

In the Appellate Tribunal for Electricity,
New Delhi
(Appellate Jurisdiction)

APPEAL NO. 131 OF 2015 & IA NOS. 311 OF 2017 & 335 OF 2016
AND
APPEAL NO. 114 OF 2015 & IA NO. 190 OF 2015

Dated: 4th July, 2018

Present: Hon'ble Mr. I.J. Kapoor, Technical Member
Hon'ble Mr. N. K. Patil, Judicial Member

APPEAL NO. 131 OF 2015 & IA NOS. 311 OF 2017 & 335 OF 2016

In the matter of:

**Taxus Infrastructure & Power
Projects Pvt. Ltd (Taxus)
308, SGL Plaza, Sec – 9, DC Chowk,
Rohini, New Delhi - 110085** **Appellant**

Versus

- 1. Gujarat Electricity Regulatory
Commission (GERC)
6th Floor GIFT ONE
Road 5C Zone 5, GIFT CITY
Gandhinagar – 382 355 (Gujarat)** **Respondent No.1**
- 2. Gujarat Urja Vikas Nigam Ltd. (GUVNL)
Sardar Patel Vidyut Bhavan
Race Course
Vadodara – 390007 Gujarat** **Respondent No.2**
- 3. Gujarat Electricity Development
Agency (GEDA)
4th Floor, Block No. 11 and 12
Udhyog Bhawan, Sector 11
Gandhinagar – 382017 (Gujarat)** **Respondent No.3**
- 4. Gujarat Energy Transmission
Corporation Ltd. (GETCO)**

- Sardar Patel VidyutBhawan
Race Tower
Vadodara – 390007, Gujarat** Respondent No.4
5. **Chief Electrical Inspector (CEI)
6th Floor, Block 18,
Udhyog Bhawan, Sector 11,
Gandhinagar – 382 017, Gujarat** Respondent No.5
6. **State Load Despatch Centre (SLDC)
Gotri Road, Near TB Hospital
Vadodara – 390021, Gujarat** Respondent No.6

Counsel for the Appellant(s) : **Mr. Sachin Datta, Sr. Adv.
Mr. Dinesh Sharma
Ms. Ritika Jhurani
Ms. Kritika Khanna**

Counsel for the Respondent(s) : **Ms. Suparna Srivastava
Ms. Sanjana Dua
Mr. Tushar Mathur for R-1**

**Mr. M.G. Ramachandran
Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Ms. Ranjitha Ramachandran
Ms. AnushreeBardhan
Ms. Rhea Luthra
Ms. PoorvaSaigal
Mr. Shhubham Arya
Mr. Polkit Agarwal for R-2**

APPEAL NO. 114 OF 2015 & IA NO. 190 OF 2015

In the matter of:

**Gujarat Urja Vikas Nigam Limited (GUVNL)
Sardar Patel Vidyut Bhavan
Race Course Circle**

Vadodara – 390007 (Gujarat) Appellant

Versus

- 1. Taxus Infrastructure & Power Project Pvt. Ltd (Taxus)
804 – A Arcadia, South City – II
Gurgaon – 122018 (Haryana) Respondent No.1**
- 2. Gujarat Energy Development Agency
4th Floor, Block No. 11 & 12
Udhyog Bhavan, Sector 11
Gandhinagar – 382017 (Gujarat) Respondent No.2**
- 3. Gujarat Electricity Transmission Corporation Limited
Sardar Patel Vidyut Bhavan
Race Court Circle
Vadodara – 390007 (Gujarat) Respondent No.3**
- 4. Chief Electrical Inspector
6th Floor, Block 18, Udhyog Bhavan
Sector 11, Gandhinagar – 382 017 (Gujarat) Respondent No.4**
- 5. State Load Despatch Centre
132 kV Gotri Sub Station Compound
Gotri Road, Near TB Hospital
Vadodara – 390021 Respondent No.5**
- 6. Gujarat Electricity Regulatory Commission
6th Floor GIFT ONE
Road 5-C Zone 5, GIFT CITY
Gandhinagar – 382 355 (Gujarat) Respondent No.6**

**Counsel for the Appellant(s) : Mr. M.G. Ramachandran
Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Ms. Ranjitha Ramachandran
Ms. Anushree Bardhan
Ms. Poorva Saigal
Mr. Shhubham Arya
Mr. Polkit Agarwal**

Counsel for the Respondent(s) : **Mr. Sachin Datta, Sr. Adv.**
Mr. Dinesh Sharma
Ms. Ritika Jhurani
Ms. Kritika Khanna for R-1

Ms. Suparna Srivasatava
Ms. Sanjana Dua
Mr. Tushar Mathur for R-6

JUDGMENT

PER HON'BLE MR. I.J. KAPOOR, TECHNICAL MEMBER

1. The instant cross Appeals are being aggrieved filed by Gujarat Urja Vikas Nigam Ltd. (hereinafter individually referred to as the “**GUVNL**”) and M/s Taxus Infrastructure and Power Projects Pvt. Ltd. (hereinafter individually referred to as the “**Taxus**”) under Section 111 of the Electricity Act, 2003 (hereinafter referred to as the “**Act**”) against the Order dated 30.3.2015 (“**Impugned Order**”) passed by the Gujarat Electricity Regulatory Commission (hereinafter referred to as the “**State Commission/GERC**”) in Petition No. 1364 of 2013 filed by Taxus wherein it has been held that the Solar PV Power Plant of Taxus is deemed to have been commissioned on 31.3.2013 and Taxus is entitled to raise the bills for energy injected into the grid w.e.f. 01.4.2013 and delay in commissioning of the plant for 402 days was due to the Force Majeure (FM) events & Taxus is not liable to pay Liquidated Damages (LD) for the said delay.

2. The Appeal No. 131 of 2015 has been filed by M/s Taxus Infrastructure & Power Projects Pvt. Ltd which is a solar power developer in the State of Gujarat. It is a generating company within the meaning of Section 2(28) of the Act and has set up 5 MW Solar Photo Voltaic (PV) Power Project (“**Solar Project**”) in Kutch District of Gujarat. Taxus is the Respondent No. 1 in the Appeal No. 114 of 2015.

3. The Appeal No. 114 of 2015 has been filed by Gujarat Urja Vikas Nigam Ltd. which is engaged in bulk procurement of power on behalf of the distribution licensees in the State of Gujarat and is a licensee within the meaning of the Act. GUVNL is the Respondent No. 2 in Appeal No. 131 of 2015.

4. In both the Appeals, other Respondents are common. They are as below:
 - i. Gujarat Electricity Regulatory Commission (“**State Commission/GERC**”) is the Electricity Regulatory Commission in the State of Gujarat discharging functions under the provisions of the Act.

 - ii. Gujarat Energy Development Agency (“**GEDA**”) is the Nodal Agency for the promotion of renewable energy based generation in the State of Gujarat.

 - iii. Gujarat Energy Transmission Corporation Ltd. (“**GETCO**”) is the Transmission Licensee in the State of Gujarat. It is also

discharging functions of the State Transmission Utility (“**STU**”) of Gujarat in terms of the Act.

- iv. Chief Electrical Inspector (“**CEI**”) is the authority designated under the Act and Central Electricity Authority (“**CEA**”) Safety Rules, 2010. CEI issues certificate under the CEA (Measures relating to Safety and Electric Supply) Regulations, 2010 to the effect that the electrical installations fulfil the safety requirements and are ready for energization.
- v. State Load Despatch Centre (“**SLDC**”) is the State Body under the Act to ensure integrated operation of the power system in the State of Gujarat.

5. Brief facts of the case in nutshell as follows:

- a) The State Commission vide Order dated 29.1.2010 determined the tariff for Solar PV Power Projects commissioned within the control period of two years i.e. up to 28.01.2012.
- b) Based on Guidelines for allocation of Solar Power Capacity (Phase II) issued by GEDA, Taxus applied for the allocation of 5 MW solar capacity which was granted by the Government of Gujarat (GoG) on 14.10.2010.
- c) On 8.12.2010, GUVNL entered into a Power Purchase Agreement (‘**PPA**’) with Taxus for supply of electricity from the Solar Project. As per PPA the Scheduled Commercial Operation Date (SCOD) of the Solar Project was 31.12.2011

and tariff was Rs. 15/kWh for first 12 years from Commercial Operation Date (COD) of the Solar Project.

- d) On 10.1.2011, Taxus approached GoG to set up the Solar Project through a Special Purpose Vehicle (SPV), which was denied by the GoG vide letter dated 1.4.2011.
- e) Taxus entered into Memorandum of Understanding (MoU) dated 28.3.2011 and 29.3.2011 with farmers for purchase of land for setting up Solar Project. On 31.3.2011, the GoG revised the Jantri rates for registration of sale deed for procurement of land. The same was further revised on 18.4.2011. On 11.5.2011, GoG issued a provisional mechanism for registration of agricultural land for industrial purpose. Title of the land could be registered on 28.11.2011.
- f) On 18.10.2011, Taxus applied for approval of the Collector to purchase the agricultural land for industrial purpose under Section 89A of the Bombay Tenancy and Agricultural Land (Vidarbha Region and Kutch Area) Act, 1958. The same was granted on 18.2.2012.
- g) Due to delay in setting up of the Solar Project, Taxus on 6.12.2011, filed a Petition No. 1145 of 2011 before the State Commission for extension of the Control Period as decided in the Order dated 29.1.2010. Some other Developers also filed similar petitions before the State Commission. The State Commission vide common Order dated 27.1.2012 dismissed all the Petitions filed by the Solar Power Project Developers.

- h) Taxus challenged the Order dated 27.1.2012 of the State Commission in Petition No. 1145 of 2011 before the High Court of Gujarat vide Special Civil Application No. 2942 of 2012.
- i) The State Commission vide Order dated 27.1.2012 determined the tariff for Solar Power Projects for the next control period i.e. from 29.1.2012 to 31.3.2015.
- j) Inspection of the 66 kV transmission line for evacuation of power from the Solar Project was carried out on 20.2.2013 by the CEI and inspection of 66 kV feeder bays at substation of GETCO was carried out by Assistant Electrical Inspector on 22.2.2013. The CEI granted approvals for energization of the Solar Project on 3.4.2013.
- k) GEDA vide letter dated 17.8.2013 certified the Solar Project as commissioned and available for commercial operation with effect from 8.8.2013.
- l) On 19.11.2013, Taxus filed a Petition No. 1364 of 2013 before the State Commission, for a declaration the Solar Project to be commissioned on 31.03.2013 instead of 08.08.2013 as certified by GEDA, applicable tariff for the Solar Project based on the Order dated 27.01.2012 of the State Commission, payment of tariff for the energy injected into the grid between 01.04.2013 to 08.08.2013 and holding the claim of LD of GUVNL as invalid.
- m) The State Commission passed an interim order dated 23.01.2014 in Petition No. 1364 of 2013 directing GUVNL not to

adjust the amount payable by it for the energy injected into the grid against LD for the delay in commissioning of the Solar Project from 31.12.2011 to 8.8.2013 and to make payment for the energy injected into the grid from the period 08.08.2013 onwards.

- n) GUVNL challenged the interim Order dated 23.01.2014 before the High Court of Gujarat by way of Special Civil Application (SCA) No. 2406 of 2014. The High Court of Gujarat heard the SCA No. 2942 of 2012 filed by Taxus and SCA No. 2406 of 2014 filed by GUVNL and passed an Order dated 26.02.2014 based on the consensus arrived at between the parties. As per the Order dated 26.02.2014 of the High Court, Taxus filed an Amended Petition No. 1364 of 2013 before the State Commission.
- o) The State Commission passed the Impugned Order on 30.3.2015. Aggrieved by the Impugned Order, GUVNL & Taxus have filed the present Appeals.
- p) The Appeal No. 131 of 2015 has been filed by Taxus on the following issues:
- (i) Disallowance of complete FM period as prayed before the State Commission and consequently no payment of LD to GUVNL.
 - (ii) Consideration of the revised SCOD as 31.3.2013 instead of 6.2.2013.

- (iii) Taxus is eligible for tariff of Rs. 15 per kWh instead of Rs.10.52 per kWh for the first 12 years and Rs.7.00 per kWh thereafter.
- (iv) Eligibility of Taxus to receive the Late Payment Charges (LPC) from GUVNL as per the provision of the PPA on the bills raised by Taxus for the energy supplied during 31.3.2013 to 8.8.2013 and thereafter from 8.8.2013.

q) The Appeal No. 114 of 2015 has been filed by GUVNL on the following issues:

- (i) Against allowing deemed commissioning of the Solar Project as 31.3.2013 even though CEI issued permission for energization of Solar Project on 3.4.2013 and GEDA certified commissioning date as 8.8.2013 as per the provisions of the PPA.
- (ii) Against allowing the prayer of Taxus and considering various periods of delay as FM events and rejecting the claim of GUVNL for LD.

6. Since the cross Appeals filed by Taxus & GUVNL pertain to the same Impugned Order, we are dealing them by way of this common judgement.

7. Questions of Law:

A. GUVNL has raised the following questions of law in the present Appeal No. 114 of 2015 which are as follows:

- a) Whether in the facts and circumstances of the case, the State Commission is right in holding that the Solar Project should be deemed to have been commissioned by Taxus on 31.3.2013 despite the fact that certification by GEDA for the commissioning, as per the agreed terms of the PPA (Article 1 – Definition read with Schedule 3), is only on 8.8.2013 and the prerequisite permission from CEI Inspector for energization of project was received on 3.4.2013?
- b) Whether in the facts and circumstances of the case, the State Commission is right in deciding that the delay of 402 days in the commissioning of the Solar Project, namely, from 31.12.2011 (SCOD) till 6.2.2013 was on account of FM events falling under Article 8 of the PPA?
- c) Whether in the facts and circumstances of the case, the State Commission is right in rejecting the claim of GUVNL for LD payable by Taxus for the period from 31.12.2011 till 8.8.2013 and restricting such LD only for the period from 6.2.2013 till 31.3.2013?
- d) Whether in the facts and circumstances of the case, the State Commission is right in holding that Taxus shall be entitled to the tariff at Rs 10.52/kWh for the first 12 years and not Rs 9.98 per unit (i.e. tariff of 1st year of control period)?

- e) Whether in the facts and circumstances of the case, the State Commission was right in entertaining the issue of certification by GEDA on the commissioning of the Solar PV Power Project in the proceedings before the State Commission, when GEDA is an independent Agency and is not subjected to the jurisdiction of the State Commission?
- f) Whether in the facts and circumstances of the case, the State Commission is right in deciding the issue of application of the principles of res-judicata and also the issue of purported energization of the Solar Project by Taxus without the prerequisite approval of the Authorities concerned, in favour of Taxus and against GUVNL?
- g) Whether in the facts and circumstances of the case, the State Commission is right in over-looking the implication of the Undertaking dated 28.3.2013 given by Taxus on the aspect of payment of the LD based on which the extension was granted by the GUVNL even though the GUVNL was entitled to terminate the PPA due to delay beyond one year from SCOD?

B. Taxus has not raised any specific questions of law in the present Appeal No. 131 of 2015.

- 8. We have heard the learned counsel and learned senior counsel appearing for the Appellant and the Respondents at considerable length of time and also carefully gone through the written submissions and submissions put forth during the hearings. Gist of the same is discussed hereunder.

9. The learned senior counsel Mr. Sachin Datta appearing for Taxus submitted the following submissions for our consideration on the issues raised by the Appellant in Appeal No. 131 of 2015:
- a) The State Commission failed to appreciate the facts in right perspective and hence erred in not granting period of 629 days as the FM within the ambit of the PPA. Accordingly, Taxus is not liable to pay any LD. The FM conditions were corresponding to the failure on the part of GUVNL, GETCO & GEDA to perform their obligations.
 - b) The State Commission failed to appreciate that non – payment of dues by GUVNL of the power supplied by Taxus amounts to breach of the PPA.
 - c) Non-availability of land title on the name of Taxus delayed the release of sanctioned loan by the financial institution i.e. IREDA which was sanctioned on 29.7.2011. Thereafter the loan was scrapped as IREDA analyzed the Solar Project in view of the State Commission's Order dated 27.01.2012 wherein the tariff was revised from Rs.15/kWh to Rs.9.98/kWh. IREDA, after due diligence agreed to fund the project in debt equity ratio of 50:50 and it re-sanctioned the loan on 10.9.2012, to a reduced amount of Rs.37 Cr. This qualifies as FM event because it was beyond the control of Taxus.
 - d) The State Commission failed to consider that Taxus was not able to commission the Solar Project on the SCOD due to the reason not attributable to it. The delay was on the grounds of delay in the statutory & non statutory approvals, disbursement

of sanctioned loan amount & delay in commissioning activities by the actions of GUVNL, CEI, GETCO & GEDA. The plant was ready for commissioning from 15.3.2013 but the authorities have taken time to approve the commissioning and their approval was necessary to declare the Solar Project commissioned. Accordingly, it was delayed upto 31.3.2013 which was for the reason beyond the control of Taxus & qualifies as FM events.

- e) The State Commission has failed to appreciate that the Solar Project was ready in all aspects on 18.2.2013 when some deficiency was stated by CEI which was rectified by Taxus & informed to CEI on 15.3.2013. CEI confirmed the same during inspection which was carried out with delay on 29.3.2013 & confirmed that the plant is ready in every aspect thus the delay from 18.2.2013 to 31.3.2013 clearly indicates that it was not attributable to Taxus but the delay was due to delayed approval of concerned authorities.
- f) The state commission failed to appreciate that Taxus had made specific prayer for LPC payable by GUVNL in the Petition No. 1364 of 2013. The State commission has not passed any order on this prayer. It is also established fact that Taxus had raised the invoices at tariff Rs.10.52/kWh of energy supplied. However, GUVNL had paid tariff at Rs. 9.13/kWh which is in gross violation of order passed by the State Commission. GUVNL has paid less bill amount against the invoices raised by Taxus and as such it is eligible to receive LPC as per the PPA.

- g) The State Commission has erred in deciding the FM period & consequent effect on the extension of SCOD, COD, tariff receivable by Taxus. For LD the State Commission has not considered the period of litigation between the parties before the High Court of Gujarat as it was beyond the control of Taxus & qualifies as FM event and accordingly Taxus is entitled to get extension in SCOD, COD of the project & exception from payment of LD amount and also eligible to get the relief respect to tariff receivable by Taxus.
- h) The approval of Collector for permission under section 89(1) of 1958 Act to utilize agriculture land purchased by Taxus for industrial purpose delayed till 18.2.2012 is a FM event.
- i) The State Commission failed to consider that Taxus had initiated the project activities immediately after signing of the PPA by applying to GoG to allow to set up the Solar Project in SPV, entered into MoU to purchase the land with farmers and applied to IREDA for loan in April 2011. Taxus had also awarded the EPC contract to M/s Schneider. Taxus had employed an amount of about Rs. 34 Cr. as equity & qualify for FM event. Taxus is eligible to get the tariff of Rs 15/kwh as claimed by it which is legal & valid consideration of FM events.
- j) The State Commission erred to consider that Taxus is liable to pay the LD for the period from 7.2.2013 to 30.3.2013 as the Solar Plant was ready for commissioning on 16.3.2013.
- k) The State Commission has failed to consider that the control period of 2 years for completion of the Solar Project in order

dated 29.1.2010 was affected due to FM events for 27 months period and hence the completion date of Solar Project works out to 18.2.2014. However, the State Commission has considered & decided that Taxus to complete the project upto 6.2.2013 which is contrary to earlier decision of State Commission itself.

- l) The issue of COD has acquired finality. GUVNL is unreasonably insisting for COD from the date for which GEDA had issued the Certificate of commissioning. This would be contrary to the provision of the PPA that the COD is to be reckoned on the basis of the date on which the Solar Plant “is available” for commercial operation and the sequence of events leading up to the COD as evident from the correspondence exchanged, which demonstrates that the plant was ready in all respects as early as 15.3.2013 and the only reason that the plant could not get into generation mode on 31.03.2013 was that the GETCO line was switched off on 30.3.2013 at 19.20 hours and it was made available thereafter on 31.03.2013 at 16.25 hours by which time there was not enough time to put the plant in generation mode owing to inadequate sun radiation. The judgment of the Hon’ble Supreme Court in case of Gujarat Urja Vikas Nigam Ltd. v. M/s ACME Solar Technologies (Gujarat) Pvt. Ltd. and Ors. [2016 SCC On Line SC 1513] has been relied by Taxus in this regard.

10. The learned counsel Mr. M G Ramachandran appearing for GUVNL submitted the following submissions for our

consideration on the issues raised by the Appellant in Appeal No. 114 of 2015:

- a) The State Commission has not dealt many issues raised by GUVNL during proceedings before the State Commission.
- b) The State Commission has erred in deciding deemed commissioning of the Solar Project on 31.3.2013 instead of 8.8.2013 ignoring the specific provision of the PPA which provides for the certification by GEDA for considering the date of the commissioning. The grievance of Taxus against the decision of GEDA on the commissioning date of the Solar Project can be taken up in an Appropriate Forum (i.e. Writ Petition under Article 226 of the Constitution of India) and not in the proceedings under Section 86 (1) (f) of the Act, for adjudication before the State Commission which is for adjudication of the dispute between Taxus as a Generating Company and GUVNL as a licensee.
- c) The State Commission as an adjudicator is bound by the terms and conditions of the PPA and cannot decide contrary to the specific provisions of the PPA. The decision of the State Commission in not accepting the GEDA's certificate on commissioning date of 8.8.2013 is contrary to the terms of the PPA.
- d) The State Commission has erred in deciding commissioning date as 31.3.2013 based on the letter dated 15.3.2013, the correspondences dated 19.3.2013 and 20.3.2013 with GEDA and communication dated 20.3.2013 addressed by Taxus to

the CEI, the inspection of the power plant on 29.3.2013 and the certificate for energization issued on 3.4.2013. CEI had issued the approval for energization only vide letter dated 03.04.2013. Accordingly, there was no question of the Solar Project being commissioned on 31.3.2013 i.e. prior to the prerequisite approval by the CEI.

- e) In view of requirements under law and based on the actual energy generation from the Solar Project prior to 3.4.2013 which was not corresponding to the 5 MW capacity, the Solar Project could not be considered to have been commissioned or under commercial operation prior to 3.4.2013.
- f) The State Commission has erred in holding that the Solar Project was affected by FM event for the period from 31.12.2011 to 6.2.2013 due to delay in GOG's decision regarding implementation of the project through a SPV, delay in registration of land sale deeds, delay in granting statutory approval under Section 89 A of the Bombay Tenancy and Agriculture Lands (Vidarbha Region and Kutch Area) Act, 1958 ("**1958 Act**"). These reasons were specifically raised by Taxus in the earlier Petition No. 1145 of 2011 filed before the State Commission, the same were duly considered by the State Commission and were dealt with and rejected in the Order dated 27.1.2012 passed by the State Commission. Taxus having chosen to challenge the said order of the State Commission before the High Court and raised these issues and then voluntarily choosing to have petition disposed of with liberty to move to this Tribunal

and not exercising that liberty, cannot be permitted to raise the same issues again before the State Commission.

- g) The State Commission had failed to appreciate that Taxus had given an undertaking dated 28.03.2013 specifically stating that '*we shall pay the liquidated damages from the Scheduled Commercial Operation Date agreed to in the Power Purchase Agreement dated 8.12.2010 up to the date of the commissioning of the Solar Power Project in view of the period extended by GUVNL as a special case*' in view of inordinate delay in commissioning of the Solar Project. Accordingly, the claim for extension of time beyond the SCOD on the basis of FM is an afterthought and contrary to the said undertaking.
- h) The State Commission has erred in accepting the plea of FM made by Taxus due to delay in the decision of GoG on implementation of the Solar Project under a SPV. In terms of Article 4.1 of the PPA, it is the obligation of Taxus to obtain all statutory approvals, clearances and permits. Taxus had itself chosen to implement the Solar Project through a SPV and had applied to the GoG. In the circumstances, it was not open to the State Commission to construe the period from 10.1.2011 to 1.4.2011 as FM event.
- i) The State Commission has failed to appreciate that the request made by Taxus to set up the Solar Project in the name of another Company is in violation of the Guidelines notified by the GoG, wherein a specific undertaking as below is required:

“I also give an undertaking that, “No change in the share holding pattern of the Applicant company shall be done without the prior approval of Government. At least 51% of the voting rights shall be maintained by the applicant company for a period of 5 (five) years from the date of allotment.”

- j) The State Commission has failed to appreciate that Taxus cannot raise its issue with GoG before the State Commission as it was not an issue between GUVNL and Taxus. Further, it does not fall within any of the events mentioned in Article 8.1 of the PPA dealing with FM.
- k) The State Commission erred in holding that there was a FM Event for delay in the registration of the Sale Deed on account of the revision in Jantri Rate. The acquisition of land was entirely at the cost and responsibility of Taxus. Taxus had on its own decided not to set up the project in the Solar Park where the land was to be allocated by the GoG with all associated facilities and approvals. In any event the revision in the Jantri Rate was made on 1.4.2011 and further revised on 18.4.2011 and thereafter with effect from 11.5.2011 the provisional registration of the Title Deed of the agricultural land for industrial purpose was allowed. In the circumstances mentioned above, the delay of 40 days cannot in any manner be construed as a Force Majeure event.
- l) The State Commission has failed to appreciate that a number of other Solar Power Project Developers had established the solar power projects in the District Kutch, where Taxus's plant is located and these project developers had completed the projects without any claim of having been affected by the delay in the Notification of Jantri Rate or

release of the registered land sale deed documents. If other Project Developers could validly establish the power project in the same Kutch area, there cannot be any claim of FM.

- m) The State Commission also failed to appreciate that the claim made by Taxus regarding delay in grant of permission under 1958 Act was devoid of any merit. The State Commission erred in relying on the Section 89 (1) (a) of the 1958 Act whereas the applicable provision is Section 89A of the said Act. Taxus in its Petition had clearly stated that it had applied for permission under Section 89A and the permission granted by the Collector was also under Section 89A. The State Commission has failed to consider that no prior permission or approval is required under Section 89A for purchase and use of land for bonafide industrial purpose and such approval is only required under Section 89 (1) (a) of the said Act. Section 89 A of the 1958 Act is an exception to Section 89 of the said Act and was introduced by an amendment in the year 1996 and 1997. The Resolution dated 20.7.1996 issued by the State Government brings out the reasons behind introduction of Section 89 A for the purpose that the land acquisition for industrial purposes gets delayed inordinately and was creating hurdles in implementing projects. The amendments provided that if a party has a clear title to the land and wishes to use it for bonafide industrial purpose, he can immediately start doing so and within one month of beginning such usage, seek certificate from the Collector in this regard. The role of the Collector is only to verify whether the title of the land is clear

or not and that the land is being used for a bonafide industrial purpose. As one of the bona fide industrial purpose is setting up the power projects, Taxus could have acquired the clear title to the land and begun construction of the solar project. The conditions of Section 89 would not be applicable to the case of the Taxus.

- n) The State Commission erred in relying on the decision dated 11.11.2013 of this Tribunal in Appeal No. 54 of 2013 and Order dated 07.04.2012 of the State Commission in Petition No. 1125 of 2011 (Cargo Solar) particularly when Taxus did not choose to challenge the Order dated 27.1.2012 passed by the State Commission. The case of Cargo Solar is distinguishable as being a Solar Thermal project, the land requirement was much higher.
- o) The State Commission has failed to appreciate that the reliance of Taxus on the word 'without prejudice' stated in the top of the undertaking dated 28.3.2013 was misplaced. The undertaking stated 'without prejudice' in view of the fact that Taxus had undertaken obligations in view of GUVNL agreeing to extend the term of the commissioning under the PPA as a special case. Term 'without prejudice' would mean that so long GUVNL did not extend the term as a special case for Taxus, it did not have any obligation in terms of the undertaking. GUVNL has acted in terms of the offer made by Taxus and extended the term, it is then not open to Taxus to claim that its obligations under the said document are not to be enforced but GUVNL will have to abide by its obligation of extension of the term. The extension of term was a

subsequent obligation and in consideration of Taxus agreeing to pay LD.

- p) The learned counsel has also given a detailed note on the scope of Regulatory powers of the State Commission under the Act vis-à-vis terms of the PPA/Agreements entered into between the parties. While doing so the learned counsel has relied on various judgements of Hon'ble Supreme Court viz. India Thermal Power Ltd. V. State of MP (2000) 3 SCC 379, Tata Power Co. Ltd. v. Reliance Energy Ltd. 2008 (10) SCC 321, GUVNL v. Tarini Infrastructure Ltd. (2016) 8 SCC 743, GUVNL v. EMCO Ltd. (2016) 11 SCC 182, GUVNL v. ACME Solar Technologies 2016 (12) SCALE 173, Energy Watchdog v. CERC 2017 (4) SCALE 580, PTC India Ltd. v CERC (2010) 4 SCC 603 etc. and judgement of this Tribunal in case of BSES Rajdhani Power Ltd. v. CERC in Appeal Nos. 82 & 90 of 2012.
- q) The contention of Taxus regarding payment of LPC by GUVNL is misplaced as according to terms and conditions of PPA and commissioning certificate issued by GEDA, Taxus is not eligible for any payment to be made for the period 1.4.2013 to 7.8.2013.
- r) The contentions of Taxus regarding considering financing by IREDA is also misplaced as it is clearly excluded from the vents of FM in terms of PPA and further any delay in this regard is only on account of Taxus. Further, the contention of Taxus to consider delay due to litigation before the High Court of Gujarat is also misplaced as it has not hampered

the construction work at site and further it is Taxus who chose to take the matter to the court.

11. The learned counsel Ms. Suparna Srivastava appearing for the State Commission substantiated the Impugned Order by reiterating the stand taken in the Impugned Order. She has made following arguments/submissions for our consideration on the issues raised in the Appeals:

a) Taxus has sought extension of commissioning date of the Project due to FM events and hence denied liability to pay any LD as claimed by GUVNL for delay in commissioning of the Project. Before the State Commission, Taxus has submitted that it was prevented from performing contract for 402 days (with 35 days of overlapping) due to conditions beyond its control. Taxus in its claim for extension of SCOD by 402 days (delay in GoG permission for implementation of Project through SPV, delay in registration of land sale deeds and delay in granting statutory approval as per 1958 Act) before the State Commission did not claim any extension on the ground of delay in sanction of loan by IREDA or the time elapsed in litigation. However, at this appeal stage now Taxus is claiming extension in SCOD by 52 more days on the said accounts, which is not permitted.

b) The State Commission has duly considered the submissions made by GETCO and the same are required to be seen in its entirety. The State Commission after considering all the facts and submissions made by GETCO, GUVNL and Taxus allowed

commissioning date as 31.3.2013 for the Solar Project. Accordingly, GUVNL was required to pay tariff prevailing as on 31.3.2013 and Taxus was allowed to raise bill on GUVNL.

12. After careful consideration of the submissions of the learned counsel and learned senior counsel appearing for the Appellants and the Respondents on various issues raised in the present Appeals, our observations are as follows:-

a) In the present Appeals GUVNL has raised questions of law and Taxus has not raised any particular question of law. Core issues before us for deliberation are related to commissioning date of the Solar Project, tariff applicable and FM events affecting the commissioning of the Solar Plant and LD thereupon. We are proceeding to deal the same based on these issues raised in the present Appeals.

b) Let us first take the issue related to commissioning of the Solar Project. This issue needs deliberation on the provisions of the PPA, Regulations of the State Commission, findings of the State Commission in the Impugned Order etc.

c) Now we shall first examine the impugned findings of the State Commission on the issue of commissioning. The relevant extract from the Impugned Order on this issue is reproduced below:

“10.18. From the above, it is established that

(i) The petitioner had been approaching the CEI and GEDA for approval of its project since 18.03.2014.

(ii) The CEI inspected the plant on 29.03.2013, and or is evident from its letter dated 03.04.2013, the plant was ready in all respect on 29.03.2013.

(iii) The 66 KV line connecting the petitioner's plant to the nearby GETCO sub-station, which was the responsibility of GETCO, was also ready on 20.03.2013.

(iv) The said 66 KV lines were charges at 18.50 and 18.55 hours on 30.03.2013.

(v) The 66 KV line was switch off by GETCO at 19.20 hours on 30.03.2013.

(vi) The GEDA official visited the project site on 31.03.2013, and observed that the 66 KV was not charged.

(vii) The GETCO could charge the line only at 16.35 hours and the RMU was charged at 18.20 hours.

(viii) By this time, the solar radiation had reduced to the extent that the solar plant could not generate power on 31.03.2013.

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

From the above and perusal of the Impugned Order it can be seen that the State Commission after considering relevant aspects of the case has held that though Solar Project was ready for charging it could not be commissioned by 31.3.2013 due to reasons beyond its control.

- d) As per the PPA signed between GUVNL and Taxus, COD is defined as below:

“Commercial Operation Date” With respect to the project shall mean the date on which the solar photovoltaic grid interactive power plant is available for commercial operation (certified by GEDA) and such date as specified in a written notice given at least ten days in advance by the power producer to GUVNL.”

The COD of the Solar Project is the date on which Solar Project is available for commercial operation as per certificate of GEDA and such date as specified in written notice given by Taxus to GUVNL at least 10 days in advance.

- e) Now let us analyse the impugned findings of the State Commission regarding certificate issued by GEDA. The relevant extract is reproduced below:

“10.21. The Chief Electrical Inspector and the representative of GETCO have also admitted that the plant was ready for commission on 29.3.2013 and 30.3.2013. From the verification of documents on record and letters of representative of CEI and letters of representative of GETCO and the energy recorded in the energy meters submitted by the GETCO with its reply dated 26.02.2014, it is clear case that the petitioner’s plant was ready for commissioning on 31.03.2013. However, the respondents have relied on the Certificate No. GEDA/SOLAR/TAXUS/2013/08/2495 dated 17.8.2013 issued by the GEDA declaring that the petitioner plant was commissioned on 8.8.2013.”

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

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

10.24. In the present case, we observe and note that the GEDA which is the State Nodal Agency for promotion of Renewable Energy Sources failed to perform the duty cast upon it. In the present case, the representative of the GEDA though visited on 31st March 2013 and found that the plant was not able to generate the electricity on 31st March 2013 due to lower solar radiation and non connectivity of the transmission system with the power plant, no effective step was taken by it. The GEDA has also not taken any effective action against the representation made by the petitioner on 10.05.2013 and to declare that its plant was commissioned on 31.03.2013. There is no reply of GEDA on above submissions made by the petitioner who invested huge amount in the solar energy project, which is Renewable Energy Source Project. There is no explanation of GEDA on which ground and on which reasons they have issued the commissioning certificate on 8.8.2013 without any subsequent visit to the project. The GEDA has further refused to the guidelines issued by it for setting up the Solar

Power Plant, which it has prescribed certain pre-requisites for commissioning of the solar plants. But, the fact that the GEDA team visited and inspected the petitioner's plant on 31.03.2013, proves that either all the pre-requisites were either fulfilled or were waived. Thus, the whole litigation arose in the present case due to negligent performance and failure to fulfill duty cast upon GEDA by the State as well as the Commission in various provisions of orders and regulations. We therefore, direct to GEDA to act as per the provision of orders of the Commission in future scrupulously, without fail.

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

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

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

From the above it can be seen that based on facts and circumstances of the case and non-explanation/failure to fulfill duty on part of GEDA in issuing the commissioning certificate, the State Commission has held that the deemed date of commissioning of Solar Project as 31.3.2013.

f) GUVNL has contended that GEDA being an external agency, is not governed with the provisions of the Act and hence the remedy against the grievances with GEDA regarding issuance of commissioning certificate lies elsewhere in the form of writ petition and not with the State Commission. GUVNL has also contended that the State Commission cannot alter the terms and conditions of the PPA entered into between the parties. In this regard GUVNL has relied on various judgements of Hon'ble Supreme Court and this Tribunal. We have gone through the said judgements and find that the references were mostly related to the PPAs entered for tariff determined under Section 63 of the Act. Whereas in the present case the State Commission has determined the generic tariff under Section 62 of the Act. The same is clear from the opening para of the generic tariff order of 2010 or 2012. The relevant extract from the order of 2012 clearly mentions as “ *In exercise of the powers conferred under Sections 61 (h), 62 (1) (a), and 86 (1) (e) of the Electricity Act, 2003 (36 of 2003), guidelines of the National Electricity Policy, 2005, Tariff Policy, 2006 and all other powers enabling it on this behalf, the Gujarat Electricity Regulatory Commission (hereinafter referred to as “GERC” or “the Commission”) determines the tariff for procurement of power by Distribution Licensees and others in Gujarat from Solar Energy Projects (the “Tariff Order”).* We have gone through the provisions of the PPA wherein it is mentioned that the availability of the Solar Project for commercial operation is to be certified by GEDA. From perusal of the Orders dated 29.1.2010 and 27.1.2012, we observe that the commissioning/commercial operation of the solar projects are linked with the

applicable tariff on them. Further, these regulations are termed as “Determination of tariff for Procurement of Power by the Distribution Licensees and others from Solar Energy Projects”. So, any dispute about commissioning is directly linked to the tariff at which procurement of solar power is done by GUVNL. It is also observed that the State Commission has earlier dealt issues connected to GEDA in similar cases which has travelled to this Tribunal and also High Court and there has been no adverse findings on dealing of GEDA certificate by the State Commission. Further, it is established under the law that the State Commission has jurisdiction over the interpretation of the PPA entered into between the parties. It is the prerogative of the State Commission to adjudicate any dispute on the terms of the PPA for tariff determined under Section 62 of the Act. In view of the above we are of the considered opinion that the State Commission is the correct forum for adjudication of any dispute regarding commissioning of Solar Project even though the certificate was to be issued by GEDA. The judgements relied upon by GUVNL on this are not applicable to the present case. Accordingly, the contentions of GUVNL are misplaced and are rejected.

- g) We also considered that the State Commission while deciding the issue of deemed commissioning of the Solar Project has gone into details of sequence of events leading to no injection of power from the Solar Project on 31.3.2013 and thereafter injection of power into the grid from 1.4.2013 onwards. The analysis of the State Commission includes deliberation on the visits of CEI& GEDA for certification as required under the PPA

and thereafter issuance of certificates by CEI & GEDA. The State Commission has stated that till the time GETCO could connect the Solar Project on 31.3.2013 there was no insolation and hence power could not be injected to the grid. The State Commission has further observed that as per the certificate of CEI issued on 3.4.2013 which was based on visit on 29.3.2013, the Solar Project was ready but could not inject power due to non-availability of evacuation system which was the responsibility of GETCO. The power was injected into the grid by Solar Project from 1.4.2013 onwards and has been consumed by the discoms in State of Gujarat. Further, a careful perusal of the PPA reveals that there is no mechanism/procedure to define the commissioning/COD. It merely states certificate of commissioning from GEDA under Schedule 3 of the PPA. The relevant portion of the Schedule 3 reads out as below:

“Certificate of Commissioning of the Solar Photovoltaic Grid Interactive Power Project issued by GEDA.”

The State Commission in the Impugned Order has stated as below:

“The GEDA has further refused to the guidelines issued by it for setting up the Solar Power Plant, which it has prescribed certain pre-requisites for commissioning of the solar plants. But, the fact that the GEDA team visited and inspected the petitioner’s plant on 31.03.2013, proves that either all the pre-requisites were either fulfilled or were waived.”

This clearly establishes that it was to the discretion of GEDA to issue such certificate certifying solar power project to be available for commercial operation from a particular date. This can also be inferred by the certificate dated 17.8.2013 issued by GEDA which also does not speak about the basis of issuance of such certificate except mentioning electricity generation on 8.8.2013 for the time from 1145 Hrs. to 1345 Hrs. without interpreting the same. Accordingly, we are of the considered view of the State Commission regarding GEDA not being diligent in carrying out its duties conferred upon by the GoG/State Commission.

- h) GUVNL has also contended that the State Commission has not gone into the details of disconnecting the transmission line connecting to the Solar Project on 30.3.2013 and again connecting it on 31.3.2013 late in the evening when the Solar Project was not able to go into generating mode due to absence of solar radiations. According to GUVNL the works at Taxus end were not completed so the Solar Project was not able to go into generating mode and hence GETCO is not at any fault. We have gone through the details of the issue and find that the GETCO has placed affidavit before the State Commission stating that after it received communication from Taxus it energised the transmission line in the evening of 31.3.2013. However, we do not find any such communication on record which reveals the contention of GETCO before the State Commission. On contrary we find that GETCO has declared the portion of transmission line connecting the Solar Project as

being declared on commercial operation w.e.f. 31.3.2013. This becomes important in case GETCO was ready for commercial operation of its transmission system before 31.3.2013 it had the option to approach the State Commission for declaration of the said transmission system under commercial operation in terms of GERC (Multi-Year Tariff) Regulations, 2011 at a prior date, which is not the case. This clearly establishes that GETCO was not ready with its transmission system before the sunset of 31.3.2013.

- i) It is also observed that the State Commission in the Impugned Order at para 10.29 has emphasised that in Petition No. 1126 of 2011 and allied matter, GUVNL admitted that in case of the plant is ready for commissioning but if the transmission system is not available in that eventuality, it is deemed that the plant is commissioned and the plant developer is eligible to receive the tariff prevailing on the respective date. Making evacuation system available was the responsibility of GETCO. This is also evident from the schedule 3 of the PPA and observations of the State Commission in the Impugned Order. The relevant para from Impugned Order and PPA is reproduced below:

“10.28. The Commission passed the Order No. 2 of 2010 dated 29.01.2010 in which the Commission has decided that it is the duty of the Power Procurer and GETCO to create the necessary transmission network from the Power Producer i.e. Solar Power Project to the GETCO’s Sub-Station for evacuation of power. Thus, the duty has been cast upon the GETCO to create necessary infrastructure of transmission line

for evacuation of power generated from the power plant. Any delay in providing necessary transmission system for evacuation of power can, therefore, be not allowed to adversely affect the interests of the power producer. In the present case, we note that the petitioner's plant was ready for commissioning/energization as per the CEI inspection, however, the same was not energized for commission on 31.03.2013 due to non-availability of transmission system."

Relevant extract from PPA is reproduced below:

SCHEDULE 3
APPROVALS

1. Consent from the GETCO for the evacuation scheme for evacuation of the power generated by the 5 MW Solar Photovoltaic Grid Interactive Power Projects.

- j) In view of our discussions as above, we are of the considered opinion that there is no legal infirmity in the decision of the State Commission in considering 31.3.2013 as the deemed date of commissioning for the Solar Project.
- k) Now let us take up the issue related to the tariff applicable to the Solar Project. According to Taxus tariff of Rs. 15/kWh (as agreed in PPA) should be applicable to its Solar Project and according to GUVNL tariff as applicable for FY 2013-14(as the Solar Project was commissioned only on 8.8.2013 as per GEDA certificate) for such projects shall be applicable to Solar Project.

However, the State Commission has come to the conclusion that tariff of Rs. 10.52/kWh shall be applicable to the Solar Project. Let us examine the impugned findings of the State Commission on this issue. The relevant extract from the same is reproduced below:

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

10.28. The Commission passed the Order No. 2 of 2010 dated 29.01.2010 in which the Commission has decided that it is the duty of the Power Procurer and GETCO to create the necessary transmission network from the Power Producer i.e. Solar Power Project to the GETCO’s Sub-Station for evacuation of power. Thus, the duty has been cast upon the GETCO to create necessary infrastructure of transmission line for evacuation of power generated from the power plant. Any delay in providing necessary transmission system for evacuation of power can, therefore, be not allowed to adversely affect the interests of the power producer. In the present case, we note that the petitioner’s plant was ready for commissioning/energization as per the CEI inspection, however, the same was not energized for commission on 31.03.2013 due to non-availability of transmission system.

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

“.....During the hearing Shri M.G. Ramchandran on behalf of GUVNL had assured that those projects ready for commissioning but not commissioned due to non-availability of evacuation system could be entitled to the existing tariff. In the order of the Commission dated 27.1.2011, the following details are recorded:

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

10.30. We therefore, decide and declare that the respondent GUVNL is required to pay the tariff as prevailing on 31.03.2013. We allow the petitioner to raise bill/invoice to the respondent GUVNL for the energy as recorded in the ABT complaint meter and as also reflected in the energy accounting carried out by the SLDC. We also decide and direct the respondent GUVNL to make the payment of the bills/ invoices raised by the petitioner within 15 days from the receipt of the bills issued by the petitioner.”

The State Commission while referring to its decisions in orders dated 29.1.2010 and 27.1.2012 wherein GETCO has been made responsible for creation of necessary transmission network for solar power projects in the State of Gujarat and admission on part of GUVNL regarding entitlement of tariff determined by the Commission in its order No.2 of 2010 dated 29.1.2010 in case a solar project is ready for commissioning, but could not be commissioned due to non-availability of evacuation system concluded that the Solar Project is entitled for the tariff as prevailing on 31.3.2013.

- l) In the present case it can be seen that the SCOD of the Solar Project was 31.12.2011 which was falling under the control period as per the order dated 29.1.2010 of the State Commission and accordingly the tariff as per the said order was Rs. 15/kWh for the initial 12 years starting from COD the Solar Project and Rs.5 per kWh from the 13th year to 25th year. The same has been agreed in Article 5 of the PPA. The control period as per the order dated 29.1.2010 was 2 years which ended on 28.1.2012. The State Commission came with new tariff order dated 27.1.2012 for solar power projects with control period beginning from 29.1.2012 to 31.3.2015. Accordingly, the applicable tariff for the Solar Project of Taxus shall be the applicable tariff for commissioning of the Solar Project from 29.1.2012 to 31.3.2013 as per the State Commission's order dated 27.1.2012.
- m) The relevant extract from the Impugned Order leading to conclusion of State Commission's decision of tariff is reproduced below:

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

.....

The said order was challenged before the Hon'ble APTEL by Solar Energy Society of India by filing Appeal No. 75 of 2012. In the said appeal, Hon'ble Tribunal passed judgment dated 17.04.2013 and directed the Commission to pass an

consequential order. Accordingly, the Commission had passed an consequential order in Suo-Motu proceedings in Order No. 1 of 2012 on 07.07.2014. Thereafter, the Commission found some error in the said order. Hence, the Commission passed corrigendum dated 11.07.2014 to the said order dated 07.07.2014 and decided the tariff for procurement of power by the distribution licensees and others for the control period from 29.01.2012 to 31.03.2015, which is stated below:

.....

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

“.....

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

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

Above tariff shall apply for solar projects commissioned on or before 31st December 2011. In case, commissioning of Solar Power Project is delayed beyond 31st December 2011, GUVNL shall pay the tariff as determined by Hon'ble GERC for Solar Projects effective on the date of commissioning of solar power project or above mentioned tariff, whichever is lower.

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

The PPA also recognizes this fact.

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

From the above it can be seen that the State Commission based on its decision of deemed commissioning date as 31.3.2013 for the Solar Project and as per the provisions of the PPA and based on this Tribunal's judgement and change in

tariff issued by way of corrigendum decoded tariff of Rs. 10.52/kWh for first 12 years and Rs. 7/kWh for subsequent year.

n) GUVNL has while relying on the undertaking given by Taxus contended that the tariff for the Solar Project shall be Rs. 9.98 for 1st 12 years and Rs. 7 per unit thereafter and Taxus has demanded for the tariff as per the PPA. We observe that in view of provisions for applicable tariff under PPA, condonation of certain delays in commissioning of the Solar Project and as per the tariff orders there is no significance of such undertakings even though the Solar Project was delayed by more than one year. In view of the same and our decision on agreeing to the decision of the State Commission on the deemed commissioning date of the Solar Project as 31.3.2013 the tariff has to be set as per the provisions of the PPA which works out be the tariff applicable for FY 2012-13 and the State Commission has rightly determined the same as Rs. 10.52/kWh for first 12 years and Rs 7/ kWh for subsequent years.

o) In view of the above we do not find any legal infirmity in the decision of the State Commission on the issue of applicable tariff and accordingly the contention of Taxus for higher tariff and contention of GUVNL for lower tariff does not sustainable.

Hence, this issue is decided against both the Appellants i.e. Taxus and GUVNL.

p) Now we come to the final issue raised in the Appeals which is regarding the duration of FM events and consequently

applicability of LD on Taxus for delay in commissioning of the Solar Project. Taxus has demanded that the delay in commissioning of the Solar Project was due to FM events and it should not be penalised to pay LD until commissioning of Solar Project i.e. 31.3.2013. Whereas, GUVNL has contended that the delay in commissioning of the Solar Project was due to reasons attributable to Taxus and the same cannot be termed as FM events. Let us first analyse the impugned findings of the State Commission while dealing the FM events. The relevant extract from the Impugned Order is reproduced below:

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

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

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

.....
.....

FORCE MAJEURE EVENT:

10.34. *The Approvals defined in Article 1 as under:*

.....

.....

10.45. *As the petitioner had raised the issue of Force Majeure on account of non-availability of statutory approvals from statutory authorities and the Government officials, for the land procured by the petitioner. We deal with the above issue first as under.*

.....

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

.....

10.54. *From the above discussions, it is evident that after signing the PPA on 8.12.2010, the petitioner initiated action for acquiring the requisite land and signed the MOU with the land owners on 28th and 29th March, 2011. After, the issue*

of SPV was settled in the form of denial by the State Government on 01.04.2011, the petitioner approached the authorities for registration of land. However, in the meantime the Government of Gujarat had revised the Jantri Rates through GR dated 31.03.2011. The high rates of Jantri as well uncertainty over the Jantri Rates for non-agricultural land had created a situation, wherein the registration of sale deed got delayed up to 28.11.2013. This delay was definitely beyond the control of the petitioner.

.....

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

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

“89. Transfers to non-agriculturists barred.-

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

[owner] or partly as tenant or who is not an agricultural laborer:

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

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

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

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

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

authorized by the state government is a statutory authority who grants the permission. The permission /approval granted by the above authority is a statutory permission/approval as it is under the provision of the said Act.

10.58. In the present case, the petitioner had applied for the permission under section 89 (1) (A) of the Bombay Tenancy and Agricultural lands (Vidarbh Region and Kutch area) Act 1958 on 18.10.2011/05.11.2011 to the Deputy Collector/Collector of Kutch. The Deputy Collector, Anjar vide letter No. JMN/Ganot-89/VASI/222/1/2012 dated 18.02.2012 granted the approval under section 89 (1) (A) of the Bombay Tenancy and Agricultural lands (Vidarbh Region and Kutch area) Act, 1958.

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

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

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

“.....Article 8 of the PPA

8.1. Force Majeure Events:

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

(i) acts of God;

(ii) typhoons, floods, lightning, cyclone, hurricane, drought, famine, epidemic, plague or other natural calamities;

(iii) acts of war (whether declared or undeclared), invasion or civil unrest;

(iv) any requirement, action or omission to act pursuant to any judgment or order of any court or judicial authority in India (provided such requirement, action or omission to act is not due to the breach by the Power Producer or TPL of any Law or any of their respective obligations under this Agreement);

(v) inability despite complying with all legal requirements to obtain, renew or maintain required licenses or legal approvals;

(vi) earthquakes, explosions, accidents, landslides; fire;

(vii) expropriation and/or compulsory acquisition of the Project in whole or in part by Government Instrumentality;

(viii) chemical or radioactive contamination or ionizing radiation; or

(ix) damage to or breakdown of transmission facilities of GETCO / TPL;

(x) exceptionally adverse weather condition which are in excess of the statistical measure of the last hundred (100) years.

(b) Force Majeure Exclusions:

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

1. Unavailability, Late Delivery or Change in cost of plants and machineries, equipment, materials, spares parts or consumables for the project;

2. Delay in performance of any contractor / sub contractor or their agents
3. Non performance resulting from normal wear and tear experience in power generation materials and equipments
4. Strike or Labour Disturbances at the facilities of affected parties
5. In efficiency of finances or funds or the agreement becoming onerous to perform, and
6. Non performance caused by, or concerned with, the affected party's'
7. Negligent and intentional acts, errors or omissions;
8. Failure to comply with Indian law or Indian Directive; or
9. Breach of, or default under this agreement or any Project agreement or Government agreement.....

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

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

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

concerned of the PPA be considered as Force Majeure event. The petitioner and Respondent GUVNL consciously agreed that any delay in obtaining legal approval is to be considered as a Force Majeure Event.

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

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

“.....Article 4: Undertakings

4.1. Obligations of the Power Producer:

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

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

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

10.66. We also note that the Hon'ble Supreme Court of India has in its Judgment in case of the Ramala Sahkari Chini Mills Ltd. v. CCE, (2010) 14 SCC 744, at page 750, decided

regarding the word “include” an interpretation of the same which is re-produced below;

.....

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

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

10.76. As stated in earlier para, the time period of Force Majeure is required to be given effect in to the Commercial Operation Date and Scheduled Commercial Operation Date and also required to be given its effect in terms of the PPA. The PPA was signed by the parties on 08.12.2010. The SCOD agreed in PPA was 31.12.2011 which is required to be revised with consideration of the force majeure event decided in this order in earlier para. Accordingly, revised SCOD of the project is decided as 06.02.2013.

LIQUIDATED DAMAGES:

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

“...Article 4: Undertakings

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

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

1. The Project cannot be commissioned by Scheduled Commercial Operation Date because of Force Majeure event; or

2. The Power Producer is prevented from performing its obligations because of material default on part of GUVNL.

3. Power Producer is unable to achieve commercial operation on Scheduled Commercial Operation Date because of delay in transmission facilities/evacuation system for reasons solely attributable to the GETCO.

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

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

From the above it can be seen that the State Commission has considered the delays on account of rejection of application for execution of Solar Project through SPV by GoG, registry of land purchased for the Solar Project and delay in granting statutory approval under Section 89 (1) (a) of the 1958 Act as FM events and has condoned the delay of 402 days on account of these. Further based on this decision the State Commission as a consequential effect worked out revised SCOD as 6.2.2013 and has held that Taxus is liable to pay LD to GUVNL for the period from 7.2.2013 till deemed commission date i.e. 31.3.2013.

- q) Taxus has contended that the State Commission has not considered delay on account of unavailability of loan from IREDA and time elapsed during litigation before the High Court of Gujarat and hence considering these delays too, no LD is applicable to it. The learned counsel for the State Commission has submitted that Taxus has only pleaded to consider delay of 402 days because of FM events considered in the Impugned Order and allowed by the State Commission. While going through the Impugned Order we came across the following para:

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

<i>Sr. No.</i>	<i>Description</i>	<i>Date of start</i>	<i>Date of end</i>	<i>Delay in days</i>
<i>01.</i>	<i>Delay due to delay in permission in grant of Special Purpose Vehicle (SPV) company</i>	<i>10.01.2011</i>	<i>01.04.2011</i>	<i>79</i>
<i>02.</i>	<i>Delay due to non registration of land sale deed</i>	<i>01.04.2011</i>	<i>22.11.2011</i>	<i>236</i>
<i>03.</i>	<i>Delay due to delay in granting statutory approval (89A)</i>	<i>18.10.2011</i>	<i>18.02.2011</i>	<i>122</i>

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

From the above and submissions made by the State Commission it becomes clear that Taxus has only emphasised for condonation of the delay on account of the above mentioned reasons and not on account of loan from IREDA or delay due to time elapsed in litigations.

- r) Further, it is observed that the issue related to financing has been excluded from the FM events and also the litigation before

the High Court has not delayed the process of construction of the Solar Project as at any point of time there was no specific direction of High Court or the State Commission to stop the work at site and also it is seen that during the litigation process the work was continued at the site by Taxus.

Hence, the claim made by Taxus for declaring delay in granting loan by IREDA and litigation period as FM event is not sustainable and it is liable to be rejected.

- s) GUVNL has submitted that Taxus has made application under Section 89 (A) and not under 89 (1) (a) of the 1958 Act which was considered erroneously by the State Commission while granting relief to Taxus. GUVNL has further contended that under Section 89 (A) there is no requirement of prior approval from Collector for use of agricultural land for industrial purposes and actually the approval was granted under Section 89 (A). The learned counsel for GUVNL has further submitted that vide Act No 7 of 1997, Section 89A has been introduced after Section 89 in the 1958 Act. The relevant portion of Act No 7 of 1997 is as under:

"8. In the Bombay Tenancy and Agriculture Lands (Vidarbha Region and Kutch Area) Act, after section 89, the following new section shall be inserted namely:-

"89A. (1) Nothing in section 89 shall prohibit the sale or the agreement for the sale of land for which no permissions is required under sub-section (1) of section 65B of the Bombay Land Revenue Code, 1879 in favour of any person for use of such land by such person for bonafide industrial purpose:

Provided that–

.....
.....

(c) Where, on receipt of the notice of the date of purchase for the use of land for a bonafide industrial purpose and other particulars sent by the purchaser under clause (a), the Collector, after making such inquiry as he deems fit-

- i. Is satisfied that the purchase of such land has validly purchased the land for a bonafide industrial purpose in conformity with the provisions of sub-section(1), he shall issue a certificate to that effect to the purchaser in such form and within such time as may be prescribed,*
- ii. Is not so satisfied, he shall, after giving the purchaser an opportunity of being heard, refuse to issue such certificate and on such refusal, the sale of land to the purchaser shall be deemed to be in contravention of section 89.*

.....”

By Amendment Act No 7 of 1997 which introduced Section 89A, the amendments were introduced in the 1958 Act related to land use for the industrial purposes. Corresponding amendments in the Bombay Land Revenue Code, 1879 were also made.

- t) After careful consideration of the Impugned Order we are of the considered opinion that the State Commission while discussing the pleadings made by Taxus and in its concluding table has recorded the said event under Section 89 (A). However, while analysing the event the State Commission has discussed the provisions of 89 (1) (A) of the 1958 Act. The State Commission has concluded its findings while considering the case under Section 89 (1) (a) while mentioning in the table as 89 (A). The

relevant extracts from the Impugned Order are already reproduced above. Accordingly, there is need for us to go through the said Section 89 (A), the relevant extract is reproduced above. We find that there is substance in the submissions made by GUVNL as perusal of the Section 89 (A) of the 1958 Act reveals that actually there is no such prior requirement of certificate from Collector (such requirement is post facto for the purpose to check the requirement is for bona fide reasons) for using non-agricultural land for industrial purpose. It is also observed that Hon'ble Supreme Court in case of Dipak Babaria v. State of Gujarat 19 (1986) 1 SCC 581 while dealing the 1958 Act had made similar observations on requirement of certificate from the Collector.

u) Perusal of the petition filed by Taxus before the State Commission we find that Taxus has mentioned Section 89 (A) for the purpose of approval from the Collector. Further, it is also observed that the permission obtained/granted from the Collector was also under Section 89 (A) of 1958 Act. Accordingly, we are of the considered opinion that the State Commission has committed error in deciding this part as FM event and accordingly we disallow the said period as FM and hence the Impugned Order passed by the State Commission is liable to be set aside and matter stand remitted back to the State Commission to pass the consequential order.

13. In view of our discussions and decisions as above, all the questions of law raised by GUVNL and all the issues raised by

Taxus have been dealt while discussing the main issues as above and does not require any further deliberations on the same.

ORDER

Having regard to the factual and legal aspects of the matter, as stated supra, the issues raised in Appeal No. 131 of 2015 are answered against the Appellant (“**Taxus**”) and the instant appeal, being Appeal No. 131 of 2015, filed by the Appellant is dismissed as devoid of merits. Accordingly, IA Nos. 311 of 2017 and 335 of 2016 stand disposed of as having become infructuous.

We are of the considered opinion that the issues raised in Appeal No. 114 of 2015 are answered in favour of the Appellant (“**GUVNL**”). Accordingly, the instant Appeal filed is allowed in part. The Impugned Order dated 30.3.2015 is hereby set aside. The matter stand remitted back to the State Commission, the 1st Respondent herein, to the extent as discussed at para 12 u) above. Accordingly, IA No. 190 of 2015 stands disposed of as having become infructuous.

No order as to costs.

Pronounced in the Open Court on this **4th day of July, 2018.**

(Justice N. K. Patil)
Judicial Member

√

REPORTABLE/NON-REPORTABLE

mk

(I.J. Kapoor)
Technical Member