

No.N/388/2017

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,

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

Dated : 27.02.2020

Present:

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

OP No.210/2017

BETWEEN:

Kodangal Solar Parks Private Limited,
A Company Registered under the provisions
of the Companies Act, 1956
having its Registered Office at
No.504/2, 5th Floor,
White House Block-1,
66-3-1192/1/1, Kundanbagh,
Begaumpet,
Hyderabad-500 016.
Represented by its Authorised Signatory

.... **PETITIONER**

(Represented by Smt. Poonam Patil, Advocate).

AND:

- 1) Bangalore Electricity Supply Company Limited,
A Company Registered under the provisions
of the Companies Act, 1956
Having it Registered Office at K.R. Circle,
Bengaluru -560 001.
(Represented by its Managing Director)

- 2) Karnataka Renewable Energy Development Limited,
A Company Registered under the provisions of
of the Companies Act, 1956 having its
Registered Office at No.39, 'ShanthiGruha',
Bharat Scouts and Guides Building,
Palace Road,
Bengaluru- 560 001.
(Represented by its Managing Director)
- 3) Karnataka Power Transmission Corporation Limited,
A Company Registered under the provisions of
of the Companies Act, 1956
Having its Registered Office at
Corporate Office, KaveriBhavan,
K.G. Road,
Bengaluru-560 009.
(Represented by its Managing Director)
- 4) State of Karnataka,
Department of Energy,
Room No.236, 2nd Floor,
VikasaSoudha,
Bengaluru-560 001.
(Represented by its Additional Chief Secretary)
- 5) Hubli Electricity Supply Company Limited,
A Company Registered under the provisions
of the Companies Act, 1956
Having it Registered Office at
P.B. Road, Navanagar,
Hubballi-580 025.
(Represented by its Managing Director)

----**RESPONDENTS**

(Respondent No.1 & 3 are represented by M/s JUSTLAW,
Respondent No.2 by Sri RakshitJois, Advocate.
Respondent No.4 is by Sri G.S. Kannur, Senior Advocate)

ORDERS

1. This is a petition filed under Section 86 (1) (f) of the Electricity Act, 2003, by the petitioner praying for the following reliefs:

- a) To call for records;
- b) To declare that the petitioner was prevented from performing its obligation under the PPA due to Force Majeure events affecting it;
- c) To declare that Effective Date under Article 3.1 of the Power Purchase Agreement (PPA) is the date on which the Supplementary PPA (SPPA) receives its concurrence from this Commission i.e., on 10.10.2017.

Alternatively:

- d) To declare that Effective Date under Article 3.1 of the Power Purchase Agreement (PPA) is the date on which the Second Supplementary PPA (SPPA) signed by the Petitioner and Respondent No.1 on 06.09.2017;
- e) If the Commission were to consider that there is a delay in fulfilment of the Conditions Precedent and commissioning the project within COD, to condone the inadvertent delay caused due to *Force Majeure* events affecting it in fulfilment of the conditions precedent and in achieving the Commercial Operation Date (COD) of the project.

- f) To direct the Respondents not to levy any Liquidated damages and not to take any other or incidental coercive measures under the PPA or under any other law, against the petitioner based on the previous understanding of the parties on the Effective Date and resultant COD;
 - g) To direct the Respondents to make payment at the rate of Rs.5.48/- per unit as per Article 12.1 of the PPA dated 02.06.2016; and
 - h) To pass such other order/s including an order as to costs, to meet the ends of justice and equity.
2. The case of the petitioner as averred in the petition, read with relevant documents produced along with the petition may be stated as follows:
- a) The petitioner is a company registered under the Companies Act, 2013, primarily engaged in the business of setting up of power plants and generation of electricity and is the Special Purpose Vehicle (SPV) of Marikal Solar Parks Private Limited. In response to Request for Proposal (RfP) dated 20.11.2015 for undertaking development of solar PV ground mount power plants in 60 taluks of the State of Karnataka, Marikal Solar Parks Private Limited, a Single Business Entity, was the successful bidder to develop 20 MW Solar Power Project, at Basavana Bagevadi taluk. The 2nd Respondent (KREDL), the Nodal Agency appointed by Government of Karnataka (GoK) for development of the above said Solar Power Project in 60 taluks, has issued the Letter of Award (LoA)

and Allotment Letter dated 23.03.2016 (Annexure P-1) in favour of Marikal Solar Parks Private Limited. The LoA (Annexure-P1) contained the details of the project location and the proposed technology for development of 20 MW capacity Solar Power Project and the discovered tariff of Rs.5.48/- per unit. The said LoA also contained other terms and conditions and asked Marikal Solar Parks Private Limited, to execute the Power Purchase Agreement (PPA) with the 1st respondent/BESCOM. Further, it contained a term requesting to acknowledge this LoA within seven days of the receipt of LoA and to indicate a suitable date for execution of the PPA. Accordingly, Marikal Solar Parks Private Limited, acknowledged the LoA on 31.03.2016 within seven days of its receipt.

- b) The Power Purchase Agreements were required to be executed within a certain period, as per the terms and conditions stated in the RfP floated by the 2nd Respondent (KREDL). There was some confusion between the parties to whom the LoAs were issued, as to within which time they were required to execute the PPAs, as per the terms mentioned in LoAs, had not specified the period within which PPAs were to be executed. Therefore, on a representation, the 2nd Respondent (KREDL) issued an Addendum dated 11.04.2016 clarifying that the PPAs should be executed within sixty days from the date of the receipt of the LoAs. Even after this Addendum, some of the Solar Power Developers could not execute the PPAs within the time stipulated in the

Addendum and they made a request for further extension of time for execution of the PPAs. On the said request the 2nd respondent (KREDL) had issued an Official Memorandum (OM) dated 27.05.2016 with the following terms:

“(i) Based on the Developers request approval is accorded to extend the time for 8 working days from 25.05.2016 i.e., up to 03.06.2016 to execute the Power Purchase Agreement (PPA) with concerned Electricity Supply Company Limited (ESCOM).

(ii) For the developers who are signing the PPA availing this time extension, the commercial operation date ('Commercial Operation Date'/'COD') for the Project shall be achieved by the Developer within 12 (twelve) months from 25.05.2016.”

The petitioner being the SPV of Marikal Solar Parks Private Limited, executed the PPA dated 02.06.2016 (Annexure P-2) with 1st Respondent (BESCOM) utilizing the extension of time granted under OM dated 27.05.2016. Therefore, it is obvious that the petitioner has to achieve COD within one year from 25.05.2016 and the PPA should contain the term accordingly. This Commission approved the PPA dated 02.06.2016 (Annexure P-2), subject to incorporating certain modifications / corrections in the PPA and to execute a Supplementary PPA (SPPA) to that effect and the communication of the approval was sent to 1st respondent and the petitioner, through letter dated 07.10.2016

(Annexure P-3). The main correction suggested was to incorporate 25.05.2016 as the 'Effective Date' instead of the date of approval of PPA as allowed to others. The 1st respondent through its letter dated 20.10.2016 (Annexure P-4) requested the petitioner to execute the SPPA as required. Accordingly, the SPPA dated 17.01.2017 (Annexure P-5) was executed between parties.

c) The communication of approval (Annexure P-3) mainly suggested to modify the existing term regarding 'Effective Date' appearing in Article 3.1, 8.5 & 21.1 as '25.05.2016' instead of '*the date of approval of PPA by KERC*' as it existed in the PPA (Annexure P-2). This correction was suggested as the petitioner had availed the extended time provided in OM dated 27.05.2016, thereby the petitioner was required to commission the project within one year from 25.05.2016, as stipulated in the said OM.

d) Here itself, we may note that some of the Solar Power Developers who availed the benefit of OM dated 27.05.2016 and executed the PPAs, dissatisfied with the condition of commissioning the projects within one year from 25.05.2016, filed Review Petitions to quash the Condition No.2 in the OM dated 27.05.2016 and to allow them as others to commission the projects within one year from the date of approval of the PPA by the Commission. Ultimately, the said grievance was allowed and the Solar Power Developers who executed PPAs availing the benefit of OM dated 27.05.2016, were allowed to commission the projects within one

year from the date of approval of the PPAs by the Commission. The petitioner is one such person who had filed RP No.5/2017 (Annexure P-6) and was allowed to commission the Solar Power Project within one year from the date of approval of its PPA dated 02.06.2016 (Annexure P-2) by the Commission. RP No.5/2017 was decided on 13.07.2017. While passing the order in RP No.5/2017, it was held that the Condition No.(ii) in OM dated 27.05.2016 was invalid and consequently, it was directed so far as the PPA executed by the petitioner, to restore the meaning of 'Effective Date' as 'the date of approval of the PPA by the Commission' instead of the '25.05.2016' in the relevant Articles of PPA (Annexure P-2) and to execute a SPPA to carry out the said correction. Therefore, subsequent to the order dated 13.07.2017 passed in RP No.5/2017, the 'Effective Date' in the PPA (Annexure P-2) should be read as 'the date of approval of the PPA by the Commission'. The petitioner requested the 1st Respondent (BESCOM) through letter dated 19.07.2017 to effect necessary corrections in the PPA (Annexure P-2). Accordingly, the 2nd SPPA dated 06.09.2017 was executed between the parties. This 2nd SPPA was approved by the Commission on 10.10.2017.

- e) That the PPA requires approval of the Commission and it does not come into force without such approval. In the present case, the parties have executed the SPPAs as per the directions of the Commission as noted above. The SPPAs also require approval of the Commission and the

'Effective Date' should be counted from the date of approval of the 2nd SPPA, i.e., from 10.10.2017. The petitioner developed and commissioned the said project on 05.01.2018, as supported by the Commissioning Certificate as per Annexure-P12 dated 11.01.2018, after filing of this petition on 30.10.2017. Therefore, it is contended that the Solar Power Project of the petitioner was commissioned well within one year from 10.10.2017, the date of approval of 2nd SPPA.

f) That there was inordinate delay in issuing the Evacuation Scheme Approval by the 3rd Respondent (KPTCL). The petitioner had approached the concerned office of the 3rd Respondent on 17.05.2016 itself before signing the PPA (Annexure P-2) for seeking Evacuation Scheme approval to evacuate power from its Solar Power Project at 110 kV level to 110/11 kV Mukarthihal Sub-station. The 3rd Respondent issued Tentative Evacuation Scheme approval dated 23.02.2017 (Annexure P-8) and Regular Evacuation Scheme approval dated 28.07.2017 (Annexure P-9). The reason for such inordinate delay in issuing Regular Evacuation Scheme approval were due to the following reasons:

(i) That the 3rd Respondent (KPTCL) kept the Evacuation Scheme approval on hold as this Commission returned all the PPAs to concerned ESCOMs vide letter dated 21.07.2016 requiring to furnish certain clarifications from 2nd Respondent (KREDL).

- (ii) That the 3rd Respondent (KPTCL) demanded the petitioner to produce copy of the signed PPA for processing the Evacuation Scheme approval. The petitioner was not having the copy of signed PPA. That after approval of the PPA (Annexure P-2) by this Commission, the 3rd Respondent (KPTCL) started processing of the Evacuation Scheme.
- (iii) That on 06.01.2017, the Chief Engineer (Ele.), Transmission Zone, KPTCL, Bagalkote, furnished a Feasibility Report relating to the Petitioner's 20 MW Solar Power Project at BasavanaBagewadi taluk to 110/11 kV Mukartihal Sub-station. That the 3rd Respondent (KPTCL) on 23.02.2017 communicated Tentative Evacuation Scheme approval (Annexure P-8) with the terms and conditions stated therein. The petitioner was required to accept the terms and conditions stated in the Tentative Evacuation Scheme, before proceeding to further process the Evacuation Scheme by KPTCL. The petitioner vide in its letter dated 24.06.2017 conveyed its acceptance for the terms and conditions stated in the Tentative Evacuation Scheme.
- (iv) The 3rd Respondent (KPTCL) held back the issuance of Regular Evacuation Scheme approval for want of production of the order in RP No.5/2017. Finally, the RP No.5/2017 was disposed of on 13.07.2017 allowing the request of the petitioner. On the same day, the petitioner furnished a copy of the Commission's

order in RP No.5/2017 to the 3rd Respondent (KPTCL) and requested to proceed with the issuance of the Regular Evacuation Scheme approval. Ultimately, Regular Evacuation Scheme approval dated 28.07.2017 (Annexure P-9) was issued in favour of the petitioner. That the 3rd Respondent (KPTCL) took more than 14 months for issue of the Regular Evacuation Scheme approval as against a normal one month's period usually required to provide such approval.

- g) That the petitioner was required to initiate the land acquisition activity only after getting the Regular Evacuation Scheme approval dated 28.07.2017. The petitioner could identify the required extent of lands for the development of Solar Power Project in question and filed an application before the 2nd Respondent (KREDL) on 23.10.2017 after enclosing consent letters of the land holders, who agreed to lease/sub-lease of the same in favour of the petitioner. It is stated that at the time of filing the present petition, the further proceedings under Section 109 of the Karnataka Land Reforms Act, 1961 (KLR Act, 1961) and under Section 95 of the Karnataka Land Revenue (Amendment) Act, 2015 [KLR (Amendment) Act, 2015] were still pending. Therefore, the petitioner has averred that it could not get lease/sub-lease of the required extent of lands in its favour even on the date of filing the petition i.e., on 31.10.2017.

- h) That the petitioner through letter dated 23.01.2017 (Annexure P-10) requested the 1st Respondent (BESCOM) for wavier of the fulfilment of the Conditions Precedent, explaining the difficulties faced by it. In spite of it, the 1st Respondent (BESCOM) through its letter dated 24.07.2017 (Annexure P-11) demanded to comply with the Conditions Precedent in default, the petitioner would be liable for damages/penalties as per the terms of the PPA.
- i) The petitioner contended that the non-fulfilment of Conditions Precedent and non-achieving the Scheduled Commissioning Date (SCD)/Scheduled Commercial Operation Date (SCOD) of the Solar Power Project in question were due to 'Force Majeure' events as explained above.
- j) That the 1st Respondent (BESCOM) is not entitled to realize the liquidated damages stated in the PPA under Articles 4.3 & 5.8, until and unless, the 1st Respondent (BESCOM) establishes the actual loss or damage caused to it due to non-performance of the obligations under the PPA by the petitioner. The 1st Respondent (BESCOM) had not stated in its letter dated 24.07.2017 (Annexure P-11) anything regarding the damage/loss caused to it.
- k) For the above reasons, the petitioner has prayed for the above reliefs.
- l) The petitioner alleged in the pleading said to be the Rejoinder dated 12.06.2018, the following grounds in support of the 'Force Majeure'

events which according to the petitioner, prevented to commission the Solar Power Project within the time specified in the PPA (Annexure P-2).

- (i) Delay due to Goods & Service Tax (GST) implementation by Government of India (Gol);
- (ii) Delay due to Demonetization by Gol;
- (iii) Delay due to wrong classification of Modules under the CTH 8501 at Chennai Port.

3. Upon notice, the Respondents appeared through their Counsel and filed their Statement of Objections denying the claims of the petitioner.

4. The 1st Respondent (BESCOM) contended that the grounds raised by the petitioner for non-fulfilment of the obligations under the PPA, due to the alleged events of the 'Force Majeure' are untenable. The petitioner has failed to commission the project within 06.10.2017 i.e., 12 months from 07.10.2016, the date of approval of the PPA (Annexure P-2). The petitioner was requested to execute the SPPA on 20.10.2016, but it executed the SPPA on 17.01.2017. The Commission in its letter dated 25.10.2016 (Annexure R-1) clarified that no separate approval is required for the SPPA. The petitioner had sufficient time to achieve the "Conditions Precedent" within 8 months, but till date has not produced the documents of the lands required for the Solar Power Project evidencing the clear title and possession of the same. The petitioner can be excused in the event of establishing 'Force Majeure' events preventing to fulfil the obligations under the PPA or, if specifically waived in writing by the 1st Respondent (BESCOM) in this respect. The alleged 'Force Majeure' events are

not covered under Article 14 of PPA. The petitioner is trying to take advantage of its own wrongs and blaming others. Hence, the letter dated 24.07.2017 of the 1st Respondent (BESCOM) demanding the liquidated damages from the petitioner under Articles 4.3 & 5.8 is enforceable. The 'Effective Date' as directed in the communication letter dated 07.10.2016, approving the PPA (Annexure P-2) was 25.05.2016 and it was modified again as "from the date of approval" vide order in R.P.No.5/2017. The petitioner has not acted diligently and it is trying to bypass its obligations.

5. The 2nd Respondent (KREDL) has contended that it being the Nodal Agency of the Government of Karnataka (GoK), has processed the LoA and Allotment letter dated 23.03.2016 (Annexure P-1). The 2nd Respondent (KREDL) has not disputed the issuance of Addendum and OM as alleged by the petitioner and the subsequent filing of the RP No.5/2017 and the order passed on it. That this 2nd Respondent (KREDL) cannot be blamed for the delay caused in achieving the obligations by the petitioner under the PPA.
6. The 3rd Respondent (KPTCL) has raised the following defences in its Statement of Objections.

- a) That at the request of 2nd Respondent (KREDL) it had conducted a pre-feasibility study for 1200 MW Solar Power Project in 60 taluks and forwarded the list of Sub-stations to the 2nd Respondent (KREDL) vide letter dated 27.02.2016 (Annexure R-1). However, Letter of Allotments were made taluk-wise and not Sub-station wise, which

led to ambiguity in processing the applications as requested by the petitioner.

- b) That on 17.05.2016, the petitioner approached this Respondent seeking an Evacuation Scheme approval and on 25.05.2016 this Respondent replied that the petitioner could evacuate power through Mukarthihal Sub-station at 110 kV level situated in BasavanaBagewadi taluk and requested the petitioner to furnish the additional documents such as; PPA executed with BESCOM, DPR and Topo-Sheets to process the request. The copy of the letter dated 25.05.2016 is as per Annexure R-2.
- c) On 21.07.2016, this Commission directed to return all the PPAs to concerned ESCOMs for want of clarification in the process of inviting the tender proceedings. The copy of the letter dated 21.07.2016 of the Commission is as per Annexure R-3.
- d) On 29.08.2016, this Commission accorded in principle approval for all PPAs executed in respect of 1200 MW projects, after obtaining clarification. The said letter dated 29.08.2016 is produced as Annexure R-4. Subsequent to issue of letter dated 29.08.2016 (Annexure R-4) this Respondent started processing the applications for grant of Evacuation Schemes.
- e) On 04.08.2016, the 2nd Respondent (KREDL) requested this Respondent not to communicate Evacuation Scheme approvals to

the Solar Power Project Developers without obtaining the confirmation regarding payment of facilitation fees by the Developers to KREDL payable as per Karnataka Solar Policy 2014-21. The letter dated 04.08.2016 is produced at Annexure R-5.

- f) This Respondent vide letter dated 16.09.2016 (Annexure R-6) requested the petitioner to furnish additional documents and to pay the requisite processing fees. In spite of it, the petitioner did not provide necessary additional documents. This Respondent keeping in mind, the short gestation period for Solar plants approved Tentative Evacuation Scheme on 23.02.2017 (Annexure R-7) with the condition that all the necessary documents including a copy of DPR, Topography-Sheet should be filed before this Respondent and facilitation fee should be paid to KREDL and the communication of the acceptance of the terms of the said Tentative Evacuation Scheme, should be intimated and thereafter, the Regular Evacuation Scheme approval would be processed.
- g) That the petitioner conveyed his acceptance of the terms and conditions of the Tentative Evacuation Scheme only through its letter dated 24.06.2017 (Annexure R-8) after lapse of 121 days from the date of Tentative Evacuation Scheme approval. Subsequently, on 28.07.2017 Regular Evacuation Scheme was approved as per Annexure R-9.

h) Therefore, it is contended by this Respondent that there was no delay on its part in granting Evacuation approvals and it had acted diligently pursuant to the petitioner's application for Evacuation Scheme approval within reasonable time. The petitioner is misleading by thrusting its part of delays on this Respondent.

i) This Respondent has denied other allegations made by the petitioner against it.

7. The gist of the Statements of Objections filed by the 4th Respondent (GoK) may be stated as follows:

a) The petitioner has filed the application dated 23.10.2017 (Annexure R-3) before the MD, KREDL, requesting to process the file with recommendation to the Energy Department for issuance of Government Notification in respect of 97.26 acres of land identified by it, enclosing the consent letters of land owners to lease the same in favour of the petitioner.

b) That the procurement of land required for the project and obtaining of Evacuation approvals from KPTCL were the responsibility of Solar Power Project Developer. At the request of petitioner this Respondent issued order dated 24.02.2018 (Annexure R-4) authorizing Managing Director, KREDL, to take the lands on lease from the land owners and to sub-lease it to the petitioner after following the required procedures stated in Government Order

No.EN 66 VSC 2016 dated 05.10.2016 and under Section 95 of the KLR (Amendment) Act, 2015.

c) That this Respondent had issued earlier a Government Order No.EN 66 VSE 2016 dated 05.10.2016 (Annexure R-1) authorizing KREDL to take lands on lease from land owners and to sub-lease the same to the Solar Power Developers after following the due procedures under KLR (Amendment) Act, 2015.

d) KREDL had addressed letter dated 19.03.2018 (Annexure R-5) to the Deputy Commissioner, Vijayapura district, requesting to issue deemed conversion order in respect of the lands identified for sub-leasing to the petitioner and also to get mutation of the said lands pursuant to the deemed conversion order.

e) The petitioner had to pursue these proceedings and get the required orders. There are no latches on the part of this Respondent.

8. The petitioner has filed separate Rejoinders to the Statements of Objections filed by the Respondents-1 to 4, alleging that these Respondents were responsible for the delay in getting different approvals.

9. From the pleadings and documents and the rival contentions of the parties, the following Issues arise for our consideration:

- 1) Whether the 'Effective Date' can be considered as 10.10.2017, the date on which 2nd SPPA was approved by the Commission as contended by the petitioner?
 - 2) Whether the petitioner has proved the 'Force Majeure' events alleged by it to claim extension of time for achieving Conditions Precedent as well as achieving Scheduled Commissioning Date?
 - 3) If, Issue No.2 is held in negative, whether the 1st Respondent is entitled to liquidated damages as per Articles 4.3 and 5.8 of the PPA?
 - 4) Whether the Solar Power Project of the petitioner was liable for reduced tariff for the delay in commissioning of the said project?
 - 5) To which reliefs the petitioner is entitled to?
 - 6) What Order?
10. After considering the arguments addressed by the learned counsel for the parties and the pleadings, records and the written arguments of both the parties, our findings on the above issues are as follows:
11. Issue No.1: Whether the 'Effective Date' can be considered as 10.10.2017, the date on which 2nd SPPA was approved by the Commission as contended by the petitioner?
- a) That there is no dispute that the PPA is a statutory contract and it requires approval of the Commission. Without approval of the

Commission, the rights and liabilities under the PPA cannot be enforced by either of the parties.

- b) 'Effective Date' is defined in Article 21.1 of the PPA as the date of the approval of the PPA by this Commission. Article 3.1 of the PPA also states that *'this agreement shall come into effect from the date of getting concurrence'* from KERC. In the present case, as per Annexure P-3 letter dated 07.10.2016, the petitioner and the 1st Respondent (BESCOM) were informed the approval of the Commission to the PPA (Annexure P-2). Therefore, 07.10.2016 is to be considered as 'Effective Date' for the purpose of interpreting the relevant different clauses in the PPA. Any of the clauses in the PPA does not provide that the date on which SPPA is approved can also be considered as 'Effective Date', in the event there is a need to execute a SPPA. This Commission has clarified in its letter dated 25.10.2016 [Annexure R-1 produced by the 1st Respondent (BESCOM)] that no separate approval is required for the SPPA executed at the directions of Commission.
- c) The communication of approval letter dated 07.10.2016 (Annexure P-3) states that the PPA was approved, subject to the corrections/modifications being incorporated in the PPA by entering into a suitable SPPA. Because of such condition, the learned counsel for the petitioner submitted SPPA requires approval of this Commission and without the approval, the SPPA is not legally binding document and the terms of PPA as corrected or modified cannot be enforced.

The learned counsel for the petitioner also points out that subsequent to disposal of RP No.05/2017, the 2nd SPPA was executed on 06.09.2017 and the said SPPA was approved by this Commission on 10.10.2017. Therefore, it is contended that the 'Effective Date' in the present case should be considered as 10.10.2017.

- d) The carrying out of the corrections/modifications suggested by the Commission is only a formality to keep the PPA up-dated as per the orders of the Commission. The parties to the PPA have no option of rejecting or dissenting with the corrections/modifications suggested by the Commission, they cannot wriggle out from the terms of the contract. In the event of the Commission directing corrections/modifications to the terms of PPA, such corrections / modifications are really deemed to be incorporated in the PPA. For that reason, the execution of the SPPA by incorporating the corrections/ modifications are only a formality. Even in the absence of execution of the SPPA, the terms of PPA should be read along with the suggested corrections/modifications.
- e) The Commission notes that the suggested corrections/modifications in respect of 'Effective Date' as suggested in letter dated 07.10.2016 (Annexure P-3) was only to bring the meaning of 'Effective Date' as per OM dated 27.05.2016 issued by the 2nd Respondent (KREDL). Because the petitioner taking the benefit of extended time under the said OM executed the PPA. Therefore, it was deemed that it had

agreed to commission the project within one year from 27.05.2016. But the PPA had wrongly contained the term that 'Effective Date' be the date of approval of the PPA by the Commission. It is true that subsequently by filing RP No.05/2017, it was held that the KREDL has no such authority to fix a different date even for the PPA holder's who executed the PPAs taking benefit of this OM. The other corrections suggested while communicating the approval of PPA are only in the nature of corrections of clerical errors or to bring the terms of the PPA in accordance with the prevalent law governing the rights and liabilities of the parties.

- f) The learned counsel for the petitioner relied upon paras 30 & 31 of the decision in *M.V. Shankar Bhat and Others Vs. Claude Pinto (Deceased) by LRs. and Others (2003) 4 SCC 86* which reads thus:

“ 30. When an agreement is entered into subject to ratification by others, a concluded contract is not arrived at. Whenever ratification by some other persons, who are not parties to the agreement is required, such a clause must be held to be a condition precedent for coming into force of a concluded contract.

31. The word 'subject to' has been defined in *Black's Law Dictionary, Fifth Edition*, at page 1278, *inter alia*, as: "subservient, inferior, obedient to; governed or affected by; provided that; provided; answerable for". In *Collin's English* the words 'subject to' has been stated to mean

as: “under the condition that: we accept, subject to her agreement.”

g) The law laid down in the above two paras of the decision of the Hon'ble Supreme Court does not in any way go against the views which we have taken above.

h) For the above reasons, we hold Issue No.1 in negative.

12. Issue No.2: Whether the petitioner has proved the 'Force Majeure' events alleged by it to claim extension of time for achieving Conditions Precedent as well as achieving Scheduled Commissioning Date?

a) Before proceeding to consider this Issue, we may note the relevant part of 'Force Majeure' as stated in Article 14.3.1 of the PPA which reads thus:

'14.3.1 A 'Force Majeure' means any event or circumstance or combination of events including 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 and 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).....

b)

c)

d)....

e)

Article 14.4 provides for the events regarding 'Force Majeure' exclusions.

Article 14.5 provides for issue of notice to the other side before claiming the benefit of 'Force Majeure' event by an Affected Party. Article 14.6 further provides regarding the duty to mitigate the effect of 'Force Majeure' event to the extent reasonably possible by the Affected Party.

b) The main grievances of the petitioner is that there was inordinate delay for issuance of the Regular Evacuation Scheme approval, thereby all other activities relating to establishment of the Solar Power Project were delayed. The petitioner states that it has filed the application for Evacuation Scheme approval on 17.05.2016 and ultimately KPTCL issued Regular Evacuation Scheme on 28.07.2017, after a lapse of more than 14 months. On the other hand, the KPTCL had denied the said allegations of the petitioner and it contended that the Regular Evacuation Scheme approval was issued within reasonable time and the petitioner itself was responsible for the delay and falsely, the petitioner is blaming this Respondent.

c) Now, we may consider the rival contentions in this regard, by examining the grounds stated by the petitioner for the delay and the defence taken by the KPTCL in this regard as follows:

(i) It is alleged by the petitioner it had approached the concerned office of the 3rd Respondent (KPTCL) on 17.05.2016 itself before signing the PPA for seeking Evacuation Scheme approval to evacuate power at 110 kV level to 110/11 kV Mukarthihal Sub-station. This fact is admitted by the 3rd Respondent and it is contended that it has replied as per letter dated 25.05.2016 (Annexure R-2) that the petitioner could evacuate the generation from its Solar Power Project at 110 kV level to 110/11 kV Mukarthihal Sub-station in Basavana Bagewadi taluk. This reply would show that the petitioner could proceed to find out the suitable lands required for the establishing of the Solar Power Project. This reply was given by the 3rd Respondent within reasonable time.

(ii) The petitioner has contended that the 3rd Respondent (KPTCL) had kept the Evacuation Scheme approval on hold as this Commission had returned all the PPAs to concerned ESCOMs vide letter dated 21.07.2016. The 3rd Respondent admitted this fact and produced the letter dated 21.07.2016 (Annexure R-3) to ascertain the reasons for which the PPAs were returned by the Commission to the concerned ESCOMs and has also

produced letter dated 29.08.2016 (Annexure R-4) written by this Commission to the Additional Chief Secretary to Government, Energy Department, stating that as the Commission had received certain clarifications required it has accorded in principle approval to the 1200 MW Solar Power Projects in 60 taluks in the State and to ratified the action taken by KREDL, in inviting tenders, subject to certain conditions. The KPTCL has further stated that subsequent to the date of this letter it had proceeded to process the pending applications for Evacuation Scheme approvals filed by different parties. It is not the case of the petitioner that before 29.08.2016 it had furnished the required documents and particulars as stated in Annexure R-2 dated 25.05.2016. Hence, the KPTCL with holding the Evacuation Scheme approvals for few days had not affected the petitioner in any way.

- (iii) The petitioner has contended that the 3rd Respondent (KPTCL) demanded the petitioner to produce copy of the signed PPA for processing the Evacuation Scheme approval. But the petitioner was not having the copy of the signed PPA. It is expected that whenever the petitioner has executed the PPA on 02.06.2016 (Annexure P-2) it is expected to have a copy of the said PPA. If for some reason, the 1st Respondent (BESCOM) had refused to give a copy of PPA, the petitioner could have complained to

higher authorities, because the 1st Respondent (BESCOM) could not have refused to give a copy of the PPA.

(iv) The petitioner contended that the 3rd Respondent (KPTCL) held back the issuance of Regular Evacuation Scheme approval for want of production of order in RP No.05/2017 and it had produced the order dated 13.07.2017 passed in RP No.05/2017 before the 3rd Respondent (KPTCL) on the day on which the order was passed in the said RP. It is not in dispute that the 3rd Respondent (KPTCL) had received the copy of the order dated 13.07.2017 passed in RP No.05/2017 and subsequently issued Regular Evacuation Scheme approval on 28.07.2017.

(v) The 3rd Respondent (KPTCL) has contended that as per letter dated 16.09.2016 (Annexure R-6) it had requested the petitioner to furnish the additional documents and to pay the requisite processing fees. Further it has contended that though the petitioner did not provide the necessary additional documents, considering the short gestation period for establishing the Solar plants, this Respondent approved the Tentative Evacuation Scheme on 23.02.2017 (Annexure P-8 & R-7), with the condition that all necessary documents including a copy of DPR, Topography Sheet and document evidencing payment of facilitation fee to KREDL should be furnished before taking any further action. This Respondent has further contended that the

petitioner had conveyed his acceptance to the tentative evacuation scheme only on 24.06.2017 after lapse of 121 days from the date of Tentative Evacuation Scheme approval. The copy of the acceptance letter of 24.06.2017 (Annexure R-8) given by the petitioner is produced by this Respondent. The Annexure R-8 shows that this letter of acceptance was actually delivered to the concerned office of the 3rd Respondent (KPTCL) on 27.06.2017. Therefore, this Respondent contended that soon after the receipt of the acceptance letter, the Regular Evacuation Scheme dated 28.07.2017 (Annexure P-9 & R-8) was issued. These facts show that the petitioner was not ready to get the Regular Evacuation Scheme at an early date for one or the other reason. The only reason that could be inferred appears to be that the petitioner had not finalized acquisition of required extent of lands for setting up of the Solar Power Project within the vicinity of 110/11 kV Mukarthihal Sub-station. The petitioner has not given any other reason for the delay caused by him in obtaining the Regular Evacuation Scheme approval.

- d) For the reasons stated above, we hold that there is no merit in the contention of the petitioner that the 3rd Respondent (KPTCL) was responsible for the delay of more than 14 months in granting Regular Evacuation Scheme approval.

e) The other ground urged by the petitioner is that as there was delay in issuing the Regular Evacuation Scheme approval, the search for required extent of land its acquisition were delayed. It is stated that unless Regular Evacuation Scheme approval was obtained, the petitioner was not in a position to identify the lands. The said reason stated by the petitioner cannot be accepted. As already noted, the 3rd Respondent (KPTCL) had long back informed the petitioner through letter dated 22.05.2016 (Annexure R-2) that the petitioner could evacuate the generation from his proposed Solar Power Project to Mukarthihal Sub-station in Basavana Bagewadi taluk. Therefore, there was no impediment for the petitioner to acquire the land in the vicinity of this Sub-station for establishing its Solar Power Project. The reason for not acquiring the lands required must be different from the reason now being offered by the petitioner. It can be seen that ultimately, the petitioner made up its mind to take the lands on lease/sub-lease with the help of KREDL, as per the different Government Orders in existence. It is the responsibility of the petitioner to trace the required extent of lands and to acquire it by purchase/lease/sub-lease etc., for the required period to hold the lands for the life of the solar project. The objection statements of the 4th Respondent (GoK) shows that the petitioner was able to file the application dated 23.10.2017 (Annexure-3 produced by it) before the MD, KREDL requesting to process the file with recommendation to the Energy Department for issuance of Government Notification in

respect of 97.26 acres of land identified by the petitioner for grant of lease/sub-lease as per prevailing procedure. This is the first step, which the petitioner had taken on 23.10.2017 for acquiring the possession of required extent of lands for establishing the Solar Power Project. The petitioner was required to commission the project within one year from 07.10.2016, the date on which approval of PPA was communicated. Therefore, one can say that the first step taken by the petitioner towards acquisition of land was beyond the date of Scheduled Commissioning Date of the Solar Power Project. Admittedly, the said proceeding for sub-leasing the required extent of lands and its conversion for non-agricultural use etc., had taken long time as noted above.

f) Therefore, the real question is whether filing of an application before KREDL on 23.10.2017 for taking further action to obtain an order from various authorities so as to enable the petitioner to get the lease/sub-lease of the required extent of land after conversion etc., could be at least considered as the date on which the petitioner had acquired the required extent of land for establishing the Solar Power Project.

g) The lands required could be either purchased or taken on lease by the petitioner. For purchase of lands or for taking it on lease, the petitioner has to obtain permission under Section 109 of the Karnataka Land Reforms Act, 1961 (for short KLR Act, 1961). The GoK has issued a Circular bearing No.RD 01 LRM 2016 dated 22.02.2016

facilitating grant of permission under Section 109 of the KLR Act, 1961 and to obtain conversion order for non-agricultural purpose within a timeframe. The GoK has issued Notification dated 05.10.2016 (Annexure R-1) permitting KREDL to enter into lease with land owners and to sub-lease the same to the Solar Power Project Developer in order to facilitate development of Solar Power Project. Sub-para (D) of the above referred Circular No.RD 01 LRM 2016 dated 22.02.2016 issued by the Revenue Department, GoK, states that "the permission under Section 109 of KLR Act,1961 shall be brought under SAKALA as time prescribed for its delivery being within 60 days". Therefore, one can say that a definite timeline of 60 days is prescribed for obtaining an order under Section 109 of the KLR Act, 1961 from the date of filing the application. Hence, if an application with necessary documents was filed before KREDL and despite filing the same, there was a delay by the concerned authorities in granting the approval under Section 109 of KLR Act 1961, beyond 60 days, it can be stated that Condition Precedent is achieved in so far as this aspect is concerned. Therefore, at best, we may assume that in the event a Solar Power Project Developer was able to file the required application before KREDL before 60 days from the date for achieving the Conditions Precedent, it can be said that he had the documents of title evidencing clear possession of the lands required for commissioning the project. In the present case, such application was filed before

KREDL, after lapse of the date prescribed for commissioning of the project by the petitioner.

h) For the above reasons, we hold the acquisition of land was not at all delayed due to the reasons stated by the petitioner. The facts disclose that the petitioner itself should be blamed for the delay in acquiring the required extent of lands.

i) The other grounds stated by the petitioner in its Rejoinder dated 12.06.2018 that the commissioning of the project was delayed due to implementation of GST, demonetization and wrong classification of modules at Chennai Port, are untenable. These grounds were not properly raised in the pleadings of the petitioner. Apart from it, the petitioner has failed to establish that implementation of GST and demonetization and the wrong classification of modules at Chennai Port affected the progress of the implementation of his project.

j) The petitioner has raised these grounds at a later stage, which would show that it was an after-thought ground. If really, the petitioner was affected by these grounds the same would have been alleged in the petition itself and not at a belated stage.

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

13. Issue No.3: If, Issue No.2 is held in negative, whether the 1st Respondent is entitled to liquidated damages as per Articles 4.3 and 5.8 of the PPA?

a) The petitioner has contended that without proof of actual damage or loss a party cannot recovery liquated damages stated in the contract. The law on this subject is discussed in detail in the decision cited in (2015) 4 SCC 136 between Kailash Nath Associated Vs Delhi Development authority and another. The summary of the principles stated in paragraph 43 of this judgement reads as follows:

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

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

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

- b) Respondents have relied upon number of other judgements of Hon'ble Supreme Court and Hon'ble APTEL. We think it is not necessary to quote all those decisions.
- c) In the case of non-supply of energy by a generator to the distribution licensee, it is not possible to prove the actual damage or loss. Therefore, if the contract provides a genuine pre-estimate of damage or loss, the defaulting party is liable to pay the liquidated damages without proof of actuals loss or damage.

d) The definition clause in article 21.1 of the PPA defines “ Damages” shall have the meaning set forth in Sub Clause (w) of clause 1.2.1. The said sub clause (w) reads as follows:

“ the damages payable by either party to the other of them, as set forth in this agreement, whether on per deim basis or otherwise, are mutually agreed genuine pre-estimate loss and damage likely to be suffered and incurred by the party entitled to receive the same and are not by way of penalty”.

- e) The petitioner has not led any acceptable evidence to infer that the liquidated damages agreed in the PPA are in the nature of penalty.
- f) For the above reasons, we hold the issue no.3 in affirmative.

14. Issue No.4: Whether the Solar Power Project of the petitioner was liable for reduced tariff for the delay in commissioning of the said project?

As per Article 8.4 of the PPA the petitioner had to commission the project within 12 months from the effective date. Therefore, the petitioner had to commission the project on or before 06.10.2017. The project was commissioned on 05.01.2018 as per commissioning certificate dated 11.01.2018 (Annexure-P12). We find that there is delay in commissioning the solar power project of the petitioner. We have held in the preceding paragraphs that the petitioner was not prevented by any force majeure event in commissioning the project. Under Article 12.2 of the PPA, if there is delay in commissioning of the project and there is a change in applicable tariff, the tariff for the project will be the lower of the tariff agreed in the PPA or the KERC applicable tariff as on the Commercial Operation Date. The generic tariff Order dated 12.04.2017, would apply for the project, wherein

the tariff fixed is Rs.4.36 per unit. Hence, the solar power project of the petitioner is liable for reduced tariff of Rs.4.36 per unit, the tariff prevailing on the date of commissioning of the project. Hence Issue No.4 is held accordingly.

15. Issue No.5: To which reliefs the petitioner is entitled to?

In view of the various findings given above, the petitioner is not entitled to any of the reliefs prayed for by it

16. Issue No.6: What Order?

For the above reasons, we pass the following:

ORDER

- a) The petition is dismissed holding that the petitioner is not entitled to any of the reliefs claimed in the petition; and
- b) The petitioner is liable to pay damages as provided in Article 4.3 and 5.8 of the PPA.

Sd/-
(SHAMBHU DAYAL MEENA)
CHAIRMAN

Sd/-
(H.M. MANJUNATHA)
MEMBER

Sd/-
(M.D. RAVI)
MEMBER