

No. N/137/2020, N/138/2020, N/139/2020 & N/11/2021

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

Dated: 05.07.2022

Present

Shri P. Ravi Kumar	..	Chairman
Shri H.M. Manjunatha	..	Member
Shri M.D. Ravi	..	Member

OP No.61, 62, 63/2020 & 7/2021

BETWEEN:

Tepsol Photovoltaic Power
Ventures Private Limited,
A Company incorporated under the
Companies Act, 2013, having its
Registered Office at: 8-2-610/68/1,2,3
5th Floor, Accord Blu,
Road No.10, Banjara Hills,
Hyderabad-500 034.

... **PETITIONER IN ALL OPs.**

(Represented by Sri Srinivas Raghavan,
Senior Advocate for M/s Navayana Law Offices)

AND:

Bangalore Electricity Supply Company (BESCOM),
A Company incorporated under the
Companies Act, 1956,
Having its Corporate Office,
at K.R. Circle,
Bengaluru-560 001.

... **RESPONDENT IN ALL OPs.**

(Represented by Sri S. Sriranga,
Senior Advocate for M/s JUSTLAW,
Advocates)

COMMON ORDERS

1. In all the petitions, similar questions of fact and law arise for consideration and the parties are also same. Therefore, this common judgment is being passed in the above cases. The terms & conditions contained in all the PPAs are exactly the similar one. In OP No.7/2021 the KREDL is added as respondent No.2 along with BESCO as respondent No.1. However, no relief is claimed against KREDL and it is also not a necessary party.
2. The petitioner has filed the petitions under Section 86 (1) (f) of the Electricity Act, 2003, in essence praying in all the cases the following reliefs to:
 - a) Declare that the termination notices issued by the petitioner in different cases are legal and valid, in law; and consequently.
 - b) Permanently restrain/injunct the respondent including its officials, employees, assignees from invoking the Performance Bank Guarantees (PBGs) drawn on Standard Chartered Bank offered by the petitioner in different cases towards performance guarantees as detailed in the petitions.
 - c) Direct the respondent to forthwith return the petitioner's original PBGs produced in different cases.
 - d) Direct the respondent to pay the costs incurred by the petitioner in maintaining the PBGs continued to be kept valid, calculated from the respective date of Notice of Termination of the PPAs till the actual return of the PBGs, to the petitioner by the respondent.
 - e) Grant such other consequential reliefs as this Commission deems appropriate under the facts and circumstances of the case.

3. The facts relevant for the disposal of these cases narrated in the petitions may be stated as follows:

a) Pursuant to the KREDL Tender Notification dated 11.10.2018 calling for bid for selection of developers for development of 100 MW AC Solar Power Projects in the State of Karnataka for implementation in five taluks, TEP Solar India Mauritius was declared as successful bidder in respect of four projects of 20 MW capacity each in different taluks. The successful bidder incorporated the petitioner – TEPSOL Photovoltaic Power Ventures Private Limited for development of these four Projects. The petitioner executed four different PPAs with BESCOM for sale of solar energy for the tariffs discovered and adopted by the Commission. The PPAs contain the terms & conditions for construction and maintenance of Power Projects & supply of power from the Projects to the State grid. For brevity, the relevant dates of execution of PPAs and other particulars are stated in the following tabular columns:

Sl. No.	Particulars	OP No.61/2020	OP No.62/2020	OP No.63/2020	OP No.07/2021
1	Location of Project	Gajendragad (Gadag)	Mundargi (Gadag)	Gurmitkal (Yadgir)	Kurugodu (Ballari)
2	Tariff discovered & adopted	Rs.2.91/unit	Rs.2.91/unit	Rs.2.91/unit	Rs.2.91/unit
3	Date of PPA	31.01.2019	31.01.2019	31.01.2019	31.01.2019
4	Date of approval of PPA (Effective Date)	25.03.2019	25.03.2019	25.03.2019	25.03.2019
5	Scheduled Commissioning Date	24.09.2020	24.09.2020	24.09.2020	24.09.2020
6	Last date for achieving Conditions Precedent	Prior to Commercial Operation Date			
7	Date of Issue of Termination Notice	15.09.2020	15.09.2020	15.09.2020	04.12.2020
8	Date of reply by BESCOM to the Termination Notice	18.11.2020	17.10.2020	12.11.2020	-----
9	Performance security furnished by the petitioner	Rs.2.00 cr.	Rs.2.00 cr.	Rs.2.00 cr.	Rs.2.00 cr.

b) The material averments made in OP No.61/2020, OP No.62/2020 & OP No.63/2020 are as follows:

- (i) The petitioner, prior to the raise of COVID-19 to a pandemic status, had achieved a substantial progress towards development of the Projects and the activities related to land acquisition, obtaining different permits, designing the layout of Projects and entering Engineering, Procurement & Construction Contracts (EPCC) were on track to complete the construction of Projects well within the timelines specified in the PPAs. However, COVID-19 pandemic has unexpectedly stalled & hampered the development and implementation of the Projects due to complete & partial lockdown restrictions imposed all over the country including Karnataka. COVID-19 pandemic also affected the supply chain of the solar panels and other material required for the establishment of Solar Power Projects from China PR. The continuance of COVID-19 pandemic affected the progress of the Project works and the petitioner could not achieve the Conditions Precedent as well as commissioning of the Projects within the Scheduled Commissioning Date.
- (ii) The petitioner intimated the respondent from time to time, the imposition of lockdown due to COVID-19 pandemic in the State as well as the local areas where the Projects were situated. The respondent was also requested to provide time extension for achieving the Scheduled Commissioning Dates of different Projects.

The respondent in turn, intimated to commission the Projects and to approach this Commission seeking extension of time for achieving Scheduled Commissioning Date of the Projects. The petitioner had also filed OP No.22/2020 seeking extension of time for achieving SCOD of all these three Projects. The Commission vide its Order dated 20.08.2020 rejected these petitions holding that the same were premature and the petitioner could file the petition for extension of time on the ground of Force Majeure events subsequent to commissioning of the Projects as provided in last para of Article 5.7.1 of the PPA.

- (iii) The petitioner had obtained regular evacuation approvals on 20.03.2020, 20.03.2020 & 16.04.2020 and had acquired required lands for Projects on 16.03.2020, 05.05.2020 & 01.07.2020 in respect of the above three Projects respectively. It had obtained financial closures on 22.05.2020 for a term loan of Rs.171.24 cr in respect of the above three Projects of 20 MW each from Indian Renewable Energy Development Agency Limited (IREDA) with the terms & conditions stated in the letter dated 22.05.2020 issued by it. The petitioner had also entered into EPC Contract dated 11.12.2019 with TEPSOL Projects Private Limited for development of all the Projects.
- (iv) Since the Force Majeure events had continued, thereby prevented the petitioner from performing its obligations under the PPAs, the petitioner issued termination notices all dated 15.09.2020 to the respondent in respect of these three Projects under Article 5.7.4 of

the PPAs. In the termination notices, the petitioner has stated that it is legally and contractually entitled to exercise its right to terminate the PPAs since the Force Majeure events continued even after a maximum period of four months, thereby the PPAs have been terminated with immediate effect. The respondent was also requested to return the PBGs.

(v) It is stated that as the respondent had not agreed to return the PBGs accepting the termination of PPAs, the petitioner has filed these petitions.

c) The material averments made in OP No.07/2021 are as follows:

(i) The averments made regarding COVID-19 pandemic and its effect on the progress of the Project in this case also are similar to other three cases. The petitioner has issued Force Majeure notices on different dates to the respondent. The petitioner claimed that in the process of completing the Project it had acquired lands and had entered into other contracts and had applied for obtaining various approvals. It is stated that the KPTCL while processing the application of the petitioner for evacuation of power from the Project to the Sub-station, came to the conclusion that the evacuation from the Project to the Sub-station was not feasible and it denied the issue of provisional evacuation approval. Further, the KPTCL had also stated that no other feasible alternate Sub-station was available for the Project Site. These facts were intimated to the petitioner by KPTCL vide letter dated 10.03.2020.

(ii) The petitioner contended that due to the prevailing COVID-19 pandemic and non-availability of evacuation of power from the Project Site to the Sub-station and difficulty in obtaining the other suitable lands, it was compelled to issue termination notice dated 04.12.2020 to BESCO. It appears BESCO has not replied to the termination notice.

(iii) It is stated that as the respondent had not agreed to return the PBGs accepting the termination of PPA, the petitioner has filed this petition bearing No.OP 07/2021.

4. The respondent (BESCO) appeared through counsel and filed the statement of objections. The material part of the statement of objections may be stated as follows:

a) That the contentions of the petitioner that it could not commission the Projects within the SCOD on account of nationwide restrictions due to COVID-19 pandemic and that the same is a Force Majeure event are denied as untenable. The petitioner had twelve months' time before the onset of COVID-19 pandemic, for commissioning the Projects. That the petitioner is only urging COVID-19 pandemic as a ruse to camouflage the defaults on its part from commissioning the Projects within the Scheduled Commissioning Dates.

b) That as per Article 16, the petitioner can terminate the PPA only when there is a BESCO Event of Default and in the present cases, there is no such default. Therefore, the petitioner could not have terminated the PPAs by issue of termination notices dated 15.09.2020 and such notices

are illegal. Hence, it claimed liquidated damages as specified in Article 4.3 & 5.8 of the PPA.

c) The contention of the petitioner that the PPA has become void under Section 56 of the Indian Contract Act, 1872 is untenable and denied. That in the present cases the contracts could have been completely performed though there was delay in its performance, therefore, the petitioner cannot take up the benefit of the said Section 56.

d) In OP No.07/2021, the respondent has not denied the non-feasibility of evacuation of power from the Project site to the nearest Sub-station or such other Sub-stations in the vicinity.

5. We have heard the learned senior counsel for the parties. It is contended on behalf of the petitioner that in all the cases Force Majeure events continued even after a maximum period of four months, thereby the petitioner at its will can terminate the PPAs and the petitioner has issued termination notices dated 15.09.2020 in the 1st three cases and the termination notice dated 04.12.2020 in OP No.07/2021. On the other hand, it is contended on behalf of the respondent (BESCOM) that the termination of PPA can take place under Article 5.7.4 by following the procedure as per Article 16 and that Article 16 provides for termination of PPA by the developer for BESCOM Event of Default and that there was no such BESCOM Event of Default in the present cases. Hence, it is contended that the termination notices issued are illegal. In reply, it is contended on behalf of the petitioners that the termination of PPA as per Article 5.7.4 requires only an issue of notice and the said provision is to be construed accordingly.

It is contended on behalf of the petitioner that on the principles stated in Section 56 of the Indian Contract Act, 1872, these PPAs have become void due to impossibility of performance. The said contention was denied by the respondent.

6. From the rival contentions and pleadings and records, the following issues arise for our consideration:

Issue No.1: Whether the termination of the PPAs in these cases is valid and legal?

Issue No.2: Whether the PPAs entered into between parties, have become void on the principles stated in Section 56 of the Indian Contract Act, 1872?

Issue No.3: Whether the respondent is entitled to claim damages under Article 4.3 & liquidated damages under Article 5.8 of the PPAs?

Issue No.4: To which reliefs the petitioner is entitled to?

Issue No.5: What Order?

7. After considering the rival submissions of the parties, and on perusal of the records, our findings on the above issues are as follows:

8. Issue No.1: Whether the termination of the PPAs in these cases is valid and legal?

- a) The petitioner has relied upon Article 5.7.4 for terminating the PPA. The said Article reads as follows:

5.7.4 "In the event that the Developer is prevented from achieving the progress in fulfilling the Condition Precedent or commissioning the Project for the reasons specified in the Article 5.7.1 (a), (b), (c) and if such events continue even after a maximum period of

4 (four) months, any of the Parties may terminate the agreement as per the provisions of Article 16."

- b) Before considering this issue, a finding on the question as to whether there existed COVID-19 pandemic for a period of four months and above subsequent to execution of the PPAs or not is to be arrived. The termination notices dated 15.09.2020 and 04.12.2020 claim that COVID-19 pandemic continued for a period of four months and above. The petitioner has relied upon number of Office Memoranda issued by the Ministry of New & Renewable Energy (MNRE), New Delhi, and also the Orders passed by the State Government directing full/partial lockdowns restricting the movements of public and goods from one place to another place. The termination notices itself contain the details of such memoranda and orders.
- c) The respondent has not specifically denied the existence of COVID-19 pandemic and the issuances of memoranda and orders in this regard. The Commission can also take judicial notice of the existence of COVID-19 and the restrictions imposed during the said period. The MNRE in OM dated 17.04.2020 (Annexure-P41 in OP No.61/2020) issued advisory/guidelines for time extension in Scheduled Commissioning Date of Renewable Energy (RE) Projects considering disruption due to COVID-19 lockdown. It is stated in the said OM that lockdown due to COVID-19 be treated as Force Majeure. Further, that the lockdown period and additional thirty days after the end of such lockdown be counted for the duration of the Force Majeure Event and let there be blanket extension

without the requirement of examination on case to case basis. From the above facts, the Commission is of the view that there existed COVID-19 pandemic (Force Majeure Event) for a continuous period of four months and above, preventing or unavoidably delaying the affected party from performing its obligations under the PPA. Therefore, we proceed to examine the Issue No.1.

- d) According to the petitioner in case any of the Force Majeure events specified in Article 5.7.1 (a), (b) & (c) continues even after a maximum period of four months, any of the parties may terminate the PPA. Further, it is contended that the phrase "as per the provisions of Article 16" appearing in the last portion of Article 5.7.4 is to be interpreted to mean only issuance of a written notice to the other side intimating the exercise of right to terminate the PPA, when Force Majeure event continues for more than four months. Further, it is contended that the procedure as required under Article 16 of issuing a Preliminary Default Notice is not called for. Therefore, it is contended that the issue of termination notices dated 15.09.2020 in the 1st three cases and dated 04.12.2020 in OP No.07/2021 stating that the on-going COVID-19 pandemic (Force Majeure event) continued even after a maximum period of four months and the petitioner unequivocally declaring its right to terminate the PPA and terminating the PPA instantly is sufficient compliance of Article 5.7.4.
- e) On the other hand, the counsel for the respondent submitted that the termination of PPA can take place under Article 5.7.4 by following the procedure as per Article 16 and that Article 16 provides for termination of

PPA by the developer only in case of 'BESCOM Event of Default' and that there was no such BESCOM Event of Default in the present cases, therefore, the petitioner could not have terminated the PPA for the reason that pandemic COVID-19 continued even after a maximum period of four months. In other words, the contention of the respondent is that in case, a 'BESCOM Event of Default' had occurred as stated in Article 16.2 and that could not have been cured due to a Force Majeure Event affecting BESCOM, which had continued for a period of four months and above, would entitle the petitioner to terminate the PPA under Article 5.7.4 but not in other cases of Force Majeure Events. Therefore, it is contended that the on-going pandemic COVID-19 cannot be considered as a Force Majeure Event entitling the petitioner to terminate the PPA as per provisions of Article 5.7.4, even if the Force Majeure event continued for a period of more than four months. It is pointed out that in the present cases, the petitioner had issued termination notices, terminating the PPA instantly only for the reason that pandemic COVID-19 (Force Majeure Event) continued for more than four months, without following the procedure specified as per provisions of Article 16 of the PPA. This contention of the respondent leads to an inference that for termination of PPA under Article 5.7.4 a mere continuance of any Force Majeure Event for a period of four months and above itself is not sufficient and the Force Majeure Event should relate to Force Majeure Events affecting either 'Developer Default' or 'BESCOM Event of Default' as provided under Articles 16.1.1 & 16.2. Further that in case of 'BESCOM Event of Default'

which could not be cured due to a force majeure event continuing for four months and above the developer can terminate the PPA and in case of 'Developer Default' which could not be cured due to a Force Majeure event continuing for four months and above, the BESCOM can terminate the PPA, as per the provisions of Article 16. Therefore, according to the submissions of the learned senior counsel for the respondent Article 5.7.4 is to be read in this manner for terminating the PPA for Force Majeure Events continuing for a period of four months and above.

- f) The learned counsel for the respondents relied upon the decision cited in 2020 SCC Online Bom 704 on the file of the Hon'ble High Court of Bombay between Standard Retail Private Limited Vs. G.S. Global Corporation & Others and other connected cases decided on 08.04.2020. In this case, the question that arose for consideration was as to whether a buyer is entitled to enforce a Force Majeure Event (the COVID-19 pandemic period) to terminate the agreement with the seller for supply of certain goods, invoking frustration, impossibility and impracticability of the contract with the seller. The Hon'ble High Court of Bombay, on considering the fact that the Force Majeure benefit was available only to seller as per the terms of agreement, the buyer cannot invoke the Force Majeure Event or the defence of frustration impossibility etc., as per Section 56 of the Indian Contract Act, 1872. Therefore, the termination of the agreement with the seller effected by the buyer on the ground of continuation of COVID-19 pandemic was held to be not proper. This decision may not be helpful to the respondent in the present case.

Because in the above stated case, the Force Majeure benefit was available only to the seller but not to the buyer, however, in the present case for termination of the PPA under Article 5.7.4 both parties can rely upon the continuance of the Force Majeure Event for a period of more than four months.

g) The learned senior counsel for the petitioner contended that the PPA can be terminated by any of the parties provided Force Majeure Event continued even after a maximum period of four months. Further, he submitted that in that event any of the parties can exercise its right to terminate the PPA by expressing its intention to terminate. According to him, exercising such option to terminate the PPA is done by issuing a written notice to the other side. Therefore, he submitted that the last portion in Article 5.7.4 to the effect that “any of the parties may terminate the agreement as per provisions of Article 16” is to be interpreted to mean by issue of a written notice but not by issue of a Preliminary Default Notice as required under Articles 16.3 or 16.4, calling upon the other side to cure the defect within a particular period. Therefore, he contended that in the present cases, the issue of termination notices dated 15.09.2020 immediately effects the termination of PPAs.

h) After considering the rival contentions the Commission is of the considered view that the contention of the learned senior counsel for the petitioners is to be accepted. Therefore, the PPAs in OP No.61, 62 & 63/2020 stand terminated upon issue of termination notices dated 15.09.2020 by the petitioner on the ground of continued on-going COVID-19 pandemic

(Force Majeure Event) continued even after a maximum period of four months.

i) So far as the facts concerned in OP No.07/2021, it is found that the KPTCL while processing the application of the petitioner for evacuation approval of power from the Project to the Sub-station, came to the conclusion that the evacuation from the Project to the Sub-station was not feasible and it denied the issue of provisional evacuation approval. Further, the KPTCL had also stated that no other feasible alternate Sub-station was available for the Project Site. These facts were intimated to the petitioner by KPTCL vide letter dated 10.03.2020. Therefore, the petitioner in this case has not done any other activity towards establishment of the Project. The petitioner has also not made any attempt to search for the change of location of the Project. It is not the case of the petitioner that due to on-going COVID-19 pandemic it was unable to search the alternate site for the Project.

j) In view of the above facts, it appears the petitioner cannot take the benefit of on-going COVID-19 pandemic as a Force Majeure Event which could prevent the petitioner in the performance of its obligations under the PPA. In this regard, we may note the material part of the definition of Force Majeure as stated in Article 14.3 which reads as follows:

“14.3 Force Majeure:

14.3.1 A ‘Force Majeure’ means any event or circumstance or combination of events those stated below which wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if an to the extent that such events

or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices:

- a) xxxxxxx
- b) xxxxxxx
- c) xxxxxxx
- d) xxxxxxx
- e) xxxxxxx "

k) The above definition of Force Majeure makes it clear that COVID-19 pandemic cannot be considered as a Force Majeure event in the present case. That leads to the conclusion that the issue of termination notice dated 04.12.2020 in this OP No.07/2021, has no effect of terminating the PPA.

l) For the above reasons, we hold that termination of PPAs is valid so far as OP No.61, 62 & 63/2020, however, the termination of PPA in OP No.07/2021 is not valid. Issue No.1 is held accordingly.

9. Issue No.2: Whether the PPAs entered into between parties, have become void on the principles stated in Section 56 of the Indian Contract Act, 1872?

a) The learned senior counsel for the petitioner relied upon para 34 of the Hon'ble Supreme Court of India, decision in Energy Watchdog & Others Vs. Central Electricity Regulatory Commission & Others [(2017) 14 SCC 80]. The said paragraph is extracted by the petitioner in para 9 of the Rejoinder filed by it. It reads as follows:

“34. The law in India has been laid down in the seminal decision of Satyabrata Those Vs. Mugneeram Bangur & Co., 1954 SCR 310. The second paragraph of Section 56 has been adverted to, and it was stated that this is exhaustive of the law as it stands in India. What was held was that the word “impossible” has not been used in the Section in the sense of physical or literal impossibility. The performance of an act may not be literally impossible, but it may be impracticable and useless from the point of view of the object and purpose of the parties. If an untoward event or change of circumstance totally upsets the very foundation upon which the parties entered their agreement, it can be said that the promisor finds it impossible to do the act which he had promised to do. It was further held that where the Court finds that the contract itself either impliedly or expressly contains a term, according to which performance would stand discharged under certain circumstances, the dissolution of the contract would take place under the terms of the contract itself and such cases would be dealt with under Section 32 of the Act. If, however, frustration is to take de hors the contract, it will be governed by Section 56.”

- b) On the basis of the law laid down in the above paragraph by the Hon'ble Supreme Court of India, it is contended that in the present case the performance of contract has become impossible, therefore, the contract becomes void. The respondent denied the applicability of the above principle stated in Section 56 of the Indian Contract Act, 1872.
- c) In the present case, the performance of the contract has not become impossible because the effect of Force Majeure Event due to COVID-19 would be for a limited period and the delay due to Force Majeure Event

can also be exempted as per Article 14. The object and purpose of the contract is not defeated due to the COVID-19 effect. Therefore, Section 56 of the Indian Contract Act, 1872 is not applicable. Merely for the reasons, that there is a provision for termination of PPA as provided in Article 5.7.4, the contract cannot be treated as contingent contract as per Section 32 of the Indian Contract Act, 1872, which reads as follows:

“S.32. Enforcement of contingent contracts on an event happening – Contingent contracts to do or not to do anything if an uncertain future event happens, cannot be enforced by law unless and until that event has happened.

If the event becomes impossible, such contracts become void.”

d) For the above reasons, we hold Issue No.2 in negative.

10. Issue No.3: Whether the respondent is entitled to claim damages under Article 4.3 & liquidated damages under Article 5.8 of the PPAs?

a) Articles 4.1, 4.3 & 5.8 read as follows:

“4.1 Conditions Precedent:

Save and except as expressly provided in article 14 or unless the context otherwise requires, the respective rights and obligations of the Parties under this Agreement shall be subject to the satisfaction in full of the conditions precedent specified in this Clause 4 (the “Conditions Precedent”) by the Developer prior to COD, unless such completion is affected by any Force Majeure event, or if any of the activities is specifically waived in writing by BESCOM.

4.3 Damages for delay by the Developer:

In the event that the Developer does not procure fulfilment of any or all of the Conditions Precedent set forth in Clause 4.2 prior to COD and the delay has not occurred

for any reasons attributable to BESCO or due to Force majeure, the Developer shall pay to BESCO Damages in an amount calculated at the rate of 0.2% (zero point two per cent) of the Performance Security for each day's delay until the fulfilment of such Conditions Precedent, subject to a maximum period of 30 (thirty) days. On expiry of the said 30 (thirty) days, BESCO at its discretion may terminate this Agreement.

5.8 Liquidated Damages for delay in commencement of supply of power to BESCO:

5.8.1. If the Developer is unable to commence supply of power to BESCO by the Scheduled Commissioning Date other than for the reasons specified in Clause 5.7.1, the Developer shall pay to BESCO, Liquidated Damages for the delay in such commencement of supply of power and making the Contracted Capacity available for dispatch by the Scheduled Commissioning Date as per the following:

- a) For the delay up to one (1) month an amount equivalent to 20% (twenty percent) of the Performance Security.*
- b) For the delay of more than one (1) month and up to two (2) months on account equivalent to 40% (forty thousand) of the total Performance Security.*
- c) For the delay of more than two and up to three (3) months on amount equivalent to 40% (forty percent) of the Performance Society.*

For avoidance of doubt, in the event of failure to pay the above mentioned damages by the Developer entitles BESCO to encash the Performance Security."

- b) Article 4.1 provides that the respective rights & liabilities of the parties under this agreement shall be subject to the satisfaction in full of the Conditions Precedent specified in this Article by the Developer prior to COD subject to such exceptions stated in the said Article. In the event Conditions Precedent are not fulfilled by the Developer within the actual commissioning of the Project, the respondent (BESCOM) enforce the other rights arising under the terms of the PPA. However, it can claim damages as provided in Article 4.3. In the event of valid termination of the PPA by the Developer, the Developer is relieved of all the liabilities arising under the terms of the PPA.
- c) We found that in OP No.61, 62 & 63/2020 the termination of PPA is valid. Therefore, the petitioner in these cases is relieved from the liability to pay damages under Article 4.3 & Liquidated Damages under Article 5.8 of the PPA.
- d) We found that in OP No.07/2021 the termination of the PPA is found to be not valid. Therefore, the petitioner in this case is at least liable for payment of damages under Article 4.3 which comes to 6% of the Performance Security.
- e) For the above reasons, we hold Issue No.3 partly in affirmative.

11. Issue No.4: To which reliefs the petitioner is entitled to?

- a) In view of the findings arrived on the above issues, in OP No.61, 62 & 63/2020, the respondent (BESCOM) is to be directed to return the PBGs furnished by the petitioner immediately without any deductions. In that

event that it is not necessary to issue any order of injunction against the respondent as prayer by the petitioner.

b) In view of the findings arrived in OP No.07/2021, as noted in sub-para (d) of para 10 above, the respondent is entitled to invoke 6% of PBG furnished in this case and is to be directed to return the balance PBG.

c) In OP No.07/2021 also, there is no necessity to issue any order of injunction against the respondent as prayed for by the petitioner.

d) Issue No.4 is held accordingly.

12. Issue No.5: What Order?

For the above reasons, we pass the following:

ORDER

a) OP No.61, 62 & 63/2020 are substantially allowed. The respondent (BESCOM) is directed to return the original Performance Bank Guarantees in all these cases to the petitioner.

b) OP No.07/2021 is partly allowed. The respondent (BESCOM) is directed to return the original Performance Bank Guarantee furnished in this case to the petitioner, subject to its claim for 6% of the said Performance Bank Guarantee.

c) The other reliefs claimed by the petitioner as prayed for in the petitions are not allowed.

d) The original Order be kept in OP No.61/2020 and the copies of it be kept in all other connected cases.

sd/-
(P. RAVI KUMAR)
Chairman

sd/-
(H.M. MANJUNATHA)
Member

sd/-
(M.D. RAVI)
Member