APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

(APPELLATE JURISDICTION)

Appeal No. 403 of 2017,
Appeal No. 4 of 2018,
Appeal No. 29 of 2018,
Appeal No. 35 of 2018 &
Appeal No. 373 of 2018

Dated : 26.07.2022

Present: Hon'ble Mr. Justice R. K. Gauba, Officiating Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member

APPEAL NO. 403 OF 2017

In the matter of:

NTPC Vidyut Vyapar Nigam Limited
Core-7, SCOPE Complex, Institutional Area,
Lodhi Road, New Delhi-110003 **…….APPELLANT**

Versus

1. M/s Godawari Green Energy Limited
   Through its Managing Director
   Hira Arcade, Pandari
   Raipur- 492001

2. Central Electricity Regulatory Commission
   Through its Secretary,
   3rd & 4th Floor, Chanderlok Building,
   36, Janpath, New Delhi- 110001

3. Union of India
   Ministry of New and Renewable Energy,
   Through its Secretary,
   Block-14, CGO Complex, Lodhi Road.
   New Delhi-110003

4. Punjab State Power Corporation Limited
   Through its Chief Engineer (PP & R)
   SLDC Building, 220 KV Grid Sub-Station,
   PSPCL, Ablowal, Patiala- 147001

5. Southern Power Distribution
Company of Telangana Limited (TSSPDCL)
Through its Managing Director,
6-150, Mint Compund, Hyderabad-500633

6. Eastern Power Distribution Company of
Andhra Pradesh Limited (APEPDCL)
Through its Managing Director,
P&T Colony, Corporate office
Seetamma Dhara, Visakhapatnam-530013.

7. Northern Power Distribution Company of
Telangana Limited (TSNPDCL),
Through its Managing Director,
Corporate Office, No 2-5-31/2,
Vidyuth Bhavan, Nakkalagutta,
Hanmakonda, Waragal-506001

8. Chhattisgarh State Power
Distribution Company Limited
Through its Managing Director,
Fourth Floor, Vidyut Seva Bhawan, Dangania,
Raipur, Chhattisgarh -492013

9. Maharashtra State Electricity Distribution Co. Ltd.
Through its Managing Director,
Prakashgad, 5th Floor, Anant Knekar Marg,
Station Road, Bandra (East), Mumbai-400 051

10. Ajmer Vidyut Vitaran Nigam Ltd.
Through its Managing Director,
Old Power House Hathi Bhata
Jaipur Road, Ajmer-305001

11. Jaipur Vidyut Vitaran Nigam Limited
Through its Managing Director,
Vidyut Bhawan, Janpath,
Jaipur-302005, Rajasthan

12. Jodhpur Vidyut Vitaran Nigam Ltd.
Through its Managing Director,
New Power House Industrial Area
Jodhpur-342003

13. U.P Power Corporation Limited
Through its Managing Director,
14th Floor, Shakti Bhawan, Extn. 14,
Ashok Marg, Lucknow-226 001

14. Assam Power Distribution Company Limited
Through its Managing Director,
Bijulee Bhawan, Paltanbazar,
Guwahati-781001

15. Bangalore Electricity Supply Company Limited
Through its Managing Director,
Corporate Office K.R Circle,
Bangalore-560001

16. Damodar Valley Corporation
Through its Managing Director,
DVC Towers, VIP Road
Kolkata – 700 054

17. GRIDCO Limited
Through its Managing Director,
Janpath, Bhubaneshwar-751022

18. Tamil Nadu Generation and Distribution Company Limited,
Through its Managing Director,
144, Anna Salai,
Chennai - 600 002

19. West Bengal State Electricity
Distribution Company Limited,
Through its Managing Director,
Vidyut Bhawan, 7th Floor, Block-DJ, Sector- II,
Bidhannagar, Kolkata-700091

20. Southern Power Distribution Company of
Andhra Pradesh Limited (APSPDCL),
Through its Managing Director,
Corporate Office No 19-13-65/A,
Kesavayanagunata, Tirruchanoor Road,
Tirupathi-517501 **……..RESPONDENTS**

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Mr. Shubham Arya
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Ms. Devi V Nair
Mr. Amal Nair
Ms. Parichita Chaudhary
Ms. Neha Garg
Mr. Ashwin Ramanathan for R-10 to12

Mr. Rajiv Srivastava
Ms. Garima Srivastava
Ms. Gargi Srivastava for R-13

APPEAL NO. 4 OF 2018

In the matter of:

NTPC Vidyut Vyapar Nigam Limited
Core-7, SCOPE Complex, Institutional Area,
Lodhi Road, New Delhi-110003 **…….APPELLANT**

Versus

1. MEIL Green Power Limited
Through its Managing Director
S2 Technocrat Industrial Estate
Balanagar, Hyderabad - 500 037
Andhra Pradesh

2. Central Electricity Regulatory Commission
Through its Secretary,
3rd & 4th Floor, Chanderlok Building,
36, Janpath, New Delhi- 110001

3. Union of India
Ministry of New and Renewable Energy,
Through its Secretary,
Block-14, CGO Complex, Lodhi Road.
New Delhi-110003

4. Punjab State Power Corporation Limited
Through its Chief Engineer (PP & R)
SLDC Building, 220 KV Grid Sub-Station,
PSPCL, Ablowal, Patiala- 147001

5. Southern Power Distribution
Company of Telangana Limited (TSSPDCL)
Through its Managing Director,
6-150, Mint Compund, Hyderabad-500633

6. Eastern Power Distribution
Company of Andhra Pradesh Limited (APEPDCL)
Through its Managing Director,
P&T Colony, Corporate office
Seetamma Dhara, Visakhapatnam-530013.

7. Northern Power Distribution
Company of Telangana Limited (TSNPDCL),
Through its Managing Director,
Corporate Office, No 2-5-31/2,
Vidyuth Bhavan, Nakkalagutta,
Hanmakonda, Waragal-506001

8. Chhattisgarh State Power
Distribution Company Limited
Through its Managing Director,
Fourth Floor, Vidyut Seva Bhawan, Dangania,
Raipur, Chhattisgarh -492013

9. Maharashtra State Electricity Distribution Co. Ltd.
Through its Managing Director,
Prakashgad, 5th Floor, Anant Knekar Marg,
Station Road, Bandra (East), Mumbai-400 051

10. Ajmer Vidyut Vitaran Nigam Ltd.
Through its Managing Director,
Old Power House Hathi Bhata
Jaipur Road, Ajmer-305001

11. Jaipur Vidyut Vitaran Nigam Limited
Through its Managing Director,
Vidyut Bhawan, Janpath,
Jaipur-302005, Rajasthan

12. Jodhpur Vidyut Vitaran Nigam Ltd.
Through its Managing Director,
New Power House Industrial Area
Jodhpur-342003

13. U.P. Power Corporation Limited
Through its Managing Director,
14th Floor, Shakti Bhawan, Extn. 14,
Ashok Marg, Lucknow-226 001

14. Assam Power Distribution Company Limited
Through its Managing Director,
Bijulee Bhawan, Paltanbazar,
Guwahati-781001

15. Bangalore Electricity Supply Company Limited
Through its Managing Director,
Corporate Office K.R Circle,
Bangalore-560001

16. Damodar Valley Corporation
Through its Managing Director,
DVC Towers, VIP Road
Kolkata – 700 054

17. GRIDCO Limited
Through its Managing Director,
Janpath, Bhubaneshwar-751022

18. Tamil Nadu Generation and
Distribution Company Limited,
Through its Managing Director,
144, Anna Salai,
Chennai – 600 002

19. West Bengal State Electricity
Distribution Company Limited,
Through its Managing Director,
Vidyut Bhawan, 7th Floor, Block-DJ, Sector- II,
Bidhannagar, Kolkata-700091

20. Southern Power Distribution Company
of Andhra Pradesh Limited (APSPDCL),
Through its Managing Director,
Corporate Office No 19-13-65/A,
Kesavayanagunata, Tirruchanoor Road,
Tirupathi-517501 **……..RESPONDENTS**

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Mr. Anand Kumar Srivastava
Ms. Shreya Mukherjee
Ms. Shikha Pandey
Mr. Shivam Sinha
Mr. Akshay Shandilya for R-1

Mr. Rajinder Nischal
Mr. Mayank Joshi for R-3

Mr. Rajiv Srivastava
Ms. Garima Srivastava
Ms. Gargi Srivastava for R-13

APPEAL NO. 29 OF 2018

In the matter of:

Godawari Green Energy Limited
Through its Authorized Signatory,
Shri C.B. Bansal,
Regd. Office: Hira Arcade, Pandari
Raipur – 492 001 **…. APPELLANT**

Versus

1. Central Electricity Regulatory Commission,
   4th Floor, Chanderlok Building,
   36, Janpath, New Delhi - 110 001

2. NTPC Vidyut Vyapar Nigam Limited
   Core-7, SCOPE Complex, Institutional Area,
   Lodhi Road, New Delhi- 110003

3. The Union of India
   Ministry of New and Renewable Energy,
   Block-14, CGO Complex,
   Lodhi Road, New Delhi- 110003

4. Punjab State Power Corporation Limited
   SLDC Building, 220 KV Grid Sub-Station,
   PSPCL Ablowal, Patiala- 147001

5. Central Power Distribution Company of
   Andhra Pradesh Limited
   (APCPDCL), Mint Compound
   Hyderabad- 500063

6. Eastern Power Distribution Company of
   Andhra Pradesh Limited (APEPDCL),
   Corporate Office P &T Colony,
   Seethammadhara, Vishakhapatnam - 530 013

7. Northern Power Distribution Company of
   Andhra Pradesh Limited (APNPDCL), Commercial & IPC,
   House No.1-1-478, 503 & 504,
   Opposite NIT Petrol Bunk, Chaitnaya Puri,
   Kazipet, Warrangal – 506004

8. Chhattisgarh State Power Distribution
Company Limited
Fourth Floor, Vidyut Seva Bhawan, Dangania
Raipur, Chhattisgarh -492013

9. Maharashtra State Electricity Distribution Co. Ltd.
Prakashgad, 5th Floor, Anant Knekar Marg,
Station Road, Bandra (East). Mumbai-400 051

10. Ajmer Vidyut Vitaran Ltd.
Old Power House Hathi Bhata
Jaipur Road, Ajmer-305001

11. Jaipur Vidyut Vitaran Ltd.
Jaipur-302005

12. Jodhpur Vidyut Vitaran Ltd.
New Power House Industrial Area
Jodhpur-342003

13. U.P Power Corporation Limited
14th Floor. Shakti Bhawan,
Extn. 14, Ashok marg
Lucknow-226 001

14. Assam Power Distribution Company Limited
Bijulee Bhawan
Paltanbazar,
Guwahati-781001

15. Bangalore Electricity Supply Company Limited
Corporate Office K.R Circle,
Bangalore-560001

16. Damodar Valley Corporation
DVC Towers, VIP Road
Kolkata – 700 054

17. GRIDCO Limited
Janpath, Bhubaneshwar-751022

18. Tamil Nadu Generation and Distribution
Company Limited, 144, Anna Salai,
Chennai - 600 002

19. West Bengal State Electricity Distribution Company Limited, Vidyut Bhawan, 7th Floor, Block-DJ, Sector- II, Bidhannagar, Kolkata-700091 **… RESPONDENTS**

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Ms. Ranjitha Ramachandran
Ms. Poorva Saigal
Mr. Pulkit Agrawal
Mr. Arvind Kumar Dubey for R-2

Mr. Rajinder Nischal
Mr. Mayank Joshi for R-3

Mr. Anand K. Ganesan
Ms. Swapna Seshadri
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Ms. Devi V Nair
Mr. Ashwin Ramanathan
Ms. Parichita Chaudhary
Ms. Neha Garg for R-10 to12

Mr. Rajiv Srivastava
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Ms. Gargi Srivastava
Ms. Mitali Chavhan for R-13

APPEAL NO. 35 OF 2018

In the matter of:

Rajasthan Sun Technique Energy Pvt. Ltd.
Third Floor, Reliance Centre, South Wing

Prabhat Colony, Santacruz (East)
Mumbai 400 055 … **APPELLANT**

VERSUS

1. Central Electricity Regulatory Commission
   3rd & 4th Floor, Chanderlok Building
   36, Janpath, New Delhi 110 001

2. NTPC Vidyut Vyapar Nigam Limited
   Core 7, SCOPE Complex, Institutional Area
   Lodhi Road, New Delhi 110 003

3. The Union of India
   Ministry of New and Renewable Energy
   Block 14, CGO Complex
   Lodhi Road, New Delhi 110 003 … **RESPONDENTS**

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Ms. Aanchal Arora

Counsel for the Respondent (s) : Mr. M.G. Ramachandran, Sr. Adv.
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Ms. Shikha Sood
Ms. Tanya Sareen
Mr. Ravi Nair
Ms. Poorva Saigal
Mr. Shubham Arya
Mr. Pulkit Agarwal
Mr. Arvind Kumar Dubey for R-2

Mr. Rajinder Nischal
Mr. Mayank Joshi for R-3

APPEAL NO. 373 OF 2018

In the matter of:

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

…APPELLANT

VERSUS

1. Central Electricity Regulatory Commission
   3rd and 4th Floor,
   Chanderlok Building,
   36, Janpath, New Delhi - 110001

2. NTPC Vidyut Vyapar Nigam Limited
   NTPC Bhawan, Core 7, Scope Complex
   7 Institutional Area, Lodhi Road
   New Delhi-110003

3. Ministry of New and Renewable Energy
   Block-14, CGO Complex,
   Lodhi Road, New Delhi-110 003

4. Chief Engineer/ Incharge
   Punjab State Power Corporation Ltd.
   (State Load Despatch Centre)
   220 KV Grid Sub-Station, PSPCL
   Ablowal, Patiala-147 001

5. Chief General Manager (Commercial & RAC)
   Central Power Distribution Company of
   Andhra Pradesh Ltd.
   18-214, Munna Nagar, Anantapur,
   Andhra Pradesh – 515005

6. Chief General Manager (Commercial, RAC & Plg.)
   Eastern Power Distribution Company
   of Andhra Pradesh
   Corporate Office, P&T Colony
   Seethammadhara
   Vishakhapatnam-530013

7. Chief General Manager, Operation,
Commercial & IPC
Northern Power Distribution Company of
Andhra Pradesh Ltd.
H.No. 1-1-478, 503 & 504 Opposite Nit Petrol Bunk,
Chaitnaya Puri, Kazipet,
Warrangal-506004

8. Chief Engineer (Commercial)
Chattisgarh State Power Distribution Company Ltd.
Fourth Floor, Vidyut Seva Bhawan, Dangania,
Raipur (Chhatisgarh)-492013

9. Chief Engineer (Commercial)
Maharashtra State Electricity Distribution Company Ltd.
"Prakashgad", 5th Floor, Anant Knekar Marg,
Bandra (East), Mumbai-400051

10. Managing Director
Ajmer Vidyut Vitran Nigam Ltd.
Old Power, Hathi Bhata, Ajmer – 305001.

11. Chairman
Jaipur Vidyut Vitran Nigam Ltd.
Vidyut Bhawan, Jyoti Nagar,
Jaipur-302005

12. Managing Director
Jodhpur Vidyut Vitran Nigam Ltd.
New Power House, Industrial Area,
Jodhpur-342003

13. Chief Engineer (PPA)
U.P. Power Corporation Ltd
14th Floor, Shakti Bhawan, Ext. 14,
Ashok Marg, Lucknow-226001

14. Chief General Manager (Commercial)
Assam Power Distribution Company Ltd.
Bijulee Bhawan, Paltanbazar,
Guwahati-781001

15. The General Manager (Electricity)
Bangalore Electricity Supply Corporation
Power Purchase, BESCOM, Corporate Office,

K.R. Circle, Bangalore-560001

16. Chief Engineer (Commercial)
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DVC Towers, VIP Road,
Kolkata-700054

17. Sr. General Manager (PP),
Grid Corporation of Orissa Ltd.
Janpath, Bhubhaneswar-751022

18. Director (Distribution)
Tamil Nadu Generation and Distribution Company Ltd.
144, Anna Salai,
Chennai-600002

19. Chief Engineer (PTR)
West Bengal State Electricity Distribution
Company Ltd.
Vidyut Bhawan, 7th Floor, Block-DJ,
Sector-II, Bidhannagar,
Kolkata-700091 **…RESPONDENTS**

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Ms. Shreya Mukherjee
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Mr. Tushar Srivastava
Mr. Shivam Sinha
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Mr. Soumya Prakash
Mr. Nishant Talwar
Mr. Akshay Shandilya
Mr. Avijeet Lala

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Mr. Pulkit Agarwal
Mr. Shubham Arya
Mr. Arvind Kumar Dubey
Ms. Srishti Khindaria
Ms. Shikha Sood

Ms. Tanya Sareen
Mr. Shubham Arya
Ms. Poorva Saigal for R-2

Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Mr. Amal Nair
Mr. Ashwin Ramanathan
Ms. Neha Garg
Ms. Sugandh Khanna
Ms. Parichita Choudhary for R-4, 10, 11 & 12

J U D G M E N T

Per Hon'ble Mr. Sandesh Kumar Sharma, Technical Member

1. The captioned Appeals have been filed under section 111 of the Electricity Act, 2003 against common order dated 11.10.2017 ("Impugned Order") passed by Central Electricity Regulatory Commission (in short "CERC" or "Central Commission" or "Respondent Commission") in Petitions No. 304/MP/2013, Petition No. 16/MP/2014, Petition No. 312/MP/2013 and Petition No. 313/MP/2013.

2. The captioned Appeal No. 403 of 2017 and Appeal No. 4 of 2018 have been filed by NTPC Vidyut Vyapar Nigam Ltd. ("NVVN"), assailing the Impugned Order for adjustment of generation tariff and other consequential reliefs including adjustment of capacity utilization factor, extension of time for execution of project.

3. The Appeal No. 29 of 2018 has been filed by M/s. Godawari Green Energy Limited ("GGEL") against the rejection of prayer of GGEL seeking revision in tariff due to non-acceptance of Force Majeure event as claimed by the Appellant-GGEL and levy of Liquidated Damages.

4. The Appeal No. 35 of 2018 has been filed by M/s. Rajasthan Sun Technique Pvt. Ltd. ("RSTPL") against the Impugned Order dated 11.10.2017 on account of

compensation claimed against drastic drop in Direct Normal Irradiance ("**DNI**") and Foreign Exchange Variation.

5. The Appeal No. 373 of 2018 has been filed by M/s. Megha Engineering & Infrastructures Limited ("MEIL") against the common order of Central Electricity Regulatory Commission dated 11.10.2017 against the decision of the Central Commission stating the Central Commission despite having jurisdiction to regulate the tariff discovered under the Reverse Competitive Bidding for PPAs concluded under the JNNSM Scheme, has failed to provide relief(s) in relation to adjustment of tariff that were prayed by MEIL and Force Majeure Event.

Parties (Appeal No. 403 of 2017 Appeal No. 4 of 2018)

6. The Appellant, NTPC Vidyut Vyapar Nigam Limited (NVVN) is an Inter State Trading Licensee having been granted trading licence in terms of the provisions of Section 2 (26) read with Section 14 of the Electricity Act, 2003 by CERC.

7. Respondent no. 1, is a Generating Company (Appellant or GGEL in Appeal No. 403/2017 and Appellant or MEIL in Appeal No. 4/2018) within the meaning of Section 2 (28) of the Electricity Act, 2003 and is engaged in the business of setting up a grid connected Solar Thermal Power Plant in the State of Rajasthan under Jawaharlal Nehru National Solar Mission Scheme (hereinafter referred as "**JNNSM**" or "Solar Mission").

8. Respondent No. 2, Central Electricity Regulatory Commission established under the Electricity Act, 2003 having jurisdiction to regulate and adjudicate the matter under reference.

9. Respondent No. 3 is Government of India, Ministry of New and Renewable Energy (**"MNRE"**) which formulated and floated the Jawaharlal Nehru National Solar Mission ("JNNSM") Phase-I.

10. Respondents No. 4 to 20 are the State Utilities procuring power from NVVN and have entered into a Power Sale Agreement with NVVN for the said purpose.

***Parties* (Appeal No. 29 of 2018)**

11. The Appellant, Godawari Green Energy Ltd. (GGEL) is a company incorporated under the Companies Act, 1956 and has established a 50 MW solar thermal power plant in the State of Rajasthan, pursuant to the JNNSM.

12. Respondent No. 1 is the Central Commission. Respondent No. 2, NVVN is a trader in electricity, entrusted with bundling of power under the JNNSM for onwards sale to beneficiary distribution companies of various States. Respondent No. 3 is the MNRE. Respondents No. 4 to 19 are beneficiaries of the power generated by the solar power developers under the JNNSM, Phase 1, bundled and sold through NVVN.

Parties (Appeal No. 35 of 2018)

13. Appellant, M/s. Rajasthan Sun Technique Energy Private Ltd. (RSTPL) is a wholly owned subsidiary of Reliance Power. The company was established to develop a concentrated solar power project.

14. Respondent No. 1 is the Central Commission. Respondent No. 2, NVVN is a trader in electricity, entrusted with bundling of power under the JNNSM for onwards sale to beneficiary distribution companies of various States. Respondent No. 3 is the MNRE.

Parties (Appeal No. 373 of 2018)

15. The Appellant, Megha Engineering & Infrastructure Ltd. (MEIL), is a company incorporated under the Companies Act, 1956. The Appellant developed a 50 MW solar thermal power project near Nagalapuram, Peddavaduguru Mandal in the Anantapur district, Andhra Pradesh.

16. Respondent No. 1 is the Central Commission. Respondent No. 2, NVVN is a trader in electricity, entrusted with bundling of power under the JNNSM for onwards sale to beneficiary distribution companies of various States. Respondent No. 3 is the MNRE. Respondents No. 4 to 19 are beneficiaries of the power generated by the solar power developers under the JNNSM, Phase 1, bundled and sold through NVVN.

Relief Sought (Appeal No. 403 of 2017 Appeal No. 4 of 2018)

- Appeal No. 403 of 2017- To set-aside the Impugned order to the extent that the Central Commission has not allowed NVVN to adjust the claim for shortage of energy supplied by the Respondent No. 1 as provided in the PPA dated 10.1.2011.
- Appeal No. 4 of 2018- To set-aside the Impugned Order to the extent that the Central Commission has not allowed NVVN to adjust the claim for shortage of energy supplied by the Respondent No. 1 as provided in the PPA dated 10.1.2011.
- Appeal No. 4 of 2018- To set-aside the Impugned Order to the extent that the Central Commission has accepted the claim of the Respondent No. 1 for declaration of drought as Force Majeure Event even when the corresponding area of the project has been declared as drought area by the State Government.

***Relief Sought* (Appeal No. 29 of 2018)**

- Direct the Central Commission to devise a mechanism to suitably revise the tariff of the Appellant for the remaining term on account of drastic drop in DNI, being a Force Majeure event under the PPA.
- Quash and set-aside the bill for compensation dated 12.10.2017 and accordingly direct the Respondent No. 2 to refund the amount of Rs. 14,07,84,950/- wrongly deducted as liquidated damages without showing actual levy of penalty on the Discoms by the SERC.

Relief Sought (Appeal No. 35 of 2018)

- Direct the Central Commission to devise a mechanism to suitably revise the tariff of the Appellant for the remaining term on account of drastic drop in DNI, being a Force Majeure event under the PPA.
- Declaration of depreciation in Rupee rate as a force majeure event and directing the Central Commission to compensate for that.

Relief Sought (Appeal No. 373 of 2018)

- Adjustment in the tariff under the PPA having regard to the variation in CUF resulting from the change in the level of DNI;
- Allow the public unrest in the State of Andhra Pradesh as a force majeure event;
- Allow the fire accident as an event under force majeure;
- Adjustment in the tariff due to foreign exchange rate variation;

Background

17. The Renewable Energy Generation based on Solar Energy was in the nascent stage in the country in the year 2010, the total solar generation capacity was only 161 MW in the year 2010 of which Solar Thermal Capacity was non-existent, accordingly, Government of India, MNRE, in January, 2010 launched the Jawaharlal Nehru National Solar Mission (in short "JNNSM" or "Solar Mission") for promoting and developing solar power projects in the country to achieve Renewable Energy Targets inter-alia promoting Solar Thermal Projects also.

18. NVVN was designated as the nodal agency by the MNRE under the JNNSM for entering into Power Purchase Agreements with the Solar Power Developers to purchase solar power, in accordance with the tariff and PPA duration as fixed by the Central Commission.

19. As part of the Solar Mission, MNRE, on 25.07.2010, issued guidelines for the selection of developers for setting up Grid connected Solar Power Projects, NVVN was designated to purchase power from the Thermal Solar Power Developers as an intermediary and sell power to the Distribution Licensees ("Discoms") after bundling it with the unallocated power procured from the Central unallocated quota of coal based power projects of NTPC (a PSU owned and controlled by the Central Government).

20. As part of the process, bids were invited to set up the first large scale Solar Power Project based on Solar Thermal Capacity in India i.e. capacity specific to a technology which was proposed to be implemented for the first time in the country.

21. It is important to note here that the use of Solar Thermal Technology for generation of electricity was introduced for the first time in the country through

invitation of bids. The Solar Thermal technology, at the time of the bid process, was a nascent and commercially underdeveloped technology and continues to be, as measures required for promoting and developing the technology are not coming up. CERC, in Explanatory Memorandum for Tariff Norms for Solar Power Projects, 2012, observed that:

> *"Internationally, there is very limited experience in the field of electricity generation utilising Solar Thermal technology. However, efforts are underway at various countries across globe to increase share of solar thermal based power plant installations."*

22. Prior to introduction of the Solar Thermal Technology, Solar Projects were setup based on Solar Photo-Voltaic technology which uses Sun's light to convert light energy into electrical energy using photo-voltaic cells, however, the Solar Thermal technology captures the rays of the sun, concentrate the same by various reflectors on either water directly or a heat-transfer fluid, cause the heat from the sun's rays to heat the water to steam and use the steam to turn the turbine thus generating electricity.

23. In Solar Thermal Technology, the concentration of only direct rays of the sun through mirrors produces heat which in turn converts water into steam to generate electricity. However, in case of Solar Photo Voltaic Technology, even the diffused rays can generate electricity. Therefore, in present context, it is the Direct Normal Irradiance (hereinafter "DNI") which is the source of energy of such projects requiring fair projected data regarding the DNI availability in the geographical area of the project.

24. The main and fundamental question as is posed to us for our consideration is whether the Generators can be held responsible for the inaccurate assumptions, they had made of the expected DNI, which was based on certain

information available through certain agencies, as accurate and reliable DNI data prior to the bids and/or even for considerable time thereafter was not available.

25. The root cause of these litigations is, thus, non-availability of accurate DNI data resulting into the disputes regarding compensation due to drastic reductions in DNI from the expected value, compensation for Foreign Exchange [hereinafter 'forex'] variation as a force majeure event, payment of Liquidated damages for short-supply of committed energy due to reduction in DNI and force majeure claims of fire, flooding etc. The grievance of the Solar Project Developers is essentially that the plants were planned, constructed and finally commissioned, on the basis of the DNI values in existence which were available and accordingly, the projects were bid, however, after commissioning the plants it was found that the actual DNI numbers were far lower than the projections resulting in reduced generation and efficiency resulting into claim for compensation for the same.

26. Contrary to the claims by the Developers, NVVN and the Discoms being the ultimate purchasers of such power, contended that the entire process being a bid process, it is the Generators who had a choice to bid or not to bid, and if they did so on the basis of assumptions made by them, any risk involved is their responsibility.

27. Each issue raised through these Appeals will be taken up in the succeeding paragraphs in the light of various submissions made before us including the documents available.

Relevant Facts/ information

28. Learned advocates for the contesting parties placed before us the factual information through written and oral submissions. Some of the relevant facts/ submissions are noted here for reference.

29. For the selection of the projects / developers, MNRE issued the guidelines on 25.07.2010, the relevant clause 3.7 of the guidelines for the selection of projects/ developers is as under:-

> ***"3.7 Selection of Projects based on Discount in Tariff***
>
> *a) The Short-listed Projects would be asked by NVVN to submit RfP bid indicating the discount in Rs/kWh on CERC Approved Applicable Tariff.*
>
> *b) The RfP containing format and detailed mechanism for Discount in Tariff will be issued by NVVN, if required after short-listing of Solar Thermal Projects.*
>
> *c) The Projects offering the maximum discount in Rs/kWh on the CERC Approved Applicable Tariff would be selected first and so on.*
>
> *d) ……*

30. Further, the Ld Advocate, on behalf of NVVN, submitted that the Website of MNRE gave some information available on DNI but with the disclaimer as under:

> *"This website belongs to Ministry of New & Renewable Energy, Government of India. Content displayed on this website is managed by MNRE and are for reference purpose only. All efforts have been made to make the information as accurate as possible. The MNRE will not be responsible for any loss or harm, direct or consequential or any violation of laws that may be caused by inaccuracy in the information available on this website. Any discrepancy found may be brought to the notice of Ministry. Website Designed and Developed by NIC-MNRE Computer Centre & Hosted at NIC web server."*

31. The Central Commission, on 26.04.2010, issued the tariff order in Suo Moto Petition No. 53 of 2010 determining the Tariff for Renewable Power Projects including Solar Thermal Power Projects. The generic Tariff determined by the Central Commission for Solar Thermal Project was INR 15.31.

32. Thereafter, NVVN, on 18.08.2010, floated the Request for Selection (RfS) for inviting proposals for setting up grid connected Solar Thermal Projects for purchase of solar power for a period of 25 years. The bidders were required to submit the 'Request for Proposal' (RfP) indicating discount on Central Commission's determined generic tariff of Rs.15.31/kWh. The relevant provision of the RfS reads as under: -

> "*4. While this RfS has been prepared in good faith, neither the NVVN nor their employees or advisors make any representation or warranty, express or implied, or accept any responsibility or liability, whatsoever, in respect of any statements or omissions herein, or the accuracy, completeness or reliability of information, and shall incur no liability under any law, statute, rules or regulations as to the accuracy, reliability or completeness of this RfS, even if any loss or damage is caused by any act or omission on their part.*
>
> *1.7 Ministry of New and Renewable Energy has issued guidelines for selection of new grid connected solar power projects of PV and Thermal and are available in the website of MNRE and NVVN at www.mnre.gov.in and www.nvvn.co.in respectively. These guidelines shall form the basis for selection of new projects under 1st batch of JNNSM. The RfS document has been prepared in line with these guidelines."*

33. In addition, NVVN circulated the Draft Power Purchase Agreement wherein Article 4.4.1 indicated the minimum CUF percentage as 16% for solar thermal projects with the normative CUF of 23 % and maximum CUF at 25%.

34. The Letter of Intent (LOI) issued by NVVN provided that:

> *"2.2 Acceptance of the Project is subject to terms and conditions of RfS document, clarifications on RfS issued by NVVN, Guidelines issued by MNRE Govt. of India, elaborations on Guidelines as per Clause 4.4 of the Guidelines issued by NVVN and the terms and conditions of RfP."*

35. Further, relevant clause, the agreement signed between NVVN and the developers, on Force Majeure provided that:

> ***"11. ARTICLE 11: FORCE MAJEURE***
>
> *11.1 Definitions 11.1.1 In this Article, the following terms shall have the following meanings:*
>
> *11.2 Affected Party 11.2.1 An affected Party means NVVN or the SPD whose performance has been affected by an event of Force Majeure.*
>
> ***11.3 Force Majeure***
>
> *11.3.1 A "Force Majeure" means any event or circumstance or combination of events those stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that* ***such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the***

Affected Party had taken reasonable care or complied with Prudent Utility Practices:

a) Act of God, including, but not limited to lightning, drought, fire and explosion (to the extent originating from a source external to the site), earthquake, volcanic eruption, landslide, flood, cyclone, typhoon or tornado;

b) any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action; or

c) radioactive contamination or ionising radiation originating from a source in India or resulting from another Force Majeure Event mentioned above excluding circumstances where the source or cause of contamination or radiation is brought or has been brought into or near the Power Project by the Affected Party or those employed or engaged by the Affected Party.

d) An event of Force Majeure identified under NVVN-Discom PSA, thereby affecting delivery of power from SPD to Discom.

11.4 Force Majeure Exclusions

11.4.1 Force Majeure shall not include (i) any event or circumstance which is within the reasonable control of the Parties and (ii) the following conditions, except to the extent that they are consequences of an event of Force Majeure:

a. Unavailability, late delivery, or ***changes in cost of the plant, machinery, equipment****, materials, spare parts or consumables for the Power Project;*

b. Delay in the performance of any contractor, sub-contractor or their agents;

c. Non-performance resulting from normal wear and tear typically experienced in power generation materials and equipment;

d. Strikes at the facilities of the Affected Party;

e. Insufficiency of finances or funds or the agreement becoming onerous to perform; and

f. Non-performance caused by, or connected with, the Affected Party's:

i. Negligent or intentional acts, errors or omissions;

ii. Failure to comply with an Indian Law; or

iii. Breach of, or default under this Agreement.

11.5 Notification of Force Majeure Event

11.5.1 The Affected Party shall give notice to the other Party of any event of Force Majeure as soon as reasonably practicable, but not later than seven (7) days after the date on which such Party knew or should reasonably have known of the commencement of the event of Force Majeure. If an event of Force Majeure results in a breakdown of communications rendering it unreasonable to give notice within the applicable time limit specified herein, then the Party claiming Force Majeure shall give such notice as soon as reasonably practicable after reinstatement of communications, but not later than one (1) day after such reinstatement. Provided that such notice shall be a pre-condition to the Affected Party's entitlement to claim relief under this Agreement. Such notice shall include full particulars of the event of Force Majeure, its effects on the Party claiming relief and the remedial measures proposed. The Affected Party shall give the other Party regular (and not less than monthly) reports on the progress of those

remedial measures and such other information as the other Party may reasonably request about the Force Majeure Event.

11.5.2 The Affected Party shall give notice to the other Party of (i) the cessation of the relevant event of Force Majeure; and (ii) the cessation of the effects of such event of Force Majeure on the performance of its rights or obligations under this Agreement, as soon as practicable after becoming aware of each of these cessations.

11.6 Duty to Perform and Duty to Mitigate

11.6.1 To the extent not prevented by a Force Majeure Event pursuant to Article 11.3, the Affected Party shall continue to perform its obligations pursuant to this Agreement. The Affected Party shall use its reasonable efforts to mitigate the effect of any Force Majeure Event as soon as practicable.

11.7 Available Relief for a Force Majeure Event

11.7.1 Subject to this Article 11:

a. no Party shall be in breach of its obligations pursuant to this Agreement except to the extent that the performance of its obligations was prevented, hindered or delayed due to a Force Majeure Event;

b. every Party shall be entitled to claim relief in relation to a Force Majeure Event in regard to its obligations, including but not limited to those specified under Article 4.5;

c. For avoidance of doubt, neither Party's obligation to make payments of money due and payable prior to occurrence of Force Majeure events under this Agreement shall be suspended or excused due to the occurrence of a Force Majeure Event in respect of such Party.

d. Provided that no payments shall be made by either Party affected by a Force Majeure Event for the period of such event

on account of its inability to perform its obligations due to such Force Majeure Event.

In the event affecting the "delivery of power", it has to be seen that whether the same qualifies under "Force Majeure" or not."

36. Subsequently the Project Developers submitted Detailed Project Report **(DPR)** prepared by its consultant after examining various technical aspects of the project to be developed by the Solar Power Developer, the specific characteristics of the project site selected by the Solar Power Developer, various technical details including on heat transfer etc. and the above basis, the issues relating to the Direct Normal Irradiance ('**DNI**') and CUF were gone into by the consultant.

37. On 23.01.2012 Amendment Agreement No. 1 was executed between Respondent No. 1 and NVVN to the PPA dated 10.01.2011. Articles 4.4.1 and 4.8.3 as amended by the Amendment Agreement No. 1 is as under:

"4.4.1NVVN, at any time during a Contract Year, shall not be obliged to purchase any additional energy from the SPD beyond _____ Million kWh (MU). If for any Contract Year, it is found that the SPD has not been able to generate minimum energy of _____ Million kWh (MU), on account of reasons solely attributable to the SPD, the non-compliance by SPD shall make SPD liable to pay the compensation provided in the PSA as payable to Disocms and shall duly pay such compensation to NVVN to enable NVVN to remit the amount to Discoms. This compensation shall be applied to the amount of shortfall in generation during the Contract Year. The amount of compensation shall be computed at the rate equal to the compensation payable by the Discoms towards non-meeting of RPOs, subject to a minimum of 25% of the applicable tariff."

……..

"4.8.3The third party may carry out checks for testing the CUF of the Power Project. During a Contract Year, if the CUF of the Power Project is found to be below 23% or if it is found that the SPD has not been able to maintain a CUF of 25% for a consecutive period of three (3) months during a Contract Year on account of reasons solely attributable to SPD, the SPD shall be liable for non-fulfilment of its obligation. The liability shall be equal to the amount levied by the Discom on NVVN for non-supply of power by NVVN which is turn shall have the right to assign such liability to the SPD under this Agreement."

38. Based on the ground data measurement of DNI over the period, the Petitioners found that there is a considerable drop in DNI around 15 to 25%. Due to drop in DNI there was expected shortfall in generation which would be lesser by 10 to 20%. This would result into lower revenue during the term of PPA. The Generators requested NVVN for suitable tariff adjustment based on the reduction of Direct Normal Irradiance (DNI) by 15% to 25% from 2000-2200 kWh/m2/year i.e. the data available. However, the request of the Generators was declined for compensatory tariff on the ground that the same was not in accordance with the PPA.

39. On 21.05.2012, representation was made by various Solar Power Developers including the Respondent no.1 to MNRE raising various concerns including variation in DNI affecting the engineering and procurement activities, non-availability of heat transfer fluid (HTF) etc.

40. On 28.05.2012 MNRE constituted an Expert Committee to review progress of implementation of Solar Power Projects being established under Phase-I of JNNSM.

41. During July / August 2012, Final Assessment Report of the Expert Committee appointed by MNRE to review progress of Implementation of Solar Power Projects was prepared.

42. On 18.10.2012, a Meeting of the Review Committee appointed by MNRE related to the Grid Connected Solar Power Projects under Phase-I of JNNSM was held. The Review Committee discussed various issues relating to the implementation of the project and made recommendations to MNRE.

43. Again on 03.04.2013, Meeting of the Review Committee for discussing issues raised by the Solar Power Developers for implementation of projects under Phase-I of the JNNSM was held. The Review Committee recommended that the developers may be allowed general extension of 10 months beyond initial SCD of 28 months from the PPA date. The summary record of the meeting of the Review Committee for the Solar Power Developers Project provides as under:

> *"A meeting of the Review Committee for Solar Thermal Power Projects under Phase-I of JNNSM was held in the chamber of Shri Tarun Kapoor, Joint Secretary, MNRE at 13.00 hrs on 3rd April, 2013. List of participants is at Annexure.*
>
> *2.0 The Chairman briefly discussed the persisting problems of the developers of the solar thermal plants under JNNSM Ph-Land issues requiring consideration. The gist of deliberations held/recommendations made by the Committee on the same is as under:*
>
> *Requests received from solar Thermal Power Project Developers under Batch-I of Phase-I of JNSM for (i) implementation of force majeure clause for low DNI and (ii) no change in PPA specified tariff*

due to delay in commissioning: *It was noted that the developers of solar thermal projects have been representing from time to time asking for more time to commission the projects because of delays due to several reasons like low DNI, problem in availability of HTF etc.* ***This issue was discussed in Sub Committee meeting held on 18th Oct 2012 wherein the Committee felt that the situation of low DNI could be considered as akin to Force Majeure event not being in the control of the SPDs and recommended that MNRE may take appropriate steps to approve consideration of "Force Majeure" event due to lower DNI; also that NVVN be asked to obtain legal opinion on specific issue of applicability of CERC tariff in case of delayed commissioning of projects beyond permissible period. NVVN has since obtained legal opinion and forwarded the same to MNRE. From the legal opinion, it is clear that the clauses regarding CERC applicable approved tariff and SCD will have to be revisited as the existing clauses may not give authority to NVVN under their PPA provisions to provide any relief.***

a. *The following observations / recommendations were made by the Committee:*
    i. *With regard to the issue of CERC applicable tariff, the definition in PPA talks of both date of commissioning as well as date of signing of PPA which becomes vague because if we go by the date of signing the PPA, the CERC tariff remains stable whereas if we go by date of commissioning the CERC applicable tariff will keep changing to such an extent there have been drastic falls in the subsequent orders. Considering the fact that solar thermal projects are coming up for the first time in the country and all the project*

developers are facing major problems and delay of even one day beyond the scheduled commissioning date will result in a sharp dip in the tariff, the Committee felt that it will be appropriate if the words "and the year of commissioning" are deleted from the definition of "CERC applicable approved tariff meaning thereby that the tariff on the date of signing of PPA will remain applicable. This would then also apply to the SPV projects, which may have gone beyond the time period specified by CERC for commissioning of the projects.

ii. *The Committee considered the Clause 3.12 regarding commissioning of the projects where timelines have been defined. It was noted that one modification has been made on 15.3.2013 vide which some relief have been given, viz, the allowed time for commissioning with penalties had been extended from 8 months to 18 months beyond SCD of 28 months from PPA. However, the request of the developers is to shift the SCD beyond 28 months mentioned in clause 3.12. The Committee noted that the developers have been making request for giving more time for the last several months. The Committee also noted that the Expert Committee formed to look into the issues of solar power developers had also recommended that the time provided is inadequate for commissioning of solar thermal projects. The important point here is that all the projects seem to be getting delayed. Only one project i.e. Godawari is likely to be commissioned on schedule or may be with a slight delay because the developers have put in extra efforts. Even then they have also requested for extra time because they felt that due to lesser time availability they have to squeeze certain*

actions resulting in extra cost. The reasons given by developers are lower DNI, difficulty in procuring heat transfer fuel (HTF), more time required for construction of the projects due to the complexity and new technology, financing problems and land acquisition issues. In certain cases, very long pipelines have to be laid to bring water to the site. ***The Committee felt that while it is the responsibility of the developers to comply with all the conditions laid down and to meet the deadline as MNRE has not taken responsibility for DNI nor for any other hardship being faced by the developers, it is important that all these projects do come up and do not turn into financially unviable and unsustainable assets. Solar thermal has good future if indigenization takes place and technology suitable for Indian conditions is developed. Therefore, these upcoming projects also act like laboratories under Indian conditions.*** *If these projects fail as has happened with the first 2.5 MW project, the solar thermal technology in India may be closed for ever as no developer may like to come forward. Recently in Rajasthan tenders, no bids were received. It was also a fact that the developers have to increase the solar field involving extra land acquisition and clearances involving extra time. After due consideration of all the aspects, the Committee recommended that the developers may be allowed general extension of 10 months beyond initial SCD of 28 months from PPA date, before imposition of any penalties that can remain as per the revised structure approved earlier. This way the revised SCD for all projects will be 38 months w.e.f date of PPAs, after which the penalties will be imposed spread over period of the*

next 18 month as per the structure specified in the amendment issued on 15.3.2013. This is only a one time recommendation taking the peculiar circumstances into account.

iii. The above amendments in the Guidelines would be covered under clause 4.4 of "Power to Remove Difficulties" under which Secretaries of Ministry of Power and Ministry of New & Renewable Energy can take a decision."

44. It may be seen that the Review Committee after detailed deliberations concluded that:

- the situation of low DNI could be considered as akin to Force Majeure event not being in the control of the SPDs and recommended that MNRE may take appropriate steps to approve consideration of "Force Majeure" event due to lower DNI;
- it is important that all these projects do come up and do not turn into financially unviable and unsustainable assets. Solar thermal has good future if indigenization takes place and technology suitable for Indian conditions is developed.
- these upcoming projects also act like laboratories under Indian conditions.

45. In the context of the above, the issues emerging out of these Appeals are:

a) Compensation in tariff due to drastic reduction in DNI from the expected values,

b) Liquidated damages due to lower generation and supply,

c) Foreign exchange rate variation (Forex) in respect of foreign loans taken is a Force Majeure Event, and

d) Force Majeure claims on account fire, drought etc.

Observations & Analysis

46. After hearing Learned Advocates, Mr Buddy Ranganadhan for GGEL and RSTPL, Mr Sakya Singh Chaudhari, for MEIL, Mr M. G. Ramachandran for NVVNL and Mr Anand K Ganesan, for the Discoms, the first question came before us is:

i) whether the plea of the Appellant-Generators (Godavari, RSTPL and MEIL) deserves consideration due to drastic reduction in DNI as against the available values of DNI and inter-alia Generators are entitled to compensation on account of the lower DNI after the commissioning of the plants?

47. There is no dispute on the fact that the Solar Thermal Technology for setting up large Solar Thermal Projects was introduced for the first time in the country. The Review Committee constituted by MNRE observed these projects as pilot projects by citing these as laboratories under Indian conditions. The observation of the Committee, for the sake of emphasis, is extracted below:

> *"These upcoming projects also act like laboratories under Indian conditions. If these projects fail as has happened with the first 2.5 MW project, the solar thermal technology in India may be closed forever as no developer may like to come forward."*

48. It is our obligation to record that these projects should be tried and developed for future growth of solar generation and therefore, it is the duty of us to ensure that these projects become a success story for inviting future investments in the technology. Therefore, it is important for all the organisations to take utmost measures in promoting the technology by removing all the hurdles in

implementation of these projects so as to ensure establishment of such technology, being important for the country. In fact, the potential for Solar Thermal Generation is much higher as compared to Solar Photo-voltaic Generation as also indicated by CERC in its Explanatory Memorandum for Tariff Norms for Solar Power Projects, as under:

> *"While India receives solar radiation of 5 to 7 kWh/m2 for 300 to 330 days in a year, power generation potential using solar PV technology is estimated to be around 20MW/sq. km and using solar thermal generation is estimated to be around 35MW/sq. km."*

49. There was no contest from the parties on the submission of the developers that no company in India had or could have had any prior experience of setting up solar thermal projects in India, even to the extent that it is for the first time in the world that Solar Thermal Projects of this scale were being set up at least at the time when the subject bids were invited.

50. As fittingly pointed out by the Generators and also endorsed by the Review Committee declaring these projects as "laboratories", the claims of the Generators cannot be seen through the lens of a normal thermal technology which has been around for over a century. These projects are unique projects paving way for future developments in the country reaping benefits from untouched technology utilising free natural resource. The Central Commission also recognises this in the Impugned Order appreciating the Generators who had commissioned their plants despite heavy odds, when admittedly other bidders had not done so.

51. We fail to understand that even after noticing that these projects are like "laboratories" and only the three developers have successfully commissioned the projects against heavy odds and challenges in addition to non-availability of accurate and fair information on DNI, yet, CERC, as also the MNRE have while

considering the claims and counter claims not translated the above undisputed position into a mechanism to save this technology. Considering that India has large potential for Solar Thermal Generation, failure of the pilot projects may have far reaching consequences, country may be deprived of the free natural resource for generation of electricity.

52. Contrary to above, NVVN and the Discoms vehemently argued against any relief to be extended to the Developers. They contended that the entire process being a bid process, it is the Generators who had a choice to bid or not to bid, and if they did so on the basis of assumptions made by them, any risk involved is their responsibility.

53. Their (NVVN and Discoms) contention is based on the bidding guidelines and the contractual agreements made. However, if we go by this contention then no new technology can be introduced in the country and the growth as an outcome of competition and adoption of new technologies shall get badly hampered. Further, the issue emerges out from the fact that the information as available and considered by CERC for determination of tariff and adopted by the Developers can make them responsible for the loss, even when Review Committee acknowledged that low DNI is akin to Force Majeure and the SCOD of project may be extended and was accordingly extended.

54. It is not denied that the Review Committee of MNRE, the nodal Ministry for promoting Renewable power, has observed the same by citing that the failure of these projects may adversely impact the country as no developer shall come forward.

55. There cannot be any argument on whether introduction of new technology deserves various supports and measures for promotion of the new technology. In the present case the Developers having no past experience and the precise

information was not available, have to depend on certain information as available from the reputed organisations, in this case from the Government website of MNRE, which is also considered by the Central Commission for determining the tariff.

56. The DNI data shown in the MNRE Solar Irradiation Map was 2074 kWh/m2/year and also admittedly considered by the Central Commission in the determination of Generic Levelised Tariff of Rs. 15.31 and accordingly, relied upon by the Generators in making their bids. It was submitted that the MNRE Solar Irradiation Map was itself modelled on NASA and NREL satellite data and not on ground readings. The Explanatory Memorandum of the CERC's 2012 RE Tariff Regulations (as relied upon by the Generators) provides as under: -

> *"It appears from the above table that the solar irradiation level at different locations is different and also has yearly variation at the same location. In the RE Tariff Regulations-2009, a CUF of 23% has been specified. For determination of solar field size corresponding to target CUF of 23% and Capital cost, Rajasthan State, Jodhpur District DNI data of the year 2005 taken as representative irradiation* ***(Direct Normal Insolation (DNI): 2074 kWh/m2/year)*** *for the analysis."*

57. However, the DNI which was actually found available after the commissioning of the project by the Generators was in the range of 1500-1700 kWh/m2/year (RSTPL) and 1676 kWh/m2/year (Godavari). There was no contest by NVVNL and the Discoms on the actual DNI value as indicated herein.

58. There was a contest that even if the above technology was being ushered in for the first time in the country would not, however, absolve the Generators from their responsibility of doing their due diligence, stating to the fact that the bidding

criterion in the JNNSM Guidelines clearly spell out that the bidders had to either have a tie-up with a technology provider or have other tie-up with experts in the field.

59. If that is so, the procurer (NVVN) should have ensured that the bidders have the requisite access to the technical know-how to set up the projects before the projects are commissioned, yet the question is whether even with this technical support that the bidders ought to have done any differently than what they had. There was no weather laboratory operating in the region which could have provided the accurate information, further filtering out precise value of DNI from the satellite data was not possible as also pointed out in the report submitted to CERC.

60. The CERC, in the impugned Order observed that the Generators should have used technical expertise to help them convert the satellite data of DNI to ground data, ignoring the fact that the generators have in their DPR have gone into great detail in the analysis of different sources of data including from the MNRE Website, Meteonorm, C-WET, IMD etc. Unfortunately, CERC without analysing the Report by Mr. B D Sharma submitted to it on its initiative on "Performance of Solar Plants in India" in February 2011 has made the above observation, the report recommended that: -

> *"The radiation data can be used from all the above-mentioned sources. However, each has its own accuracy levels. The satellite data has the following limitations:*
>
> - *The sensors generally cannot distinguish between clouds and snow cover*
> - *The measurements are less accurate near mountains, oceans or other large bodies of water.*

- *All measurements are essentially made at the top of the atmosphere and require atmospheric models to estimate the solar radiation at the ground.*

….

..Based on the merits and de-merits of the different sources of radiation data, it can be concluded that the most reliable data is obtained from ground based weather stations…."

61. In our opinion the observation of the CERC that the Generator could have utilised technical expertise to properly analyse the data was meaningless since admittedly and undisputedly all the data that was available at the time of the bids was only the data from satellite analysis, such as the NASA, Meteonorm etc which cannot be transformed to precise DNI value at the ground level.

62. Undoubtedly, the actual readings of DNI measured at ground level was not available and therefore, accurate predictions, on the basis of which, could have been made by the Generators, irrespective of whatever technical expertise they may have had access to. In fact, NVVN and the Discoms, present and contesting, before us have also not denied this. It was indeed because of this reason that the Developers were mandated to commission "Weather Stations" as part of their projects for measuring the actual DNI values, it was a part of the contractual obligations for the Generators to install DNI reading instrumentation at the plants.

63. Further, it was contested that CERC cannot extend the relief under competitively bid tariff adoption. It is important to note here that the role of a Regulator has been concisely stated by the Hon'ble Supreme Court in the case of Lafarge Umium Mining Pvt Ltd in T N Godhavarman Thirumulpad Vs Union of India [2011] 7 SCC 338 para 122 –

> "..*The difference between a Regulator and a Court must be kept in mind. The Court/Tribunal is basically an authority which reacts to a given situation brought to its notice whereas a Regulator is a proactive body with the power conferred upon it to frame statutory rules and regulations* …."

64. We are compelled to note here that the Central Commission, in dealing with the subject, acted in a manner as if it is resolving the simpliciter personal dispute between two parties, CERC should have approached the present case for resolution after weighing all pros and cons and using its Regulatory powers under section 79(1)(f) of the Electricity Act, 2003 as observed by the Hon'ble Supreme Court in the above cited case. We add here that in such cases, the Central Commission ought not to forget its fundamental role of being a Regulator first and an Adjudicator second.

65. Further, it was brought before us that the measuring instruments for DNI were commissioned by the Generators, and after obtaining the reading from these instruments could have raised the issue at that time only. We feel that, even if the instruments were commissioned prior to signing of the Supplementary PPA, as argued, it would have taken number of years to determine the precise DNI value for future projections. For precise measurement and forecast, regular measurement is required for years together as also, suggested in the B. D. Sharma Report that DNI readings have to be considered over a long term for accurate predictions to be based thereupon. Hence, even at the time of the DPR being submitted or even when instruments were commissioned there was undisputedly no accurate DNI Readings that the Generators could have relied upon to base their projections of CUF and Minimum Energy. The DNI cannot be predicted through a single reading, similar to hydrology determination for a hydro project, data for long years is required.

66. As is also seen, the selection of the project was based on reverse bid on the benchmark of the CERC determined Generic Tariff. In determination of Generic Tariff, CERC has assumed certain data/ values including the DNI value. It is inconceivable that the bidders could have conceived or structured their bids on parameters that were alien to the CERC Generic Tariff or otherwise if the bidding criteria had been without any benchmark tariff at all, as in the case of ordinary bids under Section 63 for Thermal or even today for other Renewable Energy projects, the considerations may have well been very different.

67. We are inclined to accept the contention of the Developers that once some benchmarks are laid down, it would be extremely unfair, arbitrary and unreasonable to expect the bidders to give their bids without any reference to the parameters which had been taken into account in the determination of the generic tariff.

68. We are not obliged to agree to the contest that the bidders should have submitted the bids without referring to the basic parameters adopted for determination of the benchmark tariff. There was non-existence of the precise value of DNI, which is source of fuel for the electricity generation, any drastic change in the DNI if known earlier could have, even, resulted into different value of the Generic Tariff.

69. The MoM dated 18.10.2012 of the Review Committee also recorded that that at the time of selection/PPA, the SPDs have based their bids on the best available resource data at that time which was approximately 15-20% higher than the actual data collected by them at their respective sites. In para 7, the Experts have deliberated and the Committee recommended that:

> *"MNRE may take appropriate steps to approve consideration of "Force Majeure" event due to lower DNI as was available to the SPDs*

at the time of bidding for these projects. If approved, this would require assessment of time period lost and consequently shifting of COD by the same"

70. The finding of the CERC, that the argument of the Generators that they had taken into account parameters similar to those on which the generic tariff was determined, as being far-fetched, is itself far-fetched. We are inclined that once CERC has decided on certain assumptions, cannot observe that others are wrong if they adopt those assumptions.

71. NVVN and the Discoms have persistently contended that there was no indication or mention of the DNI or CUF in the bidding related documents either released by NVVN or the MNRE. Though it may be correct that there may not be any direct representation of the DNI, however, undoubtedly, the only source available for information on DNI was the website of the Nodal Ministry, MNRE and as conceded by all the contesting parties that the same value was adopted by CERC for the determination of the Generic Tariff. The fact that the bidding was a reverse bid on the benchmark of the CERC determined Generic Tariff is indication enough that the Generators were bound to consider and look into the various parameters that the CERC may have gone into while determining the generic tariff.

72. The argument that the Generators have never approached NVVN on the issue of negotiating the CUF after finding reduction in the value of DNI, find no merit as once they approached Central Commission, which is the right forum, have all the rights for pleading before the Central Commission for invoking its powers under Sections 79 (1)(b) and (f) of the Electricity Act, 2003 for revision in tariff under Article 9 of the PPA. The power to revise the tariff under Article 9 of the PPA is with the Central Commission and not with NVVN or MNRE. Therefore,

once the Generators had approached the CERC by filing a petition for revision of tariff with the same CUF, the CERC was bound to deal with the same.

73. The Generators submitted that MNRE was requested through the joint representations dated 05.03.2014 and 16.10.2015 during pendency of the petition, also pleaded before CERC as recorded in the proceedings dated 18.05.2017 and 17.08.2017. Generators were pursuing the MNRE with regard to (i) appropriate adjustment in tariff due to low DNI (ii) changing the DNI on account of CUF and (iii) not to levy any penalty for minimum guaranteed generation as well as to "revise the minimum guaranteed energy in line with drop in DNI" as also submitted before us.

74. We decline to accept the arguments that the Generators never took up the issue before NVVN and as such are not entitled to make a claim on account of reduction in DNI, in fact for any such compensation, it is the Nodal Ministry or finally the CERC to decide and adjudicate, the Generators rightly approached the two.

75. This Tribunal had, during the course of the arguments, repeatedly asked the Learned Counsel for NVVNL and the Discoms, as to how and on what basis had the CERC determined the CUF of 23% for Solar Thermal Plants in their 2009 RE Tariff Regulations which was used to determine the generic tariff. Apart from a vague reference to some contentions statedly to have been made to the CERC by certain stakeholders about the likely CUF of such plants which could potentially be between 24% to 51% there was no answer forthcoming. Only answer we could get is reference to the Explanatory Memorandum, for the sake of reference, it is again quoted as under:

> *"It appears from the above table that the solar irradiation level at different locations is different and also has yearly variation at the*

same location. ***In the RE Tariff Regulations-2009, a CUF of 23% has been specified. For determination of solar field size corresponding to target CUF of 23% and Capital cost, Rajasthan State, Jodhpur District DNI data of the year 2005 taken as representative irradiation (Direct Normal Insolation (DNI): 2074 kWh/m2/year) for the analysis.***

The table shown below calculates electricity output and CUF based on SAM modeling (for a 111 MW plant with net generation of 100 MW with standard component efficiency used is tabulated below) for Jodhpur District representative irradiation (Direct Normal Insolation (DNI): 2074 kWh/m2/year) with different size of solar field assuming nil thermal storage."

76. The same Explanatory Memorandum to the CERC 2012 RE Regulations also makes it clear that CUF is nothing but a factor of DNI and Solar Field size. The Generators have referred us to a statement made by them on affidavit before the CERC that, similar to what the CERC has demonstrated in the above Explanatory Memorandum, the Generators had projected a higher CUF than 23% by simply projecting a higher Solar Field Size for the very same DNI number which certainly have cost implications.

77. If that is the position brought before CERC, the findings that the Generators have themselves increased the projected CUF beyond what was provided for in the sample PPA annexed to the bid documents therefore they were comfortable with the DNI number, is clearly and evidently wrong, cannot be accepted as reasonable and appropriate. In case the DNI value is reduced drastically, the CUF shall also get reduced. All their projections are bound to fail. CERC ought to have considered and acted upon accordingly.

78. The argument that the draft PPA itself provided a maximum CUF of 23% and a minimum of 16% to provide for any possible drop in project parameters so as to take care of the variation, therefore, the argument of the Generators that they should be compensated for the reduction in DNI which is beyond their control has no force as the draft PPA itself has margins for such variations due to seasonal and weather variations. We find no merit in the argument. If, the margins provided there in has any indication in drop in parameters including the DNI, CERC ought to have considered this aspect in the Impugned Order. Therefore, in case the cushion is not enough to absorb the actual variation in the parameters, there are more reasons to consider the claims of the Developers. It is an undeniable fact that the DNI for most part of the period has not been even remotely enough to sustain even the minimum CUF of 16%.

79. Further, there is no averment against the Generators that their plants are inefficient, cause for lower CUF/ generation. The MNRE committee have complimented the Generators on the engineering of the projects and their quality considering the circumstances of the sites. On the contrary, it has been established that when the DNI was adequate, the plants have been able to generate more than the minimum CUF. It is therefore clear that the minimum CUF could not be maintained by the Generators only on account of insufficient DNI, which certainly cannot be attributed to the Developers.

80. NVVN and the Discoms have invited our attention to various judgments of the Hon'ble Supreme Court and the High Courts, covering the captioned dispute and citing that the judgments direct that in a bidding process, the bids have to be maintained and if the bidders have bid on the basis of certain assumptions, they cannot claim for review of the bids or avoid their contractual obligations. It is, therefore, important to see whether the said statement of law would apply to the facts in these cases.

81. Therefore, there is need to understand about the assumptions made by the Developers and on what basis. Is there any vacuum in getting certain information which accordingly created by the bidder or the assumptions are made on the basis of certain information which is reliably obtained from and considered by various Government organisations or statutory authorities.

82. Our attention was invited by NVVN and the Discoms to the Judgment of this Tribunal in Nabha Power Vs PSPCL Appeal No. 207 of 2012, Judgment dated 23rd April 2014. In this case, bids were invited on the representation that the project was located in Seismic zone III when in reality, it fell within Seismic Zone IV. This Tribunal there held that even though the representation of the authority inviting the bids was wrong, if the generator therein had done his due diligence, he would have discovered that the project actually fell within seismic zone IV, hence there was no escape for that generator from its contractual obligations.

83. Before we examine whether the said judgment is applicable to the present case or not, it is important to note here that no actual or precise data on DNI was available at the time of bidding or till commissioning of the project, the only source was the information provided on MNRE website and value duly considered by CERC in the determination of Generic Tariff. The information for seismic zones is available accurately and precisely and can easily be obtained from seismic zone maps. Therefore, in the referred case, seismic zone in which the project is situated could have been ascertained correctly and accurately if the developer had exercised due diligence. It cannot be denied that the information on seismic zones is precisely and accurately available in related Government publications however, in the present case, no reliable and accurate ground readings were available for the Developers to ascertain even if they had exercised due diligence. The developers were dependent only on the satellite data available from various authoritative sources such as NASA, NREL, although all such data were only computed data from satellite imagery which could not substitute for ground

readings of DNI. Therefore, there was no possible way for the Generators, in the present case, to ascertain the true picture on the ground no matter what they may have done.

84. Accordingly, we are unable to find any application or similarity of that judgment to the facts of the present case.

85. To the contrary, the generators relied upon the judgment of this Tribunal in Patikari Power Ltd Vs HPERC, Appeal No. 179 of 2010 Judgment dated 23-4-2012. Although it arose from a totally different background and facts, related to Hydro Project. This Tribunal observed therein that the hydrology for a Hydro plant is crucial to determining the performance parameters of that Hydro plant. There is a similarity in the two cases as DNI to the Solar Thermal Plant is like Hydrology to the Hydro power plant. Both require long years to be determined before projecting the utilisation factor or the CUF for the respective projects. As water potential (hydrology) is the source of energy of Hydro Plants, DNI is the source of energy for Solar Thermal Plants, both are natural resources, any drastic variation is beyond the control of the developer and have adverse impact on the performance inter-alia on the generation of electricity and therefore, would definitely be a ground for the Commission to exercise its Regulatory powers. We are inclined to agree with the same.

86. The Generators submitted that the term 'Force Majeure' under Article 11.3.1 of the PPA, as quoted earlier, is defined to mean any event or circumstance or combination of events that wholly or partly prevents a party to perform his obligations, to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the affected party. Further, the definition of "Act of God" under Article 11.3.1 a) is non-exclusive and not only limited to the events mentioned therein but would cover all events which are directly related to an Act of God, including the present drastic drop in DNI as

sought by the Generators. Also, the claim that any dramatic change in the quality of the fuel, i.e. the DNI as it was taken to be prior to the bid and afterwards during the continuance of the contract would squarely qualify as a Force Majeure event.

87. We, at this stage, also prefer to refer to the fact that the MNRE Committee considered the shortfall in DNI to be "akin to force majeure" and thereby recommended an extension of the SCOD for the plants resulting into signing of Supplementary PPA to provide for such extension of SCOD on that specific ground and accepted by the Central Commission.

88. We are unable to understand one thing, can an event, in the present case insufficient DNI, considered as "akin to force majeure" for the purpose of extending the SCOD of the plants, fail to qualify as "akin to force majeure" for another cause i.e. the claim for compensation by the Generators. Any natural phenomena declared as Force Majeure Event, will remain as Force Majeure for all purposes. Therefore, once reduction in DNI, an uncontrollable event, is recognized as an event similar to force majeure for the purpose of extending the SCoD, fact established vide Notification dated 08.05.2013 by the MNRE, it can hardly be argued that the event of lower DNI is not a Force Majeure event for the purpose of revision and adjustment in tariff.

89. We also note here that while rejecting the claim of the Generators, CERC in the Impugned Order has observed that:

> *"177. -------- Hence, it is erroneous to contend that CUF incorporated in the PPA was done without the knowledge of the actual DNI that would be applicable to the project.*
>
> *178. It is understood that petitioners made efforts to verify the DNI data with free data sources available at that time.* ***However, no effort is observed to have been made to measure the actual DNI in the***

pre-bid stage. The argument that there was insufficient time to determine the actual DNI values or any other impractical bid conditions should have been brought up by the Petitioners at the initial stages, such as at the time of RfS or financial closure. Even in the case of paucity of time, if the Petitioners felt it was a critical bidding factor, they should have suggested the same to MNRE/NVVN for including the same under Force Majeure clauses. However, no such efforts from the petitioners can be observed.

179. It is the responsibility of the Solar Power Developers, i.e. the Petitioners herein to carry out due diligence before the bidding as required the RfS document. The Petitioners have failed to prove to our satisfaction that they carried out due diligence about the DNI before quoting the bid and even at the time of subsequent amendments to the PPAs. Therefore, the responsibility for resultant variation between the DNI stated to be assumed by the Petitioner at the time of bidding and the actual DNI on ground lies squarely to the account of the Petitioners."

90. From the observation, it is not clear what due diligence was required from the Generators. Is it that they should not consider that the information and assumptions taken by CERC may not be correct and it is them to discover. We are deeply anguished by such an observation and analysis put forth by the Central Commission, a statutory body enjoying vast power and knowledge. None of the Government agencies, or reputed international agencies had the precise data on DNI value at the ground level in the State of Rajasthan, the only information which was available in the country was through the website of MNRE based on satellite data made available by NASA/ NREL. Even to this fact, CERC itself has determined the Generic Tariff based on some information which was not precisely correct and adopted the same without any due diligence. Any rough estimation of Generic Tariff has resulted into this serious dispute.

91. Citing of the definition of “Due Diligence” is something which should have been observed only if the Central Commission has performed and determined the Tariff based on information collected after due diligence and thus setting an example for the promotion of the Renewable Power – Solar Thermal Projects in the country.

92. We, therefore, opine that once insufficient DNI is an event beyond the control of the Developers and is similar to force majeure which duly considered for extension of SCOD, it ought to be considered as force majeure for the purpose of claim for compensation. Therefore, the Central Commission, in exercise of powers under Section 79, should have exercised its regulatory powers in view of the situation akin to Force Majeure in line with the recommendation of the Review Committee of Experts constituted by the MNRE. Accordingly, a mechanism to suitably compensate the generators required to be evolved in order to off-set the revised capital costs incurred and additional operational costs to be incurred for the remaining term of the project, due to drastic drop in DNI. This would ensure long term viability and sustainability of the project and future establishment and development of Solar Thermal Technology.

93. We find merit in the Appeals filed by the Developers i.e GGEL, RSTPL and MEIL for the claim for compensation and accordingly, allow the appeals of the Generators on the issue of compensation for insufficient DNI. The Central Commission shall formulate the mechanism for compensating the Generators against the reduction in DNI from the adopted value of DNI for determination of Generic Tariff to the actual annual values measured at project sites.

94. The second issue which is raised in the Appeals is:

ii) whether Liquidated Damages claim by the NVVN is permissible even when the loss on account of short supply of power by the Generator cannot be quantified and proved?

95. The issue of Liquidated Damages is limited to the claim of NVVN against GGEL and MEIL only as issue of levy of LD from RSTPL is pending before the CERC. NVVN has challenged the Impugned Order on the ground that CERC rejected its claim against MEIL and in the case of GGEL, restricted the claim by adjusting it for the grid unavailability. GGEL challenged the Impugned Order for levy of liquidated damages claiming the short supply of power as uncontrollable event due to low DNI, which is not under its control.

96. CERC, in the Impugned Order has relied upon the following judgments:

- Hon'ble Supreme Court judgment titled *"Construction & Design Services Vs. Delhi Development Authority" (2015)14 SCC 236,*
- Hon'ble Supreme Court titled "*Kailash Nath Associates Vs. Delhi Development Authority" (2015)4 SCC 136,* and
- Delhi High Court in the judgment titled ***"****Engineers India Limited Vs. Tema India Limited****"*** *FAO(OS)487/2015.*

97. Further, the above titled judgment of Delhi High Court observed that:

> ***"18. In the case of Vishal Engineers & Builders v. Indian Oil Corporation :*** *2012 (1) Arbitration Law Report 253 (Delhi), it was held that the plaintiff must first prove the damages that they have suffered to recover simpliciter a sum by way of liquidated damages. Further, the legal position, as explained in Indian Oil Corporation v. Lloyds Steel Industries Limited: 2007 (4) Arbitration Law Report 84 (Delhi), wherein it is held that in a particular case where there is a clause of liquidated damages the Court will award to the party aggrieved only*

reasonable compensation which would not exceed an amount of liquidated damages stipulated in the contract. It would not, however, follow there from that even when no loss is suffered; the amount stipulated as liquidated damages is to be awarded. Such a clause would operate when loss is suffered but it may normally be difficult to estimate the damages and,

therefore, the genesis of providing such a clause is that the damages are pre-estimated. Thus, discretion of the Court in the matter of reducing the amount of damages agreed upon is left unqualified by any specific limitation. The guiding principle is 'reasonable compensation'. In order to see what would be the reasonable compensation in a given case, the Court can adjudge the said compensation in that case. For this purpose, as held in Fateh Chand (supra) it is the duty of the Court to award compensation according to settled principles.

Settled principles warrant not toward a compensation where no loss is suffered, as one cannot compensate a person who has not suffered any loss or damage. There may be cases where the actual loss or damage is incapable of proof; facts may be so complicated that it may be difficult for the party to prove actual extent of the loss or damage. Section 74 exempts him from such responsibility and enables him to claim compensation in spite of his failure to prove the actual extent of the loss or damage, provided the basic requirement for award of 'compensation', viz. the fact that he has suffered some loss or damage is established. The proof of this basic requirement is not dispensed with by Section 74. That the party complaining of breach of contract and claiming compensation is entitled to succeed only on proof of 'legal injury' having been suffered by him in the sense of some loss or damage having been sustained on account of such breach, is clear from Sections 73 and 74.

Section 74 is only supplementary to Section 73, and it does not make any departure from the principle behind Section 73 in regard to this matter. Every case of compensation for breach of contract has to be dealt with on the basis of Section 73. The words in Section 74 'Whether or not actual damage or loss is proved to have been caused thereby' have been employed to underscore the departure deliberately made by Indian legislature from the complicated principles of English Common Law, and also to emphasize that reasonable compensation can be granted even in a case where extent of actual loss or damage is incapable of proof or not proved. That is why Section 74 deliberately states that what is to be awarded is reasonable compensation. In a case when the party complaining of breach of the contract has not suffered legal injury in the sense of sustaining loss or damage, there is nothing to compensate him for; there is nothing to recompense, satisfy, or make amends. Therefore, he will not be entitled to compensation See State of Kerala v. United Shippers and Dredgers Ltd. Even in Fateh Chand (supra) the Apex Court observed in no uncertain terms that when the section says that an aggrieved party is entitled to compensation whether actual damage is proved to have been caused by the breach or not, it merely dispenses with the proof of 'actual loss or damage'. It does not justify the award of compensation whether a legal injury has resulted in consequence of the breach, because compensation is awarded to make good the loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach. If liquidated damages are awarded to the petitioner even when the petitioner has not suffered any loss, it would amount to 'unjust enrichment', which cannot be countenanced and has to be eschewed."

98. After analysing the applicability of the above judgments, CERC in the Impugned Order has observed that:

> *"223. Therefore, in the light of the above cited judgments, the Commission observes that the following principles are laid down:* ***firstly*** *the party complaining of breach of contract and claiming compensation is entitled to such compensation only on proof of 'legal injury' having been suffered by him in the sense of some loss or damage having been sustained on account of such breach.* ***Secondly****, the actual loss need not be proved and can be given on the basis of pre-estimate of damage or loss; and* ***thirdly****, the Commission is required to find out the genuineness of the pre-estimate damages incurred by the Respondent and the extent of 'reasonable compensation' which can be accounted for as 'liquidated damages'."*

99. Therefore, CERC observed that compensation for liquidated damages can be claimed against the loss incurred by NVVN, and thus require to show or prove the quantum of damage occurring because of the Generator.

100. In the case of MEIL, CERC has observed that no loss or injury has been proved as such NVVN is not entitled to claim any compensation for liquidated damages. The relevant extract of the decision is quoted as under:

> *"Further, Respondent No.3 has also not referred to any loss caused due to non-compliance of RPOs. Therefore, the Respondents have failed to bring on record the proof of any 'legal injury' in the sense of some loss or damage having been sustained on account of breach i.e. short supply of the power energy to the DISCOMS. Hence, NVVNL and the distribution companies are not entitled to raise any claim from the Petitioner on this account unless they prove that they suffered loss by the way of penalty*

from the SERC on account of non-compliance of RPO due to shortfall generation."

101. In the case of GGEL, CERC observed that the grid failure is an event which is not in the control of the Generator (GGEL), therefore, as per Article 4.4.1 liquidated damages cannot be levied on the Generator during the grid unavailability. Relevant extract of Article 4.4.1is quoted as under:

"....*If for any contract year, it is found that the SPD has not been able to generate minimum energy of 91.980 Million kWh (MU), on account of reasons, solely attributable to the SPD, the non-compliance by SPD shall make SPD liable to pay compensation provided in the PSA as payable to Discoms and shall duly pay such compensation to NVVNL to enable NVVNL to remit the amount to Discoms...."*

102. Clause 4.4.1 (as amended in Godavari's PPA) reads as under:-

If the SPD "……...has not been able to generate minimum energy of 98.550 Million kWh {MU}, ***on account of reasons solely attributable to the SPD,*** *the non-compliance by SPD shall make SPD liable to pay the compensation provided in the PSA as payable to Discoms and shall duly pay such compensation to NVVN to enable NVVN to remit the amount to Discoms. This compensation shall be applied to the amount of shortfall in generation during the Contract Year. The amount of compensation shall be computed at the rate equal to the compensation payable by the Discoms towards non-meeting of RPOs, subject to a minimum of 25% of the applicable tariff."*

103. The Ld Advocate on behalf of the Generators has submitted that it may not be completely essential to interpret the aforesaid Clause 4.4.1, it may be noted

that Article 6.8.3 of the PSA (executed by NVVNL on a back-to-back basis, with Rajasthan discoms) provides under:-

> *"6.8 Renewable purchase obligation*
>
> *……..*
>
> *6.8.3. NVVN, at any time during a Contract Year, shall not be obliged to purchase any additional energy from the SPD beyond …Million kWh (MU) [Insert value of energy generated corresponding to a CUF of 21% for solar PV and CUF of 25% for solar thermal projects. Provided that in case of solar projects using advanced technologies, the value of CUF shall be the average CUF committed by the SPD at the point of signing the PPA]. If for any Contract Year, it is found that the* ***SPD has not been able to generate minimum energy of …. Million kWh (MU)*** *[Insert value of energy generated corresponding to a CUF of 12% for solar PV and CUF of 16% of solar thermal projects and further provided that in case of* ***solar projects using advanced technologies****, the value of CUF shall be 7% below the average CUF committed by the SPD at the point of signing the PPA],* ***on account of reasons solely attributable to the SPD, the non-compliance by SPD shall make SPD liable to pay the compensation to NVVN to enable NVVN to remit the amount to Discoms.*** *This compensation shall be proportional to the amount of shortfall in solar energy during the Contract Year."*

104. A bare reading of Clause 4.4.1 along with Article 6.8 of the PSA, as quoted above, makes it clear that: -

(i) The lower generation has to be "***on account of reasons solely attributable to the SPD***";

(ii) The compensation payable under the PPA "..*shall make SPD (Generator) liable to pay the compensation provided in the PSA..*"

(iii) ***"…The amount of compensation shall be computed at the rate equal to the compensation payable by the Discoms towards non-meeting of RPOs…"*;**

(iv) The rate of the compensation shall "…*subject to a minimum of 25% of the applicable tariff….".*

105. It was further, added by the Ld Advocate on behalf of Generators that the 2nd 3rd and 4th conditions are not satisfied for the simple reason that the Rajasthan Commission has not imposed any penalty on the Discoms for shortfall in procurement of RPO's. The relevant orders of the RERC has been relied on by the Learned Advocate, which have not at all been disputed or denied by either NVVNL or the Discoms. Therefore, it is clear that since the Discom has not been levied any penalty for shortfall in procurement of RPO's by RERC there can be no question of the Discoms claiming any compensation from NVVNL under the PSA or for that matter, NVVNL claiming any such compensation from the SPDs.

106. However, at this stage we do not feel to deliberate on this submission which was argued oppositely by NVVN.

107. The Central Commission while considering the issue of levying of liquidated damages observed that Grid unavailability is an event which is not attributable to Generators. The relevant extract of the Impugned Order is quoted below:

"Since grid unavailability or back-down instructions cannot be attributed to the SPD, the amount of shortfall in generation should be adjusted to

that extent. Otherwise, the SPD is not only incurring the loss of tariff payable for these units that were lost due to lack of evacuation from DISCOM, but also paying penalty for the same, which is inequitable

108. In case, the decision of the Central Commission is upheld, then GGEL has to pay Liquidated Damages on account of short supply of power after adjusting the equivalent quantum due to unavailability of the grid, which is an uncontrollable event, and the Generator cannot control it. Whereas, MEIL shall not liable to pay any damages as NVVN has failed to submit or prove the loss suffered by the beneficiary Discoms due to the short supply of power.

109. On the contrary, NVVN has submitted that the power procured from the Solar power Developers, under the PPA, is allocated to various Discoms through separate contract, the PSA and as such it cannot be established individually which power is supplied to which Discom. The compensation claimed from the Petitioner for shortfall in the generation and supply of the electricity is in the nature Liquidated Damages as per Article 4.4.1 of the PPA and therefore, cannot be denied. In support of these contentions, NVVN relied upon the judgments of the Hon'ble Supreme Court in Kailash Nath Associates Vs. DDA [(2015) 4 SCC 136] and Construction and Design Services Vs. DDA, [(2015) 14 SCC 263].

110. We decline to accept the contention of NVVN as explained in the foregoing paragraphs. However, as observed earlier the event of "low DNI" is a natural phenomenon and cannot be controlled by the Generators, occurring of such event is thus, uncontrollable event which cannot be attributed to the Generator.

111. Further, the Review Committee of MNRE suggested that "***the Committee felt that the situation of low DNI could be considered as akin to Force Majeure event not being in the control of the SPDs".*** Accordingly, the event of "low DNI" was considered as Force Majeure Event for the extension of SCOD of

the projects. The same was agreed to by CERC, approving the SCOD by ten months.

112. As per Article 4.4.1 of the PPA and the observation of CERC vide the Impugned Order, no compensation can be claimed by NVVN against the event which is not attributed to the Generator and is uncontrollable. DNI, as mentioned earlier, is a natural phenomenon, depends on the nature and cannot be controlled by the Generators.

113. Therefore, we set aside the Impugned Order to the extent that liquidated damages have been levied on GGEL and upholding the decision of non-levying of the compensation for liquidated damages on MEIL for reasons cited in the Impugned Order and observation made by us in the foregoing paragraphs.

114. The third issue which is raised in the Appeals is:

iii) whether Foreign exchange rate variation (Forex) in respect of foreign loans taken can be considered as Force Majeure Event?

115. This issue arises from the Appeals filed by RSTPL and MEIL. Godavari has not raised the issue.

116. The Force Majeure is defined in the Agreement signed between NVVN and the Generators. The Article 11 of the Agreement has been quoted earlier, however, for the sake of easy reference its relevant part is quoted as under:

> *"A "Force Majeure" means any event or circumstance or combination of events those stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that*

such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices:"

117. From the above it is clear that any event, which is not under the reasonable control, directly or indirectly, of the Generators and cannot be avoided even after taking reasonable care, can be considered as akin to Force Majeure.

118. The submission of the Generators made before us pleaded that since the technology and the project were completely new to India, the equipment had per force to be imported and paid for in foreign exchange (forex). The majority of the funding came from foreign lenders who were willing to lend to this project whereas Generators were struggling to get funding from Indian Lenders and hence any change in the forex rate, and as they contend such extreme and uncontrollable variation of up to almost 39%, would have to be likened to force majeure with compensation being claimed for the same.

119. On the contrary, NVVNL and the Discoms urge that the FM Clause (Article 11) of the PPA is not an "inclusive" clause but an exhaustive one and further that inadequacy of funding is a specific exclusion from Force Majeure. This is responded to by RSTPL by suggesting that though the word "inclusive" is not to be found in the opening part of Article 11, a wholesome reading of the entire clause would show that, "exclusions" could have been provided for only if the main part were "inclusive" and the exclusions itself contemplate an exclusion therefrom that is if the funding itself were affected due to force majeure it would fall outside the exclusion zone. They have further pressed into service the doctrine of *contra-proferentum* rule to support their argument. Generators argued that the Contract was drafted by NVVN as such ambiguity, if any, shall go in their favour.

120. The Generators have argued that the Solar Thermal Technology was completely new to the country, as also observed by MNRE and CERC, there was dearth of equipment or to emphasise no equipment were available to be procured indigenously. Further, added that the technology was in the nascent stage and is in the process of introduction in India at such a large scale, the lenders, bankers and financiers in India were not very well versed in estimating the financial viability of such projects and were reluctant to grant loans for the project.

121. Accordingly, the Generators (RSTPL and MEIL) arranged part of its financing for the project from Axis Bank, which in turn availed loans under a Foreign Currency Facility Agreement with Asian Development Bank and from FMO, a Netherlands based fund.

122. It is further stated that at the time of the bid, the US$ exchange rate was nearly Rs. 45 per dollar, however by the time the project was commissioned and put to operation, the exchange rate had jumped to nearly Rs. 62 per dollar, i.e. an increase of nearly 39%. RSTPL has relied on a Notification dated 31-3-2010 whereunder the CERC has itself considered a forex variation of 0.36% per annum, whereas the CAGR of the forex variation in this case is almost 4.5% approx. over a period of 11 years, that is nearly 13 times the CERC number. Generators also argued that there were many reasons for the huge fluctuation in the exchange rate, all of which were completely beyond their control.

123. It is seen that the contract has not envisaged any clause to accommodate for such a large variation. In response, NVVNL and the Discoms have argued that (i) forex fluctuations would not be force majeure under Clause 11 of the PPA; (ii) Forex variation specifically comes within the exclusions to force majeure under the latter part of Clause 11 of the PPA; (iii) The relief available under the Force Majeure clause would not include any compensation for such variation; and (iv) referred to several Judgments including Alopi Prashad & Sons Vs Union of India

[AIR 1960 SC 588] and Numaligharh Refinery Ltd Vs Dealing Industrial Co Ltd [2007] 8 SCC 466.

124. Therefore, before proceeding further, the argument of NVVN require further scrutiny whether the Article 11 is an exhaustive provision in the PPA.

125. The argument of NVVN and the Discoms is that the aforesaid Article 11 is an exhaustive clause and unless the subject event falls within the confines of sub-clauses (a) to (d) of clause 11.3.1, it would not qualify as a force majeure event. We are not inclined to accept this contention of NVVN and the Discoms.

126. The reason that the word “including” is not there in the first few lines of clause 11.3.1 does not make the clause an exhaustive clause. If an “exclusive” clause provides for exclusions in the contract after the principal clause, the general understanding is that the principal clause is “inclusive” clause. If the principal clause is to be read as an exhaustive clause there was absolutely no reason for the writers of the Agreement (NVVN in the present case) to repeat the same through “exclusion” clause, it should first try and define what a force majeure clause was and then cite examples of force majeure events. As such, if the principal clause 11.3.1 was drafted as an exhaustive clause, then there was no necessity or reason to provide for exclusions therefrom in Clause 11.4.

127. Therefore, mere fact that the provision provides for ‘exclusions’ is itself testimony to the ‘inclusive’ nature of the main force majeure clause. It is settled law that all the provisions in the contract are to be read harmoniously and the Court or Tribunal must interpret the contract in the manner that two prudent businessmen in the ordinary course of business would have. To interpret Clause 11.3.1 to be an exhaustive clause would render Clause 11.4 completely otiose. We are therefore of the clear view that Clause 11.3.1 is an ‘inclusive’ clause and clauses (a) to (d) thereof are only particular instances of events that satisfy the main definition of 11.3.1.

128. Further, the argument for the claim of compensation for Foreign Exchange Rate Variation (FERV) made by the Generators has merit because of reasons put forth before us. There cannot be any deny to the fact that (i) the technology was new to the country, (ii) equipment required for setting up the project were not available, (iii) the Indian lenders were reluctant to grant loans for the project due to failure to self-assess the commercial viability of the project etc.

129. Once it is settled that Article 11.3.1 is an inclusive clause, it requires resolution of whether the events of FERV would fall within the ambit of the definitional part of 11.3.1. The Generators submitted that the performance of the obligations under the contract were partly delayed which is beyond the control of the Generator and could not have been avoided by any prudent utility practice that could possibly have been undertaken by the Generator.

130. The argument of NVVNL and the Discoms that forex variation is excluded from the ambit of the FM clause has already been dealt in the foregoing paragraphs, there cannot be any exclusion to the exclusions. That is to say, the exclusions covered under Clause 11.4.1 (a) to (f) would themselves not apply if they were consequences of force majeure themselves. In the present context, if the FERV being caused by events which qualify as force majeure events would definitely not be hit by the exclusions under Clause 11.4.1.

131. We need to read the relevant part of Article 11 again which provides that:

> *"A "Force Majeure" means any event or circumstance or combination of events those stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that* ***such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not***

have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices:"

132. It may be seen that existence of any event, not under the reasonable control of the performing party, prevents or delays in performance of obligation and could not have been avoided through prudent utility practices, is covered under the force majeure. In this case, the FERV event has affected the Generators in performing its obligation and is not under their control, but whether prudent utility practice was followed or not need to answered for categorizing FERV event as Force Majeure Event.

133. For the purpose of emphasis, it is again reiterated that these projects were being set up for the first time in India based on a technology which was in the nascent stage, coupled with the huge and unprecedented variation in the foreign exchange rate, the business risks were unprecedented and could not be envisaged at that time. With very little experience and unavailability of project equipment indigenously, the Generators were forced to procure equipment from foreign countries against foreign currency, contrary to this if the developers had a choice of sourcing the equipment from India, in rupee terms, without needlessly exposing themselves to forex variation, there could have been some justifiable argument against the claim made by the Generators. There was no counter argument that the equipment could not have been sourced from India as it was not available here. Certainly, the FERV was a business risk, taken by the Generators as the Solar Thermal Technology along with equipment was required to be imported which cannot be considered as normal business risk.

134. The Generators could have envisaged and made an arrangement for some reserve fund for taking care of FERV, however, as stated above, none of the parties imagined the risk, the Committees recommended that the projects are like "Pilot Projects" and thus require all measures so that these projects do not

become unviable. The companies participated in the bids, having no past experience, to say no company in India has any experience, realized that the equipment cannot be procured against Indian Rupee and have to imported from other countries only after the award of the Contract. Further, such a large variation was unprecedented and uncontrollable and was not foreseen by anyone resulting the risk taken as "unnatural business risk". Therefore, the Generators failed to think of the "prudent utility practice" resulting into the scenario of facing unviability of the project.

135. We opine that such an unnatural business risk is akin to Force Majeure and to be dealt accordingly. We find merit in the case. It becomes necessary that in such a case, as the development of the Solar Thermal Technology and setting up of projects based on the technology are essential for the country, the FERV shall be classified under Force Majeure Event and the Central Commission may frame suitable mechanism for the purpose of appropriate compensation.

136. The fourth issue which is raised in the Appeals is:

iv) whether fire, drought etc as claimed by MEIL are force majeure events?

137. The Central Commission in the Impugned Order has observed that:

> *"205. From the letter of NVVNL to MEIL dated 21.01.2014, it is observed that the fire had originated within the project site itself, thereby not satisfying the condition laid out in the PPA. Since the fire did not originate from a source external to the site and the same was also communicated to the Petitioner vide letter dated 21.01.2014, the fire incident does not qualify as a Force Majeure event. Hence no compensation can be awarded to the Petitioner under the said clause.*

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

138. The first issue i.e. incident of fire has been rejected by the Central Commission under para 205, as quoted above. The Article 11 of the PPA on Force Majeure provides that the following events are inclusive in Force Majeure events, the relevant extract (Clause 11.3.1 a)) is quoted as under:

"a) Act of God, including, but not limited to lightning, drought, fire and explosion (to the extent originating from a source external to the site), earthquake, volcanic eruption, landslide, flood, cyclone, typhoon or tornado;"

139. From the above, it is clear that fire, to the extent originating from a source external to the site, is covered under Force Majeure Event. It has already been observed in the foregoing paragraphs that Article 11.3.1 is an inclusive clause. Therefore, "fire", an act of God is a force majeure event.

140. Therefore, we decline to accept the observation of the Central Commission under para 205 of the Impugned Order, the order is set-aside to this extent.

141. The second issue i.e. drought situation has been accepted as force majeure event by CERC in para 206 of the Impugned order that *"the incident is squarely covered as Force Majeure event under Clause 11.3.1(a) of the PPA. Accordingly, the prayer for extension of Scheduled Commercial Operation Date or the SCoD of the 50 MW project of MEIL for the period during which the drought persisted is allowed."*

142. We opine that the said event is fully covered under Article 11 (titled Force Majeure) of the PPA, therefore, the Impugned Order is upheld to this extent.

ORDER

For foregoing reasons as stated supra, we are of the considered view that the appeals filed by the Generators i.e. Appeal No. 29 of 2018, Appeal No. 35 of 2018 and Appeal No. 373 of 2018 have merit and thus allowed.

The Appeal No. 403 of 2017 and Appeal No. 4 of 2018 are devoid of merit and are disposed of as dismissed.

The Impugned Order is *set aside* to the extent as observed in the foregoing paragraphs. The Central Commission is directed to pass necessary consequential orders in light of subject-wise conclusions recorded by us.

Pronounced in the Virtual Court on this 26th Day of July, 2022.

(Sandesh Kumar Sharma)	**(Justice R. K. Gauba)**
Technical Member	**Officiating Chairperson**

REPORTABLE / ~~NON-REPORTABLE~~

pr/mkj