

No./66/2018

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

Dated: 11.11.2020

Present

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

OP No.29/2018

BETWEEN:

Messrs Adani Green Energy (UP) Limited,
A Company Registered under the
Provisions of the Companies Act, 2013
Adani House, Nr. Mithkhali Six Roads,
Navrangpura,
Ahmedabad-380 009.
(Represented by its Authorized Signatory)

... PETITIONER

[Represented by Smt. Poonam Patil, Advocate]

AND:

1) Hubli Electricity Supply Company Limited,
A Company Registered under the provisions of
Companies Act, 1956 having its Registered
Office at Navanagar, P.B. Road,
Hubli-580 025.
(Represented by its Managing Director)

2) Karnataka Renewable Energy Development Limited
A Company Registered under the provisions of
Companies Act, 1956 having its Registered
Office at No. 39, 'Shanthi Gruha'
Bharat Scout and Guides Building, Palace Road,
Bengaluru-560 001.
(Represented by its Managing Director)

3) Karnataka Power Transmission Corporation Limited
A Company Registered under the provisions of
Companies Act, 1956 having its Registered
Corporate Office, kaveri Bhavan,
K.G. Road, Bengaluru-560 009.
(Represented by its Managing Director)

4) State of Karnataka,
Department of Energy,
Room No.236, 2nd Floor,
Vikasa soudha,
Dr. B.R. Ambedkar Veedhi,
Bengaluru-560 001.
(Represented by its Addl. Chief Secretary)

..... **RESPONDENTS**

[Respondents 1 & 3 represented by Indus Law, Advocates;
Respondents 2 & 4 represented by Sri. Murugesh V Charati, Advocate]

ORDERS

1. This is a petition filed under section 86 of the Electricity Act, 2003, praying for the following reliefs to:
 - a) Call for records;
 - b) Declare that the Petitioner was prevented from performing its obligation under the Power Purchase Agreement (PPA) due to Force Majeure events referred hereinafter affecting it; and
 - c) Grant concurrence to the Supplemental Power Purchase Agreement (SPPA) dated 17.12.2016; and
 - d) Declare that the 'Effective Date' under Article 3.1 of the PPA is the date on which the Supplementary PPA receives its concurrence from this Hon'ble Commission;

Alternatively

- d) Declare that the Effective Date under Article 3.1 of the PPA is the date on which the Supplementary PPA signed by the Petitioner and Respondent-1 on 17.12.2016;

Alternatively

- d) Declare that the Effective Date under Article 3.1 of the PPA is the date on which the PPA approval letter of the Commission received by the Petitioner on 21.10.2016;
- e) If the Commission were to consider that there is a delay in fulfilment of the Conditions Precedents and commissioning the project, the Commission may be pleased to condone the inadvertent delay caused for the reasons beyond the control of the Petitioner due to 'Force Majeure' events affecting it in fulfilment of the Conditions Precedent and in achieving the Commercial Operation Date (COD) of the Project; and
- f) Direct the Respondents not to levy any liquidated damages and not to take any other or incidental coercive measures under the PPA or under any other law for the time being force, against the Petitioner based on the previous understanding of the parties on the 'Effective Date' and resultant COD;

2. The facts of the case are:

- a) The Petitioner is a Company incorporated under the Companies Act, 2013, a 100% subsidiary of Adani Green Energy Limited and is primarily engaged in the business of setting up of power plants and generation of Electricity.
- b) The Respondent-2 invited proposals by its "Request for Proposal" dated 12.02.2016 (hereinafter referred to as RfP) prescribing the technical and

commercial conditions for selection of bidders for undertaking development of Solar PV ground mounted power plants in Karnataka to be implemented in 17 Taluks for capacity of 290 MW through private sector participation.

- c) Respondent-2 after evaluation of the proposals received from bidders, accepted the bid of Adani Green Energy Limited for development of 20 MW capacity of Solar project at Chanapatana Taluk of Ramanagara District, and issued a Letter of Award (hereinafter called the "LoA") and Allotment Letter dated 30.05.2016 (Annexure-P2 produced by the Petitioner) to Adani Green Energy Limited, requiring, execution of Power Purchase Agreement.
- d) Adani Green Energy Limited accepted the LoA for development of 20 MW Solar PV project at Chanapatana Taluk of Ramanagara District, vide its letter dated 08.06.2016 (Annexure-P3 produced by the Petitioner) and as per clause No.2.1.1 of the RfP, proposed to execute the Project through Special Purpose vehicle (SPV), Adani Green Energy (UP) Limited, i.e., the Petitioner.
- e) Thereafter, the Petitioner executed a PPA with Respondent-1 on 28.06.2016 (Annexure-P4 produced by the Petitioner) for setting up of the Solar Power Plant at Chanapatana Taluk of Ramanagara District. The PPA was forwarded by the Respondent-1 to the Commission for approval.
- f) The Commission vide its letter dated 05.10.2016 (Annexure-P5 produced by the Petitioner) communicated the approval of the PPA subject to incorporating certain corrections/modifications by entering into a suitable Supplemental PPA. The said letter of the Commission was received by the Petitioner on 12.10.2016.

Accordingly, the Petitioner executed a SPPA dated 28.12.2016 (Annexure-P6 produced by the Petitioner) with 1st Respondent.

g) The Petitioner received the inter connection approval from the Respondent-3 (KPTCL) on 28.02.2018 (Annexure-P7 produced by the Petitioner) for connecting the project within KPTCL grid at 66kv 66/11kv Byrapatna Sub-station and successfully commissioned project on 02.03.2018.

h) Clause 3.1 of the PPA defines the term "Effective Date" as 'This agreement shall come into effect from the date of its execution by getting concurrence from KERC on the PPA and such date shall be referred to as the 'Effective Date'.

i) As per Article 4.2 of the PPA, the Solar Project Developer (SPD), is required to achieve the Conditions Precedent, i.e., financial closure, obtain evacuation approval and documentary evidence of having clear title and possession of the land, required for the Project in the name of Developer within eight months from the Effective Date of the PPA, unless such completion is affected by any Force Majeure event, or if any of the activities is specifically waived in writing by the 1st Respondent (HECSOM).

j) Article 21 of the PPA defines the term "Scheduled Commissioning Date" as twelve months (12) from the 'Effective Date'.

k) The Petitioner communicated with the Additional Chief Secretary, Government of Karnataka (GoK), Energy Department vide its letter dated 30.05.2017 (Annexure-P9 produced by the Petitioner) relating to fulfilment of Conditions Precedent under the PPA and submitted that the process for land procurement

and approval under Section 95/109 of the Karnataka Land Revenue Act, 1964 Karnataka Land Reforms Act, 1961 respectively, is a time consuming process and beyond the control of Developers. The Petitioner requested the Government of Karnataka (GoK) to intervene in the matter and direct the ESCOMs to take cognizance of the documents submitted to KRDEL, as sufficient compliance of the 'Conditions Precedent'.

- l) The Petitioner further addressed a letter dated 10.06.2017 (Annexure-P10 produced by the Petitioner) to Respondent-1 requesting to accept documents submitted to the Respondent-2 (KREDL) for approval under Section 95/109 of the KLR Act,1964 and KLR Act,1961 respectively as sufficient compliance of Conditions Precedent. The Petitioner also requested for time extension of three months, if the submitted documents are not acceptable.
- m) The Respondent-No.1 vide letter number HESCOM/GM(T)/PTC/347/17-18/10245-47 dated 19.07.2017 (Annexure-P11 produced by the Petitioner), Informed the Petitioner that to take written direction from either Government of Karnataka and / or KREDL for considering documents submitted by KREDL for Section 95/109 approval as sufficient compliance of Conditions Precedent.
- n) The Petitioner had, immediately after issuance of LoA, even before the signing of PPA and approval of the PPA by the Commission, approached the KPTCL for connectivity approvals. However, KPTCL, kept the connectivity approval process on hold for want of Commission's approval to the PPA in light of Commission's communication returning all the PPAs to ESCOMs. In the absence

of Commission's approval and transmission connectivity approvals, the Petitioner was unable to progress on the land acquisition activities. Hence, the Petitioner lost precious time of project execution for no fault of it but due to delay in the process of getting approval of PPA from the Commission and withholding of the connectivity permissions by KPTCL.

o) Tentative Evacuation Scheme was communicated vide letter dated 08.06.2017 (Annexure-P12 collectively produced by the Petitioner). Despite the best efforts from the Petitioner, KPTCL had given regular connectivity approval on 21.06.2017 (Annexure-P12 collectively produced by the Petitioner) and due to this, there was consequential delay in acquisition of lands and various Government approvals.

p) After getting the regular connectivity approval from KPTCL, the Petitioner initiated land acquisition activity and approached KREDL on 03.06.2017 (Annexure-P13 produced by the Petitioner) for issuance of Government Order under Section 95 of KLR (Amendment) Act, 2015, for acquisition of 88 acres 19 guntas of land on lease. The said Order from the Government authorities is awaited. This has resulted in delay in obtaining the clear title and possession of the land, required for the project within 8-months from 'Effective Date' of the PPA i.e., 05.10.2016. The above said circumstance/events were not within the reasonable control of the Petitioner in the performance of its obligations under the PPA (and it amount to 'Force Majeure' under Article 14 of the PPA).

- q) The Petitioner has stated that the Demonetization declared on 08.11.2016, stalled the activities of the Solar Power Project for a period of 2-3 months and it also affected the acquisition of lands required for the project.
- r) The Petitioner has further stated that Goods and Services Tax (GST) introduced with effect from 01.07.2017, affected the supplies by the Vendors of the goods indented which resulted in slow progress of the project implementation for a period of 3-4 months.
- s) The Petitioner has further stated that there was extraordinary delay in Customs clearance of Solar Modules imported by the Petitioner for its projects in Karnataka through Chennai Port and Nahva Sheva Port due to wrong classification of HSN Code for Solar PV modules by the respective Customs Authorities. In this regard, the Petitioner has made detailed averments in Paragraphs 32 to 38 of the petition and relied upon Annexure-P14 to Annexure-P18.
- t) The definition of 'Force Majeure' cannot be restricted to a few examples set out in Article 14.3 of the PPA and the illustrations are not exhaustive and the intention of the parties was to save the performing party from the consequences of anything over which the affected party has no control and as a result of which it was rendered incapable of performing the contract.
- u) As per Article 5.7 of the PPA, the Scheduled Commissioning Date and expiry date of the PPA needs to be deferred for the period during which such Force Majeure

event subsists and consequently the SPD is prevented from performing its obligations under Article 5.1.

v) For land acquisition, the following process needs to be followed:

(i) For Purchase of land: Procedure under Section 109 of the Karnataka Land Revenue Act, 1964 is to be followed. The Application for purchase of land has to be submitted to the Managing Director, KREDL by the Petitioner, thereafter, KREDL issues a formal letter after processing it & sends it to Deputy Commissioner of the District concerned. Thereafter, the Petitioner has to follow it with concerned Deputy Commissioner's Office for Purchase of land from individual farmers & got it conversion into non-agricultural purpose. This process is tedious, complex and time consuming cumbersome process.

(ii) For Lease of land: KREDL scrutinises all land documents and forwards the same to the Department of Energy for issuance of Government Notification/Order under Section 95 of KLR (Amendment) Act, 2015. Post this Government Notification, the concerned Deputy Commissioner issues a demand note for payment of conversion fees. After paying of the conversion fees, the lease between the farmer/land owner & KREDL will be registered. Thereafter, the Lease/sub-lease will have to be registered between the SPD and KREDL. These activities involve collection and collation of huge amount of documentation from the taluk offices and involves numerous steps. Moreover, for the land extent beyond the ceiling limit of 20 units, Cabinet approval of Karnataka

Government is required. The whole process takes 5 to 6 months or even more time for KREDL.

- w) The Petitioner considering the above facts, on 06.07.2017 and 31.07.2017 (Annexure-P19 collectively) issued notice to the Respondent-1 in accordance with the Articles 14.5 and 5.7 of the PPA on occurrence of the 'Force Majeure' events and requested to allow time extension for fulfilment of Conditions Precedent till issuance of approval from Government of Karnataka permitting usage of lands for non-agricultural purposes or till project achieves its Commercial Operation Date, whichever is earlier.
- x) The Ministry of New and Renewable Energy (MNRE), on 28.07.2017 (Annexure-P20), taking due cognizance of the fact that the delay in connectivity permission, land approvals and 'Force Majeure' events can delay project implementation, has informed the State Governments that competent authorities can allow extension of time as per contractual agreements.
- y) In the light of the MNRE's letter, the Petitioner on 02.08.2017 (Annexure -P21), once again requested to the Respondent-1 in terms of Article 5.7 of PPA to provide relief by granting extension of time in submission of documents on fulfilling Conditions Precedent and achieving SCOD by at least 74 days (equivalent to delay by KPTCL for connectivity approval).
- z) The Petitioner requested the 1st Respondent to provide relief by providing time extension in Commercial Operation Date (COD) for a period equivalent to the period for which our project was affected due to delay in Government

Notification, for conversion of land and Tahsildar Notice to stop construction of activities. The Petitioners rigorous pursuance with the various Government authorities, the Tahsildar finally withdrew the Notice dated 11.01.2018. Due to such continued pressure exerted on the Petitioner, the construction equipment and labour also had to be de-mobilized. Due to the said incidence the Petitioner lost at least 20 days' precious time in the implementation of the Project, on no fault of Petitioner and such circumstance/events were not within the reasonable control of the Petitioner and which resulted into preventing Petitioner in the performance of its obligations under the PPA.

aa) The 1st Respondent (HESCOM) vide letter dated 21.02.2018 (Annexure-P25 produced by the Petitioner) communicated its concurrence for synchronization and commissioning on or before 15.03.2018 considering the Petitioner's request letters dated 30.01.2018, 16.02.2018 for grant of extension upto 15.03.2018, due to Force Majeure events and its consequences on the progress of the project. The 1st Respondent, in the said letter also directed the Petitioner to file petition before KERC with all the relevant grounds/documents for justifying the claims for time extension of Commercial Operation Date (COD).

3. Apart from the above, the Petitioner urged the following grounds:

a) There was considerable delay in approval of PPA by the Commission. No meaningful progress is expected till the PPA is approved by the Commission.

The Supplementary PPA has modified the terms of the PPA. In other words, the original PPA is to be read together with the SPPA. The 'Effective Date' needs to be revised from 05.10.2016 to the date of signing of SPPA on 28.12.2016. Unless the SPPA is approved, the 'Effective Date' does not commence. As SPPA is yet to be approved, there is no question of levying penalty or liquidated damages.

- b) In view of the changes in the definition on Delivery Point in the SPPA, the Petitioner had to make substantial deliberations on whether to continue with or shift the project site/s. The Petitioner waited for a long time for the approval of the SPPA to get certainty on the Delivery point/s. Since, approval was not accorded to the SPPA, the Petitioner was contemplating to commission the project as per the original PPA. This caused substantial delays. In order to confer certainty on the investment, the SPPA needs to be approved by the Commission. Hence, the Effective Date should be considered from the date of approval of the SPPA.
- c) The delay in grant of PPA approval and connectivity approval beyond reasonable time, is not within reasonable control of the Petitioner and therefore is a 'Force Majeure' event under Article 14 of PPA.
- d) As per Article 5.7 of the PPA, SCOD and expiry date of PPA needs to be deferred for the period for which such 'Force Majeure' event subsists.
- e) The tariff under the PPA is discovered through competitive bidding and hence, it is not vulnerable to the variations in the Generic Tariff Effected vide different

Generic Tariff Orders. The Generic Tariff Order dated 30.07.2015 specifically excludes its applicability to the projects under competitive bidding. Since the subsequent Generic Tariff Order dated 12.04.2017 is only a modification of the earlier order, this too is not applicable to the petitioner's case. Hence, there is no resultant impact on the tariff for delays in the commissioning of the project.

f) The letter dated 14.10.2016 of the commission (it ought to be 05.10.2016) of the Commission approving the PPA was received by the Petitioner in Ahmedabad on 21.10.2016. Further, there was a delay of 74 days in granting approval by KPTCL (and also delay in land acquisition). Moreover, there was a delay in land acquisition around 3(three)months due to Demonetisation. Further there was around 3(three) months delay in project execution due to GST implementation. In addition, there was a delay due in commissioning due to wrong classification of modules under the CTH 8501 instead of 8541 at Chennai Port. Hence, the project commissioned on 02.03.2018 with the delay of 149 days in terms of 'Effective Date' as per PPA, is to be deemed as having commissioned within the timeline prescribed under the PPA. In view of the same, the Petitioner requested for allowing the petition.

4. Upon issuance of Notice, the Respondents appeared through their Counsel and filed Statement of Objections.

5. Respondent-1 & 3 filed common Objections contending as under:

- a) The petition for declaration in respect of 'Effective Date' is highly untenable and not maintainable. The petition in the present form is not maintainable as there is no cause of action alleged by the Petitioner.
- b) There is no requirement of Supplemental PPA to be approved by the Commission. A Supplemental PPA is nothing but, an extension of the PPA which is an integral part of the original PPA. The Supplemental PPA itself states that it is part of the original PPA. The Commission has clearly stated in its letter dated 25.10.2016 (Annexure-1 produced by the Respondent-1 & 3) that there is no necessity for the approval of SPPA.
- c) The say of the Petitioner that due to non-approval of Supplemental PPA there was delay in completion of Conditions Precedent and commissioning the project, is after thought and to justify its own lackadaisical attitude.
- d) The say of the Petitioner that it was prevented from completion of Conditions Precedent due to Force Majeure Events, is false. The Petitioner was duty bound to finalize the project site even before making an application for power generation. Hence, the contention of the Petitioner that evacuation approval was must for finalization of the project site is contrary to the accepted procedure. The Petitioner did not immediately file the application for evacuation approval after the LoA was received from KREDL and there is process involved in the processing of the evacuation approval. Owing to such huge competition in the field of generation, the developer's applications are

processed first come first serve basis, if all the other requisite conditions including furnishing documents and payment of fees are fulfilled.

- e) On 21.07.2016 (Annexure-2 produced by the Respondent-1 & 3) the Commission informed the Respondent No.2 that all the PPAs returned for want of clarification. On 29.08.2016 (Annexure-3 produced by the Respondent-1 & 3) the commission accorded all the PPAs in principal approval and directed to resubmit PPAs for approval.
- f) The Petitioner made a request for Evacuation Approval to the 3rd Respondent on 31.08.2016 and the 3rd Respondent intimated the Petitioner for remittance of processing fee on 01.10.2016. The Petitioner took 6(Six) long months to pay the processing fee and paid on 10.03.2017. Subsequently the Petitioner informed that there were some issues in land and hence, same was changed and thus the processing fee could not be remitted before. After due compliance of the procedures the 3rd Respondent processed the application and issued tentative evacuation approval on 08.06.2017. Even after that the Petitioner applied for the inter-connection approval on 10.10.2017 and same was granted by the 3rd Respondent on 12.10.2017. For the reasons stated above, it was the Petitioner who delayed in finalization of the project site, in payment of processing fee and furnishing the necessary details. Therefore, the Respondents are not responsible for the delay.
- g) The Petitioner was well aware of the process of land procurement and conversion being a time consuming process and no extra-ordinary

circumstances or inevitable situations have been highlighted by the Petitioner to seek an extension on the said ground. The Petitioner should have exercised due diligence and ensured the compliance of Conditions Precedent including land procurement in a prudent and efficient manner.

- h) The delay in commissioning has occurred solely due to the Petitioner's incapability to complete the Conditions Precedent on time, including land, labour and procure material on the site on time. It is oxymoronic to state that the delay in the project was on account of lack of approvals for land and evacuation approval.
- i) It is not the case of the Petitioner that such a clause of damages for non-compliance of Conditions Precedent is arbitrary or invalid. The Petitioner has not challenged the said clause. Admittedly, there is a delay in the completion of the Conditions Precedent and in such a case the say of the Petitioner that it is not liable to pay the damages is highly erroneous.
- j) The Respondent had no role to play in procurement of the land or the conversion of the said land. The Petitioner being well aware of the terms and conditions of the PPA did not achieve all necessary Conditions Precedent within the prescribed time.
- k) There was no requirement for the Petitioner to wait for the approval of the SPPA by the KERC to apply for conversion of the land on which it intended to put up the project.

- l) The allegations stated by the Petitioner cannot be termed as Force Majeure events as defined under the PPA. If the Petitioner was aggrieved by the event of Force Majeure, the same had to be notified to the Respondents within a period of 7 days as stipulated under PPA. No such notice of an event of Force Majeure has been issued to the Respondents. The Petitioner cannot seek refuge under Force Majeure Clause of the PPA as the petition was hopelessly barred by time to notify the Respondents regarding these delays as per the Force Majeure clause under PPA. The Petitioner need not have waited to make an application for land conversion, when it had very well contemplated of a situation of setting up a project for power generation on the said land.
- m) It was the duty of the Petitioner to update the Respondents of the progress of the Conditions Precedent on a monthly basis. The Petitioner itself not having adhered to the obligations cast upon him under the PPA cannot allege default on the Respondent. It is denied that events leading to the delay were not within the reasonable control of the Petitioner and Petitioner was unable to fulfil Conditions Precedent.
- n) The say of the Petitioner that no meaningful progress is expected till the PPA is approved by the Commission, that in effect since the PPA shall be effective only from the 'Effective Date' i.e. PPA approval by the Commission, that since the PPA, as it stands supplemented, by the supplemental PPA, has modified the terms of the PPA, that Effective Date, needs to be revised from the date of

the approval of the PPA to the date signing of Supplemental PPA as granted to Developers who signed PPA, are baseless and denied.

- o) The SPPA requires approval as per the Law, is baseless and denied. The Supplemental PPA is not for cosmetic or grammatical changes but substantial changes, that particularly in view of the changes in the definition on Delivery Point, the Petitioner had to make substantial deliberations on whether to continue with or shift the project sites, that the Petitioner waited for a long period for the approval SPPA to get certainty on the Delivery Points, that similarly there is a delay in according approval under Section 95 approval under Karnataka Land Revenue (Amendment) Act, 2015/ Section 109 KLR Act, 1964 approval, that the approvals were not accorded in the stipulated time are vexatious and hence denied. The Respondent-1 & 3 prays for dismissal of the petition.

6. The Respondent No.2/KREDL contended that:

- a) Being nodal agency of the Government of Karnataka for facilitating the development of renewable energy in the state had called for the Request of Proposal (RfP) for the Development of 290 MW Solar Power Projects to be implemented in the 17 Taluks vide Notification dated 12.02.2016 for implementation of 290 MW capacity solar power projects and issued the letter of allotment dated 30.05.2016 in favour of Adani Green Energy Limited for commissioning of 20 MW (AC) Solar Power Plant in Channapatana Taluk of Ramanagara District.

- b) As per Government Order dated 05.10.2016, KREDL was directed to enter into a lease agreement with the land owners of the proposed Solar Project Parks, after the SPD obtaining necessary approvals and thereafter to sublease the lands to the SPD.
- c) The Petitioner presented the documents for verification and to execute the lease agreement. The KREDL then issued the letter to the Additional Chief Secretary Energy Department to issue Government order.
- d) The KREDL later issued a letter to the Deputy Commissioner, Ramanagara District, to issue an Official Memorandum in the name of land owners and no response is received from the Deputy Commissioner Ramanagara District. Hence, the Respondent-2 could not obtain necessary clearances, to execute lease deed with the land owners. As such, the delay that has been occurred cannot be attributed to the Respondent-2. Hence, prayed for dismissal of the petition.

7. The gist of the Statement of Objections filed by the 4th Respondent (GoK) are as under:

- a) It is the responsibility of developer to identify and acquire required land for development of Project. The Petitioner for the first time identified the lands and submitted a list to KREDL vide letter dated 03.06.2017 (Annexure-R1 submitted by Respondent No.4) and also states that the process of acquisition of the remaining land is under process. Pursuant to the same the KREDL immediately recommended for approval under Section 109 of the KLR Act, 1961.

b) The Respondent-2 (KREDL) after obtaining the documents issued a letter dated 13.06.2017 (Annexure R-2 produced by Respondent-4) to the Deputy Commissioner, Ramangara District requesting to issue an Official Memorandum in the name of the land owners.

c) The Petitioner is seeking for a relief under the head of the 'Force Majeure' and inadvertent delay, but has failed to produce the documents to prove the said contentions. There is no provision under the PPA and RfP for time extension and retention of the agreed tariff under the head of inadvertent delay, and prayed for dismissal of the petition.

8. The Petitioner has filed the Rejoinder, to the Objections filed by the Respondent-1 to 4. In its rejoinder, the Petitioner reiterated the averments made in the petition and denied the grounds raised by the Respondent.

The Petitioner has filed additional, documents along with the rejoinder. Both the parties have filed documents on different dates.

9. We have heard the learned Counsels for the parties. The Petitioner and Respondent 1 & 3 have filed written arguments.

10. From the above, pleadings and rival contentions raised by the parties, the following issues arise for our consideration:

Issue No.1: Whether the Petitioner proves that the 'Effective Date' under Article 3.1 of PPA should be treated as:

(a) The date on which the SPPA dated 28.12.2016 would be approved by the Commission as the approval of the said SPPA was essential?

Or

(b) 28.12.2016 the date on which the said SPPA was executed?

Or

(c) 21.10.2016 the date on which the PPA approval letter dated 05.10.2016 was received by the Petitioner?

IssueNo.2: Whether the Petitioner has proved that the events or circumstance alleged by it amounts to 'Force Majeure' events entitling for extension of time for achieving the Conditions Precedent and Scheduled Commissioning Date?

Issue No.3: If issue No.2 is held either in affirmative or in negative, what should be the consequence as per PPA clauses?

Issue No.4: What Order?

11. After considering the submission of the parties and the material on record, our findings on the above issues are as follows:

12. Issue No.1: Whether the Petitioner proves that the 'Effective Date' under Article 3.1 of the PPA should be treated as:

a) The date on which the SPPA dated 28.12.2016 would be approved by the Commission, as the approval of the said SPPA was essential?

Or

b) 28.12.2016, the date on which the said SPPA was executed?

Or

c) 21.10.2016, the date on which the PPA approval letter dated 05.10.2016 was received by the Petitioner?

a) 'Effective Date' is defined in Article 21.1 of the PPA as the date of approval of PPA by KERC. Further, Article 3.1 mentions the 'Effective Date' with reference to the PPA as 'this agreement shall come into effect from the date of getting concurrence from KERC on the PPA and such date shall be referred to as the 'Effective Date'. In the present case vide letter dated 05.10.2016 (Annexure-P5 produced by the Petitioner), the Petitioner and the Respondent-1 were informed of the approval of the Commission to the PPA dated 28.06.2016 (Annexure-P4 produced by the Petitioner). Therefore, the date 05.10.2016 has to be considered as the 'Effective Date' for the purpose of interpreting the relevant clauses in the PPA. The PPA does not provide that the date of receipt of intimation regarding approval of the Commission to the PPA or the date on which the SPPA is signed by the Petitioner and the Respondent-1, in case the execution of such SPPA is needed, could be considered as the 'Effective Date'. Therefore, the contention of the Petitioner is not acceptable.

b) The Petitioner has contended that, as the letter dated 05.10.2016 (Annexure-P5 produced by the Petitioner) communicating approval of the Commission for the PPA in question directed to incorporate certain corrections/modifications in the PPA by entering into a suitable SPPA, the execution of SPPA and also the approval of such SPPA is essential. Further, it is contended that when the execution of such SPPA and its approval by the Commission is required, such dates should be considered as the 'Effective Date'.

c) The letter dated 05.10.2016 (Annexure-P5 produced by the Petitioner) signed by the Secretary, of this Commission communicates approval of the Commission to the PPA dated 28.06.2016 executed between the parties in respect of development of 20 MW (AC) Solar Power Project in Channapatana Taluk of Ramanagara District, subject to certain corrections/modifications being incorporated in the said PPA by entering into a suitable SPPA. Therefore, it can be said that the approval of PPA dated 28.06.2016 communicated by letter dated 05.10.2016 is absolute subject to incorporating the corrections/modifications. For the purpose of incorporating the corrections/modifications, the execution of a SPPA is required. There is no direction given to the parties that after entering into the SPPA, the same should be again got approved by the Commission. It cannot be said that the approval of the Commission to the PPA takes effect only after effecting the corrections/modifications suggested, as the corrections/ modifications suggested to be carried did not materially alter the rights and liabilities of the parties. Hence, the contention of the Petitioner that the SPPA requires approval cannot be accepted. This aspect was clarified by the Commission in a subsequent letter dated 25.10.2016 (Annexure-1 produced by the Respondent 1 & 3) addressed to the Government.

d) Therefore, Issue No.1 is held in negative.

13. IssueNo.2: Whether the Petitioner has proved that the events or circumstances alleged by it amount to 'Force Majeure' events, entitling for extension of time for achieving the Conditions Precedent and Scheduled Commissioning Date?
14. The Petitioner has contended that the following events/circumstance, as 'Force Majeure' events and they are not under the reasonable control of the Petitioner.
- i) Delay in granting approval of PPA and evacuation approval;
 - ii) Delay in grant of land conversion order;
 - iii) Demonetization;
 - iv) Goods and Service Tax;
 - v) Delay in clearance of importance Solar module by the Custom Authorities at Mumbai and Chennai Ports;
 - vi) Tahsildar Notice to stop all construction activities at site;
15. We deem it proper to consider the events one after the other and give our findings, as hereunder.
16. Regarding: Delay in granting approval of PPA and evacuation approval:
- a) It is contended by the petitioner that the delay in approval of PPA by KERC has resulted delay in getting other required approvals. This contention cannot be accepted because as per the PPA, the 'Effective Date' is from the date on which KERC approves the PPA and the petitioner is required to achieve the Conditions Precedent within eight months and Scheduled Commissioning Date within twelve months from the 'Effective Date'. Hence, delay in approving the PPA by

KERC if any, will not affect the petitioner for the reason that time begins for achieving different milestones, from the date of approval of PPA by KERC.

- b) Any of the Respondents has not made an attempt to explain the delay of nearly three months in approving the PPA by the Commission. However, the letters dated 21.07.2016 (Annexure-R2) addressed to the 2nd Respondent (KREDL) and dated 29.08.2016 (Annexure-R3) addressed to the Additional Chief Secretary to Government, Energy Department by this Commission would explain the reasons for the delay in approving the PPAs. These two letters were produced by the 3rd Respondent (KPTCL) would make it clear that the KREDL had not furnished the clarifications within time for the irregularities in conducting the bid proceedings, thereby the PPAs were ordered to be returned to ESCOMs and subsequently this Commission accorded in principle approval to PPAs on certain assurance given by GoK to amend the Solar Policy. Hence, there is no delay on the part of this Commission in approving the PPAs.
- c) The Petitioner had undertaken to develop 20 MW Solar Project at Chanapatana Taluk of Ramanagara District. The LoA was issued on 30.05.2016 (Annexure-P2 produced by the Petitioner) and the Petitioner acknowledged acceptance of the terms and conditions of the LoA through letter dated 08.06.2016 (Annexure-P3 produced by the Petitioner). The Petitioner required to search for the lands, required for establishment of the Solar Power Project after examining the availability of evacuation scheme approval to transmit the power from the Solar Power Project, to the KPTCL Sub-station. Therefore, for establishing a Solar

Power Project, the required extent of land should be available as well as the possibility of evacuating the power from project to the nearest Sub-station. For this purpose, the Developer has to search a suitable location.

- d) The Petitioner has made application dated 31.08.2016 to the 3rd Respondent for grant of tentative evacuation scheme to 20 MW Solar project at Channapatna Taluk of Ramanagara District. The Petitioner requested to change of location of evacuation from Channapatna Sub-station to 66/11kV Byrapatna Sub-station due to non-availability of land at Madevapur Doddi Belki Village. The 3rd Respondent (KPTCL) intimated the Petitioner for remitting the processing fee vide letter dated 01.10.2016 and the Petitioner paid the processing fees on 10.03.2017 after a lapse of 5 months. Therefore, it may be said that the 3rd Respondent (KPTCL) can proceed to process the application subsequent to 10.03.2017. Accordingly, the 3rd Respondent granted the tentative evacuation scheme on 08.06.2017 (Annexure-P12 collectively produced by the Petitioner). The Petitioner gave its acceptance to tentative evacuation scheme approval on 09.06.2017, and requested to issue regular evacuation scheme approval and the 3rd Respondent granted regular evacuation scheme approval on 21.06.2017 (Annexure-P12 collectively produced by the Petitioner). It is the contention of the Petitioner that even though he filed an application for granting tentative evacuation scheme approval on 31.08.2016, the 3rd Respondent granted on 08.06.2017 (Annexure-P12 collectively produced by the Petitioner). From the above facts, we are of the considered opinion that there was delay in granting

evacuation scheme approvals from 10.03.2017 to 21.06.2017 which comes to 100 days.

e) KPTCL in its Statement of Objections has stated that on 27.02.2016, it had furnished Sub-station wise Feasibility Study Report to KREDL; that the allotments of PPA were done Taluk-wise and not Sub-station wise and this created ambiguity in processing the applications for evacuation of power to different Sub-stations; that for want of clarification, the Commission vide letter dated 29.08.2016 (Annexure-3 produced by Respondent 1 & 3) returned all the PPAs to ESCOMs and accorded in-principle approval to all the PPAs and clarified that KREDL would co-ordinate with KPTCL and ESCOMs for efficient power evacuation scheme from the Solar Power Projects. The Commission also directed that all the PPAs must be re-submitted for obtaining approval. It can be seen from the tentative evacuation scheme approval dated 08.06.2017 (Annexure-P12 collectively produced by the Petitioner), that the Petitioner had made an application to KPTCL seeking evacuation approval on 31.08.2016. As noted in the above paragraph, the KERC has returned all the PPAs for want of clarification and on 29.08.2016 (Annexure-3 produced by Respondent 1 & 3), the Commission accorded in-principle, approval to all the PPAs. Thereafter, PPA has been approved by the Commission on 05.10 2016 (Annexure-P5 produced by the Petitioner). The tentative evacuation scheme was granted on 08.06.2017 (Annexure-P12 collectively produced by the Petitioner). After receipt of the

acceptance of the tentative evacuation approval (08.06.2017) the regular evacuation scheme was granted on 21.06.2017 (Annexure-P12 Collectively).

f) From the above facts, it can be said that KPTCL has granted the tentative evacuation scheme after lapse of 100 days and there is no explanation by the KPTCL for in delay the approving evacuation scheme apart from it according to the Petitioner, the entire process of land identification in and around the Sub-stations consumed a considerable amount of time.

17. Regarding: Delay in grant of land conversion order:

a) The Respondent-4 in its Statement of Objections has contended that the Petitioner for the first time identified the lands required for the project and submitted a list to KREDL on 03.06.2017 and also stated that the process of acquisition of the remaining land is under progress. The Petitioner in its petition had stated that on 03.06.2017 (para 27) it has requested to the KREDL for issuance of Government Notification under Section 95 of KLR (Amendment) Act, 2015 for acquisition 88 acres 19 guntas land on lease. Annexure-P13 dated 03.06.2017 shows that the Petitioner submitted the following:

- I. Land schedule list;
- II. Copy of KREDL No.KREDL/07/RPO/GC/290/MW/F29/2016/1954 dated 30.05.2016.

b) According to Annexure-P13 dated 03.06.2017, the Petitioner has identified about 100 acres of land for the project out of which it has entered into agreement to sale with the Farmers/land owners for 88 acres 19 guntas and acquisition of the balance land is in progress and the details of the same shall

be submitted shortly, on execution of registered agreement to sale with the Farmers/ land owners.

- c) The land required for the project could be either purchased or taken on lease by the Petitioner. For purchase of lands, the Petitioner has to obtain permission under Section 109 of the KLR Act, 1961. The GoK had issued a Circular bearing No.RD 01 LRM 2016 22.02.2016 facilitating grant of permission under Section 109 KLR Act,1961 and obtain conversion of such lands for non-agricultural purpose within a timeframe. The GoK had issued Notification dated 05.10.2016 permitting KREDL to enter into agreement for lease of lands with the land owners and to obtain conversion of such agricultural land for non-agricultural purpose and thereafter to sub-lease the same to the Developer in order to facilitate development of Solar Project.
- d) Under the Notification dated 05.10.2016 KREDL has to follow the procedure stated in Circular No.RD 01 LRM 2016 dated 22.02.2016 for obtaining an order under Section 109 of the KLR Act, 1961 for purchase of agricultural land and its conversion and thereafter has to sub-lease the land to the Developer for establishing the Solar Project.
- e) The 2nd Respondent (KREDL) after obtaining the documents on 03.06.2017 (Annexure-P13) from the Petitioner, issued a letter dated 13.06.2017 (Annexure-R2 produced by 4th Respondent) to the Deputy Commissioner, Ramanagara District, Ramanagara, requesting him to issue an Official Memorandum in the names of land owners. The 2nd Respondent (KREDL) in its Statement of

Objections in Paragraph 9, has stated that subsequent to issuing letter to the Deputy Commissioner, Ramanagara District, Ramanagara (Annexure-R2 dated 13.06.2017 produced by the 4th Respondent), this 2nd Respondent (KREDL) did not obtain the necessary clearances from the Deputy Commissioner, Ramanagara District, Ramanagara, to enable this 2nd Respondent (KREDL) to take lease deed with the land owners in order to sub-let the same to the Petitioner. This would show that the Deputy Commissioner, Ramanagara District, Ramanagara, has not yet issued the required order for conversion of land from agriculture to non-agriculture purpose pursuant to the letter issued by the 2nd Respondent (KREDL).

- f) From the records, it can be seen that the Petitioner itself has approached the Deputy Commissioner, Ramanagara District, Ramanagara, requesting for land conversion order and finally, the Deputy Commissioner, issued land conversion order in favour of the Petitioner and issued the intimation letter dated 15.07.2019 [Document No.2 produced by the Petitioner along with memo dated 20.11.2019] to the Petitioner to deposit the land conversion fees totally amounting to Rs.92,11,917/- for taking necessary action. Subsequently, the land conversion fees were paid on 26.07.2019, and thereafter, the Deputy Commissioner, Ramanagara District, Ramanagara, issued the land conversion order dated Nil (Document No.3 produced by the Petitioner along with Memo dated 26.11.2019) and thereafter, the Petitioner took lease deeds from the farmers. From the above facts, it can be said that there was an inordinate

delay in getting the land conversion order by the Deputy Commissioner, Ramanagara District, Ramanagara.

18. Demonetization:

According to the Petitioner, due to Demonetization, all the business activities at the ground level were stalled for a period of 2 to 3 months. Demonetization impacted the land acquisition phase.

19. Goods and Service Tax (GST):

- a) The Petitioner contended that some of exemptions which were provided on goods required for execution, construction and operation of Solar Project are ceased to exist. Project was actually affected due to GST induced disruptions for a period of 3 to 4 months.
- b) Regarding Demonetization and GST, the learned Advocate for the Petitioner (in his Rejoinder filed on 25.06.2019) rely upon the judgment and order dated 28.08.2018 between Messrs Mytrah Abhinav Power Private Limited Vs. Southern Power Distribution Company of Telangana Limited and Others, passed by the Hon'ble Telagana Electricity Regulatory Commission, Hyderabad, wherein it is held as under: -

“The incidents mentioned by the petitioner have some force to treat them as non-political events, which included labour difficulties mentioned in Article 9.1 (b) (i) of PPAs as one of the force majeure events. Further, Article 9.1 (a) of PPA clearly mentions that if the “events and circumstances are not within the affected party’s reasonable control and were not

reasonably foreseeable and the effects which the affected party could not have prevented by prudent utility practices or, in the case of construction activities, by the exercise of reasonable skill and care. Any events or circumstances meeting the description of force majeure which have the same effect upon the performance of any of the solar power project set up in accordance with solar policy announced by GOTS under the competitive bidding route and which therefore materially and adversely affect the ability of the project or, as the case may be the DISCOM to perform its obligations hereunder, shall constitute force majeure with respect of the solar power developer or the DISCOM, respectively" which clearly encompasses the reasons given by the petitioner for the delay of 244 days as events termed as force majeure. The petitioner had no control or domain over the incidents mentioned causing delay in completing the project and therefore the delay cannot be totally attributable to the petitioner."

c) Having regard to the facts of the case on hand, we rely on aforesaid order of TERC and we are of the considered opinion that Demonetization and Goods and Services Tax have an impact of implementation in commissioning of the project.

20. Delay due to wrong classification of Solar Modules:

a) There was an extraordinary delay in clearance of Solar Modules imported through Chennai Port and Nahava Sheva Port, by the Petitioner for its projects in

Karnataka, due to wrong classification HSN Code and Solar PV Modules by the respective Customs Authorities.

b) The Petitioner, to substantiate its above contention has produced; (i) Public Notice issued by Commissioner of Customs, NS-V dated 29.09.2016 (Annexure-P14); (ii) A letter addressed to Messrs Wardha Solar Maharashtra Private Limited, dated 27.07.2017 by the Deputy Commissioner of Customs, INDEV CFS NS-V (Annexure-P15); (iii) Summons dated 27.09.2017 (Annexure-P16) issued by Appraiser of Customs, Special Intelligence and Investigation Branch; and (iv) Reply given by the Petitioner to the Deputy Commissioner (Customs), Chennai dated 06.10.2017 (Annexure-P17); and (v) A letter dated 31.10.2017 (Annexure-P18) addressed to the Deputy Commissioner of Customs, Chennai. We have gone through these documents. It appears from the records that these documents (Annexure-P15 &16) pertain to the project situated at Nalwar village in Chitapur Taluk, Kalburgi District of and the project situated at Galipura Kaval, Holenarasipura Taluk in Hassan District respectively and M/s Wardha Solar Maharashtra Private Limited, were not pertaining to the Petitioner project. Hence, we are unable to accept the say of the Petitioner that wrong classification of Solar Modules caused delay in commissioning the Solar Power Project.

21. Tahsildar Notice to stop all construction activities at site:

a) It is the case of the Petitioner that the Tahsildar of Channapatana Taluk, on 30.12.2017 (Annexure-P22 produced by the Petitioner) issued Notice to the Petitioner to stop all construction activities at site of the above project, till the time non-agricultural conversion is obtained. Due to the said Notice, the Petitioner was compelled to stop execution works at the project Site.

b) According to the Petitioner with persistent efforts and rigorous pursuance with the various Government authorities, the Tahsildar has finally withdrew the above Notice vide letter dated 11.01.2018. Due to such continued pressure exerted on the Petitioner, the construction equipment and labour also had to be demobilized and due to said incidence the Petitioner lost at least 20 days of precious time in the implementation of the Project, on no fault of Petitioner and such circumstance/events were not within the reasonable control of the Petitioner and which resulted into preventing the Petitioner in the performance of its obligations under the PPA. Further we also verified the Annexure-P32 to P33 produced by the Petitioner, wherein the proceedings of the GoK dated 15.09.2017 also expressed opinion to seek grant of extension of time to the developer for KERC.

22. Regarding; Extension of time: Article 5.7 of PPA deals with the circumstance under which extension time to commissioning the project shall be granted.

a) 5.7 Extension of Time:

5.7.1 *In the event that the Developer is prevented from performing its obligations under Clause 5.1 by the Scheduled Commissioning Date due to:*

- a) Any HESCOM Event of Default; or*
- b) Force Majeure Events affecting HESCOM; or*
- c) Force Majeure Events affecting the Developer*

The Scheduled Commissioning Date and the Expiry Date shall be deferred, subject to the limit prescribed in Clause 5.7.2 and Clause 5.7.3 for a reasonable period but not less than 'day for day' basis, to permit the Developer or HESCOM through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the Developer or HESCOM, or till such time such Event of Default is rectified by HESCOM.

5.7.2 *In case of extension occurring due to reasons specified in clause 5.7.1 (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.*

5.7.3 *In case of extension due to reasons specified in Article 5.7.1 (b) and (c), and if such Force Majeure Event continues even after a maximum period of 3 (three) months, any of the Parties may choose to terminate the Agreement as per the provisions of Article 16.*

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 18.

5.7.4 *As a result of such extension, the Scheduled Commissioning Date and the Expiry Date newly determined shall be deemed to be the Scheduled Commissioning Date and the Expiry Date for the purposes of this Agreement.*

b) The learned Advocate for the Petitioner rely upon Annexure-P32 & P33 (collectively). The Government of Karnataka, vide its letter dated 15.09.,2017 addressed to all the Managing Directors of ESCOMs gave a direction to take a decision to the extension of time in accordance with law. The extract of the letter is as under:

ಆದ್ದರಿಂದ, ಎಂ.ಎನ್.ಆರ್.ಇ. ರವರ ಪತ್ರ ದಿನಾಂಕ: 28.07.2017ರ ಪ್ರತಿಯನ್ನು ತಮ್ಮ ಮಾಹಿತಿ ಮತ್ತು ಮುಂದಿನ ಸೂಕ್ತ ಕ್ರಮಕೈಗೊಳ್ಳಲು ಈ ಪತ್ರದೊಂದಿಗೆ ಲಗತ್ತಿಸಿದ್ದು, ಸದರಿ ಎಂ.ಎನ್.ಆರ್.ಇ. ರವರ ಪತ್ರದಲ್ಲಿ ನೀಡಿರುವ ಸೂಚನೆಯಂತೆ ವಿಳಂಬವಾಗಿರುವ ಸೌರ ವಿದ್ಯುತ್ ಯೋಜನೆಗಳಿಗೆ ಕಾಲಾವಧಿ ವಿಸ್ತರಿಸುವ ಬಗ್ಗೆ ನಿಯಮಾನುಸಾರ ಪರಿಶೀಲಿಸಿ ಕೂಡಲೇ ಅಗತ್ಯ ಕ್ರಮ ಕೈಗೊಳ್ಳುವಂತೆ ಕೋರಲು ನಿರ್ದೇಶಿತನಾಗಿದ್ದೇನೆ.

Further, the learned Advocate for the Petitioner relied upon letter dated 15.09.2017 (Annexure-P13 collectively produced by the Petitioner)

addressed to the Secretary, KERC, Bengaluru. The relevant portion of the letter is as under:

“ನವೀಕರಿಸಬಹುದಾದ ಇಂಧನ ಮೂಲಗಳಲ್ಲಿ ಒಂದಾದ ಸೌರ ವಿದ್ಯುತ್ ಯೋಜನೆಗಳನ್ನು ಪ್ರೋತ್ಸಾಹಿಸಿ ಪರಿಸರ ಮಾಲಿನ್ಯ/ಜಾಗತಿಕ ತಾಪಮಾನವನ್ನು ತಗ್ಗಿಸುವ ನಿಟ್ಟಿನಲ್ಲಿ ಕರ್ನಾಟಕ ರಾಜ್ಯವು ಸೌರ ವಿದ್ಯುತ್ ಉತ್ಪಾದನೆಯಲ್ಲಿ ದೇಶದಲ್ಲಿಯೇ ಮುಂಚೂಣಿಯಲ್ಲಿರುತ್ತದೆ. ಆದ್ದರಿಂದ, ಈಗಾಗಲೇ ತಮ್ಮನ್ನು ಕೋರಿರುವಂತೆ ಮತ್ತು ಕೇಂದ್ರ ಸರ್ಕಾರದ ಪತ್ರದಲ್ಲಿ ನೀಡಿರುವ ಸೂಚನೆಯಂತೆ ವಿಳಂಬವಾಗಿರುವ ಸೌರ ವಿದ್ಯುತ್ ಯೋಜನೆಗಳಿಗೆ ಕಾಲಾವಧಿ ವಿಸ್ತರಣೆಗೆ ಅನುಮೋದನೆ ನೀಡಿ ಆದೇಶ ಹೊರಡಿಸುವಂತೆ ಕೋರಲು ನಿರ್ದೇಶಿತನಾಗಿದ್ದೇನೆ”.

- c) It is evident from the above that due to reasons specified Article 5.7.4 Schedule Commissioning Date could be extended up to 6 (Six) months and as result of such extension, the newly determined Scheduled Commissioning Date and Expiry date shall be deemed to be the Scheduled Commissioning Date and the Expiry date for the purposes Agreement.
- d) In pursuance of the provision of Article 5.7 of PPA the 1st Respondent granted the extension of time and it is well settled law that the parties are bound by the terms and condition of the contract i.e., PPA. Therefore, after considering above facts and extension of time given by HESCOM (1st Respondent) as per the Article 5.7.2 of PPA wherein 6 (Six) months' time has been granted for SCOD (Annexure-P25). Therefore, we are of the opinion that the 1st Respondent (HESCOM), after considering 'Force Majeure' events as stipulated in Article 14.3.e PPA, had granted 6 (six) months' time for achieving SCOD. The Petitioner has

commissioned the project on 02.03.2018 within the extended time (Annexure-P25).

- e) The delay in Evacuation Approval, the grant of land conversion order, Tahsildar Notice, Government Notification in conversion of land are in our opinion the events/circumstance, not under the reasonable control of the Petitioner.
- f) According to the Petitioner, till date the conversion order/Notification under Section 95 of KLR (Amendment) Act, 2015 for acquisition of 88 acres and 19 guntas is awaited from the Government. Document produced along with the Memo dated 26.11.2019, goes to show that the deemed conversion order was issued vide letter dated Nil/ 2019 (document-3 produced by the Petitioner).
- g) The learned Advocate for the Petitioner relied up on the letter dated 28.08.2017 of the Ministry of New and Renewable Energy, Government of India (Annexure-P20 produced by the Petitioner). The relevant portion reads as the under:

It is also be clarified that if in a project equipment's/materials have been purchased/ordered and substantial advances paid as per original completion date, and there is a delay on part of the state organizations regarding land, transmission or any such reasons, the extension of the project may be allowed.

- h) We have gone through relevant material on the issue placed before us and carefully considered the submission of learned Counsel for the both parties.

Subsequent to completion of various scrutiny formalities, the PPA signed on 28.06.2016 which provided a guaranteed tariff of Rs.4.79 kWh and completion period of 12 months. The said PPA was approved by the Commission on 05.10.2016. As per guidelines issued by the Government of Karnataka a number of Approvals/clearances/sanctions were required in the process of setting up of Solar Project such as financial closures, approval for conversion of land from the agricultural purpose to non-agricultural purpose to be used for setting up of a Solar Power Project, approval for grid connectivity, approval from Chief Electrical Inspector for charging of the line, permission to purchase or lease the land etc. While going through the matrix of various dates/events, it is pertinent to notice that the approval from the Government instrumentalities had received by the Petitioner, after lapse of considerable time which in turn became the impediments in timely commissioning of Solar Project. For instance, the land conversion order issued by the concerned authorities only during 2019, tentative power evacuation approval came to be granted on 08.06.2017 and regular evacuation scheme approval was granted on 21.06.2017. With these events/dates, and also taking into consideration of substantial investment on the project for implantation of the project it become almost certain that COD of project cannot be achieved as per the schedule.

- i) In view of above facts and anticipated delay in the COD, the Petitioner apprised the 1st Respondent and requested for extension of COD till 15.03.2018 as admissible under the PPA. According to it, total completion period of 12

months from the 'Effective Date' was provided considering all the activities including various approvals, procurement of equipment, installation and commissioning a final safety clearance from Chief Electrical Inspector for charging line etc. It is noticed by us that in receiving approval from Government instrumentalities for land conversion, tentative/regular scheme approvals, acquisition of land, conversion of land from agricultural to non-agricultural etc., the Petitioner not only faced severe difficulties but also substantial delays. Considering these facts and also taking into consideration of substantial investment on the project for implementation, the 1st Respondent granted extension time for 6 months up-to 15.03.2018.

- j) In similar set of facts, the Hon'ble Appellate Tribunal for Electricity (APTEL) in its order dated 14.09.2020, in Appeal No.351 of 2018 between Chennamangathi halli Solar Power Project LL.P. and BESCO and Others held at Para 8.15 as under:

"In view of the above, we are of the considered opinion that considering facts and circumstances of the matter, the first Respondent was justified in extending COD up to six months as per the relevant provision (clause 2.5) of the PPA. Besides, it is also crystal clear that the approvals / clearances from various Govt. instrumentalities were accorded after considerable delays (of 7-8 months) which in turn attributed to delay in commissioning of the solar projects. As these approvals were beyond the control of the Appellants, the State Govt. and first Respondent have rightly considered them as an event of force majeure and accordingly granted approval for COD extension."

k) In view of the principles laid down by the Hon'ble APTEL in a recent judgment cited above and the extension of time granted by the HESCOM (1st Respondent), holding that the Petitioner has fulfilled the conditions of Article 14.3.e of PPA and extended time up-to 15.03.2018 and the Petitioner has commissioned the project on 02.03.2018, within the extended time. Therefore, we are of the opinion that the circumstances and events narrated by the Petitioner in the petition are 'Force Majeure' events and they are not under the reasonable control of the Petitioner. Therefore, the Petitioner has proved that events or circumstances alleged by it amounts to 'Force Majeure' events entitling for extension of time for achieving the Conditions Precedent and Scheduled Commissioning Date. Hence, we answer Issue No.2 in affirmative.

23. Issue No.3: If issue No.2 is held either in affirmative or in negative, what should be the consequence as per PPA clauses?

a) We have already held that Issue No.2 in affirmative. As per the PPA signed on 28.06.2016 provided a guaranteed tariff of Rs.4.79 per unit and the HESCOM has extended time till 15.03.2018 to achieve SCOD. The Petitioner has commissioned the project on 02.03.2018 i.e., within the extended time. Therefore, we are of the opinion that the Petitioner is entitled for the agreed tariff of Rs.4.79 per unit as per Article 12.1 of the PPA.

b) The learned Advocate for 1st & 3rd Respondent relied upon the ruling reported in (2017) 1 Supreme Court Cases 487 between All India Power Engineer Federation and Others Vs. Sasan Power Limited and Others. We have gone

through the rulings. The facts of the case are quite different from the case on hand.

- c) Having regard to the principles laid down by the Hon'ble APTEL, in its order dated 14.09.2020 in Appeal No. 351 of 2018, we are of the opinion that the Petitioner is entitled for a tariff of Rs.4.79 per unit. Hence, we answer Issue No.3 accordingly.

24. Issue No.4: What Order?

For the above reasons, we pass the following:

ORDER

- a) The petition is allowed.
- b) The Petitioner is entitled for a tariff of Rs.4.79 per unit as per Article 12.1 of the PPA dated 28.06.2016.

Sd/-
(SHAMBHU DAYAL MEENA)
Chairman

Sd/-
(H.M. MANJUNATHA)
Member

Sd/-
(M.D. RAVI)
Member