

No.N/2/2018

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

Dated :15.09.2020

Present

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

OP No. 02/2018

BETWEEN:

Messrs Adani Green Energy (UP) Limited,
A Company Registered under the
Provisions of the Companies Act, 1956
Adani House, Nr. Mithakhali Six Roads,
Navrangpura
Ahmedabad-380 009.
(Represented by its Authorized Signatory)

... PETITIONER

[Represented by Sri Poonam Patil, Advocate]

AND:

1) Bangalore Electricity Supply Company Limited,
A Company Registered under the
provisions of Companies Act, 1956 having its
Registered Office at K.R. Circle,
Bengaluru-560 001.
(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,
Cauvery 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 Addl. Chief Secretary)

..... **RESPONDENTS**

[Respondents 1 & 3 represented by Just Law, Advocates;
Respondents 2 & 4 represented by Sri G.S. Kannur, Advocate]

ORDER

1. This is a petition filed under section 86 (1)(f) 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 due to 'Force Majeure' events affecting it, referred herein after;
- c) Grant concurrence to the Supplemental PPA dated 17.12.2016; and
- d) Declare that the 'Effective Date' under Article 3.1 of the PPA is the date on which the SPPA receives its concurrence from this Commission;

Alternatively:

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

Alternatively:

- d) Declare that '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 26.10.2016;
- e) If the Commission were to consider that there is 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.
- 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;
- g) Direct the Respondents to make payment at the rate of Rs.4.84 per unit, as per Article 12.1 of the Power Purchase Agreement dated 29.06.2016; and
- h) Pass such other order/s including an order as to costs, to meet the ends of justice and equity.

2. The facts mentioned in the Petition 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 No.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 a capacity of 290 MW through private sector participation.
- c) Respondent No.2 after evaluation of the proposals received from bidders, accepted the bid of Adani Green Energy Limited for development of 20 MW (AC) capacity of solar project in K.R. Pet Taluk of Mandya District and issued a Letter of Award (hereinafter called the "LoA") and Allotment Letter dated 30.05.2016 (Annexure-P1) to Adani Green Energy Limited, requiring, execution of PPA.
- d) Adani Green Energy Limited accepted the LoA for development of 20 MW Solar PV project in K.R. Pet Taluk of Mandya District, vide its letter dated 08.06.2016 (Annexure-P2) 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 29.06.2016 (Annexure-P3) for setting up of the Solar Power Plant at K.R. Pet taluk of Mandya District. The PPA was forwarded by the Respondent-1 to the Commission for approval.
- f) The Commission vide its letter No.KERC/S/F-31/Vol-1183/16-17/1778 dated 14.10.2016 (Annexure-P4) communicated the approval of the PPA subject to incorporating certain corrections/modifications by entering into a suitable SPPA. The said letter of the Commission was received by the Petitioner on 26.10.2016. Accordingly, the Petitioner executed a SPPA dated 17.12.2016 (Annexure-P5) with 1st Respondent.
- g) Clause 3.1 of the PPA defines the term "Effective Date" as the date of concurrence of KERC for the PPA.
- h) 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 1st Respondent.
- i) Article 21 of the PPA defines the term "Scheduled Commissioning Date" as twelve months (12) from the 'Effective Date'.

- j) The petitioner communicated with Additional Chief Secretary, Government of Karnataka (GoK), Energy Department vide its letter dated 30.05.2017 (Annexure-P8) 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 KREDL, as sufficient compliance of the 'Conditions Precedent'.
- k) The Petitioner further addressed a letter dated 10.06.2017 (Annexure P-9) to 1st Respondent requesting to accept documents submitted to 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. The Respondent No.1 vide letter dated 28.06.2017 (Annexure-P10) informed the petitioner regarding non-compliance of Condition Precedent, and in this regard penalty will be levied as per PPA terms and conditions.
- l) 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 the 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 in 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.

m) That the Hon'ble Commission had given approval of PPA on 14.10.2016, whereas the Petitioner approached 1st Respondent for seeking approval connectivity on 22.07.2016, i.e., well in advance. Subsequently, due to change of land location from Madigarahosalli to Narayanapura village, the Petitioner submitted a request letter to the Respondent-3 (KPTCL) on 31.08.2016 requesting not to process on their application dated 22.07.2016 and to process the evacuation application dated 31.08.2016 for the proposed 66/11 kV Ranganathapura (Santebachalli), Sub-station. Despite the best efforts, the Respondent-3 (KPTCL) had given tentative evacuation scheme approval on 27.10.2016 and regular evacuation scheme approval on 05.12.2016 (Annexure-P11 Collectively).

n) After getting the regular connectivity approval from KPTCL, the petitioner initiated land acquisition activity and approached KREDL on 13.06.2017, for issuance of order under Section 95 of Karnataka Land Revenue (KLR) (Amendment) Act, 2015, for acquisition of 104 acres 20 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 (eight) months from effective date of the PPA i.e., 14.10.2016. The above said circumstances/events were not within the reasonable control of the petitioner in the performance of its obligations under the PPA.

o) 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.

p) 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 the SPD is prevented from performing its obligations under Article 5.1.

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

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 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.

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.

- r) The Petitioner considering the above facts, on 06.7.2017 and 31.07.2017 (Annexure-P12 Collectively) issued notices 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 GoK permitting usage of lands for non-agricultural purposes or till project achieves its Commercial

Operation Date, whichever is earlier. The Petitioner also requested Respondent-1 to withdraw its letter dated 28.06.2017 imposing levy of penalty as referred in letter dated 31.07.2017 written to General Manager, BESCO.

s) The Ministry of New and Renewable Energy (MNRE), on 28.07.2017 (Annexure-P13), taking due cognizance of the fact that the delay in connectivity permissions, 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.

t) In the light of the MNRE's letter, the Petitioner on 02.08.2017 (Annexure-P14), once again requested 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 66 days (equivalent to delay by KPTCL for connectivity approval).

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 SPPA alters and modifies the PPA. In other words, the original PPA is to be read together with the SPPA. The Effective Date, needs to be changed from 14.10.2016 to the date of signing of SPPA, i.e., 17.12.2016. Unless the

SPPA is approved, the Effective Date does not commence. Hence, 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. 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 delay in the commissioning.

f) The letter dated 14.10.2016 of the Commission approving the PPA was received by the Petitioner in Ahmedabad on 26.10.2016. Further, there was a delay of 66 days in granting evacuation approval by KPTCL and also delay in land acquisition. Hence, the project was commissioned on 23.10.2017. (This date is not correct, in fact, the Project was commissioned on 22.12.2017 as per Annexure R-1 submitted by Respondent-1).

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

5. The gist of the Statement of objections filed by the Respondent No.1 is as follows:

a) The 1st Respondent admitted that the Adani Green Energy Limited, is the successful bidder for establishment of 20 MW Solar Power Plant at K.R. Pet Taluk of Mandya District and accordingly, LoA was issued on 30.05.2016 and the Adani Green Energy Limited, accepted the LoA on 08.06.2016 and the Petitioner, is the SPV of Adani Green Energy Limited, executed the PPA on 29.06.2016, which was approved by the Commission on 14.10.2016.

b) The SPPA was executed on 17.12.2016 and the Petitioner commissioned the plant on 22.12.2017 (Annexure-R1). The 1st Respondent further contended that on 14.06.2017, the Petitioner furnished certain documents in order to comply with the Conditions Precedent stipulated in the PPA. However, the

Petitioner did not produce any documents showing that the Petitioner was in clear title and possession of land on which it intends to execute the project.

- c) The 1st Respondent vide letter dated 28.06.2017 called upon the Petitioner to fulfil the Conditions Precedent in terms of PPA, failing which the action in terms of the PPA will be taken.
- d) The relationship between the parties is governed strictly by the terms of the PPA contract. The terms of the PPA spell out the timeframe for commissioning the project, the 'Effective Date' of the PPA, the period within which Conditions Precedent have to be achieved and the penalty that follows due to non-adherence to the timelines of the PPA.
- e) As per Article 4 of the PPA, the petitioner is required to satisfy Conditions Precedent within eight months from the 'Effective Date'. Therefore, the Petitioner was required to achieve Conditions Precedent on or before 13.06.2017. One of the Conditions Precedent was that the Petitioner had to furnish documentary evidence of having the clear title and possession of the land required for the project in the name of the developer. However, the Petitioner has not produced any document showing that the clear title and possession of land. It was only on 13.06.2017, that the Petitioner made a request to KREDL for issuance of notification under Section 95 of the Karnataka Land Revenue Act, 1964. The petitioner has not taken steps within the reasonable time to achieve Conditions Precedent. Therefore, the

Petitioner has not acted in a diligent manner and the delay can only be attributed to the Petitioner.

- f) The PPA clearly sets out the events which are 'Force Majeure' events, in Article 14. It is settled position of law that delays in obtaining approvals by the petitioner cannot be considered to be events of 'Force Majeure'. Further, Article 5.1 clearly sets out the obligations of the Developer and states that it is the responsibility of the developer to obtain all clearances, consents etc. Hence, knowing fully well of its obligations under the PPA contract, the Petitioner is attempting to take advantage of its own wrong, which is impermissible in law and ought not to be permitted.
- g) The petitioner was required to achieve SCOD by 13.10.2017 as per Article 8.5 of the PPA. The Petitioner has commissioned the Plant on 22.12.2017. The reasons assigned for the delay in commissioning of the project cannot be attributed to this Respondent.
- h) Article 5.7 stipulates the circumstances in which the Petitioner can be granted extension of time to commission the project. The Petitioner is entitled to extension of SCOD in cases of default by the Respondent, 'Force Majeure' events affecting the Petitioner and the Respondent. In this case, the delay in commissioning the plant can in no manner be attributed to the reasons stipulated in article 5.7 of the PPA. Therefore, the Petitioner is not entitled to any extension of SCOD under Article 5.7 of the PPA.

- i) The Petitioner is liable to pay damages to the Respondent in the event of failure to achieve Conditions Precedent and SCOD within the stipulated timeframe in accordance with Articles 4.3 and 5.8 of the PPA. Therefore, the Petitioner herein is required to pay liquidated damages as per terms of PPA.
- j) The Petitioner is attempting to bypass its obligations under the PPA by filing this petition. PPA clearly states, in the event of delayed execution of the project, the Petitioner would only be entitled to a tariff of Rs.4.36 per unit in terms of the Commission's tariff order dated 12.04.2017, which is the order that is applicable at the time when the Petitioner commissioned its plant. Article 12 of the PPA, states that in the event of delay in commissioning of the project beyond SCOD and during such period, if there is variation in the KERC Tariff, then the applicable Tariff for the project.
- k) The Petitioner was well aware of the terms of the PPA prior to executing the same and the say of the Petitioner that the date on which SPPA is signed or the date on which the Petitioner received letter from the Commission approving the PPA should be considered as 'Effective Date' does not flow from the terms of PPA between the parties. The Petitioner cannot be permitted to alter the terms of the PPA merely to suit its needs. This is especially so as the Commission has clarified vide its letter dated 25.10.2016 (Annexure-R2) that no separate approval is required for the SPPA.
- l) The 1st Respondent further contended that the say of the Petitioner that the procurement of land under Section 95 and 109 of the KLR Act and KLR

(Amendment) Act, 2015 is a time consuming process and beyond the control of the Petitioner is untenable, for the reason that the onus of obtaining all necessary approvals was on the Petitioner as per Article 5.1.1 of the PPA.

m) The Petitioner filed an application for issuance of Government Order under Section 95 of the KLR Act for acquisition of land at belated stage and was not diligent in executing the project. The Petitioner is not entitled for extension of time as it is not affected by any 'Force Majeure' events and letter dated 06.07.2017 and 31.07.2017 cannot be considered as 'Force Majeure' notice under Article 14.5 of the PPA and is liable to pay liquidated damages as per the PPA.

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

(a) Being a nodal agency of the Government of Karnataka for facilitating the development of renewable energy in the state had called for the Request for 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 development of 20 MW solar power plant in K.R. Pet Taluk, Mandya District.

(b) As per Government Order dated 05.10.2016 KREDL was directed to enter into lease agreement with the land owners for the proposed solar parks and thereafter to sub-lease the lands to 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, Mandya District to issue an Official Memorandum in the name of land owners and no response is received from the Deputy Commissioner. 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 and prayed for dismissal of the petition.

7. The gist of the Statement of objections filed by the 3rd Respondent (KPTCL) are as under:

a) The KPTCL issued Sub-station wise feasibility study to KREDL on 27.02.2016. That the allotment of Projects, were done Taluk wise and not Sub-station wise. This has created ambiguity in processing the applications for evacuation of power to different Sub-stations. Therefore, the Commission returned all the PPAs to ESCOMs, vide letter dated 22.07.2016 (Annexure-R1).

b) On 29.08.2016 (Annexure-R2) the Commission accorded in-principle approval on all PPAs and clarified that KREDL would co-ordinate with the Respondent-3 (KPTCL) and the ESCOMs for efficient power evacuation from the solar plants. On 22.07.2016, the Petitioner filed in the application with

the Respondent-3 (KPTCL) requesting for evacuation approval to 220/66 kV substation at Madigarahosalli. Subsequently, on 31.08.2016 the Petitioner filed another application requesting evacuation approval to 66/11 kV at Ranganathapura Sub-station instead of 220/66kv Madigarahosalli village. Thereafter, tentative evacuation Scheme was approval issued on 27.10.2016 and the Petitioner communicated its acceptance of evacuation Scheme vide letter dated 14.11.2016. Later regular evacuation Scheme approval was granted on 05.12.2016. Hence, the allegation that the there was a delay on the part of the Respondent-3 in granting evacuation approval is untenable and denied.

c) The PPA clearly set out the events which are 'Force Majeure' events, in Article 14 of the PPA. The said clause would make it evident that delays sought to be termed as events of 'Force Majeure' are not in fact events that come under purview of Article 14. Delays in obtaining approval cannot be considered to be events of 'Force Majeure'. Article 5.1 clearly sets out the obligations of the Developer to obtain all clearances, consents etc.,

d) The contention of the Petitioner that it could not achieve Conditions Precedent due to delay in approval of PPA by KERC, evacuation approvals and grid connectivity approval by the Respondent No.3, is untenable and same were granted within a reasonable time from the date of revised proposal vide letter dated 31.08.2016. before the deadline for the Petitioner to achieve Conditions Precedent.

e) Hence, the delay in commissioning the plant cannot be attributed to the Respondent-3 (KPTCL).

f) The 'Effective Date' commences only after the SPPA receives the concurrence from the Commission is absolutely untenable as there is no requirement of SPPA to be approval by the Commission. The Petitioner is liable to pay the liquidated damages for not achieving Conditions Precedent and not commissioning the plant within stipulated timeframe. Averment that the Petitioner could not achieve Conditions Precedent and SCOD due to 'Force Majeure' event is untenable & denied.

g) All other averments not specially traversed and contrary to the above are denied and prayed for dismissal of the petition.

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

a) The Petitioner for the first time identified the lands and submitted a list to KREDL vide letter dated 14.06.2017 (it ought to be 13.06.2017, Annexure-R1 submitted by Respondent-4) in respect of lands and also stated that the process of the acquisition of the remaining land is under progress. Pursuant to the same, the KREDL immediately recommended for approval under Section 109 of the Karnataka land Reforms Act.

b) The Deputy Commissioner, Mandya District on 23.08.2017 addressed a letter to the Petitioner to furnish the requisite documents for granting permission.

The Petitioner did not take any steps to comply with the requirements. The Deputy Commissioner, Mandya District addressed a letter to the KREDL on 23.11.2017 (Annexure-R2) informing the KREDL about the non-furnishing of the documents by the Petitioner. Thereafter the KREDL addressed a letter to the Petitioner to comply with the requirements immediately vide letter dated 02.02.2018 (Annexure-R3).

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 in advertent delay. Hence, prayed for dismissal of the petition.

9. The Petitioner has filed the Rejoinder, to the objections filed by the R1 to R4. In its rejoinder, the Petitioner urged the following events/circumstance as 'Force Majeure' events for claiming extension of time to achieve the Conditions Precedent and commissioning the Solar Power Project, beside reiterating the averments made in the Petition and denied the grounds raised by the Respondent.

- (i) Introduction of GST;
- (ii) Demonetization;
- (iii) Delay due to wrong classification of Solar modules.

The Petitioner has filed additional documents along with the rejoinder. Both parties have filed documents as per the Memo's filed on different date.

10. We have heard the Learned Counsels for the parties. The Petitioner has filed written arguments.

11. 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 17.12.2016 would be approved by the Commission as the approval of the said SPPA was essential?

Or

(b) 17.12.2016 the date on which the said SPPA was executed?

Or

(c) 26.10.2016 the date on which the PPA approval letter dated 14.10.2016 was received by the Petitioner?

Issue No.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?

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

13. 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 17.12.2016 would be approved by the Commission, as the approval of the said SPPA was essential?

Or

b) 17.12.2016, the date on which the said SPPA was executed?

Or

c) 26.10.2016, the date on which the PPA approval letter dated 14.10.2016 was received by the petitioner?

a) 'Effective Date' is defined in Article 21.1 of the PPA as the date of the approval of PPA by the KERC. Further, Article 3.1 of the PPA 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 14.10.2016 (Annexure-P4), the Petitioner and the Respondent-1 were informed the approval of the Commission to the PPA dated 29.06.2016 (Annexure-P3). Therefore, the date 14.10.2016 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 No.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 14.10.2016 (Annexure-P4) communicating approval of 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 14.10.2016 (Annexure-P4) signed by the Secretary of this Commission communicates approval of the Commission to the PPA dated 29.06.2016 executed between the parties in respect of development of 20 MW (AC) Solar Power Project in K.R. Pet Taluk, Mandya 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 29.06.2016 communicated by letter dated 14.10.2016 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 addressed to the Government (Annexure-R2 filed by Respondent-3)

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

14.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?

The Petitioner in its petition has relied upon the following events or circumstance, as 'Force Majeure' Events for claiming the extension of time to achieve the Conditions Precedent and commissioning the Solar plant:

- (i) Delay in granting evacuation approval;
- (ii) Delay in grant of land conversion order;

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 & 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 22.07.2016 (Annexure-R1) addressed to the 1st Respondent (BESCOM) and dated 29.08.2016 (Annexure-R2) 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 Power Project in K.R. Pet Taluk. The 'LoA' was issued on 30.05.2016 (Annexure-P1) and the Petitioner acknowledged the acceptance of the terms and conditions of the LoA through letter dated 08.06.2016 (Annexure-P2). The Petitioner was 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 the project to the nearest Sub-station. For this purpose, the Developer has to search a suitable location. The land can be either purchased or taken on lease for the required period/project.

d) The Petitioner has made application dated 12.07.2016 and 23.07.2016 to the 3rd Respondent for grant of tentative evacuation scheme to 20 MW K.R. Pet Taluk, Mandya District. The 3rd respondent granted the tentative evacuation scheme on 27.10.2016 (Annexure-P11 Collectively). The Petitioner gave its acceptance to the tentative evacuation scheme on 14.11.2016. and requested to issue regular evacuation scheme approval and the 3rd Respondent granted regular evacuation scheme approval on 05.12.2016(Annexure-P11 Collectively) i.e., within a month. It is the contention of the Petitioner that even though he filed an application for granting tentative evacuation scheme approval, the 3rd Respondent granted on 27.10.2016 (Annexure-P11 Collectively). It is pertinent to note that on 23.07.2016, the PPA was not approved by the KERC and hence the question of considering the application dated 23.07.2016 does not arise. The PPA has been approved by the KERC on 14.10.2016 (Annexure-P4) and the 3rd Respondent granted the tentative evacuation scheme approval on 27.10.2016 (Annexure-P11 Collectively). Hence, we are not inclined to accept the arguments of the learned Advocate for the Petitioner that there is inordinate delay in granting evacuation scheme approval.

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, returned all the PPAs to ESCOMs (Annexure-R2 produced by KPTCL) 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 27.10.2016 (Annexure-P11 collectively) that the petitioner had made an application to KPTCL seeking evacuation approval on 23.07.2016. As noted in the above paragraph, the KERC has returned all the PPAs for want of clarification and on 29.08.2016 (Annexure-R2 produced by R3), the Commission accorded in principle, approval to all the PPAs. Thereafter, PPA has been approved by the Commission on 14.10.2016 (Annexure-P4). The tentative evacuation scheme was granted on 27.10.2016. After receipt of the acceptance of the tentative evacuation by the Petitioner (14.11.2016), the regular evacuation scheme was granted on 05.12.2016 (Annexure-P11 Collectively).

- f) From the above facts, it can be said that KPTCL has granted the Tentative Evacuation Scheme as well as Regular Evacuation Scheme approvals in a reasonable time. Therefore, the allegation that KPTCL caused delay in granting evacuation approval is untenable.

g) According to the petitioner, the entire process of land identification in and around the Sub-stations consumed a considerable amount of time. The Commission notes that the PPA was part of the bidding document and the timelines for achieving Conditions Precedent and commissioning the project and the consequences for delay were known to the petitioner at the time of bidding. The petitioner should have been prudent and ascertained the availability of lands in the vicinity of the Sub-stations within 3-4 months from the date of issuance of LoA. From the sequence of events mentioned above, we hold that there was inordinate delay by the petitioner in identifying the proper location of the project and applying for Evacuation approval which could have been avoided, if the petitioner had taken proper timely steps in identifying the lands.

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

a) The Respondent-4 has contended that the Petitioner approached KREDL on 14.06.2017 (para 6 of Statement of objections) requesting to obtain an order for land conversion. The Petitioner, in its Petition has stated that on 13.06.2017 (para 27) it has requested to KREDL for issuance of Government Notification. Annexure-P7 shows that the Petitioner submitted (i) Acknowledgement of Section 109 application submitted to KREDL (ii) Sworn Affidavit for possession of land, apart from the other documents to evidence the fulfilment of Conditions Precedent. It is pertinent to note that in R-1 (produced by -R4) petitioner did not whisper about the production of

land related documents. According to R-1, the Petitioner has identified about 107 acres' land for the project and out of which it had entered into agreement to sale with farmer's/land owners for 104 acres and 20 guntas, the acquisition of balance land was in progress and details of the same shall be submitted shortly. These averments go to show that till 13.06.2017 the Petitioner has no clear title and possession of the lands required for the project.

b) Now, the question is whether filing an application before KREDL on 13.06.2017 (Annexure R-1 of Respondent-4) for taking further action by KREDL to obtain an order under Section 109 of the KLR Act, 1961 amounts to sufficient compliance of Conditions Precedent in relation to production of documentary evidence of clear title and the possession of lands required for the project in the name of the Petitioner. Though, the LoA was issued on 30.05.2016, the Petitioner could finally locate the lands belatedly near K.R.Pet Sub-station and addressed a letter to KREDL in this regard on 13.06.2017. As already noted, Conditions Precedent were required to be complied with on or before 13.06.2017. The Petitioner has not explained the delay in identifying the lands. Hence, we note that the Petitioner cannot bring the event of delay in identifying the lands under any of the provisions of 'Force Majeure' events under Article 14 of PPA.

c) The lands 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 dated 22.02.2016 facilitating grant of permission under Section 109 of the KLR Act, 1961 and to 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. The Petitioner opted to obtain the land on sub-lease instead of purchasing the lands from the owners. Sub-para (D) of the Circular No.RD 01 LRM 2016 dated 22.02.2016 issued by the Principal Secretary to Government, Revenue Department, reads as follows:

“D – The permission under Section 109 of the Karnataka Land Reforms Act, 1961 shall be brought under SAKALA with time prescribed for its delivery being within 60 days.”

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 Developer for establishing the Solar Project. Therefore, one can say that a definite timeframe of 60 days is prescribed for obtaining an order under Section 109 of the KLR Act, 1961. Had the petitioner applied to KREDL, at

least 60 days before the date on which Conditions Precedent had to be achieved and there was a delay by the concerned authorities in processing the same or granting the approval, the date of application to KREDL by the developer, could be considered as the date of fulfilment of the production of the documentary evidence of having clear title and possession of the lands required for the project. Hence, in the present case, had the petitioner applied to KREDL at least 60 days before 13.06.2017, the date on which the Conditions Precedent should have been fulfilled, we could have considered whether making such application and producing the application to Respondent No.1 would amount to fulfilment of the Conditions Precedent within the stipulated time. Therefore, in our considered opinion, it is not possible to hold that the petitioner approaching KREDL on 13.06.2017, (Annexure-R1) which is the last date of achieving Conditions Precedent from the 'Effective Date' for getting conversion of land etc., is sufficient for fulfilment of the Conditions Precedent relating to production of documentary evidence of the title and possession of the lands required.

e) Article 14.4 of the PPA, stipulates 'Force Majeure' exclusions. Any non-performance caused due to negligence, omissions, errors, failure to comply with an Indian Law and breach or default under the Agreement cannot be termed as a 'Force Majeure' event. The Petitioner has not taken steps within reasonable time frame to obtain necessary approvals. Hence, the

avertment that the Petitioner could not complete the project within the stipulated time frame as it was affected by the 'Force Majeure' event is untenable and cannot be accepted.

f) Article 14.5 of the PPA sets out the procedure to be followed for notification of an event of 'Force Majeure' and requires issuance of a notice of 'Force Majeure' within seven days of occurrence of such event. The Petitioner admittedly has not issued such notices within seven days as contemplated in the PPA. It is settled law that when the terms of a contract contemplate issuance of a notice of 'Force Majeure' and the same is not followed, the 'Force Majeure' clause cannot be deemed to be invoked.

g) 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 contention. There is no provision under the PPA and RFP for time extension and retention of the agreed tariff under the head of inadvertent delay.

h) It appears from Annexure-R2 (produced by Respondent-4) that, the Petitioner has filed the application dated 13.06.2017 before the Deputy Commissioner, Mandya seeking permission to purchase the land under Section 109 of the Karnataka Land Reforms Act, 1961. The Deputy Commissioner, Mandya, addressed a letter dated 23.08.2017 (Annexure-R2) to the Petitioner informing to produce necessary documents. Since there was no response from the Petitioner, the Deputy Commissioner, Mandya,

issued another letter dated 23.11.2017 (Annexure R-2 Produced by Respondent-4) to the Petitioner informing to furnish the documents within seven (7) days otherwise it is not possible to consider the request of the Petitioner. It is pertinent to note that the KREDL also wrote a letter to the Petitioner on 02.02.2018 (Annexure-R3 produced by R4) informing the Petitioner to furnish the necessary document to the Deputy Commissioner, Mandya, immediately. All these correspondence on unequivocally evident that the Petitioner is not diligent in identifying the land with timeframe.

- i) The Petitioner could not have expected that when it moved the KREDL on 13.06.2017, an order for conversion of land could have been passed and in turn, lease of land in its favour could have been granted on or before 13.06.2017, the last date for fulfilment of the Conditions Precedent.
- j) The petitioner has not produced the copies of the consent letters, said to have been obtained from the land owners to lease their lands for the Solar Project of the petitioner which were said to have been annexed to the application dated 14.06.2017, filed before the Respondent-4. The Respondent No.4 has produced a copy of the letter dated 13.06.2017, (Annexure-R1) which shows that the consent letters of land owners are not produced along with it. The petitioner is required to establish that the very same lands in respect of which consent letters were issued, were finally converted and sub-let to it. The petitioner has produced agreements of lease dated 06.10.2017 and 10.03.2018 vide Memo dated 10.12.2019.

However, it cannot be ascertained that these documents relate to the lands in respect of which consent letters were said to have been obtained from the land owners, while filing the application dated 13.06.2017, before the KREDL or on 14.06.2017 before Respondent No.4. The Document No.2 produced by the petitioner on 10.12.2019, shows that the petitioner had made an application on 26.04.2018 (Document No.2) before the Deputy Commissioner, Mandya, seeking deemed conversion order under Section 95 of the KLR Act, 1964 that to for 54 acres 12 guntas whereas the Petitioner required 100 acres of land to establish 20 MW Solar Power Plant.

k) The learned Advocate for the petitioner in her Rejoinder and written arguments urged the following events/circumstances as 'Force Majeure' events for claiming extension of time to achieve the Conditions Precedent and commissioning the Solar Power Projects:

- i) Introduction of GST;
- ii) Demonetization;
- iii) Delay due to wrong classification of Solar modules.

18. Introduction of GST:

- a) The Petitioner contended that some of the exemptions which were provided on Goods required for execution, construction and operation of Solar Power Projects are ceased to exist.
- b) The Petitioner has not produced any documentary evidence in support of its claim to establish that its project was actually affected due to any GST

induced disruptions for a period of 3-4 months. Therefore, we hold that the Petitioner has failed to establish that introduction of GST has affected the progress of its project.

19. Demonetization:

- a) 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.
- b) Regarding demonetization, the Petitioner has argued that demonetization has adversely affected the project for 2 to 3 months from 08.11.2016 as land acquisition and project activities were delayed considerably. Except vague averment, in the rejoinder and written arguments no definite instances are mentioned to demonstrate as to how the progress of the project was affected due to demonetization. Therefore, without adequate proof, we are unable to accept that demonetization adversely effected the progress of the project of the Petitioner.

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 Nahva Sheva Port, by the petitioner for its projects in Karnataka, due to wrong classification of 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-P25); (ii) A letter addressed to M/s Wardha Solar Maharashtra Private Limited, dated 27.07.2017 by the Deputy Commissioner of Customs, INDEV CFS NS-V (Annexure-P26); (iii) summons dated 27.09.2017 (Annexure-P27) 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-P28); and (v) a letter dated 31.10.2017 (Annexure-P29) addressed to the Deputy Commissioner of Customs, Chennai. We have gone through these documents. On perusal of these documents, we could not find any material to establish that these documents were pertains to the project to be established by the petitioner in Karnataka. Hence, these documents are not helpful to the Petitioner to show that delay due to wrong classification of Solar modules was one of the grounds for non-fulfillment of Conditions Precedent and Scheduled Commissioning Date. Therefore, we are unable to accept the contention of the Petitioner that there was extraordinary delay in clearance of Solar Modules imported by the Petitioner.

c) It is Pertinent to note that these events/circumstances were not pleaded by the Petitioner in its original petition. In the Rejoinder filed by the Petitioner casually referred these grounds, no details as to how these grounds impacted the fulfillment of Conditions Precedent and implementation of

project were provided. In the written argument only, the Petitioner elaborately narrated about the above grounds.

21. We note that the project was commissioned on 22.12.2017 as per letter dated 31.01.2018 (Annexure-P20 produced by Petitioner along with I.A. on 15.03.2018). Therefore, it can be stated that the commissioning of the project was not delayed on account of non-receipt of land conversion order and hence, this cannot be construed as a 'Force Majeure' event, affecting the implementation of the project.

22. We are of the opinion that the Petitioner has failed to establish that it could produce the acceptable documentary evidence establishing the title and possession of the lands required within the period prescribed for fulfilling the Conditions Precedent.

23. For the reasons stated above, we hold that the petitioner had not established that the delay in granting approval of PPA, in granting evacuation approval; delay in grant of land conversion order; introduction of GST, demonetization and delay due to wrong classification of Solar modules by the Customs Authorities at Chennai and Nahava Sheva Ports are not within the reasonable control of the petitioner and they amount to 'Force Majeure' events. Hence, we answer Issue No.2 in negative.

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

- a) Issue No.2 is found to be held in negative that the petitioner is not entitled for extension of time to achieve the Conditions Precedent or commissioning the project, under the 'Force Majeure' clause of the PPA. Whenever there is delay in achieving the Conditions Precedent and Scheduled Commissioning Date, the Solar Project Developer would be liable for payment of damages under Article 4.3 and liquidated damages for delay in commencement of supply of power under Article 5.8 of the PPA.
- b) The Petitioner has alleged that, the proof of loss or damage, arising out of breach of contract, is essential, even when the Liquidated Damages are provided for in a contract. Relying on the case laws mentioned in the Written arguments and Section 74 of the Indian Contract Act, 1872.
- c) We note that in 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*. *The summary of the principles stated in paragraph 43 of this judgement reads as follows:*
- “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 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 Section 73 of the Indian Contract Act, 1872.

43.3 Since Section 74 of the Indian Contract Act, 1872 awards reasonable compensation for damage or loss caused by a breach of contract, the 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 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 dispensing 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."

- d) It is held that, where it is possible to prove actual damage or loss, such proof is not dispensed with and in cases where damage or loss is difficult or impossible to prove, 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.
- e) We also note that, in this case, there was an option to the Respondent-1 to terminate the PPA when the project was not commissioned within time, but this option was not exercised and the project was allowed to be commissioned. 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 the termination of the Agreement and in 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 termination of the contract is not taken. We also

note that, the quantum of the Liquidated Damages mentioned in the PPA is reasonable.

f) Further, as a consequence of delay in commissioning of the project beyond the Scheduled Commissioning Date, the project would be liable for applicable tariff as on the Commercial Operation Date, if any, as provided in Article 12.2 of the PPA. It would be appropriate here to note the relevant parts of Article 12 of the PPA dated 29.06.2016, which are hereunder:

a) Article 12.1 states that "the developer shall be entitled to receive the tariff of Rs.4.79/kWh of energy supplied by it to BESCO, Bangalore in accordance with terms of PPA during the period between COD and the expiry date."

b) Article 12.2 of PPA envisages that as a consequence of delay in commissioning of the project beyond the Scheduled Commissioning Date, subject to Article 4, if there is change in the KERC applicable tariff, the changed applicable tariff for the project shall be the lower of the following:

i) Tariff as in clause 12.1 above

Or

ii) KERC applicable Tariff as on the commercial Operation Date.

g) The "Commercial Operation Date" is defined under Article 21.1 of PPA as under:

“COD or Commercial Operation Date” shall mean the actual commissioning date of respective units of the power project where upon the developer starts injecting power from the power project to the delivery point.”

h) The Petitioner contended that the tariff under the PPA is discovered through competitive bidding. Hence it is not vulnerable to variations in the generic tariff effected vide different Generic Tariff Orders. The tariff order dated 12.04.2017 is only modification of the earlier order, which is not applicable to the petitioner's case. We have perused the contents of the Revised Tariff Order dated 12.4.2017, which is applicable to Grid Interactive Megawatt Scale Solar Power plants for Financial Year 2018. The clause 4 of the Tariff Order dated 12.4.2017 inter alia says that:

Clause 4. ii – “This tariff determined shall also be applicable to those grid connected megawatt scale solar power PV Plants for which PPAs were entered into before 1st April, 2017 but are not commissioned within the specified Commercial Operation Date (COD) and achieve COD during the period from 1st April, 2017 to 31st March, 2018.”

i) In the instant case the Petitioner has entered into PPA on 29.06.2016 and Commissioned the project on 22.12.2017 and agreed to the terms of Power Purchase Agreement dated 29.06.2016 wherein Clause 12.2 of PPA envisaged the applicability of varied tariff as determined by the KERC as

on the Commercial Operation Date. If the petitioner is not accepting the terms of PPA on later stage, then it is not tenable at this juncture, it could not have accepted during the time of entering PPA with BESCO and could have challenged it before appropriate forum.

j) We rely upon the *Civil Appeal No.1220 of 2105 (Gujarat Urja Vikas Nigam Limited Vs. EMCO Limited and others)* decided on 02.02.2016, where in Hon'ble Supreme Court of India has held, as follows:

"31. Apart from both the Respondent No.2 and the Appellant tribunal failed to notice that the 1st Respondent conveniently ignored one crucial condition of the PPA contained in the last sentence of para 5.20 of the PPA: -

*"In case, commissioning of solar power project is delayed beyond 31st December 2011, GUVNL shall pay the tariff as determined by the Hon'ble GERC for solar power project effective on the date of commissioning of solar power project of 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 first tariff order. It also visualized that for the subsequent control period, the tariff payable to the project/power producer (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 1st Respondent would be entitled only the lower of the two tariffs---

k) The learned Advocate for the Respondent -1 & 3 produced the following rulings: -

- (i) (2011) 1 SCC 394 between BSNL Vs. Reliance Communications Limited;
- (ii) (2015) SCC online APTEL 140 between Lanco Kondapalli Power Limited Vs. Andhra Pradesh Electricity Regulatory Commission;
- (iii) (2003) 5 SCC 705 between ONGC Limited Vs. Saw Pipes Limited;
- (iv) (2015) 14 SCC 263 between Construction and Design Services Vs. Delhi Development Authority; and
- (v) Appeal No.62/2013 decided on 30.06.2014 between PTC India Limited Vs. Gujarat Electricity Regulatory Commission;

l) We have gone through the above judgment. The facts of the above rulings are quite different from the case on hand.

m) We are of the opinion that the Petitioner has failed to establish any 'Force Majeure' event to claim extension of time for achieving the Conditions Precedent or SCOD. In the instant case, 20 MW Solar Power Plant of the Petitioner in K.R. Pet Taluk, Mandya District, was synchronized to KPTCL Grid at 20 MW K.R. Pet Taluk, Mandya District, on 22.12.2017 at 14.13 Hrs (Annexur-R1 produced by Respondent-1). This project should have been commissioned on or before 13.10.2017 as per terms of PPA. Tariff agreed in the PPA dated 29.06.2016 was of Rs.4.84/kWh, but KERC has revised the tariff of Rs.4.36 per unit for grid interactive megawatt scale solar power project by its Tariff Order dated 12.04.2017, which is applicable to this project as per provisions of Article 12.2 of the PPA, because this solar

project is commissioned on 22.12.2017 Sub-sequent to the KERC Tariff order dated 12.04.2017. Therefore, as per Article 12.2 of the PPA, the Petitioner is entitled to get the reduced tariff of Rs.4.36 per kWh.

n) Therefore, Issue No.4, is held accordingly, holding that the Petitioner is not entitled to any reliefs.

25. Issue No.4: What Order?

For the foregoing reasons, we pass the following.

ORDER

- a) The Petitioner is not entitled to any of the reliefs claimed in the petition;
- b) The Petitioner is entitled to get reduced tariff of Rs.4.36 per kWh as per terms of Article 12.2 of PPA dated 29.06.2016 as per Generic Tariff Order dated 12.4.2017 issued by KERC for grid connected megawatt scale PV solar Plants and for the energy supplied to the 1st Respondent from the Commercial Operation Date, during the term of PPA;
- c) The Petitioner is liable for payment of damages as per Article 4.3 of the PPA and liquidated damages for delay in commencement of supply of power to the 1st Respondent as per Article 5.8 of the PPA.

sd/-
(SHAMBHU DAYAL MEENA)
Chairman

sd/-
(H.M. MANJUNATHA)
Member

sd/-
(M.D. RAVI)
Member