

No. N/62/18

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION****No. 16 C-1, Miller Tank Bed Area, Vasanth Nagar, Bengaluru- 560 052****Dated : 26.12.2019****Present:**

Shri Shambhu Dayal Meena	..	Chairman
Shri H.M. Manjunatha	..	Member
Shri M.D. Ravi	..	Member

**OP No.35/2018****BETWEEN:**

K.K. RAO GREEN ENERGY PRIVATE LIMITED

A Company registered under the provisions

Of the Companies Act, 1956,

Having its Registered Office at

Plot No. Part of 8, Road No.1,

I,D,A Nacharam, HYDERABAD – 500 076

*(Represented Navayana Law Offices, Advocates)* ...**PETITIONER****AND**

1. KARNATAKA RENEWABLE ENERGY DEVELOPMENT LIMITED,  
A Company registered under the provisions  
Of the Companies Act, 1956, having its Registered # 39,  
"Shanthigruha" Bharath Scouts & Guides Building, Palace Road,  
Bengaluru- 560 001  
(Represented by its Managing Director)
2. MANGALORE ELECTRICITY SUPPLY COMPANY LIMITED,  
MESCOM Bhavan, Kavour Cross Road, Bijai,  
Mangaluru – 575 001  
(Represented by its Managing Director)
3. KARNATAKA POWER TRANSMISSION CORPORATION LIMITED,  
Kaveri Bhavan, K.G. Road,  
Bengaluru – 560 009  
(Represented by its Managing Director) ... **RESPONDENTS**  
*(Respondent-1 represented by Sri G S Kannur, Advocate*  
*Respondents-2 & 3 represented by Sri Shahbaaz Hussain, Advocate)*

1. This petition is filed under section 86 (1) (f) of the Electricity Act, 2003 praying to:
  - a) Set aside the letter dated 19<sup>th</sup> May, 2017 issued by MESCOM (Annexure – P1) and consequently;
  - b) Direct the Respondent MESCOM to pay the tariff of Rs. 7.17 per unit agreed under the PPA dated 21<sup>st</sup> October, 2014 (Annexure – P3);
  - c) Direct Respondent MESCOM not to levy any damages or penalty under the PPA dated 21<sup>st</sup> October, 2014;
  - d) Pass such other order or orders, as may deem appropriate in the facts circumstances of the case.
  
2. The facts of the case as mentioned in the petition are:
  - a) The Respondent-1, Karnataka Renewable Energy Development Limited (KREDL) invited proposals by its "Request of Proposal" dated 01<sup>st</sup> March 2014 for selection of bidders for development of Solar Thermal/PV power plants in Karnataka. The parent company of the Petitioner, M/s K.K. Rao Engineering Works Private Limited participated in the bid and the proposal was accepted for development of 3 MW capacity Solar PV Power Project at Siraguppa, Ballari District. A letter of award dated 24<sup>th</sup> July 2014 was

issued by KREDL requiring to execute Power Purchase Agreement (PPA) with MESCOM.

- b) The parent company of the Petitioner, the successful bidder by letters dated 16<sup>th</sup> September 2014 and 10<sup>th</sup> October 2014 requested to accept the Petitioner Company as the SPV to undertake and perform the obligations and to enter into PPA. A PPA dated 21<sup>st</sup> October 2014 was initiated by the Petitioner with the 2<sup>nd</sup> Respondent. The 2<sup>nd</sup> Respondent, by its letter dated 18<sup>th</sup> November, 2014 requested the Commission to communicate the approval of the PPA.
- c) The Petitioner was informed by the 2<sup>nd</sup> Respondent vide letter dated 29<sup>th</sup> December, 2014 that the Commission vide its letter dated 08<sup>th</sup> December, 2014 had approved the PPA, subject to deletion of the "Arbitration" Clause No.18.4. Therefore, the 2<sup>nd</sup> Respondent by the same letter called upon the Petitioner to execute an Addendum to the PPA to delete the "Arbitration" clause.
- d) By letter 31<sup>st</sup> January, 2015, the Petitioner requested Respondent-3 (KPTCL) to issue feasibility certificate for bay extension.
- e) The Petitioner by its letter dated 02<sup>nd</sup> February 2015, requested Respondent-1 for change of location of the project to Chittaguppa, Humnabad Taluk, Bidar District. On 7.2.2015, Respondent-1 issued 'No Objection' for change of location.
- f) As per the directions of the Commission, the Petitioner executed the Addendum to the PPA on 03<sup>rd</sup> February 2015 and received the original PPA with Addendum from the Respondent-2 on 13<sup>th</sup> February, 2015.

- g) On 25<sup>th</sup> February, 2015, one Mr. Limbaji executed a Sale Deed in favour of Mr. Ramakrishna for a portion of the project land. This land was to be leased to the Petitioner Company for execution of the Project. Similarly, four other Sale Deeds dated 11<sup>th</sup> March, 2015 were executed in favour of Mr. Ramakrishna by others enabling the procurement of the project land.
- h) The Sale Deeds for the project lands were executed during February-March 2015. The Registration authority had to initiate the mutation process immediately upon execution of the Sale Deeds. However, due to the technical errors in the system maintained with the Tahsildar's Office, the mutation process was initiated on 25<sup>th</sup> April, 2015. The mutation process so initiated should have been completed within one month from the date of initiation. However, the same was completed on 4<sup>th</sup> June, 2015 due to Panchayath Elections, Code of Conduct, lack of personnel in the Taluk Administration offices and other Administrative delays beyond the control of the Petitioner.
- i) The Petitioner vide letter dated 16<sup>th</sup> June 2015 requested the permission of Deputy Commissioner (DC), Bidar for getting the land on lease from the said Ramkrishna, under section 109 of Karnataka Land Reforms Act, 1961. The office of the DC vide letter dated 04<sup>th</sup> July 2015 sought a report from the Assistant Commissioner of Basava Kalyana, the Assistant Director of Urban and Rural Development, Bidar and the Tashildar of Humnabad on the Petitioner's request. The Tashildar of Humnabad submitted his report on 14<sup>th</sup> July 2015.

- j) KPTCL, vide letter dated 27<sup>th</sup> July, 2015, granted regular evacuation approval on 'Self-Execution" basis with validity period of 12 months from the effective date as per the PPA with a direction to construct 11kV SC line for a distance of about 1.8 km from the generation point to 110/11kV Sub-Station at Chitaguppa Station.
- k) The Urban and Rural Policy Department, Office of the Additional Director, Mini Vidhana Soudha, Dharwad vide letter dated 28<sup>th</sup> July 2015 communicated to DC, Bidar granting permission to use / buy land of the said Ramkrishna at Sy. Nos. 79/6, 79/7, 79/8, 79/9, 79/10 at Kodambal Village, Hunumbad Taluk, Bidar for industrial (Power Generation) purpose.
- l) The Petitioner vide letters dated 01<sup>st</sup> August, 2015 and 13.10.2015 requested the Assistant Executive Engineer (Ele) O&M Division, Mannekalli, GESCOM and KPTCL to provide cost estimation for construction 11 kV SC Line for 2 Km and construction of 11 kV Bay at 110/11 kV Chitaguppa Sub-Station.
- m) GESCOM vide its letter dated 03<sup>rd</sup> December, 2015 informed the cost estimation for construction the 11 KV SC line. KPTCL vide letter dated 08<sup>th</sup> December 2015 provided cost estimation for construction of 11 kV terminal bay to Superintending Engineer (El.) Tr (W&M) Circle, KPTCL, Kalaburagi and requested to take needful action. KPTCL vide letter dated 26<sup>th</sup> December 2015 requested the Petitioner to pay supervision charges. The Petitioner by its letter dated 09<sup>th</sup> January 2016 submitted receipts for having paid the charges. On 23.01.2016, KPTCL, accorded

approval for Self Execution Scheme. The Petitioner submitted the Procured Material Drawings for approval of KPTCL vide letter dated 29<sup>th</sup> January, 2016.

- n) GESCO on 03.02.2016, sanctioned the estimate for construction of 2km 11kV line under "Self Execution Basis".
- o) The DC, Bidar vide letter dated 08<sup>th</sup> February, 2016 passed an order permitting the Petitioner to use the land of Ramkrishana at Kondbal Village, Hunumbad Taluk, Bidar on lease for the purpose of setting up power generation plant.
- p) The Petitioner by its letter dated 08<sup>th</sup> February, 2016 submitted diagrams and requested Chief Electrical Inspector to Government (CEIG) to approve the same. The CEIG by its letter dated 19<sup>th</sup> February 2016 requested the Petitioner to produce certain documents. The Petitioner by its letter dated 01<sup>st</sup> March 2016 submitted the documents.
- q) The Petitioner entered into a Lease Agreement dated 22<sup>nd</sup> February 2016 with Ramkrishna for usage of land for setting up of power generation plant.
- r) The Petitioner faced serious difficulties in implementation of the project which were beyond the control of the Petitioner. It took about nine (9) months for the Petitioner to secure the permission under Section 109 i.e., non-agricultural approval. This was brought to the notice of the 2<sup>nd</sup> Respondent vide letters dated 2.11.2015, 26.12.2015 & 12.4.2016 along with other aspects that led to the delay such as the delay in grant of CEIG approval. The Petitioner submitted a detailed representation on

21<sup>st</sup> April, 2016 to Respondent-2 explaining in detail, the chronology of events and the time taken for the non-agricultural approval. On 27<sup>th</sup> April, 2016 the Petitioner wrote another detailed letter enclosing the photographs to show that the project was ready in every respect except the statutory approvals which were delayed for the reasons beyond the control of the Petitioner.

- s) On 24<sup>th</sup> February, 2016 by submitting all required documents, the Petitioner applied for the conversion of agricultural land to non-agricultural purposes with the DC, Bidar under Sakala Scheme.
- t) KPTCL, vide letter dated 22<sup>nd</sup> March 2016 provisionally approved the drawing submitted by the Petitioner. KPTCL requested the Chief Engineer Electricity, TA & QC to arrange for inspection and vide letter dated 28<sup>th</sup> March 2016 requested the Petitioner to pay inspection charges. The Petitioner by its letter dated 30<sup>th</sup> March 2016 submitted the receipts for having paid the inspection charges. KPTCL completed the inspection on 20<sup>th</sup> April, 2016.
- u) The DC, Bidar issued a letter dated 07<sup>th</sup> April, 2016 directing the Petitioner to remit a sum of Rs. 3,98,748/- as conversion charges. The said fee was remitted by the Petitioner on 12<sup>th</sup> and 13<sup>th</sup> April, 2016. The DC, Bidar issued an Official Memorandum dated 22<sup>nd</sup> April, 2016 granting approval to the Petitioner to use lands for the Non-Agricultural purposes but signed the same on 06<sup>th</sup> May 2016.
- v) The Petitioner wrote a letter dated 12<sup>th</sup> May, 2016 mentioning that in view of the pendency of approvals from various Departments, the

Petitioner required two months' extension of time without any penalty to commission the project.

- w) The CEIG vide letter dated 5<sup>th</sup> May 2016 approved the drawings and intimated to pay the inspection charges. The Petitioner submitted the required documents and paid inspection charges on 11.5.2016. The CEIG vide letter dated 20<sup>th</sup> May 2016 accorded Electrical Safety approval. The plant was commissioned on 21.5.2016. The Petitioner was accorded extension of time by one month and one day i.e. up to 21<sup>st</sup> May 2016 for commissioning the project vide letter dated 8.8.2016 of the Respondent-2.
- x) The Petitioner by its letter dated 26<sup>th</sup> September 2016 requested the Commission to approve the extension of time without change in PPA Tariff, bringing to the notice of the Commission that, as per the PPA, the COD was 21<sup>st</sup> April 2016 and that, the project was commissioned on 21<sup>st</sup> May 2016 with a delay of about one month and submitted reasons for the delay. The Commission vide letter dated 07<sup>th</sup> October 2016 directed the 2<sup>nd</sup> Respondent to take needful action on the said representation.
- y) The Petitioner by its letter dated 24<sup>th</sup> December 2016 requested the Managing Director of Respondent-3 to waive the penalties and requested to honour and implement the tariff granted under PPA.
- z) The Petitioner approached the Hon'ble High Court of Karnataka by filing WP No. 5492 of 2018. The Hon'ble High Court after hearing all the

parties disposed of the matter on 19.02.2018 with a direction to approach the concerned Respondents in accordance with law. Hence this petition is filed.

3. The grounds urged by the petitioner are:
  - a. Even though, the PPA was initialed on 21<sup>st</sup> October, 2014, the initialed PPA cannot be deemed to be an executed and legally enforceable document. As per the Electricity Act, 2003, no Agreement executed between the parties can be legally binding without the approval of the Commission. Hence, the 2<sup>nd</sup> Respondent sent the initialed PPA to the Commission for approval on 18<sup>th</sup> November, 2014. Thereafter, the Respondent sent an intimation letter on 29<sup>th</sup> December, 2014 calling upon the Petitioner to sign the Addendum to delete the Arbitration Clause in the PPA. As per the convenience and appointed date provided by the Respondent, the Addendum to the PPA was signed on 3<sup>rd</sup> February, 2015. It is only with the signing of the Addendum, the Respondent informed the Petitioner that the PPA execution process is complete and the approved original of the PPA and the Addendum was handed over to the Petitioner on 13<sup>th</sup> February, 2015. It is only after this date that the Petitioner could approach for project financing, closure of debt etc. After the initialed or draft PPA is approved by the Commission, the same is deemed to have been executed. The period of eighteen months for commissioning the project has to be reckoned from 13<sup>th</sup> February, 2015, the date of handing over of the PPA to

Petitioner, instead of the date of signing of the PPA. The Petitioner's commissioning of the project on 20.05.2016 can be said to be within the timelines prescribed under the PPA.

- b. The Commission being a quasi-judicial body ought not to have unilaterally corresponded with Respondent-2 behind the back of the Petitioner directing to reduce the tariff and levy liquidated damages, for the delay in commissioning of the plant. On the one hand the Commission has taken a unilateral premeditated view that the Petitioner is entitled to reduced tariff and liable to pay liquidated damages, and on the other hand has directed to file a petition before itself. A quasi-judicial body cannot pre-judge an important issue such as reduction of tariff and liquidated damages without hearing the affecting parties.
- c. The Hon'ble High Court of Karnataka in the case of *Clean Solar Power (Hiriyur) Private Limited V/s. KERC & Others* quashed a similar communication issued by this Commission. Subsequently, this Commission passed an order in OP No. 02/2017 between Clean Solar Power (Hiriyur) Private Limited V/s. HESCOM & Another (Clean Solar case) without altering the tariff.
- d. The Commission, in number of cases has directed ESCOMs to consider the requests of Solar Project developers for extension of time at ESCOM's level. The Commission as a Regulator cannot micro-manage

the affairs of Respondent-2 and should desist from contract management.

- e. The Respondent-2, under the provisions of the approved PPA, has rightly extended the SCD after due consideration of the cause for delay under Clause 5.7.1 of the PPA and provided for reasonable period of extension under clause 5.7.4. Hence, the Petitioner is entitled to the tariff of Rs. 7.17 per unit as agreed.
- f. The tariff under the PPA is discovered through a transparent scheme of competitive bidding. Hence, the tariff is not amenable to the variations in different generic tariff orders. The generic tariff order dated 30<sup>th</sup> July, 2015 specifically excludes its applicability to the projects under competitive bidding. Hence, there is no resultant impact of the delay in the commissioning. The Commission through Respondent-2 cannot determine / re-determine the tariff as though it is exercising power under section 62 of the Act.
- g. Even presuming that project is delayed beyond the timelines agreed under the PPA, the same is due to the Force Majeure Events as per Article 14 of the PPA. The grant of permission for the Non-Agricultural use by the Revenue Administration was not within the control of the Petitioner. As per Article 5.7 of the PPA, SCD and expiry date of PPA need to be deferred for the period for which such Force Majeure event subsists.

- h. Article 5.8 of the PPA has fixed the Liquidated Damages in case of delay in commencement of supply. The Ministry of New and Renewable Energy vide letter dated 28<sup>th</sup> July, 2017, has informed State Governments that if there are delays of any kind on the part of the State Government Authorities / PSUs in granting connectivity permission, allotment of land etc., extension of time may be granted as per the PPA terms.
- i. The Petitioner made the request to Respondent- 3 for Power Evacuation approval on 31<sup>st</sup> January, 2015. The final evacuation approval was granted by KPTCL on 27.7.2015 with a delay of nearly five months. This was not within the control of the Petitioner. The permission for drawing of the 11 kV line under Self Execution Scheme was applied for by the Petitioner on 01<sup>st</sup> August, 2015. The same was granted by GESCOM after a lapse of about six months on February, 2016. The petitioner applied for the Drawing Approvals on 29<sup>th</sup> January, 2016 whereas the permission from the Respondent-3 was received on 22<sup>nd</sup> March, 2016, with a delay of about two months. The Inspection of materials by TA & QC wing of Respondent-3 was applied for on 22<sup>nd</sup> March, 2016, whereas, the same was granted on 20<sup>th</sup> April, 2016, with a delay of about one month. The Petitioner applied for Safety Approval to the CEIG on 08<sup>th</sup> February, 2016, and the same was granted on 20<sup>th</sup> May, 2016, with a delay of about three months. From the date of project land registration, one year and three

months was taken for grant of the permission for Non-Agricultural use by the DC, Bidar.

- j. The generic tariff order dated 30<sup>th</sup> July, 2015 makes it abundantly clear about the applicability of the tariff as per the PPAs submitted for approval on or before 01<sup>st</sup> September, 2015 getting commissioned before 31<sup>st</sup> March, 2018. In the case of the Petitioner, the PPA was approved much before 1<sup>st</sup> September, 2015 and the project was commissioned much before 31<sup>st</sup> March, 2018. Hence, the tariff agreed in the PPA is applicable to the Petitioner.
- k. The damages levied under clause 4.3 of the PPA are not legally tenable. Clause 4.3 of the PPA mentions that if the delay has occurred for the reasons attributable to MESCOM or due to Force Majeure events, the damages are not to be levied. The Respondent has not mentioned as to which condition precedent has been delayed beyond 30 days of the specified period. The various permissions, sanctions and approvals have been given to the Petitioner after a lapse of several months for no fault of the Petitioner. As per Article 6.1.3 (d), Respondent-2 is obliged to provide support to facilitate the Petitioner in implementation and operation of the project. This obligation includes the obligation to secure requisite permissions and sanctions from various authorities. Hence, the Respondent cannot unilaterally impose the damages without explaining the reasons for such levy.

The petitioner has prayed to allow the petition.

4. Upon Notice, the Respondents entered appearance through their Counsel and filed the Statement of Objections. The gist of the Objections filed by Respondent-1 is as follows:

a. The Respondent-1 being the nodal agency for facilitating the development of renewable energy projects had called for bids for development of solar projects of 50 MW capacity and after processing the same, issued letter of award. The respondent-1 is not a necessary party to the Petition. The Respondent Nos. 2 & 3 have to counter the contentions urged by the Petitioner. Hence, the Respondent-1 has prayed to dismiss the petition as against it.

5. The gist of the Objections filed by Respondent-2 is as follows:

a. As per the terms of the PPA, the petitioner was obligated to achieve Commercial Operation Date (COD) on or before 21.04.2016, but, the project was commissioned on 20.05.2016 with a delay of one month. The delay is attributable to the negligent acts of the petitioner and not otherwise. The Petitioner is, primarily responsible for the delay in commissioning the project for the following reasons:

b. The Petitioner had requested Respondent-1 for change of location to Chittaguppa, Humnabad Taluk, Bidar District on 02.02.2015, more than 3 months after the execution of PPA.

- c. The application of the Petitioner to shift the location of the project, though allowed, cannot be a reason for delay under the Force Majeure Clause of the PPA, which mentions as:

*“to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices”.*

The Force Majeure clause is applicable only when the affected party has clearly established that it had taken reasonable care and complied with Prudent Utility Practices, which is not so in this case.

- d. Respondent-1 had issued NOC to the petitioner on 07.02.2015 allowing the change of location. The Petitioner got one Mr. Ramakrishna to own the project land vide sale deed executed on 25.02.2015 and 11.03.2015, 18-30 days after receiving the NOC from Respondent-1 with the intention of leasing such land from Mr. Ramakrishna for execution of the project. The Petitioner having requested for change in location, failed to act in a timely manner to ensure that the project is commissioned within the stipulated time.

- e. The Petitioner in para 13 of the petition has averred that the said Mr. Ramakrishna obtained complete ownership of the project land on 04.06.2015 when the mutation of the new land was completed. The Petitioner, admittedly, took over three months in complying with the post-sale compliances and the reasons accorded to such delay by

the Petitioner is the purported technical error in the system maintained with Tahsildar's office. The petitioner has failed to provide any proof to support this claim. The petitioner has attempted to pass the blame on the Tahsildar's office without any documentary evidence and the Petitioner is put to strict proof of such contention.

- f. The Petitioner was in a position to apply for permission to lease the land only after 8 months of execution of the PPA. The Petitioner was expected to be in such a position immediately after execution of the PPA. The delay of 8 months is only on account of shift in location and the un-substantiated technical errors in the Tahsildar's computer system. Such delay is attributable solely to the act of shifting the project to a different location and the same is not covered under the force majeure clause.
- g. The Petitioner has advertently admitted to the delay of 4 months owing to the shift of the project on hand in a letter addressed to Respondent-2 on 21.04.2016 (Annexure P-31).
- h. The time of 18 months is provided for in the PPA for commissioning the project considering the time involved in obtaining necessary government licenses and approvals. The COD has been delayed primarily on account of shift in location as elucidated above and the subsequent delays, therefore, flowed from it.

- i. The Petitioner has contended that the effective date of PPA is the date of execution of SPPA (Addendum), which is highly erroneous and contrary to the provisions of PPA. Article 3.1 of the PPA provides for effective date as follows:

*“This Agreement shall come into effect from the date of its execution by both the parties and such date shall be referred to as the Effective Date”.*

Admittedly, the PPA was executed on 21.10.2014 and as per Article 3.1 of the PPA, the same has come into effect on the very same date. The Addendum was executed to carry out changes directed by the Commission (to delete the arbitration clause). The PPA was approved by the Commission, with an observation to delete the said clause. The petitioner being a signatory to the PPA and having consented to the terms of PPA is now estopped under law to make contentions in direct contradiction to the terms of PPA. Should the Petitioner have been of the opinion that the effective date shall be the date of approval by the Commission or the date of execution of Addendum, the Petitioner should have raised a protest and objected to Article 3.1 of the PPA. The petitioner, on the contrary, has wilfully without any protest in any form has consented to Article 3.1 of the PPA and signed the PPA. Having done so, it is legally bound by the terms of the PPA and is prohibited from claiming otherwise. Hence, the effective date of the PPA should be considered as date of its execution, which is 21.10.2014.

If the date of execution of the Addendum is to be considered as execution of PPA and thereby the effective date of PPA, the same would have been provided for, either in PPA or the Addendum.

- j. The Petitioner has averred that since the tariff under PPA was fixed pursuant to the competitive bidding process as per the provisions of Section 63 of the Act, the same is not amenable to the generic tariff orders passed by the Commission from time to time. The Petitioner has also contended that the generic tariff order dated 30.07.2015 in its preamble has excluded itself from being applied to those projects in respect of which the tariff is discovered through competitive bidding process and therefore, the tariff of Rs. 6.51 per unit as per the said order cannot be levied on the project of the Petitioner, which is a result of competitive bidding process. These averments are misleading and erroneous. As per Clauses 12.1 and 12.2 of the PPA, the parties have agreed and subjected the tariff under PPA to the revised tariff of the Commission, if any as on the date of COD of the project in the event of delay in achieving COD.
- k. Section 63 of the Act excludes the applicability of generic tariff order as a matter of law but does not restrict the parties to the contract from agreeing to such generic tariff in the event of delay in achieving the COD. In the instant case, in line with provisions of the Section 63 of the Act, the tariff was not fixed as per the generic tariff determined by the Commission but was fixed as per the competitive bidding process,

however, the tariff as per Article 12 was subject to the project commissioning within the SCD and if there was delay, the lower of the agreed tariff or the generic tariff was made applicable. The Electricity Act, 2003 does not mandate the applicability of generic tariff orders on projects resulting from competitive bidding process, but in this case, the legally binding and enforceable terms of PPA mandate so. Therefore, in terms of the PPA, the applicable tariff in the instant case is Rs. 6.51 per unit, which was the prevailing tariff determined by the Commission as on the date of delayed commissioning of the project.

- I. The Petitioner has also averred that the Commission does not have power to regulate or validate the applicable tariff on the ground that the Petitioner has not been made privy to the communication between the Commission and the Respondent. It is a settled principle of law that every contract is subject to the applicable statutes and any provision of the contract in so far as it contradicts any law is void to that extent. Section 86 (1)(b) of the Electricity Act, 2003 requires the Commission to regulate electricity purchase and procurement process of the distribution licenses including the price at which electricity shall be procured from the generation companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State. This Section empowers the Commission to regulate the PPA and the clauses thereof in such manner as it deems fit.

m. The reasons for the delay in commissioning of the project and in fulfilling the conditions precedent are not covered under the force majeure clause of the PPA and hence, Respondent-2 is entitled to liquidated damages as per Articles 4.3 and 5.8.1 of the PPA.

6. The gist of the Objections filed by Respondent-3 is as follows:

a. The allegation that there is a delay on the part of the Respondent No.3 in giving necessary approvals, is denied as false. The chain of events with regard to the approval of power evacuation is as follows:

i) The Application for evacuation scheme was received on 09.08.2014 but the same was marred by infirmities and was not submitted along with necessary documents. Hence, a letter was addressed to the Petitioner on 10.09.2014, seeking required documents for processing of the application.

ii) The Petitioner filed an application on 16.09.2014 mentioning that it was looking forward to establish the solar plant in any of the 7 sub-stations named in the application and requested for issuance of feasibility certificate with evacuation arrangement and bay extension. It was also mentioned by the petitioner in the application that based on the feasibility certificate, land would be procured by the petitioner in the surrounding area for establishing the solar plant. In response to the same, Respondent-3 vide letter dated 12.11.2014 sought documents as the project was selected to be established in Siraguppa Taluk,

Ballari District, but the sub-stations for which feasibility were sought were in different places of Bidar District.

- iii) The Petitioner on 16.11.2014, filed an application stating that land was purchased near the Chitaguppa Sub-station and requested to issue feasibility certificate for evacuation of power and bay extension. The Respondent-3 replied vide letter dated 10.12.2014, requesting the petitioner to furnish a letter from Respondent-1 approving the change of location and the petitioner was also requested to pay the processing fees.
- iv) The Petitioner vide its letter dated 31.01.2015 requested the Respondent-3 to issue feasibility certificate for evacuation from Chitaguppa Sub-station and produced certain documents but did not furnish the approval from for change of location. The Petitioner submitted the approval from Respondent-1 for change of location on 09.02.2015.
- v) The Respondent-3 on 26.02.2015 intimated the petitioner to pay processing fees for the changed location and the fees was paid by the Petitioner on 12.03.2015.
- vi) Thereafter, the Respondent-3 sought a field report from the concerned transmission zone on 11.05.2015 and the same was received on 16.06.2015.
- vii) The tentative evacuation approval was granted on 10.07.2015, which was duly accepted by the petitioner on the same day and

Regular evacuation scheme was communicated to the petitioner on 27.07.2015.

viii) Therefore, there is no delay caused by Respondent No. 3 in the process of according power evacuation approval to the Petitioner. The Respondent no.3 has acted diligently and the time taken in processing the evacuation application is reasonable. The Petitioner, has in fact, delayed in clarifying the change in location.

The Respondents have prayed to dismiss the petition in its entirety.

7. The petitioner has filed Rejoinders to the Objections filed by the Respondents and written arguments reiterating the contentions that the delay in commissioning the project was due to force majeure events and therefore, there should be no reduction in tariff or levy of liquidated damages.

8. We have heard the learned counsel for the parties and perused the records. The following Issues arise for our consideration:

- (1) Whether the extension of time, granted by the 2<sup>nd</sup> Respondent to the Petitioner, for achieving the commercial operation of the Solar Power Plant, can be subjected to legal scrutiny by the Commission?
- (2) Whether the Petitioner has made out a case for deferment or extension of the Scheduled Commissioning Date of its Plant?

- (3) What should be the tariff for the Project, for the term of the PPA?
  - (4) Whether the Petitioner is liable to pay liquidated damages, as provided in the PPA for delay in achieving Conditions Precedent and commencement of supply of power to the Respondent-2 ?
  - (5) What Order?
9. After considering the submissions made by the learned counsel for the parties and the pleadings and other material placed on record, our findings on the above Issues are, as follows:
10. **ISSUE No.(1):** *Whether the extension of time, granted by the 2<sup>nd</sup> Respondent to the Petitioner, for achieving the commercial operation of the Solar Power Plant, can be subjected to legal scrutiny by the Commission?*
- (a) Article 5.7 of the PPA provides that extension of time to commission the project may be granted by the 2<sup>nd</sup> Respondent for a maximum period of 6 months, if the developer is prevented from performing the obligations by the SCD. It does not specifically stipulate that, such extension of time granted by the 2<sup>nd</sup> Respondent should be got approved by the Commission. However, Article 5.7.1 of the PPA, stipulates the grounds on which alone, the time could be extended, for achieving the commissioning of the project. Article 12.2 of the PPA provides for reduction of tariff, as a consequence of delay in the commissioning of the Project, beyond the SCD, subject to certain

terms and conditions stated therein. Whenever an event affects the quantum of tariff applicable, for supply of energy to the Distribution Licensees, we are of the considered opinion that, the same should be scrutinized and approved by the Commission. It is settled law that, this Commission has the exclusive jurisdiction to determine the tariff, for supply of electricity by a Generating Company to a Distribution Licensee and it has to regulate the electricity purchase and the procurement process of the Distribution Licensees, including the price at which the electricity shall be procured, from different agencies through PPAs. Therefore, we hold that, even in the absence of a specific term in the PPA, an event affecting or altering the tariff, already approved in the PPA, should be got approved by this Commission.

- (b) The Petitioner has contended that, as the Respondent-2 has accepted the claim of *Force Majeure* Events and granted the extension of time, the Commission cannot interfere in the matter. We are unable to accept the contention of the Petitioner. Any extension of time beyond the SCD, to commission a Power Project, has a bearing on the tariff payable. The tariff determination / fixation of price for electricity, is not an adversarial proceedings. The consumer who is not a party to the proceedings, ultimately pays for the supply of electricity and, therefore, is the most affected party. The Commission is required to safeguard such consumers' interest. While

upholding the role of the Commission, as a regulator and custodian of the interest of consumers, the Hon'ble Supreme Court, in the case of *All India Power Engineers Federation Ltd v. Sasan Power Ltd.*, reported in (2017) 1 SCC 487, has held that, even if parties to a contract (generating company - seller of energy and distribution licensee - purchaser of energy) waive a certain term affecting the tariff, the Commission, as a custodian of the consumers' interest, has to intervene and exercise its regulatory powers. Accordingly, we hold that, the Commission has the mandate and powers to scrutinize the correctness and legality of the extension of time, granted by the 2<sup>nd</sup> Respondent.

(c) Therefore, we answer Issue No.(1), in the affirmative.

11) **ISSUE No.(2):** *Whether the Petitioner has made out a case for deferment or extension of the Scheduled Commissioning Date of its Plant?*

a. We note that, under Clause 5.7.1 of the PPA, extension of time, for commissioning the Project, can be granted, if the developer is prevented from performing its obligations due to the 2<sup>nd</sup> Respondent's 'Event of Default' or the *Force Majeure* Events. The *Force Majeure* Events are mentioned in Clause 14.3 of the PPA. Under the said clause, it is also necessary to prove that, the *Force Majeure* Event could have been avoided if the affected party had taken reasonable care. Keeping these in view, we need to

examine, if the Petitioner, had taken reasonable care in performing its obligations under the PPA.

- b. The 1<sup>st</sup> Respondent invited bids for development of solar projects of 50 MW capacity in Karnataka. K K Rao Engineering Works Pvt Ltd., was one of the selected bidders for development of a solar project of 3 MW capacity and LoA dated 24.7.2014 was issued by the Respondent-1 wherein it is mentioned that the offer of the bidder to develop the solar plant at Siriguppa, Ballari District, was accepted. Pursuant to receipt of the LoA, the Petitioner Company was formed as the SPV to enter into PPA and to execute the project.
- c. The PPA is signed by the parties on 21.10.2014. As per Article 4.1 of the PPA, the Conditions Precedent had to be achieved within 270 days from the date of signing the PPA. As per the definition of the SCD in Article 21 of the PPA, the Project had to be commissioned within 18 months from the date of signing the PPA, i.e., on or before 20.04.2015. The achievement of the Conditions Precedent, would include obtaining of all the approvals by the SPV.
- d. It is alleged by the Petitioner that, due to delay in handing over the original PPA, it could not commence the work relating to establishing of the project. The recitals in the PPA would reveal

that the parties have signed the PPA and copies of the same were delivered on the date of signing the PPA (21.10.2014). If the copy was not delivered, the Petitioner ought to have demanded and collected the same. A signed copy of the PPA would be sufficient to proceed with the preliminary works for implementation of the Project. The approval of the PPA, by the Commission, has no bearing on the initial obligations of the SPV, such as, applying for approvals for land conversion and evacuation, loans, etc. The Petitioner has not produced any document to show that its applications for such approvals, loans, etc., were rejected or delayed, for want of approval of the PPA.

- e. We note that the PPA was sent by the 2<sup>nd</sup> Respondent to the Commission for approval vide letter dated 18.11.2014. The Commission approved the same vide letter dated 08.12.2014 and directed the parties to delete the Arbitration Clause. Upon receipt of this letter, the 2<sup>nd</sup> Respondent addressed a letter to the petitioner on 29.12.2014, to depute an authorized signatory for signing the addendum to the PPA, to effect the deletion of Arbitration Clause. The Addendum to the PPA was signed on 03.02.2015.
- f. An important aspect which we note is that, the PPA signed on 21.10.2014 mentions the location of the project as Humnabad Taluk, instead of Siraguppa Taluk, as was proposed by the bidder

(K K Rao Engineering Works Pvt Ltd) in its bid in response to the RfP and accepted by Respondent-1 and intimated in the LoA. The location could not have been mentioned as Humnabad Taluk in the PPA signed on 21.10.2014. The petitioner or the Respondent-2 who are the parties to the PPA have not given any acceptable explanation for inserting the location as Humnabad Taluk, instead of Siraguppa Taluk. The request for change of location was made by the petitioner for the first time on 02.02.2015 to the Respondent-1. When a letter dated 29.12.2014, was addressed by the Respondent-2 to the petitioner to depute an authorized signatory for signing the addendum to the PPA, subsequent to the request for change in location, the Petitioner came forward to sign the Addendum to the PPA on 03.02.2015. The petitioner is responsible for the delay between 29.12.2014 and 03.02.2015 in executing the Addendum to the PPA. No reason is furnished for this delay of more than a month.

- g. Another important aspect noted is that even before the signing of the PPA, the petitioner applied for issuance of feasibility certificate to the Respondent-3 on 9.8.2014 and 16.9.2014 (Annexures R-1 & R-2 produced by Respondent-3) for evacuation of power from the project from Humnabad Taluk. Hence, it can be inferred that the Petitioner had initiated measures to execute the project in the changed location at Humnabad even before the signing of the

PPA. Therefore, even if handing over of the original PPA was on 13.02.2015, it can be stated that this has not affected the execution of the project in any manner. Therefore, we are unable to accept that, this is a *Force Majeure* Event, causing delay in the commissioning of the Project.

- h. The other allegation made by the petitioner is that the Respondent-3 delayed the grant of evacuation approvals. The Respondent-3 has denied this aspect and furnished the dates on which the requests were made and clarifications /documents were sought and produced. A developer while applying for evacuation approval has to give definite details of the location of the project and produce the topo sheet marking the project location and nearby sub-station(s) to enable Respondent-3 to examine the feasibility of issuing evacuation approval. From the correspondences produced by Respondent-3 with the Objections, it can be made out that upto 31.1.2015/9.2.2015 , the petitioner was not certain about the location of the project. Though the application for evacuation approval was made by the petitioner on 9.8.2014, for the first time in the letter dated 16.11.2014, the petitioner has stated that lands have been purchased near Chitaguppa Sub-station. In the earlier letters of the petitioner to the Respondent-3, there is no certainty about the location and it is admitted that lands were not purchased. The

details of the land/exact location were not given even with the letter dated 16.11.2014. Therefore, Respondent-3, vide letter dated 10.12.2014, sought for approval of change in location and the topo sheet to show the location of the project. The petitioner has stated in the rejoinder that there is no necessity of obtaining any approval from Respondent-1 for change of location of the project and Respondent-3 could not have insisted upon the production of such document. The petitioner has in the rejoinder stated that as on 21.10.2014 (date of signing the PPA), it was known that the project would be set up in Humnabad Taluk. If it was so, it should have produced the documents showing the location of the project, to Respondent-3. In the application dated 9.8.2014 produced as Annexure 53, the petitioner had mentioned that it was planning to establish the solar plant near one of the two sub-stations at Mannekalli, Taluk & District Bidar, or Nirna, Humnabad Taluk. In the letter dated 16.9.2014, a list of 7 sub-stations is mentioned by the petitioner stating that the solar plant would be established near any of the 7 sub-stations and that land would be procured in the surrounding area based on the feasibility certificate to be given. These facts clearly indicate that the project location was not finalized by the petitioner when the applications for evacuation were made. Admittedly, the sale deeds for the land in Humnabad Taluk were executed on 25.2.2015 and 11.3.2015, the lease rights were granted by the

concerned authorities on 08.02.2016 and conversion of land was granted by the DC, Bidar on 22.04.2016. Therefore, the documents reveal that some time during January or February 2015, the exact location was finalized by the petitioner and relevant documents were produced. This delay cannot be attributable to the Respondents in any manner.

- i. The petitioner has contended that the date of application for grant of evacuation approval should be taken as 09.08.2014. The petitioner has admitted in the rejoinder that the date on which the documents showing the exact location of the project is produced, should be taken as the date of application for evacuation approval and has stated that the relevant documents were furnished by the petitioner to the Respondent-3 vide letters dated 31.01.2015 and 09.02.2015 (Annexure R-6 & R-7 produced by Respondent-3). On 26.02.2015, the Respondent-3 requested the petitioner to pay the processing fee. The fee was paid on 12.03.2015. The petitioner has alleged that even after producing the documents, the Respondent-3 took 6 months to issue the evacuation approval which is only a simple format which had to be typed and issued. We cannot accept that the evacuation approval is only a simple format which had to be typed and issued. The technical feasibility report has to be called for from the concerned transmission zone and approved by the

concerned Engineer(s). This has been done by the Respondent-3 during the period from 11.05.2015 to 04.07.2015. The tentative evacuation approval was granted on 10.07.2015 and Regular evacuation approval was granted on 27.07.2015. Considering the dates and events mentioned above, it can be stated that the evacuation approval was granted within a reasonable time, after production of all the documents by the petitioner and there is no delay on the part of Respondent-3 in granting the evacuation approval.

- j. The other allegation made by the petitioner is that the mutation process, grant of lease and conversion of land were delayed by the Government authorities. As stated earlier, the sale deeds in respect of the lands were executed on 25.02.2015 and 11.03.2015. It is stated by the petitioner that the mutation process, which had to be completed in one month was completed by the Revenue authorities on 12.06.2015, due to technical errors in the Computer system and Panchayat elections. The application for grant of lease of the lands was made to the DC, Bidar on 16.06.2015 by the petitioner. The DC, after calling for the reports from the concerned authorities, has passed an Order dated 08.02.2016, granting the lease. Thereafter, the petitioner applied on 24.02.2016 for conversion of the land for non agricultural use, before the DC, Bidar. The DC directed to pay the fee on 07.04.2016. The petitioner

paid the fee on 12.04.2016 and the conversion order was passed by the DC on 22.04.2016.

- k. In respect of the period of delay from the date of signing the PPA mentioning Humnabad Taluk as the location of the project and date of sale deeds for purchasing the land, it is stated by the petitioner that this was due to delay in communication of approval of the PPA by Respondent-2 and that soon after receipt of intimation about the approval of PPA, steps were taken to purchase the land of 15 acres from several persons. Article 4 of the PPA provides that the developer has to obtain all consents, clearances and permits within 270 days from the date of signing the PPA, unless prevented by force majeure events mentioned in Article 14. Article 14.3.1 defines the force majeure events. The event mentioned by the petitioner does not qualify as force majeure event as per the terms of the PPA. The bidder had in the RfP mentioned the location as Siraguppa Taluk, Ballari District and the same was accepted. Clause 1.1.10 of the RfP provides that the selected bidder may change the location proposed during the RfP stage if the land cannot be acquired or for other technical reasons. In this case, no such reasons are mentioned for changing the location. The change of location was the unilateral decision of the petitioner. There is a delay in executing the sale deeds by the petitioner from 21.10.2014, the date of signing the PPA mentioning

the location as Humnabad Taluk and 25.02.2015/11.03.2015, the dates of sale deeds. The reason mentioned by the petitioner cannot be accepted, as we have held in the preceding paragraphs that the petitioner ought to have procured a copy of the PPA and that the petitioner took more than a month to sign the Addendum to the PPA and obtain the original PPA. We have noted in the preceding paragraphs that even before the signing of the PPA, the petitioner had initiated steps to execute the project at Humnabad Taluk.

- l. The next allegation of the petitioner is that GESCOM caused delay in providing the estimate for laying the 11 kV line from the project to the Sub-station. It is alleged that though the application was made to GESCOM on 01.08.2015, the estimate was made on 03.12.2015 and the estimate was approved by GESCOM on 03.02.2016. We note that GESCOM is not a party to these proceedings. Without hearing GESCOM about the reasons, it cannot be concluded that this is a force majeure event or not.
- m. The next allegation of the petitioner is that the Respondent-3 caused delay in providing the estimate for bay extension. It is stated that the application was made by the petitioner on 13.10.2015, estimate was made by Respondent-3 on 08.12.2015, supervision charges were paid by the petitioner on 09.01.2016 and the estimate was issued on 23.01.2016. we note that immediately,

after grant of Regular evacuation approval on 27.07.2015, the petitioner should have applied to Respondent-3 for estimation of bay extension. After a delay of about 2½ months, the petitioner has made the application. No reason is given for this time lapse. Looking at the dates and events mentioned above, the time taken by Respondent-3 cannot be said to be too long.

- n. The further allegation of the petitioner is that Respondent-3 caused delay of 2 months in approving the drawings of the material, from the date of submission of drawings by the petitioner on 29.01.2016 to the date of approval on 22.03.2016. The time taken is less than 2 months, and this period cannot be termed as delay. It is also alleged that the TA & QC wing of Respondent-3 took one month's time for inspection of materials from 22.03.2016 to 20.04.2016 and to issue the Certificate. This period of less than one month cannot be termed as delay, as charges have to be collected, spot inspection has to be conducted and the materials have to be tested for quality.
- o. It is also alleged by the petitioner that the CEIG took 3 months' time to grant safety approval from 08.02.2016, the date of submission of drawings by the petitioner to 20.05.2016, the date of grant of approval. CEIG is not a party to these proceedings. From the sequence of events mentioned in the Written Arguments filed by

the petitioner, it is seen that certain clarifications were sought by the CEIG on 19.02.2016 and the same were submitted by the petitioner on 01.03.2016 & 25.03.2016. The drawing scrutiny fee was paid on 18.04.2016. The drawings were approved on 05.05.2016, Inspection charges paid on 19.05.2016 and the Safety approval was granted on 20.05.2016. The Safety approval dated 20.05.2016, reveals that certain documents were called for on 12.05.2016 by the CEIG, after the petitioner filed the work completion report on 11.05.2016. The documents called for were submitted by the petitioner on 20.05.2016 and on the same day, the safety approval was granted. Thus, we feel that the time taken for granting safety approval cannot be termed as delay.

p. For the foregoing reasons, Issue No. 2 is answered in the negative.

12) **ISSUE No.(3):** *What should be the tariff for the Project, for the term of the PPA?*

(a) Article 12 of the PPA reads as follows:

*“12.1: The Developer shall be entitled to receive the Tariff of Rs.7.17 per kWh of energy supplied by it to MESCOM 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 Clause 12.1 above*

*ii. KERC Applicable Tariff as on the Commercial Operation Date."*

- (b) It is the allegation of the petitioner that the tariff cannot be altered in this case, as the same was discovered through bidding under Section 63 of the Electricity Act. We note that the draft PPA containing the above Article, was a part of RfP. The petitioner was aware of the Clause in the PPA at the stage of bidding. The parties have signed the PPA containing the above Clause which provides for reduction of the tariff, as a consequence of delay in commissioning of the Solar Power Project, beyond the SCD, subject to certain terms and conditions stated, therein.
- (c) We have held that the events claimed by the petitioner for not being able to adhere to the time lines in the PPA, do not fall under the *Force Majeure* clause in the PPA, that could have entitled the Petitioner to seek extension of the commissioning date, agreed to in the PPA. Thus, the Petitioner is not entitled to the tariff, originally agreed to in the PPA, at Rs.7.17 per unit, when admittedly the Plant was not commissioned within the stipulated time and it is entitled only for the revised tariff, as on the date of commissioning of the Plant, as per Article 12.2 of the PPA. Admittedly, in the present case, the generic tariff for the Solar

Power Plants, was revised much before the Plant was ready for commissioning. In any case, the Petitioner having voluntarily entered into a PPA, which has a clause providing for revision of the tariff agreed, if there is a delay in commissioning of the Project, within the scheduled period, cannot now wriggle out of such a clause, without valid grounds.

(d) The contention of the Petitioner is that the generic tariff order dated 30.07.2015 is not applicable to the case. The PPA provides that the KERC tariff, on the date of commercial operation, will be applicable for the Project. The Project is commissioned on 20.05.2016. The Hon'ble Supreme Court of India, in Civil Appeal No.1220 of 2015 (*Gujarat Urja Vikas Nigam Limited VS EMCO Limited and another*), decided 02.02.2016, has held, as follows:

*"31. Apart from that both the respondent No.2 and the appellate tribunal failed to notice and the 1<sup>st</sup> Respondent conveniently ignored one crucial condition of the PPA contained in the last sentence of para 5.2 of the PPA:-*

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

*The said stipulation clearly envisaged a situation where notwithstanding the contract between the parties (the PPA), there is a possibility of the first Respondent not being*

*able to commence the generation of electricity within the “control period” stipulated in the 1<sup>st</sup> tariff order. It is also visualised that for the subsequent control period, the tariffs payable to projects / power producers (similarly situated as the first Respondent) could be different. In recognition of the said two factors, the PPA clearly stipulated that in such a situation, the 1<sup>st</sup> Respondent would be entitled only for lower of the two tariffs....”*

The ratio of the Hon'ble Supreme Court's judgment, in the above case, is applicable to the Petitioner's case, as the PPA envisages a similar situation.

- (e) The petitioner has relied on the decision of the Commission in Clean Solar case, to say that the PPA in that case contained a similar provision but the Commission passed an order that the agreed tariff would apply. In the Clean Solar case, although the project was commissioned after a certain period of delay, there was no variation in the KERC determined generic tariff as on the date of the commissioning of the project. In the case on hand, the generic tariff order dated 30.07.2015 had come into force, as on the date of commissioning of the plant. The facts being different, the decision in Clean Solar case does not help the petitioner.
- (f) Hence, on the facts and in the circumstances of the case, we hold that, the Petitioner's Plant is entitled to a tariff of Rs.6.51 per unit, for the term of the PPA, as per the Generic Tariff Order dated 30.07.2015.
- (g) Accordingly, we answer Issue No. (3), as above.

13. **ISSUE No.(4):** *Whether the Petitioner is liable to pay liquidated damages, as provided in the PPA for delay in achieving Conditions Precedent and commencement of supply of power to the Respondent-2 ?*

(a) We note that, when a timeline of 270 days is provided in the PPA for getting all the approvals, the delay by the Petitioner, in applying for such approvals and, thereafter, attributing the delay to the authorities, cannot be accepted. We note that, it is settled law that, the *Force Majeure* clause in the PPA has to be strictly interpreted. None of the reasons or events cited by the Petitioner, for the delay in commissioning of its Project, falls under the *Force Majeure* Events, mentioned in the PPA, as held in the preceding paragraphs. Hence, we consider the Petitioner is not entitled to extension of time, as provided in the clauses of the PPA. Admittedly, there is a delay in achieving the Conditions Precedent, viz., in acquiring the land and in producing the documentary evidence for having acquired the title and possession of the land acquired for the Project in the name of the Developer. Unless there are grounds established by the Petitioner for the extension of time for achieving the Conditions Precedent, the Petitioner would be liable for payment of damages under Article 4.3 of the PPA, for the

delay in achieving the Conditions Precedent and under Article 5.8 of the PPA, for the delay in supply of power to the Respondent-2.

(b) The learned counsel for the Petitioner submitted that, the Respondent-2 has to prove the actual loss suffered even when the Liquidated Damages are provided for in the PPA. He has relied on several case laws in the Written Arguments. He has relied upon the decision of the Hon'ble Supreme Court, reported in (2015) 4 SCC 136 in the case of *Kailash Nath Associates –Vs- Delhi Development Authority and others*. In the said case, the Hon'ble Supreme Court, on consideration of the various authorities, has summarized the principle, in paragraph-43 of the Judgment, thus:

**“43.** *On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:*

**43.1** *Where a sum is named in a contract as liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.*

**43.2** Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found *inter alia* in Section 73 of the Contract Act.

**43.3** Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a *sine qua non* for the applicability of the section.

**43.4** The section applies whether a person is a plaintiff or a defendant in a suit.

**43.5** The sum spoken of may already be paid or be payable in future.

**43.6** The expression 'whether or not actual damage or loss is proved to have been caused thereby' means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

**43.7** Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application."

- c) In the above decision, in Paragraph-43.6, it is held that, where it is possible to prove actual damage or loss, such proof is not dispensed with and it is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if it is a genuine pre-estimate, can be awarded. We are of the considered opinion that, in the present case, it is

difficult or impossible to prove the actual damage or loss and that the liquidated damages named in the contract is a genuine pre-estimate of the damage or loss sustained, for the delay in achieving the Conditions Precedent and the SCD. It is difficult, or impossible, to prove the actual damage or loss sustained, in the case of the delay in supply of power to the Respondent. In the above decision, in Paragraph-43.7, it is stated that, Section 74 will apply to cases of forfeiture of earnest money under a contract and where forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application.

d) We note that, admittedly, there is delay in supply of power beyond the SCD. The Project was commissioned on 20.05.2016, instead of on or before 20.04.2016, which was the SCD. We are of the considered opinion that, the damages to be recovered, as per Article 4.3 of the PPA, for not fulfilling the Conditions Precedent, is akin to the principle stated in Paragraph-43.7 of the above-said decision, because the rights and obligations of the parties under the PPA would be subject to the satisfaction, in full, of the Conditions Precedent, specified in Article 4.3.

e) Article 4.3 of the PPA provides that, for the delay in achieving the Conditions Precedent, the Developer shall pay to the Respondent, the damages in an amount, calculated at the rate of 0.2% of the

Performance Security, for each day's delay, until fulfilment of such Conditions Precedent, subject to a maximum period of thirty days. The said Article further provides that, on expiry of the said thirty days' period, the Respondent, at its discretion, may terminate the PPA. The Respondent has not taken any steps for termination of the PPA, even after the expiry of the thirty days' period, but has demanded only the Liquidated Damages, as per the terms of the PPA.

- f) We note that, in the decision reported in (2018) 6 SCC 157, in the case of *Madhya Pradesh Power Management Company Limited – Vs- Renew Clean Energy Private Limited and another*, the Hon'ble Supreme Court has held that, where the contract provides for claiming damages and also for termination of the contract, for the delayed performance, the damages in terms of the Agreement could be claimed, instead of taking steps for termination of the Agreement and that, under such circumstances, the Liquidated Damages as per the Agreement could be awarded. Therefore, we are of the considered view that, even without there being any proof of the actual damage or loss, the Liquidated Damages, as agreed to, could be awarded, where steps for the termination of the contract is not taken. We also note that, the quantum of the Liquidated Damages, agreed to, is quite reasonable, as provided in Articles 4.3 and 5.8 of the PPA.

g) The petitioner has challenged Annexure P-1 under which liquidated damages are claimed by Respondent-2. While claiming the liquidated damages for delay in commencement of supply of power, the Respondent-2 has calculated the delay of 31 days. We note that the delay is only 30 days in commencement of supply of power. The SCD was 20.04.2016 and the plant was commissioned on 20.05.2016. Therefore, the delayed period has to be counted from 21.04.2016 to 20.05.2016, which comes to one month. Hence, under clause 5.8.1(a) of the PPA, the petitioner is liable to pay liquidated damages at 20% of the Performance Security, for the delay in supply of power by one month. In Annexure P-1, the Respondent-2 has claimed damages for the second month also, assuming that the delay in commencement of power supply even entered the second month which is not correct.

h) Issue No.4 is answered accordingly.

14) **ISSUE No.(5):** *What Order?*

For the foregoing reasons, we pass the following:

**ORDER**

(a) The Petitioner is entitled to a tariff of Rs.6.51 (Rupees Six and Paise fifty one) only per unit, the varied tariff as applicable on the date of commissioning of the Petitioner's Plant, as fixed by

the Commission in the Order dated 30.7.2015, for the term of the PPA;

- (b) The Petitioner is also liable to pay damages, as provided under Articles 4.3 and 5.8.1(a) of the PPA; and
- (c) The claim for liquidated damages made by Respondent-2 in Annexure P-1 for the delay in commencement of supply of power beyond one month, is set aside.

The petition is disposed of accordingly.

Sd/-

(SHAMBHU DAYAL MEENA)  
CHAIRMAN

Sd/-

(H.M. MANJUNATHA)  
MEMBER

Sd/-

(M.D. RAVI)  
MEMBER

