

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION

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

Dated : 28th August, 2018

Present:

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

O P No. 163/2017

BETWEEN:

Gavi Ganga Solars Private Limited,
No.658/8, 2nd Floor, F, 1st 'C' Main Road,
40th Cross, 8th Block, Jayanagar,
Bengaluru - 560 082.

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PETITIONER

[Represented by Kumar & Bhat, Advocates]

AND:

- 1) Chamundershwari Electricity Supply Corporation Limited,
No.29, Kaveri Grameena Bank Road,
Hinkal,
Vijayanagar, 2nd Stage,
Mysuru – 570 019.
- 2) Bangalore Electricity Supply Company Limited,
Corporate Office, K.R. Circle,
Bengaluru – 560 001.
- 3) Karnataka Power Transmission Corporation Limited,
Cauvery Bhavan, Kempegowda Road,
Bengaluru – 560 009.
- 4) Karnataka Renewable Energy Development Limited,
Bharath Scouts and Guides Limited,
Palace Road,
Bengaluru – 560 001.

- 5) The Deputy Commissioner,
District Administrative Bhavan,
Shidlaghatta Road,
Chikkaballapura - 562 101.

.. **RESPONDENTS**

[Respondents 1 & 3 - represented by Justlaw, Advocates,
Respondent 4 - represented by Shri Rakshith Jois Y.P., Advocate,
Respondents 2 & 5 - unrepresented]

ORDERS

- 1) This Petition is filed under Section 86(1)(b) of the Electricity Act, 2003 praying to:
- (i) direct the 1st Respondent - Chamundeshwari Electricity Supply Corporation Limited (CESC) to comply with the original terms of the PPA and provide the confirmation for time extension with original tariff, under Article 8 i.e., *Force Majeure*;
 - (ii) direct the 1st Respondent to accept the original tariff agreed in the PPA, i.e., Rs.8.40 per kWh, and remit the same to the Petitioner;
 - (iii) declare that the Petitioner is entitled to the *Force Majeure* condition, as per Article 8 of the Power Purchase Agreement (PPA), and consequently, is eligible to seek extension of time, as per Article 2 of the PPA with original tariff;
 - (iv) restrain the 1st Respondent from deducting any Liquidated Damages from the Petitioner, as *Force Majeure* events have caused the delay;

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- (v) declare that the Petitioner is entitled to extension of time with original tariff, as per Article 2 of the PPA, without imposing or changing any conditions in the PPA; and,
 - (vi) grant such other reliefs, as the Commission deems fit, in the interest of justice and equity.
- 2) The facts of the case, as mentioned by the Petitioner and the grounds urged, in support of its prayers, may be summed up, as follows:
- (a) The Petitioner is a company registered under the Companies Act, 2013, carrying on the business of developing, executing, managing and running solar energy plant. The Government of Karnataka (GoK) issued the Karnataka Solar Policy 2014-21, vide Notification dated 22.05.2014. Under the said Policy, the GoK envisaged Utility Scale Grid Connected Solar Photo Voltaic and concentrated solar power projects and endeavoured to promote Solar Energy Projects preferably by land owning farmers with a minimum capacity of 1 MW and maximum capacity of 3 MW per land owning farmer in the State for sale of power to the Electricity Supply Companies (ESCOs) at the KERC determined tariff from time to time.
 - (b) The GoK issued guidelines vide Notification No.EN VSC 2014, Bangalore, dated 26.08.2014, to invite applications from the eligible land owners, for

awarding 1-3 MW capacity Solar Photo Voltaic Power MW Scale plants and to enter into PPAs with the jurisdictional ESCOMs.

- (c) Accordingly, Smt. A. R. Rekha, a land owning farmer had made an application for grant of solar power project with capacity of one MW, to be established in her land at Sy.No.35, Guttahalli Village, Ambajidurga Hobli, Chintamani Taluk, Chikkaballapur District. The 4th Responent (KREDL) issued a Letter of Award (LoA) in her favour, vide allotment letter dated 16.03.2015. The 1st Respondent (CESC) executed a PPA dated 24.06.2015 with her (Solar Project Developer/SPD), for purchase of power, from the one MW Solar Power Plant.
- (d) As the SPD had no capacity to invest and establish the Solar Power Plant, she found the investor and formed the Petitioner SPV namely, Gavi Ganga Solar Private Limited, with the SPD as 26% shareholder, as permitted under Article 12.11 of the PPA. A Supplemental PPA (SPPA) dated 11.08.2016 was also entered into, between the 1st Respondent (CESC) and the Petitioner-SPV, for development of Solar Power Plant, with the consent of the farmer.
- (e) Immediately, after entering into PPA, the Petitioner started the Project development work on the site, like land levelling, fencing, obtaining necessary approvals and sanctions such as conversion of land, evacuation line, funds from the authorities concerned and loan sanction from the banks

for the establishment of the Solar Power Project. As per Article 2 of the PPA, the Project had to be completed on or before the Scheduled Commissioning Date, i.e. within eighteen (18) months from the Effective Date. Even though the PPA was signed on 24.06.2015, the same had to be approved by the Commission. After approval of the Commission, the PPA was handed over to the Petitioner on 23.07.2015.

Here itself we may note that, many of the actions stated to be initiated / taken by the Petitioner are in fact of the SPD.

- (f) The Petitioner lost a month's time to receive the approved PPA, which is to be treated as *Force Majeure* event, under Article 8.3 of the PPA. The 1st Respondent (CESC) had not initially understood the formalities of forming an SPV and the modalities of the Supplemental Agreement. The Commission had clarified the same during December, 2015 and even after that, the 1st Respondent could not understand the clarification given by the Commission, and the Commission issued new formats for AOA, MOA and SPPA on 21.03.2016. In between the above said two clarifications, nine (9) months had lapsed from the date of the PPA. As there was no clarity with regard to assignment of the PPA, the Petitioner could not get any investor to provide funds for the Project.

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- (g) The GoK issued a Circular dated 01.12.2015, fixing the time, for grant of deemed conversion, as 15 days. As per the said Circular, the Petitioner had submitted all requisite documents like PPA, KREDL's letter, RTC, PTCL NOC and other relevant documents, on 11.05.2016, before the Deputy Commissioner, for conversion of the land. The Deputy Commissioner passed an Order on 30.11.2016, for conversion of the land, after a delay of about 7 months. The Petitioner had also applied for the evacuation approval, before the KPTCL on 20.6.2016 and the same was granted on 13.10.2016, after a delay of four months. Subsequent to the power evacuation approval, the 2nd Respondent granted Work Order, to carryout the Sub-station work, on 20.12.2016, resulting in a delay of 6 months. Subsequent to the evacuation approval, the Petitioner could obtain the Work Order, to construct the 11 kV line, only on 08.12.2016.
- (h) The Petitioner made a request on 30.08.2016 for providing the MEI breaker, and the same was received on 15.12.2016, after 3½ months.
- (j) A portion of the 11 kV line from the Petitioner's Plant to the Sub-station, had to cross the railway line at Y. Hunsuenahalli, for which the 2nd Respondent had to get approval from the South Western Railways and this approval took about six months' time. The Petitioner got approval through the 2nd Respondent on 05.05.2017. The 2nd Respondent ought to have processed for permission from the Railways, while estimating the 11 kV approval.

Further, permission was granted only to lay the underground cable at railway crossing and the same could not be charged without safety approval from the Railways. This condition obstructed the Petitioner to commission the Plant. The safety clearance was granted on 15.06.2017. The said delay of one year was caused, due to the fault of the 1st and 2nd Respondents and, therefore, has to be treated as a *Force Majeure* event.

- (k) The request for extension of time to commission the Plant was made to the 1st Respondent (CESC) on 09.12.2016, but the same was received by the Petitioner on 23.02.2017, after a delay of 2 months 15 days. As the above said approvals are valid for 18 months, from the date of the signing of the PPA, the Petitioner could not carryout the Sub-station work, as extension of time was not granted, immediately, despite a direction by the GoK in the Circular dated 24.11.2016, that the 1st Respondent (CESC), had to extend the time, under the PPA, within 15 days. Hence, there was a delay of 2 months 15 days in granting the extension of time. Further, there was a delay of three months due to demonetization which has to be treated as a *Force Majeure* event.

- (l) Owing to inordinate delay in the issuance of various permissions and sanctions, including conversion Order, the time fixed under the PPA had expired and the Petitioner had sought extension of time to commission the Project. The reasons for the delay in CoD fall under the *Force Majeure* Events,

as defined under Article 8 read with Article 2 of the PPA and, therefore, the application for extension of time with original tariff has to be considered by the Commission.

- (m) The Petitioner has invested Rs.6.50 Crores and has committed to revenue sharing with the farmer, assuming the original tariff. If any change is effected to the original tariff, the same would amount to violation of the PPA, cause heavy losses to the Petitioner and affect the livelihood of the farmer.
 - (n) After execution of the PPA between the Petitioner and the 1st Respondent (CESC), the conditions set forth therein would only apply and there would be no scope for any third party to intervene, guide, or alter the agreement and no substantive regulations can vary the clauses on conditions, timelines, tariff, etc., in the said PPA.
- 3) Upon issuance of Notice, the 1st, 3rd and 4th Respondents appeared through their Counsel and filed Statement of Objections. The 2nd and 5th Respondents remained unrepresented.
- 4) The objections of 1st Respondent may be summarized, as follows:
- (a) As the Petitioner was unable to execute the Project, in a timely manner, she sought extension of time for commissioning the Project by six months, under

the *Force Majeure* conditions. As several requests for extension of the Scheduled Commissioning Date were received from the Solar developers, the GoK issued an Order dated 24.11.2016, directing all the Electricity Supply Companies (ESCOs) to constitute a three-member Committee to consider and to dispose of the requests of the farmers / developers. A Committee was constituted by the 1st Respondent (CESC), to consider the requests for the extension sought for by 1 to 3 MW Solar Generators, under the land owning farmers' category. The said Committee held a meeting on 15.02.2017 wherein, the causes for the delayed achievement of the scheduled commercial operation were considered, in respect of six (6) generators, including the Petitioner, and a decision was taken to accord extension of six months' time to achieve the SCOD.

- (b) The Petitioner furnished the documents to the Committee, constituted for the purpose for consideration of request for extension of time. As per the same, the following information was gathered pertaining to the various reasons assigned for the delayed execution of the Project.

Land conversion

Date of submission of application	:	11.08.2016
Date of conversion	:	30.10.2016
Delay in getting approval	:	3 months

KPTCL evacuation approval (Regular):

Date of submission of application	:	20.06.2016
Date of approval	:	13.10.2016
Delay in getting approval	:	4 months

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- (c) The Committee, after detailed discussions and scrutiny of all the documents, opined that, approval may be accorded for extension of SCOD by six months, considering Article 2.5 of the PPA, as there is a delay in the issuance of approvals by the various Government entities.
- (d) On 23.02.2017, the 1st Respondent (CESC) addressed a letter to the Petitioner, informing about the extension of time, by six months, for SCOD, with certain conditions. A SPPA was entered into on 20.03.2017, incorporating the change in COD and sent to the Commission, for approval. However, the same was returned by the Commission, on 07.04.2017.
- (e) On 16.3.2017, the Commission addressed a letter to all the ESCOMs in the matter, pertaining to extension of time granted to the Solar Generators and informed them, not to allow any extension of time beyond the scheduled commissioning, if any, as per the original PPA, without obtaining the prior opinion of the Commission. Further, vide letter dated 05.04.2017, the ESCOMs were directed by the Commission to advise all the land owning Solar Developers / SPVs, to approach the Commission and seek for approval of the extension of time. In furtherance to the same, the Petitioner has filed this petition.
- (f) The Additional Chief Secretary to Government, Energy Department, vide letter dated 25.04.2017, addressed to the Commission, has sought for its

approval to the extension of CoD, given by the 1st Respondent (CESC), for six months from the date of SCOD as per Articles 2.5 and 8 of the PPA.

- (g) The Project was commissioned on 22.06.2017.
- (h) In respect of extension of the Project duration of the already awarded Solar Power Projects, the Ministry of New and Renewable Energy, has issued letter No.30/106/2014-15/NSM dated 28.7.2017, addressed to the Principal Secretaries (Power/Energy) of State Governments, as stated below:

“Ministry has 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 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 organisations regarding land, transmission or any such reasons, the extension of the project may be allowed.”

- (j) The 1st Respondent (CESC) has, therefore, prayed that the Commission may be pleased to accord directions in the present Petition, in the interest of justice.

- 5) The Objections of the 3rd Respondent may be summarized, as follows:
- (a) The allegation of the Petitioner has alleged that, there is delay on the part of the Respondent in approving the power evacuation, is denied as false. The chain of events with regard to the approval of power evacuation is as hereunder:
- (i) Application received on 20.06.2016.
 - (ii) On receipt of application, the Petitioner was requested on 21.07.2016 to pay the processing charges.
 - (iii) On 23.07.2016 Petitioner paid processing fees.
 - (iv) On 29.07.2016, the EE of Chintamani was directed to submit the feasibility report.
 - (v) On 03.09.2016, the feasibility report was submitted.
 - (vi) The tentative evacuation approval was issued to the Petitioner on 22.09.2016.
 - (viii) On 07.10.2016, the Petitioner submitted the acceptance for the tentative evacuation approval.
 - (viii) On 13.10.2016 the regular evacuation approval was issued to the Petitioner.

From the above chain of events, it is clear that the 3rd Respondent has not delayed the process of according evacuation approval to the Petitioner.

The Petitioner has filed the application for evacuation approval, after a lapse of one year from the date of execution of the PPA and is responsible for the delay. The Petitioner ought to have achieved the Conditions Precedent by 23.06.2016, but applied for the evacuation approval on 20.06.2016. This indicates that, the Petitioner was not diligent in implementing the Project.

- (b) The Petitioner has contended that, there is a delay by the 3rd Respondent in granting the Work Order on 20.12.2016, to carryout the Sub-station work. However, all other necessary approvals required to commence the work at the Sub-station, like approval of equipment drawings, estimate for the 11 kV TB at KPTCL Sub-station and equipment, were given before 20.12.2016 and hence, the delay in execution of the Project, cannot be attributed to the 3rd Respondent.
- 6) The 4th Respondent, in its Statement of Objections, has stated that, it is for the 1st Respondent to counter the contentions urged by the Petitioner and that it is not a necessary party to this Petition. Hence, 4th Respondent has prayed that, the Petition against it be dismissed.
- 7) We have heard the learned counsel for the parties and perused the records. The following issues would arise for our consideration:

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- (1) Whether the extension of time of six months, granted by the 1st Respondent (CESC) to the Petitioner, for achieving the commercial operation of the Petitioner's Plant, 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 Plant, under the Force Majeure Events, as per the PPA?
 - (3) What should be the tariff for the Project, for the term of the PPA?
 - (4) What Order?
- 8) After considering the submissions made by the counsel for the parties and the pleadings and other materials placed on record, our findings on the above issues are, as follows:
- 9) **ISSUE No.(1):** *Whether the extension of time of six months, granted by the 1st Respondent (CESC) to the Petitioner, for achieving the commercial operation of the Petitioner's Plant, can be subjected to legal scrutiny by the Commission?*
- (a) Article 2.5 of the PPA does not specifically stipulate that, any extension of time granted by the CESC should be got approved by the Commission. However, Article 2.5.1 of the PPA stipulates the grounds, on which alone the time could be extended, for achieving the commercial operation. Article 5.1 of the PPA provides for reduction of tariff, as a consequence of the delay in the commissioning of the Project, beyond the Scheduled Commissioning

Date, subject to certain terms and conditions stated, therein. Whenever an event affects the quantum of tariff, applicable for supply of energy to the Distribution Licensees, we are of the considered opinion that, the same should be scrutinized and approved by the Commission. It is a settled law that, this Commission has the exclusive jurisdiction to determine the tariff for supply of electricity, by a Generating Company to a Distribution Licensee and it has to regulate the electricity purchase and the procurement process of the Distribution Licensees, including the price at which the electricity shall be procured from different agencies, through PPAs. Therefore, we hold that, even in the absence of a specific term in the PPA, an event affecting or altering the tariff, already approved in the PPA, should be got approved by this Commission.

- (b) The Petitioner has contended that, since the 1st Respondent (CESC) has accepted the claim of the *Force Majeure* events and granted the extension of time, the Commission has to pass an Order in favour of the Petitioner, treating the averments and pleadings of the Petitioner, as admitted by the Respondent. Reliance is placed by the Petitioner, on the judgments of the Hon'ble Delhi High Court, in the case reported in AIR 2005 Delhi 319 and the Hon'ble Supreme Court, in the case reported in AIR 2005 SC 2765, in support of such contention. We are unable to accept the contention of the Petitioner. Any extension of time to commission a Power Project, has a bearing on the tariff payable. The tariff determination / fixation of price for

electricity is not an adversarial proceedings. The consumer, though not a formal party, ultimately pays for the supply of 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, in the case of *All India Power Engineers Federation Ltd v. Sasan Power Ltd.*, reported in (2017) 1 SCC 487, has held that, even if the parties to a contract (generating company - seller of energy and distribution licensee - buyer of energy) waive off a certain term affecting the tariff, the Commission, as a custodian of consumer interest, has to intervene and exercise its regulatory power. Accordingly, we hold that, the Commission has the mandate and powers to scrutinize the correctness and legality of the extension of time granted by the 1st Respondent (CESC).

(c) Therefore, we answer Issue No.(1), in the affirmative.

10) **ISSUE No.(2):** *Whether the Petitioner has made out a case for deferment or extension of the Scheduled Commissioning Date of its Plant, under the Force Majeure Events, as per the PPA?*

(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 CESC 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 CESC and achieve financial closure and provide a certificate to CESC from the lead banker to this effect;

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

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

2.1.2 *SPD shall make all reasonable endeavors to satisfy the Conditions Precedent within the time stipulated and CESC 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 CESC 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 CESC 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 CESC or due to Force Majeure, the SPD shall pay to CESC 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, CESC at its discretion may terminate this Agreement*

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XXX

2.3.2 Appropriation of Performance Security

Upon occurrence of delay in commencement of supply of power to CESC as provided in clause 2.5.7, or failure to meet the Conditions Precedent by the SPD, CESC 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 CESC 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 CESC Event of Default; or
- (b) Force Majeure Events affecting CESC; 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 CESC through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the SPD or CESC, or till such time such Event of Default is rectified by CESC.*

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 ESCOMs.

Subject to the other provisions of this agreement, if the SPD is unable to commence supply of power to CESC by the scheduled commissioning date, the SPD shall pay to CESC, 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 CESC 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 CESC 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 the Article 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 CESC's 'Event of Default' or the *Force Majeure* Events. The *Force Majeure* events and the requirement of issuing a written Notice, are mentioned in Article 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 24.6.2015. As per Article 2.1 of the PPA, the Conditions Precedent had to be achieved within 365 days from the date of signing the PPA and the Project had 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. The Petitioner claims that, the delay in handing over a copy of the PPA after approval on 23.07.2015 by the Commission has caused the delay in implementing the Project. The recitals in the PPA would reveal that, the parties have signed the PPA and copies of the same were delivered on the date of the PPA. A signed copy of the PPA would be sufficient to proceed with the preliminary works for implementation of the Project. The approval of the PPA by the Commission has no bearing on the initial obligations of the SPD, such as, applying for approvals, loans, etc. The Petitioner has not produced any documents to show that, any of its application for approval, loans, etc., was rejected or delayed on this count. Therefore, we are unable to accept that, the time taken for approval of the PPA is a *Force Majeure* Event, causing delay in the commissioning of the Project. The provisions of the PPA do not provide for exclusion of the time taken for approval of the PPA in counting the period available for commissioning the project. Hence, the time taken in the regulatory process for approval of the PPA, cannot be termed as 'delay'. In any case, as noted earlier, it is not shown that, the absence of the approved PPA prevented the SPD, from taking any step/ action, to implement the Project.

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- (d) It is the case of the Petitioner that, the SPD applied for conversion of the land on 11.05.2016. The Order of the Deputy Commissioner, Chikkaballapur reveals that, the application was belatedly made before the Deputy Commissioner, for conversion of the land, on 11.8.2016. Even if the date is considered as 11.05.2016, the application is made after a lapse of about 10 months from the Effective Date of the PPA. No explanation is given for this delay on the part of the SPD in applying for land conversion. The land conversion charges were paid by the SPD, on 08.11.2016. The land conversion Order was passed by the Deputy Commissioner, on 30.11.2016 in about 3 ¹/₂ months, from the date of application and 22 days, from the date of payment of charges, which is found to be reasonable.
- (e) The SPD applied for the evacuation approval to the 3rd Respondent on 20.06.2016, after about one year from the date of the PPA. No explanation is given for this delay in making the application. The Petitioner has alleged that, the 3rd Respondent has caused a delay of 4 months, in granting the evacuation approval. The 3rd Respondent has, in its Statement of Objections, furnished the dates and events leading to the grant of evacuation approval. Within a period of 3 months from the date of payment of charges, the evacuation approval was granted by the 3rd Respondent and considering the various steps involved in granting of such approval, this reasonable period cannot be termed as 'delay'.

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- (f) It is the further allegation of the Petitioner that, there was delay by the 3rd Respondent in granting of the Work Order, to carry out the Sub-station Work. This allegation is countered by the 3rd Respondent, contending that the other approvals were given in time to commence the work. We note that, when a time-line of 365 days is provided in the PPA, for getting all approvals, the inordinate delay by the SPD/Petitioner in applying for such approvals and thereafter, attributing the delay to the authorities, cannot be accepted. The 1st Respondent, while granting the extension of time to commission the Project, ought to have taken note of these aspects.
- (g) The other allegation is that, a delay of 3 months, in execution of the Project work was caused by the demonetisation decision of the Central Government. This allegation is not substantiated and, in any case, cannot be treated as a *Force Majeure* Event.
- (h) The other allegation of the Petitioner is that, the 2nd Respondent had to get the approval of the Railways, for the construction of a span of 11 kV line, running between the Sub-station and the Solar Power Plant. That, after the grant of approval dated 8.12.2016, for constructing the 11 kV line under self-execution, the 2nd Respondent addressed a letter dated 11.01.2017 to the Railways, seeking approval of the railway crossing of the 11 kV line, for a length of 273 metres. That, the Railways, on 05.05.2017, granted approval for execution of the work and informed that, the line should not be charged

before obtaining safety approval from the Railways. That, the work completion certificate of laying the line was submitted by the 2nd Respondent to the Railways on 15.05.2017 and a safety certificate was requested to charge the line. That, the safety certificate dated 15.06.2017 was issued by the Railways and informed to the 2nd Respondent on 16.06.2017. The Petitioner has alleged that, there is a delay of about one month in issuing the safety certificate. That, the 1st and 2nd Respondents have caused delay of one year, in getting the approval from the Railways and this has to be treated as a *Force Majeure* Event. We note that, the time taken, from 08.12.2016 to 16.06.2017 is about 6 months. During this period, the Petitioner has stated that, the line was constructed and was ready within 3 days from 05.05.2017, which is the date of approval of Railways. From 09.05.2017 to 16.06.2017, the safety approval was awaited from the Railways, for charging the line. This period is about 40 days. When a time line of 18 months is given to commission the Plant, all such periods of time, involved in various steps of implementation of the Project are taken into consideration and cannot be excluded in reckoning whether such time-line is met or not. We note that, it is the obligation of the Petitioner to obtain all approvals under the clauses of the PPA and the allotment letter dated 16.03.2015 issued by the 3rd Respondent. The obligation of the 1st Respondent (CESC) is only to provide support to the developer and facilitate in the implementation of the project. Therefore, this event cannot be considered as falling under *the Force Majeure* clause of the PPA.

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- (j) It is also the allegation of the Petitioner that, the breaker was supplied by the MEI, after a period of 3 months & 15 days, from the date of the Order. We note that, the breakers have to be tailor-made, based on the drawing submitted, tested and certified by the TAQC and thereafter, despatched. Considering the various steps involved, the period of about 3 months and 15 days, taken in supply of breakers, cannot be termed as 'delay'. It is also not explained, as to why there was a delay on the part of the Petitioner in taking timely action necessary for placing the Purchase Order for the breaker.
- (k) It is also the case of the Petitioner that, the communication on extension of time for the SCOD was sent on 23.02.2017, after 2 months from the date of request on 9.12.2016 and the Petitioner could not carry out the Sub-station work, as the approval had lapsed by then. We have noted earlier, the inordinately long time taken by the Petitioner in making applications for grant of various approvals. Had timely action been taken, the chain of events could have been completed, within the stipulated time and the Plant could have been commissioned, within the SCOD.
- (l) We note that, it is a settled law that the *Force Majeure* clause in the PPA has to be strictly interpreted. No notice, as contemplated under the said clause, is stated to have been issued by the Petitioner to the 1st Respondent (CESC). None of the reasons or events cited by the Petitioner for delay in commissioning of its project, falls under the *Force Majeure* Events, mentioned in the PPA, as held in the preceding paragraphs. Hence, we hold that, the

Petitioner is not entitled to extension of time, as provided in the clauses of the PPA. Consequently, the Petitioner would be liable for payment of Liquidated Damages, as per Article 2.5.7 of the PPA.

- (m) We have held that, the Petitioner is not entitled to the extension of time beyond the SCOD 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 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 the 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.
- (n) The Hon'ble Supreme Court, in Civil Appeal No.3600 of 2018 (*M.P. Power Management Company Ltd. Vs Renew Clean Energy Pvt. Ltd., and another*), decided on 05.04.2018, has held that, for delay in achieving Conditions Precedent and commissioning the Project, the Generating Company is liable to pay damages stipulated in the PPA.
- (p) Therefore, we answer Issue No.(2), in the negative.

11) **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.8.40 per kWh based on the KERC tariff order S/03/1 dated 10.10.2013 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.8.40/- per kWh

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

(b) Article 5.1 of the PPA, provides for 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 the generic tariff for supply of electricity, generated from various sources, to the Distribution Licensees, based on, among other parameters, mainly 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 a 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 1st Respondent (CESC), 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 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 of largescale Solar capacity addition across the globe. Thus, the 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, Rs.6.51 per unit in the Order dated 30.07.2015, Rs.4.36 per unit in the Commission's Order dated 12.04.2017 and Rs.3.05 per unit in the Order dated 18.5.2018.

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- (c) We note that, the Petitioner SPV took the risk of implementation of the Project after more than a year after the execution of the PPA, with barely four months left for its commissioning as agreed in the PPA and could not do it for certain reasons and events, which we have held to be not falling under the *Force Majeure* clause in the PPA, that could have entitled the Petitioner to seek extension of the commissioning date, agreed to in the PPA. It is safe to infer that, the normative Capital Cost of the Solar Power Plants, when the Petitioner took effective steps to procure capital equipment for its Project, was lower than the normative cost of the Solar Power Plants, assumed in the Generic Tariff Orders dated 10.10.2013 and 30.07.2015. Thus, the Petitioner is not entitled to the tariff, originally agreed to in the PPA, when admittedly the Plant was not commissioned, within the stipulated time and it is entitled only for the revised tariff, as on the date of commissioning of the Plant, as per Article 5.1 of the PPA. Admittedly, in the present case, the generic tariff for the Solar Power Plants, that was agreed to 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 to, 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 22.6.2017.

The Petitioner has not furnished any material particulars of the cost incurred in implementing the Project and the period when the investments were actually made, except for a mere statement that, Rs.6.5 crores is spent on the project. The Petitioner has stated that, the owner of the Project had no capacity to invest and establish the Plant and hence, found the investor-SPV (the Petitioner). We may safely infer that, the major part of the investments has been made after the formation of the SPV. In any case, 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, in Civil Appeal No.1220 of 2015 (*Gujarat Urja Vikas Nigam Limited VS EMCO Limited and another*), decided on 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 first respondent 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 a PROJECTS/ power producers (similarly situated as the first respondent) could be different. In recognition of the said two factors, the PPA clearly stipulated that in such a situation, the 1st respondent would be entitled only for lower of the two tariffs...."

The ratio of the Hon'ble Supreme Court's judgment, in the above case, is applicable to the Petitioner's case as the PPA envisages a similar situation.

(e) 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.

(f) Accordingly, we answer Issue No. (3) as above.

12) **ISSUE No.(4):** What Order?

For the foregoing reasons, we pass the following:

ORDER

- (a) It is declared that the Petitioner is not entitled to any of the reliefs, sought for, in the Petition;
- (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