

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION
No. 16 C-1, Miller Tank Bed Area, Vasanth Nagar, Bengaluru- 560 052

Dated : 25th September, 2018

Present:

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

OP No.105/2017

BETWEEN:

- 1) Bannura Solar Power Project LL.P.,
A Limited Liability Partnership under the
provisions of the Limited Liability Partnership
Act, 2008, having its Principal Office of
Business at:
BC 109, Davidson,
Camp : Belagavi – 590 001

[Represented Navayana Law Offices, Advocates]

- 2) Smt. Malati B. Raddi,
Major, Occ.: Agriculture,
R/o 2507, M.M. Extension,
Belagavi ..

PETITIONERS

[Represented by Manmohan, P.N. Associates, Advocates]

**[Note: Petitioner No.2 is impleaded, as per Order dated 07.11.2017
on her Application]**

AND:

Mangalore Electricity Supply Company Limited (MESCOM),
MESCOM Bhavana,
Kavoor Cross Road,
Bejai,
Mangaluru – 575 004.

.. **RESPONDENT**

[Represented by Shri Shahbaaz Husain, Advocate]

ORDERS

- 1) In essence, this Petition is filed under Section 86(1)(b) of the Electricity Act, 2003 seeking extension of time for the commercial operation of the Solar Power Project of the Petitioners, on the grounds of the *Force Majeure* events.
- 2) From the pleadings and the submissions of the learned counsel for the Petitioners, the issues that would arise for our consideration in the present Petition are, as follows:
 - (1) Whether this Commission has jurisdiction to call upon the Petitioners to prove the *Force Majeure* Events, relied upon by them, by filing a Petition, urging the relevant grounds and producing proper evidence, for the scrutiny of the Commission, inspite of the Respondent admitting or not denying the occurrence of such *Force Majeure* Events?
 - (2) Whether the Petitioners have proved the *Force Majeure* Events, relied upon by them, to claim exclusion of the delayed period in commissioning of their Solar Power Project?

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- (3) What should be the tariff for the Petitioners' Solar Power Project, for the term of the PPA?
- (4) What Order?
- 3) The learned counsel for the 2nd Petitioner argued that, the Commission has no jurisdiction to call upon the Petitioners to file a Petition before it, for proving the *Force Majeure* Events. In support of his argument, the learned counsel for the 2nd Petitioner has relied upon the different clauses of the Power Purchase Agreement (PPA) dated 13.07.2015, entered into between the Petitioners and the Respondent [Mangalore Electricity Supply Company Limited (MESCOM)]. He has also relied upon different decisions, in this regard. We shall first consider the jurisdictional issue.
- 4) For appreciating the jurisdictional issue, raised by the learned counsel for the 2nd Petitioner, the following relevant clauses in the PPA and the relevant material facts, may be noted, as under:
- (a) The 2nd Petitioner, who is one of the farmers, was selected for developing a one MW Solar Power Project, on her land bearing Sy.No,228, Bannura Village, Ramadurga Taluk, Belagavi District and for selling the power generated by the Project to the Respondent (MESCOM), as per the Guidelines issued, for selecting the land owning farmers under the State Solar Policy 2014-2021. In this regard, the 2nd Petitioner [Solar Project Developer (SPD)] and the

Respondent (MESCOM) have entered into a PPA dated 13.07.2015. The said PPA was approved by this Commission on 01.09.2015. The 1st Petitioner is a Special Purpose Vehicle (SPV), formed on 04.02.2016, to establish and maintain the Solar Power Project in terms of Article 12.11 of the PPA. The PPA provides that the Project shall be commissioned on or before 12.01.2017 i.e., 18 (eighteen) months from the date of the PPA.

(b) Article 5.1 of the PPA, which provides for the applicability of the tariff, reads thus:

“5.1 Tariff payable:

The SPD shall be entitled to receive the Tariff of Rs.8.40 (Rs. Eight Paise Forty only) per kWh based on the KERC tariff order S/03/1 dated 10.10.2013 in respect of SPD's solar PV projects in terms of the agreement for the period between COD and the Expiry Date. However, subject to Clause 2.5, if there is a delay in commissioning of the project beyond the Scheduled Commissioning Date and during such period there is a variation in the KERC Tariff, then the applicable Tariff for the projects shall be lower of the following:

- (i) Rs.8.40/- per kWh;*
- (ii) Varied tariff applicable as on the date of commercial operation.”*

Article 2.5 of the PPA, which provides for the extension of time to perform its obligations, reads thus:

“2.5 Extensions of Time

2.5.1 *In the event that the SPD is prevented from performing its obligations under Clause 4.1 by the Scheduled Commissioning Date due to:*

- (a) Any MESCOM Event of Default; or
- (b) Force Majeure Events affecting MESOM; or
- (c) Force Majeure Events affecting the SPD.

- 2.5.2** *The Scheduled Commissioning Date and the Expiry Date shall be deferred, subject to the reasons and limits prescribed in Clause 2.5.1 and Clause 2.5.3 for a reasonable period but not less than 'day for day' basis, to permit the SPD or MESCOM through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the SPD or MESCOM, or till such time such Event of Default is rectified by MESCOM.*
- 2.5.3** *In case of extension occurring due to reasons specified in clause 2.5.1(a), any of the dates specified therein can be extended, subject to the condition that the Scheduled Commissioning Date would not be extended by more than 6 (six) months.*
- 2.5.4** *In case of extension due to reasons specified in Article 2.5 (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 9.*
- 2.5.5** *If the Parties have not agreed. Within 30 (thirty) days after the affected Party's performance has ceased to be affected by the relevant circumstance, on the time period by which the Scheduled Commissioning Date or the Expiry Date should be deferred by, any Party may raise the Dispute to be resolved in accordance with Article 10.*
- 2.5.6** *As a result of such extension, the Scheduled Commissioning Date and the Expiry Date newly determined date shall be deemed to be the Scheduled Commissioning Date and the Expiry Date for the purposes of this Agreement."*

Article 10.3, which provides for the dispute resolution, reads thus:

“10.3 Dispute Resolution:

10.3.1 If any dispute is not settled amicably under clause 10.2, the same shall be referred by any of the parties to the KERC for dispute resolution in accordance with the provisions of the Electricity Act, 2003.”

- (c) The Petitioners were required to commission the Solar Power Project on or before 12.01.2017, to claim the tariff of Rs.8.40 per unit, for the energy supplied. If there was a delay in commissioning of the Project beyond 12.01.2017, the tariff applicable was the 'Varied Tariff', as determined by this Commission prevailing as on the Commercial Operation Date (COD). However, in case, the Petitioners were prevented from commissioning the Project, within the time, due to the *Force Majeure* Events affecting them, the commissioning date would be deferred for a reasonable period, required to overcome the effects of such *Force Majeure* Events. Article 2.5.5 of the PPA implies that, the Respondent (MESCOM) has discretion to agree on the time period, by which, the commissioning date could be extended on the grounds of the *Force Majeure* Events affecting the Petitioners. Article 2.5.6 of the PPA provides that, as a result of such extension of time, the commissioning date is deemed to have been extended.
- (d) The 2nd Petitioner submitted a letter dated 03.12.2016 (ANNEXURE - L) to the Respondent (MESCOM), requesting for extension of time, for commissioning of the Solar Power Project, by 6 (six) months, stating that, there was an

inordinate delay, in disposing of her application dated 23.12.2015, requesting for change of location, from Sy.No.228 of Bannura Village in Belagavi District, to Sy.No.95 of Channamagathihallikaval in Chitradurga District, for establishing the Solar Power Project, thereafter, she had taken up the follow-up actions by applying on 19.09.2016 for evacuation approval and on 20.10.2016 for conversion of land in Sy.No.228 of Bannura Village. Thereafter, the Respondent (MESCOM) did not intimate about the extension of time.

- (e) This Commission, by letter dated 16.03.2017, directed all the Electricity Supply Companies (ESCOMs), in the State, not to allow any extension of time, beyond the SCOD, without obtaining the prior permission of the Commission, in respect of the Solar Power Projects. Subsequently, this Commission, by letter dated 05.04.2017, directed all the ESCOMs to advise the SPDs / SPVs concerned of the Solar Power Projects, to file a Petition before this Commission, with all the relevant grounds and supporting documents, for seeking approval of any extension of the Commissioning Date granted by the EXCOMs. Accordingly, the Respondent (MESCOM) directed the Petitioners to file the necessary Petition before this Commission, for obtaining the approval of the Commission, for the extension of time for achieving the SCOD. Thereafter, the 1st Petitioner has filed this Petition on 19.06.2017 before this Commission. On 06.07.2017, this Commission permitted the Petitioners, on their request, to commission the Solar Power Project. Subsequently, the said Project was commissioned on 10.07.2017.

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- 5) Upon Notice, the Respondent (MESCOM) appeared through its counsel. The Respondent (MESCOM) filed its Statement of Objections on 14.09.2017. Subsequently, the 2nd Petitioner was impleaded, on her application dated 07.11.2017. The Petitioners have filed their rejoinder to the Statement of Objections on 16.01.2018. The Respondent (MESCOM) filed a Memo dated 22.03.2018, withdrawing the Statement of Objections, while the case was being adjourned for arguments. Thereafter, the learned counsel for the Petitioners submitted their arguments and they have also filed their written arguments. The learned counsel for the Respondent (MESCOM) submitted that, he had nothing to say in the matter and that would abide by the Orders to be passed by this Commission in the case.
- 6) After considering the submissions of the Petitioners and the evidence on record, our findings on Issue No.(1) are, as follows:
- 7) **ISSUE No.(1):** *Whether this Commission has jurisdiction to call upon the Petitioners to prove the Force Majeure Events, relied upon by them, by filing a Petition, urging the relevant grounds and producing proper evidence, for the scrutiny of the Commission, inspite of the Respondent admitting or not denying the occurrence of such Force Majeure Events?*
- (a) The learned counsel for the 2nd Petitioner submitted that, this Commission has no jurisdiction to call upon the Petitioners to file a Petition, for proving the *Force Majeure* Events, in view of the fact that the Respondent (MESCOM) has

to consider the request of the Petitioners for extension of time, on the grounds of the *Force Majeure* Events and has to grant extension of time, by six months, for commissioning the Solar Power Project, as per the terms of the PPA. Therefore, he submitted that, there was no dispute between the parties and hence, the present Petition cannot be treated as a dispute under Section 86(1)(f) of the Electricity Act, 2003. The learned counsel also submitted that, the tariff agreed to between the parties, cannot be altered by this Commission, as the Respondent (MESCOM) has not resisted any of the grounds urged by the Petitioners for establishing the *Force Majeure* Events. The learned counsel also submitted that, the grounds urged by the Petitioners would establish the *Force Majeure* Events, entitling the Petitioners for extension of time, for commissioning the Project.

(b) We have cautiously considered the arguments put forth by the learned counsel for the 2nd Petitioner and the decisions relied upon by him. In our considered view, his arguments are not tenable, for the following reasons:

(i) This Commission has come across a number of instances, where the Distribution Licensees, who had entered into the PPAs with the Solar Power Developers (SPDs), had indiscriminately granted the extension of time for commissioning the Solar Power Projects, relying upon the clause relating to 'extension of time', contained in the PPAs. Therefore, the Commission was compelled to issue the letter dated

05.04.2017, directing all the Distribution Licensees in the State, to advise the concerned SPDs / SPVs to file a Petition before this Commission, with all the relevant grounds / documents, for seeking the approval of the extension of time, granted by the Electricity Supply Companies (ESCOMs), for commissioning the Solar Power Projects. It is true that, the clause relating to the 'extension of time', incorporated in the PPAs, permits the Distribution Licensees to grant the extension of time, on the grounds of *Force Majeure* Events, affecting the SPDs. In Article 8 of the PPA, the meaning of the '*Force Majeure* Events' and the limitations and restrictions of its applicability, in a given case, are stated.

- (ii) The main contention of the learned counsel for the 2nd Petitioner is that, when the term of the PPA empowers the Respondent (MESCOM) to grant the extension of time for commissioning of the Solar Power Project, on the grounds of *Force Majeure* Events, the Commission cannot interfere with the discretion, exercised by the Respondent (MESCOM) in extending the time. It is not in dispute that, if the commissioning of the Solar Power Project does not take place within the specified time, the SPD would be entitled to a lower tariff, applicable as on the date of the commercial operation of the Project. Therefore, the indiscriminate extension of time, on the purported ground of a *Force Majeure* Event, affects the tariff, payable under the PPA, for the energy supplied. In the present case, as per the term of

the PPA, the Project was required to be commissioned, on or before 12.01.2017. However, the Project was commissioned on 10.07.2017, subsequent to the filing of the present Petition. It is also not in dispute that, the tariff payable for the Solar Power Projects was reduced during the subsequent Control Periods. Therefore, the Respondent (MESCOM), accepting or consenting the *Force Majeure* Events, claimed by the Petitioners on insufficient grounds or otherwise, would affect the tariff, payable under the PPA, which in turn, would affect the interest of the consumers. In such an event, the Commission has a duty to intervene and satisfy itself, as to whether the claim of the Petitioners for the extension of time, on the ground of the *Force Majeure* Events, is properly met or not, irrespective of the satisfaction of the Respondent (MESCOM) on the said fact.

- (iii) The above view, that we have taken, is based on the principles stated in the judgment rendered by the Hon'ble Supreme Court, in the case of *All India Power Engineer Federation and Others –Vs- Sasan Power Limited and Others*, reported in (2017) 1 SCC 487. In the said decision, the Hon'ble Supreme Court has considered the effect of a waiver of a right, by the Distribution Licensee, under the provision of the PPA, which would adversely affect the tariff agreed to under the PPA. The principles are stated thus:

"The general principle is that everyone has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity which may be dispensed with without infringing any public right or public policy. ..."[Paragraph-22]

"The test to determine the nature of interest, namely, private or public is whether the right which is renounced is the right of party alone or of the public also in the sense that the general welfare of the society is involved. ..." [Paragraph-23]

Further, it is held that:

"... If there is any element of public interest involved, the court steps in to thwart any waiver which may be contrary to such public interest." ..." [Paragraph-24]

In the said case, the question was, 'whether the waiver of a provision of the PPA by the Distribution Licensee, having an effect to increase the tariff, was valid or not'. It is held that, the increase in the tariff would adversely affect the consumers and thereby, any waiver by the Distribution Licensee, against the terms of the PPA, is invalid. We are of the considered opinion that, the principle stated above would squarely apply to a case, where the Distribution Licensee gives its consent, against the terms of the PPA, in respect of a *Force Majeure* Event, which has the effect of an increase in the tariff, which in turn, would affect the consumers. Therefore, it becomes the duty of this Commission to scrutinize, as to whether there was a case for the

extension of time, for commissioning the Solar Power Project, on the grounds of the *Force Majeure* Events, as per the terms of the PPA.

- (iv) This Commission has the exclusive jurisdiction to determine the tariff for supply of electricity by a Generating Company to a Distribution Licensee, as per the provisions of Sections 61 to 64 of the Electricity Act, 2003 and the relevant Regulations framed thereunder. The Generating Company is prohibited from recovering a price or charge exceeding the tariff determined by the Commission. Therefore, wherever the terms of the PPA provide for reduction in tariff, on occurrence of certain events, the Commission alone has the jurisdiction to pronounce a finding regarding the proof or otherwise of the occurrence of such events. The parties concerned being in agreement regarding the occurrence of such events, is irrelevant. Therefore, in the present case, the clause in the PPA authorizing the Respondent (MESCOM) to extend the time for commissioning of the Project by the Petitioners, on the grounds of the *Force Majeure* Events, is contrary to the provisions of the Electricity Act, 2003, as it has the effect of taking away the jurisdiction of the Commission, to determine the applicable tariff. The parties cannot confer or take away the jurisdiction of a Court or Adjudicating Authority. It is only this Commission that has the exclusive jurisdiction, to adjudicate upon the existence or otherwise, of such an event, which affects the tariff.

(c) Now, let us consider the decisions, relied upon by the learned counsel for the 2nd Petitioner, in support of his arguments.

(i) The learned counsel's first contention that, this Commission is not a party to the PPA, and being a third party to the PPA, it has no jurisdiction to intervene in the matter and to determine, as to whether the extension of time granted by the Respondent (MESCOM), in terms of the Agreement is valid or not, is not acceptable. As already noted above, this Commission has the jurisdiction to satisfy itself, as to whether the extension of time granted by the Respondent (MESCOM), on the grounds of the *Force Majeure* Events is valid or not. For this purpose, the Commission need not be a party to the PPA, but it has got a duty to intervene and determine the applicable tariff, in a given case and there need not be a dispute between the parties on it.

(ii) The learned counsel for the 2nd Petitioner has relied upon the decision, reported in 2016 (3) SCC 515, in the case of *Bangalore Electricity Supply Company Limited –Vs- Konark Power Projects Ltd., and Another*, to contend that, the tariff agreed to in a PPA, cannot be altered during the term of such PPA. The principle stated in the said case is not applicable to the case on hand because, in this case, the terms of the PPA, itself provided for a reduced tariff, on proof of

certain events. It is also held by the Hon'ble Supreme Court, in the case of *Gujarat Urja Vikas Nigam Ltd. –Vs- Tarini Infrastructure Ltd., & Others*, reported in AIR 2016 SC 5580, that the decision rendered in the *Konark* case was confined only to the facts of that case.

- (iii) The learned counsel for the 2nd Petitioner next relied upon the decision reported in 2017 SCC Online SC 1248, in the case of *Gujarat Urja Vikas Nigam Limited –Vs- Solar Semiconductor Power Company (India) Private Limited and Others*, to contend that, this Commission has no power under its inherent jurisdiction, to alter the tariff or the other terms and conditions, agreed to in a PPA. In the said case, the question that arose for consideration was, 'whether the Commission could extend the Control Period in respect of a Solar Power Project, under its inherent jurisdiction.' This question was answered in the negative. The principle stated, in the said decision, is not applicable to the case on hand, as this Commission is not exercising its inherent powers, but is exercising its power to determine the tariff, to resolve the question involved in this case.
- (iv) The learned counsel for the 2nd Petitioner has also relied upon the decision, reported in 2010 SCC 567, in the case of *Suraj Mal Ram Niwas Oil Mills (P) Ltd. –Vs- United India Insurance Company Ltd., and Another*, to contend that, a stranger cannot alter the legal obligations

of the parties to the contract. The said principle is not relevant in the present case, for the reasons stated above.

- (v) The learned counsel for the 2nd Petitioner has submitted that, the Generic Tariff Order dated 30.07.2015, revising the tariff at Rs.6.51 per unit, and the Generic Tariff Order dated 12.04.2017, revising the tariff to Rs.4.36 per unit, are not applicable to the present case. For contending the non-applicability of the Generic Tariff Order dated 30.07.2015, the learned counsel for the 2nd Petitioner has relied upon a portion of Paragraph-3 of the Tariff Order, which reads thus:

"3. Applicability of the Order:

In view of the above, the Commission, in modification of its Order dated 10th October, 2013, decides that the norms and tariff determined in its Order shall be applicable to all new grid connected MW scale solar PV and solar thermal power plants, entering into Power Purchase Agreement (PPA) on or after 1st September, 2015 and getting commissioned during the period from 1st September, 2015 to 31st March, 2018 for which PPAs have not been entered into, prior to 1st September, 2015.

In respect of the projects that are commissioned during the period from 1st September, 2015 to 31st March, 2018 for which PPAs have been entered into and submitted to the Commission prior to 1st September, 2015 for approval, the tariff as per the said agreement shall be applicable.

....."

The learned counsel for the 2nd Petitioner has relied upon the latter portion of Paragraph-3 of the said order, noted above, to contend that, the Solar Power Project of the Petitioners has complied with all the requirements, stated therein, therefore, it is entitled to the tariff of Rs.8.40 per unit, as per the Generic Tariff Order dated 10.10.2013. It is submitted that, the Solar Power Project has been commissioned, long before 31.03.2018 and the PPA dated 13.07.2015, has been approved by this Commission on 01.09.2015, therefore, the tariff, as per the PPA dated 13.07.2015, is applicable to the Petitioners' Project.

The latter part of Paragraph-3 of the Tariff Order, noted above, states that *'the tariff as per the said Agreement shall be applicable'*. Article 5.1 of the PPA dated 13.07.2015 provides for the contingencies, in which a lower tariff is applicable for the Project. If the Project is liable for a lower tariff, the same should be considered and the applicability of such lower tariff is not taken away in the latter part of Paragraph-3 of the Tariff Order, noted above. *'The tariff as per the said Agreement'*, does not mean that it is only the tariff of Rs.8.40 per unit, in all cases, but it could be a lower tariff, in the event of any delay in commissioning of the Solar Power Project, as provided in Article 5.1 of the PPA.

The learned counsel for the 2nd Petitioner has further submitted that, the Generic Tariff Order dated 12.04.2017 cannot be made applicable, retrospectively, from 01.04.2017, as this Commission has no jurisdiction to do so. In this regard, the learned counsel has relied upon the decision, reported in (2011) 6 SCC 570, in the case of *J.S. Yadav – Vs- State of UP and Another*, to contend that, the vested right of the Petitioners for a tariff of Rs.8.40 per unit, agreed to in the PPA, cannot be taken away. In Paragraph-22 of the said Judgment, it is held that, *“Thus, ‘vested right’ is independent of any contingency. Such a right can arise from a contract, statute or by operation of law. A vested right can be taken away, only if the law specifically or by necessary implication provides for such a course.”* In the present case, the term of the PPA itself provides for a lower tariff, in certain contingencies. The Generic Tariff Order dated 12.04.2017, has become final and it cannot be assailed in these proceedings. Further, it may be noted that, in the present case, the Solar Power Project is commissioned on 10.07.2017, much later than 12.04.2017. Hence, this decision is not applicable to the case on hand.

- (vi) The learned counsel for the 2nd Petitioner has further submitted that, this Commission has no powers, much less, the inherent powers, to issue the letters dated 16.03.2017 and 05.04.2017, directing the ESCOMs not to allow any extension of time and directing the ESCOMs to advise the

Solar Project Developers to file a Petition, before the Commission, seeking approval of the extension of time, granted by the ESCOMs, if any. This contention of the learned counsel is not tenable, as this Commission has the exclusive jurisdiction, to consider the validity of the extension of time, when it affects the tariff payable.

(d) For the reasons stated above, we answer Issue No.(1), in the affirmative.

8) **ISSUE No.(2):** *Whether the Petitioners have proved the Force Majeure Events, relied upon by them, to claim exclusion of the delayed period in commissioning of their Solar Power Project?*

(a) It would be useful to note the meaning of 'Force Majeure' and the limitations and restrictions for availing of the benefit under the Force Majeure Events, contained in Article 8 of the PPA. Article 8.2 of the PPA defines the 'Affected Party' as the 'MESCO' or the 'SPD', whose performance has been affected by the Event of Force Majeure. The material clause is 8.3, which reads thus:

"8.3 Force Majeure Events:

(a) *Neither Party shall be responsible or liable for or deemed in breach hereof because of any delay or failure in the performance of its obligations hereunder (except for obligations to pay money due prior to occurrence of Force Majeure events under this Agreement) or failure to meet milestone dates due to any event or circumstance (a "Force Majeure Event") beyond the reasonable control of the Party affected by such delay or failure, including the occurrence of any of the following:*

- (i) Acts of God;
- (ii) Typhoons, floods, lightning, cyclone, hurricane, drought, famine, epidemic, plague or other natural calamities;
- (iii) Strikes, work stoppages, work slowdowns or other labour dispute which affects a Party's ability to perform under this Agreement;
- (iv) Acts of war (whether declared or undeclared), invasion or civil unrest;
- (v) Any requirement, action or omission to act pursuant to any judgment or order of any court or judicial authority in India (provided such requirement, action or omission to act is not due to the breach by the SPD or MESCOM of any Law or any of their respective obligations under this Agreement);
- (vi) Inability despite complying with all legal requirements to obtain, renew or maintain required licenses or Legal Approvals;
- (vii) Fire, Earthquakes, explosions, accidents, landslides;
- (viii) Expropriation and/or compulsory acquisition of the Project in whole or in part;
- (ix) Chemical or radioactive contamination or ionizing radiation; or
- (x) Damage to or breakdown of transmission facilities of either Party;

(b) The availability of the above item (a) to excuse a Party's obligations under this Agreement due to a Force Majeure Event shall be subject to the following limitations and restrictions:

- (i) The non-performing Party gives the other Party written notice describing the particulars of the Force Majeure Event as soon as practicable after its occurrence;
- (ii) The suspension of performance is of no greater scope and of no longer duration than is required by the Force Majeure Event.
- (iii) The non-performing Party is able to resume performance of its obligations under this Agreement, it shall give the other Party written notice to that effect;
- (iv) The Force Majeure Event was not caused by the non-performing Party's negligent or intentional acts, errors or

omissions, or by its negligence/failure to comply with any material Law, or by any material breach or default under this Agreement;

(v) In no event shall a Force Majeure Event excuse the obligations of a Party that are required to be completely performed prior to the occurrence of a Force Majeure Event."

(b) To put it simply, '*Force Majeure Events*' mean, any event or circumstance beyond the reasonable control of the 'Affected Party', including the occurrence of any of the Events stated under Article 8.3 of the PPA, which the Affected Party could not reasonably prevent or control. The said Article further provides for the '*limitations and restrictions*' for the applicability of the *Force Majeure Events*. The important limitation and restriction is that, '*the Force Majeure was not caused by the non-performing party's negligent or intentional acts, errors or omissions, or by its negligence/failure to comply with any material law or any material breach of law or any material breach or default under this Agreement*', apart from the requirement of issuing a Notice to the other party regarding the occurrence and cessation of the *Force Majeure Events*.

(c) The following are the *Force Majeure Events*, relied upon by the Petitioners, to claim the extension of time for commercial operation of the Solar Power Project:

(1) Delay in obtaining the Order relating to conversion of the land from '*agricultural use*' to '*non-agricultural purpose*'; and,

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- (2) Delay in obtaining the Evacuation Approval from the KPTCL and other grid connectivity approvals.
- (d) The scrutiny of the documents and material placed on record, would show that, the Petitioners have failed to establish the *Force Majeure* Events, relied upon by them, nor have they, admittedly, issued the required Notices, to claim the exclusion of the delayed period in commissioning of their Solar Power Project, for the following reasons:
- (1) *Reg.: Delay in obtaining the Order relating to conversion of the land from 'agricultural use' to 'non-agricultural purpose';*

The 2nd Petitioner has executed the PPA dated 13.07.2015 to establish one MW Solar Power Project in Sy.No.228 of Bannura Village, Ramadurg Taluk, agreeing to connect the Project to the 110 kV Katkol Sub-station in Ramadurg Taluk. The commercial operation of the Project should have been completed within eighteen months, from the date of execution of the PPA i.e., on or before 12.01.2017. The Petitioners have applied on 20.10.2016 for conversion of 5 acres of land in Sy.No.228, from 'agricultural use' to 'non-agricultural purpose' (as per Ex.10). The Deputy Commissioner has granted the Conversion Order on 20.06.2017 (as per Ex.11). The land Conversion Order was issued, after eight months from the date of the application requesting for conversion of the said land.

The delay in applying for conversion of the land, in Sy.No.228, is tried to be explained, as follows:

- (i) That the 2nd Petitioner requested, through application dated 03.12.2015 to the KREDL and the State Government, to change the location of the Solar Power Project, from Sy.No.228 of Bannura Village to Sy.No.95 of Chennamangathihallikaval, which was also owned by her. It is stated that, there was an inordinate delay in not accepting her request and soon thereafter, the 2nd Petitioner filed an application of conversion of the land, in Sy.No.228, on 20.10.2016.
- (ii) We are of the considered view that, the delay, if any, caused by the State Government in not accepting the request of the 2nd Petitioner for change of location, cannot be treated as a *Force Majeure* Event. The 2nd Petitioner had undertaken to establish the Project in Sy.No.228 of Bannura Village. Hence, the 2nd Petitioner has no legal right to claim the change of location of the Project, from one place to another. The 2nd Petitioner has not made out any event or circumstance, which was beyond her reasonable control to establish the Solar Power Project in Sy.No.228 of Bannura Village. It can be seen that, when the request for change of location was not accepted, the Petitioners proceeded to establish the Project in Sy.No.228, itself. This delay was caused due

to the errors or omissions, on the part of the Petitioners. Therefore, one can say that there is a delay of about fifteen months, from the date of execution of the PPA, in applying for conversion of the land, which is attributable to the Petitioners, alone.

- (iii) After impleading of the 2nd Petitioner, she has contended that, she had to spend more than ten to twelve months in obtaining the copies of the Revenue records and other documents, required to be filed along with the application, for conversion of the land in Sy.No.228. A perusal of the Photostat copies of the Revenue records and the other documents provided, does not establish the date, on which the Petitioners applied for copies of these records, but simply shows that, they were obtained just prior to applying for conversion of the land. Therefore, that the contention is to be rejected. As claimed by the Petitioners, after rejection of their request, for change of location of the Solar Power Project by the Government, they applied for conversion of the land. Therefore, soon after the execution of the PPA, there was no reason for the Petitioners to apply for the Revenue records and other documents, required to be filed along with the application, for conversion of the land in Sy.No.228.

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- (2) *Reg.: Delays in obtaining the Evacuation Approval from the KPTCL and other grid connectivity approvals.*
- (i) As already noted, the 2nd Petitioner has finally made up her mind to apply for the land conversion of Sy.No.228 of Bannura Village, on 20.10.2016, when her attempts for change of location, for establishing the Solar Power Project, was found to be not acceptable. Therefore, it could be clearly inferred that, the application, seeking for the power Evacuation Approval, was made in and around the same time. The KPTCL, by letter dated 03.11.2016 (ANNEXURE-J), had issued the tentative Evacuation Approval, for the Solar Power Project of the Petitioners, to be established at Sy.No.228 of Bannura Village, through the 110/33/11 kV Katkol Sub-station. It could be seen from ANNEXURE-M to the Petition that, the 2nd Petitioner made a representation dated 30.11.2016, requesting for change in the location, for evacuation of power, from the 110/33/11 kV Katkol Sub-station to the 110/33/11 kV Salahalli Sub-station. This request was finally accepted by the KPTCL, Bagalkot, and finally under the letter dated 24.06.2017 (Ex.34) granted the regular Evacuation Approval.
- (ii) From the above facts, it could be said that, the representation dated 30.11.2016 of the 2nd Petitioner, requesting for change in the location of the Sub-station from Katkol to Salahalli, was the date on which the 2nd Petitioner applied for the Evacuation Approval. This would show

that, there is a delay of one year and four months in applying for the Evacuation Approval, from the date of execution of the PPA. This delay was attributable to the acts or omissions, on the part of the Petitioners alone. Any of the *Force Majeure* Events, stated in Article 8 of the PPA, would not be available, to condone the said delay. The regular Evacuation Approval with reference to the Salahalli Sub-station, was granted by the KPTCL, vide letter dated 24.06.2017 (Ex.34). The Solar Power Project of the Petitioners was commissioned on 10.07.2017.

- (iii) The above events would establish that, there was no delay on the part of the KPTCL, in issuing the power Evacuation Approval and the other steps to be taken by it. Had the Petitioners taken proper care in applying for the power Evacuation Approval soon after the execution of the PPA, there would not have been any delay, in commissioning the Solar Power Project, within the stipulated period.
- (e) For the above reasons, we answer Issue No.(2), in the negative.
- 9) **ISSUE No.(3):** *What should be the tariff for the Project, for the term of the PPA?*
- (a) The generic tariff for the Solar Power Projects, as on the date of commissioning of the present Project, was, admittedly, Rs.4.36 per unit.

Therefore, as per Article 5.1 of the PPA, the Petitioners are entitled to the tariff of Rs.4.36 (Rupees Four and Paise Thirty Six) only per unit, the varied tariff, as applicable on the date of commissioning of the Solar Power Project.

(j) Therefore, we answer Issue No.(3), accordingly.

10) **ISSUE No.(4):** What Order?

For the foregoing reasons, we pass the following:

ORDER

- (a) The Petition is dismissed and the Petitioners are not entitled to any of the reliefs, sought for, in the Petition;
- (b) The Petitioners are entitled to a tariff of Rs.4.36 (Rupees Four and Paise-Thirty Six) only per unit, the varied tariff as applicable on the date of commissioning of the Petitioners' plant, as fixed by the Commission in the Order dated 12.04.2017, for the term of the PPA, as per Article 5.1 of the PPA; and,
- (c) The Petitioners are also liable to pay damages, as provided under Articles 2.2 and 2.5.7 of the PPA.

Sd/-
(M.K. SHANKARALINGE GOWDA)
CHAIRMAN

Sd/-
(H.D. ARUN KUMAR)
MEMBER

Sd/-
(D.B. MANIVAL RAJU)
MEMBER