power Producer, at its sole cost and expense, shall acquire and maintain in effect all clearances, consents, permits, licenses and approvals required from time to time by all regulatory/statutory competent authority (ies) in order to enable it to perform its obligations under the Agreement. GUVNL will render all reasonable assistance to the Power Producer to enable the latter to obtain such clearances without any legal obligation on part of GUVNL.*

*Provided, however, non-rendering or partial rendering of assistance shall not in any way absolve the Power Producer of its obligations to obtain such clearances. Nor shall it mean to confer any right or indicate any intention to waive the need to obtain such clearances.....”*

The above Article provides that it is the obligation on the part of petitioner i.e. power producer to acquire the land and get clearances, permits, approval from the relevant statutory/Regulatory competent authorities in order to enable him to perform the obligation under the agreement. Moreover, the Respondent GUVNL, who is the power procurer, will render reasonable assistances in the above obligation of the power producer i.e. petitioner.

10.40. It is also necessary to refer Article 3.1 and 3.2 which pertains to construction and operation and reads as under:-

“.....Article 3: Construction and Operation:

*3.1. The Power Producer shall complete the construction of the project on or before the Scheduled Commercial Operation Date.*

*3.2. For the purposes of such completion of the project, the Power Producer and GUVNL shall together endeavor to ensure that all Approvals pursuant to Article 2.1 are cleared within the Commercial Operation Date.....”*

10.41. Article 3.1 state that the power producer, i.e. the petitioner shall complete the construction of the project before Scheduled Commercial Operation Date. Article 3.2 state that the power producer i.e. the petitioner and the respondent GUVNL shall together ensure that all approvals pursuant to Article 2.1 are cleared within the commercial operation date.

10.42. Article 4.1 of the PPA pertains to obligation of the power producer. Article 4.1(i) provides for the obligation of the power producer to obtain all statutory approvals, clearance etc. the said article reads as under:-

*“.....Article 4: Undertakings*

*4.1. Obligations of the Power Producer:*

*(i) The Power Producer shall obtain all statutory approvals, clearances and permits necessary for the project at his cost in addition to those approvals as listed in Schedule 3.*

The above article provides that it is the obligation on the part of power producer (petitioner) to obtain all statutory approvals, clearances and permits necessary for the project in addition to the approval listed in scheduled 3 of the PPA.

10.43. As Article 4.1 (i) of the PPA, a reference has been made to schedule 3 of the PPA.

Hence, it is necessary to refer the same which reads as under :-

“.....

*SCHEDULE 3*

*APPROVALS*

1. *Consent from the GETCO for the evacuation scheme for evacuation of the power generated by the 5 MW Solar Photovoltaic Grid Interactive Power Projects.*
2. *Approval of the Electrical Inspectorate, Government of Gujarat for commissioning of the transmission line and the Solar Photovoltaic Grid Interactive Power converters installed at the project site.*
3. *Certificate of Commissioning of the Solar Photovoltaic Grid Interactive Power Project issued by GEDA.*
4. *Permission from all other statutory and non-statutory bodies required for the project.*
5. *Clearance from the Airport Authority of India, if required.*
6. *Clearance from the Department of Forest, Ecology and Environment, if required.....”*

Clause 4 of the schedule 3 provides that the project developer (petitioner) is required to obtain the approval/permission from statutory and non-statutory authorities required for the project.

10.44. The petitioner had set up the Solar PV Power Plant based on the Letter of Intent (LOI) issued by Government of Gujarat. The Government of Gujarat framed the Solar Power Policy 2009 with regard to promotion of Solar based Power generation in the State set up in the State. The said policy also provides that GEDA and Gujarat Power Corporation Limited shall facilitate in obtaining clearances and approvals which are in purview of the State Government of Gujarat.

10.45. As the petitioner had raised the issue of Force Majeure on account of non-availability of statutory approvals from statutory authorities and the Government

officials, for the land procured by the petitioner. We deal with the above issue first as under.

10.46. It is undisputed between the parties that the petitioner signed the PPA on 08.12.2010 in the name of M/s. Taxus Infrastructure and Power Projects Pvt. Limited. Thereafter, he had applied dated 10.01.2011 to the EPD, Government of Gujarat, who had issued the LOI to the petitioner, to allow the petitioner to execute the project through SPV. However, the same was denied by the Government of Gujarat vide its letter dated 01.04.2011 without assigning any reasons for the same. We note that the absence of decision regarding the permission for execution of the Project through SPV created uncertainty regarding purchase of land, obtaining the term-loan, signing of EPC contract etc. The petitioner was not able to decide as to whether to initiate above actions in its own name or in the name of the proposed SPV. It proves that the aforesaid period during which the petitioner was unable to decide and purchase the land and also to applying for the loan to the financial institution, is beyond the control of the petitioner. Thus, an uncertainty continued in absence of approval from the Government officials about setting up the plant by the petitioner, which was beyond the control of the petitioner and the same qualifies as a Force Majeure Event.

10.47. Now, we deal with the issue raised by the petitioner with regard to delay in obtaining the necessary land for the project although the petitioner had taken made all necessary efforts for the same. The petitioner contended that the MOU was signed for procurement of agriculture land for establishing the power plant by signing the agreement with the farmers for Sale/Purchase of land during the month

of March, 2011. In support of above submissions, the petitioner had submitted the MOU dated 28/29 March, 2011 on stamp papers signed by the farmers as the register banakhat for purchase/sale of agriculture land having area of 32 acre with farmers for the land of Village Rapar Khokhara, Taluka Anjar, Dist Kutch.

10.48. We note that after signing of register banakhat while carry out the Sale Deed it is necessary to pay the Jantri rate determined by the Government of Gujarat for such procurement/sale of the land. We note that the Government of Gujarat issued GR No. STP/12209-769-11-H.1 dated 31/03/2011 and revised the Jantri rate for procurement/sale of agriculture land. The said GR states that change in the Jantri rate are effective from 01.04.2011. The Jantri rate revised by the Government of Gujarat was too high, which led to agitation across the State. But the said GR did not declare the Jantri Rates for non-agriculture land.

10.49. Consequent upon lager number of representations received from the public at large, the State Government revised the Jantri Rates vide GR No. STP/12209-8540-11-H-1 dated 18.04.2011. Though the Jantri Rates were reduced w.e.f. 18.04.2011, the new GR once again failed to notify the Jantri Rates for non-agriculture land. Since, the land purchased by the petitioner was non-agriculture land, it was not allowed to be registered in the name of the petitioner.

10.50. Recognizing the difficulties faced due to non- availability of Jantri rates for non-agriculture land, the Government of Gujarat vide its Notification No. STP-122009-1027 dated 11/05/2011 framed the policy for provisional registration of title deed of agriculture land for industrial purpose. Moreover, aforesaid circular/GR provides that the conveyance deeds of agricultural land acquired for non-

agriculture land may be accepted/registered by the concerned authority on the following conditions :-

- (i) Conveyance deed required to be submitted with an affidavit to the effect that upon notification of Jantri Rate, 2011 for non-agriculture purposes, the appropriate value shall be paid by the concerned parties;
- (ii) Until such notification conveyance deed will be kept pending; and
- (iii) The above arrangements will continue till Jantri rate 2011 comes into effect for non-agriculture purposes;

10.51. We also note that the MOUs for land dead were signed by the petitioner on 28-29/03/2011. However, the sale/conveyance deed could not be registered by the Sub-Registrar, Anjar which was accumulated by Sub-Registrar, Anjar in its letter dated 26/07/2011. The relevant portion of the said letter re-produced below :-

“.....

*Date: 26.07.2011*

“...To

*Taxus Infrastructure & Power Project Private Ltd.,  
Director Punit Singh Rana,  
Residence Prashant Vihar, Ist Floor,  
Out Ring Road, New Delhi – 110 085.*

- 1. Mouze Rapar, Tal. Anjar, Survey No. 141, 141/1 and 141/2 which land sale deed No. 8146/2011 recorded.*
- 2. Mouze Rapar, Tal. Anjar, Survey No. 135 land sale/conveyance deed No. 8137/2011 recorded.*
- 3. Mouze Rapar, Tal. Anjar, Survey No. 143, sale/conveyance deed No. 8142/2011 recorded.*

*The documents for the above properties are received for registration, but due to non-decision of Jantri rate for industrial purpose, the above sale/conveyance deeds are pending for registration.....”*

*Sd/-  
Sub-Registrar, Anjar...”*

10.52. The petitioner wrote a letter dated 16/08/2011 to the Deputy Commissioner, Revenue, Bhuj, Gujarat and stated that it has procured 32 acres land and done registry on 06/06/2011 and the same were submitted to the Sub-Registrar, Anjar for registration. However, he is unable to execute the sale deed in absence of new Jantri rate. He has also stated that in absence of new Jantri rate, the petitioner is unable to execute the projects and start generation from 31/12/2011. It affects the execution of the project, and hence, immediate intervention of the Dy. Commissioner, Revenue, Bhuj, Gujarat was sought by the petitioner. It is also stated that 3 ½ (Three and Half) months had already passed after the land purchased by the petitioner. However, due to non-availability of Jantri rate, the land is not registered in company name and the petitioner’s project is affected. The relevant portion of the said letter dated 16.08.2011 reads as under:

*“.....*

***Taxus***

*Ref. No. TIPPPPL/2011-12/09/49*

*Date: 16.08.2011*

*To,  
The Deputy Commissioner (Revenue)  
Bhuj, Gujarat.*

*Sub: Non-Availability of Jantri Rate*

*Sir,*

.....

*For the same we had purchased 39 Acres of land bearing survey Nos. 140/3, 690/28, 143, 135, 141 in Village Rapar, Taluka – Anjar, Distt. Kutchh. Registries of Survey Nos. 135,141,143 are herewith attached (Annexure- C) admeasuring 32 Acres. These registries are being done on date 06.06.2011 & lying with Sub-Registrar, Anjar. He is unable to execute these sale deeds in the absence of New Jantri Rates. Sir, as per the PPA, it is clear that we have to start generation by 31<sup>st</sup> December 2011. Non- execution of sale deed is becoming a great deterrent for Project Progress. This is a matter which needs your immediate attention for intervention and for resolving.*

*We as developers have invested substantially on the project. Our project progress is greatly affected by non-availability of Jantri rate as we can not execute sale deed. Three and half months have been elapsed since we had purchase the land. These irrevocable losses of time will surely affect the deadline of the project. It is matter of high priority that meets to be addressed. How can developers of power project be allowed to face such problems? We request for resolving the matter.....”*

Thus, the aforesaid letter recognized that though the petitioner purchased the agricultural land but the sale/purchase deed not registered due to non-availability of decided Jantri rate by the Government of Gujarat.

10.53. Ultimately, after the Jantri rate issue was resolved, the sale deed was registered on 28.11.2013. In support of this, the petitioner has submitted copies of the certificate of stamp duty and the registered sale deed.

10.54. From the above discussions, it is evident that after signing the PPA on 8.12.2010, the petitioner initiated action for acquiring the requisite land and signed the MOU with the land owners on 28<sup>th</sup> and 29<sup>th</sup> March, 2011. After, the issue of SPV was settled in the form of denial by the State Government on 01.04.2011, the petitioner approached the authorities for registration of land. However, in the meantime the Government of Gujarat had revised the Jantri Rates through GR dated 31.03.2011. The high rates of

Jantri as well uncertainty over the Jantri Rates for non-agricultural land had created a situation, wherein the registration of sale deed got delayed up to 28.11.2013. This delay was definitely beyond the control of the petitioner.

10.55. The third ground for delay in execution of plant is stated as the delay in grant of permission under section 89 (1) (A) of the Bombay Tenancy and Agricultural lands (Vidarbh Region and Kutch area) Act 1958. In this regard, it is observed that the petitioner had purchased the aforesaid land from the agricultural farmers to set up the 5 MW Solar PV Power Plant on it. Therefore, prior to utilization of agriculture land for non agriculture purpose and as the land is situated in Kutch District of Gujarat, the approval u/s 89(1) (A) of the Bombay Tenancy and Agricultural lands (Vidarbh Region and Kutch area) Act 1958, is required from the Collector of the Kutch District Moreover, for utilization of agriculture land for non agriculture purpose i.e. Industrial purpose it is necessary to obtain statutory approval u/s. 65 and 66 of the Land Revenue Code of the Gujarat. The approvals as stated above are the statutory approvals from the Government of Gujarat for utilization of agriculture land. Non availability of above approval from the concerned officials lead to delay in the project set up by the petitioner.

10.56. In the present case, the petitioner has arranged to procure private agricultural land through MOUs with the land owners for the purpose of construction of the Solar PV Power Project. The petitioner submitted that he is required to obtain an approval under 89(1)(A) of the Bombay Tenancy and Agricultural lands (Vidarbh Region and Kutch area) Act 1958, read with Rule 45 from the Collector/ Dy. Collector of the

Kutch prior to procurement of agricultural land for the industrial purpose. Hence it is necessary to refer to section 89(1)(A) of The Bombay Tenancy and Agricultural lands (Vidarbha Region and Kutch area) Act, 1958 which reads as under:

*CHAPTER – VIII RESTRICTIONS OF TRANSFERS OF AGRICULTURAL LANDS AND ACQUISITION OF HOLDINGS AND LANDS*

*“89. Transfers to non-agriculturists barred.-*

*(1) Save as provided in this Act, - (a) no sale (including sales in execution of a decree of a Civil Court or for recovery of arrears of land revenue or for sums recoverable as arrears of land revenue), gift, exchange or lease of any land or interest therein, or (b) no mortgage of any land or interest therein, in which the possession of the mortgaged property is delivered to the mortgagee, [or] [(c) no agreement made by an instrument in writing for the sale, gift, exchange, lease or mortgage of any land or interest therein.] shall be valid in favour of a person who is not an agriculturist or who being an agriculturist cultivates personally land not less than three family holdings whether as [owner] or tenant or partly as [owner] or partly as tenant or who is not an agricultural laborer:*

*Provided that the Collector or an officer authorised by the State Government in this behalf may grant permission for such sale, gift, exchange, lease or mortgage, [or for such agreement] in such circumstances as may be prescribed: [Provided further that no such permission shall be granted, where land is being sold to a person who is not an agriculturist for agricultural purpose, if the annual income of such person from other source exceeds five thousand rupees.].*

*(2) Nothing in this section shall be deemed to [prohibit the sale, gift, exchange or lease or the agreement for the sale, gift, exchange or lease, of] a dwelling house or the site thereof or any land appurtenant to it in favour of an agricultural labourer or an artisan.*

*(3) Nothing in this section shall apply to a mortgage of any land or interest therein effected in favour of a co-operative society as security for the loan advanced by such society. (4) Nothing in Section 90 shall apply to any sale made under sub-section (1).*

The above section of the Act provides that the agriculture land in the district of Kutch can be transferred to a non-agriculturist person, only after permission for the same is granted under the first proviso by the Collector or an officer authorized by the State Government. As such, in the present case, permission under this section is mandatory and statutory.

10.57. It is a fact that The Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch area) Act, 1958, read with Rule 45 thereof are the Act and Rules made by the legislature and the provisions of the same are mandatory in nature which are required to be followed by the person concerned. As the above Act and Rules framed under it were passed by the legislature, they are statutory provisions in the eye of law. Section 89 of the above Act, recognizes that the collector or other person authorized by the state government is empowered to grant permission for transfer of agricultural land to non agriculturist. Thus, the collector or the officer authorized by the state government is a statutory authority who grants the permission. The permission /approval granted by the above authority is a statutory permission/approval as it is under the provision of the said Act.

10.58. In the present case, the petitioner had applied for the permission under section 89 (1) (A) of the Bombay Tenancy and Agricultural lands (Vidarbha Region and Kutch area) Act 1958 on 18.10.2011/05.11.2011 to the Deputy Collector/Collector of Kutch. The Deputy Collector, Anjar vide letter No. JMN/Ganot-89/VASI/222/1/2012 dated

18.02.2012 granted the approval under section 89 (1) (A) of the Bombay Tenancy and Agricultural lands (Vidarbha Region and Kutch area) Act, 1958.

10.59. Thus, the time elapsed between 18.10.2011/05.11.2011 to 18.02.2012 is the time passed in obtaining the statutory/Government approvals from the concerned authorities, u/s. 89 (1) (A) of the Bombay Tenancy and Agricultural lands (Vidarbha Region and Kutch area) Act 1958.

10.60. Based on the above observations, we decide that the time elapsed between 25/28.03.2011 to 18.02.2012 is the time passed in obtaining the statutory/Government approvals from the concerned authorities to purchase the agricultural land for industrial purpose and to utilize it for industrial purpose to set up Solar Power Plant, which was not in the control of the petitioner.

10.61. Having decided that the reasons given by the petitioner in obtaining approvals/permissions as mentioned in para 10.32 above, were beyond the control of the petitioner, we shall now examine whether there can be construed as Force Majeure events in terms of the PPA. Relevant portions of Article 8 of the PPA, dealing with Force Majeure are reproduced below:-

***“....Article 8 of the PPA***

**8.1. Force Majeure Events:**

*(a) Neither Party shall be responsible or liable for or deemed in breach hereof because of any delay or failure in the performance of its obligations hereunder (except for obligations to pay money due prior to occurrence of Force Majeure events under this Agreement) or failure to meet milestone dates due to any occurrence of any of the following:*

*(i) acts of God;*

- (ii) typhoons, floods, lightning, cyclone, hurricane, drought, famine, epidemic, plague or other natural calamities;
- (iii) acts of war (whether declared or undeclared), invasion or civil unrest;
- (iv) any requirement, action or omission to act pursuant to any judgment or order of any court or judicial authority in India (provided such requirement, action or omission to act is not due to the breach by the Power Producer or TPL of any Law or any of their respective obligations under this Agreement);
- (v) inability despite complying with all legal requirements to obtain, renew or maintain required licenses or legal approvals;
- (vi) earthquakes, explosions, accidents, landslides; fire;
- (vii) expropriation and/or compulsory acquisition of the Project in whole or in part by Government Instrumentality;
- (viii) chemical or radioactive contamination or ionizing radiation; or
- (ix) damage to or breakdown of transmission facilities of GETCO / TPL;
- (x) exceptionally adverse weather condition which are in excess of the statistical measure of the last hundred (100) years.

**(b) Force Majeure Exclusions:**

Force Majeure shall not include the following conditions, except to the extent that they are consequences of an event of Force Majeure:

1. Unavailability, Late Delivery or Change in cost of plants and machineries, equipment, materials, spares parts or consumables for the project;
2. Delay in performance of any contractor / sub contractor or their agents
3. Non performance resulting from normal wear and tear experience in power generation materials and equipments
4. Strike or Labour Disturbances at the facilities of affected parties
5. In efficiency of finances or funds or the agreement becoming onerous to perform, and
6. Non performance caused by, or concerned with, the affected party's'
  - I. Negligent and intentional acts, errors or omissions;
  - II. Failure to comply with Indian law or Indian Directive; or
  - III. Breach of, or default under this agreement or any Project agreement or Government agreement.....

.....

**8.2 Available relief for a force majeure event:**

No party shall be breach of its obligation pursuant to this agreement to the extent that the performance of its obligations was prevented, hindered or delayed due to a force majeure for avoidance of doubt neither parties obligation to make payments of money due and payable prior to occurrence of the force majeure event under this agreement, shall be suspended for excuses due to occurrence of force majeure event in respect of such party.....”

10.62. The above Article provides that the different events which are beyond the reasonable control of the party to perform the obligation cast upon them are qualified as Force Majeure Event. Further, the word “including” appearing in the Article 8.1 above indicates that the list of events mentioned therein is not exhaustive but inclusive. Therefore, the situation/conditions which are similar in nature of the event specified in Article 8.1 and occurring due to reasons beyond the reasonable control of the party qualify as Force Majeure events. It is also necessary to refer the Article 8.1 (b) which state about Force Majeure exclusion events. We also note that Article 8.1 (i) (v) of the PPA provides that any inability despite complying with all legal requirements to obtain for maintain license or legal approval which leads to delay or failure in the performance of obligation by the party concerned of the PPA be considered as Force Majeure event. The petitioner and Respondent GUVNL consciously agreed that any delay in obtaining legal approval is to be considered as a Force Majeure Event.

10.63. Article 8.2 provides for the relief available in the event of Force Majeure. Article 8.2 state that in the event of Force Majeure, the time elapsed (delay) due to such event, shall not be treated as a breach of agreement and as such the period of such delay is to be suspended while evaluating the time period required to fulfill by the party concerned.

10.64. It is necessary to refer the Article 4.1 of the PPA pertains obligation of the power producer. Article 4.1(i) provides for the obligation of the power producer to obtain all statutory approvals, clearance etc. the said article reads as under:-

*“.....Article 4: Undertakings*

*4.1. Obligations of the Power Producer:*

*(i) The Power Producer shall obtain all stator approvals, clearances and permits necessary for the project at his cost in addition to those approvals as listed in Schedule 3.*

The above article provides that it is an obligation on the part of power producer (petitioner) to obtain all statutory approvals, clearances and permits necessary for the project in addition to the approval listed in scheduled 3 of the PPA.

10.65. Clause (4) of the Schedule 3 state that it is duty of Power supplier (petitioner) to obtain the statutory and government approvals which are necessary for project. On combined reading of Article 8 and clause (4) of Schedule 3, it transpires that the delay in obtaining the statutory approval and approval from the Government officials as stated in schedule 3 of the PPA be construed as a Force Majeure Event.

10.66. We also note that the Hon’ble Supreme Court of India has in its Judgment in case of the Ramala Sahkari Chini Mills Ltd. v. CCE, (2010) 14 SCC 744, at page 750, decided regarding the word “include” an interpretation of the same which is re-produced below;

*“.....14. Similarly, in ESI Corpn. v. High Land Coffee Works, another three-Judge Bench of this Court had observed that: (SCC pp. 619-20, para 7)*

*“7. ... The amendment is in the nature of expansion of the original definition as it is clear from the use of the words ‘include a factory’. The amendment does not restrict the original definition of ‘seasonal factory’ but makes addition thereto by inclusion. The word ‘include’ in the statutory definition is generally used to enlarge the meaning of the preceding words and it is by way of extension, and not with*

*restriction. The word 'include' is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used, these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import but also those things which the interpretation clause declares that they shall include."*

*15. Therefore, it is trite that generally the word "include" should be given a wide interpretation as by employing the said word, the legislature intends to bring in, by legal fiction, something within the accepted connotation of the substantive part. (Also see CIT v. Taj Mahal Hotel; Indian Drugs & Pharmaceuticals Ltd. v. ESI Corpn. and T.N. Kalyana Mandapam Assn. v. Union of India) It is also well settled that in order to determine whether the word "includes" has that enlarging effect, regard must be had to the context in which the said word appears. [See South Gujarat Roofing Tiles Manufacturers Assn. v. State of Gujarat; R.D. Goyal v. Reliance Industries Ltd. and Philips Medical Systems (Cleveland) Inc. v. Indian MRI Diagnostic and Research Ltd.]....."*

From the above Judgment, it transpires that the Hon'ble Supreme Court held that the word "includes" is used in the Statue, generally to enlarge the meaning of the preceding words and it is by way of extension and not with restriction. The word "include" is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the Statute and when it is so used, these words or phrases must be construed as comprehending, not only such things as they signify according to their natural impact. It is not limited to the provisions stated in the agreement or Statue but the same can be applicable for similar situations which specified in the clause of agreement where the word "included" used.

10.67. Moreover, the words "beyond the reasonable control of the party" stated in the said article is also relevant in this case because the person who has to perform the duty

cast upon it be able to carry out and perform the duty as stipulated in the agreement. We note that the approval requires towards (i) permission under U/s. 89 (1)(A) of Bombay Tenancy and Agricultural Land (Vidarbha Region and Kutch Area) Act, 1958, (ii) registration of sale deed etc. are the statutory approval and approval from Government of Gujarat under the relevant provisions of revenue law of the State. We also note that Article 8.1 (a) (v) of the PPA provides that inability despite complying all legal requirements to obtain, renew or maintain required license is a ground for Force Majeure. It is well settled principle that whenever any disputes arises between the parties with regard to provisions of the agreement, it is necessary to read the agreement as a whole with its relevant provisions and give effect to them. In the present case, it is an obligation on part of the petitioner to obtain permission from all statutory and non-statutory bodies and Government of Gujarat officials which are necessary for the project as per the Clause 4 of the Schedule 3 read with Articles 2.1, 3.2 and 4.1(i) of the PPA. The petitioner is under mandatory obligation to obtain the permission which is required from statutory and non-statutory bodies.

10.68. We also note that the petitioner had applied to the Government officials for allowing the petitioner that the project be implemented by the SPV created by the petitioner. However, the same was denied after considerable delay by the Government. It, therefore, qualifies as a Force Majeure Event because clarity about the project executing agency, i.e. whether it is to be executed by the petitioner or SPV, it is necessary prior to execution of the project for purchase of land, term-loan

etc. Hence, the delay from 10.01.2011 to 01.04.2011 also qualifies as force majeure event.

10.69. From the above, it is clear that the petitioner was under obligation to procure the land, get the clearance from statutory authorities and Government of Gujarat necessary under the statues and various provisions of revenue law of the State of Gujarat. The PPA recognized that it is an obligation on part of the petitioner as a project developer to obtain the statutory approvals and approval from Government of Gujarat officials etc. as per the provisions of clause 4 of Schedule 3 of the PPA. Thus, it is mandatory for the petitioner to obtain the necessary statutory approval for their project. Land is the most critical and important item for the construction of the project by the petitioner. Moreover, the title of the land in the name of the petitioner is necessary prior to start the construction activity, as well as it is also necessary for him whenever it approached to financial institutions for receiving the term loan for the project. In the present case, as noted in earlier para, the petitioner had procured the land by signing MOU on 28/03/2011 and 29/03/2011 with the farmers after signing the PPA on 28.11.2011. However, the sale deed/conveyance deed for sale/purchase of land was delayed due to uncertainty about the Jantri rates payable on such sale deed. Moreover, the sale deed was not registered by the Sub-Registrar as stated in earlier para up to 28.11.2011. Thereafter, the approval under section 89 (1) (A) of the Bombay Tenancy and Agricultural Land (Vidarbha Region and Kutch Area) Act, 1958, was received by the petitioner from Collector on 18.02.2012. The time elapsed in obtaining the above statutory approvals due to (i) non-clarity of Jantri rate for purchase of agricultural land, (ii) non- registration of

sale/conveyance deed, (iii) time for approval under section 89 (1) (A) of the Bombay Tenancy and Agricultural Land (Vidarbha Region and Kutch Area) Act, 1958, is beyond the control of the petitioner and it qualify as a Force Majeure Event in terms of Article 8.1(a)(v) read with Clause 4 of schedule 3 of the PPA.

10.70. We also note that the petitioner had applied for the term loan for the project to IREDA. The IREDA granted the sanction of the term loan on 21.11.2011 as per their sanction letter dated 29.07.2011. The IREDA and petitioner have entered in agreement for term loan on 21/11/2011. However, the term loan was not released by the IREDA due to non-availability of land for the project which was finally got approved by the Dy. Collector on 18/02/2012, though the petitioner had signed MOU for procurement of land on 28/03/2011 and 29/03/2011. It is also noted that in anticipation of necessary approvals from the Government of Gujarat and release of loan by IREDA, the petitioner had placed EPC contract on M/s. Schneider Electric Pvt. Limited on 30.05.2011. The loan assent and placement of EPC Contract clearly shows that petitioner was genuinely trying to execute the project within the specific time period, but could not do so due to force majeure events.

10.71. The respondent has contended that the petitioner had raised the same issues in petition No.1145 of 2011, which was rejected by the Commission, vide order dated 27.01.2012. Since, the above order has attained finality, the petitioner cannot raise the same issues again the present petition. In this connection, we observe that the petition No. 1145 of 2011 was filed by the petitioner seeking extension of control period of the order No. 2 of 2010 dated 29<sup>th</sup> January, 2010. This petitioner was one of a bunch of

petitioners, all seeking similar prayers, and hence were disposed of by a common order dated 27.01.2012. Though some of the petitioner had raised the issue of uncertainty about Jantri Rates, none of them had raised the issue of force majeure. Some of the relevant portion of the order dated 27.01.2012 are reproduced below.

“ .....

*5.2 The above petition is similar to other petitioners which have asked for extension of the control period. Though, unlike other petitioners, he has mentioned adjudication of dispute under the PPA. Some other petitioners such as those in Petition Nos. 1145, 1146, 1147, 1148, 1164, 1169, 1171, 1179 and 1182 of 2011 and 1186 of 2012 have requested for extension of the SCOD and non-levy of liquidated damages, in addition to extension of control period. However, none of these petitioners has provided any information as to whether he has taken recourse to resolution of disputes in accordance with the provisions of the PPA before approaching the Commission. During the hearing also the petitioners did not furnish any such detail. In view of this, we treat these petitions as petitions seeking extension of the control period and not for adjudication of disputes under the PPA.*

.....

*14.3 Article 5.2 of the PPA provides, inter alia, that “..... Above tariff shall apply for power projects commissioned on or before 31 December 2011. In case, commissioning of Solar Power Projects is delayed beyond 31 December 2011, GUVNL shall pay the tariff as determined by Hon’ble GERC for Solar Projects effective on the date of commissioning of Solar Power Projects or above mentioned tariff, whichever is lower”. This means that if the project is not commissioned within the stipulated period the existing tariff or the new tariff whichever is lower will apply. The petitioners have consciously agreed to this provision by signing the PPA. The Commission has already circulated on 1 November 2011 a discussion paper for determining tariff for Solar Projects for the second control period which is to start from 29 January 2012. The tariff suggested is lower than the current tariff. The petitioners have sought extension of the control period in order to prevent the application of a lower tariff in the event of not being able to commission the project within the stipulated period. The reasons given by them are project specific. The situations of various projects are widely different. In some cases, the projects are at an advanced stage. In some other cases, the projects are at an initial stage, and in some cases even the order for*

*equipment is yet to be issued. Some of them have asked for one month and some others have asked as long as six months. The petitioners have not been able to show that there has been a problem which is industry-wide and spread over the whole State or a major part of the State, necessitating an extension of the control period. On the other hand, a number of projects have been commissioned or are likely to be commissioned within the control period indicating that the issues raised by the petitioners are not industry-wide. If some developers could not complete the projects, it is not adequate justification why the tariff order should be modified for extending the control period to give relief to some project developers. This becomes more anomalous especially when a discussion paper has already been issued, and public hearing has already been completed for issue of the tariff order for the next control period. Further, the issues which they have raised can, if they so desire, be addressed by the parties concerned only within the framework and the terms and conditions of Power Purchase Agreement. If they invoke Force Majeure condition, it is for them to establish the existence of such conditions, following the procedure prescribed in the PPA. There cannot be a general order for addressing such issues which are specific to some individual project developers, especially when several others have successfully implemented their projects.”*

.....”

10.72. The Order of the Commission dated 27.01.2012 in said Petition No. 1145 of 2011 was challenged by the petitioner before the Hon'ble High Court of Gujarat by filing SCA No. 2942 of 2012. In the said SCA, the Hon'ble High Court passed an Order dated 26.02.2014 stated in para 10.5 above. The Hon'ble High Court of Gujarat decided and directed the Commission to decide the issues raised by the petitioner in the Petition No. 1364 of 2013 filed by the petitioner as expeditiously as possible including the issues raised in amendment petition. We note that in Petition No. 1364 of 2013, the petitioner raised the issues/disputes the said petition i.e. (i) billing disputes, (ii) liquidated damages disputes, (iii) commissioning date of the project, (iv) tariff receivable by the petitioner etc. As far as the disputes pertaining

to Order dated 27/01/2012 of the Commission in Petition No. 1145 of 2011 is concerned, the petitioner have liberty to approach to the Hon'ble Appellate Tribunal for Electricity for appeal against the Commission's Order.

10.73. In view of the above, we observe that the subject matter of earlier petition No. 1145 of 2011 and the present Petition No. 1364 of 2013 are distinctly different from each other and the pleas of the respondent reading non-maintainability of the present petition on above grounds is misleading and hence, rejected.

10.74. In the present case, since the issue involved is regarding occurrence of the force majeure events, it is necessary to refer the following judgments of the Hon'ble APTEL and this Commission, which are relevant in this case as under:

I) Judgment of Hon'ble Appellate Tribunal dated 4.2.2014 in Appeal No. 123 of 2012 and I.A. No. 396 of 2012 in case of GUVNL V/s. GERC and others.

*16. As per the Force Majeure clause, neither party shall be responsible or liable for breach because of any delay or failure in performance of its obligations or to meet the milestone dates due to event or circumstances beyond the reasonable control of the party. The Force Majeure Events include inability to obtain legal approvals by a party despite complying all legal requirements to obtain the required legal approvals.*

*17. Article 8.1(b) describes the Force Majeure Exclusions i.e. the events not included as Force Majeure. The list of exclusions inter alia, includes non-performance caused by party's negligent and intentional acts, errors or omissions.*

18. Article 8.2 provides for the relief for a Force Majeure Event. According to Article 8.2, a party shall not be in breach of its obligations to the extent of delay due to Force Majeure Event.

19. Thus, as per the PPA, inability despite complying all legal requirements to obtain required legal approvals falls under the Force Majeure Events. Let us examine whether the delay in obtaining land and water linkage clearances/ approvals by Cargo Solar fall under the Force Majeure Event and whether there was delay in obtaining the land and water clearance/approvals despite Cargo Solar complying with all legal requirements for obtaining such approvals.

.....

22. We notice that Solar Power Policy 2009 of the State Government notified on 6.1.2009 stipulates that the GEDA, the Government agency for development of renewable energy sources and Gujarat Power Corporation Ltd. shall be the State Government nodal agencies for facilitation and implementation of Solar Power Policy. These nodal agencies will facilitate and assist the project developers. They will also undertake the activities which include the identification of suitable locations for Solar Projects, in preparing a land bank and requirement of erection/up-gradation of connecting infrastructure to the project site and facilitate in arranging right of way, water supply and in obtaining clearances and approval which are in the purview of the State Government. In pursuance of the State Government Policy, Cargo Solar was allocated to set up a 25 MW Solar Thermal Power Project in the State.

.....

24. We find that the PPA defines the "Approvals" means the permits, clearances, licenses and consents as listed in Schedule 3 and any other statutory approvals. Schedule 3 of the PPA includes 'permission from all other statutory and non-statutory bodies required for the Project' besides the specific consents and approvals listed therein. Article 8.1

*stipulating events of Force Majeure clearly include inability of a party obtains legal approvals despite complying with all legal requirements to obtain such approvals.*

*25. As rightly held by the State Commission, the approval required from District Collector under Section 89 of the Bombay Tenancy and Agriculture Lands (Vidharbh Region and Kutch Area) Act, 1958 and obtaining environmental clearance and CRZ clearance from the Ministry of Environment & Forest under the Environment (Protection) Act, 1986 are the legal approvals required for acquisition of agricultural land and use it for the purpose of setting up the solar power project and for meeting the requirement of water required for the project from the identified water source respectively. Such approvals will fall within the definition of 'approvals' as given under the definition and 'Legal Approvals' as given under article 8.1 (a) (v) of the PPA. The delay in obtaining these approvals despite Cargo Solar complying with all legal requirements to obtain these approvals would fall within the Force Majeure Events under clause 8.1(a)(v) of the PPA.*

.....

*27. Undoubtedly the obligation to obtain the statutory approvals, clearances, etc. and bearing the cost of obtaining such approvals lies with the Project Developer according to the PPA. However, the question here is not that whether it is not the obligation of the Project Developer i.e. Cargo Solar to obtain such approvals but whether the delay in obtaining such approvals from the Government instrumentalities despite the Project Developer complying with the legal requirements to obtain such approvals would be covered under Force Majeure Event or not. Thus, we do not find force in the argument of the learned counsel for the Appellant that the delay in obtaining the above approvals for land and water linkage would not qualify for inclusion under Force Majeure Event.....*

.....

44. *Learned counsel for the Appellant has argued that it was open to Cargo Solar to put up the project in any area other than Kutch as the procurement of land in Kutch required the approval of the Collector under Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch Area) Act, 1958 with Rule 45 thereof. We do not find any force in this argument. The project developer had freedom to select appropriate land and technology as per the State Government Policy and the State Commission's order dated 29.1.2010. The PPA dated 30.4.2010 entered into between Cargo Solar and GUVNL also defines the Project to be established in District Kutch. It is not open for GUVNL at this stage to question the location selected by Cargo Solar. We are of the view that the question of delay in obtaining the statutory approvals under Force Majeure Events has to be dealt strictly as per clause 8.1 of the PPA. The State Commission has correctly done so after examining the type of clearances/approval required after satisfying that Cargo Solar had complied with all legal requirements to obtain such approvals.*

.....

47. *The State Commission in the above order did not give a finding on suggestion of one of the project developers that Government should identify and designate authorities to facilitate the developers in acquiring land, arranging water supply, etc., as it felt that the above suggestion would fall in the jurisdiction of the State Government. Thus, the State Commission did not give a finding on the above suggestion as it felt that the same did not fall in its jurisdiction. However, in the present case we have to examine if there was a delay in obtaining the legal approvals from the Government instrumentalities which were beyond the control of Cargo Solar and whether the same would fall under Force Majeure Events clause of the PPA or not in the circumstances of the present case. We have come to the conclusion that the delays in obtaining legal approvals for land and water would fall*

*under Article 8.1 (a)(v) of the PPA and covered as a Force Majeure Event. Thus, this contention of GUVNL does not deserve acceptance.*

*55. Summary of our findings: 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, 1986 and CRZ Regulations sought by Cargo Solar are the statutory/legal approvals under the 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 the 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 the PPA.*

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

Thus, in the above judgement, the Hon’ble APTEL decided that the delay in obtaining the statutory/legal approvals/ approvals from the Government instrumentals qualifies as force majeure event.

- II) The Commission had also passed the judgment/order dated 07.04.2012 in Petition No. 1125 of 2011 in case of M/s. Cargo Solar Power Gujarat Private Limited as under:

“ .....

*8.17 From the above, it appears that it is an obligation on the part of the petitioner to acquire the land for the project. The petitioner had executed*

MOUs with various agricultural land owners and also applied to the Dy. Collector Anjar, Kutchh for approval/permission on 7.8.2010 u/s 89(1)(A) of The Bombay Tenancy and Agricultural lands (Vidarabh Region and Kutch area) Act 1958 read with Rule 45 there to.

.....”

- III) Judgment dated 11.11.2013 of Hon’ble APTEL in Appeal No. 54 of 2013 in case of GUVNL vs. GERC, Acme Solar Technologies (Gujarat) Pvt. Limited and Others.

“.....7. It is admitted fact as made clear by learned counsel for both the sides that the respondent no.2 ACME Solar (petitioner before the State Commission) has not challenged the findings recorded in the impugned order dated 31.12.2012. Thus, the findings of the State Commission given in the impugned order are admitted to the respondent no.2 ACME Solar. The Power Purchase Agreement (PPA) dated 31.05.2010 had in clause 4.3 a very important provision to the effect that the power producer shall pay to the GUVNL (appellant) , liquidated damages for the delay at the rate mentioned therein if the project is not commissioned by its scheduled commercial operation date except when the delay is due to the three reasons, namely, force majeure event or power producer is prevented from performing its obligation because of material default on the part of GUVNL or the power producer is unable to achieve the commercial operation of plant on scheduled commercial operation date (SCOD) because of delay in transmission facilities/evacuation system for reason solely because of delay in transmission facilities etc. for the reasons solely attributable to the GETCO, the producer shall not pay the liquidated damages for the delay caused in commissioning the project. This very important clause was deleted or done away with in the supplemental PPA dated 24.03.2011, by virtue of clause 2.3 of which the power developer was made liable to pay liquidated damages for the delay caused in commissioning of the project on the scheduled commercial operation date even if the GETCO failed to construct the transmission system or the evacuation system. Thus, the very important clause which was existing in original PPA was removed merely because the power developer respondent no.-2 had to change the original location of the project, because of certain governmental actions regarding change in Janti/Katha rates, non-registration of sale deeds as well as agitation by farmers, land owners etc., the factors which were beyond the control of the power generator/developer-(respondent no.2 herein). Since there was agitation of the farmers etc., and there was change in the Katha rates of the land to be acquired and due to certain impediments in the land acquisition, the project developer had no option but to change the site of the project and hence he ultimately changed the site. Since the site

*had to be changed by the project developer, he was bound to enter into supplemental PPA on 24.03.2011 whereby he had no option but to sign the said supplemental PPA in which there was specific clause 2.3 making the generator liable to pay liquidated damages even in case of non-availability of transmission system for evacuation of power by scheduled commercial operation date by GETCO. Since the respondent no. 2 has not challenged the impugned order in this Tribunal, he appears to be satisfied. Hence this is not the occasion for this Tribunal to go into the legality, reasonableness or validity of clause 2.3 of supplemental PPA dated 24.03.2011. Respondent no.2 has accepted all the findings recorded in the impugned order passed by the learned State Commission. The learned counsel for the appellant has not pointed out or shown any evidence to establish that Solar Power Plant was not ready in September, 2011 and it could be ready only by March, 2012 or alternatively as pleaded by the learned counsel for the appellant in December, 2011. The evidence on record makes it clearly evident that the plant was ready for commissioning by September, 2011, namely, on 30.09.2011. The finding in this regard made by the learned State Commission is based on correct and proper analysis and appreciation of the material on record to which we fully agree and there is no cogent and sufficient reason to deviate from the finding recorded by the learned State Commission in the impugned order. So far as issue regarding implication of supplemental PPA dated 24.02.2011 in regard to liability of the developer – respondent no. 2 to pay liquidated damages vis-à-vis the availability of transmission of GETCO is concerned, we also agree to the finding recorded by the learned State Commission in the impugned order because respondent no.2-developer did whatever he could do within his control and ran from pillar to post requesting the highest authorities of the Energy Department of the State to direct GETCO to construct transmission facility without any further delay and if GETCO could not perform its obligation, the generator respondent no. 2 cannot be held liable for that after September, 2011 ....”*

10.75. From the above observations, we decide that the delay in commissioning of the petitioner’s power project, to the extent given below, is due to the force majeure events :-

Sr. No.	Description	Date of start	Date of end	Delay in days
01.	Delay due to delay in permission in grant of Special Purpose Vehicle (SPV) company	10.01.2011	01.04.2011	79
02.	Delay due to non registration of land sale deed	01.04.2011	22.11.2011	236
03.	Delay due to delay in granting statutory approval (89A)	18.10.2011	18.02.2011	122
	<b>Total</b>			<b>437</b>
	No. of days overlapping between events 2 & 3			35
	<b>Total Delay due to Force Majeure Events</b>			<b>402</b>

10.76. As stated in earlier para, the time period of Force Majeure is required to be given effect in to the Commercial Operation Date and Scheduled Commercial Operation Date and also required to be given its effect in terms of the PPA.

The PPA was signed by the parties on 08.12.2010. The SCOD agreed in PPA was 31.12.2011 which is required to be revised with consideration of the force majeure event decided in this order in earlier para. Accordingly, revised SCOD of the project is decided as 06.02.2013.

**LIQUIDATED DAMAGES:**

10.77. Now, we deal with issue regarding the liquidated damages. We note that it is agreed between the parties that in case of any delay in achieving SCOD by the petitioner the petitioner shall pay the liquidated damages for delay in the SCOD. Therefore, it is necessary to refer Article 4.3 of PPA which reads as under :-

*“...Article 4: Undertakings*

*4.3. Liquidated damages for delay in commissioning the project/solar photovoltaic grid interactive power plant beyond Scheduled Commercial Operation Date:*

*If the project is not commissioned by its Scheduled Commercial Operation Date other than the reasons mentioned below, the Power Producer shall pay to the GUVNL liquidated damages for delay at the rate of Rs. 10000 (Rupees Ten Thousand) per day per MW for delay of first 60 days and Rs. 15000 (Rupees Fifteen Thousand) per day per MW thereafter. Liquidated damage is payable up to delay period of 1 year from Scheduled Commercial Operation Date. If the Power Producer fails to make payment of the liquidated damages for a period exceeding 30 days, GUVNL shall be entitled to invoke the Bank Guarantee to recover the liquidated damages amount. In case of delay more than 1 year, GUVNL assumes no obligation and has right to*

*terminate the Power Purchase Agreement by giving 1 month termination notice.*

- 1. The Project cannot be commissioned by Scheduled Commercial Operation Date because of Force Majeure event; or*
- 2. The Power Producer is prevented from performing its obligations because of material default on part of GUVNL.*
- 3. Power Producer is unable to achieve commercial operation on Scheduled Commercial Operation Date because of delay in transmission facilities/evacuation system for reasons solely attributable to the GETCO.*

The above Article provides that if there is any delay in achieving the scheduled commercial operation date i.e. 31.12.2011, in that event the power producer shall require to pay the Respondent GUVNL liquidated damages for delay @ Rs. 10,000/- per day per MW for delay of first 60 days and Rs. 15,000/- per day per MW thereafter. It is also stated that the liquidated damages is payable up to delay period of one year from SCOD i.e. 31.12.2012.

10.78. As we have decided in para 10.76 above, the revised SCOD of the project is 06.02.2013. We have also decided in para 10.26 and 10.27 above that the deemed dated of commissioning of the project is 31.03.2013. As such, the petitioner is liable to pay the liquidated damages for the period for 06.02.2013 to 31.03.2013. Any amount of liquidated damages recovered by the respondent, in excess of the liquidated damage worked out for this period, shall be refunded by the respondent within 15 days for the date of this order.

10.79. The next issue is related to what should be the tariff payable to the petitioner? The petitioner has claimed that it is entitled to a tariff of Rs. 15 per kWh for the first 12

years and Rs. 5 per kWh for the next 13 years, as directed by this Commission in Order No. 2 of 2010.

10.80. In order to decide this issue, let us refer to the Commission's various orders on determination of tariff for procurement of power by the distribution licensees in the State from Solar Power Projects. The Commission issued the Order No. 2 of 2010 on 29.01.2009 determining the tariff for Solar PV Projects commissioned within the control period of 29.01.2010 to 29.01.2012 as: (i) Rs. 15 per kWh for initial 12 years from the date of commercial operation of the project, and (ii) Rs. 5 per kWh from 13<sup>th</sup> year to 25<sup>th</sup> years.

10.81. Subsequently, the Commission determined the tariff for Solar PV Projects commissioned between 29.01.2012 to 31.03.2015 through its Order No. 01 of 2012 dated 27.01.2012, as under:

<b>Period →</b>	<b>29 Jan. '12 to 31 Mar. '13</b>	<b>1 Apr. '13 to 31 Mar. '14</b>	<b>1 Apr. '14 to 31 Mar. '15</b>
<b><i>For megawatt-scale photovoltaic projects availing accelerated depreciation</i></b>			
Levelised Tariff for 25 years	<b>Rs. 9.28 per kWh</b>	<b>Rs. 8.63 per kWh</b>	<b>Rs. 8.03 per kWh</b>
For first 12 years	<b>Rs. 9.98 per kWh</b>	<b>Rs. 9.13 per kWh</b>	<b>Rs. 8.35 per kWh</b>
For subsequent 13 years	<b>Rs. 7.00 per kWh</b>	<b>Rs. 7.00 per kWh</b>	<b>Rs. 7.00 per kWh</b>
<b><i>For Megawatt-scale photovoltaic projects availing accelerated depreciation</i></b>			
Levelised Tariff for 25 years	<b>Rs. 10.37 per kWh</b>	<b>Rs. 9.64 per kWh</b>	<b>Rs. 8.97 per kWh</b>
For first 12 years	<b>Rs. 11.25 per kWh</b>	<b>Rs. 10.30 per kWh</b>	<b>Rs. 9.42 per kWh</b>
For subsequent 13 years	<b>Rs. 7.50 per kWh</b>	<b>Rs. 7.50 per kWh</b>	<b>Rs. 7.50 per kWh</b>
<b><i>For Kilowatt-scale photovoltaic projects availing accelerated depreciation</i></b>			

Levelised Tariff for 25 years	<b>Rs. 11.14 per kWh</b>	<b>Rs. 10.36 per kWh</b>	<b>Rs. 9.63 per kWh</b>
<i>For Kilowatt-scale photovoltaic projects not availing accelerated depreciation</i>			
Levelised Tariff for 25 years	<b>Rs. 12.44 per kWh</b>	<b>Rs. 11.57 per kWh</b>	<b>Rs. 10.76 per kWh</b>

The said order was challenged before the Hon'ble APTEL by Solar Energy Society of India by filing Appeal No. 75 of 2012. In the said appeal, Hon'ble Tribunal passed judgment dated 17.04.2013 and directed the Commission to pass an consequential order. Accordingly, the Commission had passed an consequential order in Suo-Motu proceedings in Order No. 1 of 2012 on 07.07.2014. Thereafter, the Commission found some error in the said order. Hence, the Commission passed corrigendum dated 11.07.2014 to the said order dated 07.07.2014 and decided the tariff for procurement of power by the distribution licensees and others for the control period from 29.01.2012 to 31.03.2015, which is stated below:

Period →	29 Jan. '12 to 31 Mar. '13	1 Apr. '13 to 31 Mar. '14	1 Apr. '14 to 31 Mar. '15
<i>For megawatt-scale photovoltaic projects availing accelerated depreciation</i>			
Levelised Tariff for 25 years	<b>Rs. 9.70 per kWh</b>	<b>Rs. 9.02 per kWh</b>	<b>Rs. 8.39 per kWh</b>
For first 12 years	<b>Rs. 10.52 per kWh</b>	<b>Rs. 9.64 per kWh</b>	<b>Rs. 8.82 per kWh</b>
For subsequent 13 years	<b>Rs. 7.00 per kWh</b>	<b>Rs. 7.00 per kWh</b>	<b>Rs. 7.00 per kWh</b>
<i>For megawatt-scale photovoltaic projects not availing accelerated depreciation</i>			
Levelised Tariff for 25 years	<b>Rs. 10.92 per kWh</b>	<b>Rs. 10.15 per kWh</b>	<b>Rs. 9.44 per kWh</b>

years	<b>kWh</b>	<b>kWh</b>	
For first 12 years	<b>Rs. 11.97 per kWh</b>	<b>Rs. 10.96 per kWh</b>	<b>Rs. 10.03 per kWh</b>
For subsequent 13 years	<b>Rs. 7.50 per kWh</b>	<b>Rs. 7.50 per kWh</b>	<b>Rs. 7.50 per kWh</b>
<b><i>For kilowatt-scale photovoltaic projects availing accelerated depreciation</i></b>			
Levelised Tariff for 25 years	<b>Rs. 11.64 per kWh</b>	<b>Rs. 10.82 per kWh</b>	<b>Rs. 10.07 per kWh</b>
<b><i>For kilowatt-scale photovoltaic projects not availing accelerated depreciation</i></b>			
Levelised Tariff for 25 years	<b>Rs. 13.10 per kWh</b>	<b>Rs. 12.18 per kWh</b>	<b>Rs. 11.33 per kWh</b>

<b><i>Levelised Tariff for Solar Thermal Projects availing accelerated depreciation</i></b>	
With accelerated depreciation benefit:	<b>Rs. 11.83 per kWh for 25 years</b>
<b><i>Levelised Tariff for not Solar Thermal Projects not availing accelerated depreciation</i></b>	
Without accelerated depreciation benefit:	<b>Rs. 13.23 per kWh for 25 years</b>

10.82. Further, the relevant clause of the PPA in this regard is reproduced below:

“ .....

*Article 5.2: GUVNL shall pay the fixed tariff mentioned hereunder for the period of 25 years for all the Scheduled Energy/Energy injected as certified in the monthly SEA by SLDC. The tariff is determined by Hon'ble Commission vide Tariff Order for Solar based power project dated 30.01.2010.*

*Tariff for Photovoltaic project: Rs. 15/KWh for first 12 years and thereafter Rs. 5/KWh from 13<sup>th</sup> year to 25<sup>th</sup> Year.*

*Above tariff shall apply for solar projects commissioned on or before 31<sup>st</sup> December 2011. In case, commissioning of Solar Power Project is delayed beyond 31<sup>st</sup> December 2011, GUVNL shall pay the tariff as determined by*

*Hon'ble GERC for Solar Projects effective on the date of commissioning of solar power project or above mentioned tariff, whichever is lower.*

10.83. According to the above clause of the PPA, if the project is commissioned by 30.12.2011, i.e. the SCOD defined in the PPA, the petitioner is entitled to tariff determined by the Commission in its Order No. 2 of 2010, viz., Rs. 15 per kWh for initial 12 years and Rs. 5 kWh for subsequent 13 years. In case of delay in commissioning of the project, the tariff payable shall be the tariff determined by the Commission for the relevant period or the above period, whichever is lower.

10.84. The petitioner has contended that since its project was delayed due to force majeure events, it is entitled to receive payment at the rate of Rs. 15 per kWh for initial 12 years and Rs. 5 per kWh for subsequent years.

10.85. The respondent has on the other hand, relied on the undertaking dated 28.03.2013 given by the petitioner, wherein the petitioner argued to the tariff of Rs. 9.98 per unit for first 12 years and Rs. 7.00 per unit thereafter, as decided by the Commission in its Order No. 02 of 2012. Contents of the undertaking are reproduced below:

“ .....

*DATE: 03.06.2013*

*“Without Prejudice”*

***Sub: Your Letter Ref. No. GUVNL/COM/Solar/991***

*Sir,*

*This is with reference to above mentioned letter wherein you have informed us that since our project was not commissioned on or before*

*31<sup>st</sup> March 2013 and are thus not eligible for the rate of 9.98/unit. Sir, on this we would like to bring to your kind notice the following facts:*

- 1) Our Solar photovoltaic grid interactive 5MW plant was available for commercial operation on 16<sup>th</sup> March 2013 which was Saturday and on 18<sup>th</sup> March 2013, we met your goodself at GUVNL and requested you for extension of PPA till 31<sup>st</sup> March 2013, which had already been granted to some other Solar Power developers. The G.M. – Commercial informed us that it can only be done on our accepting Rs. 9.98/unit as the rate and paying all the L.D. till commissioning of the plant.*
- 2) On 20<sup>th</sup> March 2013 we approached GEDA for the purpose of commissioning of the 5 MW Solar Plant. We also informed GEDA that we have applied to Chief Electrical Inspector General (CEIG) for inspection.*
- 3) On 20<sup>th</sup> March 2013, GETCO wrote a letter to the Chief Electrical Inspector requesting them to grant approval to charge 66KV DC Kanaibay – M/s Taxus Tower line.*
- 4) As per our discussion with your goodself on 18<sup>th</sup> March 2013 and subsequent meetings and telecom, we agreed to the conditions laid down by GUVNL for extension of PPA and gave our consent on 25<sup>th</sup> 2013, after which GUVNL issued us a letter of extension with a request to GEDA that they may visit and certify the project for commissioning on or before 31<sup>st</sup> March 2013.*
- 5) The CEIG inspection was carried by Dy. CEIG, north zone Mehsana, on 29<sup>th</sup> March 2013.*
- 6) The transmission line was charged on 30<sup>th</sup> March 2013 by GETCO & ABT meter was installed by GETCO on the same date, but inexplicable they disconnected the energized line thereafter.*
- 7) On 31<sup>st</sup> March 2013, GEDA team come to our site for inspection at 11:00 AM but GETCO officials cited the day as holiday (31<sup>st</sup> being Sunday) and would not charge the line. After a lot of requesting they relented and charged the line only at 4:35 PM. In normal procedure, charging of transformer & RMU taken about two hours, by which the Sun had set and power generation could not take place, despite everything being in place. The energy generation started with the first sunshine on 1<sup>st</sup> April 2013.*

8) *The above facts are all available in correspondence with various agencies and are undisputable.*

*Sir, given the above mentioned facts, it is quite evident that the solar power plant was ready in all aspects before 31<sup>st</sup> March 2013 yet could not be commissioned because of procedural delays by CEIG / GETCO and other related agencies. Sir, I would request you to kindly look into the above mentioned facts and kindly record our commissioning date to be 31<sup>st</sup> March 2013.*

*Further in Power Purchase Agreement signed by your goodself, the date of commissioning is defined as “the date on which the solar photovoltaic grid interactive plant is available for commercial operation (certified by GEDA) and such date as specified in a written notice given at least 10 days in advance by the power procedure to GUVNL”.*

*The very fact that plant had been available for commercial generation since 16<sup>th</sup> March 2013 and could not generate power because of legal and procedural hurdle on part of various governmental agencies should be taken into account and the date of commissioning should be 31<sup>st</sup> March 2013, so that we can get atleast Rs. 9.98/unit as tariff till the tariff related case pending in Hon’ble high court of Gujarat is decided.*

*Thanking you in anticipation of positive action.....”*

10.86. The petitioner, on the other hand, contended that since its project was ready for commissioning from 15.03.2013, it was under duress to commission the project at the earliest. Also, the undertaking was given under pressure from the respondent, due to unequal bargaining power of the petitioner viz-a-viz the respondent. It was also pointed out that the undertaking was given “without prejudice.”

10.87. In this connection, it is observed that the tariff payable to the petition is solely governed by the orders of the Commission read with the provisions of the PPA. The Commission has issued Order No. 2 of 2010 for the projects commissioned up to 29.01.2012 and the Order No. 1 of 2012 for the projects commissioned thereafter. As

such, the applicable tariff is solely related to the date of commissioning of the project. The PPA also recognizes this fact.

10.88. It has already been decided by us in earlier para that the petitioner's project is deemed to have commissioned on 31.03.2013. The applicable tariff on that, as decided in Order No. 1 of 2012, consequential order dated 07.07.2014 and corrigendum to it dated 11.07.2014 passed by the Commission after the direction given by the Hon'ble APTEL in order dated 17.04.2013 in Appeal No. 75 of 2012 is Rs. 10.52 per unit during the initial 12 years and Rs. 7.00 per unit in subsequent years. As such, the petitioner is entitled to this tariff only and not Rs. 15.00 per unit for the initial 12 years and Rs. 5.00 per unit thereafter as claimed by the petitioner.

**OTHER ISSUES:**

10.89. The respondent has also raised the issue that the petitioner is not entitled to raise certain issues, which were already decided and settled in Petition No. 1145 of 2011, and is thus, the present petition is not maintainable on the principle of res-judicata.

10.90. In this connection, our observations are as under:

10.90.1 Petition No. 1145 of 2011 was filed by the petitioner before the Commission for extension of control period specified in Order No. 2 of 2010 dated 29.1.2010. The said prayer reads as under:

*(i) To extend the control period by 4 months as defined by the Commission in its Order dated 29.01.2010?*

*(ii) To declare that the control period as defined by the Commission ends on 28.01.2012 and not 31.12.2011 as defined under the PPA?*

10.90.2 The above prayer says that the extension in the control period which was specified in Order No. 2 of 2010 dated 29.1.2010 was prayed to be extended by the petitioner. The control period decided in Order No. 2 of 2010 is as under:

***“ .....7.2 Control period***

*.....*

***Commission’s Ruling***

*It has been observed that the capital cost of the solar power project might reduce drastically as time elapses. However, since the gestation period for Solar PV projects is about 6 months and that for Solar Thermal Projects is 18-24 months, the Commission decides that the control period for this order will be 2 years.*

According to the above decision of the Commission, the projects was required to commission during the 2 years from the date of the said order and they were eligible to receive the tariff determined by the Commission in the said order.

10.90.3 In the present petition, the petitioner sought various reliefs which are stated in Para 1 of this order. By comparing the prayers of Petition No. 1145 of 2011 and the prayers of present petition, it is clear that in both cases the prayers of the petitioner are different.

10.90.4 The petitioner had in Petition No. 1145 of 2012 prayed for extension of control period on the ground of change in Jantri rate, flooding, non

registration of land etc. The above issues raised for extension of control period. While deciding the Petition No. 1145 of 2011, the Commission had considered similar 37 numbers of petitions combinedly. The Commission had not considered the actual facts of the petitioner's case, which are elaborated in the present petition for various relief sought by the petitioner. The Commission's decision in 37 numbers of petitions was based on common facts and issues and common prayer while in the present case, the petitioner raised specific issues with relevant supplementary documents and advanced plea for various reliefs sought by him.

10.90.5 Though, the petitioner and the respondent GUVNL are common in the previous as well as the present petitions, the facts of the case and prayers/reliefs sought in the two petitions are different and distinct from each other. Hence, the decision on prayers of Petition No. 1145 of 2011 by the Commission on 27.01.2012 is not applicable in the present case. Therefore, the principle of res-judicata is not applicable in the present petition. The principle of res-judicata stated in section 11 of Civil Procedure Code, 1908 is stated as below:

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

- *Explanation I- The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.*
- *Explanation II. - For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such court.*

- *Explanation III. - The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.*
- *Explanation IV. - Any matter which might and ought to have been made ground of defense or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.*
- *Explanation V.- Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.*
- *Explanation VI- Where persons litigate bona fide in respect of public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.*
- *Explanation VII.- The provisions of this section shall apply to a proceeding for the execution of a decree and reference in this section to any suit, issue or former suit shall be construed as references, respectively, to proceedings for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.*
- *Explanation VIII.-An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in as subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.....”*

As per the above, the principle of res-judicata is applicable only if both the petitioner and respondents are same in both cases as well as the prayers sought are also similar. In the present case, though the first criteria are fulfilled, the second criteria are not satisfied. Hence, the principle of res-judicata is not applied in the present case.

10.91. Thus, the contentions of the respondent GUVNL is not valid and legal as per the provisions of the Civil Procedure Code, 1908. In this regard, it is also necessary to refer the judgements pronounced by the apex courts. The Hon’ble Supreme Court in case of the ***Arjun Singh v. Mahindra Kumar, (1964) 5 SCR 946***, held as under:

*“.....That the question of fact which arose in the two proceedings was identical would not be in doubt. Of course, they were not in successive suits so as to make the provisions Section 11 of the Civil Procedure Code, applicable in terms That the scope of the principle of res judicata is not confined to what, is contained in Section 11 but is of more general application is also not in dispute. Again, res judicata could be as much applicable to different stages of the same suit as to findings on issues in different suits. In this connection we were ‘referred to what this Court said in Satyadhan Ghosal v. Smt Deorajin Debi<sup>2</sup> where Das Gupta, J. speaking for the Court expressed himself thus:*

*“The principle of res judicata-is based on the need of giving a finality, to judicial decisions. What it says is that once resjudicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter — whether on a question, of fact or on a question of law — has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again.... The principle of res judicata applies also as between the two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings.”*

*Mr Pathak — laid great stress on this passage as supporting him in the two submissions that he made: (1) that an issue of fact or law decided even in an interlocutory proceeding could operate as res judicata in a later proceeding, and next (2)that in order to attract the principle of res judicata the order or decision first rendered and which is pleaded as res judicata need not be capable of being appealed against.*

12. We agree that generally speaking these propositions are not open to objection. If the court which rendered the first decision was competent to entertain the suit or other proceeding, and had therefore competency to decide the issue or matter, the circumstance that it is a tribunal of exclusive jurisdiction or one from whose decision no appeal lay would not by themselves negative the finding on the issue by it being *res judicata* in later proceedings. Similarly, as stated already, though Section 11 of the Civil Procedure Code clearly contemplates the existence of two suits and the findings in the first being *res judicata* in the later suit it is well established that the principle underlying it is equally applicable to the case of decisions rendered at successive stages of the same suit or proceeding. But where the principle of *res judicata* is invoked in the case of the different stages of proceedings in the same suit, the nature of the proceedings, scope of the enquiry which the adjectival law provides for the decision being reached, as well as the specific provisions made on matters touching such decision are some of the material and relevant factors to be considered before the principle is held applicable. One aspect of this question is that which is dealt with in a provision like Section 105 of the Civil Procedure Code which enacts:

*“105. (1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.*

*Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand made after the commencement of this Code from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness.”*

*It was this which was explained by Das Gupta, J. in Satyadhayan Ghosal case- already referred to:*

*“Does this, however, mean that because an earlier stage of the litigation a court had decided an interlocutory matter in one way and no appeal has been taken therefrom or no appeal did lie, a higher court cannot at a later stage of the same litigation consider the matter again?... It is clear therefore that an interlocutory order which had not been appealed from either because no appeal lay or even though an appeal lay an appeal was not taken could be challenged in an appeal from the final decree or order.”*

*It is needless to point out that interlocutory orders are of various kinds; some like orders of stay, injunction or receiver are designed to preserve the status quo pending the litigation and to ensure that the parties might not be prejudiced by the normal delay which the proceedings before the court, usually take. They do not, in that sense, decide in any manner the merits of the controversy in issue in the suit and do not, of course, put an end to it even in part. Such orders are certainly capable of being altered or varied by subsequent applications for the same relief, though normally only on proof of new facts or new situation which subsequently emerge. As they do not impinge upon the legal rights of parties to the litigation the principle of res judicata does not apply to the findings on which these orders are based, though if applications were made for relief on the same basis after the same has once been disposed of the court would be justified in rejecting the same as an abuse of the process of court. There are other orders which are also interlocutory but would fall into a different category. The difference from the ones just now referred to lies in the fact that they are not directed to maintaining the status quo, or to preserve the property pending the final adjudication but are designed to ensure the just, smooth, orderly and expeditious disposal of the suit. They are interlocutory in the sense that they do not decide any matter in issue arising in the suit, nor put an end to the litigation. The case of an application under O. IX, Rule 7 would be an illustration of this type. If an application made under the provisions of that rule is dismissed and an appeal were filed against the decree in the suit in which such application were made, there can be no doubt that the propriety of the order rejecting the reopening of*

*the proceeding and the refusal to relegate the party to an earlier stage might be canvassed in the appeal and dealt with by the appellate court. In that sense, the refusal of the court to permit the defendant to “set the clock back” does not attain finality. But what we are concerned with is slightly different and that is whether the same Court is finally bound by that order at later stages so as to preclude its being reconsidered. Even if the rule of res judicata does not apply it would not follow that on every subsequent day which the suit stands adjourned for further hearing, the petition could be repeated and fresh orders sought on the basis of identical facts. The principle that repeated applications based on the same facts and seeking the same reliefs might be disallowed by the court does not however necessarily rest on the principle of res judicata. Thus if an application for the adjournment of a suit is rejected, a subsequent application for the same purpose even if based on the same facts, is not barred on the application of any rule of res judicata, but would be rejected for the same grounds on which the original application was refused. The principle underlying the distinction between the rule of res judicata and a rejection on the ground that no new facts have been adduced to justify a different order is vital. If the principle of res judicata is applicable to the decision on a particular issue of fact, even if fresh facts were placed before the Court, the bar would continue to operate and preclude a fresh investigation of the issue, whereas in the Other case, on proof of fresh facts, the court would be competent, may would be bound to take those into account and make an order conformably to the facts freshly brought before the court.....”*

10.92. The respondent contended that the petitioner is not eligible to raise the issue with regards to (a) Non-registration of land due to revision/re-revision in Jantri rates, (b) delayed in registration of land due to delay in permission under section 89 (1) (A) of Bombay Tenancy Act 1956, (c) Denial of SPV permission, (d) payment of liquidated damages under the PPA. The respondent contended that above issue

were raised by the petitioner in Petition No. 1145 of 2011, but not considered by the Commission and were rejected. The order dated 27.01.2012 of the Commission was challenged before Hon'ble High Court of Gujarat by the Petitioner. The Hon'ble High Court directed that for above issues, the Petitioner is at liberty to approach the Hon'ble APTEL. However, the petitioner has not approached the APTEL. Hence, the petitioner cannot claim the above issues before the Commission as the same have been finalized. The above contentions of the GUVNL are not valid and acceptable as issues/ prayers of the Petition No. 1145 of 2011 were distinct and different from those in the present petition. Hence, it is not covered under the principle of res-judicata and not attends the finality. Hence, the contentions of the respondent on above issues are not accepted and the same are rejected.

11.0. In view of the above, we decide that the present petition succeeds partially.

(1) The Solar PV Power Plant of the petitioner is deemed to be commissioned on 31.03.2013.

(2) The petitioner is entitled to raise the bills for energy injected into grid w.e.f. 01.04.2013, as reflected in the State Energy Account prepared by SLDC.

(3) The respondent shall make payment of the bills so raised within 15 days from the receipt of the bills.

(4) The delay of 402 days in commissioning of the plant was due to force majeure events and as such the revised SCOD of the project is 06.02.2013.

(5) The petitioner is liable to pay liquidated damages for the period from the revised SCOD, viz., 06.02.2013 to the deemed date of commissioning, viz. 31.03.2013.

(6) Any amount of liquidated damages, recovered by the respondent, in excess of that payable for the above period shall be refunded by the respondent within 15 days from the date of this order.

(7) The petitioner is entitled to payment for energy supplied by it at a rate of Rs. 10.52 per unit for the first 12 years and Rs. 7.00 per unit thereafter, as decided by the Commission in its Order No. 01 of 2012 read with the consequential order dated 07.07.2014 in Suo -Motu proceeding in Order No. 1 of 2012 and corrigendum to it dated 11.07.2014.

12.0. We order accordingly.

13.0. With this order the present petition stands disposed of.

Sd/-  
**[Dr. M. K. IYER]**  
**MEMBER (Finance)**

Sd/-  
**[SHRI PRAVINBHAI PATEL]**  
**CHAIRMAN**

Place: Gandhinagar.

Date: 30 /03/2015.