

No. N/253/2018

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

Dated: 23.07.2021

Present

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

OP No.104/2018

BETWEEN:

M/s Kavit Green Energy Private Limited,
A Company incorporated under the
provisions of Indian Companies Act, 1956
having its Registered office at 9th Floor,
Galav Chambers, Opp. Sardar Patel Statue,
Sayajgunj, Vadodara,
Gujarat-390 020.

(Represented by its Authorized Signatory)

..... PETITIONER

(Represented by Sri Parashuram Ajjampur Lakshman,
Advocate)

AND:

- 1) Gulbarga Electricity Supply Company Limited (GESCOM),
A Company incorporated under the provisions of
Companies Act, 1956 having its
Registered Office at Station Main Road,
Kalaburgi-585 102.
- 2) Karnataka Renewable Energy Development Limited (KREDL),
A Company incorporated under the provisions of
Companies Act, 1956 having its at # 39, "Shanthigruha",
Bharath Scouts & Guides Building,
Palace Road, Gandhi Nagar,
Bengaluru-560 001.
(Represented by its Managing Director).

- 3) Karnataka Power Transmission Corporation Limited (KPTCL),
A Company incorporated under the provisions of
Companies Act, 1956 having its at
Cauvery Bhavan, K.G. Road,
Bengaluru-56 009.
(Represented by its Managing Director)

....RESPONDENTS

(Respondent No.1 & 3 represented by Sri S. Sriranga
& Ms. Sumana Naganand, Advocates
for M/s JUSTLAW Advocates)

(Respondent No.2 represented by
Sri Murugesh V. Charati & Smt. Latha, Advocate)

ORDERS

1. The present petition is filed under Section 86 (1) (f) of the Electricity Act, 2003, praying for the following reliefs to:
 - a) Set aside the 1st Respondent's communication bearing No.GESCOM/CEE/(CP)/EE/AEE(PTC)/2017-18/29472-78 dated 16.09.2017 purportedly issued on the basis of the KERC letter dated 24.08.2017 produced as Annexure-P15;
 - b) Approve the Respondent GESCOM vide its Order No.GESCOM/ CEE/ (CP)/ EE/ AEE (PTC)/ 2016-17/ 35997-36002 dated 28.10.2016 produced as Annexure-P8;
 - c) Accord approval to the supplemental agreement dated 23.05.2017 entered into between Petitioner and Respondent produced as Annexure-P13;
 - d) Direct the 1st Respondent to refund Rs.2,83,00,000/- (Rupees Two crore eighty-three lakhs only) illegally deducted as the Liquidated Damages; and
 - e) Pass such further order/s including an order as to costs to meet the ends of justice.

2. The material facts required for the disposal of the controversies involved in the case, as can be gathered from the pleadings and documents produced by the parties may be stated as follows:

a) The Karnataka Renewable Energy Development Limited (KREDL) is a Nodal Agency of the Government of Karnataka (GoK) for facilitating the development of renewable energy in the State. The GoK had resolved to undertake development of 500 MW of solar power energy in the State through private sector participation. Pursuant to it, KREDL had floated Request for Proposal (RfP) dated 30.05.2014 for development of Solar Thermal Power and/ or Solar PV Power Plant in Karnataka, prescribing the technical and commercial terms and conditions for selection of bidders for the said purpose. The draft PPA was a part of the RfP.

b) The KREDL received several proposals and after evaluation of those proposals accepted the bid of the petitioner M/s Kavita Green Energy Private Limited, for development of 5 MW Solar PV Project near Mallapura, Nayakanahatti, Challakere taluk of Chitradurga district to supply the energy at Rs.7.10 per unit and issued Letter of Award (LoA) dated 19.11.2014 (Annexure-P1). As per the terms prescribed in LoA, the petitioner executed the Power Purchase Agreement (PPA) dated 09.02.2015 (Annexure-P2) with 1st respondent (GESCOM).

c) In terms of Article 4.1 of the PPA, the petitioner was required to fulfil the Conditions Precedent within 365 days from the Effective Date,

unless such completion was affected by any Force Majeure event or if any of the activities was specifically waived in writing by the 1st respondent (GESCOM). The 'Effective Date' was defined in Article 3.1 of the PPA as the Date of signing of the PPA. Article 4.2 of the PPA enumerated the Conditions Precedent required to be fulfilled by the petitioner/developer. Article 4.3 of the PPA provided for payment of damages for not fulfilling the Conditions Precedent within the time specified. Article 8.5 of the PPA provided that the Solar Power Project should be commissioned within eighteen months from the Effective Date. Article 5.8 of the PPA provided for payment of Liquidated Damages for delay in commencement of supply of power to the 1st respondent (GESCOM) as provided in the said Article. Article 5.7 of the PPA provided for the grounds on which extension of time for commissioning the project beyond the Scheduled Commissioning Date (SCD) could be allowed by the 1st respondent (GESCOM). In the present case, the 1st respondent (GESCOM) extended the time for achieving the Conditions Precedent and also commissioning the project at the request of the petitioner and thereafter, a Supplemental PPA (SPPA) incorporating these extensions was sent for approval of the Commission. Then the Commission found that without any legal basis, the periods for fulfilling the Conditions Precedent and commissioning of the project were extended and directed the 1st respondent (GESCOM) to stick to the original terms of the PPA and to recover the damages and Liquidated Damages as per relevant terms

and to reduce the tariff as per Article 12.2 of the PPA. Aggrieved by such directions of the Commission, the petitioner has filed the present petition.

d) For the sake of clarity and brevity and for better understanding of the progress of relevant events and the facts involved in the case, we may state the different events and facts with dates and other particulars in a tabular column as noted below:

Sl. No.	Date	Particulars of facts and events	Annexures/Reference
1	2	3	4
1	30.05.2014	KREDL invited RfP for selection of bidders to undertake development of Solar PV Projects in the State of Karnataka.	
2	19.11.2014	Kavit Industries Limited – the petitioner, was awarded LoA by KREDL for establishment of Solar PV Project of 5 MW capacity near Mallapura in Challakere taluk for sale of energy at Rs.7.10 per unit with other terms & conditions stated therein.	P1
3	09.02.2015	Petitioner & Respondent-1 entered into PPA.	P2
4	09.02.2015	Effective Date i.e., the date of execution of PPA.	Article 3.1 of PPA
5	08.02.2016	Deadline for achievement of Conditions Precedent.	Article 4.1 of the PPA
6	25.02.2016 & 08.03.2016	The petitioner sought extension of time for fulfilment of Conditions Precedent vide letters dated 25.02.2016 & 08.03.2016	P3 & P4 respectively.
7	March 2016	The petitioner identified the lands required for project.	As per written submission filed by the petitioner

1	2	3	4
8	24.03.2016 13/04/2016 06.05.2016 11.05.2016	Petitioner filed application requesting KPTCL for approval of power evacuation scheme from project site to the nearby Bevoor 110/33 kV Sub-station. KPTCL intimated the petitioner for payment of processing fees. CEE of concerned Transmission Zone submitted report. Petitioner paid processing fee.	In P4
9	11.05.2016	KPTCL granted tentative evacuation scheme with the terms & conditions stated therein.	P5
10	19.05.2016	The petitioner accepted the terms & conditions stated in Tentative Evacuation Scheme approval and requested to issue the Regular Evacuation Scheme approval.	As per P6
11	18.06.2016	As per the request of the petitioner the 1 st Respondent (GESCOM) Board granted extension of time for achieving the Conditions Precedent subject to the petitioner meeting the original Scheduled Commissioning Date.	As per para 10 of the petition.
12	25.06.2016	KPTCL granted Regular Evacuation Scheme.	P6
13	30.06.2016 June 2016	The petitioner got the approval for purchasing identified agricultural lands u/s 109 of the KLR Act, 1961. The petitioner applied for conversion of land from agricultural use to non-agricultural purpose..	R1 produced by 1 st Respondent (GESCOM) As per written submission of the petitioner.
14	05.08.2016	The petitioner intimated the 1 st respondent (GESCOM) regarding achievement of Conditions Precedent.	As per para 12 of the petition.
15	08.08.2016	Scheduled Commissioning Date (SCD)	As per definition clause of Article 21.1 & 8.5 of the PPA.

1	2	3	4
16	26.08.2016	The petitioner requested the 1 st Respondent (GESCOM) to grant six months' extension of time for commissioning of the project from SCD.	P7
17	28.10.2016	Respondent granted extension of time up to 09.02.2017 for commissioning the plant subject to the conditions stated therein and executing SPPA and approval of the same by KERC.	P8
18	03.02.2017	KPTCL issued Work Completion Report in respect of evacuation line and Terminal Bay.	P9
19	06.02.2017	CEIG issued electrical safety approval for electrical installation pertaining to 5 MW Solar Power Project of the petitioner.	P10
20	07.02.2017	Deputy Commissioner, Koppal district, Koppal, issued order permitting use of agricultural lands to non-agricultural purpose as requested by the petitioner.	Produced along with written submission of the petitioner.
21	08.02.2017	CEE, Corporate Planning, GESCOM, Kalaburagi, issued OM according approval for synchronization of 5 MW Solar Plant of the petitioner.	P11
22	09.02.2017	The petitioner's plant was synchronized/ commissioned with KPTCL Grid.	P12
23	23.05.2017	The petitioner and the 1 st respondent (GESCOM) have executed SPPA incorporating the revised dates for achieving Conditions Precedent and SCOD and also stating the change of location of the project from Mallapura village in Challakere taluk of Chitradugra district to Hunasihalli village in Yelaburga taluk of Koppal district and subject to Article 12 of the PPA dated 09.02.2015 requiring application of the prevailing KERC tariff as on revised Commissioning Date.	P13

1	2	3	4
24	24.08.2017	On submission of the SPPA (Annexure-P13) for approval, the KERC informed the 1 st respondent (GESCOM) that the extension of time granted for achieving Conditions Precedent & commissioning of the project was not supported by none of the provisions of the PPA, hence, directed to enforce the terms of original PPA depending upon the actual date of COD and to reduce the tariff and to recover Liquidated Damages for delay in achieving COD and other related aspects.	P15
25	16.09.2017	Pursuant to the letter dated 24.08.2017 of the Commission, the 1 st Respondent (GESCOM) informed the petitioner to pay damages as per Article 4.3 of the PPA for not achieving the Conditions Precedent within stipulated time and to pay the Liquidated Damages as per Article 5.8 of the PPA for delay in supply of power. The 1 st Respondent totally claimed Rs.2,83,00,000 from the petitioner and intimated that the tariff applicable for 5 MW Solar Power Project was Rs.6.51 per unit for the entire period of PPA.	P16
26	28.02.2017 to 12.09.2018	Subsequent to commissioning of the project on 09.02.2017, the petitioner submitted invoices for the months from February 2017 to September 2018 for the energy supplied in the respective months.	P14 (collectively)
27	16.11.2018	The petitioner filed the petition before this Commission.	

e) In the petition, the petitioner has not urged any fact for constituting Force Majeure event. In para 13 of the petition, it is stated that the petitioner vide letters dated 26.08.2016 and 02.11.2016 sought extension for COD up to 09.02.2017 due to delay in getting the land conversion order dated 30.06.2016 and the Gram Panchayat approval. However, in the letter dated 26.08.2016 produced at Annexure-P7 there is no

whisper of delay in getting the land conversion order or the Gram Panchayat approval. The letter dated 02.11.2016 is not produced by the petitioner. In the letters dated 25.02.2016 to 08.03.2016 marked at Annexure-P3 & P4 respectively, the petitioner had sought extension of time for fulfilment of Conditions Precedent, stated that the reason for twelve months' delay from the date of PPA was only because of problem faced in arranging the project equity which was sorted out and cent per cent project equity was arranged by the time of filing these letters. On a liberal construction of the pleadings of the petitioner, one may gather that the petitioner has relied upon the following two facts in support of Force Majeure event for claiming the extension of time for reaching the time limit either for achieving the Conditions Precedent or for commissioning the Project:

- (i) That there was delay of twelve months in arranging cent per cent project equity; and
- (ii) There was delay in issuing land conversion order.

Only in rejoinder filed to the statement of objections of the 1st respondent (GESCOM), the petitioner has stated that delay in achieving the Conditions Precedent and SCD was due to change in location of the project and delay in getting land conversion order.

- f) The petitioner has relied upon the following legal grounds. They may be stated as follows:

- (i) The extension of time granted by the 1st respondent (GESCOM) for achieving the Conditions Precedent and for commissioning of the project has been clearly documented by way of SPPA dated 23.05.2017 (Annexure-P13), thereby the revised dates for achieving the Conditions Precedent and commissioning of the project would prevail and the petitioner has achieved these milestones well within the extended time. Therefore, the petitioner is entitled to the tariff agreed under the PPA dated 09.02.2015 (Annexure-P2). In substance, it is contended that the Commission could not have reviewed the extension of time granted by the 1st respondent (GESCOM).
- (ii) The tariff discovered in bidding process and adopted under Section 63 of the Electricity Act, 2003 cannot be altered for any reason.
- (iii) The direction by the Commission to the 1st Respondent (GESCOM) for reduction of tariff and for recovery of damages etc., without issuing a notice to the petitioner is contrary to the law and against the principles of natural justice. Therefore, the letter dated 24.08.2017 (Annexue-P15) addressed to the 1st Respondent (GESCOM) and the action taken by the 1st Respondent (GESCOM) in compliance with that letter are illegal.

(iv) The Secretary of the Commission who is not even the Member of the Commission has written an administrative letter to the 1st Respondent (GESCOM) to alter the tariff. (It appears the petitioner is referring to the letter dated 24.08.2017 (Annexure-P15) which is signed by the Secretary on behalf of the Commission as the administrative letter referred by it above.)

(v) One cannot take aid of any of the Generic Tariff Orders passed by this Commission from time to time, for reduction of tariff as per Article 12.2 of the PPA.

(vi) The tariff of Rs.7.10 per unit agreed in Article 12.1 of the PPA is for a period of 25 years from the date of commercial operation of the project, thereby even the Regulator cannot alter that tariff in the middle of that period. In support of it, the decision of the Hon'ble Supreme Court of India in case of BESCO Vs. Konark Power Private Limited is relied upon.

g) For the above reasons, the petitioner has prayed for allowing the prayers stated in its petition.

3. The respondents appeared through their counsel. The 2nd respondent (KREDL) filed a formal statement of objections stating that it is not a necessary party and the claims set-up in the petition are to be answered by other respondents and the petition as against it may be dismissed.

4. The 1st respondent (GESCOM) filed its statement of objections. The relevant grounds urged by the 1st respondent (GESCOM) may be stated as follows:
- a) That the petitioner has failed to achieve the Conditions Precedent or commissioning of the project within the time stipulated in the PPA and these facts are admitted and undisputed.
 - b) In the present case, the delay in commissioning the project can in no manner be attributable to the reasons stipulated in Article 5.7 of the PPA, therefore, the petitioner is not entitled to extension of Scheduled Commissioning Date. The petitioner alone is responsible for delay in fulfilling its obligations and suffer for consequences of not fulfilling the obligations.
 - c) The extension of time granted vide Board Resolution dated 18.06.2016 as stated in para 10 of the petition is not denied by the 1st respondent (GESCOM). The 1st respondent (GESCOM) granting extension of time up to 09.02.2017 for commissioning the project vide letter dated 28.10.2016 (Annexure-P8) is not denied. It is contended that in the said letter itself it is made clear that the extension of time granted was subject to the same being approved by this Commission and the applicable tariff would be the revised tariff as per Article 12.2 of the PPA.
 - d) The 1st respondent (GESCOM) stated that on receipt of the letter dated 24.08.2017 (Annexure-P15) from KERC, it had in turn intimated the petitioner to pay the damages etc., vide letter dated 16.09.2017 (Annexure-P16).

- e) There was an inordinate delay in identifying the lands required for the project, which led to delay in obtaining the conversion order from the Deputy Commissioner, Koppal district, Koppal. The permission granted by the Deputy Commissioner for purchase of agricultural lands by the petitioner is produced at Annexure-R1 by the respondent (GESCOM).
 - f) It is contended that the decision of the Hon'ble Supreme Court of India in BESCO Vs. Konark Power Projects Limited in Civil Appeal No.5612 of 2012, has no relevance to the facts of the present case.
 - g) That the Secretary of this Commission has only intimated the decision of the Commission vide letter dated 24.08.2017 (Annexure-P15) and it is not the decision of the Secretary itself.
 - h) All other legal grounds urged by the petitioner are denied as untenable.
5. The 3rd respondent (KPTCL) has not filed any statement of objections. It may be noted that there are no adverse averments made against the 3rd respondent (KPTCL) by the petitioner.
6. The petitioner has filed separate rejoinders to the statement of objections. In the rejoinder filed to the statement of objections of the 1st respondent (GESCOM), it is stated that the delay in achieving the Conditions Precedent and SCD was due to change of location of the project and delay in getting orders for conversion of lands from agricultural to non-agricultural use by the Revenue Department and delay in obtaining the approval from the Gram Panchayat. These facts clearly fall under Force Majeure event under

Article 14.3.1 (e) of the PPA. Further, it is contended that this Commission has dealt with similar issue of extension of time granted by the distribution licensee for commissioning of the project, in OP No.29 of 2018 decided on 11.11.2020 between M/s Adani Green Energy (UP) Limited Vs. HESCOM and has accepted the extension of time granted by the distribution licensee in view of the judgment in Chennamangathihallil Solar Power Project LLP., Vs. BESCO decided on 14.09.2020 by the Hon'ble ATE. The petitioner has denied all other contentions raised by the 1st respondent (GESCOM) and reiterated the grounds already urged in the petition. In the rejoinder filed to the statement of objections filed by the 2nd respondent (KREDL), there is no material fact worth to be noted relevant for this case.

7. We have heard the learned counsel for the parties. They have also filed the written submissions.
8. From the pleadings and the submissions made by the parties, the following issues arise for our consideration:

Issue No.1: Whether the extension of time granted by the 1st respondent (GESCOM) for achieving the Conditions Precedent up to 09.08.2016 and extension of time up to 09.02.2017 for commissioning of the project vide the Board Resolution dated 18.06.2016 communicated vide its order dated 28.10.2016 (Annexure-P8), cannot be reviewed by this Commission?

Issue No.2: If review can be done by the Commission whether the extension of time granted by the 1st Respondent (GESCOM) is valid and legal?

Issue No.3: Whether the petitioner has made out a case for extension of time for achieving the Conditions Precedent and commissioning of the project on the ground of Force Majeure event/s?

Issue No.4: Whether the petitioner is liable to pay damages under Article 4.3 of the PPA for not achieving the Conditions Precedent within the time allowed?

Issue No.5: In case of delay in commissioning the Solar Power Project beyond the Scheduled Commissioning Date, whether the said project is liable for any reduction of tariff as provided in Article 12.2 of the PPA?

Issue No.6: Whether the petitioner is liable to pay Liquidated Damages under Article 5.8 of the PPA for delay in supply of energy, and if so, whether the imposition of entire Liquidated Damages by the 1st respondent (GESCOM) is proper?

Issue No.7: To which reliefs the petitioner is entitled to?

Issue No.8: What Order?

9. After considering the submissions of the parties and the material on records and pleadings, our findings on the above issues are as follows:

10. Issue No.1: Whether the extension of time granted by the 1st respondent (GESCOM) for achieving the Conditions Precedent up to 09.08.2016 and extension of time up to 09.02.2017 for commissioning of the project vide the Board Resolution dated 18.06.2016 communicated vide its order dated 28.10.2016 (Annexure-P8), cannot be reviewed by this Commission?

a) The learned counsel for the petitioner contended that Article 5.7 of the PPA empowers the 1st respondent (GESCOM) to grant extension of time for commissioning of the project, and on the request of the petitioner, the 1st respondent (GESCOM) has extended the time till 09.02.2017 for commissioning the project, and the petitioner has commissioned the project well within that time. Further, he submitted the discretion exercised by the 1st respondent (GESCOM), pursuant to the provisions in Article 5.7 of the PPA cannot be re-opened or reviewed by the Commission. In support of it, he relied upon the para 8.15 of the decision in Appeal No.351 of 2018 dated 14.09.2020 Chennamangathihalli Solar Power Project LLP., Vs. BESCO & Others by the Hon'ble ATE. The said para 8.15 of the above case reads as follows:

"In view of the above, we are of the considered opinion that considering facts and circumstances of the matter, the first Respondent was justified in extending COD up to six months as per the relevant provision (clause 2.5) of the PPA. Besides, it is also crystal clear that the approvals / clearances from various Government instrumentalities were accorded after considerable delays (of 7-8 months) which in turn attributed to delay in commissioning of the solar projects. As these approvals were beyond the control of the Appellants, the State Government and first Respondent have rightly considered them as an event of Force Majeure and accordingly granted approval for COD extension."

Further, the learned counsel for the petitioner also relied upon para 23 (a) of the Order dated 11.11.2020 in OP No.29 of 2018 between M/s Adani

Green Energy (UP) Limited Vs. HESCOM & Another of this Commission which reads as follows:

“23. Issue No.3: If Issue No.2 is held either in affirmative or in negative, what should be the consequence as per PPA clauses?

a) We have already held that Issue No.2 in affirmative. As per the PPA signed on 28.06.2016 provided a guaranteed tariff of Rs.4.79 per unit and the HESCOM has extended time till 15.03.2018 to achieve SCOD. The petitioner has commissioned the project on 02.03.2018 i.e., within the extended time. Therefore, we are of the opinion that the petitioner is entitled for the agreed tariff of Rs.4.79 per unit as per Article 12.1 of the PPA.”

Further, he submitted that the provisions considered by the Hon'ble ATE for extension of time by the distribution licensee in favour of the Solar Project Developer was similar to the provisions of Article 5.7 of the PPA. Therefore, he submitted once the 1st respondent (GESCOM) granted the extension of time, the same cannot be re-opened or reviewed by this Commission.

b) On the other hand, the learned counsel for the 1st respondent (GESCOM) submitted that in Channamangathihalli Solar power Project LLP., Vs. BESCOM & Another in Appeal No.351 of 2018, the controversy decided clearly establishes that the Commission has jurisdiction to ascertain the validity and legality of the extension of time granted by the distribution licensee in favour of the Project Developer acting under Article 5.7 of the

PPA. Therefore, he contradicted the submission of the learned counsel for the petitioner.

c) After considering the rival submissions and on perusal of the judgment in Appeal No.351 of 2018 of the Hon'ble ATE and the provisions of Article 5.7 of the PPA, we are very clear in our mind that the contention advanced by the learned counsel for the 1st respondent (GESCOM) is to be accepted. We may record the reasons for the same as follows:

(i) In Chennamangathihalli case, the respondent (BESCOM) of that case who had entered into PPA with the Solar Developer had granted extension of six months' time to commission the project at the request of the project developer. This Commission had held that the project developer had to independently prove the grounds relevant for Extension of Time under Force Majeure events as provided in PPA though the respondent (BESCOM) had granted extension of six months' time at the request of the project developer. It was contended by the project developer that when the BESCOM had granted Extension of Time as per the terms of the PPA, the Commission has no jurisdiction to interfere with the decision taken by the respondent (BESCOM) in extending the time. The project developer had also led evidence in that case to prove the Force Majeure events urged by it. This Commission on scrutiny of the material on record had held that the Commission had jurisdiction to call upon the project developer to prove the Force Majeure events in spite of BESCOM not

disputing that fact and that the project developer had failed to prove the Force Majeure events alleged by it. On consideration of the rival contentions, the Hon'ble ATE at para 6 of Chennamangathihalli case framed the following issues:

"Issue No.1: Whether in the facts and circumstances of the matter, the State Commission was justified to intervene on its own when there was no dispute between the parties?"

Issue No.2: Whether the State Commission has correctly held that there was no force majeure conditions so as to grant extension of time and the Appellants are entitled for reduced tariff applicable for future control periods?"

(ii) While answering Issue No.1, the Hon'ble ATE in para 7.11 has held as follows:

"In the light of various judgments of the Apex Court as also relied by the Respondent's learned counsel, it is well within the jurisdiction of the State Commission to interfere and settle the issues for a logical conclusion in accordance with law. We do not find force in the submission of the Appellants that the State Commission has interfered in the case on its own which is beyond its jurisdiction. Accordingly, we opine that while the State Commission has prima-facie, acted in accordance with law and statute."

However, while answering Issue No.2, the Hon'ble ATE has held that the finding of the Commission that the Appellants had failed to establish Force Majeure events was not justified and on re-appreciation of the facts held that the Appellants in that case

established the Force Majeure events pleaded by them. The finding on Issue No.2 is purely based on the disputed question of facts. The Hon'ble ATE has found that there was 7-8 months' delay in issuing various approvals and then also made the observation regarding the terms of PPA enabling the distribution company to grant extension of time. Therefore, the finding on the question of law as to whether the Commission has jurisdiction to call upon the developer to produce proper evidence for the scrutiny of the Commission to establish the Force Majeure event relied upon by it, rendered in Issue No.1, would clearly establish that the Commission has the jurisdiction to scrutinize the evidence and to render a finding on the Force Majeure event.

(iii) In this connection, we may also note the decision of the Hon'ble Supreme Court of India in the case of All India Power Engineer Federation & Others Vs. Sasan Power Limited & Others reported in (2017) 1 SCC 487. In the said decision, the Hon'ble Supreme Court has considered the effect of a waiver of a right, by the Distribution Licensee, under the provision of the PPA, which had the effect of adversely affecting the tariff agreed to under the PPA. The principles are state thus:

“The general principle is that everyone has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity which may be dispensed with without infringing any public right or public policy. ...” [Paragraph-22]

“The test to determine the nature of interest, namely, private or public is whether the right which is renounced is the right of party alone or of the public also in the sense that the general welfare of the society is involved. ...” [Paragraph-23]

“... If there is any element of public interest involved, the court steps into thwart any waiver which may be contrary to such public interest.” ...” [Paragraph-25]

“All this would make it clear that even if a waiver is claimed of some of the provisions of the PPA, such waiver, if it affects tariffs that are ultimately payable by the consumer, would necessarily affect public interest and would have to pass muster of the Commission under Sections 61 to 63 of the Electricity Act. This is for the reason that what is adopted by the Commission under Section 63 is only a tariff obtained by competitive bidding in conformity with Guidelines issued. If at any subsequent point of time such tariff is increased, which increase is outside the four corners of the PPA, even in cases covered by Section 63, the legislative intent and the language of Sections 61 and 62 make it clear that the Commission alone can accept such amended tariff as it would impact consumer interest and therefore public interest.” [Paragraph-31]

In the said case, the question was, ‘whether the waiver of a provision of the PPA by the Distribution Licensee, having an effect of increase in tariff, was valid or not’. It is held that, the increase in the tariff would adversely affect the consumers and thereby, any waiver by the Distribution Licensee, against the terms of the PPA, is invalid. We are of the considered opinion that, the principle stated above would squarely apply to a case, where the Distribution Licensee gives its consent, against the terms of the PPA, in respect of a Force Majeure

Event, which has the effect of relinquishment of the benefit by it, in obtaining the energy at a lower rate as per the terms of PPA. A distribution licensee incurring the burden of higher tariff or relinquishing the benefit of lower tariff in purchasing the power, outside the framework of the terms of the PPA is against the interest of consumers. Therefore, it becomes the duty of this Commission to scrutinize, as to whether there was a case for the extension of time for commissioning the Solar Power Project, on the ground of Force Majeure Events.

(iv) Therefore, wherever the terms of the PPA provide for reduction in tariff, on occurrence of certain events, the Commission alone has the jurisdiction to pronounce a finding regarding the proof or otherwise of the occurrence of such events. The parties concerned being in agreement regarding the occurrence of such events, is irrelevant. Therefore, in the present case, the clause in the PPA authorizing the 1st respondent (GESCOM) to extend the time for commissioning of the Project by the petitioner, on the ground of Force Majeure events, is not helpful to the petitioner, as it has the effect of taking away the jurisdiction of the Commission, to determine the applicable tariff. The parties cannot confer or take away the jurisdiction of a Court or Adjudicating Authority. It is only this Commission that has the exclusive jurisdiction to adjudicate upon the existence or otherwise of such an event which affects the tariff. We may also note that the existence of any provision in the PPA authorizing the Distribution Licensee to extend the time where it affects the tariff, in effect amounts to delegation of

adjudicatory function to the Distribution Licensee to decide whether a fact relied on by the developer amounts to Force Majeure event or not. Such delegation of adjudicatory function is not valid in law. Therefore, one cannot contend that the decision of 1st respondent (GESCOM) to extend the time for commissioning of the Solar Power Project under the provision of PPA is not subject to scrutiny by the Commission.

(v) The reliance on para 23 (a) in OP No.29 of 2018 of this Commission is also not helpful to the petitioner. In that case, Issue No.2 framed was as to whether the petitioner had proved the Force Majeure events entitling to it for extension of time for achieving the Conditions Precedent and Scheduled Commissioning Date. After appreciation of the material on records, this Commission had held that issue in affirmative. Therefore, on Issue No.3, while discussing the consequences of extension of time in para 23 (a) of OP No.29 of 2018, the Commission has noted that the petitioner is entitled to agreed tariff as per Article 12.1 of the PPA.

(vi) For the above reasons, whenever the extension of time by the distribution licensee affects the public interest, it would have to pass muster of the Commission i.e., would have to be accepted as adequate by the Commission.

d) Hence, Issue No.1 is held in negative.

11. Issue No.2: If review can be done by the Commission whether the extension of time granted by the 1st Respondent (GESCOM) is valid and legal?

a) We may note the facts and circumstances placed by the petitioner before the 1st respondent (GESCOM), for requesting extension of time for fulfilment of Conditions Precedent and for achieving the commissioning of the project. In support of these facts, the petitioner has written letters dated 25.02.2016 & 08.03.2016 (Annexure-P3 & P4 respectively) requesting extension of five/six months' time for achieving the Conditions Precedent and letter dated 26.08.2016 (Annexure-P7) to grant extension of time till 09.02.2017 for commissioning the project, to the 1st respondent (GESCOM). In Annexure-P3 & P4, the petitioner has not stated any of the facts constituting Force Majeure event. The only reason stated in these letters for not achieving the Conditions Precedent was the problem faced in arranging the project equity. It may be noted that difficulty in arranging the project equity falls under Force Majeure Exclusions as provided in Article 14.4.1 (e) of the PPA. Therefore, it can be said that petitioner has not placed any event constituting Force Majeure event in these letters. In Annexure-P7 dated 26.08.2016 relating to extension of SCD up to 09.02.2017, the petitioner states that as the 1st respondent (GESCOM) was pleased to extend the time to achieve the Conditions Precedent, now the time for achieving the SCD be extended. It may be noted that none of the facts showing the 'GESCOM Event of Default' or Force Majeure event affecting the petitioner was stated in this

letter. As already noted acting on such requests, the 1st respondent (GESCOM) has extended the time for achieving the Conditions Precedent and SCD. It may also be noted that such requests were made subsequent to the deadline fixed for achievement of Conditions Precedent and SCD, and contrary to the provisions of PPA and against the public interest.

- b) From the above facts, it can be said that the 1st respondent (GESCOM) has extended the time without there being any valid and legal ground as required under Article 5.7.1 of PPA, but has granted extension only on the ground that the petitioner had made such request for extension.
- c) Hence for the above reasons, we hold Issue No.2 in the negative.

12. Issue No.3: Whether the petitioner has made out a case for extension of time for achieving the Conditions Precedent and commissioning of the project on the ground of Force Majeure event/s?

- a) In support of this issue, the petitioner has firstly relied upon delay in identifying the lands. According to the petitioner, the lands for projects were identified in March 2016, more than a year after the date of execution of the PPA. Identification of lands and getting the legal possession of it is the responsibility of petitioner. The petitioner has not pleaded any facts supporting the difficulty in identifying the lands and finalising the deals for acquiring the lands. Therefore, this fact cannot be treated as a Force Majeure event.

- b) Secondly, the petitioner has stated that there was delay in issuing the order by the Deputy Commissioner, Koppal district, Koppal, for permitting the land use from agricultural to non-agricultural purpose. The petitioner has not stated the date on which it applied for land conversion order before the concerned Deputy Commissioner. The Deputy Commissioner issued approval dated 30.06.2016 (Annexure-R1 produced by GESCOM) for purchase of identified agricultural lands by the petitioner under Section 109 of Karnataka Land Reforms Act, 1961 (for short KLR Act, 1961). In the written submission, the petitioner has stated that in June 2016, it applied for conversion of land from agricultural use to non-agricultural purpose. Subsequently, the Deputy Commissioner by his order dated 07.02.2017 (produced along with written submission of the petitioner) allowed use of agricultural lands to non-agricultural purpose, after collecting the required conversion fee.
- c) From the above facts, it can be said that the petitioner identified the lands required for the project in March 2016 and it got the order dated 30.06.2016 (Annexure-R1 produced by GESCOM) permitting purchase of agricultural lands in its name. The said document produced at R1 shows that before issuing the permission, the Deputy Commissioner obtained reports from the concerned Assistant Commissioner, Koppal Sub-Division, Koppal, and the Additional Director of Town & Rural Planning Department, Regional Office, Dharwad. Therefore, it can be said that such approval obtained by the petitioner was within three months from

the date of identifying the lands. This period appears to be a reasonable period taken by the Deputy Commissioner for issuing the approval for purchase of lands under Section 109 of KLR Act, 1961.

- d) The petitioner had no difficulty in carrying out the project works on the identified lands without waiting for any approvals by the Revenue authorities, soon after identifying the lands in March 2016 or at least on passing the order on 30.06.2016 allowing the petitioner to purchase the identified lands. The Karnataka Solar Policy 2014-2021 issued by Government of Karnataka, in Energy Department, vide Notification No.EN 21 VSC 2014 dated 22.05.2014, in paragraph 18 relating to conversion of agricultural land states as follows:

"18. Policy initiatives under consideration of GoK to promote solar power projects:

- xxx
- xxx
- xxx
- Conversion of agricultural land for setting up of solar projects:

Developers will be allowed to start project execution without waiting for formal approval on filing application for conversion of agricultural land for setting up of solar power projects on payment of specified fees.

- xxx
- xxx
- xxx
- xxx
- xxx
- xxx

Corresponding to the above, sub-Section 10 was introduced in Section 95 of the Karnataka Land Revenue Act, 1964 by Act 31 of 2015 w.e.f. 13.08.2015 which reads as follows:

“95. Uses of agricultural land and the procedure for use of agricultural land for other purpose:

(1) to (9) xxxxxxxxxxxxxxxxxxxxxx

(10) If any occupant of any agriculture land assessed or held for the purpose of agriculture wishes to divert such land or part thereof for the purpose of setting up of solar power generation in accordance with Karnataka Solar Policy 2014-21 issued in GO. No.EN 21 VSC 2014 dated 22.05.2014 which has been approved by State and Central Government and which has been approved by the Competent Authority, the permission applied for conversion of such land shall be deemed to have been granted for that purpose so long as they use for purpose for which permission is granted subject to payment of the conversion fine and all such other fees payable if any, in this regard.”

e) The petitioner obtained land conversion order on 07.02.2017 permitting use of agricultural lands to non-agricultural purpose. It is not the case of the petitioner that it started the project work on the spot only after obtaining the conversion order dated 07.02.2017. It cannot be so because the petitioner has commissioned the project on 09.02.2017. It is also not the case of the petitioner that soon after acquiring the possession of the lands, it was prevented from carrying on the work on

the spot till it obtained the order from the Deputy Commissioner on 30.06.2016 or 07.02.2017.

f) The SCD was 08.08.2016 as per the terms of the PPA. The petitioner has identified the lands in March 2016. It was almost impossible to complete the project within a period of four months and one week after identifying the lands. The petitioner had to obtain the evacuation scheme approvals and only thereafter it could have started construction of evacuation line activity.

g) The petitioner could complete the work in respect of evacuation line and terminal bay at Bevoor Sub-station just before 03.02.2017, the date on which work completion report (Annexure-P9) was issued to the petitioner. Therefore, one can say that delay in identifying the lands required for project was the sole reason. This delay on the part of the petitioner cannot be treated as a Force Majeure Event.

h) For the above reasons, we hold Issue No.3 in the negative.

13. Issue No.4: Whether the petitioner is liable to pay damages under Article 4.3 of the PPA for not achieving the Conditions Precedent within the time allowed?

a) Admittedly, the petitioner could not achieve the Conditions Precedent within 365 days from the date of execution of the PPA. The petitioner has also failed to show that it was prevented due to Force Majeure event from achieving the Conditions Precedent within the time

stipulated. The petitioner contended that the completion of Conditions Precedent was specifically waived in writing by the 1st respondent (GESCOM). In support of it, the petitioner has relied upon the extension of time granted for achieving the Conditions Precedent as per Board Resolution of the 1st respondent (GESCOM). This Resolution extracted in para 10 of the petition does not show that the extension of time granted amounted to waiver of any of the activities to fulfil the Conditions Precedent enumerated in Article 4.2 of the PPA. It can also be noted that the said Resolution merely extends the time for complying with the Conditions Precedent subject to the said developer meeting the original commissioning date in order to avoid attraction of Article 12.2 of the PPA. As already noted the petitioner has not met the SCD. Therefore, the petitioner has not established that the 1st respondent (GESCOM) has waived any of the activities towards fulfilment of Conditions Precedent.

b) For the above reasons, we hold Issue No.4 in affirmative.

14. Issue No.5: In case of delay in commissioning the Solar Power Project beyond the Scheduled Commissioning Date, whether the said project is liable for any reduction of tariff as provided in Article 12.2 of the PPA?

a) The relevant provisions in this regard are at Article 12.1 and 12.2 of the PPA which read thus:

“Article 12: - Applicable Tariff and Sharing of the CDM Benefits

Article 12.1: *The Developer shall be entitled to receive the Tariff of Rs.7.05/kWh for energy supplied by it to*

GESCOM in accordance with the terms of this Agreement during the period between COD and the Expiry Date.

Article 12.2: *Provided further that as a consequence of delay in Commissioning of the Project beyond the Scheduled Commissioning Date, subject to Article 4, if there is a change in KERC applicable Tariff, the changed applicable Tariff for the Project shall be the lower of the following:*

- i) Tariff at in Clause 12.1 above.*
- ii) KERC applicable Tariff as on the Commercial Operation Date.*

Article 12.3: xxxxxx

Article 12.4: xxxxxx

Article 12.5: xxxxxx".

b) The learned counsel for the petitioner urged certain legal grounds which are already noted in sub-para (f) of para 2 of this Order, in support of his contention that the tariff of Rs.7.10 per unit cannot be reduced to Rs.6.51 per unit. The ground No. (i) urged is already dealt with under Issue No.1 as noted above. The ground Nos. (ii) to (vi) urged are not worth to be considered. The reasons may be stated as follows:

c) Regarding Ground No.(ii) & (v): As noted above, Article 12.2 provides for reduction of tariff, if KERC applicable tariff as on the Commercial Operation Date is lower than the tariff stated in Article 12.1 of the PPA. The applicable tariff as on the date of commissioning of the project is Rs.6.51 per unit as provided in Generic Tariff Order dated 30.07.2015. The

contentions of the petitioner in this regard has no legal basis. The petitioner has relied upon the decision of *Hon'ble ATE in Renascent Power Ventures Private Limited Vs. Uttar Pradesh Electricity Regulatory Commission & Others (Appeal No.183 of 2019)* to contend that the tariff discovered under bidding process cannot be altered by the State Commission. The petitioner has not produced the decision of that case except quoting two paras in its rejoinder filed to the statement of objections of the 1st respondent (GESCOM). We have perused the disputed facts and the decision arrived by the Hon'ble ATE in that case. From the rival contentions, the 1st point raised for consideration was “*Whether the 1st Respondent-Commission was justified in reducing the tariff by Rs.0.14 as a condition for sale/transfer of shareholding of 3rd Respondent in favour of the Appellant?*” The very reading of this issue would show that the consideration for reduction of tariff in that case was based on a request for sale/transfer of shareholding of generating company in favour of appellant of that case. Therefore, we hold that this decision has no bearing in the present case.

d) Regarding Ground No.(iii): The petitioner contended that the letter dated 24.08.2017 (Annexure-P15) issued by this Commission addressed to the 1st respondent (GESCOM) directing to take action for reduction of tariff and for recovery of damages etc., is contrary to law and natural justice, as no notice was issued to the petitioner before giving such direction. This contention has no basis. The Commission in its Regulatory

power found that none of the provisions of the PPA envisaged any such extension of time for the reasons stated by the 1st respondent (GESCOM) and the petitioner. Therefore, this Commission directed the 1st respondent (GESCOM) to take action as per the existing terms of the PPA. Further, it is specifically stated that the petitioner be informed to file a petition before the Commission, if so advised with all relevant grounds/ documents for justifying its claims for extension of time under Force Majeure events stated in the PPA. Therefore, the rights of the petitioner were in no way affected.

e) Regarding Ground No.(iv): The letter dated 24.08.2017 (Annexure-P15) is signed by the Secretary on behalf of the Commission. This fact is made clear on perusal of the said letter. The Secretary is the person empowered to communicate the decision of the Commission to third parties. Therefore, this ground is mischievously wrong.

f) Regarding Ground No.(vi): The facts of the case in Civil Appeal No.5612 of 2012 between BESCO Vs. Konark Power Projects Limited decided by the Hon'ble Supreme Court of India are entirely different from the facts of the present case. In that case the tariff agreed in the PPA was same throughout the term of the PPA and there was no provision for alteration of tariff in certain contingency as provided in Article 12.1 & 12.2 of the present PPA. Therefore, the decision in that case holding that during the term of the PPA, the tariff cannot be altered, cannot be applied in the

present case in view of the specific provision in the present PPA as noted above.

g) For the above reasons, we hold Issue No.5 in the affirmative.

15. Issue No.6: Whether the petitioner is liable to pay Liquidated Damages under Article 5.8 of the PPA for delay in supply of energy, and if so, whether the imposition of entire Liquidated Damages by the 1st respondent (GESCOM) is proper?

a) The learned counsel for the petitioner submitted whether the claim is for the Liquidated Damages or for Unliquidated Damages, no pecuniary liability arises till the Court or Forum has determined the damages payable to the party complaining the breach of any term of the contract. Therefore, the learned counsel for the petitioner submitted that the 1st respondent (GESCOM) without getting the claim determined towards Liquidated Damages before a competent Commission, can recover the Liquidated Damages agreed to under Article 5.8 of the PPA. In support of his contention, the learned counsel for the petitioner relied upon the decision in *ONGC Vs. Saw Pipes Limited (2003) 5 SCC 705 of the Hon'ble Supreme Court of India* to contend that without proof of reasonableness of damages stipulated are proved the Liquidated Damages stated in the contract cannot be recovered.

b) The learned counsel for the 1st respondent (GESCOM) has not denied the above proposition of law. However, he contended that in a case

where there is breach of term of the PPA regarding supply of energy, the distribution licensee has the right to claim the Liquidated Damages without leading any evidence in proof of the actual damages suffered due to the breach of such term. He submitted that in the case of supply of energy to the distribution licensee, it is very difficult to lead any evidence in proof of the actual damages sustained. Therefore, he submitted that the PPA would contain a term regarding payment of Liquidated Damages pre-determined by the parties, for the breach of any particular term of contract. Further, he submitted that without requiring any evidence, the Commission has to presume the loss caused to the 1st respondent (GESCOM) as agreed in the Liquidated Damages clause. In support of his contention, he relied upon the following decisions:

- (i) *Construction and Design Services Vs. DDA* [reported in (2015) 14 SCC 263] – para No.14 to 17;
- (ii) *Bharat Sanchar Nigam Limited Vs. Reliance Communication Limited* [reported in (2011) 1 SCC 394]; para No.47, 48 & 53;
- (iii) *Oil and Gas Corporation Vs. Saw Pipes Limited* [reported in (2003) 5 SCC 705] – para No.64, 66 to 68;
- (iv) *Lanco Kondapali Power Limited Vs. Andhra Pradesh Regulatory Commission and Others* [reported in (2015) SCC Online APTEL 140] – para No.51, 53 & 54.
- (v) *PTC India Limited Vs. Gujarat Electricity Regulatory Commission* (Appeal No.62 of 2013 of Hon'ble ATE, decided on 30.06.2014) – para No.47 & 48.

c) On perusal of the reasons and the findings given in the above decisions, we are of the considered view that the 1st respondent

(GESCOM) can claim the Liquidated Damages as per Article 5.8 of the PPA without leading any evidence in proof of loss sustained by it, due to non-supply of energy. In this regard, we may note para No.66 & 68 of the Hon'ble Supreme Court of India, judgment in *Oil and Natural Gas Corporation Limited Vs. Saw Pipes Limited* reported in (2003) 5 SCC 705 referred above which reads as follows:

Para – 66 “ *In Maula Bux case [(1969) 2 SCC 554, Maula Bux Vs. Union of India]the Court has specifically held that it is true that in every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree and the court is competent to award reasonable compensation in a case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. The Court has also specifically held that in case of breach of some contracts it may be impossible for the court to assess compensation arising from breach.*”

Para – 68 From the aforesaid discussions, it can be held that:

“ (1) *Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same.*

(2) *If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the*

breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

(3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.

(4) In some contracts, it would be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation."

- d) In the case of Lanco Kondapali Power Limited Vs. Andhrda Pradesh Regulatory Commission and Others reported in (2015) SCC Online APTEL 140, referred above, the Hon'ble ATE in para 51 of its judgment has stated that in view of the difficulties in calculating the actual damages suffered by a party due to non-supply of electricity by another party, a pre-calculated Liquidated Damages on pre-estimated basis as agreed between the parties in the PPA for breach of contract, is enforceable.
- e) In this regard, the Commission notes that the summary of the principles stated in para No.43 of the judgment of the Hon'ble Supreme Court of

India, reported in (2015) 4 SCC 136 in the case of *Kailash Nath Associates Vs. Delhi Development Authority and Another* is useful. 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 so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.

43.2 Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found inter alia Section 73 of the Indian Contract Act, 1872.

43.3 Since Section 74 of the Indian Contract Act, 1872 awards reasonable compensation for damage or loss caused by a breach of contract, the damage or loss caused is a sine qua non for the applicability of the section.

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

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

43.6 *The expression “whether or not actual damage or loss is proved to have been caused thereby” means that where it is possible to prove actual damage or loss, such proof is not dispensing 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.”*

f) 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 actual loss or damage.

g) It may be noted that the interpretation clause in Article 1.2.1 (w) of the PPA provides as follows:

“1.2.1 In this Agreement, unless the context otherwise requires,

(a) to (v)

(w) the damages payable by either party to the other of them, as set forth in this Agreement, whether on per

diem basis or otherwise, are mutually agreed genuine pre-estimated loss and damage likely to be suffered and incurred by the Party entitled to receive the same and are not by way of penalty (the “Damages”); and
 x)

The petitioner has not produced any material to infer that the Liquidated Damages stated in Article 5.8 of the PPA is in the nature of penalty. On the other hand, the terms of the PPA would show that it is a genuine pre-estimate of the damages payable for non-supply of energy within the specified time.

h) For the above reasons, we hold Issue No.6 in the affirmative.

16. Issue No.7: To which reliefs the petitioner is entitled to?

In view of the above findings, we hold that the petitioner is not entitled to any of the reliefs prayed for.

17. Issue No.8: What Order?

For the above reasons, we proceed to pass the following:

ORDER

The petitioner is not entitled to any of the reliefs prayed for in the petition. Accordingly, the necessary consequences under Article 4.3, Article 5.8 & Article 12.2 of the PPA shall follow. The 1st respondent (GESCOM) is at liberty to recover damages from the petitioner for delay in achieving the Conditions Precedent and to recover the Liquidated Damages for delay in commencement of supply of power to the 1st respondent (GESCOM) and to reduce tariff for delay in Commissioning of the Plant.

sd/-
 (SHAMBHU DAYAL MEENA)
 Chairman

sd/-
 (H.M. MANJUNATHA)
 Member

sd/-
 (M.D. RAVI)
 Member