

No. N/83/2020

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

Dated: 15.06.2021

Present

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

OP No.36/2020

BETWEEN:

M/s Aavanti Solar Energy Private Limited,
A Company registered under the Companies Act,
1956/2013 having its Registered Office at
2898/2, 1st Floor, Ward No.5,
Bus Stand Road,
Shiggaon,
Haveri District-581 205.
(Represented by its Authorized Signatory)

...PETITIONER.

(Represented by Ms. Poonam Patil, Advocate]

AND:

Gulbarga Electricity Supply Company Limited,
A Company registered under the Companies Act,
1956 having its Registered Office at
Station Road,
Kalaburagi.
(Represented by its Managing Director)

...RESPONDENT

(Respondent represented by Sri S. Sriranga,
Advocate for M/s JUSTLAW Advocates).

ORDERS

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

- a) Direct the Respondent to forthwith open a monthly unconditional, revolving and irrevocable Letter of Credit in favour of the Petitioner Company in compliance with Clause 13.6.1 of the Power Purchase Agreement (PPA) dated 03.06.2016;
- b) Direct the Respondent to reimburse the cost of penalty to be levied on the Petitioner by their Bankers as per letter dated 30.11.2019 vide Annexure-K; and
- c) Grant such other and further reliefs as this Hon'ble Commission may deems fit in the facts and circumstances of the case, in the interest of justice.

2. The relevant material facts pleaded by the Petitioner for the disposal of the present case may be stated as follows:

- a) That the Petitioner entered into Power Purchase Agreement (PPA) dated 03.06.2016 (Annexure-C) with the Respondent agreeing to supply Solar Energy at the tariff of Rs. 5.03 per unit from the Solar Power Project of 20 MW capacity setup at Shiggaon Taluk, Haveri District.
- b) The Petitioner has commissioned the solar power project on 31.03.2018 as per commissioning certificate dated 20.04.2018 (Annexure-F).
- c) Article 13 of the PPA relates to 'billing and payment' and Article 13.6.1 provides for opening of the Letter of Credit (LOC) and maintaining the same throughout the term PPA and the entitlement of the Petitioner to realise the monthly bill or supplementary bill by invoking the Letter of Credit, in the event the monthly bill or

supplementary bill is not paid within the due date. The relevant portion of Article 13.6 for the purpose of this case is as follows:

13.6 *Payment Security Mechanism*

Letter of Credit (LOC):

13.6.1 *GESCOM shall provide to the Developer, in respect of payment of its Monthly Bills and/or Supplementary Bills, a monthly unconditional, revolving and irrevocable letter of credit ("Letter of Credit"), opened and maintained which may be drawn upon by the Developer in accordance with this Article.*

13.6.2 *Not later than 1 (one) Month before the start of supply, GESCOM through a scheduled bank of Kalaburagi/Chennai open a Letter of Credit in favour of the Developer, to be made operative from a date prior to the Due Date of its first Monthly Bill under this Agreement. The Letter of Credit shall have a term of twelve (12) Months and shall be renewed annually, for an amount equal to:*

- a) the estimated average monthly billing for the first Contract Year;*
- b) the average of the monthly billing of the previous Contract Year for each subsequent Contract Year.*

13.6.3 _____

13.6.4 _____

13.6.5 _____

13.6.6 _____

13.6.7 _____

13.6.8 _____

d) Articles 6.1.1 and 6.1.2 provide that the Respondent-GESCOM is to comply with and perform the obligations set out in the PPA and has to pay timely payments of tariff invoices as per the procedure set out in Article 12 of the PPA. The grievance of the Petitioner is that in spite

of repeated requests and demands, the Respondent-GESCOM has failed to open the Letter of Credit and the Respondent has also failed to pay the monthly tariff invoices on repeated occasions. The Petitioner contended as the Letter of Credit was not opened it could not realise the monthly tariff invoices though there were delay in making payments of the said invoices. For this reason, the Petitioner requested to direct the Respondent to open the Letter of Credit as required.

- e) The further grievance of the Petitioner is that as per the loan sanction letter, the banker has instructed to create charge on the Letter of Credit to be executed by the Respondent-GESCOM and in case of failure to create such charge on or before 10.09.2020 the banker would impose 1% penal interest on the entire loan amount. Therefore, the Petitioner claimed that the Respondent is liable to reimburse 1% penal interest to be levied on the loan amount in the event of default to create charge on the LC in favour of the banker. In support of such contention the Petitioner has produced the 'Sanction Letter for Review/Renewal of Credit Facilities' dated 30.11.2019 (Annexure-K) issued to the Petitioner.
- f) The Petitioner has filed the present petition on 10.09.2020 before this Commission. The Petitioner stated in the petition that inspite of issuing several letters, the Respondent has failed to open the Letter of Credit as requested. The letter dated 17.01.2018 (Annexure-G) was issued to the Respondent requesting to open the Letter of Credit stating that

the solar power project was almost ready for synchronisation with the grid. Subsequently to commissioning of the solar power project the Petitioner has issued letters dated 07.08.2018, 19.02.2019, 12.03.2019, 11/15.04.2019, 15.05.2019, 19.11.2019 (Annexure-H collectively), requesting the Respondent to open Letter of Credit and stating its grievance that on number of times the monthly tariff invoices were not paid on or before the due dates. The Petitioner has also wrote letters dated 30.01.2020 (Annexure-J) demanding to open the LOC and also wrote another letter dated 31.03.2020 (Annexure-J1) requesting to open the Letter of Credit and also intimating that the financial lender (Bank) would charge 1% penal interest and the Respondent would be liable to reimburse the same to the petitioner, for not opening the Letter of Credit. The Petitioner requested for a direction against the Respondent to reimburse the quantum of penalty that would be levied on the Petitioner by its banker.

g) Therefore, the Petitioner has filed the present petition.

3. The Respondent appeared through Counsel and filed its statement of objections on 05.01.2021 as follows:

- a) That the Respondent has already opened the letter of Credit dated 10.09.2020 (Annexure-R1) as required under the terms of the PPA. Therefore it is contended that the first prayer does not survive for consideration and has become infructuous.
- b) In so far as the second prayer is concerned it is contended that the said prayer is premature as the event of imposing penalty was only

anticipated and has not occurred till filing of the petition, thereby the second prayer deserves to be rejected.

c) Therefore the Respondent has prayed for the dismissal of the petition.

4. We have heard the Learned Counsel for the parties. It is not disputed that Respondent has opened Letter of Credit dated 10.09.2020 as per Annexure-R1 as required under Article 13.6 of the PPA. Therefore the first prayer made by the Petitioner does not survive for consideration, as the Petitioner has opened the Letter of Credit. In support of the 2nd prayer, the Learned Counsel for the Petitioner has produced the letter dated 03.04.2020 issued by the Union Bank of India disclosing the details of penal interest charged towards non perfection of security. The total amount of penal interest shown to have been imposed comes to Rs. 84,93,376.46/-. Therefore the Learned Counsel for the Petitioner submitted that the Respondent should be made liable to pay this amount. On the other hand, the Learned Counsel for the Respondent denied the entitlement of the Petitioner to claim the said penal interest and also contended that the imposition of such penal interest is not valid and legal and the Respondent is not liable to reimburse the same.

5. From the rival contentions the following issues arise for our consideration:

Issue No.1: Whether the Respondent is liable to reimburse Rs. 84,93,376.46/- stated to have been charged towards penal interest for non-perfection of security?

Issue No.2: What order?

6. After considering the submissions of the parties and the material on record our findings on the above issues are as follows:

7. Issue No 1: Whether the Respondent is liable to reimburse Rs. 84,93,376.46/- stated to have been charged towards penal interest for non-perfection of security?

a) The sanction letter of Review/Renewal of Credit Facilities dated 30.11.2019 (Annexure-K) issued by Union Bank of India addressed to the Petitioner states that the review/renewal of the loan account was approved as stated in the said letter subject to providing the primary security and collateral security as follows:

Primary Security:

- *Exclusive charge on the entire project assets (fixed movable and immovable assets including project land) both present and future.*
- *Exclusive charge on all project documents, titles, insurance policies of the project.*
- *Exclusive charge on the hypothecation of entire current assets of the project both present and future.*
- *Exclusive charge on the project TRA/ Escrow account.*

Collateral Security:

- *Pledge of 30% of the shares / equity (5400 numbers) held in the company by M/s. OPG Power Generation Private Limited and non-disposal undertaking for the balance shareholding. Additionally, we have negative lien or another 30% shares of the Company held by the promoters.*
- *Charge on standby LC (BG) to be provided by the DISCOM (GESCOM) to the company for payment security.*

It is also further stated in the said letter regarding other approvals as follows:

Other Approvals:

- *Further extension of timeline for creation / perfection of securities from 01.07.2019 to 31.03.2020 and waiver of 1% penal interest for delay in creation / perfection of securities up to from 01.07.2019 to 31.03.2020.*
- *Permission for granting 6 months time i.e. up to March 2020 for furnishing SBLC/LG as payment security from GESCOM.*

This letter further states that the borrower shall return a copy of the sanction letter duly signed by authorized signatory in token of having accepted the stipulated terms and conditions. There is an endorsement made by the borrower on this letter to the fact that "Accepted subject to our LTR DT. 23.01.2020". However the Petitioner has not produced the letter dated 23.01.2020 which contained the terms and conditions subject to which the sanction letter was accepted.

- b) The Petitioner has produced a letter dated 12.10.2020 addressed to the Petitioner by the lender-Union Bank of India stating that inspite of granting 6 months time for perfection of securities, the same was still pending and that as per the sanction terms 1% penal interest was being charged for non-perfection of security. Further it states that the same was communicated vide letter dated 16.03.2020 and 21.05.2020. As already noted the Petitioner has filed the present petition on 10.09.2020, therefore if at all penal interest was being imposed for non-perfection of security as intimated in the letter dated 16.03.2020 and 21.05.2020, the Petitioner should have estimated the claim towards penal interest in the petition itself and

should have made the prayer for recovery of the said amount. But the Petitioner has not quantified the penal interest that might have been charged till the filing of the petition and has simply made a prayer for a direction against the Respondent to reimburse the penal interest to be levied on the Petitioner. It appears from the sanction letter dated 30.11.2019 (Annexure-K) that the lender-Union Bank of India had waived the penal interest intended to be imposed for the delay in creation or perfection of securities. Therefore the claim amount of Rs. 84,93,376.46/- towards penal interest said to have been charged for non-perfection of security till 10.09.2020, stated in the letter dated 03.04.2021 appears to be not a genuine claim as against the Petitioner.

- c) Even assuming that there was such a claim by the lender-Union Bank of India as against the Petitioner towards panel interest, the question is whether the Respondent would be liable to reimburse the same for non-opening of the Letter of Credit within time. The liability of the Respondent for payment of compensation for loss or damage caused by breach of contract is governed by the provisions stated in Section 73 of the Contract Act 1872. The relevant portion of the said section reads as follows:

OF THE CONSEQUENCES OF BREACH OF CONTRACT

73. Compensation for loss or damage caused by breach of contract.- *When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him*

thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract. _____

Explanation.-In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

- d) Applying the principles stated in Section 73 of the Contract Act, it is clear that the Respondent cannot be held liable for reimbursement of the amount claimed by the lender-Union Bank of India as against the Petitioner. The loss or damage which naturally arose in the usual course of things from such breach or which the parties knew, when they made the contract to be likely to result from the breach of it, can only be recovered. Such compensation cannot be given for any remote and indirect loss or damage sustained by reason of the breach. In the present case the Petitioner agreeing to pay penal interest for non-perfection of securities due to delay in opening the Letter of Credit cannot be said to be the loss or damage sustained by reason of such breach. At the time of entering into PPA it was not made known to the Respondent that the Petitioner would agree for such term with its lender and the Respondent would be made liable for delay in opening the Letter of Credit. Therefore, we hold that

even if there was a claim by the lender against the Petitioner for penal interest, the Respondent cannot be made liable to pay or reimburse the same to the Petitioner.

e) For the above reasons we hold Issue No.1 in Negative.

8. Issue No. 2:- What Order?

For the reasons stated above we pass the following:

ORDER

The petition is dismissed.

sd/-

(SHAMBHU DAYAL MEENA)
Chairman

sd/-

(H.M. MANJUNATHA)
Member

sd/-

(M.D. RAVI)
Member