

No.N/65/2018

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

**Dated: 15.09.2020**

**Present**

<b>Shri Shambhu Dayal Meena</b>	<b>: Chairman</b>
<b>Shri H.M. Manjunatha</b>	<b>: Member</b>
<b>Shri M.D. Ravi</b>	<b>: Member</b>

**OP No. 30/2018**

**BETWEEN:**

Messrs Adani Green Energy (UP) Limited,  
A Company registered under the  
provisions of the Companies Act, 1956  
Adani House, Nr. Mithakhali Six Roads,  
Navrangpura  
Ahmedabad-380 009.  
(Represented by its Authorized Signatory)

**... Petitioner**

[Represented by Smt. Poonam Patil, Advocate,]

**AND:**

- 1) Bangalore Electricity Supply Company Limited  
(BESCOM), A Company Registered under the  
provisions of Companies Act, 1956 having its  
Registered Office at K.R. Circle,  
Bengaluru-560 001.  
(Represented by its Managing Director)
- 2) Karnataka Renewable Energy Development Limited  
(KREDL), A Company Registered under the  
provisions of Companies Act, 1956 having its  
Registered Office at No. 39, 'Shanthi Gruha'  
Bharat Scouts and Guides Building,  
Palace Road,  
Bengaluru-560 001.  
(Represented by its Managing Director)

3) Karnataka Power Transmission Corporation Limited  
(KPTCL) A Company Registered under the  
provisions of Companies Act, 1956 having its  
Registered Corporate Office,  
Cauvery Bhavan, K.G. Road,  
Bengaluru-560 009.  
(Represented by its Managing Director)

4) State of Karnataka (GoK),  
Energy Department,  
Room No. 236, 2<sup>nd</sup> Floor,  
Vikasa Soudha,  
Dr. B.R. Ambedkar Veedi,  
Bengaluru-560 001.  
(Represented by its Additional Chief Secretary)

... Respondents

[Respondent No.1 & 3 Just Law, Advocates  
Respondent No.2 & 4 represented by Sri G.S. Kannur, Advocate]

### **ORDERS**

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

- a) Call for records;
- b) Declare that the Petitioner was prevented from performing its  
obligation under the Power Purchase Agreement (PPA) due to  
'Force Majeure' events affecting it;
- c) Grant concurrence to the Supplemental Power Purchase  
Agreement (SPPA) dated 17.12.2016; and
- d) Declare that 'Effective Date' under Article 3.1 of the PPA is the  
date on which the SPPA receives its concurrence from this  
Commission;

Alternatively:

- d) Declare that the 'Effective Date' under Article 3.1 of the PPA is the date on which the SPPA signed by the Petitioner and the 1<sup>st</sup> Respondent on 17.12.2016;

Alternatively:

- d) Declare that the 'Effective Date' under Article 3.1 of the PPA is the date on which the PPA approval letter of the Commission received by the Petitioner on 21.10.2016;
- e) If the Commission were to consider that there is a delay in fulfillment of the Conditions Precedent and commissioning the project, the Commission may be pleased to condone the inadvertent delay caused for the reasons beyond the control of the Petitioner due to 'Force Majeure' events affecting it in fulfillment of the Conditions Precedent and in achieving the Commercial Operation Date (COD) of the Project; and
- f) Direct the Respondents not to levy any liquidated damages and not to take any other or incidental coercive measures under the PPA or under any other law for the time being in force against the Petitioner based on the previous understanding of the parties on the 'Effective Date' and resultant COD;

2. The material facts stated by the Petitioner, relevant for the disposal of the controversies involved in this case are as follows:

- a) The 2<sup>nd</sup> Respondent Karnataka Renewable Energy Development Limited (KREDL) being the Nodal Agency of the 4<sup>th</sup> Respondent/State of Karnataka (GoK), for facilitating the development of the renewable energy in the State, had called for the Request for Proposal (RfP)

dated 12.02.2016 for the development of 290 MW Solar Power Projects to be implemented in 17 taluks. M/s Adani Green Energy Limited, a Company registered under the Companies Act, 1956 (a single business entity) was the selected bidder for development of 20 MW Solar Photo-Voltaic Project in Gubbi taluk of Tumakuru district. The tariff discovered was Rs.4.82 per unit for the energy to be delivered. KREDL issued Letter of Award (LoA) and Allotment Letter dated 30.05.2016 as per Annexure-P1 to M/s Adani Green Energy Limited with the terms and conditions stated therein to be fulfilled by the said selected bidder. Pursuant to the LoA dated 30.05.2016 (Annexure-P1), M/s Adani Green Energy Limited, incorporated the Petitioner as a Special Purpose Vehicle (SPV), to develop the Solar Power Project and to execute the PPA with the 1<sup>st</sup> Respondent. Accordingly, the Petitioner and 1<sup>st</sup> Respondent (BESCOM) entered into PPA dated 29.06.2016 (Annexure-P3). The PPA was approved by the Commission and the approval was communicated vide letter dated 14.10.2016 (Annexure-P4). The approval of the PPA was subject to certain corrections/modifications to be incorporated in the PPA by entering into a suitable SPPA between the parties as mentioned in the said approval letter. Accordingly, the parties have executed the SPPA dated 17.12.2016 (Annexure-P5).

- b) The PPA provides that 'Effective Date' is the date of approval of the PPA by the Commission. The timeline fixed for achieving the Conditions

Precedent is eight months and for commissioning of the project is twelve months, from the 'Effective Date'. Therefore, the Conditions Precedent was required to be achieved on or before 13.06.2017 and the project was to be commissioned on or before 13.10.2017. Admittedly, the petitioner has not able to fulfil the Conditions Precedent as well as the Scheduled Commissioning Date (SCD) within the time specified as noted above. The Solar Power Project was commissioned on 09.03.2018 as per the Minutes of the Meeting Dated 09.03.2018 (Document No.6 produced by the Petitioner along with Memo dated 26.11.2019) held between relevant parties. It can be seen that the Petitioner could not achieve the timeline fixed for fulfilling one of the Conditions Precedent namely; the production of documents evidencing clear title and possession of the extent of land required for the project in the name of the Petitioner as stated in Article 4.2 (e) of the PPA, but has achieved the timeline fixed for fulfilling the other Conditions Precedent stated in Article 4.2.

- c) The Petitioner wrote letter dated 13.06.2017 (Annexure-P12) to the Managing Director, KREDL requesting to process the file with recommendations to the Energy Department, for issuance of Notification for enabling to obtain the land conversion order. Along with the said letter, the Petitioner attached particulars of the lands identified for establishing the Solar Power Project at Talekoppa village in Gubbi taluk of Tumakuru district. The Petitioner also wrote letter dated

14.06.2017 (Annexure-P7) to the 1st Respondent [BESCOM addressed to its General Manager (Electrical) – Power Purchase, Corporate Office, BESCOM, Bengaluru], intimating the compliance of the Conditions Precedent and narrating the documents produced for meeting the Conditions Precedent. However, this letter discloses that in respect of production of documentary evidence of title and possession of the lands required for establishing the Solar project, the Petitioner could not file the application before KREDL as per State Government's guidelines for enabling KREDL to obtain land conversion approval as required under Section 95 of the Karnataka Land Revenue Act, 1964 (KLR Act, 1964 for short), but had not yet obtained the land conversion order from the competent authority permitting to use the lands for non-agricultural purpose. This letter narrates that (i) Acknowledgement of Section 95 application submitted to KREDL; (ii) Consent letters from land owners to lease their lands for Solar Power Project; and (iii) Sworn Affidavit evidencing delivery of possession of lands to the Petitioner, were shown to have been produced before 1<sup>st</sup> Respondent (BESCOM), apart from some other necessary documents for fulfilling the Conditions Precedent.

- d) The Petitioner wrote the letter dated 30.05.2017 (Annexure-P8) to the Additional Chief Secretary to Government, Energy Department, stating generally the reasons for non-production of land conversion order evidencing clear title and possession of the extent of lands required for

the project and requested the Government to direct all the ESCOMs to take cognizance of the documents submitted to KREDL, as sufficient compliance of the Conditions Precedent. The Petitioner also wrote letter dated 10.06.2017 (Annexure-P9) to the 1<sup>st</sup> Respondent (BESCOM) requesting to accept the documents submitted to KREDL for obtaining sanctions/approvals under Section 95 of the Karnataka Land Revenue (Amendment) Act, 2015 [for short KLR (Amendment) Act, 2015] and under Section 109 of the Karnataka Land Reforms Act, 1961 (for short KLR Act, 1961), as sufficient compliance of production of documents regarding clear title and possession of the lands required for the Solar Power Project in the name of the Developer. In any case the 1<sup>st</sup> Respondent (BESCOM) not accepting the above request, to grant three months' time extension for production of the required land conversion order.

- e) The 1<sup>st</sup> Respondent (BESCOM) replied vide letter dated 28.06.2017 (Annexure-P10) stating that the developer had fulfilled all the Conditions Precedent except the details of land conversion order evidencing clear title and possession of lands required for the Solar Power Project in the name of the Developer, within time from the 'Effective Date' and informed that penalty would be levied as per the terms and conditions of the PPA for non-production of land conversion order. In continuation of the Petitioner's letter dated 10.06.2017 (Annexure-P9) and in reply to the letter dated 28.06.2017

(Annexure-P10) of the 1<sup>st</sup> Respondent (BESCOM), the Petitioner wrote letters dated 06.07.2017 and 31.07.2017 (Annexure-P18 collectively) stating that the application for obtaining land conversion order was still pending before the concerned offices for no fault of the Petitioner, which amounted to 'Force Majeure' event and to withdraw the proposal to levy penalty vide above said letter dated 28.06.2017.

f) The Petitioner again wrote letter dated 02.08.2017 (Annexure-P20) to the 1<sup>st</sup> Respondent (BESCOM) stating that the Ministry of New and Renewable Energy, Government of India, New Delhi, had issued letter dated 28.07.2017 (Annexure-P19) to the Principal Secretaries of all State Governments in Energy Department, to consider extension of time where there was delay in issuing the connectivity approvals and land conversion approvals by the State Authorities. In the same letter dated 02.08.2017, the Petitioner also requested to withdraw the levy of penalty proposed in the letter dated 28.06.2017.

g) The Petitioner has produced copy of the letter dated 12.09.2017 (Annexure-P21) written by 1<sup>st</sup> Respondent (BESCOM) to the Secretary of this Commission seeking directions in respect of the request made by the Petitioner on various grounds alleged by it for extension of time for fulfilment of Conditions Precedent and in achieving Scheduled Commissioning Date (SCD). The Petitioner has also produced copies of all the replies dated 17.11.2017 (Annexure-P22 collectively) given by this Commission to the 1<sup>st</sup> Respondent (BESCOM) regarding request



made by the Petitioner for extension of time. As in these replies, BESCOM informed that the Petitioner, that the Commission had communicated to allow the Developer to commission the Solar Power Projects even after SCOD subject to certain conditions stated in the said replies. The Petitioner wrote letter dated 08.12.2017 (Annexure-P23) to the 1<sup>st</sup> Respondent (BESCOM) to grant further extension of time in commissioning of the Solar Power Project in question and undertaking to file a petition before this Commission immediately after commissioning of the Project. Thereafter, the Solar Power Project was commissioned on 09.03.2018 and the present petition was filed before this Commission on 26.03.2018.

- h) The Petitioner has alleged that the 'Effective Date' in the present case should be considered as the date on which the approval of the Commission for SPPA dated 17.12.2016 (Annexure-P5) would take place. According to the Petitioner, the SPPA in the present case requires approval of the Commission as the SPPA entered into between the parties substantially modifies the terms of the PPA. Alternatively, the Petitioner has alleged that the date of execution of the SPPA or the date on which the letter issued by this Commission intimating approval of the PPA was received by the Petitioner should be treated as the 'Effective Date'. The Petitioner stated that Annexure-P4 dated 14.10.2016, the letter intimating approval of PPA, was received by it on 26.10.2016. Therefore, according to the Petitioner, the 'Effective Date' in the present

case cannot be taken as 14.10.2016 as defined in the PPA, but any of the subsequent dates as narrated above.

- i) The Petitioner has contended that there is inordinate delay in granting evacuation scheme approval and in the letter dated 31.07.2017 (Annexure-P18 collectively) addressed by the Petitioner to the 1<sup>st</sup> Respondent (BESCOM), the said delay is stated to be 40 days considering 30 days as a reasonable period to process the application.
- j) That there was delay of more than three months by this Commission in approving the PPA dated 29.06.2016, which resulted delay in achieving the progress of the project. Further, there was inordinate delay in the progress of the proceedings before the Deputy Commissioner, Tumakuru district, for conversion of agricultural lands into non-agricultural purpose.
- k) The Petitioner has stated that the Demonetization declared on 08.11.2016, stalled the activities of the Solar Power Project for a period of 2-3 months and it also affected the acquisition of lands required for the project.
- l) The Petitioner has further stated that Goods and Services Tax (GST) introduced with effect from 01.07.2017, affected the supplies by the Vendors of the goods indented which resulted in slow progress of the project implementation for a period of 3-4 months.

- m) The Petitioner has further stated that there was extraordinary delay in Customs clearance of Solar Modules imported by the Petitioner for its projects in Karnataka through Chennai Port and Nahva Sheva Port due to wrong classification of HSN Code for Solar PV modules by the respective Customs Authorities. In this regard, the Petitioner has made detailed averments in Paragraphs 31 to 39 of the petition and relied upon Annexure-P13 to Annexure-P17.
- n) The Petitioner has contended that the various delays stated above are 'Force Majeure' events and the Petitioner is entitled to extension of time for fulfilling the Conditions Precedent and for commissioning the project beyond the stipulated period stated in the PPA. It has also contended that the PPA in question has come into existence as per the terms of competitive bidding and the tariff stated in the PPA is not subject to any variations as per the Generic Tariff Order passed by this Commission and further that the Generic Tariff Order dated 30.07.2015, specifically excludes its applicability to the purchase of power under competitive bidding. That the subsequent Generic Tariff Order dated 12.04.2017 is only a modification of the Generic Tariff Order dated 30.07.2015, thereby this too is not applicable.
- o) The Petitioner has stated that out of the total area for laying the transmission line, only 0.8955 hectare of forest land was essential and the Forest Department delayed in issuing NOC for laying transmission-line which has resulted 156 days' delay in commissioning of the project.

In this regard, the Petitioner has issued notice dated 31.01.2018 (Annexure-P32) intimating the occurrence of 'Force Majeure' event due to delay in issuing NOC by the Forest Department and has produced the Demand Notice Dated 03.02.2018 (Annexure-P33) issued by the Forest Department for remitting certain amount. [Annexure-P32 & P33 are produced along with the Rejoinder filed by the Petitioner to the Statement of Objections of the 1<sup>st</sup> Respondent (BESCOM)]. The Petitioner stated in Paragraphs 66 & 67 of the petition that these two documents are produced at Annexure-P25 & Annexure-26 respectively. However, it is found that along with the petition these documents were not produced at the time of filing the petition.

p) Therefore, the Petitioner has filed the present petition before this Commission on 26.03.2018 praying for the reliefs noted above.

3. Upon notice, the Respondents appeared through their Counsels and filed separate Statement of Objections.

4. The material parts of the Statement of Objections of 1st Respondent (BESCOM) are as follows:

a) The 1st Respondent (BESCOM) has denied the contention of the Petitioner that it could not achieve Conditions Precedent within the stipulated time due to delay in approval of PPA and delay in issuance of evacuation scheme approval and has contended that the same cannot be termed as a 'Force Majeure' events.

- b) The 1st Respondent has also denied the contention of the Petitioner that the 'Effective Date' should be considered as the date on which the SPPA would be approved etc., alleged by the Petitioner. The 1<sup>st</sup> Respondent has contended that the 'Effective Date' should be considered as defined in the PPA and the Petitioner cannot be permitted to alter the terms of the PPA to suit its needs. That there is no need for approval of the SPPA by the Commission and the SPPA by itself mentions that it is only a part of the original PPA and nowhere under the law and in any other documents submitted by the Petitioner, is there a requirement of getting an approval of the SPPA. This fact is also clarified by this Commission vide letter dated 25.10.2016 (Annexure-R1 submitted by Respondent No.1-BESCOM).
- c) It is contended that there was delay in achieving the Conditions Precedent and that the Petitioner had not got the land converted and produced the documents of title and possession of the lands required for establishment of the Solar Power Project, within the stipulated time duration as required under the PPA.
- d) It is contended that the allegation of the Petitioner that there was delay in approving the revised evacuation schemes and in issuing NOC from Forest Department and that there was inordinate delay in Customs clearance from Mumbai and Chennai Ports, are not true and the same cannot be termed as events of 'Force Majeure' under Article 14 of the PPA. The averment that the Demonetization affected the implementation of the project for 2-3 months and introduction of GST delayed supply of

goods for 3-4 months are denied as untenable. It is contended that 'Force Majeure Notices' are not issued within the time specified.

- e) The 1<sup>st</sup> Respondent (BESCOM) contended that the Petitioner has failed to produce the land conversion order within the time allowed and has failed to achieve commissioning of the Solar Power Project within the Scheduled Commissioning Date and thereby liable for the payment of penalty under Article 4.3 and payment of liquidated damages under Article 5.8 of the PPA, apart from being liable for reduced tariff of Rs.4.36 per unit.
- f) That the various correspondences between the Petitioner and the 1<sup>st</sup> Respondent are not denied by the 1<sup>st</sup> Respondent.
- g) All other allegations made against the 1<sup>st</sup> Respondent are denied by it and the Petitioner was put to strict proof of the same. Therefore, the 1<sup>st</sup> Respondent prayed for the dismissal of the petition.

5. The gist of Statement of Objections filed by the 3rd Respondent (KPTCL) is as follows:

- a) That for the first time, the Petitioner filed the application dated 04.05.2017 (Annexure-R3) for approval of the evacuation scheme, from the proposed project site in Talekoppa village of Gubbi taluk in Tumakuru district, to 66/11 kV Ankasandra Sub-station in Gubbi taluk. This Respondent informed the Petitioner vide letter dated 19.05.2017 for payment of process fee. Thereafter on the next day, the Petitioner vide letter dated 20.05.2017 (Annexure-R4) paid the requisite processing fee.

Then the 1<sup>st</sup> Respondent conducted a detailed feasibility study and tentative evacuation scheme approval dated 21.06.2017 was communicated to the Petitioner. The Petitioner accepted the terms & conditions of the tentative evacuation scheme on 23.06.2017 and requested for issuance of regular evacuation scheme approval. Accordingly, the regular evacuation scheme approval dated 13.07.2017 (Annexure-R5) was issued.

b) That after lapse of eight months from the date of regular evacuation scheme, the Petitioner vide letter dated 28.02.2018 (Annexure-R6) requested for a change in the evacuation scheme since the Petitioner planned to use 66 kV UG cables near 66/11 kV Ankasandra Sub-station. This Respondent intimated to pay the requisite processing fee vide letter dated 02.03.2018 (Annexure-R7). The Petitioner paid the processing fee on 09.03.2018. On the same day, this Respondent has issued revised evacuation scheme dated 09.03.2018 (Annexure-R8).

c) It is contended by this Respondent that there was no delay on its part in approving the evacuation schemes. All other allegations made against this Respondent are denied as false and untenable. Therefore, this Respondent has prayed for the dismissal of this petition in the interest of justice.

6. The gist of the Statement of Objections of 4<sup>th</sup> Respondent (GoK) may be stated as follows:

- a) This Respondent has issued Government Order No. EN 66 VSE 2016, Bengaluru, dated 05.10.2016 (Annexure-R1), in order to facilitate the Solar Power Project developers and also to safeguard the interest of the land owners. This Government Order authorizes the KREDL to obtain lease of agricultural lands from agriculturists after obtaining the necessary order under Section 109 of the Karnataka Land Reforms Act, 1961 (The KLR Act, 1961) and in turn to sub-lease the said lands to the Solar Power Project developers.
- b) That the procurement of land required for the Solar Power Project and obtaining of evacuation scheme approval from KPTCL shall be the responsibility of the Solar Power Project developer.
- c) That the Petitioner as per its application dated 13.06.2017 (Annexure-R3) addressed to the Managing Director, KREDL, requested to process the application for obtaining necessary orders from Government in terms of Government Order dated 05.10.2016 (Annexure-R1). This application shows that the Petitioner had identified 91 acres 14 guntas of land for establishing Solar Power Project and had taken consent letters from the farmers to sub-lease the same to the Petitioner and the copy of evacuation scheme approval and copy of LoA were produced along with the said application dated 13.06.2017 (Annexure-R3).
- d) That the 2<sup>nd</sup> Respondent (KREDL) issued letter to the Petitioner dated 05.07.2017 intimating that the land identification, consultation and due diligence were to be done by the developer. In response to it, there



was no response from the Petitioner. Hence, this Respondent could not obtain the necessary clearances to execute the lease deed with the land owners in order to sub-let the same to the Petitioner. That subsequently, the Petitioner requested through letters dated 08.03.2018 and 21.03.2018 to return the file as there were some changes in the schedule of lands due to practical difficulties faced.

e) That the Deputy Commissioner, Tumakuru, in his letter dated 16.01.2019 (Annexure-R4) addressed to the 2<sup>nd</sup> Respondent (KREDL) requested to clarify as to whether the Petitioner's request for conversion of lands from agricultural into non-agricultural purpose, could be allowed, as certain land owners had directly requested for conversion of lands for the establishment of the Solar Power Project of the Petitioner. In response to it, the 2<sup>nd</sup> Respondent (KREDL) intimated the Deputy Commissioner, Tumakuru, for issuance of the Official Memorandum in the name of the land owners regarding land conversion. Therefore, the 2<sup>nd</sup> Respondent (KREDL) could not proceed to take the lease from the farmers in order to sub-let the same to the Petitioner.

f) All other allegations made in the petition are denied as untenable. Therefore, this Respondent prayed for the dismissal of the petition in the interest of justice and equity.

7. a) The 2<sup>nd</sup> Respondent (KREDL) has filed its Statement of Objections stating that it received the application from the Petitioner requesting to obtain the necessary orders from the Additional Chief Secretary to

Government, Energy Department and also to obtain land conversion order from the Deputy Commissioner, Tumakuru district. Accordingly, this Respondent made various correspondences to the Additional Chief Secretary to Government, Energy Department and to the Deputy Commissioner, Tumakuru district. However, there was no response from the office of the Deputy Commissioner, Tumakuru district. Hence, this Respondent could not obtain necessary clearances to take the lease deeds from the land owners in order to sub-let the same to the Petitioner.

b) This Respondent is not a necessary party and the petition against it may be dismissed.

8. The Petitioner has filed separate Rejoinders to the Statement of Objections filed by the Respondents.

a) In the Rejoinder filed to the Statement of Objections of the 2nd Respondent, the Petitioner has reiterated the averments made in the petition and produced two documents namely; Notification dated 13.07.2017 (Annexure-P28) wherein the Energy Department permitted KREDL to take the agricultural lands on lease from certain farmers and in turn to sub-lease the same in favour of a Solar Project Developer after following the due procedure and the letter dated 27.06.2018 (Annexure-P29) issued by Ministry of New & Renewable Energy (MNRE), Government of India, addressed to the Managing Director, Solar Energy Corporation of India (SECI).

b) In the Rejoinder filed by the Petitioner to the Statement of Objections of 1<sup>st</sup> Respondent (BESCOM), the Petitioner has reiterated the averments made in the petition. Further, the Petitioner has alleged that even if the contract provides for awarding liquidated damages for the breach of the terms of contract, the aggrieved party is entitled to only a reasonable compensation not exceeding the limit of liquidated damages quantified in the contract. Further alleged that in the present case, the 1<sup>st</sup> Respondent (BESCOM) has failed to establish that it has sustained any loss due to the delay in achieving the Conditions Precedent or the delay in supply of energy beyond the SCOD. Therefore, it is contended that the 1<sup>st</sup> Respondent (BESCOM) is not entitled to claim any damages. The Petitioner has produced Annexure-P30 to P39 along with Rejoinder filed on 30.05.2019. Annexure-P30 is a decision dated 04.02.2014 of the Hon'ble Appellate Tribunal for Electricity in Appeal No.123 of 2012, wherein it is held that the delay in obtaining the statutory/legal approvals under the PPA, would fall in the category of 'Force Majeure' events. Annexure-P34 is an Official Memorandum dated 20.06.2018 issued by the MNRE to Chairman & Managing Director, National Thermal Power Corporation (NTPC) and MD, SECI. The other Annexures produced along with this Rejoinder were already produced by the Petitioner.

- c) The Rejoinder to the Statement of Objections of the 3<sup>rd</sup> Respondent (KPTCL), contains only the repetitions of the facts already alleged by the Petitioner.
- d) The Rejoinder to the Statement of Objections of the 4<sup>th</sup> Respondent (GoK), is again the repetition of the facts already made by the Petitioner. Along with this Rejoinder, the Petitioner has filed Annexure-P40 dated 03.08.2016, a letter addressed to the Principal Secretary to Government, Revenue Department, explaining the difficulties in getting land conversion order and further has filed Annexure-P41 dated 18.01.2019, a letter issued by Energy Department, GoK to one Sri Narayanaswamy, furnishing copy of the Proceedings of the Meeting held on 15.09.2017 regarding issues of Solar Projects of 970 MWs allotted to SECI and 1200 MWs of Solar Power Projects in 60 backward taluks of 20 MWs each.
9. We have heard the learned counsels for both the parties. The Petitioner has also filed the written arguments. Subsequently, the Petitioner has filed six more documents along with Memo.
10. From the rival contentions and the relevant pleadings, the following Issues arise for our consideration:
- Issue No.1: Whether the Petitioner proves that the 'Effective Date' under the PPA for counting various timeframe for achieving different milestones under the PPA shall be treated as:
- a) The date of approval by the Commission of the SPPA dated 17.12.2016? or

- b) 17.12.2016, the date on which the said SPPA was executed?  
or
- c) 21.10.2016, the date on which the PPA approval letter dated 14.10.2016, was received by the Petitioner?

Issue No.2: Whether the Petitioner proves that there was delay in granting approval by the Commission to the PPA dated 29.06.2016 and also there was delay in granting evacuation scheme approval by the 3<sup>rd</sup> Respondent (KPTCL) and whether such delays led to delay in identifying the lands required for the Solar Power Project?

Issue No.3: Whether the Petitioner was prevented from performing its obligation of producing documents of title and possession of the lands required for establishing the Solar Power Project on or before 13.06.2017, the date on which the Conditions Precedent should have been fulfilled, due to 'Force Majeure' event?

Issue No.4: Whether the Petitioner has proved that the delay in commissioning the Solar Power Project was also due to:

- (a) Implementation of Goods & Services Tax (GST) Act, 2017 by the Government of India (GoI)?
- (b) Introduction of Demonetization by GoI? and
- (c) Wrong classification of Solar Modules under CTH 8501 instead of CTH 8541 by Customs Authorities at Chennai Port and Nahva Sheva Port?
- (d) Delay in issuance of the evacuation scheme approvals and delay in Forest clearance for laying the Transmission Line.

Issue No.5: Whether the claim for liquidated damages is established by the 1<sup>st</sup> Respondent (BESCOM) as required under Section 74 of the Indian Contract Act, 1872?

Issue No.6: Whether the Solar Power Project of the Petitioner was liable for reduced tariff as applicable on the Commercial Operation Date, in the event of delay in commissioning of the project as per Article 12.2 (ii) of the PPA?

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

Issue No.8: What Order?

11. After considering the pleadings and documents of the parties and the submissions made by the learned counsel for parties, our findings on the above Issues are as follows.

12 Issue No.1: Whether the Petitioner proves that the 'Effective Date' under the PPA for counting various timeframe for achieving different milestones under the PPA shall be treated as:

a) The date of approval by the Commission of the SPPA dated 17.12.2016? or

b) 17.12.2016, the date on which the said SPPA was executed?  
or

c) 21.10.2016, the date on which the PPA approval letter dated 14.10.2016, was received by the Petitioner?

a) 'Effective Date' is defined in Article 21.1 of the PPA as the date of the approval of PPA by the KERC. Further, Article 3.1 of the PPA mentions the 'Effective Date' with reference to the PPA as *'this agreement shall come into effect from the date of getting concurrence from KERC on*

*the PPA and such date shall be referred to as the Effective Date'*. In the present case vide letter dated 14.10.2016 (Annexure-P4), the petitioner and the 1<sup>st</sup> Respondent were informed of the approval of the Commission to the PPA dated 29.06.2016 (Annexure-P3). Therefore, the date 14.10.2016 has to be considered as the 'Effective Date' for the purpose of interpreting the relevant clauses in the PPA. The PPA does not provide that the date of receipt of intimation regarding approval of the Commission to the PPA or the date on which the SPPA is signed by the Petitioner and the 1<sup>st</sup> Respondent, in case the execution of such SPPA is needed, could be considered as the 'Effective Date'. Therefore, the contention of the Petitioner is not acceptable.

- b) The Petitioner has contended that, as the letter dated 14.10.2016 (Annexure-P4) communicating approval of Commission for the PPA in question directed to incorporate certain corrections/modifications in the PPA by entering into a suitable SPPA, the execution of SPPA and also the approval of such SPPA is essential. Further, it is contended that when the execution of such SPPA and its approval by the Commission is required, such dates should be considered as the 'Effective Date'.
- c) The letter dated 14.10.2016 (Annexure-P4) signed by the Secretary of this Commission communicates approval of the Commission to the PPA dated 29.06.2016 executed between the parties in respect of development of 20 MW (AC) Solar Power Project in Gubbi taluk of Tumakuru district, subject to certain corrections/modifications being

incorporated in the said PPA by entering into a suitable SPPA. Therefore, it can be said that the approval of PPA dated 29.06.2016 communicated by letter dated 14.10.2016, is absolute, subject to incorporating the correction/modification. For the purpose of incorporating the correction/modification, the execution of SPPA is essential. We note that there is no direction given to the parties that after entering into the SPPA, the same should be again got approved by the Commission. The Petitioner has contended that the correction/modification suggested in Annexure-P4 dated 14.10.2016 are material correction/modification, thereby after incorporating the said correction/modification, the approval of the SPPA is essential by the Commission, as the terms and conditions of the PPA would be materially altered. The Petitioner contended that the modification regarding Delivery Point, it had to make substantial deliberations as to whether to continue with or shift the project site and it waited for a long period for the approval of the SPPA to get certainty on the Delivery Point. We have gone through the relevant Article 5.4 of the PPA relating to connectivity to the grid. The said Article as it existed read as: *"The Developer shall be responsible for power evacuation from the Power Project to the nearest Delivery Point."* After the suggested corrections/modifications in Article 5.4 of the PPA, it should be read as: *"The Developer shall be responsible for power evacuation from the Power Project to the nearest Delivery Point/Delivery Points."* This correction/modification had not affected adversely the right of the



Petitioner in any way and it only clarified that the power evacuation could be either to the nearest Delivery Point or to more than one Delivery Point. Therefore, the Commission is of the considered view that this correction/modification has not adversely affected the right of the Petitioner in any way. We have also perused the other suggested correction/modification as per letter dated 14.10.2016 (Annexure-P4). We found that these corrections/modifications were not materially affecting the rights and liabilities of the parties and they were suggested to clarify certain things and to bring certain clauses in accordance with the provisions of the Electricity Act, 2003. Hence, the contention of the Petitioner that the SPPA requires approval cannot be accepted. This aspect was clarified by the Commission in a subsequent letter dated 25.10.2016 (Annexure-R1 produced by 1<sup>st</sup> Respondent/BESCOM) addressed to the Government.

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

12. Issue No.2: Whether the Petitioner proves that there was delay in granting approval by the Commission to the PPA dated 29.06.2016 and also there was delay in granting evacuation scheme approval by the 3<sup>rd</sup> Respondent (KPTCL) and whether such delays led to delay in identifying the lands required for the Solar Power Project?

i) Regarding delay in granting approval of PPA by this Commission:

a) It is contended by the petitioner that the delay in approval of PPA by KERC has resulted delay in getting other required approvals. This

contention cannot be accepted because as per the PPA, the 'Effective Date' is from the date on which the KERC approves the PPA and the Petitioner is required to achieve the Conditions Precedent within eight months and Scheduled Commissioning Date within twelve months from the 'Effective Date'. Hence, delay in approving the PPA by KERC if any, will not affect the Petitioner for the reason that the time begins for achieving different milestones, from the date of approval of PPA by KERC.

b) Any of the Respondents has not made an attempt to explain the delay of nearly three months in approving the PPA by the Commission. However, the letters dated 22.07.2016 [Annexure-R1 produced by the 3<sup>rd</sup> Respondent (KPTCL)] addressed to the MD, BESCO and dated 29.08.2016 [Annexure-R2 produced by the 3<sup>rd</sup> Respondent (KPTCL)] addressed to the Additional Chief Secretary to Government, Energy Department by this Commission would explain the reasons for the delay in approving the PPAs. These letters produced by the 3<sup>rd</sup> Respondent (KPTCL) would make it clear that the KREDL had not furnished the clarifications in conducting the bid proceedings, thereby the PPAs were ordered to be returned to ESCOMs and subsequently this Commission accorded the in principle approval with certain conditions to PPAs on assurance given by GoK to amend the Solar Policy. Hence, there is no delay on the part of this Commission in approving the PPAs.

c) Therefore, there is no substance in the say of Petitioner that there was delay in approval of the PPA by KERC and it has resulted in delay, in getting other required approvals.

ii) Regarding Delay in granting evacuation approval:

a) In Paragraph 6 of the Statement of Objections filed by the 3<sup>rd</sup> Respondent (KPTCL), it is stated that the Petitioner applied for evacuation scheme approval on 04.05.2017 as per Annexure-R3. This fact is not denied by the Petitioner. Therefore, there was nearly a year delay in applying for evacuation scheme approval after executing the PPA dated 29.06.2016. Thereafter, tentative evacuation scheme dated 21.06.2017 and regular evacuation scheme dated 13.07.2017 were issued by the 3<sup>rd</sup> Respondent (KPTCL).

b) From the above facts, we hold that there was no delay in issuing evacuation scheme approvals by the 3<sup>rd</sup> Respondent (KPTCL).

iii) Regarding delay in identifying the lands required for the Solar Power Project:

a) The Petitioner has contended that the delay in issuance of approvals of the PPA by this Commission and of the evacuation scheme by KPTCL led to delay in identifying the lands required for establishing the Solar Power Project. This contention of the Petitioner has no basis. Before applying for issuance of evacuation scheme approvals to any Sub-station, the petitioner has to identify the lands where the project would be established and has to furnish Topo Sheet of the situation of the

project site and the Sub-station to which the power would be evacuated. This fact is made clear in the application dated 04.05.2017 [Annexure-R3 produced by the 3<sup>rd</sup> Respondent (KPTCL)] for grid connectivity. In this application, the Petitioner had requested evacuation scheme approval from its project site in Talekoppa village of Gubbi taluk, to Ankasandra Sub-station. One can say that soon after identifying the lands required for the Solar Power Project, the Petitioner must have applied for evacuation scheme approvals. As already noted, there was almost eleven months' delay in applying for evacuation scheme approval from the date of execution of the PPA. Therefore, the inference is that there was inordinate delay on the part of the Petitioner in identifying the lands required for the Solar Power Project before applying for evacuation scheme approval. The Petitioner has not offered any acceptable explanation for the delay in identifying the lands.

b) For the above reasons, we hold that the say of the Petitioner that it had to identify the lands required for the Solar Power Project after issue of evacuation scheme approvals or after approval of the PPA is untenable and not true.

iv) Therefore, we hold Issue No.2 in negative.

13. Issue No.3: Whether the Petitioner was prevented from performing its obligation of producing documents of title and possession of the lands required for establishing the Solar Power Project on or before 13.06.2017, the date on which the Conditions

Precedent should have been fulfilled, due to 'Force Majeure' event?

- a) In Para 44 & 45 of the petition, the Petitioner has stated the cumbersome process to be followed while obtaining an order under Section 109 of the KLR Act, 1961 and under Section 95 of the KLR (Amendment) 2015. The said grievance of the Petitioner appears to have force, in view of the preamble stated in Circular No. RD 01 LRM 2016 dated 22.02.2016 issued by GoK and the G.O. No. EN 66 VSE 2016, Bengaluru dated 05.10.2016. Therefore, the GoK has issued the said Circular and G.O. prescribing the guidelines to be followed in granting permission under Section 109 of the KLR Act, 1961. We note that in spite of these guidelines, the inordinate delay in granting the land conversion orders continued for one or other reasons.
- b) This Commission has already considered in similar previous cases, the effect of GoK Circular No. RD 01 LRM 2016 dated 22.02.2016 and Government Order dated 05.10.2016. The Commission has come to the conclusion that, had the Petitioner applied to KREDL at least sixty days prior to the date on which Conditions Precedent had to be achieved and there being any delay by the concerned authorities in processing the same or granting the approval beyond sixty days, the filing of such application to KREDL by the developer, could be considered as the fulfilment of the production of the documentary evidence of having clear title and possession of the lands required for the project, within the last date for fulfilment of Conditions Precedent.

- c) The Petitioner has stated in the petition, that it applied before KREDL on 13.06.2017 with a request to process the application for obtaining necessary orders from Government in terms of Government Order dated 05.10.2016 [Annexure-R1 produced by the 4<sup>th</sup> Respondent (GoK)]. This application shows that the Petitioner had identified 91 acres 14 guntas of land and had taken consent letters from the farmers and the copy of evacuation scheme approval and copy of LoA issued by KREDL were produced along with the said application dated 13.06.2017 (Annexure-R3). It can be seen that the last date for fulfilling the Conditions Precedent was 13.06.2017.
- d) Now, the question is whether filing an application before KREDL on 13.06.2017 by the Petitioner for taking further action by KREDL to obtain an order under Section 109 of the KLR Act, 1961 and under Section 95 of the KLR (Amendment) Act, 2015 amounts to sufficient compliance of Condition Precedent in relation to production of documentary evidence of clear title and possession of lands required for the project in the name of the Petitioner. The Petitioner cannot expect that KREDL had to obtain the necessary orders on the very same day of filing of the application before the 2<sup>nd</sup> Respondent (KREDL).
- e) Hence, in the present case, had the petitioner applied to KREDL at least sixty days prior to 13.06.2017, the date on which the Conditions Precedent should have been fulfilled, we could have considered the

filing of such application would amount to fulfilment of the Conditions Precedent within the stipulated time.

- f) From the material on record, it is clear that the application dated 13.06.2017 (Annexure-R3) addressed to the Managing Director, KREDL, was incomplete and was not containing all the required particulars. In this application, the Petitioner had stated that the evacuation scheme approval was attached to the said application. It can be seen that evacuation scheme approvals were received on 21.06.2017/13.07.2017 (Annexure-P11 collectively), therefore, the Petitioner could not have attached any of the evacuation scheme approvals along with the application dated 13.06.2017 (Annexure-R3). It can be seen that the 4<sup>th</sup> Respondent (GoK) in its Statement of Objections has stated that subsequent to filing of application dated 13.06.2017 (Annexure-R3), the 2<sup>nd</sup> Respondent (KREDL) issued letter dated 05.07.2017 to the Petitioner intimating that the land identification, consultation and due diligence were to be done by the Developer and in response to this letter, there was no reply from the Petitioner, hence, the 4<sup>th</sup> Respondent (GoK) could not issue the necessary clearances to have the lease deeds with the land owners in order to sub-let the same to the Petitioner. Further, the 4<sup>th</sup> Respondent (GoK) stated that subsequently the Petitioner requested through letters dated 08.03.2018 & 21.03.2018 to return the file as there were some changes in the schedule of lands due to practical difficulties faced. The Petitioner has produced letter dated 03.01.2018 along with schedule of lands, addressed to the MD, KREDL requesting to process the

file with recommendation to the Energy Department for issuance of Government Notification, enabling the land conversion (This letter dated 03.01.2018 is marked as Document No.1 and is produced by the Petitioner with the Memo dated 26.11.2019). It can also be seen from other documents produced by the Petitioner along with Memo dated 26.11.2019 that the Petitioner has taken the lease of lands required for Solar Power Project directly from the farmers and got the same converted for non-agricultural purpose in the names of farmers themselves. From these facts, it is clear that the contents of application dated 13.06.2017 (Annexure-R3) were incomplete and the required particulars were not furnished. Therefore, one has to come to the conclusion that the Petitioner has abandoned the application dated 13.06.2017 (Annexure-R3) filed before the 3<sup>rd</sup> Respondent (KREDL).

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

14. Issue No.4: Whether the Petitioner has proved that the delay in commissioning the Solar Power Project was also due to:

(a) Implementation of Goods & Services Tax (GST) Act, 2017 by the Government of India (Gol)?

(b) Introduction of Demonetization by Gol? and

(c) Wrong classification of Solar Modules under CTH 8501 instead of CTH 8541 by Customs Authorities at Chennai Port and Nahva Sheva Port?

(d) Delay in issuance of the evacuation scheme approvals and delay in Forest clearance for laying the Transmission Line.



15. a) Before dealing with each of the above mentioned items on Issue No.4, we may note that the Petitioner has not stated in any of its 'Force Majeure' Notices dated 06.07.2017 & 31.07.2017 (Annexure-P18 collectively) and another 'Force Majeure' Notice dated 31.01.2018 (Annexure-P32), that the commissioning of the project was delayed due to any of the events stated in sub-paragraphs (a), (b) & (c) of Issue No.4. As already noted the Solar Power Project was commissioned on 09.03.2018 and the petition was filed before this Commission 26.03.2018. Therefore, it is clear that before issue of 'Force Majeure Notice' dated 31.01.2018 (Annexure-P32) all the three events stated in sub-paragraphs (a) to (c) of Issue No.4 had taken place. Therefore, this Notice should have contained all the three events, also as the events contributing for the delay in commissioning the project, if really the Petitioner had been affected by them. According to the Petitioner, the Demonetization stalled the progress of the establishment of Solar Power Project for a period of 2-3 months from 08.11.2016. Therefore, this event of Demonetization should have been mentioned in the 'Force Majeure Notices' dated 06.07.2017 & 31.01.2017. According to the Petitioner, the introduction of GST from 01.07.2017 affected the implementation of the project for a period of 3-4 months and further the delay in clearance of imported Solar Modules by Customs Authorities affected the progress of the project for enormous delay from July 2017. Therefore, one can say that the events in sub-paragraphs (a) to (c) in Issue No.4 are only the after-thought events pleaded in the petition.

b) In this background, we have to consider the merit of the said events pleaded by the Petitioner.

16. Regarding Implementation of Goods & Services Tax (GST) Act, 2017 by the Government of India (GoI):

- a) The Petitioner has stated that there was a slow-down from July, 2017 for a period of 3-4 months in manufacturing and service industry across the country due to introduction of GST. The petitioner has relied on the Official Memorandum (OM) dated 20.06.2018 (Annexure-P34) issued by MNRE. This OM was issued on the request of the Solar Power Developers, to SECI/NTPC/other Implementing Agencies, for grant of extension of time on case to case basis. It is made clear in this OM at Paragraph 4 (ii) that the extension of time could be given for the Solar Power Project Developers provided they furnish all documentary evidence establishing that they were actually affected due to GST induced disruptions during the period from 01.07.2017 to 31.08.2017 for which extension of time could have been claimed.
- b) In the present case, the Petitioner has not produced any documentary evidence in support of its claim to establish that it was actually affected due to GST induced disruptions during the period from 01.07.2017 to 31.08.2017.
- c) Therefore, we hold that the Petitioner has failed to establish that introduction of GST has affected the progress of its project.

17. Regarding Introduction of Demonetization by Gol:

- a) The Petitioner has stated that Demonetization adversely affected the progress of the project work for 2-3 months from 08.11.2016, as land acquisition and project activities were affected causing delay considerably. Except for the vague averment, no definite instances are mentioned to demonstrate as to how the progress of the project was affected due to demonetization. Therefore, without adequate proof, we cannot accept that demonetization adversely affected the progress of the project of the petitioner from 08.11.2016 for a period of 2-3 months.
- b) In the present case, the petitioner has not purchased the extent of lands required for the project, but had taken it on lease, that too long after the expiry of period affected by Demonetization. The Petitioner has stated that it had placed purchase orders of solar modules, inverters, transformers and mounting structures as stated in the letter dated 14.06.2017 (Annexure-P7). However, the Petitioner has not stated the actual dates of the purchase orders of these things. If really, these purchase orders were placed during the affected period of demonetization, it would have certainly produced the evidence regarding the dates of these purchase orders.
- c) In the present case, as already noted the Petitioner has identified the lands just before 04.05.2017, the date on which the application for evacuation scheme approval was filed. It is also seen that the Petitioner

has taken the lands on lease long after the introduction of Demonetization.

- d) For the above reasons, we hold that the Petitioner has failed to establish that demonetization had adversely affected the progress of the project.

18. Regarding Delay due to Wrong Classification of Solar Modules:

- a) The Petitioner at Paragraphs 31 to 39 of the petition has stated certain facts regarding the delay in clearance of imported Solar Modules by Customs Authorities at Chennai Port and Nahva Sheva Port due to Wrong Classification of Solar Modules by the said Authorities. In support of these allegations, the Petitioner has produced Annexure-P13 to Annexure-P17. The Petitioner could not aver in these paragraphs, the period for which there was delay in getting the solar modules due to the alleged wrong classification, except saying that there was enormous delay. It was required for the petitioner to say the exact period of delay due to this reason.
- b) The Petitioner has mentioned about the dispute with regard to both Chennai Port and Nahva Sheva Port Customs Authorities. It cannot be made out from the pleadings whether the modules which were sought to be released related to this project apart from other projects and the date on which these modules were got released. In Paragraph 38 of the petition, it is stated that the Petitioner once again made a representation dated 31.10.2017 (Annexure-P17) in response to the

Show-Cause Notice dated 19.10.2017 of Customs Authorities for release of the modules on furnishing the Bank Guarantee. However, the Petitioner has not stated the date on which these Solar Modules were actually got released on furnishing the required securities.

- c) The Summons dated 27.09.2017 (Annexure-P15) issued to the Petitioner appears to be not relating to this case. It relates to the Solar Power Project which is situated at Galipura Kaval Village in Holenarasipura taluk of Hassan district in Karnataka, as can be seen from the "To address" written in the said Summons. The letter dated 06.10.2017 (Annexure-P16) is written in response to the Summons dated 27.09.2017 (Annexure-P15) requesting for interim release of Solar Modules pending final adjudication of the dispute. As Summons dated 27.09.2017 (Anneuxre-P15) is not relating to this case, the letter dated 06.10.2017 (Annexure-P16) can also be said to be not relating to this case. Therefore, we are of the opinion that the Petitioner has failed to establish that the dispute regarding the wrong classification of Solar Modules related to this case. It appears that the disputed claim regarding wrong classification of Solar Modules is not yet finally adjudicated by the concerned authority.
- d) Hence, this ground for seeking extension of time is not maintainable and the same is to be rejected.

19. Regarding Delay in issuance of the evacuation scheme approvals and delay in Forest clearance for laying the Transmission Line:

a) Regarding Forest clearance in 'Force Majeure Notice' dated 31.01.2018 (Annexure-P32) addressed to the General Manager (Electrical), Power Procurement, Corporate Office, BESCOM, Bengaluru, it is stated that *"Further, though we had applied for Forest Clearance for transmission line corridor of approximately 895 meters in August 2017, the said Forest Clearance is still awaited from the Government of Karnataka, despite pre-eminent efforts. Though the in-principle approval, i.e., First Stage clearance is expected to be obtained by 03.02.2018, we are unable to start the construction activities for the transmission line in the said corridor in the absence of approval from the Government of Karnataka."* Subsequently, the Forest Department issued Demand Notice dated 03.02.2018 (Annexure-P33) for payment of certain amount for issuance of Forest clearance for laying transmission line running to an extent of 0.8955 hectares of Forest land in Ankasandra Reserved Forest. The Demand Notice dated 03.02.2018 (Annexure-P33) shows that the Petitioner had made online application dated 29.08.2017 requesting for Forest clearance to lay the transmission line. Therefore, the Petitioner stated that there was delay of 156 days in commissioning the project with the grid.

b) The 1<sup>st</sup> Respondent (BESCOM) in its Statement of Objections stated that the 'Force Majeure Notice' dated 31.01.2018 (Annexure-32) was not issued within the timeframe contemplated in the PPA and that the

application dated 29.08.2017 requesting for Forest clearance was made belatedly.

c) The 3<sup>rd</sup> Respondent (KPTCL) in its Statement of Objections regarding Forest Clearance has stated that after a lapse of eight months from the date of regular evacuation scheme, the Petitioner vide letter dated 28.02.2018 (Annexure-R6) requested for a change in the evacuation scheme since the Petitioner planned to use 66 kV UG cables near 66/11 kV Ankasandra Sub-station. This Respondent intimated to pay the requisite processing fee vide letter dated 02.03.2018 (Annexure-R7). The Petitioner paid the processing fee on 09.03.2018. On the same day, this Respondent has issued revised evacuation scheme dated 09.03.2018 (Annexure-R8). Therefore, the 3<sup>rd</sup> Respondent (KPTCL) contended that there was no delay on its part in approving the revised evacuation scheme. From the above facts, one can say that there is no delay on the part of the 3<sup>rd</sup> Respondent (KPTCL) in approving the revised evacuation scheme dated 09.03.2018 (Annexure-R8).

d) The Petitioner had obtained tentative evacuation scheme approval dated 21.06.2017 and regular evacuation scheme approval dated 13.07.2017 (Annexure-P11 collectively). Subsequently, the Petitioner made online application dated 29.08.2017 before the concerned officer of the Forest Department and ultimately received the Demand Notice dated 03.02.2018 (Annexure-P33) for payment of certain amount for allowing to lay the transmission line through a part of Forest area. It

appears after payment of the amount claimed by the Forest Department and obtaining the further orders, if any, from Forest Department, the Petitioner applied before the 3<sup>rd</sup> Respondent (KPTCL) for approval of deviation in the transmission line for evacuation of power.

e) The first question for our consideration is whether the Petitioner has justified its action for revising the evacuation scheme already approved on 13.07.2017.

f) The tentative evacuation scheme approval dated 21.06.2017 and the regular evacuation scheme approval dated 13.07.2017, provide regarding construction of the dedicated transmission line as follows:

*“Construction of 66 kV SC line and DC towers using COYOTE ACSR conductor for a distance of 6.0 kms from their solar plant to 66 /11 kV Ankasandra Sub-station along with necessary terminal bay & control equipment installed at both the ends of the line as per KPTCL technical specifications.”*

In the revised evacuation scheme approval dated 09.03.2018 (Annexure-R8) produced by the 3<sup>rd</sup> Respondent (KPTCL) it is provided for construction of the dedicated transmission line as follows:

*“Construction of 66 kV SC line on DC towers using coyote conductor (3.98 kms.) with 3 RX IC, 630 Sq.mm UG Cable line for a distance of about 1.065 kms. totalling to 5.045 kms. from your generation plant to 66/11 kV Sub-station at Ankasandra with necessary terminal bay along with required matching control equipment at both the ends as per the layout and technical specification to be approved by KPTCL. Further it is*



*to be noted that, this evacuation scheme is governed by the following condition:*

- 1. You/firm is required to provide Line differential protection for cable as per KPTCL Standards.*
- 2. To adopt safety standards while cable laying and to take permission from the concerned authority for the cable route."*

g) The comparison of the regular evacuation scheme approval and the revised evacuation scheme approval would show that there was no proposal earlier to lay the UG cable line for a distance of about 1.065 kms. within the Reserved Forest limit. Earlier the total distance of the line was 6.0 kms. and now that distance is reduced to 5.045 kms. as per the revised evacuation scheme approval. In the revised evacuation scheme approval, the Petitioner was asked to produce the Forest NOC. The Petitioner had applied for evacuation scheme approval through application dated 04.05.2017. Had the Petitioner made up his mind to lay the UG cable through Reserved Forest limit to a distance of about 1.0 km, at the time of filing application for evacuation scheme approval on 04.05.2017, it could have obtained the Forest clearance by October 2017 or so. The Petitioner has not come forward to explain the reason to revise the evacuation scheme approval at a later stage. Without acceptable reasons, the Petitioner could not bring his case for the delay caused if any, under the definition of 'Force Majeure'. In case the Petitioner could have avoided the revision of the evacuation scheme, had he taken the reasonable care or complied with Prudent Utility

Practice, then it could not have claimed 'Force Majeure'. Therefore, the Petitioner should establish that such event or circumstance was not within its reasonable control. Therefore, it was necessary for the Petitioner to show that he had valid reasons to request for revision of the evacuation scheme.

- h) The next question is whether the time taken by the Forest Department from 29.08.2017 to 02.02.2018 for issuing the Forest clearance would amount to unreasonable delay. The Petitioner claims that the whole 156 days amounted to 'Force Majeure' event. We are of the considered opinion that in the present case, the Petitioner has failed to establish that the Forest Department unreasonably delayed for issuance of Forest clearance. The Petitioner has not added the Forest Department as a Respondent in this case. In the absence of Forest Department, it is difficult to hold that it had taken undue time while issuing Forest clearance. The references made at Sl. No.1 to 12 in the Demand Notice Dated 03.02.2017 (Annexure-P33) issued by the Forest Department, would show that the file movements in different offices had taken within reasonable time. It is a known fact that obtaining Forest clearance that too in the Reserved Forest limit is a tedious task and many times such clearances are usually refused. Therefore, it appears the Petitioner has made an attempt to obtain the Forest clearance and after succeeding in it, it had applied for revision of the evacuation scheme on 28.02.2018 (Annexure-R6) before the 3<sup>rd</sup> Respondent (KPTCL). Thereafter, the 3<sup>rd</sup> Respondent issued revised evacuation scheme approval on 09.03.2018

(Annexure-R8). Therefore, we hold that the Petitioner has failed to establish that Forest clearance was delayed.

- i) As already noted the evacuation scheme approvals were issued within the reasonable time and the Petitioner itself was at fault in applying for evacuation scheme approval after lapse of eleven months from the date of PPA dated 29.06.2016.

21. For the reasons stated above, we answer Issue No.4 in negative.

22. Issue No.5: Whether the claim for liquidated damages is established by the 1<sup>st</sup> Respondent (BESCOM) as required under Section 74 of the Indian Contract Act, 1872?

- a) The Petitioner has contended that without proof of actual damage or loss a party cannot recover liquidated damages stated in the contract. The law on this subject is discussed in detail in the decision cited in (2015) 4 SCC 136 between *Kailash Nath Associates Vs. Delhi Development Authority and Another*. The summary of the principles stated in paragraph 43 of this judgement reads as follows:

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

*43.1 Where a sum is named in a contract as liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a*

*contract as a liquidated amount payable by way of damages only reasonable compensation can be awarded not exceeding the amount 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."*

- b) The Petitioner has relied upon other judgements of Hon'ble Supreme Court in *Union of India Vs. Rampur Distillery (AIR 1973 SC 1098): (1973) 1 SCC 649* and in *Fateh Chand Vs. Bal Kishan Dass AIR 1973 SC 1098*. We think it is not necessary to discuss the above decisions, as in *Kailash Nath Associates*, the above cases are considered before laying down the law stated in it as noted above.
- c) In the case of non-supply of energy by a generator to the distribution licensee, it is not possible to prove the actual damage or loss. Therefore, if the contract provides a genuine pre-estimate of damage or loss, the defaulting party is liable to pay the liquidated damages without proof of actuals loss or damage.
- d) The definition clause in Article 21.1 of the PPA defines "Damages" shall have the meaning set forth in sub-clause (w) of Article 1.2.1. The said sub-clause (w) reads as follows:
- "the damages payable by either party to the other of them, as set forth in this agreement, whether on per diem basis or otherwise, are mutually agreed genuine pre-estimate loss and damage likely to be suffered and incurred by the party entitled to receive the same and are not by way of penalty".
- e) The Petitioner has not led any acceptable evidence to infer that the liquidated damages agreed in the PPA are in the nature of penalty. On

the other hand, the agreed term shows that the liquidated damages mentioned in the PPA is the genuine estimate.

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

23. Issue No.6: Whether the Solar Power Project of the Petitioner was liable for reduced tariff as applicable on the Commercial Operation Date, in the event of delay in commissioning of the project as per Article 12.2 (ii) of the PPA?

a) As per Article 8.5 of the PPA the Petitioner had to commission the project, within 12 (twelve) months from the 'Effective Date'. Therefore, the Petitioner had to commission the project on or before 13.10.2017. The project was commissioned on 09.03.2018. We note that there is delay in commissioning the Solar Power Project of the Petitioner. We have held in the preceding paragraphs that the Petitioner was not prevented by any 'Force Majeure' events in commissioning the project. Further, as a consequence of delay in commissioning of the project beyond Scheduled Commissioning Date, the project would be liable for applicable tariff as on the Commercial Operation Date, if any, as provided in Article 12.2 of the PPA. It would be appropriate here to note the relevant parts of Article 12 of the PPA dated 29.06.2016, which are hereunder:

a) Article 12.1 states that *"the developer shall be entitled to receive the tariff of Rs.4.81/kWh of energy supplied by it to BESSCOM, Bengaluru, in accordance with terms of PPA during the period between COD and the expiry date."*

b) Article 12.2 of PPA envisages that *“as a consequence of delay in commissioning of the project beyond the Scheduled Commissioning Date, subject to Article 4, if there is change in the 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*

*or*

*ii) KERC applicable Tariff as on the commercial Operation Date.”*

b) The “Commercial Operation Date” is defined under Article 21.1 of PPA as under:

*“COD or Commercial Operation Date” shall mean the actual commissioning date of respective units of the power project where upon the developer starts injecting power from the power project to the delivery point.”*

c) The Petitioner contended that the tariff under the PPA in question is discovered through competitive bidding. Hence, it is contended that the tariff discovered is not vulnerable to variations as per the Generic Tariff Orders, and further that the Generic Tariff Order dated 30.07.2015 specifically excludes its applicability to the purchase of power under competitive bidding. Further it is contended that the subsequent Generic Order dated 12.04.2017 is only a modification of the Generic Tariff Order dated 30.07.2015, thereby this order dated 12.04.2017 is also not applicable.

d) We found that the Generic Tariff Order dated 30.07.2015 does not specifically excludes its applicability to the PPAs entered under

competitive bidding proceedings. We note that in the Generic Tariff Order dated 10.10.2013, it is stated that the Generic Tariff determined in this Order is applicable to Solar Power generators entering into PPA on or after 01.04.2013 and up to 31.03.2018 other than those where the tariff is discovered through bidding process. This exclusion contained in this Generic Tariff Order dated 10.10.2013 or in any subsequent Generic Tariff Orders do not support the contention of the Petitioner. This exclusion only means that where a PPA is to be governed by a Generic Tariff Order within a Tariff Review Period, the said tariff cannot be made applicable to the PPAs entered into under competitive bidding proceedings during the same period. We note that Article 12 of the PPA itself provides that in case, there is delay in commissioning the project beyond the SCD, the reduced tariff as applicable on the SCD is to be applied. Therefore, the contention of the Petitioner in this regard cannot be accepted.

e) Therefore, Issue No.6, is held in affirmative.

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

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

25. Issue No.8: What Order?

For the above reasons, we pass the following:



**ORDER**

- a) The petition is dismissed holding that the Petitioner is not entitled to any of the reliefs claimed in the petition;
- b) The Petitioner is entitled to get reduced tariff of Rs.4.36 per kWh as per the terms of Article 12.2 of PPA dated 29.06.2016 as per Generic Tariff Order dated 12.04.2017 issued by KERC for the energy supplied to the 1<sup>st</sup> Respondent (BESCOM) from the Commercial Operation Date, during the term of PPA; and
- c) The Petitioner is liable to pay damages as provided in Article 4.3 and 5.8 of the PPA.

sd/-  
(SHAMBHU DAYAL MEENA)  
Chairman

sd/-  
(H.M. MANJUNATHA)  
Member

sd/-  
(M.D. RAVI)  
Member