

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION

No. 16 C-1, Miller Tank Bed Area, Vasanth Nagar, Bengaluru- 560 052

Dated : 14th June, 2018

Present:

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

OP No.91/2017

BETWEEN:

Sri. Murali M Baladev,
S/o Late Baladev,
No.2, First Floor,
Chikpet,
B.V.K. Iyengar Road ,
Bengaluru-560 053

[Represented by Sri Sunil P Prasad, Advocate]

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PETITIONER

AND:

- 1) The Karnataka Renewable Energy Development Limited,
39, Shanthi Gruha, Bharat Scouts and Guides Building,
Palace Road, Bengaluru- 560 001
- 2) Bangalore Electricity Supply Company Limited,
K.R. Circle,
Bengaluru – 560 001.
- 3) The General Manager (Ele),
Power Purchase. BESCOM,
K.R. Circle, Bengaluru – 560 001
- 4) The Chief Engineer, Electy,
Transmission Zone, KPTCL,
Siddaganga Complex, B H Road
Tumakuru.

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RESPONDENTS

*[Respondent-1 represented by Shri G.S. Kannur, Advocate
Respondents 3 and 4 represented by Justlaw, Advocates]*

ORDERS

1) This Petition is filed under Section 86(1)(f) of the Electricity Act, 2003, in effect, praying to:

- (a) Pass an Order, granting extension of time by six months from the date of the receipt of the Order in the Petition, to execute and commission the project, granted to the Petitioner under the Allotment Letter dated 28.08.2015, and PPA dated 02.09.2015, or in the alternative, to issue directions to the Respondent-3, to consider the representations dated 13.02.2017 and 04.03.2017 at Annexures – M & P submitted by the Petitioner to the Respondent-3, in the interest of justice and equity; and,
- (b) Pass such other Orders, as this Commission deems fit and proper based on the facts and circumstances of the above case, in the interest of justice and equity.

2) The prayer (a) was later amended and renumbered as (1), vide IA dated 06.07.2017, as follows:

‘Pass an Order affirming the Approval dated 16.06.2017, issued to the Petitioner by the Third Respondent granting extension of time to commission the project within 01.09.2017, without altering any other terms and conditions of the Power Purchase Agreement dated 02.09.2015, in the interest of justice and equity.’

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- 3) The brief facts of the case and grounds urged by the Petitioner are as follows:
- (a) The Petitioner is a farmer and owner of the land bearing Survey No:350/2, measuring 15 acres 34 Guntas at Venkatapura Village, Kasaba- Hobli, Pavgada Taluk, Tumakuru District.
 - (b) The Respondent-1 had invited applications, for the development of renewable energy in Karnataka, under the individual land owning farmers' scheme for the purposes of setting up solar power projects, as prescribed under Segment 1, category 1 of Solar Policy, in compliance of Government Order dated August 26, 2014.
 - (c) The Petitioner's online application was accepted and the Respondent-1 had issued a Letter of Allotment, dated 28.08.2015 to the Petitioner.
 - (d) A Power Purchase Agreement (PPA) dated 02.09.2015, was executed between Respondent-2 and the Petitioner (Solar Project Developer/SPD), for the purpose of development of Solar Power Project with gross capacity of 3 MW.
 - (e) Despite entering into the PPA dated 02.09.2015, there was a dispute with regard to the rate which was fixed in the PPA (Rs.6.51 per unit). The Petitioner had submitted a representation dated 03.09.2015, to the Respondent-1 and to the Commission, requesting for a direction to the Respondent-2, for executing the PPA at a tariff of Rs.8.40 per unit, instead of Rs.6.51 per unit.

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- (f) The Petitioner filed O.P. No. 25/2016 on 28.03.2016 before the Commission seeking appropriate relief, in the said regard.
- (g) The Petitioner, in order to comply with the terms and conditions stipulated under Article 2 of the PPA, had filed the following applications, for obtaining necessary consents, clearances, approvals and permits:
- (i) Application, filed on 05.10.2015 before the Tahasildar, Pavagada Taluk, seeking Declaration in Form 15 and for permission under Section 109 of the Land Reforms Act.
 - (ii) Application, filed for obtaining NOC from Gram Panchayat and the same was issued on 16.01.2016.
 - (iii) Application, filed before the Sub-Division Officer, Madhugiri Subdivision, Madhugiri for clearance under Section 79 A and B of Land Reforms Act on 14.01.2016 and the same was issued on 13.04.2016.
 - (iv) Application, filed before the Sub-Division Officer, Madhugiri Sub division, Madhugiri for issuance of Endorsements pertaining to PTCL on 14.01.2016 and the same was issued on 28.04.2016.
 - (v) Application filed before the Sub-Division Officer, Madhugiri Subdivision, Madhugiri District for issuance of No Acquisition Certificate on 14.01.2016 and the same was issued on 13.04.2016.
 - (vi) Application, made to the Tahasildar, Pavagada Taluk, for issuance of certificate stating that the land is not in violation of any Land Grant Rules, and the same was issued on 29.04.2016.
- (h) The Petitioner filed an application on 23.05.2016, before the Deputy Commissioner, Tumakuru District for conversion of Land and the Conversion

Order was issued by the said Authority on 07.09.2016 after about 4 months from the date of filing of the application.

- (j) In the meanwhile, on 28.7.2016, OP No.25/2016 was dismissed. Aggrieved by the Order of the Commission, the Petitioner challenged the same before the Appellate Tribunal in DFR No.418/2017 and the same is pending consideration. In the process, the Petitioner lost about 14 months from the date of execution of PPA till the filing of the Appeal.
- (k) On 09.12.2015, the Petitioner filed an application before the KPTCL, for grant of evacuation approval. However, there was no response till April, 2016 from the KPTCL. Hence, on 15.04.2016, the Petitioner filed another application before the Respondent-4. On 27.04.2016, the Respondent-4 addressed a letter requesting to pay processing fee of Rs.57,250/-. The fee was paid on 28.4.2016. The Respondent-4 accorded Tentative Evacuation Approval on 13.05.2016. The Petitioner agreed to comply with Tentative Evacuation Approval and accepted the same vide letter of acceptance dated 17.05.2016. After 4 months, the Respondent-4, vide letter dated 15.09.2016, issued approval for regular evacuation scheme for the proposed project, subject to certain terms and conditions mentioned, therein.
- (l) After the Petitioner complied with the terms and conditions of the Regular Evacuation Scheme dated 15.09.2016, the Respondent-4 issued an intimation letter, dated 05.11.2016, for payment of necessary charges. The Petitioner made requisite payment and the same was acknowledged by the Respondent-4 vide letter dated 15.11.2016. On 30.11.2016, the

Respondent-4 issued approval for construction of 11 kv line with coyote ACSR conductors, from the proposed 3 MW Solar Power Plant and 01N 11 KV Terminal bay at 66/11 KV Substation Venkatapura for evacuation of power.

- (m) As per Clause 12.11 (i) of the PPA, the Petitioner intended to assign his rights, responsibilities, obligations, liabilities etc., to a Special Purpose Vehicle (SPV) for the purpose of investment and implementation of the Solar Project and accordingly entered into a MoU dated 03.09.2016 with AJS Better World an investor, to form the SPV namely, AJS Better World LLP on 11.11.2016. A Supplemental Power Purchase Agreement dated 08.12.2016, came to be entered into between the Respondent-2 and the SPV.
- (n) As per the PPA, the Petitioner was required to achieve the Scheduled date of completion and the commercial operation of the project within 18 months from the effective date i.e., from the date of PPA. As such, the Petitioner was required to complete the work, as on 01.03.2017.
- (p) The AJS Better World could not commence and proceed with the project works immediately as there was no adequate cash-flow in the country on account of demonetisation by the Government of India, and the financial closure was not submitted to the Respondents.
- (q) The investor insisted that the Petitioner should seek extension of time to complete the project work, since there was a delay in issuing the approvals

and consents, by various departments and also as the money flow was affected due to demonetisation. The investor felt that the time was insufficient for completing the project work, as only 3 months' time was remaining for the due date. Hence, the Petitioner addressed a letter dated 13.02.2017 to the Respondent-3, to grant six months' extension of time to complete the Project.

- (r) The Petitioner had informed the investor about the said letter for extension of time and requested the investor to commence the work, but there was no response from the investor. As such, the Petitioner was constrained to address a letter dated 20.02.2017, to the Respondent-3, informing about the inaction of the investor, in commencing the Project Work and requested the Respondent-2 (BESCOM) to cancel the Supplemental PPA executed between the BESCOM and the SPV.
- (s) The Petitioner was constantly pursuing with the BESCOM to consider his letter dated 13.02.2017, wherein, he had sought for extension of time. However, there was no response from the Respondent-3. The Scheduled Commissioning date had lapsed in the meantime. The Petitioner made another representation dated 04.03.2017, seeking extension of time and the same was not considered. The investor backed out from executing the project and issued a letter of withdrawal dated 08.04.2017, addressed to the Respondent-3.
- (t) Thereafter, the Petitioner assigned to an another investor, Ampolt Electronics India Private Limited, the work for execution and completion of

the project. The said investor has made huge investments for the project work by raising loans from the financial institutions. The investor has made all arrangements for installation of solar panels on the land. However, the financial institutions sought for production of extension letter approved by competent authority to release further loan amount for the project work. It is submitted by the Petitioner that, the amount for the materials ordered by the investor can be paid to the supplier, only if the financial institutions release the funds, for which the petition is required to be allowed.

- (u) The Respondent-3 had issued a notice dated 15.04.2017, informing the Petitioner to approach this Commission, for seeking extension of time. The letter dated 15.04.2017, issued by the Respondent-3, was returned unserved on 10.05.2017. However, when the Petitioner approached the Respondent-3 to enquire about his letter for extension of time, the said letter dated 15.04.2017 was served on the Petitioner on 15.05.2017.
- (v) The Petitioner submits that, Clause 2.5 of the PPA provides for extension of time and the Petitioner has made out grounds for extension of time as stipulated in the said Clause, as there is a delay on the part of various Authorities, including the Respondents, in issuing approvals and consent for the purpose of executing and operating the project. Further, due to demonetisation process, cash flow in the country was affected, resulting in stalling of the work pertaining to the Project, till the end of January. Thereafter, the project work could not be completed due to insufficient time and the application for extension of time filed by the Petitioner

pending consideration before the Respondent-2. In the meantime, the 18 months' time, as stipulated in the PPA, had lapsed as on 01.03.2017.

- (w) The Petitioner further submits that, during the pendency of the Petition, extension of time was granted to commission the project by the Respondent-3 and the Project was commissioned on 30.08.2017, as per Commissioning Certificate dated 07.09.2017.
- 4) On issuance of Notice, the Respondents entered appearance through their Counsel. The Counsel for Respondents 2 & 3 filed the common Statement of Objections on 24.08.2017, but later, on 17.10.2017, the said Statement of Objections was withdrawn and a fresh Statement of Objections filed.
- 5) The Respondent-1, in the Statement of Objections filed, has stated that no relief is claimed against it and hence the petition may be dismissed as against it.
- 6) The Respondent – 4 remained unrepresented.
- 7) The submissions of Respondents 2 & 3 in their Statement of Objections dated 17.10.2017 may be summed up as follows:
- (a) As per the terms of the PPA, the generator was required to commission the plant, within 18 months from the date of execution of the PPA. Accordingly, the Petitioner was supposed to commission the project by 01.03.2017.

- (b) As the Petitioner was unable to execute the Project within time, the Petitioner sought 6 months' extension of time to commission the project under *force majeure* conditions.
- (c) As several requests for extension of scheduled commissioning date were received from solar developers, the Government of Karnataka issued an Order dated 24.11.2016, directing all the ESCOMs to constitute a 3-Member Committee to consider and dispose of the requests of farmers/developers. Accordingly, a Committee was constituted by the Respondent 1, which in its meeting held on 25.03.2017, considered requests of 9 generators, including the Petitioner. The Petitioner had cited the following reasons for the delayed execution of the project.

Land Conversion:

Date of Submission of application: 05.10.2015

Date of Conversion: 07.09.2016

Delay in getting approval: 11 months

(Here itself we note that the date of submission of application is 23.05.2016 and not 5.10.2015, as mentioned by the Respondents and thereby the period taken to grant approval is about three and half months)

KPTCL Evacuation Approval (Regular):

Date of Submission of application: 15.04.2016

Date of Approval: 15.09.2016

Delay in getting approval: 5 months

The Committee, after detailed discussions and scrutiny of all the documents, opined that the approval may be accorded for extension of

SCOD by upto 6 months under Article 2.5 of PPA as there was delay in issue of approvals by various Government entities.

- (d) The Respondent-1, in letter dated 16.03.2017, informed the Petitioner about the extension of time for achieving scheduled commercial operation of the project.
- (e) The Commission in its letter dated 16.03.2017 informed all the ESCOMs of the State, not to allow any extension of time to solar generators beyond the scheduled commissioning date as per the PPA without obtaining prior opinion of the Commission. Further, vide letter dated 05.04.2017, the ESCOMs were directed by the Commission to advise all land owner solar developers/SPVs, to approach the Commission and seek approval of the extension of time. In furtherance to the same, the Petitioner has filed this Petition.
- (f) The Energy Department, vide letter dated 25.04.2017, addressed to the Commission, has requested it to consider approval for the 6 (six) month's extension of the COD granted by BESCO as per Clause 2.5 and Article 8 of PPA. Further, that the subject was placed before the 82nd Meeting of the Board of Directors of the BESCO held on 08.06.2017, and the Board ratified the actions taken on the extensions, issued by the BESCO, subject to approval of the Commission.

- (g) In respect of extensions of the project duration of already awarded solar power projects, the Ministry of New and Renewable Energy in its letter dated 28.07.2017 addressed to the Principal Secretaries (Power/Energy), State Government has stated as below:

“Ministry had requested not to give time extension if all the obligations are fulfilled by the concerned State Government Authorities/PSUs etc. in a project. However, if there are delays of any kind on the part of State Government Authorities/PSUs like land allotment, transmission/evacuation facilities, connectivity permission or force majeure, the competent authority in the State/SECI/NTPC etc. may consider providing extension of the time duration strictly as per the Contractual Agreement.

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

- (h) The Respondents have therefore, prayed for issue of appropriate directions in the matter.

- 8) We have heard the Counsel for the parties and perused the records. The following issues arise for our consideration:

- (1) Whether the extension of time granted by the Respondent-3 for commissioning the Petitioner's project, can be subjected to legal scrutiny by the Commission?
- (2) Whether the Petitioner has made out a case for deferment or extension of the Scheduled Commissioning Date of its Project?

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- (3) What should be the tariff for the Project for the term of the PPA?
- (4) What Order?
- 9) After considering the submissions made by the counsel for the parties and the pleadings and other material placed on record, our finding on the above issues are as follows:
- 10) **ISSUE No.(1):** *Whether the extension of time granted by the Respondent-3 for commissioning the Petitioner's project, can be subjected to legal scrutiny by the Commission?*
- (a) Clause 2.5 of the PPA provides for extensions of time. The Petitioner submits that the Respondent-3 has no objections to the Petitioner's averment and has accepted the Petitioner's submissions that include justification for extension of time granted by the Respondent-3. However, we note that, any extension of time to commission the project, has a bearing on the tariff payable. The consumer, though not a formal party, ultimately pays for the supply of the electricity and is the most affected party. The Commission is required to safeguard such consumers' interest. While upholding the role of the Commission, as a regulator and custodian of the interest of consumers, the Hon'ble Supreme Court, has in the case of *All India Power Engineers Federation Ltd, Vs. Sasan Power Ltd*, reported in (2017) 1 SCC 487, held that, even if parties to a contract (generating company- seller of energy and distribution licensee-buyer of energy), waive a certain term affecting the tariff, the Commission, as a custodian of consumer interest

has to intervene and exercise its regulatory powers. Therefore, we hold that the Commission has the mandate and powers to scrutinise the correctness and legality of the extension of time granted by the Respondent-3.

(b) For the above reasons, Issue No.1 is answered, in the affirmative.

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

(a) It would be useful to extract the relevant clauses of the PPA, before we deal with this issue:

“2.1 Conditions Precedent:

The obligations of BESCO and the SPD under this Agreement are conditional upon the occurrence of the following in full within 365 days from the effective date.

2.1.1 (i) *The SPD shall obtain all permits, clearances and approvals (whether statutory or otherwise) as required to execute and operate the Project (hereinafter referred to as “Approvals”):*

(ii) The Conditions Precedent required to be satisfied by the SPD shall be deemed to have been fulfilled when the SPD shall submit:

(a) The DPR to BESCO and achieve financial closure and provide a certificate to BESCO from the lead banker to this effect;

(b) All Consents, Clearances and Permits required for supply of power to BESCO as per the terms of this Agreement; and

(c) Power evacuation approval from Karnataka Power Transmission Company Limited or BESCO, as the case may be.

2.1.2 SPD shall make all reasonable endeavors to satisfy the Conditions Precedent within the time stipulated and BESCO shall provide to the SPD all the reasonable cooperation as may be required to the SPD for satisfying the Conditions Precedent.

2.1.3 The SPD shall notify BESCO in writing at least once a month on the progress made in satisfying the Conditions Precedent. The date, on which the SPD fulfills any of the Conditions Precedent pursuant to Clause 2.1.1, it shall promptly notify BESCO of the same.

2.2 Damages for delay by the SPD

2.2.1 In the event that the SPD does not fulfill any or all of the Conditions Precedent set forth in Clause 2.1 within the period of 365 days and the delay has not occurred for any reasons attributable to BESCO or due to Force Majeure, the SPD 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 fulfillment of such Conditions Precedent, subject to a maximum period of 60 (Sixty) days. On expiry of the said 60 (Sixty) days, BESCO at its discretion may terminate this Agreement.

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2.3.2 Appropriation of Performance Security

Upon occurrence of delay in commencement of supply of power to BESCO as provided in clause 2.5.7, or failure to meet the Conditions Precedent by the SPD, BESCO shall, without prejudice to its other rights and remedies hereunder or in law, be entitled to encash and appropriate the relevant amounts from the Performance Security as Damages. Upon such encashment and appropriation from the Performance Security, the SPD shall, within 30 (thirty) days thereof, replenish, in case of partial appropriation, to its original level

the Performance Security, and in case of appropriation of the entire Performance Security provide a fresh Performance Security, as the case may be, and the SPD shall, within the time so granted, replenish or furnish fresh Performance Security as aforesaid failing which BESCO shall be entitled to terminate this Agreement in accordance with Article 9."

"2.5 Extensions of Time

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

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

2.5.2 The Scheduled Commissioning Date and the Expiry Date shall be deferred, subject to the reasons and limits prescribed in Clause 2.5.1 and Clause 2.5.3 for a reasonable period but not less than 'day for day' basis, to permit the SPD or BESCO through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the SPD or BESCO, or till such time such Event of Default is rectified by BESCO.

2.5.3 In case of extension occurring due to reasons specified in clause 2.5.1(a), any of the dates specified therein can be extended, subject to the condition that the Scheduled Commissioning Date would not be extended by more than 6(six) months.

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

2.5.7 Liquidated damages for delay in commencement of supply of power to BESCOMs. Subject to the other provisions of this agreement, if the SPD is unable to commence supply of power to BESCO by the scheduled commissioning date, the SPD shall pay to BESCO, liquidated damages for the delay in such commencement of supply of power as follows:

(a) For the delay up to one month- amount equivalent to 20 % of the performance security.

(b) For the delay of more than one month up to three months - amount equivalent to 40 % of the performance security.

(c) For the delay of more than three months up to six months - amount equivalent to 100 % of the performance security.

For avoidance of doubt, in the event of failure to pay the above mentioned damages by the SPD, the BESCO is entitled to encash the performance security."

"8.3 Force Majeure Events:

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

(i) Acts of God;

(ii) Typhoons, floods, lightning, cyclone, hurricane, drought, famine, epidemic, plague or other natural calamities;

(iii) Strikes, work stoppages, work slowdowns or other labour dispute which affects a Party's ability to perform under this Agreement;

(iv) Acts of war (whether declared or undeclared), invasion or civil unrest;

(v) Any requirement, action or omission to act pursuant to any judgment or order of any court or judicial authority in India (provided such requirement, action or omission to act is not due to the breach by the SPD or BESCO of any Law or any of their respective obligations under this Agreement);

- (vi) *Inability despite complying with all legal requirements to obtain, renew or maintain required licenses or Legal Approvals;*
- (vii) *Fire, Earthquakes, explosions, accidents, landslides;*
- (viii) *Expropriation and/or compulsory acquisition of the Project in whole or in part;*
- (ix) *Chemical or radioactive contamination or ionizing radiation; or*
- (x) *Damage to or breakdown of transmission facilities of either Party;*

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

- (i) The non-performing Party gives the other Party written notice describing the particulars of the Force Majeure Event as soon as practicable after its occurrence;*
- (ii) The suspension of performance is of no greater scope and of no longer duration than is required by the Force Majeure Event.*
- (iii) The non-performing Party is able to resume performance of its obligations under this Agreement, it shall give the other Party written notice to that effect;*
- (iv) The Force Majeure Event was not caused by the non-performing Party's negligent or intentional acts, errors or omissions, or by its negligence/failure to comply with any material Law, or by any material breach or default under this Agreement;*
- (v) In no event shall a Force Majeure Event excuse the obligations of a Party that are required to be completely performed prior to the occurrence of a Force Majeure Event."*

- (b) We note that, under Clause 2.5 of the PPA, extension of time for commissioning the Project can be granted, if the SPD is prevented from performing its obligations due to the BESCO's 'Event of Default' or Force Majeure events. It is the submission of the Petitioner that, the causes for delay in implementing the project fall under the Force Majeure clause in

the PPA. The *Force Majeure* events and the requirement of issuing a written notice are mentioned in Clause 8.3 of the PPA. Under the said clause, it is also necessary to prove that, the *Force Majeure* event was not caused by the non-performing party's negligent or intentional acts, errors or omissions. In this backdrop, we need to examine, if the Petitioner or the SPD, in any manner, was negligent in performing its obligations under the PPA.

- (c) The PPA is signed by the parties on 02.09.2015. As per Article 2.1 of the said PPA, the Conditions Precedent have to be achieved within 365 days from the date of signing the PPA and the Project has to be commissioned within 18 months from the date of signing the PPA. The achievement of the Conditions Precedent would include obtaining of all the approvals by the SPD.
- (d) The SPD applied for approvals to various authorities and the same were given within 4 months from the date of applications as per Annexure D to D-5. The SPD applied for conversion of land 23.05.2016, after a lapse of about nine months from the effective date of the PPA. No explanation is given for this delay, on the part of the SPD. The conversion charges were paid on 12.08.2016 and the land conversion Order was passed within a reasonable period of 4 months on 07.09.2016. The Petitioner has not elaborated on the implementation steps of the project, which were affected by the time taken in grant of approval of land conversion. Hence, we are unable to accept the contention of the Petitioner that, there was a delay in granting of the approval for conversion of land which affected the

project implementation. In fact, there is a delay on the part of the SPD in applying for the conversion.

- e) The SPD applied for the evacuation approval to the office of the KPTCL at Bengaluru on 09.12.2015, after about 3 months from the date of the PPA. Thereafter, the SPD applied to the office of the KPTCL at Tumakuru on 15.04.2016 for evacuation approval. We note that the second application was submitted to the proper authority and the first application was submitted to the Corporate office of the KPTCL, which was not the proper authority. After submitting the first application to the Corporate Office, the Petitioner did not pursue it for about 4 months. The date of second application, submitted to the office of the KPTCL at Tumakuru is relevant in the case, which is after a lapse of 7½ months from the date of the execution of the PPA. It is alleged that, the second application was submitted, as no action was taken on the first application. As noted, the first application was not made to the appropriate authority and was also not followed up. On 27.04.2016, the KPTCL informed the SPD to pay the processing fee and produce certain documents. The fee was paid on 28.04.2016. On 02.05.2016, the tentative evacuation approval was granted. After receiving the acceptance from the Petitioner and conducting meetings, the regular evacuation approval was granted on 15.09.2016. Considering the chain of events, it is seen that there is no delay on the part of the authorities in granting the evacuation approval, and in fact, there is a delay on the part of the SPD, in applying for the evacuation approval. It is also not the case of the Petitioner that the project was complete, but for the evacuation facility.

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- (f) The other allegation of the Petitioner is that the delay in execution of work was caused by the demonetisation decision of the Central Government. This allegation is not substantiated and cannot in any way be treated as a *force majeure* event, as per the provisions of the PPA.
- (g) It is alleged by the Petitioner that substantial time of 14 months, after executing the PPA, was spent in correspondences with various authorities on the applicable tariff, filing of a petition and a further appeal which is pending. It is not demonstrated by the Petitioner, as to how these has caused delay in the implementation of the Project, in any manner.
- (h) Further, the case of the Petitioner is that, a SPV was formed with an investor on 11.11.2016 and SPPA was entered into on 08.12.2016. As no extension of time was granted by the Respondent-3 to complete the Project, despite making a request, vide letter dated 13.02.2017, the investor backed out from the project on 8.4.2017 and the project was, subsequently, assigned to another developer (Ampolt Electornics India Pvt Ltd, in short, Ampolt). We note that, the formation of the SPV (with the first investor) was after about 15 months from the date of the PPA, with just three months remaining for the Scheduled Commissioning Date. There is no explanation for this belated formation of the SPV. We note that during the pendency of this petition, the extension of time was granted on 16.6.2017 by Respondent-3 to the SPD to commission the project by 01.09.2017, subject to the condition of approval of the Commission / GoK for the applicable tariff and the damages to be paid. The project was commissioned on 30.8.2017, within such extended time.

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- (j) It is settled law that, the *Force Majeure* clause, in the PPA, has to be strictly interpreted. No notice, as contemplated under the clause, is stated to be issued by the Petitioner to the Respondent. None of the reasons or events cited by the Petitioner, for the delay in commissioning of its project falls under *Force Majeure events* mentioned in the PPA, as held in the preceding paragraphs. Hence, we consider that the Petitioner is not entitled to extension of time, as provided in the clauses of the PPA. Consequently, the Petitioner would also be liable for payment of liquidated damages as per Article 2.2 of the PPA.
- (k) We may note here that, the Respondents, in their earlier Statement of Objections which was subsequently withdrawn, had rightly submitted that the Petitioner, had not made out any valid ground to extend the time for commissioning the project.
- (l) We have held that, the Petitioner is not entitled to the extension of time to commission the Project. Admittedly, the SPD/Petitioner has not achieved the Conditions Precedent, within the specified time as required under Article 2.1 of the PPA. The actual dates on which they were achieved have not been furnished or elaborated by the Petitioner. For the same reason as applicable to rejection of the Petitioner's claim for extension of time for achieving the SCOD, any claim of the Petitioner, for extension of time for achieving Conditions Precedent is liable to be rejected. Thus, we hold that for not complying with the timelines as mentioned in the PPA for Conditions

Precedent and commissioning of the Project, the Petitioner is required to pay damages for such delay, as per Articles 2.2 and 2.5.7 of the PPA.

(m) The Hon'ble Supreme Court of India, in Civil Appeal No. 3600 of 2018 (M.P. Power Management Company Ltd. Vs Renew Clean Energy Pvt. Ltd., and another) dated 05.04.2018, has held that for delay in achieving Conditions Precedent and commissioning of the Project, the generating company is liable to pay damages stipulated in the PPA.

(n) Therefore, we answer Issue No.(2) in the negative.

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

(a) Clause 5.1 of the PPA reads as follows:

"5.1 Tariff Payable:

The SPD shall be entitled to receive the tariff of Rs.6.51 per kWh based on the KERC tariff order S/03/1 dated 30.07.2015 in respect of SPD's solar PV projects in terms of this agreement for the period between COD and the expiry date. However, subject to clause 2.5, if there is a delay in commissioning of the project beyond the Scheduled Commissioning Date and during such period there is a variation in the KERC Tariff, then the applicable Tariff for the projects shall be the lower of the following:

i. Rs.6.51/- per kWh

ii Varied tariff applicable as on the date of commercial operation."

(b) Article 5.1 of the PPA, extracted earlier, provides for the reduction of tariff as a consequence of delay in commissioning of the Solar Power Project,

beyond the Scheduled Commissioning Date, subject to certain terms and conditions stated therein. This is in view of the fact that, this Commission, periodically, determines generic tariff for supply of the electricity generated from various sources, to the Distribution Licensees, based on among other parameters, mainly the Capital Cost of the generating plant. Such generic tariff is made available for a period, normally, longer than a year called as 'Control Period' during which the generating plants get implemented and commissioned at the normative Capital Cost, adopted in the generic tariff order, generally after execution of a PPA with Distribution Licensee. Such PPA also has a clause stipulating the time, within which the power supply should commence, so that, the Distribution licensee can plan further supply to its consumers. The time ordinarily required, to complete various pre-commissioning activities, which in respect of megawatt scale solar power plants is taken as between 12 months to 18 months. Any delay or failure in commencement of power supply within the agreed date would disrupt the operation of the Distribution Licensees like the Respondent which could also result in their power procurement from alternative, expensive sources, leading to higher retail tariff to the consumers or short supply leading to revenue loss to them and even to imposition of penalties for not meeting the Renewable Purchase Obligation fixed by this Commission. The Capital Cost of the Solar Power Plants has been coming down very rapidly in the recent years, because of advancement in technology and production efficiency as well as, economies of scale, in the backdrop largescale solar capacity addition across the globe. Thus, generic tariff for megawatt scale solar power plants which was fixed at Rs.14.50 per unit in

the Commission's Order dated 13.07.2010 has been successively reduced to Rs.8.40 per unit in the Commission's Order dated 10.10.2013, to Rs.6.51 in the Order dated 30.07.2015, then to Rs.4.36 per unit in the Order dated 12.04.2017 and to Rs.3.05 per unit in the Order dated 18.05.2018.

- (c) It is submitted in the petition that Ampolt, the second investor has invested huge sums of money on the project (the details of such investment, however, are not furnished) and thus admittedly, most of the investments have been made after 08.04.2017, after backing out by the first investor from the project. Though, payments of charges, which are not substantial, for construction of line/ bay, are made in November, 2016, the investment on panels and other related equipment would have been made subsequent to 08.04.2017, when the first investor exited from the project. It is safe to infer that the normative capital cost of solar plants when the Petitioner took effective steps to procure capital equipment for its project was lower than the normative cost of solar plants, assumed in the generic tariff Order dated 30.07.2015, and was in line with that of the later Order dated 12.04.2017. Thus, the Petitioner is not entitled to the tariff originally agreed in the PPA at Rs.6.51 per unit, when admittedly the plant was not commissioned within the time stipulated in the PPA and it is entitled only for the revised tariff, as on the date of commissioning of the plant as per clause 5.1 of the PPA. Admittedly, in the present case, the generic tariff for solar power plants that was agreed in the PPA, was revised much before the plant was ready for commissioning. In any case, the Petitioner having voluntarily entered into a PPA, which has a clause providing for revision of

the tariff agreed, if there is a delay in commissioning of the Project, within the scheduled period, cannot now wriggle out of such a clause without valid grounds.

- (d) The PPA provides that, the tariff as on the date of commercial operation will be applicable for the Project. The Project is commissioned on 30.8.2017. The Petitioner has not furnished any material particulars of the cost incurred in implementing the Project, and the dates when the investments were actually made. This apart, as noted earlier, as per the terms and conditions of the PPA, the tariff payable to the SPD/Petitioner, is not based on the capital cost incurred by the SPD/Petitioner in Project implementation, but the tariff as per the relevant clauses of the PPA. The Hon'ble Supreme Court of India in Civil Appeal No. 1220 of 2015 (*Gujarat Urja Vikas Nigam Limited VS EMCO Limited and another*) dated 02.02.2016, has held as follows:

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

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

The said stipulation clearly envisaged a situation where notwithstanding the contract between the parties (the PPA), there is a possibility of the Respondent-1 not being able to commence the generation of electricity within the "control period" stipulated in the 1st tariff order. It is

also visualised that for the subsequent control period, the tariffs payable to PROJECTS/ power producers (similarly situated as the Respondent-1) 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 for lower of the two tariffs...."

- (e) The ratio of the Hon'ble Supreme Court's judgement in the above case is applicable to the Petitioner's case, as the PPA envisages such a situation.
- (f) We may note here that, in the earlier Statement of Objections filed by the Respondents, which was subsequently withdrawn, the Respondents had rightly submitted that if any extension of time is granted to the Petitioner, the tariff applicable at the time of commissioning of the project would be payable and also that delay in supply of power from the Petitioner's project causes problems to it.
- (g) Hence, in the circumstances and on the facts of the case, we hold that the Petitioner's Plant is entitled to a tariff of Rs.4.36 per unit for the term of the PPA, as per the Generic Tariff Order dated 12.04.2017, prevalent as on the date of commercial operation of the project, as per Article 5.1 of the PPA.
- (h) Accordingly, we answer Issue No.(3), as above.
- 13) **ISSUE No.(4):** *What Order?*

For the foregoing reasons, we pass the following:

ORDER

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

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

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

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