

**Nos. N/33/18**

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**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION****No. 16 C-1, Miller Tank Bed Area, Vasanth Nagar, Bengaluru- 560 052****Dated : 06.02.2020****Present:**

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

**OP No.12/2018****Between:**

Messrs Shorapur Solar Power Limited,  
Registered office at Karvy House,  
No.46, Avenue 4, Street No.1,  
Road No.10, Banjara Hills,  
Hyderabad-500 034.

.... Petitioner

*(Represented by Smt. Poonam Patil, Advocate)*

**And:**

1. Chamundeshwari Electricity Supply Corporation Limited,  
No.29, Kaveri Grameena Bank Road,  
Vijayanagar, 2<sup>nd</sup> Stage, Hinkal,  
Mysuru-570 017.

2. Karnataka Power Transmission Corporation Limited,  
Kaveri Bhavan,  
K.G. Road,  
Bengaluru- 560 009.

..... Respondents

*(Respondents represented by Just Law, Advocates)*

**ORDERS**

1. This is a petition filed under Section 86(1) (f) of the Electricity Act, 2003 praying to:
  - a. Hold and declare that the Scheduled Commercial Operation Date (SCOD) stands extended to the period corresponding to the time taken for grant of evacuation approval (142 days) sketches, S.109 approval (142 days) and interconnection approval (10 days);
  - b. Hold and declare that the time to complete the conditions precedent by the Petitioner shall be concurrent to the SCOD.
  - c. Set aside the Demand notice bearing No.CESC/COM/RA2/2017-18/5437-38 dt.29.06.2017 issued by the Respondent No.1 w.r.t. payment of damages towards delay in non-fulfilment of conditions precedent vide Annexure AD.
  - d. Set aside the Demand notice bearing No.CESC/Com/RA2/2017-18/20849-51 dated 29.01.2018 issued by the Respondent No.1 w.r.t. payment of liquidated damages towards delay in achieving the COD within Scheduled date vide Annexure AE.
  - e. Pass suitable directions restraining the Respondents from imposing any penalty/damages under the terms of the PPA

including but not limited to levying of Liquidated damages and also that of invoking the Bank Guarantee furnished by Petitioner.

- f. Grant such other and further reliefs as this Commission deems fit in the facts and circumstances of the case and in the interest of justice.

2. The facts submitted by the petitioner are:

- a. The petitioner is a company incorporated under the Companies Act, 1956/2013.
- b. The Government of Karnataka resolved to undertake development of 1200 MW Solar Power projects in Karnataka to be implemented in 60 taluks through private sector participation. In pursuance of the same, the Karnataka Renewable Energy Development Limited (KREDL) had invited proposals by its "Request for Proposal" (RFP) containing terms and conditions for selection of Bidders in respect of the proposed project.
- c. The Parent Company of the petitioner M/s. Karvy Consultants Ltd had placed a bid for setting up of 10 MW Solar Power plant at Shorapur Taluk in Yadgir District and the same was accepted. In compliance with the terms of RFP, the Petitioner company was promoted and incorporated as a special purpose vehicle (SPV) to undertake and perform the obligations and exercise the rights

mentioned in the letter of allotment dated 23.03.2016 and to enter into PPA in respect of the project allotted.

- d. The Petitioner entered into a PPA with the Respondent No.1 on 25.05.2016. The Commission approved the PPA on 27.09.2016 with a direction to modify certain provisions of the PPA by way of a Supplementary PPA. As per the provisions of the PPA, the effective date being the date of approval by this Commission i.e., 27.09.2016, the project ought to be commissioned within 12 months from thereon i.e., within 26.09.2017. The parties entered into a Supplementary PPA on 10.11.2016.
- e. Immediately after the execution of the PPA by the Commission, the Petitioner company started the work related to the project by applying for various consents and approvals, as follows:
- i) Approached banks for financial assistance. A copy of the letter dated 27.5.2016 and 11.7.2016 issued by the SBI expressing its willingness to extend financial assistance is produced as Annexure-F.
  - ii) The Petitioner appointed a land Aggregator to identify and acquire land for the project at Village Kembhavi. A copy of contract dated 01.11.2016 is produced as Annexure-G.

iii) The Petitioner applied for power evacuation feasibility and Grid connectivity to the KPTCL on 07.11.2016 (Annexure H).

iv) Obtained Evacuation approval from KPTCL on 30.03.2017. Copy of Evacuation approval is produced as Annexure J.

v) The Petitioner applied to KPTCL for space for Bay construction. Copy of letters dated 06.05.2017 and 15.05.2017 requesting KPTCL to provide space for Bay construction is produced as Annexure K.

vi) The Petitioner entered into agreements of sale with various land owners in the month of May 2017. Copies of agreements of sale are produced as Annexure L & L1.

vii) The Petitioner approached Tahsildar, Shorapur Taluk on 02.06.2017 to carry out survey of land and issue survey sketch and akarband. Copy of the letter is produced as Annexure M.

viii) The Petitioner applied to the DC, Yadgiri, vide application dated 22.08.2017 for exemption under Section 109 of the Karnataka Land Reforms Act, 1961 which was received in DC's office on 23.08.2017 (Annexure N).

ix) The Petitioner applied to the Department of Labour, Yadgiri for a certificate of registration on 11.08.2017 and obtained the same on 30.8.2017. Copies of application dated 11.8.2017 and certificate of Registration Dated 30.8.2017 are produced as Annexure P & P1. (We note that though the date of application is 11.8.2017, the same is received in the Department of Labour on 30.8.2017, as per the seal on the letter).

x) The Petitioner applied to the Range Forest Officer, Shorapur on 14.09.2017 for NOC to set up the solar project and obtained the same. Copy of the application dated 14.09.2017 is produced as Annexure Q.

xi) The Petitioner applied to the Yalagi Gram Panchayat for NOC on 27.09.2017 and obtained the NOC on 27.10.2017 (Annexure R & R1).

xii) The Petitioner submitted Drawings for approval to the CEIG on 09.11.2017. The CEIG approved the drawings on 14.12. 2017 (Annexure-S& S1).

xiii) Except for compliance related to Section 109 approval, which could not be achieved for reasons beyond the control of the Petitioner and achieving Financial Closure on

account of non-availability of the title documents in the name of the petitioner, the Petitioner has achieved all the other conditions precedent. The petitioner informed the Respondent No.1 about the status of conditions precedent by communication dated 06.07.2017. The Petitioner sought extension of time to commission the project by eight months till 26.5.2018, vide letters dated 26.09.2017 and 25.10.2017 addressed to Respondent-1 (Annexure AC-1 & AC-2).

xiv) The Respondent No.1 refused the request of the Petitioner for extension of time and issued a demand notice to pay damages towards non-fulfilment of conditions precedent vide letter dated 26.09.2017. The Respondent No.1 subsequently issued another demand notice under which liquidated damages equivalent to 100% of the performance bank guarantee i.e., Rs.1 crore was demanded.

xv) The Petitioner commissioned its plant on 23.02.2018 though the plant was ready in all respects on 31.01.2018.

3. The grounds urged by the petitioner are:

- a. Though lands were identified through land Aggregator appointed by Petitioner on 01.11.2016 itself, the Petitioner could not go ahead with signing agreements in this behalf as the

Respondent No.2 had not granted evacuation approval. The Petitioner had applied for Evacuation approval to KPTCL on 07.11.2016, but the same was granted on 30.03.2017, which resulted in belated procurement of lands, affecting the timeline of the project.

- b. After obtaining evacuation approval on 30.03.2017, the petitioner followed up with the land owners and entered into agreements of Sale with land owners in May 2017.
  
- c. After signing the agreements of sale, the petitioner applied for exemption of approval under Section 109 of the Karnataka Land Reforms Act, 1961 from the DC, Yadgiri. However, among the various documents required to be filed along with the application, the Petitioner was advised to obtain survey sketch (11E) from the Tahsildar's office. The Petitioner applied for the said 11 E Sketch on 2<sup>nd</sup> June 2017 as per Annexure-M. The Petitioner was given to understand by the concerned officials at the Tahsildar's office that there were about 700 applications pending for carrying out such survey and on account of pendency of the applications, the registrations were kept in abeyance as unless the sketch was prepared and uploaded in Monjini software and synchronised the same with Bhoomi software, the registrations could not take place.



d. As per the process in Tahsildar's office, once the survey applications are filed with the authorities, the survey applications are allotted to the surveyors online and while doing so, the system adopts round robin allotment approach. There were five surveyors attached to Surpur Tahsildar's office and each one is allotted one survey per day with a unique survey identity number, the result being only 5 survey allotments are done per one working day, provided there is no rain. After completing the said survey, the report is uploaded with sketch/map prepared by the surveyor in the system and only then, the fresh allotments are made by the system for the next lot of survey applications. Once the documents that have been uploaded in Monjini software are synchronised with Bhoomi software (which is used by Revenue authorities), the individual pahanies are generated by Bhoomi software. Further, the survey sketch would get synchronised or mapped with Kaveri software, which is used by the Sub-Registrar for registering the sale deeds upon submission of the physical map/sketch by the parties.

e. Consequent upon the submission of the application for survey on 02.06.2017, the Petitioner was advised to remit the survey fees on 22.08.2017 and accordingly, the same was remitted on 23.08.2017. The Petitioner immediately filed an application for

Section 109 permission with the Deputy Commissioner on 23.08.2017. The Deputy Commissioner, Yadgiri district referred the application to the Tahsildar, vide letter dated 04.09.2017 for processing the same in accordance with law. The Petitioner kept pursuing with the concerned revenue officials regularly and addressed a letter to hasten the process of issuing Section 109 order.

- f. Though the survey was carried out by the Surveyor for drawing the sketch including the aakarbund in August 2017, the same could not be uploaded by the surveyor as the earlier applications which were pending as on the date of application filed by the Petitioner, could not be completed. The survey sketch was uploaded to Monjini software and the sketch for survey nos. 420, 413 and 414 was obtained from the surveyor on 11.12.2017.
- g. The Section 109 approval for 44.14 acres as against the total extent of 61.27 acres in respect of survey nos. 413, 420 and 421, was issued vide order dated 12.01.2018. However, the Section 109 approval for survey no. 414 had been kept in abeyance on account of an interim stay order passed by the Civil court in OS. No. 14/2017 filed before the Civil Judge at Yadgir. This suit was filed by certain persons within the family of the owner post the

execution of the agreement of sale by a farmer with the Petitioner. The suit was later transferred to Senior Civil Judge at Shorapur and the same was renumbered as OS No.11/2017. The Petitioner was impleaded as a party by the Plaintiff. The suit was dismissed vide order dated 08.02.2018.

- h. The Section 109 approval in respect of this land is still pending though the Petitioner has filed the order passed by the court with the Deputy Commissioner office on 12.01.2018. The Section 109 approval for Sy.No.423 comprising 12.13 acres has also been kept in abeyance as certain clarifications with regard to the said survey number were sought by DC's office from Tahsildar's office.
- i. Though the Section 109 approval in respect of certain portion of the land was received as on 16.01.2018, the Petitioner could not commence registration of sale deeds as the Bhoomi software was not functional from 01.12.2017 to 25.01.2018. An endorsement dated 16.02.2018 by the Tahsildar to this effect is produced as Annexure Z. The Petitioner was able to register the sale deeds in respect of Sy.No.420 to the extent of 14.12. acres on 24.01.2018 and in respect of Sy.No.413/2 on 09.02.2018.

- j. After obtaining the pahanis for survey number 413, comprising 25.36 acres in the first week of February 2018, the Petitioner registered sale deed for 4.16 acres on 09.02.2018. The Section 109 order was issued on 12.01.2018 in respect of 44.14 acres and on 13.03.2018 in respect of 12 acres 13 guntas.
- k. Due to the delay in granting evacuation approval and delay in issue of Section 109 approval and consequent delay in registration of lands, the Petitioner was prevented from fulfilling the conditions precedent within the time frame stipulated under the PPA.
- l. Though the financial approval was expressed to be given to the Petitioner by the Bankers in July 2016 itself, they refused to disburse the loan amount for want of land documents in Petitioner's name. The non-disbursement of funds has had a severe financial impact on the project. Due to refusal to disburse funds by the Bankers, the Petitioner raised funds from internal accruals of the group companies. The land registration was delayed and even though the Petitioner had placed orders for equipment from internal accruals of other companies in the group, the delivery of the equipment was kept in abeyance for want of funds.

m. The Hon'ble Appellate Tribunal for Electricity has in the case of Gujarat Urja Vikas Nigam Ltd. V. GERC & ors. In Appeal No.123/2012 upheld the following findings of the GERC:

*“The events during the time period elapsed in obtaining statutory/government clearances from the Governmental instrumentalities towards land and water sources are force majeure events”.*

n. The Respondent No.1 has breached its obligation under clause 6.1.3 (a) and (d) of the PPA, wherein it is required to support and assist the Developer in procuring Applicable permits required from any Governmental agencies for implementation and operation of the Project and to support, cooperate and facilitate the Developer in the implementation and operation of the project in accordance with the provisions of the PPA.

o. As per clause 4.3 of the PPA, damages are to be paid on failure to achieve conditions precedent within the time stipulated subject to two situations viz., when the delay has not occurred for any reasons attributable to ESCOM or due to Force Majeure. In the present case, the delay in completion of conditions precedents is on account of delay in issuing evacuation approval and Section 109 approval falling under the Force Majeure clause. Therefore, the Petitioner is not liable to pay the

damages or the Liquidated damages as per the provisions of the PPA.

p. Though the Petitioner had put in best efforts to complete the project on time, it was on account of force majeure events, the progress of the Project was hindered. The total delay suffered by the Petitioner's project owing to aforesaid force majeure events is 294 days. Despite the delay of 294 days, the Petitioner with all its best and committed efforts, commissioned the project on 23.02.2018 with a delay of 148 days from SCOD (27.09.2017).

q. The Ministry of New and Renewable Energy has issued a communication to all the States, directing the competent authorities to consider the case of extension of time if there are delays of any kind on the part of the State authorities/PSUs like land allotments, transmission/evacuation facilities, connectivity permission or force majeure.

4. Upon Notice, the Respondents appeared through the Counsel, and filed Statement of Objections as follows:

a. The PPA and Supplemental PPA provide for a time frame for achieving COD and conditions precedent. The Agreement also provides for a remedy in the event the said time lines are not met.

The Respondents have acted strictly in accordance with the terms of the PPA. There is no infirmity in the actions of the Respondents. The Respondent-1 has justifiably issued the notice levying damages for non-fulfilment of conditions precedent and the same is strictly in accordance with the terms of the PPA.

- b. The Petitioner is in effect seeking for rewriting of the terms of the PPA, which is impermissible in law.
- c. As per the Article 4 of the PPA, the Petitioner was required to satisfy Conditions precedent within eight months from the effective date. Therefore, the Petitioner was required to achieve conditions precedent on or before 26.05.2017.
- d. As per the Clauses 5.1.1 and 5.1.3 of the PPA, the onus of obtaining all statutory approvals and clearances was on the Petitioner. The Petitioner was required to obtain all necessary statutory approvals such as conversion order from the DC etc. However, the Petitioner has failed to do so. The application for Section 109 approval was made on 22.08.2017, one month before the SCD, as the petitioner had no clear title and possession of the land.
- e. The delay in obtaining approvals cannot be attributed to the Respondents. Such being the case, the Petitioner is liable to pay damages for delay in fulfilling conditions precedent in terms of the Article 4.3 of the PPA.

- f. Article 5.7 stipulates the circumstances in which the Petitioner can be granted extension to commission the project. The Petitioner is entitled to extension of Scheduled Commissioning Date in cases of default by the Respondent or when force majeure events affecting the Petitioner and Respondents.
  
- g. The circumstances cited by the Petitioner to be force majeure events do not fall under the purview of the definition of force majeure clause of the PPA. The non-grant of evacuation approval/non-grant of approval under section 109 by the revenue authorities cannot be construed to be events of Force Majeure.
  
- h. As per Article 14.5 of the PPA, the Petitioner is required to issue a notice by invoking the force majeure clause within 7 days from the day the party to the PPA should have reasonably known of the said event of force majeure. The Petitioner has failed to adhere to the said requirement. Therefore, it is not open to the Petitioner to now claim that non-furnishing of evacuation approval and obtaining of Section 109 approval is an event of force majeure. It is settled law that without issuing of notice of force majeure event, the said clause is not enforceable.



- i. In so far as the Petitioner's contention on delay in granting of evacuation approval, the Petitioner applied for grant of evacuation approval only on 07.11.2016, 6 months after the PPA was signed. On 16.11.2016, the KPTCL addressed a letter to the Petitioner requesting for additional documents and processing fee for grant of evacuation approval. One of the documents sought was the details of processing fee paid to KREDL, as KREDL had issued a letter dated 03.08.2016 to the Respondent No.2 stating that no evacuation approval could be granted unless proof of facilitation fee was furnished.
- j. The Petitioner made payment towards the processing fee only on 06.01.2017 but did not furnish details of facilitation fees paid to KREDL. Even after the field report was submitted by the officer of the Respondent No.2 on 13.02.2017, the Petitioner had not submitted documents pertaining to payment of facilitation fee. However, in the interest of project, the tentative evacuation approval was granted on 17.03.2017 with a condition that necessary details regarding facilitation fees should be provided to the Respondent No.2. The regular evacuation approval was granted on 30.03.2017. Therefore, the delay in furnishing evacuation approval was solely because of the failure on the part of the Petitioner to furnish the necessary details and there was no delay on the part of the KPTCL in granting evacuation approval.

The Petitioner produced the receipt of payment of facilitation fee only at the time of interconnection approval.

- k. Insofar as the averments of the Petitioner with regard to delay in obtaining sketches and approval under Section 109 from the revenue authorities, although the Petitioner has adverted to this elaborately, the Petitioner has conveniently failed to refer to the terms of the PPA which puts the onus of obtaining all approvals from Government authorities on the Petitioner. Therefore, the contentions of the Petitioner are wholly untenable and deserve rejection. The Respondents cannot be penalised for lapses on the part of the petitioner in getting the necessary approvals from the concerned authorities.
- l. The Respondent-1 is a public utility and non-receipt of electricity within the stipulated timeframe comes at a price. The Petitioner ought not to be absolved of its obligations and duties under the PPA on the ground of delay, which is caused wholly and solely by the Petitioner itself. This Commission in its letter dated 13.9.2017 was of the opinion that no specific provision under the PPA was made out to grant extension of time to the Petitioner.
- m. A contract has to be interpreted in the manner in which it was intended to be done and plain meaning of the terms of the

contract ought to be adopted. The Petitioner cannot be permitted to alter the terms of the PPA to suits its needs. When the language of the contract is clear, the question of providing any other interpretation running contrary to the plain terms of the contract is impermissible.

- n. The Petitioner has relied on Clause 6.1.3 of the PPA to state that there is an obligation on the Respondents to provide assistance to the Petitioner when the same is requested for. No written request was ever submitted to the Respondents seeking any assistance whatsoever. Without following the procedure set out in the contract, the petitioner cannot seek the benefit under this Article of the PPA.
- o. The Petitioner started identifying property for construction of the plant by appointing a Land Aggregator only on 01.11.2016, 6 months after the PPA was signed by the parties. The Petitioner obtained NOC from the forest department and gram panchayat on 17.09.2017, 16 months after signing and execution of PPA. The Petitioner obtained complete rights over the land for the project vide absolute sale deed dated 21.01.2018. These delays are not explained by the Petitioner in the Petition nor reasons for the same were forthcoming in the project status reports.

- p. KREDL gave the letter of intent to the petitioner on 23.03.2016. The PPA was executed on 25.05.2016 with Respondent No.1 and the approval of this Commission was obtained on 27.09.2016. The application for evacuation scheme approval was submitted only on 07.11.2016, 97 days after the PPA was executed. The fees for the same was paid only on 06.01.2017 after a delay of 60 days. The Petitioner, in June 2017 applied to the Tahsildar for the survey sketch. The Petitioner has made unsubstantiated claims attaching the reason for delay in conducting the survey, the delays caused in the software to upload the necessary documents and the case pending before the Hon'ble Senior Civil Judge, Shorapur. None of the reasons assigned by the Petitioner for delay is attributable to the Respondents.
- q. The onus of raising capital was on the Petitioner. The reason stated for the delay that the petitioner did not have a lender the land was not in its name is untenable. The State Bank in its letter dated 11.07.2016 had indicated the willingness to sanction the loan subject to technical and economical viability of the project and other approvals from the authorities.
- r. The reliance placed on the judgement of the Hon'ble ATE in Appeal No.123/2012 is misconceived. The said judgment has no application to this case. The reasoning of ATE to uphold the GERC

order was that the PPA therein had a specific provision in Article 8.1 (a)(v) to include delay in obtaining the approvals by the government instrumentalities as a force majeure event and the prerequisite notice was served on the necessary parties. In the present case, no specific provision is made out in the PPA entered into between the Petitioner and the Respondent No.1. The petitioner has also failed to make reference to any provision in the PPA to substantiate the ground. The delay in the present case is not on the part of the Respondents/Government as alleged but by the petitioner itself.

- s. The averment made that the Ministry of New and Renewable Energy has addressed a letter to the Governments to direct the competent authority to consider the delays on the part of the State government in land allotment, transmission facilities etc., does not have any bearing on the present case and must not be considered. The delays in the present case have been caused by the Petitioner itself. Therefore, no benefit ought to accrue to the Petitioner on account of the MNRE letter.
- t. The averment that the Petitioner's plant was ready for commissioning in all respects as on 31.01.2018 is denied. The Petitioner submitted drawings of electrical installation for approval to the CEIG on 09.11.2017 after the lapse of scheduled

commissioning date and this shows that the Petitioner was not diligent in executing the project.

u. The Respondents have prayed to dismiss the petition with costs.

5. We have heard the oral submissions made by the learned counsel for the parties. The following Issues would arise, for our consideration:

(1) Whether the Petitioner has made out a case for deferment or extension of time for achieving the Conditions Precedent and the Scheduled Commissioning Date of its Plant?

(2) What should be the tariff for the Project for the term of the PPA?

(3) What Order?

6) After considering the submissions of the parties and perusing the material placed on record, our findings on the above Issues are as follows:

7) ISSUE No.(1): Whether the Petitioner has made out a case for deferment or extension of time for achieving the Conditions Precedent and the Scheduled Commissioning Date of its Plant?

(a) The achievement of the financial closure, obtaining of the power evacuation approval from the KPTCL / ESCOM and acquiring the land required for the Project in the name of the Project Developer, are the

main items, which have to be complied for fulfilling the Conditions Precedent.

(b) It is the allegation of the petitioner that the delay in grant of evacuation approval and the process of acquiring the land had hampered the execution of the project within the time line stipulated in the PPA and that these events have to be considered as force majeure events. The respondents have contended that it was the obligation of the petitioner to obtain all the approvals within the time line and that the delay was not caused by any action/inaction of the respondents and the petitioner has to pay damages for the delay in commissioning of the project and achieving the conditions precedent as such.

(c) Admittedly, there is a delay in achieving the Conditions Precedent, viz., in obtaining the power evacuation approval from the KPTCL and in producing the documentary evidence for having acquired the title and possession of the land acquired for the Project in the name of the Developer. Unless these are the grounds established by the Petitioner for the extension of time for achieving the Conditions Precedent, the Petitioner would be liable for payment of damages under Article 4.3 of the PPA, for the delay in achieving the Conditions Precedent.

(d) We note that the draft PPA was a part of the RFP and hence, the petitioner had knowledge of the various time lines prescribed in the PPA for achieving Conditions Precedent and commissioning of the project.

The LoA was issued to the petitioner by KREDL on 23.03.2016 with a stipulation to enter into the PPA with Respondent-1 within 30 days from the date of receipt of the LoA. The PPA was executed by the parties on 25.05.2016. The PPA was approved by the Commission on 27.09.2016, subject to certain modifications suggested by the Commission. A copy of the letter of approval of the PPA was marked to the allottee of the project. The SPPA incorporating the modifications was executed on 10.11.2016. The effective date, as defined in the PPA, is the date of approval of the PPA, i.e., 27.09.2016. As per Clause 4.1 of the PPA, the conditions precedent had to be achieved within 8 months from the effective date and the project had to be commissioned within 12 months from the effective date. Therefore, the Conditions Precedent had to be achieved within 26.05.2017 and the project had to be commissioned within 26.09.2017. The project was commissioned on 23.02.2018, with a delay of 149 days.

e) We note that Clause 14.3 of the PPA provides the force majeure events and Clause 14.4 provides for force majeure exclusions. Clauses 14.3 (e) and 14.4 (f) of the PPA require that the developer has to be diligent in executing the project and that the negligent acts, errors or omissions of the non performing party do not constitute force majeure event. In this backdrop, we need to examine whether the delay in achieving conditions precedent and commissioning of the project were due to any negligent act or omission by the developer/petitioner.



f) It is alleged by the petitioner that the Respondent-2 caused delay in granting evacuation approval. We note that the application for evacuation approval was made by the petitioner to the Respondent-2 on 07.11.2016 (Annexure H). Before applying for evacuation approval, the petitioner was required to identify the location of the project. In the application dated 07.11.2016, the petitioner has mentioned that it had identified the land at Kembhavi. On 16.11.2016 (Annexure R-7), Respondent-2 sought for certain documents (PPA, SPPA, details of SPV, DPR & toposheet showing the exact location of the project) and requested to remit the processing fee and to produce the receipt for having paid the facilitation fee to KREDL. It was also mentioned in the said letter that the request for evacuation approval would be processed only after the petitioner complied with the above conditions. In response to this letter, the petitioner paid the processing fee and produced the documents to the Respondent-2 on 06.01.2017 (Annexure R-8 & R-9). Thereafter, the tentative evacuation approval was granted on 17.03.2017 and on receipt of acceptance from the petitioner on 23.03.2017, the regular evacuation approval was granted on 30.03.2017. Looking at the above sequence of events, it is seen that there is a delay of more than 5 months from the date of PPA in applying for evacuation approval, 51 days in paying the processing fee and producing the documents sought. These delays are not explained by the petitioner. The regular evacuation approval is granted by Respondent-2 within a total period of 75 days from 06.01.2017, which cannot be termed as delay.

g) The petitioner appointed the land aggregator to identify and acquire the land for the project and entered into an agreement with the aggregator on 01.11.2016. This is more than 5 months from the date of PPA. This delay is not explained by the petitioner. The agreements for sale were entered into with the land owners in May 2017 and the reason for this delay is attributed by the petitioner to the delay in grant of evacuation approval. As mentioned above, in the application dated 07.11.2016 for evacuation approval, it is stated that land was identified at Kembhavi, however, the agreements for sale were entered into in May 2017, after more than 6 months. This gap is not explained. We have noted above that there was a huge unexplained delay by the petitioner in applying for evacuation approval, paying the processing fee and producing the documents sought by KPTCL. Had the petitioner been diligent and taken immediate action, the evacuation approval would have been granted much earlier. Therefore, we are unable to accept the reason given by the petitioner that delay in granting evacuation approval delayed the process of acquiring the land. The Conditions precedent had to be achieved within 26.05.2017 and by this time, the petitioner admittedly had not acquired the lands in its name and hence did not achieve the conditions precedent. The subsequent events mentioned by the petitioner about the delay in the Tahsildar's office or the DC's office have not caused delay in establishing the project, for the reasons mentioned below.

h) We also note that the petitioner obtained the sale deeds in respect of the lands in January and February 2018 (Annexure AA, AA1 and AA2). The sale deeds mention that possession of the lands was taken by the petitioner at the time of execution of sale deeds. It is stated by the petitioner that the project was ready on 31.01.2018. It appears that the possession of lands must have been taken while executing the agreements of sale in May 2017. Otherwise, it was not possible to complete the project works in January or February 2018, as claimed by the petitioner. It appears that for avoiding payment of higher stamp duty and registration of the agreements of sale, the possession was shown to be not taken under the agreements for sale. This leads to the inference that the subsequent events mentioned by the petitioner about the delay in Tahsildar's office or the DC's office, have not affected the implementation of the project. Therefore, it can be stated that the process of obtaining sale deeds, the litigations before the Civil Court and the Conversion order have not caused delay in the execution of the project and hence, cannot be considered as force majeure events which have affected the commissioning of the plant. The statement of the petitioner that the plant was ready on 31.01.2018 also cannot be accepted, as the construction of 33 kV terminal bay was completed by the petitioner on 06.2.2018, as per the letter at Annexure AK and thereafter on 09.02.2018 (Annexure AM), the petitioner requested for inter connection approval of the plant. The plant was commissioned on

23.02.2018. For the above reasons, we hold that the delay by the revenue offices in granting conversion of land or other acts related to the land procurement, has not affected the execution of the project and therefore, cannot be treated as a force majeure event.

i) For the foregoing reasons, we answer Issue No.1 in the negative.

8. Issue No. 2: *What should be the tariff for the Project, for the term of the PPA?*

(a) Articles 12.1 and 12.2 of the PPA read as follows:

*"12.1 The Developer shall be entitled to receive the tariff of Rs. 5.13 per kWh of energy supplied by it to CESC, Mysore in accordance with the terms of this Agreement during the period between the COD and the Expiry Date.*

*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."*

(b) Article 12.2 of the PPA, extracted above, provides for reduction of tariff, as a consequence of the delay in commissioning of the Solar Power Project beyond the Scheduled Commissioning Date, subject to certain terms and conditions stated therein. This is in view of the fact that this Commission periodically determines generic tariff, for supply of electricity generated from the various sources, to the Distribution Licensees, based on mainly Capital cost of the generating plant. Such generic tariff is made available for a period called 'Control Period' during which the Generating Plant gets implemented and commissioned, after the execution of PPA with the Distribution Licensee. Such PPA also has a clause, stipulating the time, within which the power supply should commence, so that the Distribution licensee can plan supply to its consumers. Any delay or failure in the commencement of power supply, within the agreed date, would disrupt the operation of the Distribution Licensees, which could also result in power procurement from alternative expensive sources, leading to higher retail tariff to the consumers or short supply, leading to revenue loss to the Distribution Licensees, and imposition of penalties for not meeting the Renewable Purchase Obligation (RPO) fixed by this Commission. The Capital Cost of the Solar Power Plants has been coming down, very rapidly, in the recent years, because of the advancement in technology and the production efficiency, as well as economies of scale because of largescale Solar capacity addition, across the globe. Thus, generic tariff for megawatt scale

Solar Power Plants, which was fixed at Rs.14.50 per unit in the Commission's Order dated 13.07.2010, has been successively reduced to Rs.8.40 per unit in the Order dated 10.10.2013, Rs.6.51 per unit in the Order dated 30.07.2015, Rs.4.36 per unit in the Order dated 12.04.2017, Rs.3.05 per unit in the Order dated 18.05.2018 and Rs.3.08 per unit in the Order dated 01.08.2019.

- (c) The Petitioner is not entitled to the tariff, originally agreed to in the PPA, at Rs.5.13 per unit, when admittedly the Plant was not commissioned within the stipulated time and it is entitled only for the revised tariff as on the date of commissioning of the Plant as per Article 12.2 of the PPA. The generic tariff for the Solar Power Plants was revised much before the Plant was ready for commissioning. The Petitioner having voluntarily entered into a PPA, which has a clause providing for revision of the tariff agreed to, if there is a delay in commissioning of the Project, within the scheduled period, cannot now wriggle out of such a clause without valid grounds.
- (d) The PPA provides that, the tariff on the date of commercial operation will be applicable for the Project. The Project, as per the certificate produced, is commissioned on 23.02.2018. The Certificate of the Department of Labour, Yadgiri, dated 30.08.2017 produced at Annexure P1, mentions the probable date of commencement and completion of work as 'from 01.9.2017 to 31.03.2018'. We may safely infer that, the major part of the investments have been made, after

the receipt of necessary approvals, in the year 2017, by which time, the Capital Cost had come down, substantially, as compared to the date when the Petitioner bid for the Project, and consequently, the Commission had revised the generic tariff for the Solar Power Projects, based on such Capital Cost.

d) The Hon'ble Supreme Court of India, in Civil Appeal No. 1220 of 2015 (*Gujarat Urja Vikas Nigam Limited VS EMCO Limited and another*), decided on 02.02.2016, has held, as follows:

*"31. Apart from that both the respondent No.2 and the appellate tribunal failed to notice and the 1<sup>st</sup> Respondent conveniently ignored one crucial condition of the PPA contained in the last sentence of para 5.2 of the PPA: -*

*'In case, commissioning of solar Power Project is delayed beyond 31<sup>st</sup> December 2011, GUVNL shall pay the tariff as determined by Hon'ble GERC for Solar Projects effective on the date of commissioning of solar power project or above mentioned tariff, **whichever is lower.**'*

*The said stipulation clearly envisaged a situation where notwithstanding the contract between the parties (the PPA), there is a possibility of the first Respondent not being able to commence the generation of electricity within the "control period" stipulated in the 1<sup>st</sup> tariff*

*order. It is also visualised that for the subsequent control period, the tariffs payable to PROJECTS/ power producers (similarly situated as the first Respondent) could be different. In recognition of the said two factors, the PPA clearly stipulated that in such a situation, the 1<sup>st</sup> Respondent would be entitled only for lower of the two tariffs...."*

- e) Further, in the decision of the Hon'ble Appellate Tribunal for Electricity, in Appeal No.221/2016 and others, dated 07.05.2018 (*Savitha Oil Technologies Ltd vs KERC & another*), it has been held that, the tariff, as on the Commercial Operation Date, is applicable for a Project.
- f) The ratio of the above judgments of the Hon'ble Supreme Court of India and of the Hon'ble Appellate Tribunal for Electricity, is applicable to the Petitioner's case. Hence, we hold that the Petitioner's Plant is entitled to a tariff of Rs.4.36 per unit for the term of the PPA, as per the Generic Tariff Order dated 12.04.2017, prevalent as on the date of commissioning of the Project. Hence, in the circumstances and on the facts of the case, we hold that the Petitioner's Plant is entitled to a tariff of Rs.4.36 per unit for the term of the PPA, as per the Generic Tariff Order dated 12.04.2017.
- g) The PPA provides for levy of damages under Articles 4.3 and 5.8, for delay in achieving conditions precedent and commencement of supply of power, respectively. We note that, in the decision reported



in (2018) 6 SCC 157, in the case of Madhya Pradesh Power Management Company Limited – Vs- Renew Clean Energy Private Limited and another, the Hon'ble Supreme Court has held that, where the contract provides for claiming damages and also for termination of the contract, for the delayed performance, the damages in terms of the Agreement could be claimed, instead of taking steps for termination of the Agreement and that, under such circumstances, the Liquidated Damages as per the Agreement could be awarded. Therefore, we are of the considered view that, the Liquidated Damages, as agreed to, could be awarded, where steps for the termination of PPA were not taken. As we have held that the petitioner was not prevented by any force majeure event in execution of the project, the petitioner would be liable to pay damages mentioned in the PPA.

h) Accordingly, we answer Issue No.(2), as above.

9. ISSUE No.(3): *What Order?*

For the foregoing reasons, we pass the following:

**ORDER**

(a) The Petition is dismissed and the Petitioner is not entitled to any of the reliefs sought for;

- (b) The Petitioner is entitled to a tariff of Rs.4.36 (Rupees Four and Paise Thirty Six) only per unit, the varied tariff as applicable on the date of commissioning of the Petitioner's Plant, as fixed by the Commission in the Order dated 12.04.2017, for the term of the PPA, as per Article 12.2 of the PPA; and,
- (c) The Petitioner is liable to pay Liquidated Damages, as provided under Articles 4.3 and 5.8 of the PPA.

Sd/-  
(SHAMBHU DAYAL MEENA)  
CHAIRMAN

Sd/-  
(H.M. MANJUNATHA)  
MEMBER

Sd/-  
(M.D. RAVI)  
MEMBER