

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION**  
No. 16 C-1, Miller Tank Bed Area, Vasanth Nagar, Bengaluru- 560052

**Dated : 12<sup>th</sup> June, 2018**

**Present:**

Shri M.K. Shankaralinge Gowda	..	Chairman
Shri H.D. Arun Kumar	..	Member
Shri D.B. Manival Raju	..	Member

**OP No. 121/2017**

**BETWEEN:**

Pinpoint Energy K1 Private Limited,  
#3009/2, 2<sup>nd</sup> Main, 19<sup>th</sup> Cross,  
K.R. Road, B.S.K. 2<sup>nd</sup> Stage,  
Bengaluru-560 070.

.. **PETITIONER**

*[Represented by King & Partridge, Advocates]*

**AND:**

Bangalore Electricity Supply Company Limited,  
K.R. Circle,  
Bengaluru – 560 001.

.. **RESPONDENT**

*[Represented by Just Law, Advocates]*

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**ORDERS**

- 1) This petition is filed under Section 86(1)(f) of the Electricity Act, 2003,  
praying for the following reliefs:

- (1) To declare the letter dated 03.03.2016 as illegal, opposed to law and facts, and hence invalid;
  - (2) To direct the Respondent to grant extension of time of one year from the date of this Commission's Order allowing this Petition, to enable the Petitioner to achieve the COD;
  - (3) To declare the invocation/encashment of Bank Guarantees dated 09.12.2015 as illegal and to direct the Respondent to take all consequential actions thereon and restore status – *quo ante*; and,
  - (4) To pass such other or further orders that this Commission deems fit, in the interest of justice and equity.
- 2) The material facts of the case and the submissions of the Petitioner are as follows:
- (a) The Petitioner is a Special Purpose Vehicle (SPV), promoted by Heidelberg Solar Private Limited and Solea AG ('the Consortium') for development of 5 MW capacity Solar PV Project (Project) in Bagepalli Taluk, Chikkaballapur District, awarded by the Karnataka Renewable Energy Limited (KREDL), the Nodal Agency of the Government of Karnataka for facilitating the development of renewable energy in Karnataka.

- (b) The KREDL had invited bid proposals by "Request for Proposal" (RfP) dated 05.03.2013 and prescribed the technical and commercial terms and conditions, for selection of bidders for undertaking the development of 130 MW Solar Thermal Power and / or Solar PV Power Plants in Karnataka.
- (c) After evaluation of the proposals received, the KREDL accepted the bid of the Consortium for development of 5 MW capacity of the Solar PV power plant at Bagepalli, Chikkaballapur District and issued a Letter of Award (LoA) dated 23.08.2013 and an Allotment Letter dated 23.08.2013, requiring the execution of a Power Purchase Agreement (PPA).
- (d) The Consortium promoted and incorporated the Petitioner as the SPV, in accordance with the terms of the RfP and requested the Respondent through a letter dated 03.02.2014 to accept the Petitioner as the entity to undertake and perform the obligations and exercise the rights of the Selected Bidder under the LoA, including the obligation to enter into the PPA for executing the Project. The Respondent entered into the PPA on 06.02.2014 with the Petitioner.
- (e) Though the PPA was signed on 06.02.2014, the Respondent did not handover the original, thereof, to the Petitioner until 27.05.2014, i.e., for a period of nearly four months, despite several requests made by

the Petitioner and despite the defined 'Effective Date' being the date of execution of the PPA. The Respondent failed to handover even a copy of the signed document.

- (f) Upon receipt of the PPA on 27.05.2014, the Petitioner noticed that Article 4 of the PPA mandating the Petitioner to comply with the Conditions Precedent within 180 days from the 'Effective Date' had remained unchanged. By virtue of this, the Petitioner had to comply with Conditions Precedent within a period of 60 days, as against 180 days. Further, the 'Scheduled Commissioning Date' (SCD), as per the PPA was 12 months from the Effective Date, i.e., 05.02.2015. Since the PPA was given to the Petitioner on 27.05.2014, the 'Effective Date' ought to have been amended, as four months was lost by then. 'Effective Date' ought to be construed as the date on which the PPA was received by the Petitioner and the SCD for the Project ought to have been 27.05.2015. Despite several requests made by the Petitioner to amend the timelines, in view of the delay in handing over of the PPA, the Respondent failed to rectify the same.
- (g) The delay in handing over of the PPA had the effect of jeopardising the progress towards implementation of the Project. The Petitioner was unable to arrange finance from its bankers, as they required a clear Project period of minimum 12 months for implementation of the

Project and consequently, the progress in respect of purchase of land for the Project was also jeopardized.

- (h) The Petitioner, immediately upon receipt of the PPA, identified lands to initiate the Project and began negotiations with the land owners. In view of the said progress, the Petitioner, vide letter dated 01.08.2014, requested the Respondent to extend the period for fulfilment of the Conditions Precedent till 31.12.2014. The Respondent acceded to the Petitioner's request and granted extension upto 31.12.2014, as requested, vide letter dated 13.08.2014. However, the SCD, which ought to have been automatically extended in view of the extension granted by the Respondent, remained unchanged.
- (j) The Petitioner, vide letter dated 14.11.2014, informed the Respondent that the process of conversion of the lands was being delayed owing to various reasons and requested the Respondent to grant extension of time till 06.02.2015 for financial closure and accordingly, to reaffirm the SCD as 27.05.2015. The Respondent declined the request for extension of time for the Project completion, vide letter dated 29.11.2014 without due reasons and justification.
- (k) The Petitioner met the Managing Director and the General Manager of the Respondent on 31.12.2014, requesting to extend the timelines

of the PPA. However, the Respondent, once again, declined the Petitioner's request without any valid reason, vide letter dated 06.01.2015 and intimated the Petitioner that Article 4.3 of the PPA will be invoked, if the Project is not completed within the stipulated timeline and that penalty would be levied as well.

- (l) The Petitioner made another request for extension of time to the Respondent, vide letter dated 09.01.2015, which came to be rejected, vide letter dated 31.01.2015, without any valid reason. The Respondent intimated the Petitioner that the deadline for commissioning of the Project was set as 06.02.2015. Pursuant to the receipt of the letter, the Petitioner met the Respondent-Company's Managing Director and the General Manager on 19.02.2015 and explained the difficulties that arose during the course of the initiation of the Project, initially due to the delay in handing over of the PPA to the Petitioner. The Petitioner brought to the notice of the Respondent that large financial investments had been made towards the furtherance of the said Project in terms of the acquisition of land and that the Petitioner would be put to irreparable loss, if an extension is not granted. The Respondent, after hearing the Petitioner assured that an extension would be granted to meet with the requirements of the Project.

- (m) The Respondent, despite being aware of the *bonafides* of the Petitioner and assuring the Petitioner of the extension, proceeded to levy a penalty of Rs.23,25,000/- on 23.02.2015, which was deducted from the Performance Security, furnished by the Petitioner, alleging that there has been a delay in achieving the Conditions Precedent.
- (n) The Petitioner, vide letter dated 05.03.2015, once again requested the Respondent for further extension of time by six months, as it needed to satisfy the requirements of the financial institution for raising capital and also submitted 'Agreements to Sell' procured from the owners of the lands identified for commissioning the Project. The Respondent granted the extension, vide letter dated 20.03.2015, as requested and revised the SCD to 05.08.2015.
- (o) The Petitioner, based on the assurances of the Respondent, identified an extent of 4 acres in Survey No.46 of Narepalli Village, Bagepalli Taluk and 16 acres 03 guntas in Survey No.50 in Puttaparthi Village, Bagepalli Taluk, for implementation of the Project and intimated the same to the Respondent, vide letter dated 09.04.2015. Further, the Petitioner initiated the conversion process before the Deputy Commissioner, Chikkaballapur, on 25.03.2015.
- (p) The Petitioner, vide letters dated 02.07.2015 and 15.07.2015, requested the Respondent to extend the COD till 06.02.2016, as the

conversion process was pending. The Respondent, however, granted the extension of time only till 25.11.2015, vide its letter dated 14.08.2015. The Deputy Commissioner accorded partial approval for conversion of the lands allocated for the Project, vide Order dated 17.08.2015, but withheld approval for conversion for the 'A' Kharab lands, to an extent of 5 acres 12 guntas. Consequently, the sale deeds could not be executed and the Petitioner was unable to take possession of the said lands. The Petitioner challenged the orders of the Deputy Commissioner before the Karnataka Appellate Tribunal in Revenue Appeal Nos.1015/2015 and 1016/2015. The Tribunal stayed the operation of the Order of the Deputy Commissioner, vide its Order dated 06.02.2016.

- (q) The Respondent despite having knowledge of the Petitioner's best efforts again issued a notice dated 25.02.2016 seeking to levy and recover a sum of Rs.1,55,00,000/- as liquidated damages for delay in achieving COD, out of the performance security furnished. The Petitioner immediately upon receipt of the letter issued a reply notice dated 04.03.2016, reiterating the hindrances the Petitioner was faced with and requested the Respondent to revoke the invocation of the bank guarantee. Further, the Petitioner also brought to the notice of the Respondent that the Petitioner had identified alternative lands in Challakere Taluk and executed the Lease Deeds with the land owners and annexed a copy of the Lease Deed to the



said notice. The Respondent, without acknowledging the Petitioner's notice or giving any hearing or communicating further, recovered a sum of Rs.1,55,00,000/- from out of the Performance Security / Bank Guarantee furnished by the Petitioner.

- (r) A 'Default Notice' dated 03.03.2016, communicated on 08.03.2016, was issued to the Petitioner by the Respondent, alleging non-fulfilment of the terms of the PPA by failing to achieve the COD. It was informed that the PPA would stand terminated within sixty days of the Notice, if the Project was not completed. Further, the Respondent sought to levy Rs.1,67,50,000/-, as Liquidated Damages, by invoking the Performance Security furnished by the Petitioner in terms of Article 5.8 of the PPA, for the alleged failure to achieve COD. The Petitioner, vide letter dated 21.04.2016 issued a reply to the Respondent's Notice dated 03.03.2016 with an intention of clarifying and seeking an opportunity to amicably resolve the dispute by requesting the Respondent to withdraw the Default Notice in the best interest of the project. However, the Respondent rejected the request of the Petitioner to withdraw the Default Notice, vide its letter dated 27.04.2016. The Petitioner received another letter dated 16.08.2016 from the Respondent, stating that a penalty of Rs.2,20,00,000/- would be levied on the Petitioner, by invoking the Performance Security furnished by the Petitioner, in the light of the delay in achieving COD, as per Article 5.8 of the PPA.

(s) The Petitioner challenged the Notice dated 16.08.2016 before the Hon'ble High Court of Karnataka, in Writ Petition No.46441/2016. The Hon'ble High Court, vide its order dated 26.08.2016, has stayed the operation of the said Notice and invocation of the Bank Guarantees furnished by the Petitioner. The Petitioner once again called upon the Respondent, by issuing the final Notice on 20.02.2017 to come forward to amicably resolve the dispute. The Respondent had not responded to the notice despite receipt of the same. Hence, the present Petition is filed, as agreed in Article 18.3.1 of the PPA, seeking resolution of the dispute.

3) The grounds urged by the Petitioner in support of its prayers are:

(a) The reasons for the delay fall within the ambit of Article 14.3.1(d) i.e., *force majeure* clause of the PPA. The Petitioner, from the date of execution of the PPA, faced hindrances, as the executed PPA was not given to the Petitioner, in time, in order to know the terms and conditions mentioned therein and to furnish the same to the financial institutions, to achieve financial closure and raise funds for the Project and the SCD was also not revised in accordance with the modified date of receipt of the PPA.

- (b) The Notices dated 03.03.2016 and 16.08.2016 are arbitrary, illegal, unilateral and issued without observing the principles of natural justice. That the Respondent is estopped from initiating action to invoke the bank guarantees furnished by the Petitioner and seeking to penalize the Petitioner after making assurances of extension of time for implementation of the project. The action of the Respondent is in violation of the principles of natural justice and *promissory estoppel* inasmuch as, the Respondent did not give Notice before the invocation of Bank Guarantees and, in February, 2016 and May-June, 2016 gave assurances to the Petitioner that further extension of time for completion of the Project would be granted, as sought for by the Petitioner and that no precipitative action would be taken, following the extension of time having expired on 25.11.2015.
- (c) Acting in pursuance and on the basis of the above promises by the Respondent, the Petitioner had made further investment and took further steps towards implementation of this project. The Respondent failed and neglected to resolve the dispute in accordance with Article 18.2 of the PPA, by not responding to the Petitioner's letter dated 20.02.2017. After expiry of the last extension on 25.11.2015 and in view of the subsequent unequivocal promises and assurances, held out by the Respondent, no Notice of any default of the terms of the PPA, or opportunity of hearing, was given

to the Petitioner, prior to justifying the issuance of the Notice dated 03.03.2016 and the subsequent attempt to encash the Bank guarantees given by the Petitioner.

(d) The conversion Orders passed by the Deputy Commissioner refusing to sanction conversion of the 'A' Kharab lands and the consequences, thereof, would constitute a *force majeure* event, as contemplated in Article 14.3.1 (d) of the PPA and thus the time taken, therefor, for implementation of the Project is to be excluded in favour of the Petitioner. That, the action of the Respondent in invoking the Bank Guarantees and encashing the same is arbitrary and illegal, particularly when the Petitioner had demonstrated that there was no delay attributed to it.

4) Upon issuance of Notice, the Respondent appeared through its learned counsel and filed its Statement of Objections, the gist of which is, as follows:

(a) In spite of granting the Petitioner repeated extensions, the Petitioner was unable to complete the Project, within the extended period of time. Hence, the Respondent, vide Official Memorandum dated 25.02.2016, levied a penalty of Rs.1.55 Crore for delay in

commissioning the Project despite granting extension of time till 25.11.2015.

- (b) The Respondent, vide letter dated 03.03.2016, issued a Default Notice to the Petitioner, setting out in detail the Events of Default on the part of the Petitioner, namely, that it had not commissioned the Project even after a lapse of 24 months and 19 days from the date of signing of PPA. The Petitioner was informed that the PPA would be terminated, if the Plant was not commissioned within 60 days from the date of the Default Notice. Further, the Petitioner was also informed that the Liquidated Damages amounting to Rs.1,67,50,000/-, as per Article 5.8 of the PPA, for not commissioning the Plant within the stipulated time period, was leviable.
- (c) The Petitioner, vide letters dated 21.04.2016 and 27.04.2016, requested the Respondent to withdraw the Default Notice dated 03.03.2016 and amicably settle the dispute, in terms of Article 18.2 of the PPA. On 27.04.2016, the Respondent informed the Petitioner that its request for withdrawal of the Default Notice dated 03.03.2016 cannot be considered and on 17.08.2016 the Respondent communicated to the Petitioner, vide Official Memorandum that a penalty of Rs.2.20 Crores would be recovered by invoking the Performance Security.

- (d) In the interregnum, the Petitioner approached the Hon'ble High Court of Karnataka, by filing a Writ Petition on 25.08.2016, challenging the Notice dated 03.03.2016 and 17.08.2016 before the Hon'ble High Court, wherein an Interim Order was passed, directing the Respondent not to implement the Notice dated 17.08.2016 and restraining it from invoking Bank Guarantee.
- (e) The Petitioner has, since then, made another request for amicably resolving the disputes, by addressing a letter dated 20.02.2017, to the Respondent. However, being aggrieved by the encashment of the Bank Guarantees, non-grant of further extension of time and the issuance of the Default Notice dated 03.03.2016, the Petitioner has filed the present Petition.
- (f) It is the case of the Petitioner that the delay in handing over the PPA by the Respondent has resulted in consequential delays in implementing the project. Further, it is submitted by the Petitioner that the non-conversion of kharab lands by the District Commissioner is a *Force Majeure* event under Article 14.3.1 of the PPA and the same has caused delay in executing the project. This submission is refuted by the Respondent stating that clause 14.3.1 makes it clear that *force majeure*, as defined, has no application to the facts of the present case.

- (g) With regard to the allegation of the Petitioner that, the act of invoking Bank Guarantee by the Respondent is illegal, arbitrary and in violation of the principles of natural justice and *promissory estoppel*, it is submitted by the Respondent that, it is a settled law that Bank Guarantee is an independent contract between the Respondent and the Bank. The invocation of the Bank Guarantee cannot be enjoined by a Judicial Court / Tribunal. The Petitioner has not pleaded any cause, which necessitates the grant of a permanent injunction against invoking of the Bank Guarantee. That, the prayers sought for, in the present proceedings, are contrary to the law laid down, with regard to injunction against invoking Bank Guarantee. That, hence, the Petition is liable to be rejected.
- (h) The Respondent has submitted that the Petitioner is indulging in forum shopping. The Petitioner has not only initiated proceedings before this Commission, but also initiated identical proceedings before the Hon'ble High Court of Karnataka, after filing this Petition and has obtained an interim Order, therein. The Petitioner cannot be permitted to ride two horses at the same time. The present proceedings constitute an abuse of process of law. For this reason, the present Petition deserves rejection.
- (j) With regard to the allegation of the Petitioner that, the delayed implementation of the PPA is due to the non-receipt of the signed

copy of the PPA prior to 27.05.2014, it is submitted by the Respondent that, the process of executing the PPA has taken place in furtherance to a tender called for by the KREDL. The RfP and Bid documents clearly set out the terms of the PPA proposed to be executed with the ESCOMs of Karnataka and the draft PPA was a part of the bid documents. Therefore, the Petitioner cannot feign ignorance of the same and contend that it was unaware of the 'Effective Date' of the Project and the time for implementation of the Project, merely because the PPA was given to it only on 27.05.2014. This Commission, in the case of *Clean Solar Power vs HESCOM & Others* in OP 2/2017, vide Order dated 17.10.2017, has held that non-receipt of the original PPA cannot be considered to be an event of *force majeure*, which prevented the Developer from taking the requisite steps to establish its Plant within the time-frame given. The Petitioner could have proceeded to obtain financing, etc., on the basis of a copy of the PPA or the LoA, that was issued to it, by the KREDL on 23.08.2013, itself.

- (k) With regard to the averment that, the Default Notice dated 03.03.2016 is illegal, arbitrary and unilateral, it is submitted by the Respondent that the same is issued, in accordance with Article 16 of the PPA. The Petitioner has failed to commission the project within the SCD i.e., 05.02.2015. The Respondent, vide letter dated 14.08.2015, granted the Petitioner extension of time till 25.11.2015 to



commission the Project. The Petitioner has not commissioned the Project even within the revised SCD. Therefore, the Respondent was constrained to issue the Default Notice under Article 16.3.1 of the PPA. The said Default Notice has been issued in terms of the PPA and there is no infirmity in the same.

- (l) With regard to the averment that, the Petitioner could not implement its project due to non-approval of conversion of kharab lands in Survey Nos.46 and 50, by the Deputy Commissioner, it is submitted by the Respondent that the same is untenable. There is an obligation cast upon the Petitioner to have clear title and possession of land upon which the Project is to be established. The non-grant of suitable approval, by the Deputy Commissioner, cannot be the basis for claiming failure to implement the Project. The responsibility of establishing the Project is solely on the Petitioner. The PPA clearly sets out the events classified as force majeure events in Article 14. The non-approval of the conversion of kharab land does not constitute a *force majeure event*, under Article 14 of the PPA. Further, even otherwise, the contract contemplates a certain procedure to be followed in the event of a *force majeure event*, which has admittedly not been followed.
- (m) With regard to the contention of the Petitioner that, the Respondent has wrongly invoked the Bank Guarantee and the same amounts to

violation of the principles of natural justice, it is submitted by the Respondent that, Article 4.4 (b) of the PPA provides for invocation of the Performance Security, in the event of non-achievement of the Conditions Precedent. Admittedly, the Petitioner has not fulfilled the Conditions Precedent, even after several extensions were granted to it. The PPA does not require issuance of a Notice prior to invocation of Bank Guarantees. Hence, the averment that, there has been violation of the principles of natural justice, is denied. The Respondent has implemented the terms of the PPA, by invoking the Performance Guarantees, given by the Petitioner. There is no infirmity in the actions of the Respondent and the principles of *promissory estoppel* are inapplicable. No lands were acquired by the Petitioner, even after one year from the date when extension was granted, which clearly indicates the lack of *bonafides* of the Petitioner.

- (n) The Respondent has prayed for dismissal of the petition.
  
- 5) We have heard the submissions made by the learned counsel for the contesting parties. Following issues would arise for our consideration:
  - (1) Whether the Petitioner is entitled to extension of time to commission its Project by one year from the date of this Order?

- (2) Whether the prayer of the Petitioner to declare that the encashment of Bank Guarantees by the Respondent is illegal can be granted?
  
- (3) What Order?
  
- 6) After considering the submissions made by the parties and perusing the material evidence placed on record, our findings on the above issues are as follows:
  
- 7) **ISSUE No.(1):** *Whether the Petitioner is entitled to extension of time to commission its Project by one year from the date of this Order?*
  
- (a) The main allegation of the petitioner is that neither the PPA nor a copy thereof was made available to it from the date of signing of the PPA till 27.05.2014 for about 4 months from the date of signing the PPA and this has delayed the execution of the project. We note that in the PPA, it is mentioned as follows:

"IN WITNESS WHEREOF THE PARTIES HAVE EXECUTED AND DELIVERED THIS AGREEMENT AS OF THE DAY, MONTH AND YEAR FIRST ABOVE WRITTEN.  
SIGNED, SEALED AND DELIVERED  
For and on behalf of ESCOM by  
.....  
.....  
SIGNED, SEALED AND DELIVERED  
For and on behalf of Developer by  
.....  
.....".

We note that "THE DAY, MONTH AND YEAR FIRST ABOVE WRITTEN" refers to 06.02.2014, the date of signing of the PPA. Therefore, the petitioner, ought to have received the PPA or a copy of it. Even if a copy was not given to the Petitioner, it should have demanded and procured a copy of the PPA and in default, it should have made a complaint before the appropriate authority. It cannot now contend that the same was not given till 27.05.2014. We have already held in OP No. 2/2017, referred by the respondent that a copy of the signed PPA is sufficient for initiating the works related to the project and the approval of the PPA would be required at the final stages of financial closure and other approvals. Therefore, we are not able to accept the contention of the petitioner that it could not initiate any work till it received the PPA on 27.05.2014. The draft PPA was a part of the bid documents and the time lines for achieving conditions precedent and for commissioning the projects were available in the draft PPA annexed to the bid documents. The petitioner was not diligent in the matter and having not been able to commission the project within the time lines is seeking shelter under the guise that the PPA was not available with it. Even if the submission of the petitioner is accepted that the date COD should have been 27.05.2015, i.e 12 months from the date of receipt of PPA by the petitioner, we note that despite granting extension of time upto 25.11.2015, the project has not taken off. It is stated in the letter dated 04.03.2016 addressed by the petitioner to the respondent, that on 01.03.2016, a lease deed

is executed in respect of lands measuring 30 acres in Milanahalli, Challakere taluk.

- (b) We note that, in this case, the Respondent has granted extensions of time contrary to the terms of the PPA, as in Articles 5.7 and 5.8.3. It is a settled law that, the parties to the PPA have to abide by the terms of the contract. Because of such unjustifiable and irregular extensions granted by the Respondent, beyond the period provided in the said clauses, the Respondent has provided an opportunity to the Petitioner to claim relief on grounds of *promissory estoppel*. Had the Respondent taken action strictly in terms of the PPA, there would have been no scope for such claim by the Petitioner. We are of the considered opinion that the extensions of time, granted by the Respondent beyond the time provided in the PPA, is not valid and the principles of *promissory estoppel* would not apply to such invalid actions.
- (c) We note that, the Project has not achieved much progress, despite grant of such extensions of time by the Respondent, even though not being in conformity with the terms of the PPA. The Petitioner attributes it to action of the Deputy Commissioner, Chikkaballapura, declining conversion of land of about 5 acres and 5 guntas in Sy.No.50 and 15 guntas in Sy.No.46, identified by the Petitioner for the Project, on the ground that they are kharab lands belonging to the

Government. We note from the Record of Rights, the application of the land owner, for conversion and the Orders of the Deputy Commissioner, that the total extent of land in Sy.No.46 is 4 acres and conversion was sought to an extent of 3 acres and 25 guntas for establishing the solar project. Out of the total extent of 4 acres, 15 guntas were Kharab lands and, the Order of the Deputy Commissioner and the sketch in the Order mention that 15 guntas out of 4 acres is Kharab land and the land owners have no right over the same. Similarly, the Record of Rights, application of the land owner for conversion and the Orders of the Deputy Commissioner reveal that the total extent of land in Sy.No.50 is 16 acres and 3 guntas, and the conversion was sought to an extent of 10 acres and 8 guntas for establishing the solar project. Out of the total extent of 16 acres and 3 guntas, 5 acres 35 guntas were Kharab lands and the Orders of the DC and the sketch in the Orders mention that 5 acres and 35 guntas out of 16 acres and 3 guntas is Kharab land and the land owners have no right over the same. In effect, the conversion to the extent of the land sought by the land owners was in fact granted by the DC and there was no reason to be aggrieved. It appears, without proper grounds, these orders of the Deputy Commissioner were challenged by the land owners before the Hon'ble Karnataka Appellate Tribunal (KAT) and stay of the said Orders was obtained. The Petitioner contends that this event/development falls under Article 14.3.1(d) of the PPA. We note that,

the averment in the Petition, in this regard, that the Petitioner had challenged the Orders of Deputy Commissioner, is incorrect, as the land owners have challenged the Order and the Petitioner is not a party to the said Revenue Appeals. The said clause provides that the Judgment or Order of a Court, or statutory authority, has to be made against the Developer. In this case, no Order is passed against the Developer and hence, this clause cannot be invoked by the Petitioner to claim the relief sought.

- (d) Article 4.2(f) of the PPA provides that, the Developer shall produce the documentary evidence of having the clear title and possession of the land required for the Project, in the name of the Developer. As per Article 4.1 of the PPA, this has to be done within 180 days from the date of the PPA. Time is the essence of this contract. It is envisaged that, electricity proportionate to the installed capacity will flow into the grid from the Project at a certain point of time, which the Respondent will be able to use for meeting the demand of its consumers and hence, all actions / events have been provided with agreed timelines. The Stay Order of the Hon'ble KAT has not, in any way, helped in the speedy implementation of the solar Project. In fact, on this ground, extensions of time are time and again sought by the Petitioner, although the conversion to the extent of land requested, was granted by the DC. Article 14.6.1 of the PPA provides that, the affected party shall use its reasonable efforts to

mitigate the effect of any *force majeure* event, as soon as practicable. Eventhough, there is no *force majeure* event involved, it appears that no reasonable efforts have been made, by the Petitioner, to mitigate the effects of dispute over land conversion. Hence, we feel that, the Petitioner's claim that, due to challenge to the land conversion Order, the Project could not be implemented, cannot be accepted.

- (e) Article 5.8.3 of the PPA provides that, the maximum time allowed for achievement of commercial operation, with payment of Liquidated Damages shall be limited to 16 months from the 'Effective Date' (06.02.2014) and if the achievement of COD is delayed beyond 16 months, it shall be considered as a Developer's Event of Default and the provisions of Article 16 of the PPA shall apply and the Project shall be removed from the list of Selected Projects, in the event of termination of the Agreement. Article 16 of the PPA provides for termination of the Agreement, if the COD is not achieved, within the time-frame. The Respondent has contended that, the Petitioner could not commission the Plant, despite granting extensions of time and hence, action has been taken under Article 16 to terminate the PPA. We note that Article 4.1 of the PPA provides for achievement of Conditions Precedent, within 180 days from the Effective Date. This includes obtaining all consents, clearances, permits and production of documentary evidence of having clear title and



possession of land in the name of the Developer. The Petitioner has executed the Agreement of Sale, in respect of the lands on 25.02.2015 and applied for conversion of land on 25.03.2015, more than a year from the Effective Date. The reason given for this delay by the Petitioner is vague. It is obvious that, the Petitioner has not adhered to the time-frames, mentioned in the PPA, right from the beginning.

- (f) We also note that, no Notice, as contemplated under Article 14.5 of the PPA, notifying the *force majeure* event, was given by the Developer to the Respondent. During the pendency of the proceedings, when questioned about the status of the Project, the learned counsel for the Petitioner informed that, alternative lands are being identified. It can be inferred that, the Project is in a very preliminary stage of implementation, despite lapse of more than two years from the date of execution of the PPA. We note that, the contract is frustrated due to lapse of time. The commissioning of the Project would be impossible, unless the lands are identified and all approvals are obtained by the Project Developer. If the lands are not procured 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. It is for this reason that, Articles 5.8.3 and 16.3 provide for termination of the contract. The

Respondent cannot be found fault with, for the action taken to terminate the PPA.

- (g) We note that, even if the events which prevented the Petitioner from implementing the Project within the time-frame provided in the bid documents and the PPA are construed as *force majeure* events, 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."*

Hence, we find, nothing wrong in the action of the Respondent to terminate the PPA under Article 16.

- (h) Therefore, we answer Issue No.(1) in the negative.
- 8) **ISSUE No.(2):** *Whether the prayer of the Petitioner to declare that the encashment of Bank Guarantees by the Respondent as illegal can be granted?*
- (a) The Respondent has invoked the bank guarantees for an amount of Rs.23,25,000/- for delay in achieving Conditions Precedent,

Rs.1,55,00,000/- and Rs.1,67,50,000/- in lieu of damages for the delay in achieving the COD, as per Clauses 4.3 and 4.5 of the PPA. The further Notice dated 16.08.2016, of the Respondent, seeking to levy damages of Rs.2,20,00,000/- has been stayed by the Hon'ble High Court of Karnataka, in WP No.46441/2016.

- (b) It is the allegation of the Petitioner that, the principles of natural justice were not followed by the Respondent, while invoking the Bank Guarantee. The Respondent has contended that Article 4.4(b) of the PPA provides for invocation of the Performance Security and no Notice / hearing is contemplated in the clause and that the Respondent has acted in accordance with the terms of the PPA. The Respondent has also contended that there can be no injunction against invoking of Bank Guarantee.
- (c) The prayer in the petition is to declare that the invocation / encashment of Bank Guarantees dated 09.12.2015 as illegal and to direct the Respondent to take all consequential actions, thereon, and restore status quo ante. As the Bank Guarantees were encashed well before the date of filing of the petition on 18.07.2017, the prayer should have been for recovery of the amount from the Respondent, after paying the appropriate Court fee. A mere declaration, without praying for recovery of the amount that flows from the relief of declaration, is not maintainable.

- (d) As regards the Respondent's Notice dated 16.08.2016, seeking levy of damages of Rs.2,20,00,000/-, we do not intend to pass any Order as it has been challenged before the Hon'ble High Court.
- (e) Therefore, we answer Issue No. (2), accordingly.
- 9) **ISSUE No.(3):** *What Order?*

For the foregoing reasons, we pass the following:

**ORDER**

The Petition is hereby dismissed, subject to paragraph 8(d) above,

Sd/-	Sd/-	Sd/-
(M.K. SHANKARALINGE GOWDA)	(H.D. ARUN KUMAR)	(D.B. MANIVAL RAJU)
CHAIRMAN	MEMBER	MEMBER