

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION

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

Dated : 17th December, 2018

Present:

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

OP No.162/2017

BETWEEN:

Anantapur Solar Parks Private Limited,
504/2, 5th Floor, Block-I,
White House, Municipal No.6-3-1192/1,
Kundanbah,
Begumpet,
Hyderabad – 500 016.

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PETITIONER

[Represented by Kapil Sapra & Associates, Advocates]

AND:

Chamundershwari Electricity Supply Corporation Limited,
No.29, Kaveri Grameena Bank Road,
Vijayanagar, 2nd Stage, Hinkal,
Mysuru – 570 019.

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RESPONDENT

[Represented by Justlaw, Advocates]

ORDERS

- 1) In the present Petition, filed on 21.09.2017, the Petitioner has prayed for granting extension of time of approximately 111 days, effective from 27.09.2017, to the Petitioner, for fulfilling its obligations under the PPA dated 02.06.2016 (ANNEXURE-P8), and consequently, for extending the time for completion of the Conditions Precedent and the Scheduled Commissioning Date.

- 2) Further, the Petitioner has also requested, during the time of arguments, to set aside the Notice dated 20.12.2017, issued by the Respondent to the Petitioner, calling upon it to pay the following amounts, within seven days from the date of receipt of this Notice:
 - (i) Rupees 12 Lakhs for non-fulfilment of the Conditions Precedent, as per clause 4.2 of the PPA.

 - (ii) Rupees 1.20 Crores for delay in achieving the Commercial Operation Date, as per Clause 5.8.1 of the PPA.

- 2) The material facts, as stated by the Petitioner, which are relevant for the purpose of deciding the questions in controversy involved in the case, may be stated, as follows:

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- (a) That, the Marikal Solar Park Private Limited (Marikal) was one of the successful bidders for development of three Units each of 20 MW capacity Solar Power Project, at three different locations, viz., Chikkodi Taluk in Belagavi District, Naragund Taluk in Gadag District and Basavana Bagewadi Taluk in Vijayapura District, respectively, in a bidding proceedings conducted by the Karnataka Renewable Energy Development Limited (KREDL), in accordance with the terms of the Request for Proposal (RfP) dated 20.11.2015. The Marikal being the Single Business Entity, promoted and incorporated the Petitioner-Anantapur Solar Parks Private Limited, as the Special Puppse Vehicle (SPV) for developing the 20 MW Solar Power Project allotted at Naragunda Taluk in Gadag District and in the same way, the Marikal has promoted and incorporated two other SPVs for developing the remaining two Solar Power Projects, as permitted in the RfP. In the present Petition, we are concerned with the 20 MW capacity Solar Power Project allotted in the Naragunda Taluk, for which the Petitioner is promoted and incorporated as the SPV, for developing the said Solar Power Project.
- (b) That, the KREDL had issued a Letter of Award and Allotment Letter (LoA) dated 23.03.2016 (ANNEXURE-P3), stating the details of the location of the Project, proposed technology, capacity in MW and the entitlement of tariff of Rs.5.48 per kWh and the time within which the PPA should be executed, with other terms and conditions. The KREDL had issued an Addendum dated 11.04.2016 and subsequently, an Official Memorandum dated 27.05.2016 (as

per ANNEXURE-P5 and ANNEXURE-P7, respectively), extending time to execute the PPA, effecting certain changes in the terms and conditions stated in the LoA. The Petitioner executed the PPA dated 02.06.2016 (ANNEXURE-P8), taking the benefit of the extended time, with the restrictions stated in the Official Memorandum (ANNEXURE-P7), whereby, the Project should have achieved the Commercial Operation Date (COD) within 12 (twelve) months from 25.05.2016, but not within 12 (twelve) months from the date of approval of the PPA, as allowed to others.

- (c) The PPA (ANNEXURE-P8) was sent to this Commission, for approval. This Commission approved the PPA on 28.09.2016 and intimated the same, vide letter dated 28.09.2016 (ANNEXURE-P13), directing to effect the corrections/modifications stated therein, by entering into a Supplemental PPA (SPPA). The parties executed the SPPA dated 05.01.2017 (ANNEXURE-P18), as directed in the approval letter (ANNEXURE-P13). One set of the PPA (ANNEXURE-P8) and the SPPA executed between the parties were handed over to the Petitioner by the Respondent on 05.01.2017, itself.
- (d) The Petitioner filed proceedings before this Commission, which was registered as RP No.6/2017, during the second week of April, 2017, praying, in essence, to declare that the latter part of the Official Memorandum dated 27.05.2016, issued by the KREDL, to the effect that:

“(ii) For the developers who are signing the PPA availing this time extension, the commercial operation dates ('Commercial Operation Date' / 'COD') for the project shall be achieved by the Developer within 12 (twelve) months from 25.05.2016 is invalid and not binding on the Petitioner”

be declared as, illegal and void, and for a consequent direction to amend the Effective Date in the PPA as 'the date of approval of the PPA by the Commission', instead of '25.05.2016' in Articles 3.1 and 21.1 of the PPA (ANNEXURE-P8). The said request of the Petitioner was allowed by this Commission, by Order dated 13.07.2017, passed in RP Nos.5 to 7 of 2017. Pursuant to this Order, the parties executed the second SPPA on 26.07.2017 (ANNEXURE-P33), incorporating the 'Effective Date' as '28.09.2016', in the relevant clauses of the PPA. The second SPPA was delivered to the Petitioner on 26.07.2017.

- (e) The Petitioner has averred that, there was a delay of 99 days, from 28.09.2016 to 05.01.2017, in handing over the approved PPA. Further, it has averred that, there was a delay of 12 days, from 14.07.2017 to 26.07.2017, in the execution of the second SPPA and to hand over the same to the Petitioner. Accordingly, the Petitioner states that, the delays in handing over the approved PPA with the SPPA and also the second SPPA, caused the delay in achieving the different milestones, hence, the Petitioner was unable to receive the evacuation and connectivity approvals, in time, from the KPTCL and accordingly, was unable to initiate the land acquisition process. The

Petitioner has further averred that the Respondent was solely liable for the delay in handing over the approved PPA (ANNEXURE-P8), soon after its approval on 28.09.2016 and that the Respondent is solely responsible for the delay in executing the SPPA and also the second SPPA, and thereby, the Respondent has completely acted contrary to the obligations undertaken by it as per Article 6.1.3(d) of the PPA. Therefore, the Petitioner has prayed for granting of extension of time of 111 days with effect from 28.09.2016, to the Petitioner, for fulfilling its obligations and the Conditions Precedent.

- (f) The other relevant facts, stated by the Petitioner, would be dealt with at appropriate places, while dealing with the different issues involved.

- 3) Upon Notice, the Respondent appeared through its counsel and filed the Statement of Objections. The relevant portion of which may be stated, as follows:
 - (a) The Respondent has admitted that the PPA dated 02.06.2016 was executed and the same was approved by this Commission on 28.09.2016, and that the PPA along with the SPPA was handed over to the Petitioner on 05.01.2017 and that, after allowing the Review Petition, the second SPPA was executed and handed over to the Petitioner on 26.07.2017. The Respondent has clarified that on 03.06.2016, it had supplied a copy of the PPA by e-mail to the Petitioner. This fact is not denied by the Petitioner in the Rejoinder.

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- (b) The Respondent has further contended that the delay in the execution of the SPPA dated 05.01.2017 was entirely attributable to the Petitioner and in the same way, the delay in executing and handing over the second SPPA, was also due to the fault on the part of the Petitioner.
- (c) The Respondent has stated that this Commission had marked a copy of the letter dated 28.09.2016 to the Petitioner, intimating about the approval of the PPA. The Petitioner did not appear, before it, for execution of the SPPA, for incorporating the corrections / modifications suggested by this Commission in its approval letter dated 28.09.2016 and that the original PPA could have been handed over to the Petitioner, only after incorporating the corrections/ modifications suggested by this Commission in its approval letter mentioned above. The Respondent has denied that it was solely responsible for the delay in executing the SPPA or the second SPPA.
- (d) The Respondent has denied the averment of the Petitioner that it could not fulfil its obligations under the PPA, because the Petitioner did not have the original PPA. The Respondent has further contended that the non-availability of the signed PPA, duly approved by this Commission or the alleged delay in handing over the same to the Petitioner, were not the causes for the delay in achieving the Conditions Precedent. The Respondent has denied the contention of the Petitioner that the Respondent failed to act in terms of Article 6.1.3 of the PPA. The Respondent has contended that the delay in

achieving the Conditions Precedent, within the stipulated time, was attributable to the wrong business decisions taken by the Petitioner, in this regard. Therefore, the Respondent has contended that there is no reason to extend the period for achieving the Conditions Precedent.

- 4) The Petitioner has filed the Rejoinder, reiterating its earlier stand. It can also be noted that, during the pendency of the proceedings, the Respondent issued a Notice dated 20.12.2017, calling upon the Petitioner to pay the penalty, as noted above.
- 5) We have heard the learned counsel for the parties in the matter. The learned counsel for the Petitioner has also filed the written arguments.
- 6) The following issues would arise, for our consideration:
 - (1) Whether the Petitioner is entitled to the extension of time, for achieving the Conditions Precedent and the Scheduled Commissioning Date?
 - (2) Whether the imposition of penalty on the Petitioner, by the Respondent, as per Notice dated 20.12.2017, is valid or not?
 - (3) What Order?

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- 7) After considering the submissions made by the learned counsel for the parties and the pleadings and material placed on record, our findings on the above issues are, as follows:
- 8) **ISSUE No.(1)**: *Whether the Petitioner is entitled to the extension of time, for achieving the Conditions Precedent and the Scheduled Commissioning Date?*
- (a) The achievement of the financial closure, obtaining of the power evacuation approval from the KPTCL / CESC, as the case may be and acquiring the land required for the Project in the name of the Project Developer, are the main items, while fulfilling the Conditions Precedent.
- (b) The Petitioner executed the PPA on 02.06.2016, availing of the extension of time granted in the Official Memorandum dated 27.05.2016 (ANNEXURE-P7). Therefore, in the case of the PPA executed by the Petitioner, the 'Effective Date' was to be 25.05.2016, as stated in the Official Memorandum. The concession was given under that Official Memorandum, to execute the PPA, to those persons who had not executed the PPA, within the time prescribed in the LoA or within the extended time, prescribed under the Addendum to the LoA. The Petitioner had not executed the PPA within the time prescribed in the LoA or the extended time granted under the Addendum to the LoA. Therefore, the Petitioner's Project was governed by the time limits, for achieving the Conditions Precedent and the Scheduled Commissioning Date, from the Effective Date, i.e., 25.05.2016. Therefore, as per the terms of

the PPA, the Conditions Precedent should have been achieved on or before 24.01.2017 and the Scheduled Commissioning Date should have been achieved on or before 24.05.2017. Keeping in mind this time limit for achieving the Conditions Precedent, the Petitioner proceeded with the Project.

- (c) The 'Effective Date' was defined in the draft PPA, attached to the RfP, as the 'date of approval of the PPA by the Commission'. This definition was made applicable to the Developers, who executed the PPAs within the time limits stated in the LoA / extended time limit stated in the Addendum to the LoA. In respect of the three Projects of Marikal, the PPAs were executed, availing of the extension of time under the Official Memorandum (ANNEXURE-P7), therefore, all these three Projects were governed by the 'Effective Date' as '25.05.2016', instead of 'the date of approval of the PPA by the Commission', as in the other cases. Subsequent to execution of the PPAs, the Marikal made a representation dated 25.07.2016 (ANNEXURE-P11), addressed to the Government of Karnataka, requesting to treat the 'Effective Date' in the case of its Projects as the date of evacuation approval, but it could not succeed in its efforts.
- (d) Ultimately, the Petitioner and the other SPVs of the Marikal filed R.P.Nos.5 to 7 of 2017, in the second week of April, 2017, before this Commission, praying for treating the 'Effective Date' as the 'date of approval of the PPA by the

Commission'. As already noted, those Review Petitions were allowed by this Commission on 13.07.2017 and necessary corrections / modifications were effected by the parties in the PPA on 26.07.2017. The Petitioner and others should have filed appropriate proceedings before this Commission for redressal of their grievances regarding the 'Effective Date', much earlier to the date of filing of the Review Petitions.

- (e) The Marikal, in the letter dated 10.06.2016 (ANNEXUTE-P9) addressed to the Chief Engineer (Planning & Coordination), KPTCL, Bengaluru, requested to permit the Petitioner to connect the Solar Power Project to 110/33 kV Konnur Sub-station in Naragunda Taluk. Ultimately, the KPTCL issued regular evacuation scheme dated 17.05.2017 (ANNEXURE-P24). It is noted in the regular evacuation scheme (ANNEXURE-P24) that, the tentative evacuation approval was granted on 25.01.2017. Here itself, we can note that, the regular evacuation scheme was obtained about twelve days earlier to the completion of achieving the Conditions Precedent, i.e., 27.05.2017.
- (f) We note that, there was delay in acquiring land for the Solar Power Project. This fact has been admitted by the Petitioner in Paragraph-45 of the Petition.
- (g) The Petitioner, in its pleadings, has not claimed the extension of time, on the ground of difficulty in acquiring the land for the Solar Power Project, for a period of twelve to thirteen months from the date of execution of the PPA.

For claiming the extension of time under Article 5.7.1 of the PPA, the Petitioner has to establish that, the delay in achieving the Conditions Precedent had occurred due to any CESC's Event of Default or *Force Majeure* Events, affecting the Developer. The difficulty, if any, faced by the Petitioner, in finalizing the acquisition of land for the Solar Power Project, cannot be considered as a CESC's Event of Default. It is not the case of the Petitioner that, such delay was due to the *Force Majeure* Events, affecting it.

- (h) The averments made in the Petition that, the delay of 99 days in handing over the approved PPA and the delay of 12 days in the execution of the second SPPA and in handing over the same to the Petitioner, were the causes for the delay in achieving the Conditions Precedent and the other Milestones, are unacceptable. One cannot assume that, for want of the approved PPA, the Petitioner had to defer the acquisition of land for the Solar Power Project, because, the Petitioner was making its efforts for locating and finalizing the acquisition of land for the Solar Power Project, right from the beginning of June, 2016, as could be seen from the letter dated 10.06.2016 (ANNEXURE-P9).
- (j) The Respondent has contended that, soon after the approval of the PPA by this Commission, as per the communication dated 28.09.2016 (ANNEXURE-P13), the Petitioner did not come forward to execute the SPPA. Further that, on 03.11.2016, the Respondent intimated the Petitioner to

execute the SPPA, but the Petitioner turned up only on 05.01.2017. This fact is not denied by the Petitioner in its Rejoinder. That contention of the Respondent appears to be acceptable, as the Petitioner soon after receiving the communication dated 28.09.2016 (ANNEXURE-P13) approving the PPA dated 02.06.2016, went on making representations to the KREDL, as well as to the Government and also to the Respondent, for change of the 'Effective Date' in the PPA, from 25.05.2016, to 28.09.2016, in all the relevant clauses of the PPA. Such communications are: letter dated 13.10.2016 (ANNEXURE-P14), addressed to the KREDL; letter dated 24.10.2016 (ANNEXURE-P15), addressed to the Government of Karnataka; and letter dated 21.11.2016 (ANNEXURE-P17), addressed to the Respondent. Earlier, the Marikal, on 25.07.2016 itself (ANNEXURE-P11), had addressed the letter to the Government, requesting to consider granting twelve months' time, from the date of the evacuation approval, for achieving the COD. This conduct of the Petitioner would show that, the Petitioner was waiting for the Orders from Government or other authorities, in its favour, for change of the 'Effective Date', as requested, before executing the SPPA. We find no reason for the Respondent to delay the execution of the SPPA. On the day, on which the SPPA was executed, after incorporating the corrections / modifications, stated in the Commission's letter of approval dated 28.09.2016 (ANNEXURE-P13), the PPA, as well as the SPPA were handed over to the Petitioner. Therefore, one cannot accept the contention of the Petitioner that, the Respondent was responsible for the delay of 99 days in executing

the SPPA, and in handing over the approved PPA and the SPPA, to it. The further contention of the Petitioner that, the delay of 12 days, in the execution of the second SPPA, had also led to the delay in achieving the Conditions Precedent and other different Milestones, is unacceptable, because, even in the absence of the execution of the second SPPA, any authority has to accept the 'Effective Date' as the 'date of approval of the PPA by the Commission', on production of the Order in RP No.6/2017.

- (k) The above facts would establish, beyond doubt, that the delay caused in the approval of the PPA or in executing the SPPA or the second SPPA, had no relevance, for the delay caused in finalizing the acquisition of land for the Project.
- (l) For the above reasons, we hold that, the Petitioner is not entitled for extension of time for achieving the Conditions Precedent or the Scheduled Commissioning Date.
- (m) Accordingly, we answer Issue No.(1), in the negative.
- 9) **ISSUE No.(2):** *Whether the imposition of penalty on the Petitioner, by the Respondent, as per Notice dated 20.12.2017, is valid or not?*
- (a) Admittedly, there is a delay in achieving the Conditions Precedent. viz., in acquiring the land and in producing the documentary evidence for having

acquired the title and possession of the land, acquired for the Project in the name of the Developer. Unless there are grounds established by the Petitioner for the extension of time for achieving the Conditions Precedent, the Petitioner would be liable for payment of damages under Article 4.3 of the PPA, for the delay in achieving the Conditions Precedent and under Article 5.8 of the PPA, for the delay in supply of power to the Respondent.

- (b) The learned counsel for the Petitioner submitted 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. He relied upon the decision of the Hon'ble Supreme Court, reported in (2015) 4 SCC 136, in the case of *Kailash Nath Associates –Vs- Delhi Development Authority and others*. In the said case, the Hon'ble Supreme Court, on consideration of the various authorities, has summarized the principle, in paragraph-43 of its Judgment, thus:

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

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

in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.

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

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

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

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

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

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

We note that, admittedly, there is delay in supply of power beyond the Scheduled Commissioning Date. The Project was commissioned on

10.11.2017, instead of on or before 27.09.2017, which was the Scheduled Commissioning Date.

- (c) In the above decision, in Parargraph-43.6, it is held that, where it is possible to prove actual damage or loss, such proof is not dispensed with and it is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if it is a genuine pre-estimate, can be awarded. We are of the considered opinion that, in the present case, it is difficult or impossible to prove the actual damage or loss and that the liquidated damages named in the contract is a genuine pre-estimate of the damage or loss sustained, for the delay in achieving the Conditions Precedent and the Scheduled Commissioning Date. It is difficult, or impossible, to prove the actual damage or loss sustained, in the case of the delay in supply of power to the Respondent.
- (d) Article 4.3 of the PPA provides that, for the delay in achieving the Conditions Precedent, the Developer shall pay to the Respondent, the damages in an amount, calculated at the rate of 0.2% of the Performance Security, for each day's delay, until fulfilment of such Conditions Precedent, subject to a maximum period of thirty days. The said Article further provides that, on expiry of the said thirty days' period, the Respondent, at its discretion, may terminate the PPA. The Respondent has not taken any steps for the termination of the PPA, even after the expiry of the thirty days' period, but

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

- (e) In the above decision of the Hon'ble Supreme Court, in Paragraph-43.7, it is stated that, Section 74 will apply to cases of forfeiture of earnest money under a contract and where forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application. We are of the considered opinion that, the damages to be recovered, as per Article 4.3 of the PPA, for not fulfilling the Conditions Precedent, is akin to the principle stated in Paragraph-43.7 of the above-said decision, because the rights and obligations of the parties under the PPA

would be subject to the satisfaction, in full, of the Conditions Precedent, specified in Article 4.3.

(f) For the above reasons, we answer Issue No.(2), in favour of the Respondent.

10) **ISSUE No.(3):** *What Order?*

For the forgoing reasons, we pass the following:

ORDER

(1) The Petitioner is not entitled to any of the reliefs claimed in the Petition, as the Petitioner is liable to pay damages, as provided in Articles 4.3 and 5.8 of the PPA dated 02.06.2016 (ANNEXURE-P8); and,

(2) The Respondent shall take necessary action, as per the Notice dated 20.12.2017, for recovery of damages, and as per Article 12.2 of the PPA dated 02.06.2016 (ANNEXURE-P8).

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

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

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