

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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CASE No. 78 of 2020

Case of ACME Heergarh Powertech Pvt. Ltd. seeking directions against Maharashtra State Electricity Distribution Limited by declaring that the Power Purchase Agreement dated 21 August, 2019 stands frustrated on account of Force Majeure and impossibility of performance and consequential relief.

M/s. ACME Heergarh Powertech Pvt. LtdPetitioner

V/s

Maharashtra State Electricity Distribution Co. Ltd..Respondent

Appearance

For the Petitioner :Shri. Amit Kapur (Adv.)
For the Respondent :Shri. Ashish Singh (Adv.)

Coram

I.M. Bohari, Member
Mukesh Khullar, Member

ORDER

Date: 20 June, 2020

1. M/s. ACME Heergarh Powertech Pvt. Ltd (**AHPPL**) has filed this Case dated 24 April seeking directions against Maharashtra State Electricity Distribution Company Limited (**MSEDCL**) by declaring that the Power Purchase Agreement (**PPA**) dated 21 August 2019 executed between AHPPL and MSEDCL stands frustrated on account of Force Majeure and impossibility of performance and consequential relief under Section 86 of the Electricity Act, 2003 (**EA**) along with statutory framework governing procurement of power through competitive bidding and Article 8 of the PPA.
2. **Main Prayers of AHPPL are as follows:**

- (a) *Hold and declare that MSEDCL PPA stands frustrated on account of occurrence of Force Majeure;*
 - (b) *Hold and declare that parties are discharged from their respective responsibilities, obligations and liabilities;*
 - (c) *Direct MSEDCL to return the Performance Bank Guarantee submitted by AHPPL in terms of the PPA;*
 - (d) *Pass ad interim ex parte stay against MSEDCL taking any coercive steps including invocation of bank guarantee;*
3. AHPPL has submitted the application for urgent listing and hearing of the Case along with the Stay application dated 24 April, 2020 requesting the Commission to grant ad- interim ex-parte stay against invocation of Performance Bank Guarantee or initiation of any coercive steps by MSEDCL on account of its failure to achieve Financial Closure and performance obligations because of outbreak of COVID -19 and imposition of lockdown.
4. **The Commission had issued Ad-Interim Order on 25 April 2020 and directed as under:**

“2. The Commission notes that as per PPA, Financial Closure is to be achieved by 25 April 2020 and failing which Performance Bank Guarantee (PBG) can be invoked. Further, as confirmed from MSEDCL, PBG of AHPPL is stated to be valid till 31 January 2022. Hence, in the opinion of the Commission, no harm will be caused to MSEDCL, if ad interim relief is granted to the AHPPL till final disposal of this matter.

3. Hence, the Commission deems it fit to invoke its power under Regulations 81 of the MERC (Conduct of Business) Regulations, 2004 and directs status-quo to be maintained by the parties in the matter. MSEDCL shall not initiate any coercive action in the matter till final disposal of the main Petition. At the same time, the Commission clarifies that it has not gone into merits of the matter and that the status quo will not have any impact on outcome of the main matter.

4. MSEDCL is directed to file its Replies in the matter within 10 days i.e. by 6 May 2020 with copy to the AHPPL, which in turn can file Rejoinder, if any, within 7 days thereafter.”

5. **AHPPL in its Petition has stated as under:**

- 5.1 AHPPL is a Special Purpose Vehicle (SPV) incorporated by ACME Solar Holding Ltd. (ASHL) for setting up a 300 MW solar power project in Bhadla, Jodhpur to supply its power to MSEDCL.

- 5.2 On 3 August 2017, Ministry of Power (**MoP**) issued Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects. On 14 June 2018, MNRE and MoP issued amendment to the Guidelines and revised the time limit for submitting land documents from 7 months to 12 months.
- 5.3 On 5 December 2018, MSEDCL issued Request for solution (**RfS**) document for procurement of power on long term basis through competitive bidding process for 1000 MW grid connected solar photovoltaic power projects (Phase - II).
- 5.4 During the pre-bid held on 19 December 2018 with prospective bidders, MSEDCL allowed the following changes in the bidding document:
- i) To change the location of the project once at the time of achievement of Financial Closure i.e. within 10 months from the date of signing of PPA, earlier it was 7 months.
 - ii) Projects shall be commissioned within a period of 21 months from the date of execution of the PPA. However, Projects with a capacity of 250 MW and above, if being developed outside a Solar park, shall be commissioned within a period of 24 months from the date of execution of the PPA. Earlier the timeline for commissioning was 13 and 15 months, respectively.
- 5.5 On 19 March 2019, ASHL was declared as the successful bidder and a Letter of Authorisation (LoA) was issued for development of 300 MW. On 27 May 2019, the Commission accorded approval for procurement of 1000 MW solar power by MSEDCL which included 300 MW from ASHL.
- 5.6 On 19 August 2019, AHPPL furnished performance bank guarantee of Rs. 42 Crore to MSEDCL at the rate of Rs. 14 lakh per MW. On 21 August 2019 MSEDCL and AHPPL executed PPA with effective date as 26 June 2019. Hence as per PPA, AHPPL was obligated to obtain Financial Closure and submit evidence of clear possession of land required, along with land documents within 10 months of actual effective start date i.e. by 25 April 2020 and to commission the project by 25 June 2021.
- 5.7 On 22 August 2019 Rajasthan Renewable Energy Corporation Ltd (**RRECL**) published draft Solar Policy, 2019 mandating the solar projects which supplies power outside Rajasthan is required to pay sum of Rs. 5 lakh per MW each year as contribution towards the Rajasthan Renewable Energy Development Fund. On 20 September 2019, ASHL wrote to RRECL regarding the Draft Solar Policy 2019 and making a representation on the unworkability of Draft Solar Policy 2019. On 14 December, 2019 Rajasthan Solar Policy 2019 was notified, and as per the notified policy projects against which bids have been submitted prior to commencement of the Policy, contribution towards Rajasthan Renewable Energy Fund would be Rs. 1 lakh per MW each year for the entire life cycle of the Project.
- 5.8 On 22 October 2019, MNRE issued Amendment to the Guidelines, the timeline for providing land documents for 100% of the required land, was modified from 12 months to

on or before Scheduled Commissioning Date (**SCoD**). Accordingly, AHPPL requested MSEDCL to revise the deadlines for Land Procurement under the PPA in accordance with the revised timeline.

- 5.9 MSEDCL on 17 February 2020 informed AHPPL that as bid submission and selection of the bidders was done before 22 October 2019 the request for applicability of Amendment cannot be accepted.
- 5.10 On 03 December 2019, ASHL executed Purchase Order with TBEA Xi'an Electric Technology Co. Ltd (**TBEA**) to buy Solar Inverters for AHPPL's 300 MW (AC) solar power project and on 4 December 2019, ASHL executed Purchase Order with CECEP Solar Energy Technology Ltd. (**CECEP**) to buy 450 MW of Solar PV Modules for AHPPL's 300 MW (AC) solar power project.
- 5.11 CECEP and TBEA on 7 January 2020 and 10 January 2020, respectively issued a Force Majeure Notice to ASHL on account of Outbreak of epidemic in China. ASHL on 23 January 2020 asked CECEP and TBEA clarification on force majeure notices. On 3 February 2020 and 7 February 2020, CECEP and TBEA replied to ASHL's letter 23 January 2020.
- 5.12 The Ministry of Finance (**MoF**) in its Office Memorandum (**OM**) on 19 February 2020 clarified that disruption of supply chain due to spread of Coronavirus in China or any country would be covered as a case of natural calamity and Force Majeure clause could be invoked after following due procedure.
- 5.13 On account of outbreak of Covid-19, AHPPL on 21 February 2020, issued Force Majeure notice to MSEDCL informing that the circumstances and events are completely beyond AHPPL's reasonable control which qualifies as Force Majeure affecting AHPPL's performance and obligations in terms of Article 8.1 of the PPA. Also, on 29 February 2020, AHPPL requested MSEDCL for extension of timelines for land procurement, Financial Closure and SCOD due to material change in provisions of Rajasthan Solar Policy and outbreak of Covid-19 for a period of at least 175 days as of 29 February 2020.
- 5.14 On 17 March 2020, AHPPL wrote to MSEDCL regarding continuing Force Majeure events impacting on progress of the Project and informed that delay has crossed 180 days due to the two Force Majeure events. As per the Article 3.3(2)(b) of the PPA, the maximum time period allowed for commissioning of the full Contracted Capacity with encashment of Performance Bank Guarantee and reduction in the fixed tariff shall be limited to 30 months from the date of execution of PPA or till the tariff becomes zero, whichever is earlier.
- 5.15 On 20 March 2020, MNRE, recognising the adverse effect of supply chain disruption in China and its impact on RE generators in India, issued Office Memorandum directing agencies such as NTPC and SECI to treat delay in commissioning/construction on account of disruption in supply chain due to spread of Covid-19 in China or any other country as an event of Force Majeure.

- 5.16 In terms of the Ministry of Home Affairs (MHA) Guidelines dated 24 March 2020 a nation-wide lockdown was imposed in the country and all Government, commercial and private establishments were directed to be closed till 14 April 2020 except for those providing essential services. MHA by its Order dated 15 April 2020 further extended the lockdown till 3 May 2020. The Government of Maharashtra issued Guidelines in line with MHA to contain the spread of Covid-19 in State of Maharashtra.
- 5.17 On 17 April 2020, MNRE issued OM recognizing the adverse impact of Covid-19 and stated that all renewable energy implementing agencies under MNRE will treat lockdown due to Covid-19 as Force Majeure. A period equivalent to the period of lockdown and additional 30 days for normalisation would be granted as blanket time extension. The State Governments may also treat lockdown due to Covid-19 as Force Majeure.
- 5.18 On 17 April 2020, TBEA wrote to ASHL reminding continuation of Force Majeure due to outbreak of COVID-19. TBEA stated that entire supply chain was disrupted and there was shortage of labour, hence entire manufacturing schedule had been impacted by at least 4-5 months. Further, it was possible that the same would also get extended as production capacities had reduced significantly. Hence, TBEA would not be in a position to commit any revised delivery schedule. Similarly, on 20 April 2020, CECEP issued letter to ASHL stating that works continued to be impacted on account of Force Majeure.
- 5.19 On 20 April,2020, ASHL wrote to AHPPL regarding impact of Force Majeure on Project execution. ASHL stated that its Chinese vendors had expressed inability in supplying modules and inverters as per the agreed timelines on account of Force Majeure. Accordingly, ASHL stated that in light of the uncertainty, it had become impossible to complete the Project at this stage on account of continued Force Majeure.
- 5.20 On 21 April 2020, MSEDCL replied to AHPPL's letter dated 21 February 2020 and 17 February 2020 rejecting AHPPL's claim for Force Majeure. MSEDCL stated that as per Clause 16(ii) of revised guidelines of MHA Order dated 15 April 2020, construction of renewable energy projects has been allowed to operate. Thus, MSEDCL requested AHPPL to carry on activities in order to achieve Financial Closure and SCOD as per provisions of the PPA.
- 5.21 On 24 April 2020, AHPPL informed MSEDCL that on account of disruption in global supply chain due to severity of Covid-19 spread and imposition of consequential lockdown, performance of obligations under PPA had become impossible.
- 5.22 The performance of AHPPL's obligation has been adversely impacted as solar modules, inverters and associated equipment which were to be imported from China have not been made available in a timely manner. The Chinese suppliers have indicated that delivery may not be possible before May 2021, which is further subject to the situation normalising. Otherwise, delivery may further be extended for indefinite period until Covid-19 is completely eliminated and thereby restoring normalcy in operations and functioning. Given

the said dispensation along with continuing lockdown in China and India, it is impossible for AHPPL to go ahead with the construction and commissioning of the Project.

- 5.23 The Article 8.1 of PPA expressly recognizes that a party shall not be responsible for any delay or failure to perform its obligations on account of a Force Majeure Event. The construction of Article 8.1 is such that it envisages two situations, viz. first, a Force Majeure Event whose impact and consequences are of a temporary nature which cause delay in performance of obligations by the Affected Party; and second, a Force Majeure Event that makes it impossible for the Affected Party to discharge/perform its obligation.
- 5.24 In the present case the consequences due to outbreak of Covid-19 and the ensuing delay in delivery of solar modules and inverters from China has made it impossible for AHPPL to perform its obligations within the prescribed timeline of 24 months and even with the maximum allowed limit of time extension up to 30 months. Therefore, by operation of Article 8.1 it was impossible for AHPPL to perform its obligations as a direct consequence of force majeure. The initial delay of 114 days over uncertainty in finalisation of Rajasthan Solar Policy, 2019 coupled with outbreak of Covid-19 and imposition of lockdown have made it impossible for AHPPL to proceed with the Project within the timelines provided in the PPA. Accordingly, the PPA stands frustrated and AHPPL is relieved from performing its obligations on account of impossibility.
- 5.25 As per Clause 5.4 of the Guidelines issued by the Government of India, the Force Majeure clause in the PPA ought to include definitions, exclusions, applicability, relief as per industry standards. MSEDCL has not sought approval of the Commission for deviation from industry standards in the Force Majeure clause. Industry standards allow for termination of PPAs if delay on account of force majeure continues for more than 3 months.
- 5.26 All PPAs executed with Solar Energy Corporation of India provide an Affected Party the right to terminate the PPA if a Force Majeure Event continues for more than 3 months. Further, OM dated 19 February 2020 issued by Ministry of Finance records that either party may terminate the contract if performance of obligations under a Contract are prevented or delayed by any reason of Force Majeure for a period exceeding 90 days. The recent amendments in Bidding Guidelines dated 23 October 2019 states that if Force Majeure continues for more than 180 days then either party may terminate the agreement.
- 5.27 However, PPA in its present form, has no such provision for termination. Absence of provision for termination constitutes a deviation from the Guidelines for which no approval of the Commission has been sought. Therefore, the applicable industry standard will apply and AHPPL is permitted to terminate the PPA if the force majeure event continues for more than 3 months.
- 5.28 The PPA stands frustrated on account of impossibility to perform in terms of Section 56 of the Contract Act. The PPA prescribes a maximum period of 30 months from actual effective start date within which the Project shall be commissioned. However, due to outbreak and

spread of Covid-19 it has become impossible for AHPPL to complete construction and commissioning of the Project within the said timeline.

5.29 The Hon'ble Supreme Court recognised the concept of frustration and impossibility of performance under Section 56 of the Indian Contract Act in the Cases *Satyabrata Ghose v. Mugneeram Bangur & Co. and Anr* : AIR 1954 SC 44, *Mugneeram Bangur and Co. v. Gurbachan Singh*, (1965) 2 SCR 630 and *Naihati Jute Mills Ltd Versus Khyaliram Jagannath* : AIR 1968 SC 522 in these Cases Hon'ble Supreme Court has held that an agreement to do something, which was possible when the contract was executed, but subsequently, becomes impossible without any fault of either party, would be void.

5.30 In terms of the aforesaid cases, the following legal principles emerge for consideration:

- (a) Doctrine of frustration is really an aspect of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of Section 56 of the Indian Contract Act. It would be incorrect to say that Section 56 of the Contract Act applies only to cases of physical impossibility.
- (b) The word "impossible" has to be taken in its practical and not literal sense. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose of the parties.
- (c) The test to be applied is whether the changed circumstances altogether destroyed the fundamental basis of the agreement and its underlying object. When such an event or change of circumstance occurs which is so fundamental as to be regarded by law as striking at the root of the contract as a whole, it is the court which can pronounce the contract to be frustrated. Insisting upon performance in such a situation will be impracticable and unjust.
- (d) In a contract where time is of essence wherein construction has to be completed within a particular period, any delay therein can amount to a change in the fundamental basis of the contract.

5.31 In view of the aforesaid principles, the impossibility in the present case operates at the following levels:

- a) There is physical impossibility in performance of obligations under PPA as AHPPL is not in a position to source solar modules and inverters from China on account of disruption in global supply chain due to outbreak of Covid-19. Even the domestic suppliers have not been able to provide a definite delivery schedule.
- b) Relief of time extension would not be sufficient and it is impossible to complete the Project within the said prescribed period of 30 months.

c) MSEDCL has rejected AHPPL's request for extension of time vide letter dated 21 April 2020. On account of rejection of extension and failure of MSEDCL to recognise outbreak of Covid-19 as a Force Majeure Event, it has become impossible to complete the Project.

d) The disruption due to Covid-19 is likely to result in price escalation of equipment and the entire Project cost. Increase of prices would be on account of the loss of production, increase in costs of vendors etc. It bears mention that increase in price of plant and machinery on account of force majeure events is a force majeure event as well.

5.32 There has already been a delay of 4 months on account of outbreak of Covid-19 which is still continuing. Further, there is no clarity as to when the effect of Covid-19 would subside and when manufacturing and supply would be restored to pre Covid-19 levels. In such a scenario not only will AHPPL be unable to meet the completion deadline of 24 months, but even the additional 6 months as provided under Article 3.3 will not be sufficient to attain SCOD. Therefore, in terms of Section 56 of the Contract Act, the PPA is void since performance of obligations under the PPA have become impossible.

5.33 In the present case, PPA does not have a provision to deal with situations where performance of obligations under the PPA becomes impossible for reasons beyond the control of either party. In the absence of an appropriate PPA mechanism and no Standard Bidding Documents (SBDs) dealing with the said issue, the present case is fit for the Commission to exercise its general Regulatory Powers and declare that PPA stands frustrated on account of impossibility of performance within the stipulated timelines due to prolonged force majeure event.

5.34 Since impossibility of performance has arisen on account of continued Force Majeure Event beyond the reasonable control of AHPPL, no fault is attributable to AHPPL. Invocation of Performance Bank Guarantee for failing to perform an impossible act would be untenable in law. Invocation of Performance Bank Guarantee when a Force Majeure Event is subsisting is violative of Article 8.2 (c) of PPA, which specifically provides that no payment shall be made by either party affected by Force Majeure as long as the Force Majeure event continues. Therefore, MSEDCL is obligated to return the Performance Bank Guarantee submitted by AHPPL.

6. MSEDCL in its reply dated 30 May 2020 has stated as under:

6.1 The claim of Force Majeure and Impossibility to Perform cannot go hand in hand and the Petition on this count alone is devoid of merits as Force Majeure means suspension of work/obligations on account of unforeseen events as described in the Force Majeure clause under the PPA and Impossibility to Perform means an event where the contract in itself becomes impossible to perform. Claim of Force Majeure and Section 56 of the Contract Act operate in two distinct domains which have no correlation with one another.

- 6.2 The PPA/contract entered into between Parties is not Impossible to perform. The Object and Purpose of the contract for which it was entered has not been frustrated. The Object and Purpose of the contract was (i) Sale of power by Petitioner and (ii) payment of tariff at agreed rate by MSEDCL. The above two propositions have not been frustrated and even if the case of Force Majeure is applied to certain events in the present case even then the Force Majeure may lead to a change in the above two propositions only, that too strictly in accordance with the terms of the PPA. It would in no sense lead to Impossibility to perform or frustration.
- 6.3 Rajasthan Draft Solar Policies have no sanction of law and hence cannot be a ground to claim any Force Majeure Event. Rajasthan Solar Policy 2019 was notified by the Government of Rajasthan which nowhere altered the financial position of AHPPL. Hence a misunderstanding of law whether intentional or deliberate and bad commercial decision cannot be utilized by AHPPL to claim a Force Majeure Event. Force Majeure clause in the PPA clearly does not cover the Draft Solar Policy, 2019 dated 22 August 2019 as a Force Majeure event. On the contrary the exclusions to the Force Majeure clause in the PPA clearly excludes the above event from being termed as a Force Majeure event as AHPPL has chosen to willfully and deliberately not to comply with the mandate of law by relying upon a Draft Policy which has no sanctity in the eyes of law.
- 6.4 The requirement of Financial Closure within 10 months from effective date i.e. till 25 April 2020 cannot be extended under Force Majeure. Financial Closure only involves three criteria/stipulation i.e. (i) Grid Connectivity, (ii) Land Documents and (iii) Financial Arrangement. None of the above criteria/stipulation is hindered by alleged Draft Solar Policy of Rajasthan acting as a Force Majeure Event. It is solely on account of AHPPL's own default and negligence that Financial Closure is not attained and as such AHPPL is not entitled to any reliefs as claimed.
- 6.5 Assuming without admitting that the COVID-19 lockdown was notified in India w.e.f. 24 March 2020 and hence the benefit of Force Majeure needs to be provided to AHPPL, still AHPPL would not be entitled for relief sought i.e. the "PPA stands frustrated", "the parties to be discharged from their respective responsibilities, obligations and liabilities", and "return of the bank guarantee submitted by AHPPL in terms of PPA without honoring same". Although disruption of supply chain is termed as Force Majeure as per Government of India (GoI) notification/directives, it cannot be linked to Impossibility to perform.
- 6.6 The PPA clearly includes definitions, exclusions, applicability, reliefs w.r.t Force Majeure in terms of guidelines for competitive bidding. Merely because there is no clause for Termination w.r.t Force Majeure does not mean that there is no relief provided under the Force Majeure in terms with the guidelines for competitive bidding. AHPPL at no point in time before filing of the present Petition disputed the fact of non-inclusion of termination clause as a relief in Force Majeure clause under the PPA. Hence the entire claim of AHPPL on this issue is a complete afterthought.
- 6.7 Neither the Draft Solar Policy, 2019 dated 22 August, 2019 nor the issue of Covid-19 constitutes "impossibility to perform". At best and assuming without admitting, Covid-19

after 24 March 2020 can be treated as a Force Majeure in which eventuality the performance of the obligations under the PPA shall stand suspended during such time. However, the caveat being that whether Covid-19 would apply to anything beyond laws of India.

- 6.8 As far as cost escalation due to delay is concerned, all of such contentions is a figment of imagination. On the contrary, there may be some financial benefits which may be given by the Government to certain Industries to overcome the COVID-19 situation affecting economy in general. In any case, all issues/situations/mechanisms w.r.t price escalation or otherwise has already been provided for in the PPA. Hence, there is no circumstance under which Section 56 of Contract Act can be made applicable to the present case.
- 6.9 The entire case of “Impossibility to perform” or “frustration” is based on the premise that PPA has become onerous to perform thereby discharging AHPPL of its obligations under the contract/PPA. Where performance is otherwise possible, a mere rise in price would not allow one party to say that the contract is discharged by “Impossibility of Performance”. This is based on the Judgment dated 11 April, 2017 of the Hon’ble Supreme Court in the matter of *“Energy Watchdog versus the Central Electricity Regulatory Commission”* (Civil Appeal 5399-5400/2016).
- 6.10 In case the PPA is allowed to be terminated then the same shall have cascading and irreparable financial and operational consequences. Some shall be: i) Stringent RPO targets not being achieved. ii) Levy of penalty in view of non-compliance of RPO. iii) Additional cost may be borne for complying with RPO. iv) Power Purchase planning would be severely affected as 300 MW would go out of MSEDCL’s pool of planned power v) MSEDCL shall have to purchase the same from the market at the higher short-term rates. Considering the declared Capacity Utilisation Factor (CUF), MSEDCL shall have to purchase around 780 Million Units (Mus) of power annually from the market. The consumers of the MSEDCL will be burdened by around Rs. 156 crore per annum if MSEDCL purchases Renewable Energy Certificates (RECs) at existing market rate of Rs.2000 per certificate against the energy expected from AHPPL’s project.
- 6.11 Hence, any early termination even if allowed by the Commission can only be done after providing for an appropriate compensation to MSEDCL. AHPPL cannot walk free of its commitments under the PPA without compensating MSEDCL for the loss that its action would cause to MSEDCL. MSEDCL will file a detailed statement evidencing the loss that would be suffered by MSEDCL in case an early termination is allowed.
7. At the e-hearing through video conferencing held on 2 June 2020, the Advocate of AHPPL reiterated its submissions in the Petition. The Advocate of MSEDCL reiterated its submissions in its reply and further stated that AHPPL never challenged the PPA having no termination clause. The termination clause and claim of frustration on account of impossibility to perform under Section 56 of Indian Contract Act cannot be adjudicated without following the mandate of Dispute Redressal as envisaged under Article 11 of the PPA. The request of the Advocate of MSEDCL for additional submission on this issue within two days, and rejoinder if, any by AHPPL thereafter was granted by the Commission.

8. MSEDCL in its additional submission dated 9 June 2020 has stated as under:

8.1 AHPPL through its letter dated 21 February 2020 notified MSEDCL regarding Force Majeure Event on the ground that outbreak of pandemic of Covid-19 in China shall be treated as Force Majeure. Subsequently vide letter dated 29 February 2020, AHPPL requested for extension of timelines for Land Procurement, Financial Closure and SCOD due to material change in the provisions of Rajasthan Solar Policy and outbreak of Coronavirus epidemic in China.

8.2 In view of the above two letters, the only disputes which can be adjudicated by the Commission are:

- i. Outbreak of pandemic of Covid-19 in China shall be treated as Force Majeure
- ii. Rajasthan Solar Policy shall be treated as Force Majeure.
- iii. In view of the same the SCOD and Financial Closure date needs to be extended

8.3 The additional issue i.e. (i) No termination Clause included in Force Majeure Clause under PPA and (ii) Claim of Frustration on account of impossibility to perform under Section 56 of Indian Contract Act cannot be adjudicated without following the mandate of Dispute Redressal as envisaged under Article 11 of the PPA. Moreover, for redressal of the said issue, Regulatory Powers of the Commission have been invoked which cannot be done as it is admittedly a dispute between parties which needs to be adjudicated under Section 86 (1) (f) of EA.

8.4 The Commission in its Order dated 27 February 2018 in Case No. 138 of 2015 has addressed the present objection of MSEDCL. Although the facts in that case and the present case is on different footing to the extent that in Case No. 138 of 2015 the liability was admitted by MSEDCL whereas in the present case, all claims are denied by MSEDCL. The relevant portion in the Order dated 27 July 2018 is reproduced as under:

5.3. At the hearing, the Commission had observed that MSEDCL has at no stage denied its liability to pay the outstanding amount towards Energy Bills along with LPS or opening of the LC. Therefore, there is no dispute in that sense for which the Commission's jurisdiction is being invoked. It was also pointed out by the Commission that there are provisions in the PPAs that are available to the parties in case of non-compliance of any term of the PPAs, and RPL could accordingly have taken such recourse for its grievances. Further, the Commission also took notice of Article 14.2 of the PPAs, which requires the parties to attempt at amicably resolving any claim, dispute or difference arising out of or in relation to the PPAs.

8.5 Hence, in view of the above, additional issue i.e. (i) No termination Clause included in Force Majeure Clause under PPA and (ii) Claim of Frustration on account of impossibility to perform under Section 56 of Indian Contract Act ought to be rejected by the Commission in view of non-compliance with mandate of Article 11 of the PPA.

- 8.6 Further, MSEDCL has relied upon Judgment dated 29 May 2020 passed by the High Court of Delhi in the matter of *M/s Halliburton Offshore Services Inc Versus Vedanta Limited & Anr (O.M.P (I) (COMM.) No. 88/2020 & I.A. 3696-3697/2020* on the proposition of law/ratio laid down by the said judgments.
9. **AHPPL in its reply dated 11 June 2020 to the MSEDCL's additional submission has stated that:**
- 9.1 On 21 February 2020 AHPPL served a Force Majeure Notice to MSEDCL stating that due to outbreak of Covid-19 in China, its suppliers of solar modules and inverters had expressed inability to supply equipment as per agreed timelines. Further, on 17 March 2020, AHPPL reminded MSEDCL regarding continued Force majeure and the adverse impact of Covid-19 on the Project.
- 9.2 On 21 April 2020, after a span of two months from issuance of Force Majeure Notice by AHPPL, MSEDCL rejected AHPPL's claim for Force Majeure. Accordingly, MSEDCL has failed to recognise outbreak of Covid-19 as a Force Majeure Event.
- 9.3 The termination is nothing but a consequential relief on account of continued force majeure for which AHPPL has given notice on 21 February 2020 and 17 March 2020. Due to adverse impact in operation of manufacturing facilities in China, the Chinese suppliers are unable to supply project components including solar panels and inverters in a timely manner. Consequently, it is impossible for AHPPL to complete construction and commission the Project by SCOD i.e. 25 June 2021 or even within the outer limit of 30 months i.e. 25 December 2021.
- 9.4 Hence it is beyond question that as on date, a dispute has arisen between the parties, more so as MSEDCL has denied AHPPL's claim for Force Majeure. Therefore, the requirement of notice being a mere formality cannot stand in the way AHPPL exercising its rights. It is trite that rules of procedure are intended to be a handmaid to the administration of justice. A party cannot be refused just relief merely because of transgression of rules of procedure. The said position has been upheld by Hon'ble Supreme Court in the following cases:
- (a) *Rani Kusum v. Kanchan Devi* : (2005) 6 SCC 705 (Para 10-14)
 - (b) *Mahila Ramkali Devi v. Nandram* : (2015) 13 SCC 132 (Para 20)
 - (c) *Pasupuleti Venkateswarlu v. Motor and General Traders*, (1975) 1 SCC 770 (Para 4)
- 9.5 There has been substantial compliance with notice requirements by AHPPL in as much MSEDCL has been duly informed vide letters dated 21 February 2020, 17 March 2020 and 24 April 2020. Even otherwise, it is settled position of law that Courts will not insist on performance of empty formalities. In the following cases, the Courts have expounded the theory of 'useless' or 'empty' formality holding that requirement of notices, may be done away with if it would not have served any purpose and not prejudiced either party:
- (a) *Haryana Financial Corporation v. Kailash Chandra Ahuja*: (2008) 9 SCC 31 (Para 40)
 - (b) *DLF Universal. Ltd. v. Atul Ltd.* : (2010) 51 GLR 762 (Para 24).

9.6 Reliance of MSEDCL on Halliburton Judgment as pronounced by the Delhi High Court is erroneous and misplaced. In the said judgment relief was denied due to Covid-19 based on certain specific contractual provisions and prior conduct of the parties. Evidently, the facts and circumstances in which Halliburton Judgment was passed are not identical in the present case. It is noteworthy that:

- (a) Unlike Clause 2.1(b) of the contract between the parties in the aforesaid judgement, the PPA does not provide for any extension of time in attaining SCoD.
- (b) AHPPL took all reasonable steps to mitigate the effect of force majeure, which included sending its officials to China on 16 January 2020 and 17 January 2020 to ascertain the ground position and regularly following up with the Chinese Vendors. Whereas, in the Halliburton Judgment, Hon'ble Delhi High Court specifically recorded that no steps were taken by the contractor to mitigate effects of the Force Majeure.
- (c) In contradiction to the factual matrix in the Halliburton Judgment, AHPPL was not in breach of any timelines/obligations under the PPA before outbreak of Covid-19 and serving the Force Majeure Notice on 21 February 2020. The impossibility to perform is genuinely due to Covid-19 and disruption of global supply chains which is beyond the control of AHPPL. On the contrary, AHPPL took all reasonable steps to mitigate the Force Majeure.

Commission's Analysis and Ruling:

10. The instant Case has been filed by AHPPL seeking directions against MSEDCL by declaring that the PPA stands frustrated on account of force majeure, discharging the parties from their respective responsibilities, obligations and liabilities and directing MSEDCL to return Performance Bank Guarantee submitted by AHPPL.
11. The Commission notes that in response to the RfS document issued by MSEDCL for procurement of 1000 MW solar projects, ASHL was declared one of the successful bidders for development of 300 MW solar project at tariff of Rs. 2.74/kWh after competitive bidding process was duly carried out under Section 63 of the EA. After adoption of competitively discovered rate by the Commission vide Order dated 27 May 2019 in Case No. 87 of 2019 and furnishing of Performance Bank Guarantee of Rs. 42 Cr, PPA between AHPPL (SPV of ASHL) and MSEDCL was signed on 21 August 2019 with the effective date of PPA as 26 June 2019. The PPA has stipulated timelines for various milestones such as Financial Closure, SCoD etc. As per the timelines in PPA, AHPPL was required to achieve Financial Closure and submit evidence of clear possession of land required along with land documents within 10 months of effective date i.e. by 25 April, 2020 and SCoD within 24 months from the effective date i.e. by 25 June, 2021.
12. AHPPL in the instant Case has sought relief mainly on the following three issues:

- i) Declaring delay due to uncertainty in finalisation of Rajasthan Solar Policy, 2019, as event of Force Majeure.
- ii) Declaring disruption in global supply chain of solar plant equipment due to outbreak of Covid-19 and imposition of consequential lockdown, as event of Force Majeure.
- iii) Declaring that PPA stands frustrated in terms of Section 56 of the Contract Act, because of impossibility of AHPPL to perform its obligations as a direct consequence of Force Majeure and therefore getting back the Performance Bank Guarantee submitted by AHPPL to MSEDCL in terms of the PPA.

MSEDCL has opposed above relief and has argued that PPA cannot be terminated on account of alleged Force Majeure. MSEDCL has further contended that AHPPL cannot seek such relief from this Commission before complying with mandatory requirement under Article 11 of the PPA.

13. In view of submissions made by parties, the Commission frames following issues which need to be decided for addressing dispute in present Petition:
 - a. Whether this Petition is premature as it is filed without resorting to procedure mentioned in Article 11 of the PPA?
 - b. Whether, AHPPL is affected by event of Force Majeure?
 - c. Whether PPA can be terminated on account of prolonged Force Majeure?

The Commission is addressing these issues in following paragraphs.

14. Issue A: Whether this Petition is premature as it is filed without resorting to procedure mentioned in Article 11 of the PPA?

14.1 MSEDCL has contended that this Petition is ultimately seeking termination of PPA on account of alleged Force Majeure. That this issue first needs to be discussed between the parties through Dispute Redressal mechanism as envisaged under Article 11 of the PPA. Whereas AHPPL has contended that MSEDCL has already rejected its claim of Force Majeure and hence merely not complying with formality specified under Article 11 does not restrict it from claiming relief before this Commission.

14.2 The Commission notes that Article 11 of the PPA reads as follows:

“Article 11: Dispute Resolution:

11.1 All disputed or differences between the Parties arising out of or in connection with this Agreement shall be first tried to be settled through mutual negotiation.

.....

11.4 In the event that such differences or dispute between the Parties are not settled through mutual negotiations within sixty (60) days, after such dispute arises, then it shall be adjudicated by MERC in accordance with Law.

.....

11.12 Where any dispute arises from a claim made by any change in or determination of Tariff or any matter related to Tariff or claims made by any party which partly or wholly relate to any change in the Tariff or determination of any matter agreed to be referred to the MERC, such dispute shall be submitted to adjudication by the MERC. Appeal against the decision of the MERC shall be made only as per the provisions of the Electricity Act 2003, as amended from time to time.”

Thus, in terms of Article 11, parties to the PPA first need to try and resolve their dispute through mutual negotiation and if it is not settled within 60 days then it can be referred to this Commission for adjudication.

14.3 The Commission notes that in the present case, AHPPL has served the Force Majeure Notice dated 21 February 2020 to MSEDCL on account of outbreak of Covid-19 in China which has affected contracted solar panel and inverter suppliers of AHPPL. MSEDCL vide its reply dated 21 April 2020, has rejected AHPPL's claim for Force Majeure. Thus, parties are in dispute on applicability of Force Majeure event and same has been so communicated in writing.

14.4 In present proceeding also, MSEDCL in its reply has not accepted AHPPL's claim of Force Majeure. Therefore, even if, the Commission directs parties to sit together in terms of Article 11 of the PPA for resolution of dispute through negotiation, outcome would not be different from that which has been submitted before this Commission in the present matter. Further, time limits of 60 days for resolution of disputes mutually as prescribed under Article 11 of the PPA is already over and hence the dispute needs to be adjudicated by this Commission only.

14.5 Project under dispute is yet to be setup. If parties are asked to fulfill requirement of Article 11 before this Commission can adjudicate the matter, it will only delay the adjudication of dispute which will not be in the interest of both parties.

14.6 Hence, the Commission rules that even though parties have not resorted to procedure of mutual resolution of dispute under Article 11 of the PPA, considering that period of 60 days available for mutual resolution of dispute has already lapsed, the Commission can adjudicate dispute filed under Section 86 of the EA 2003 in present matter and is proceeding accordingly.

15. Issue B: Whether AHPPL is affected by event of Force Majeure?

15.1 AHPPL has served the Force Majeure Notice dated 21 February 2020 to MSEDCL on account of outbreak of Covid-19 in China which has affected their solar panels and inverters in China. MSEDCL vide its reply dated 21 April 2020, has rejected AHPPL's claim for

Force Majeure stating that construction activities of Renewable Generation projects are allowed under lockdown period also.

15.2 In view of contrary stand of both parties, the Commission found it essential to examine the Article 8 of the PPA relating to Force Majeure which is reproduced as under:

“ 8.1 Force Majeure Events:

- a) *Neither Party shall be responsible or liable for or deemed in breach hereof because of any delay or failure in performance of its obligations hereunder (except for obligations to pay money due prior to occurrence of Force Majeure events under this Agreement) or failure to meet milestone dates due to any event or circumstance (a “Force Majeure Event”) beyond the reasonable control of the Party experiencing such delay or failure, including occurrence of any of the following:*
- i) *acts of God;*
 - ii) *typhoons, floods, lightning, cyclone, hurricane, drought, famine, **epidemic**, plague or other natural calamities;*
 - iii) *acts of war (whether declared or undeclared), invasion or civil unrest;*
 - iv) *any requirement, action or omission to act pursuant to any judgment or order of any court or judicial authority in India (provided such requirement, action or omission to act is not due to the breach by the Power Producer or MSEDCL of any Law or any of their respective obligations under this Agreement);*
 - v) *Inability despite complying with all legal requirements to obtain, renew or maintain required licenses or Legal Approvals;*
 - vi) *earthquakes, explosions, accidents, landslides, fire;*
 - vii) *expropriation and/or compulsory acquisition of the Project in whole or in part by Government Instrumentality;*
 - viii) *chemical or radioactive contamination or ionizing radiation; or*
 - ix) *An event of force majeure affecting the concerned STU/MSEDCL..as the case may be, thereby affecting the evacuation of power from the delivery points by MSEDCL*
 - x) *damage to or breakdown of transmission facilities of CTU/STU/DISCOM;*
 - xi) *exceptionally adverse weather condition which are in excess of the statistical measures of last hundred (100) years”*
- b) *Force Majeure Exclusions: Force Majeure shall not include the following conditions, except to the extent that they are consequences of an event of Force Majeure:*
- i. *Unavailability, **late Delivery** or Change in cost of plants and machineries, equipment, materials, spare parts or consumables for the project;*
 - ii. *Delay in performance of any contractor / sub-contractor or their agents*
.....”

Thus, as can be seen from the above mentioned provision of PPA, ‘epidemic’ has been included as an event of Force Majeure. Further as per Article 8.1 (b) of the PPA, ‘late Delivery’ of the plant’s machinery, equipment, materials etc. on account of Force Majeure event is also included in Force Majeure clause.

- 15.3 Admittedly Covid-19 has been declared as epidemic / pandemic and hence spread of Covid-19 can be constituted as an event of Force Majeure under the PPA. However, to claim relief under Force Majeure, affected party must give notice of such Force Majeure event to other party. As per Article 8.1 (d) of the PPA, such notice is pre-condition for claiming any relief under the Force Majeure. Further, it is also important to ascertain that event of Force Majeure has affected ability of party to perform its obligation under the PPA.
- 15.4 In the present case, the Commission notes that AHPPL has served the Force Majeure Notice dated 21 February 2020 to MSEDCL and hence requirement of notice under Article 8.1 (d) has been complied with. In the said notice, AHPPL has contended that due to spread of Covid-19 in China, its solar panel and inverter suppliers have invoked the Force Majeure clause in their respective purchase orders and informed that delivery of solar panel and inverters would be delayed. The Commission notes that AHPPL has entered into contract for supply of solar panel and inverters from suppliers located in China in the month of December 2019 with delivery of equipment starting from January 2021 to May 2021. As project is to be commissioned by 25 June 2021, it is observed that AHPPL has performed its obligation relating to placing of work order well before Force Majeure event has started. Subsequent to spread of Covid-19 in China, these suppliers have informed AHPPL about Force Majeure situation and intimated that delivery date of equipment will be delayed and exact date for the same cannot as yet be ascertained. Further, since 25 March 2020, the Government of India has imposed nationwide lockdown to contain spread of Covid-19 in India. Such lockdown could have imposed restrictions/limitations on performing other project activities such as land acquisition and Financial Closure which was to be completed by 25 April 2020.
- 15.5 MSEDCL's opposition to the Force Majeure claim of AHPPL is only on the ground that the Government of India under lockdown instructions have exempted construction of renewable energy project and hence AHPPL can continue with construction activity without affecting Covid-19 lockdown. However, MSEDCL has not stated anything about AHPPL's claim that its supplier has been affected on account of Covid-19 and consequent delay in commissioning of the project.
- 15.6 Further, it is important to note that the Ministry of Finance (Department of Expenditure), Government of India vide Office Memorandum dated 19 February 2020 in relation to 'Manual for Procurement of Goods, 2017' has clarified that disruption in supply chain on account of spread of Covid-19 in China and other countries is to be treated as Force Majeure. Relevant part of said Office Memorandum is reproduced below:

"2. A doubt has arisen if the disruption of the supply chains due to spread of corona virus in China or any other country will be covered in the Force Majeure Clause (FMC). In this regard it is clarified that it should be considered as a case of natural calamity and FMC may be invoked, wherever considered appropriate, following the due procedure as above."

- 15.7 In view of the above, as Covid-19 is an epidemic and AHPPL's suppliers have been affected on account of spread of Covid-19 causing delay in supply of material to AHPPL, the Commission rules that AHPPL is affected from Force Majeure event i.e. spread of Covid-19, and it is eligible for relief under Force Majeure Article of the PPA.
- 15.8 In addition to Covid-19, AHPPL has also cited Rajasthan's draft Renewable Policy, 2019 as a reason for delay in land acquisition and Financial Closure. It stated that on 22 August 2019 Rajasthan Renewable Energy Corporation Ltd (**RRECL**) published draft Solar Policy, 2019 mandating the solar projects which supply power outside Rajasthan is required to pay sum of Rs. 5 lakh per MW each year as contribution towards the Rajasthan Renewable Energy Development Fund. As such contribution would have affected viability of the project, AHPPL filed representation against draft Policy before RRECL. Final Policy got notified on 14 December 2019, restoring conditions before publishing of draft policy for project for which bids have already been submitted. However, this uncertainty caused delay in taking decisions. MSEDCL has opposed such submission as it is not Force Majeure event but a bad commercial decision.
- 15.9 On the issue of Rajasthan's draft Renewable Energy Policy, the Commission notes that unlike Covid-19, AHPPL has not issued any notice of Force Majeure under the PPA and hence it would not be eligible for any relief on this account. Draft policy cannot be the ground for invoking Force Majeure. AHPPL must have known this and hence not did issue Force Majeure Notice. Therefore, AHPPL's claim for additional time on account of Rajasthan's draft Renewable Energy Policy is not maintainable and hence rejected.

16. Issue C: Whether PPA can be terminated on account of prolonged Force Majeure?

- 16.1 AHPPL has contended that consequences due to outbreak of Covid-19 and the ensuing delay in delivery of solar modules and inverters from China has made it impossible for AHPPL to perform its obligations within the prescribed timeline of 24 months and even with the maximum allowed limit of time extension up to 30 months. Therefore, by operation of Article 8.1 and impossibility of AHPPL to perform its obligations as a direct consequence of Force Majeure. Accordingly, the PPA stands frustrated and AHPPL is relieved from performing its obligations on account of impossibility.
- 16.2 AHPPL has further claimed that as per Clause 5.4 of the Guidelines issued by the Government of India, the Force Majeure clause in the PPA ought to include definitions, exclusions, applicability, relief as per industry standards. MSEDCL has not sought approval of the Commission for deviation from industry standards in the Force Majeure clause. Industry standards allow for termination of PPAs if delay on account of force majeure continues for more than 3 months. Hence, AHPPL has requested the Commission to use its regulatory power to declare that present PPA stands frustrated and terminate the same.
- 16.3 MSEDCL has opposed such claim of AHPPL on the ground that there is no such clause of termination of contract on account of Force Majeure in the PPA. Further MSEDCL stated that in case the Commission allows early termination of PPA then MSEDCL shall be

appropriately compensated on account of its financial and operational losses due to termination of PPA.

16.4 The Commission notes that PPA stipulates following reliefs on account of event of Force Majeure:

“8.2 Available Relief for a Force Majeure Event:

- a) No party shall be in breach of its obligations pursuant to this agreement to the extent that the performance of its obligations was prevented, hindered or delayed due to a Force Majeure event. However, adjustments in tariff shall not be allowed on account of Force Majeure Event*
- b) 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.*
- c) 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 Events.”*

Thus, there is no clause for Termination of Contract on account of prolonged Force Majeure event. PPA only provides that during the Force Majeure event, the affected party cannot be held in breach of obligation which is prevented or delayed on account of such Force Majeure event. Once, Force Majeure event has been upheld, only relief available is that the affected party is exempted from its obligation for that period without any compensation in tariff.

16.5 AHPPL has contended that above PPA clause is deviation from Bidding Guidelines which stipulates that Force Majeure clause should be as per industry standards. Relevant part of Bidding Guidelines is reproduced below:

“5.4 Force Majeure: The PPA shall contain provisions with regard to force majeure definitions, exclusions, applicability and available relief on account of Force Majeure, as per the industry standards.”

As contended by AHPPL, industry standards allow termination of contracts on prolonged Force Majeure event. Such clause is absent in the PPA and hence it is deviation from Bidding Guideline for which MSEDCL has not taken any approval from this Commission.

16.6 The Commission notes that till date, Standard Bidding Documents are yet to be notified by the Government of India. In absence of such standard documents, each Utility prepares its Bid based on provisions of Bidding Guideline and seeks approval of the Commission, if there is deviation from Guidelines. As there is no notified Standard Bidding Documents, parties may have perception that some of the clause of the Bid Documents are in deviation

from the Bidding Guidelines. In such case, parties get opportunity to raise their concerns during pre-bid meeting which then can be addressed appropriately. However, without raising such concerns during pre-bid meeting and raising the same now and objecting that the clause is not as per the Bidding Guideline cannot be permitted. In the opinion of the Commission, this contention of AHPPL is clearly an afterthought and cannot be allowed.

- 16.7 The Commission notes that subsequent to issuance of Force Majeure Notice dated 21 February 2020, AHPPL vide its letter 29 February 2020 has requested MSEDCL to grant time extensions for meeting its obligations under the PPA. However, vide its letter dated 21 April 2020, MSEDCL has rejected AHPPL's Force Majeure claim and accordingly refused to extend time period for meeting obligations under the PPA. In view of the said rejection of Force Majeure by MSEDCL, AHPPL vide its letter dated 24 April 2020 has informed MSEDCL that it has become impossible to complete the project within scheduled timeline and hence it would be approaching the Commission to seek consequent relief.
- 16.8 Thus, AHPPL's claim that PPA has become impossible to perform, is on account of MSEDCL's denial of recognizing Force Majeure event and accordingly it did not extend the timelines for meeting obligations. However, as ruled at para 15.7 above, the Commission has upheld AHPPL's contention that spread of Covid-19 in China and subsequent lockdown imposed in India are Force Majeure events and hence as per provisions of PPA, AHPPL shall be eligible to get time extension for meeting its obligations under the PPA till such Force Majeure event gets over.
- 16.9 As per PPA, AHPPL is obligated to obtain Financial Closure and submit evidence of clear possession of land required along with land documents by 25 April 2020 and to commission the project by 25 June 2021. From the document placed on record, it is observed that MSEDCL has not issued any notice to AHPPL for encashing the Performance Bank Guarantee. However, AHPPL in distress approached the Commission and submitted the Petition along with the application for urgent listing with the Stay application dated 24 April, 2020 requesting the Commission to grant *ad-interim ex-parte* stay against invocation of Performance Bank Guarantee or initiation of any coercive steps by MSEDCL on account of its failure to achieve Financial Closure and performance obligations under PPA. The Commission issued Interim Order and directed MSEDCL not to initiate any coercive action in the matter till final disposal of the main Petition.
- 16.10 Now, the Commission has upheld AHPPL's claim of Force Majeure on account of spread of Covid-19. Hence, in terms of Article 8.2 of the PPA, AHPPL is eligible for time extension for meeting its obligations i.e. Financial Closure and commissioning of Project by the period for which Force Majeure event is in force and subject to the condition that AHPPL remains affected by it. In this regard, the Commission notes that Ministry of New and Renewable Energy (MNRE), Govt. of India vide its OM dated 17 April, 2020 has provided the treatment/roadmap regarding time-extension in Scheduled Commissioning Date of RE Projects considering disruption due to lockdown due to COVID-19 as under:

(a) *All Renewable Energy implementing agencies of the Ministry of New & Renewable Energy (MNRE) will treat lockdown due to COVID-19, as Force Majeure.*

(b) *The Renewable Energy implementing agencies may grant extension of time for RE projects, on account of lockdown due to COVID-19, equivalent to the period of lockdown and additional 30 (thirty) days for normalisation after end of such lockdown. Thus, the extension will be for the period of lockdown plus 30 (thirty) days. This will be a blanket extension - there will be no requirement of case to case examination. There will be no need to ask for any evidence for extension due to lockdown.*

(c) *The State Renewable Energy Departments (including agencies under Power/Energy Departments of States, but dealing in renewable energy) may also treat lockdown due to COVID-19, as Force Majeure and may consider granting appropriate time extension on account of such lockdown.*

(d) *The extension on account of disruption in supply of RE equipment prior to lockdown shall be dealt separately for additional Extension of Time as per para 1 above.”*

As stated in the above OM, these directives are mandatory for the agencies of MNRE and optional for State Agencies like MSEDCL. However, in order to have consistency of relief available to the RE generators, the Commission deems it fit to use this OM dated 17 April 2020 as guiding document for deciding on time extension to be allowed on account of Covid-19. Accordingly, the Commission directs MSEDCL to extend due date of Financial Closure and Schedule Commissioning Date of the project for a period starting from notice of Force Majeure i.e. 21 February 2020 till restoration of supply chain and Government of India withdrawing lockdown imposed on account of Covid-19, plus 30 days. MSEDCL is directed to ascertain the exact period for relief under Force Majeure after lockdown is completely lifted. Further, AHPPL shall provide Bank Guarantee as per PPA valid for period extended from time to time on account of Force Majeure.

16.11 The Commission also notes that AHPPL has referred to the possibility of price increase on account of Force Majeure event which was opposed by MSEDCL. In the opinion of the Commission this issue need not be analyzed in detail since Article 8.2 (a) of the PPA i.e. *‘However, adjustments in tariff shall not be allowed on account of Force Majeure Event’* is very clear and undisputable.

16.12 As the Commission has allowed extended time as above for meeting obligations under the PPA, AHPPL’s contention of impossibility to perform the obligations under the PPA does not survive. Hence, the Commission is not going into the arguments relating to frustration of contract under the Contract Act.

16.13 Having ruled as above, the Commission would like to clarify that PPA puts responsibility of constructing project on AHPPL without binding it to specific supplier of the materials. Hence, after restoration of supply chain, AHPPL should not restrict itself to present supplier

and may look for other suppliers including domestic manufacturers for completing the project within extended time period at its own risk and cost.

17. Hence, the following Order

ORDER

1. **The Case No. 78 of 2020 is partly allowed.**
2. **Disruption in global supply chain due to outbreak of Covid-19 and imposition of consequential lockdown in India is considered as event of Force Majeure. ACME Heergarh Powertech Pvt. Ltd. is exempted from its obligation for the period granted under Force Majeure without any compensation.**
3. **Maharashtra State Electricity Distribution Limited is directed to ascertain the exact period for relief under Force Majeure after lock down is completely lifted and accordingly the timeline for Financial Closure and Scheduled Date of Commissioning shall be extended with additional 30 days thereafter as ruled in paragraph 16.10 above.**

Sd/-
(Mukesh Khullar)
Member

Sd/-
(I.M. Bohari)
Member

