

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

Appeal No. 176 of 2015 and
IA Nos. 364 & 368 of 2015

Dated: 21st March, 2018

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

In the matter of :-

Chamundeshwari Electricity Supply Company Ltd. (CESC)
No. 927, New Kantharaj Urs Road,
Saraswatipuram,
Mysuru- 570009

... Appellant

Versus

1. Saisudhir Energy (Chitradurga) Pvt. Ltd.
No. 401, G.P. Elite, 8-2-283/4
Road No. 14, Banjara Hills,
Hyderabad- 500034

...Respondent No. 1

2. Karnataka Electricity Regulatory Commission
6 & 7th Floor, Mahalakshmi Chambers
No. 9/2, Mahatma Gandhi Road
Bengalore, Karnataka – 560 091

...Respondent No. 2

Counsel for the Appellant(s):

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Mr. Sriranga S.
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Mr. Raktim Gogoi
Ms. Sara Sundaram
Mr. S. Badrinath
Mr. Sohil Yadav for R-1

JUDGMENT

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

1. The present Appeal is being filed by Chamundeshwari Electricity Supply Company Ltd.(hereinafter referred to as the “**Appellant**”) under Section 111 of the Electricity Act, 2003 (hereinafter referred to as the ‘**Act**’) against the Order dated 28.01.2015 (“**Impugned Order**”) passed by the Karnataka Electricity Regulatory Commission (hereinafter referred to as the “**State Commission**”) in O.P. No. 24 of 2014 wherein the State Commission has directed the Appellant to restore the performance security furnished by the Respondent No. 1 and to either extend the time for fulfilment of conditions precedent or to terminate the PPA. Further, the State Commission has also held that the re-fixed tariff of Rs. 2.39/kWh by the Appellant is not valid and directed the parties to re-negotiate the tariff payable based on the tariff discovered through bidding process for solar projects in the State of Karnataka.
2. The Appellant, i.e. Chamundeshwari Electricity Supply Company Ltd., is one of the Distribution Licensees in the State of Karnataka.
3. The Respondent No. 1 i.e. Sai Sudhir Energy (Chitradurga) Pvt. Ltd. is a company incorporated under the provisions of the Companies Act, 1956. It was allotted 10 MW solar power project (Solar Project) to be set up in Chitradurga, Karnataka under the jurisdiction area of the Appellant.

4. The Respondent No. 2, i.e. Karnataka Electricity Regulatory Commission (KERC) is the Electricity Regulatory Commission for the State of Karnataka exercising jurisdiction and discharging functions in terms of the Act.

5. Facts of the present Appeal:

a) In October 2011, Karnataka Renewable Energy Development Ltd. (KREDL) issued Request for Proposal for selection of solar power developers to set up solar power plants in the State of Karnataka. Pursuant to the bidding process the Appellant and the Respondent No. 1 entered into a Power Purchase Agreement (PPA) on 30.8.2012 for procurement of power by the Appellant from the Solar Project to be set up by the Respondent No. 1 at a tariff of Rs. 8.49/kWh which was at a discount of Rs. 6.01/kWh to the tariff of Rs. 14.50/kWh fixed by the State Commission. Initially the Solar Project was to be set in Bellary District of Karnataka which was subsequently allowed to be relocated in Chitradurga district of Karnataka.

b) According to the terms of the PPA, there were certain pre-conditions to be fulfilled by the Respondent No. 1 which include obtaining power evacuation approval from Karnataka Power Transmission Company Limited (KPTCL)/ CESC Mysore, as the case may. Supplementary PPA was also signed between the Appellant and the Respondent No. 1 on 28.5.2013 for incorporating certain changes in Article No. 4.1 (related to completion of the conditions precedent for Solar Project within 26.8.2013 unless

such completion is affected by Force Majeure or waived in writing by the Appellant), 4.3 (damages for delay by the Respondent No. 1) and 21.1 (Scheduled Commissioning Date to mean 26.5.2014) of the PPA. The PPA and Supplementary PPAs were duly approved by the State Commission.

- c) The commissioning schedule of the Solar Project as per the PPA/ Supplementary PPA was 28.1.2014, which was firstly extended by the Appellant until 26.5.2014 and subsequently till 27.9.2014. There was exchange of letters between the Respondent No. 1 and KPTCL regarding acceptance of tentative evacuation scheme proposed by KPTCL through Thallak Village. KPTCL vide letter dated 6.2.2014 accorded evacuation approval to the Respondent No. 1 for setting up Solar Project at Thallak Village subject to certain conditions. On 19.2.2014 permission was granted by Deputy Commissioner, Chitradurga to purchase the land for establishing Solar Project.
- d) The Solar Plant could not be completed/ commissioned due to issues related to delay in the construction of 220 kV Birenhalli- Thallak & Hiriyur- Gowribididanurevacuation lines by Karnataka Power Corporation Ltd. (KPTCL), the State Transmission Utility (STU) in the State of Karnataka.
- e) Due to delay in the construction of the said evacuation line, the Respondent No. 1 approached the Appellant seeking extensions in commercial operation of the Solar Project. The Appellant granted extensions to the Respondent No. 1 with last extension until 27.9.2014. The Respondent No. 1 in June 2014 again requested

for further extension regarding commercial operation of the Solar Project which was replied by the Appellant and requested to sign a supplementary PPA with tariff entitlement of Rs. 2.39/kWh. In the meantime the Respondent No. 1 also made communications with the State Commission and based on letter from the State Commission, the Respondent No. 1 approached the Appellant for extension of commercial operation by 6 months and also requested to retain the original tariff.

- f) On 30.6.2014 the Respondent No. 1 wrote letter to KPTCL enquiring about the tentative completion schedule of the Birenhalli-Thallak&Hiriyur- Gowribididanur 220 kV line so as to enable it to commission the Solar Project in accordance with the same. The Respondent No. 1 vide letter dated 2.7.2014 again approached the Appellant to retain the original tariff as per the PPA and resolve pending issues failing which it would be constrained to approach the State Commission for suitable remedy.
- g) When the issues were not resolved, the Respondent No. 1 on 10.7.2014 approached the State Commission with Petition OP No. 24/2014. On 1.8.2014 the Appellant sent letter to the Respondent No. 1 enclosing supplementary PPA and informing that in case timelines were not adhered, the Appellant would be constrained to impose Liquidated Damages as per the PPA. On 7.8.2014 the Appellant invoked Bank Guarantee provided by the Respondent No. 1 to the tune of Rs. 1.49 Cr.
- h) KPTCL vide letter dated 19.8.2014 furnished the status of the Birenahalli – Thallak line to the Respondent No. 1 which was

asked under RTI.KPTCL informed that the said 220 kV lines were likely to be commissioned in August 2015. The Respondent No. 1 vide letter dated 16.9.2014 informed KPTCL that it would be completing solar Project as per PPA before 5.8.2015.

- i) During the course of hearing on an Interim Application by the Respondent No. 1, the State Commission vide order dated 14.11.2014 directed the Appellant not to encash the Performance Security provided by the Respondent No. 1. However, the Appellant proceeded with the encashment of the Performance Security and a sum of Rs. 23,40,60,000 was transferred to the account of the Appellant on 6.12.2014.
- j) The State Commission issued Impugned Order on 28.1.2015 and directed the Appellant to re-store Performance Security, to consider extension of timeline for fulfilment of condition precedent and to renegotiate the tariff of the Solar Project.
- k) Aggrieved by the Impugned Order passed by the State Commission, the Appellant approached High Court of Karnataka by a way of Writ Petition No 6033/2015 on 12.2.2015. The High Court of Karnataka on 14.7.2015 stayed the Impugned Order until further orders. The Writ Petition filed by the Appellant was disposed of by High Court of Karnataka reserving liberty to the Appellant to redress its grievances before this Tribunal as envisaged under the relevant provisions of the Electricity Act, 2003. The High Court of Karnataka also extended the interim order

from 14.7.2015 until 24.8.2015. Accordingly, the Appellant has preferred the present Appeal before this Tribunal.

- l) During the course of hearings before this Tribunal and based on the interim order dated 10.9.2015 of this Tribunal in IA No. 290 of 2015, the Appellant restored the Bank Guarantee of the Respondent No. 1 only on 27.9.2016 & 29.11.2016 after continuous insistence by this Tribunal.

6. Questions of law

The Appellant has raised the following questions of law in the present Appeal:

- a) Has not the State Commission passed the Impugned Order without jurisdiction insofar as it has granted relief that were never sought by the Respondent No. 1?
- b) Whether the State Commission was justified in holding that the performance of contract becomes impossible if the 220 kV lines are not commissioned, when the Respondent No. 1 itself has failed to show its readiness and willingness to execute and complete the project within the time frame fixed in the PPA?
- c) Has not the State Commission misdirected itself in holding the non-commissioning of the 220 kV lines by KPTCL to be an event of Force Majeure when it was never the case of the

Respondent No. 1 that the project could not be implemented on account of occurrence of Force Majeure event?

- d) Has not the State Commission erred in interfering with invocation of Bank Guarantee in complete ignorance of the law governing the invocation of bank guarantees?
- e) Whether the State Commission has erred in arriving at a conclusion that the Bank Guarantee invoked by the Appellant ought to be restored?
- f) Whether the State Commission has erred in failing to take into consideration of the fact that it is consumer of the State who suffers monetary and other loss and therefore entitled to performance security for the failures on the part of the Respondent No. 1?
- g) Has not the Impugned Order of the State Commission modified the terms of the concluded contract and is the same not opposed to the dictate of the Hon'ble Supreme Court of India, which specifically prohibits in interference in the concluded contracts?
- h) Is not the direction of the State Commission with regard to the re-fixation of tariff opposed to the specific terms of the PPA entered into by the parties herein?
- i) Hasn't the State Commission misdirected itself in passing the Impugned Order, which is patently opposed, to the terms of the

Agreement between the parties and which has been approved the State Commission?

- j) Whether the State Commission has taken into reckoning the financial implication of non-completion of the project and its impact on the consumers of the State?

7. We have heard learned counsel for the Appellant and the Respondents at considerable length of time and we have carefully perused their respective written submissions. Gist of the same is discussed hereunder.

8. The principle submissions on issues raised for our consideration in the instant appeal by the learned counsel for the Appellant are as follows-

- a) The State Commission has erred in holding that the commissioning of the Solar Project was completely dependent on execution of the 220 kV lines by KPTCL. Further, KPTCL was also not made a party to the proceedings before the State Commission. On the other hand, the State Commission has ignored the fact that the Respondent No. 1 has made little or no progress on the development of the Solar Project.

- b) The finding of the State Commission that non-completion of the 220 kV lines amounts to event of Force Majeure is untenable as it was never the case of the Respondent No. 1 before the State Commission and it has never issued notice regarding any Force

Majeure event contemplated in Article 14.5 of the PPA. This has been held mandatory by this Tribunal in case of Sorang Power Ltd. vs. CERC reported in 2015 SCC online APTEL 148. Accordingly, the said finding of the State Commission is unsustainable and is without any basis. Based on this finding the State Commission has held that the question of fulfilling conditions precedent by the Respondent No. 1 under Article 4.2 of the PPA does not arise. The case of the Respondent No. 1 is that the contract is void and unenforceable by virtue of Section 31, 32 & 35 of the Contract Act, 1872 which deals with contingent contracts and the question of taking recourse to any of the provisions of the contract would not arise. The judgements produced by the Respondent No. 1 also support the above contention.

- c) The arguments raised by the Respondent No. 1 are contrary to the pleadings before the State Commission and this Tribunal are liable to be rejected. Respondent No. 1 has made a case that it has fulfilled all the conditions precedent. The Respondent No. 1 further contended that the contract is void and it does not subsist, then there can be no termination of the contract.
- d) The contention of the Respondent No. 1 based on Article 4.2 e) of the PPA that even the Appellant could have granted the evacuation approval to it is denied as the power was to be evacuated from the transmission line which falls under the purview of KPTCL and not the distribution line of the Appellant. Further, at no point of time the Respondent No. 1 has sought the assistance from the Appellant regarding evacuation approvals.

- e) Based on the above the State Commission has further held that the Appellant is not entitled to appropriate the Performance Security furnished by the Respondent No. 1 as in absence of fulfilment of the conditions precedent the other rights and obligations under the PPA are not enforceable. While holding this the State Commission has ignored the fact completely that the Respondent No. 1 has not fulfilled its obligations under the PPA. Perusal of Article 4 of the PPA demonstrates that certain provisions of the PPA are saved even in case of non-fulfilment of conditions precedent and these include Articles related to appropriation and release of the Performance Security. The State Commission also failed to consider that numerous extensions that were provided by the Appellant to the Respondent No. 1 for commercial operation of the Solar Project and implication of same on the consumers of the State. Failure of the Respondent No. 1 to supply power to the Appellant would have resulted in a loss of about Rs. 48.65 Cr in view of Renewable Purchase Obligations (RPO) of the Appellant being not met.
- f) The State Commission has erred in dealing the issue of tariff and completely lost sight of the provisions regarding the same in the PPA. The State Commission has merely held that the Respondent No. 1 would be put to hardship and loss if the terms of Article 12.2 of the PPA given effect to and the same would result in unviability and closure of the Solar Project. The State Commission failed to appreciate that the Solar Project was never established. The State Commission instead of appreciating that the Article 12 ensures that the errant generators supply power in a timely manner or be ready for the penalties, have held that the Respondent No. 1 had never

anticipated such low tariff. The State Commission itself has approved the said PPA.

- g) The direction of the State Commission to renegotiate the tariff is also untenable as the Hon'ble Supreme Court in plethora of judgements has held that the terms of a concluded contract cannot be modified.
- h) The State Commission has erred in holding to restore the Performance Security, consider the request of the Respondent No. 1 to extend the time for completing the Solar Project or in alternative terminate the PPA by the Appellant as the Respondent No. 1 has not sought such relief. The Respondent No. 1 before the State Commission has sought for direction to extend the completion period for another six months from the date of receipt of all approvals from various government agencies, to abide by the tariff fixed and all terms and conditions stipulated in the original PPA and to provide support and assistance to obtain necessary permissions from various government agencies so that project could be completed in time. Accordingly, the Impugned Order suffers from serious legal infirmities.
- i) The proceedings before the State Commission was under Section 86 (1) (f) of the Act, which means that these proceedings were similar to the arbitration proceedings and was not in the scope of the State Commission to restore bank guarantees and renegotiate the terms of the concluded contract i.e. PPA. The State Commission has failed to consider the law pertaining to invocation

of the bank guarantee. The Impugned Order suffers from legal infirmities and lacks jurisdiction and needs to be interfered with.

9. The principle submissions on issues raised for our consideration in the instant appeal by the learned counsel for the Respondents are as follows-

a) The Appellant has not approached this Tribunal with clean hands. The Appellant has violated the interim order of the State Commission for not invoking the Bank Guarantee and has gone ahead for encashing the same. The Appellant is also fully aware that due to Force Majeure conditions, the Respondent No. 1 could not fulfil the conditions precedent as envisaged in the PPA. There is delay on the part of KPTCL in construction of the transmission lines and till the transmission lines are not laid KPTCL cannot provide the requisite clearance. In absence of the evacuation facility nothing could be achieved at the Solar Project. Till date the evacuation approval is not sanctioned either by KPTCL or the Appellant.

b) As per the recital of the PPA which is reproduced below the responsibility to develop the Solar Project is of both parties. The word 'subject to' used means condition precedent.

*“CESC, Mysore has agreed to entered into this PPA with the Developer for execution of the project, **subject to** and on the terms and conditions setforth hereafter.”*

The Article 4.2 (e) regarding obtaining power evacuation approval was a condition precedent for execution of the work by the Respondent No. 1 which comes within the ambit of the words 'subject to'.

- c) In compliance to the conditions precedent of the PPA the Respondent No. 1 has taken various steps like acquisition of land for the Solar Project, requested KPTCL on 24.1.2014 for granting permission for construction of evacuation line, achieved financial closure, placed order for solar panel and equipment required for Solar Project, applied to KPTCL for grant of permission to evacuate power and appointed technical staff for executing the Solar Project.
- d) As per the Article 6.13 of the PPA, the Appellant was under obligation to extend full support in implementing the Solar Project, procuring applicable permits for the project and operation of the project. The Appellant could have exercised better influence over KPTCL in implementing the transmission line for evacuation of power from the Solar Project as both are the companies of Government of Karnataka. The Appellant was aware that KPTCL is facing genuine difficulty in implementing the said 220kV transmission lines.
- e) On request from the Respondent No. 1, KPTCL granted permission for evacuation of power & synchronisation vide letter dated 6.2.2014 and put the condition that the approval will be given only after the commissioning of 220 kV line between Birenhalli – Thallak&Hiriyur – Gowribindur. This permission was the primary

requirement of the Solar Project. In absence of this permission no progress can be made especially in the case of Solar Project which had its unique characteristics. Till the said transmission line is installed by KPTCL no progress can be achieved in the Solar Project. Accordingly, the present case is the case of Force Majeure as evacuation approval is not in the control of the Respondent No. 1. The Appellant also know that they also cannot provide any effective legal evacuation facility to the Solar Project. In case of Force Majeure no party will be liable to make payment. Till date KPTCL has failed to commission the transmission lines. No plant can be commissioned without transmission lines.

- f) The Respondent No. 1 also approached the Appellant vide letter dated 5.4.2014 apprising the development and sought assistance and support of the Appellant on the same. The Respondent No. 1 sought extension for commercial operation of the Solar project. However, the Appellant took adverse stand and advised that extension can be granted if the Respondent No. 1 agrees to lower the tariff to Rs. 2.39/kWh. On application by the Respondent No.1 before the State Commission, the State Commission passed order dated 14.11.2014 restraining the Appellant from invoking the bank guarantee. The Appellant has not filed any review or appeal against the said order and has become final. The Appellant had threatened Canara Bank and put pressure on it for encashment of bank guarantee which is illegal and disobeying the orders of the competent court/ State Commission/ Tribunal.
- g) The State Commission vide Impugned Order has rightly held that non grant of approval for evacuation of power is Force Majeure

and also ordered to restore Performance Security, to consider extending the time for fulfilment of condition precedent and re-negotiation of the tariff. Bank Guarantee cannot be invoked when there is Force Majeure. Further, the Impugned Order is not opposed to the law laid down by the Hon'ble Supreme Court. The Impugned Order has also not interfered with the concluded contract i.e. PPA. In a meeting held on 4.6.2015, the Appellant informed the Respondent No. 1 that if it does not agree to the reduced tariff the PPA will be terminated. Since the Respondent has not agreed for the reduced tariff, the PPA is deemed to have been terminated.

- h) The State Commission has passed a well reasoned order after interpreting the terms of the PPA and facts and circumstances of the case. This Appeal is a misuse of process of law by the Appellant. The State Commission after noting the facts has rightly held that non-installation of the transmission lines is Force Majeure for the Respondent No. 1. The Respondent No. 1 is sincere in installation and to complete the Solar Project.
- i) The State Commission has rightly held that re-fixation of tariff at Rs. 2.39/kWh is not valid and has ordered that the parties should hold negotiations to arrive at a revised tariff. On the other hand the State Commission is the authority for the fixation of the tariff. The Respondent No. 1 has also denied that the Appellant has incurred any financial liability of Rs. 48.65 Cr.

- j) The proceedings before the State Commission are not akin to the arbitration proceedings. The State Commission has wider powers in the matter.
- k) The Respondent No. 1 has submitted that the PPA was a contingent contract and since the condition precedent was not fulfilled the PPA becomes void. On this aspect, the Respondent No. 1 has relied on the Sections 31 & 35 of the Indian Contracts Act, 1872 which defines contingent contract and when it becomes void. It is a settled legal position that new plea cannot be taken in respect of any factual controversy, however, a new ground raising a pure legal issue for which no inquiry or proof is required can be permitted to be raised by the court at any stage of the proceedings. On this issue the Respondent No. 1 has made reference to the judgement of Hon'ble Supreme Court in case of National Textile Corporation Ltd. vs. Naresh Kumar Badrikumar Jagad, 2011 (12 SCC) 695. Accordingly, this Tribunal can consider the plea of the Respondent No. 1 regarding reference made to the provisions of the Indian Contracts Act, 1872 being a pure legal issue. The Respondent has submitted that the PPA becomes void and thus the Appellant is liable to return the Bank Guarantee along with interest and cost incurred by Respondent No. 1 on the said Bank Guarantee till date.
- l) The learned senior counsel of the Respondent No. 1 has relied on the judgement of the Hon'ble Supreme Court dated 20.4.1977 in case of Union of India v. Bharat Engineering Corporation in appeal no. 51 of 1975 which has dealt contingent contract as defined in the Contract Act, 1872, and the judgement of the Hon'ble Supreme

Court dated 7.7.1978 in case of Ludlow Jute Company Ltd. v. Apeejay Pvt. Ltd. &Ors. in appeal nos. 430 and 1009 of 1978 which has dealt contracts which were subject to conditions precedent. The Respondent No. 1 has also produced judgement of Allahabad High Court in case of Lapari Devi vs. Shiv Mohan Mishra &Orson this issue.

10. After having a careful examination of principle submissions of the rival parties on various issues raised in the instant Appeal, our observations are as follows:-

a) On Question No. 6a) i.e. Has not the State Commission passed the Impugned Order without jurisdiction insofar as it has granted relief that were never sought by the Respondent No. 1?, we observe as below:

i. Let us first have a look at the reliefs sought by the Respondent No. 1 in the OP No. 24/2014 filed by it before the State Commission and the Order of the State Commission. The relevant extract from the Impugned Order is reproduced below:

“1) This is as a Petition filed by the Petitioner under Section 86(1)(f) of the Electricity Act, 2003. In substance, the Petitioner has sought for the following reliefs:

(a) To extend the scheduled Commissioning Date of the Project of the Petitioner by six months, from the date of commissioning of the 220kV lines between Birenhalli –

Thallak and Hiriur – Gowribidanur, by the Karnataka Power Transmission Corporation Limited (KPTCL);

(b) To direct the Respondent not to appropriate any portion of the Performance Security furnished by the Petitioner;

(c) To direct the Respondent to abide by the tariff of Rs.8.49 per KWhr agreed in the Power Purchase Agreement (PPA) dated 30.8.2012;

(d) To pass such other orders as may be deemed fit in the facts and circumstances of the case.

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ORDER

(1) The Respondent shall restore the Performance Security, furnished by the Petitioner by way of Bank Guarantees, from the respective dates of their appropriation by the Respondent, at its cost, within four weeks from the date of this Order.

(2) The Respondent may consider extending the time for fulfillment of the Conditions Precedent and achievement of the Commercial Operation, or terminating the PPA dated 30.8.2012 (ANNEXURE – A) under Article 5.7.3 thereof, as it deems fit in the circumstances.

(3)(a) The re-fixation of tariff at the rate of Rs.2.39 per KWhr, demanded by the Respondent is not valid.

(b) In the event of the PPA being continued, the parties shall hold negotiations to arrive at the revised tariff to be paid to the Petitioner due to the delay that would occur in achieving the Commercial Operation of the Project, keeping in view the

rates for Solar energy that might have been discovered in the recent bidding process for Solar energy in the State.”

From the above it is clear that the State Commission has dealt on the prayers made by the Respondent No. 1 on the issues of extension of time for fulfilment of conditions precedent/ scheduled commercial operation, tariff and performance security.

The contention of the Appellant that the Respondent No. 1 has not raised the issue of Force Majeure before the State Commission and the State Commission has granted relief to Respondent No. 1 by holding that the non-commissioning of the said 220 kV lines of KPTCL is a Force Majeure event is not tenable. We hold that the prayer of the Respondent No. 1 before the State Commission was also to pass such other orders as may be deemed fit in the facts and circumstances of the case.

We hold that the State Commission has the powers to adjudicate upon the disputes between the licensee and a generating company under Section 86 (1) (f) of the Act and the Appellant has also filed the Petition No. O.P. 24/2014 under the said Section of the Act. The State Commission while adjudication of disputes is required to go into the details of the issues in totality before deciding them. The State Commission is at freedom to frame additional issues if required in view of the facts and circumstances of the case and decide upon them accordingly for arriving at a just and

equitable decision. In the present case, even the Respondent No. 1 has not invoked the Article on Force Majeure in the PPA or specifically not prayed for any relief under any Force Majeure event, it was up to the State Commission to go into the details of the issues, provisions of the PPA and facts of the case to arrive at a decision.

- ii. In view of the above, we are of the considered opinion that the State Commission has not passed the Impugned Order without jurisdiction even on the issues where reliefs were not sought by the Respondent No. 1.
- iii. Hence, this issue is decided against the Appellant.

b) On Question No. 6b) i.e. Whether the State Commission was justified in holding that the performance of contract becomes impossible if the 220 kV lines are not commissioned, when the Respondent No. 1 itself has failed to show its readiness and willingness to execute and complete the project within the time frame fixed in the PPA? and on Question No. 6 c) i.e. Has not the State Commission misdirected itself in holding the non-commissioning of the 220 kV lines by KPTCL to be an event of Force Majeure when it was never the case of the Respondent No. 1 that the project could not be implemented on account of occurrence of Force Majeure event?, we consider as below:

- i. The State Commission in the Impugned Order has framed five issues for its consideration. While dealing first two issues i.e.

whether PPA can be enforced by either parties due to non-commissioning of the 220 kV lines between Birenhalli-Thallak & Hiriya-Gowribidanur by KPTCL and if the answer is no, then what should be the order of the State Commission. The relevant extract from the Impugned Order on these issues is reproduced below:

“ 7. ISSUE Nos.(1) and (2) :

(a) For the sake of convenience, Issue Nos.(1) and (2) are considered together.

(b) It is not in dispute that the KPTCL could not complete the commissioning of the 220 kV transmission lines between Birenhalli – Thallak and Hiriya – Gowribidanur, for reasons beyond its control. The letter dated 4.8.2014 of the KPTCL (produced as ANNEXURE - AA by the Petitioner on 21.8.2014), indicates that the 220 kV transmission lines would be commissioned soon after the completion of work in some locations where the Right Of Way (ROW) issues were persisting, and after getting approval from the Forest Department. The letter dated 19.8.2014 of KPTCL, marked as ANNEXURE – A1, produced along with the Rejoinder dated 28.11.2014 of the Petitioner, indicates that the estimated date for commissioning of the 220 kV lines between Birenhalli – Thallak and Hiriya – Gowribidanur, in all probability, might be by the end of August, 2015. This letter also discloses that more than 50% of the work in this regard has been completed and the balance work is in progress.

(c) It cannot be disputed that the commissioning of the 220 kV lines between Birehalli – Thallak and Hiriya – Gowribidanur by the KPTCL, is an absolute necessity for injecting the power from the Project of the Petitioner, and for evacuating the power by the Respondent. Therefore, the contract (PPA) entered into between the parties is in the nature of a contingent contract, depending upon the commissioning of the 220 kV lines. However, in the PPA, the parties have not specified any term regarding the consequences of non-happening of the commissioning of the 220 kV lines within a specified time-limit. It can therefore be implied that the parties expected that the commissioning of the 220 kV lines would take place within a reasonable time.

(d) The PPA was executed on 30.8.2012. It provides that the Conditions Precedent should be satisfied on or before 240 days from the date of execution of the PPA, and that the COD of the Project should be on or before 28.1.2014. As already noted above, the Respondent, for the first time, extended time for fulfilling the Conditions Precedent on or before 26.8.2013 and for achieving the COD of the Project on or before 26.5.2014, on the ground that the 220 kV lines had not yet been commissioned by the KPTCL. Subsequently, on the request of the Petitioner, as the 220 kV line was not ready till then, the Respondent again extended the time for achieving the COD up to 27.9.2014, but without specifying any time-limit for achieving the Conditions Precedent.

(e) The commissioning of the Project would become impossible, unless the 220 kV lines are commissioned by the

KPTCL. If the 220 kV lines are not commissioned within a reasonable time, the contract is to be treated as void for a supervening impossibility and the parties are discharged from performing the contract. What should be the 'reasonable time' to wait for completion of the 220 kV lines, could be determined in a better way by the parties, after due deliberations. The learned authors, Pollack & Mulla in the Commentary on 'The Indian Contract and Specific Relief Acts', 14th Edition, at Page-886, have discussed the provision of law pertaining to the circumstances under which the contract cannot be discharged, despite there being a supervening impossibility, as follows :

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Considering the above principles, we are of the view that in the present case, the PPA between parties is not yet frustrated, and if they so desire, they can mutually negotiate for altered terms for completion of the Project by the Petitioner, and for considering the termination of the PPA, as a last resort. The procedure for termination of the PPA, as stated in Articles 16.3 and 16.4, also leads to the above conclusion.

(f) The PPA does not become enforceable by the Respondent, if the Petitioner is able to establish the defence of force majeure events for non-fulfilment of the Conditions Precedent and the delay in commissioning of the Project within the specified time. The non-commissioning of the 220 kV lines by the KPTCL is a force majeure event, giving rise to

an excuse to the Petitioner for non-performance of the terms of the agreement. It is found that the Respondent has extended the time for commissioning of the Project in September, 2014, on the ground that the KPTCL had not yet commissioned the 220 kV lines. The said event of force majeure is still continuing. Article 5.7.3 of the PPA provides as under:

“In the case of extension due to reasons specified in Article 5.7.1(b) and (c), and if such force majeure event continues even after a maximum period of 3 (three) months, any of the parties may choose to terminate the agreement as per the provisions of Article 16.”

Therefore, the Respondent may consider to terminate the PPA under Article 16 of the PPA, by taking into consideration the relevant circumstances.

(g) For the above reasons, Issue No.(1) is answered in the negative and issue No.(2) is answered, by holding that a direction as above be issued to the Respondent.”

The State Commission while dealing these issues has gone into the details of the provisions of the PPA and also relied on the letters issued by KPTCL informing the status of the said 220 kV lines, extensions provided by the Appellant on the ground of non-availability of the 220 kV lines. The State Commission then goes on holding that the PPA cannot be enforceable due to non-commissioning of the said 220 kV lines by KPTCL and has termed PPA as a contingent contract. The State Commission has termed the situation as a Force Majeure event while leaving

option to the parties about termination of the PPA as a last resort.

- ii. We have also gone through the provisions of the PPA, communications exchanged between the Respondent No. 1 and KPTCL and between Respondent No. 1 and the Appellant. We observe that the initial scheduled commissioning date of the Solar Project was on or before 28.1.2014 and the conditions precedent were to be fulfilled in 240 days from the execution of the PPA. The Appellant on the request of the Respondent No. 1 has extended the commercial operation date of the Solar Project till 27.9.2014 on the ground of non-commissioning of the said 220 kV lines by KPTCL. However, due to delay in the execution/commissioning of the said 220 kV lines by KPTCL and conditional evacuation permission given by KPTCL vide letter dated 6.2.2014 the condition precedent as per Article 4.2 e) of the PPA i.e. *'obtained power evacuation approval from Karnataka Power Corporation Ltd. (KPTCL)/ CESXC Mysore, as the case may be'* cannot be termed as fulfilled. Further, on enquiry by the Respondent No. 1, KPTCL intimated that the said 220 kV evacuation lines are likely to be commissioned in August 2015.
- iii. Further, the Appellant was not desirous to extend the date commercial operation of the Solar Project without reducing the tariff to Rs. 2.39/kWh by a way of executing another supplementary PPA which has been held as untenable and unviable by the State Commission. In such a situation the State Commission has held the PPA as a contingent contract i.e. a

contract which can be enforceable only upon happening of a certain condition precedent. In the present case the condition precedent of non-commissioning of the said 220 kV lines has been held as a condition without which the PPA cannot be enforced. Further, the non-commissioning of the said 220 kV lines were beyond the control of KPTCL due to various issues like ROW, Forest Clearance etc. and hence as a corollary it can be concluded that fulfilment of this condition precedent was beyond the control of the Respondent No. 1 leading to the conclusion by the State Commission as being a Force Majeure event although it was not specifically raised by the Respondent No. 1 before the State Commission.

- iv. The learned senior counsel of the Respondent No. 1 has relied on the judgement of the Hon'ble Supreme Court dated 20.4.1977 in case of Union of India v. Bharat Engineering Corporation in Appeal No. 51 of 1975 which has dealt contingent contract as defined in the Indian Contract Act, 1872. We have gone through the said judgement and find that a contract which is contingent on the happening of a future uncertain event cannot be enforced by law unless and until that event has happened. If the event becomes impossible/uncertain such contract becomes void.
- v. From the above it becomes clear that under the facts and circumstances of the case on hand there is no legal infirmity in the decision of the State Commission, terming the non-availability/non-commissioning of the said 220 kV lines as a

Force Majeure event and performance of the contract has become impossible.

- vi. The Appellant has alleged that the Respondent No. 1 has not shown much progress in the execution of the Solar Project. On this issue we find from the submissions of the Respondent No. 1 that in compliance to the conditions precedent of the PPA the Respondent No. 1 has taken steps for acquisition of land for the Solar Project, achieved financial closure, tied up for solar panel and equipment required for the Solar Project, appointment of technical staff for executing the Solar Project etc. In absence of fulfilment of the condition precedent of 'evacuation approval' from KPTCL which was not in the control of the Respondent No. 1 further progress could not be made by it. The actual execution of the project was contingent upon the fulfilment of the said condition precedent. That is why the Respondent No. 1 has made prayer before the State Commission to extend the scheduled commercial operation date of the Solar Project for a period of 6 months from the date of commissioning of the said 220 kV lines by KPTCL.
 - vii. In view of the above discussions we are of the considered opinion that the issues raised by the Appellant have no merit.
 - viii. Accordingly, these issues are decided against the Appellant.
- c) On Question No. 6d) i.e. Has not the State Commission erred in interfering with invocation of Bank Guarantee in complete ignorance of the law governing the invocation of bank guarantees?

and on Question No. 6e) i.e. Whether the State Commission has erred in arriving at a conclusion that the Bank Guarantee invoked by the Appellant ought to be restored?, we observe as below:

- i. The above questions are interrelated hence we are considering them together.
- ii. Let us now analyse the findings of the State Commission on the issues raised by the Appellant. The relevant portion of the Impugned Order is reproduced below:

“8. Issue No. (3) i.e. (Whether the Respondent is entitled to appropriate the Performance Security, or any portion of it, in the present case?)

.....
.....

(e)In the present case, we have found that the performance of the contract has become impossible, as the 220 kV lines are not yet commissioned by the KPTCL. The Respondent has not specifically pleaded as to which of the other Conditions Precedent have not been fulfilled by the Petitioner within the prescribed time-limit, which authorizes the Respondent to invoke the Performance Security furnished by the Petitioner. We have also found that, not obtaining an effective evacuation approval by the Petitioner from the KPTCL was for reasons beyond the control of the Petitioner.

(f)This issue can also be examined from the angle of the relief available to the Petitioner on account of force

majeure events. The defence of force majeure events is available in respect of the non-fulfilment of the Conditions Precedent and the delay in commissioning of the Project within the specified time. The Petitioner has contended that both these events could not be achieved, as the KPTCL had not yet commissioned the 220 kV lines. We are of the opinion that non-commissioning of the 220 kV lines by the KPTCL is a force majeure event, giving rise to an excuse to the Petitioner for the above-mentioned non-performances. 'Force Majeure' is defined as any event or circumstance or combination of events, which wholly or partly prevents or unavoidably delays an affected party in the performance of its obligations under the Agreement, subject to certain exceptions. Admittedly, the case of the Petitioner does not fall under any of the exceptions mentioned in the said Article. Therefore, issue No.(3) is answered in the negative.

.....

.....

ORDER

(1)The Respondent shall restore the Performance Security, furnished by the Petitioner by way of Bank Guarantees, from the respective dates of their appropriation by the Respondent, at its cost, within four weeks from the date of this Order.”

The State Commission has held that non-fulfilment of the condition precedent in the form of approval for evacuation of power by KPTCL due to delay in commissioning of the said 220 kV transmission lines is a Force Majeure event. The State Commission based on the conditions of the PPA related to Force Majeure has held that the Appellant was not entitled to appropriate the Performance Security and ordered the Appellant to reinstate the Bank Guarantees within four weeks from the date of the Impugned Order.

- iii. It has been observed that the Appellant on 12.11.2014, requested bank for invoking the Bank Guarantee. On 13.11.2014 the Respondent No. 1 filed an application for an interim order restraining the Appellant from invoking the Bank Guarantee till the Petition No. O.P. 24/2014 is decided. The State Commission on 14.11.2014 directed the Appellant not to invoke the Performance Security for a period of six weeks and the Respondent No. 1 was directed to ensure that the Bank Guarantee is in place during the said period, failing which the Appellant was free to encash the Bank Guarantee before its expiry date. In the interim order the State Commission has asked the parties to maintain status quo. It was the duty of the Appellant not to invoke the Performance Security. However, the Appellant went ahead and invoked the Performance Security defying the orders of the State Commission.
- iv. It is further observed that the Appellant even on the orders of this Tribunal, was reluctant to restore the Bank Guarantee and a

situation has reached to the extent that contempt proceedings were initiated against the Appellant before this Tribunal.

- v. In case had the Appellant adhered to the interim order of the State Commission, the scenario of restoration of the Bank Guarantee by the Appellant would have been avoided and the present questions of law would not have arisen at all. It is the Appellant who has acted contrary to the order of the State Commission and questioning the decision of the State Commission on restoration of the Bank Guarantee. This order has not been challenged by the Appellant and it has assumed finality.
- vi. The learned senior counsel of the Respondent No. 1 has also relied on the judgement of the Hon'ble Supreme Court dated 7.7.1978 in case of Ludlow Jute Company Ltd. v. Apeejay Pvt. Ltd. &Ors. in Appeal Nos. 430 and 1009 of 1978 which has dealt contracts subject to conditions precedent. The relevant extract of the judgement is reproduced below:

“18. The contract in question is a contract of sale to some conditions precedent which must be fulfilled before one party can enforce the other. Again, the right to enforce the contract by one party is an inchoate right and it will not become an absolute right so long as the conditions precedent are not fulfilled.....”

From the above it is clear that the rights of parties are only enforceable when the conditions precedent are satisfied in a contract.

vii. In view of the above discussions we are of the considered opinion that there is no legal infirmity in the decision of the State Commission.

viii. Hence, these issues are decided against the Appellant.

d) On Question No. 6.f) i.e. Whether the State Commission has erred in failing to take into consideration of the fact that it is consumer of the State who suffers monetary and other loss and therefore entitled to performance security for the failures on the part of the Respondent No. 1? and on Question No. 6. j) i.e. Whether the State Commission has taken into reckoning the financial implication of non-completion of the project and its impact on the consumers of the State?, we observe as below:

i. The above questions are interrelated accordingly we are considering them together.

ii. The Appellant has contended that failure of the Respondent No. 1 to supply power to the Appellant would have resulted in a loss of about Rs. 48.65 Cr. in view of RPO of the Appellant being not met. We find that the Appellant has not substantiated this claim nor placed any relevant documents in this respect before the State Commission nor before this Tribunal. Further, this Tribunal has already upheld that non-commissioning of the said

220 kV lines is a Force Majeure event accordingly the question of consumers of the State suffering monetary and other loss and entitled to encash the Bank Guarantee is misplaced. In view of the same it was not required by the State Commission to take into account the financial implication of non-completion of the project and its impact on the consumers of the State.

iii. Accordingly, these issues are also decided against the Appellant.

e) On Question No. 6.h) i.e. Is not the direction of the State Commission with regard to the re-fixation of tariff opposed to the specific terms of the PPA entered into by the parties herein?, we observe as below:

i. Let us analyse the findings of the State Commission on the issue of the tariff. The relevant extract from the Impugned Order is reproduced below:

“9)ISSUE No.(4) (i.e. Whether, as a consequence of the delay in commissioning of the Project beyond the scheduled Commissioning Date, the re-fixation of tariff, as contended by the Respondent, is legally permissible?)

(a) The Respondent has contended that, as a consequence of delay in commissioning of the Project by the Petitioner, as per Article 12.2 of the PPA, the Petitioner would be entitled to receive the tariff of Rs.2.39 per KWhr. Articles 12.1 and 12.2 of the PPA thus:

“12.1 The Developer shall be entitled to receive the Tariff of Rs.8.49 (Rupees Eight and Paise Forty Nin only)per KWh of energy supplied by it to CESC, Mysore in accordance with the terms of this Agreement during the period between COD and the Expiry Date.

12.2 Provided further that if as a consequence of delay in commissioning of the Project beyond the Scheduled Commissioning Date, subject to Article 4, there is a change in KERC Applicable Tariff, the changed Applicable Tariff for the project shall be the lower of the following:

(i) Tariff at in Clause 1.1 above.

(ii) KERC Applicable Tariff as on the Commercial Operation Date less discount offered and considered in Claus 12.1 above.”

In the letter dated 17.5.2014 (ANNEXURE – G), the Respondent, relying on Article 12.2 of the PPA, has demanded the Petitioner to execute a Supplemental Agreement with the reduced rate of tariff of Rs.2.39 per KWhr. We note that Article 12.2 of the PPA would apply, subject to Article 4.1. If for any reason, the date for achieving the Conditions Precedent is extended, the scheduled Commissioning Date would also automatically get extended.

This is made clear in Article 5.7.4 of the PPA. Therefore, the Respondent, while extending the scheduled Commissioning Date, could not have claimed that there was delay in

commissioning of the Project beyond the original scheduled Commissioning Date agreed under the PPA. Hence, the Respondent could not have relied upon Article 12.2 of the PPA, while extending the time of the scheduled Commissioning Date, for claiming the reduced tariff of Rs.2.39 per KWhr.

(b) The claim of the Respondent for the reduced tariff at the rate of Rs.2.39 per KWhr for Solar energy is also not tenable, as the Petitioner would be put to extreme hardship and the Project would become economically unviable, resulting in the closure of the Project.

(c) At the time of entering into the PPA, the generic tariff fixed by this Commission for Solar energy was Rs.14.50 per KWhr. Out of this, the Respondent had offered Rs.6.01 per KWhr as the discount during the bidding process, which took place prior to signing of the PPA. There has been a steady decline in the Capital Cost to be incurred for the Solar Energy Projects, and therefore, this Commission has determined a generic tariff of Rs.8.40 per KWhr for Solar energy, by its Order dated 10.10.2013. This sharp decrease of tariff from Rs.14.50 KWhr to Rs.8.40 per KWhr could not have been expected by the Petitioner, and thereby the Petitioner could not have anticipated such a lower tariff while consenting to the provisions under Article 12.2 of the PPA.

(d) The Commission has the exclusive jurisdiction to decide the reasonableness of the rate of tariff. The mere fact that

the PPA contains such a term and the Commission had earlier approved the PPA, does not prevent the Commission from holding that the tariff of Rs.2.39 per KWhr for Solar energy, which is less than one third of the prevailing generic tariff determined by the Commission, is unconscionable.

(e)The purpose of introduction of Article 12.2 in the PPA is to safeguard the interest of the Respondent, in the event the rate of tariff decreases due to delay in achieving the Commercial Operation of the Project. Therefore, in the event of the PPA being continued, the parties are to be directed to re-negotiate the tariff to be applied consequent to the delay in achieving the Commercial Operation of the Project, keeping in view the rates for Solar energy that might have been discovered in the recent bidding process for Solar energy by the Respondent or any other Electricity Supply Company in the State. For the above reasons, issue No.(4) is answered in the negative, subject to the above observations.”

From the above it can be seen that the State Commission has held that Article 12.2 of the PPA is subject to Article 4.1 of the PPA. The State Commission further relying on Article 5.7.4 of the PPA has held that the demand of the tariff of Rs. 2.39/kWh by the Appellant is not tenable. The State Commission has also observed that the tariff so arrived by the Appellant after applying discount of Rs. 6.01/kWh on subsequent generic tariff of Rs. 8.40/kWh decided by the State Commission would make the

Solar Project unviable. The State Commission has also held that it has exclusive jurisdiction to determine the reasonableness of the tariff. The State Commission has also provided a window to re-negotiate the tariff in accordance to the rates of solar energy discovered in recent bidding process for Solar energy by the Appellant or any other Electricity Supply Company in the State of Karnataka in case PPA is continued.

- ii. Now let us analyse the provisions of Article 4.1 and 5.7.4 of the PPA quoted by the Respondent Commission in the Impugned Order. The relevant extract is reproduced below:

“4.1 Conditions Precedent

Save and except as expressly provided in Articles 4, 14,18, 20 or unless the context otherwise requires, the respective rights and obligations of Parties under this Agreement shall be subject to satisfaction in full of the conditions precedent specified in this Clause 4 (the “Conditions Precedent”) by the developer within 240 (Two hundred and forty) days from Effective Date, unless such completion is affected by any Force Majeure event, or if any of the activities is specifically waived in writing by CESC Mysore.

.....

.....

5.7: Extensions of Time

.....

5.7.4 As a result of such extension, the Scheduled Commissioning Date and the Expiry Date newly determined

shall be deemed to be the Scheduled Commissioning Date and the Expiry Date for the purpose of this Agreement.”

From the above it can be seen that the rights and obligation of the parties were dependent on the meeting of the Conditions Precedent which also includes obtaining power evacuation approval from KPTCL by the Respondent No. 1. In case of extension in Scheduled Commissioning Date and the Expiry Date, the new extended Scheduled Commissioning Date and the Expiry Date shall be the dates for the purpose of the PPA.

- iii. After perusal of the Article 4.1 and 5.7 of the PPA, it is observed that, the extensions of time in Scheduled Commissioning Date and the Expiry Date is allowed in case the Respondent No. 1 is prevented from performing its obligations under the PPA which also includes connecting Solar Project with interconnection facilities at the Delivery Point and commencement of supply of power to the Appellant not later than Scheduled Commissioning Date under specific conditions in event of default by the Appellant and Force Majeure Conditions for the Appellant and the Respondent No. 1. In case there is extension in Scheduled Commissioning Date and the Expiry Date, the new extended Scheduled Commissioning Date and the Expiry Date shall be the dates for the purpose of the PPA.
- iv. The Condition Precedent of obtaining power evacuation approval from KPTCL by the Respondent No. 1 has not been met and without which the obligations of connecting Solar Project with interconnection facilities at the Delivery Point and

commencement of supply of power to the Appellant not later than Scheduled Commissioning Date cannot be met by the Respondent No. 1. Keeping in view of the same, initially some extensions were granted by the Appellant to the Respondent No. 1. The Appellant linked subsequent request for grant in extension to signing of supplementary PPA at reduced tariff of 2.39 / kWh. Accordingly, linking the extension of the commissioning date with tariff as observed by the State Commission is not in terms of the PPA in view of the Articles of the PPA as discussed above. We are in agreement to this finding of the State Commission. Alternatively, the Article 12 of the PPA regarding reduction of the tariff would kick in only when there is delay in commissioning of the Solar Project by the Respondent No. 1 in fulfilment/ after fulfilment of the conditions precedent in normal course of business.

- v. Non- commissioning of the said 220 kV lines by KPTCL has been upheld as a Force Majeure Event by us in the foregoing paragraphs. Article 5.7 also provides remedy in the form of termination of the PPA by either party in such a situation. However, the same has been not exercised by either party. The State Commission has also held that in the dynamic solar market where the prices of solar panels are continuously falling the Respondent No. 1 could not have envisaged a discount of Rs. 6.01/kWh would be applicable over new low tariff of 8.40/kWh announced by the State Commission thereby resulting in a low tariff of Rs. 2.39/kWh from the Solar Project which was originally scheduled to be commissioned in 2014. This would have rendered the Solar Project unviable. The State

Commission in the interest of the parties has kept window open to arrive at a re-negotiated tariff in line with new discovered solar tariff in the State of Karnataka.

- vi. 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 on the issue of tariff.

- vii. Hence, this issue also decided against the Appellant.

- f) On Question No. 6.g) i.e. Has not the Impugned Order of the State Commission modified the terms of the concluded contract and is the same not opposed to the dictate of the Hon'ble Supreme Court of India, which specifically prohibits in interference in the concluded contracts?, and on Question No. 6 i) i.e. Hasn't the State Commission misdirected itself in passing the Impugned Order, which is patently opposed, to the terms of the Agreement between the parties and which has been approved by the State Commission?, we observe as below:
 - i. In view of our discussions and decisions at S. No. 10. a) to 10. e) in upholding the decisions of the State Commission on all the issues raised by the Appellant, we are of the considered view that there is no modification of the concluded contract i.e. the PPA by the State Commission. On the other hand the State Commission has only interpreted the various articles of the PPA to arrive at a just and equitable decision and going further to save the PPA if the parties desires so.

ii. Accordingly, this issue is also decided against the Appellant.

ORDER

Having regard to the legal and factual aspects of the matter as stated above, we are of the considered view that the issues raised in the instant appeal have no merit. The appeal is hereby dismissed devoid of merits.

The Impugned Order dated 28.1.2015 passed by the State Commission is hereby upheld and IA Nos. 364 & 368 of 2015 stand disposed of as such.

No order as to costs.

Pronounced in the Open Court on this **21st day of March, 2018.**

(N K Patil)
Judicial Member

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REPORTABLE/NON-REPORTABLE

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(I.J. Kapoor)
Technical Member