

No. N/70/18

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

Dated: 07.09.2021

Present

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

OP No.31/2018

BETWEEN:

M/s. Asian Fab Tec Limited,
Plot No.15, II Phase,
Peenya Industrial Area,
Bengaluru-560058.
(Represented by its Managing Director
Sri K.H. Puttaswamy Gowda)

...PETITIONER

(Represented by Sri Reuben Jacob, Advocate)

AND:

1. Bengaluru Electricity Supply Company Limited,
K.R. Circle,
Bengaluru – 560001.
(Represented by its Managing Director)
(Represented by Sri Shahbaaz Husain, Advocate)

...RESPONDENT

ORDERS

This petition filed by the Petitioner under Section 86 of Electricity Act 2003, praying for the following reliefs, to: -

- a) Approve the extension of time of three months for achieving scheduled commissioning date granted by

BESCOM as per its letter dated 17.11.2017 vide Annexure-A, without any change of tariff in respect of the Petitioner's Solar PV 20 MW Solar PV Project in Gowribidanur Taluk, Chikkaballapura District as per Power Purchase Agreement dated 03.06.2016 vide Annexure-E;

b) Pass such other order/s as this Commission deems fit in the facts and circumstance of this case.

1. The brief facts set out in this petition are as under: -
2. The Karnataka Renewable Energy Development Corporation (in short KREDL), the nodal agency for the development of renewable energy projects in the State of Karnataka, issued a request for proposal on 20.11.2015 from various eligible, entitled developers for development of projects for generation of 1200 MW (AC) through solar power projects. The Petitioner herein pursuance of the said request for proposal has submitted its bid for development of 20 MW Solar PV Project in Gowribidanur Taluk, Chikkaballapur District, Karnataka State. After evaluation of the proposals of the different bidders the bid offered by the Petitioner was accepted and accordingly, a letter of award and allotment letter dated 23.03.2016 were issued in favour of the Petitioner for the said project. Thereafter, a Power Purchase Agreement (PPA) was entered into on 03.06.2016 between the Petitioner and the Respondent (Annexure-A). The said PPA was

approved by the KERC on 07.10.2016. Thereafter two supplemental PPAs have been executed (Annexure-B & B1). As per Clause 3.1 of the PPA, the effective date is defined as the date of getting concurrence from the KERC. As per the Clause 8.5 of PPA the developer had to commission the project within 12 months from the effective date. The effective date was 07.10.2016 and the project was required to be commissioned by 06.10.2017.

3. Further it is stated in the petition that, the Petitioner vide letter dated 28.09.2017, requested for extension of two and half months in order to achieve commissioning of the project and the reasons assigned by the Petitioner and the reply of BESCOM are reproduced as here under: -

“ By communication dated 28-09-2017, the petitioner herein requested for extension of two and half months in order to achieve commissioning of the project. The reasons assigned in seeking for extension reads as follows:

“We have been seeing very heavy rainfall continuously from August 2017 to till date. We also understand that these rains are said to the heaviest in last 15 to 20 years.

We wish to bring to your kind notice that, due to heavy rainfall we were unable to execute the project as per our planning as these rains have damaged our equipment foundations and tower structural bases. The rains have caused interruption in our working at the project site and also water has clogged our cable ducts, many of our civil structures have also been damaged (photos enclosed). To reconstruct all the damaged works and to re-

erect the equipments and tower structures, we need at least 2 months time to complete. We now request you to give us the time extension for further 2 1/2 months from scheduled commissioning date and oblige."

By communication dated 17-11-2017 BESCO informed the petitioner regarding its approval of extension of time upto 06-01-2018, which letter reads as follows:

"Inviting reference to the above subject, PPA was executed on 29.6.2016. As per PPA Article 8 (Clause '8.5'), the Developer shall Commission the project within 12 (Twelve) months from the effective date, effective date being the date of approval of PPA by KERC. Hence, the project was to be commissioned within 06.10.2017. But the project has not been commissioned within SCOD.

Further, it was requested vide your letter cited under ref (3) to extend the commissioning date by 3 months from SCOD i.e., upto 06.01.2018.

Hon'ble KERC vide letter cited under ref (3) has directed as follow.

- i. To allow the developer of the said projects to commission the Solar Project.
- ii. As per the terms of the original PPA, depending upon the actual Commercial Operation Date (CoD), the BESCO should enforce reduced tariff, recovery of liquidated damages due to delay in achieving the CoD and other related aspects, and
- iii. To direct the developer of the said projects, to file a petition before the Commission after successful commissioning of the project with all the relevant grounds/documents, for justifying their claims for extension of time under Force-majeure conditions of the PPA, if so advised.

Hence, in this regard, I am directed to communicate the approval of BESCO to

commission the project on or before 06.01.2018, subject to the following conditions:

- *To file a petition before the Commission, with all the relevant ground/documents for justifying the claims for extension of time under Force-majeure conditions of the PPA.*
- *The tariff applicable is as per Article 12 (clause 12.2) of PPA.*
- *At present, the prevailing varied tariff applicable as per KERC Tariff Order dated: 12.04.2017.*
- *The liquidated damages as per PPA clause 4.3 and 5.8 are applicable.*
- *The contract performance guarantees are valid upto 02.06.2018. Hence, the same are to be extended upto 02.09.2018 and extended CPGs are to be furnished within 15 days from the date of this letter.*

However, this approval issued purely based on the request of Solar Power Developer for the purpose of commissioning of the said project only."

4. Further the Petitioner stated that, within the said extended period the Petitioner has commissioned the project and in that regard a commissioning certificate dated 24.01.2018 has been issued by KPTCL (Annexure E). Thereafter, in view of the condition/direction in letter dated 17.11.2017 (Annexure D) received from the Respondent, the Petitioner has preferred this petition on the following grounds: -

- a) The Petitioner has stated that, for two months i.e., in August and September 2017 there was very heavy rainfall at the project site. Due to heavy rainfall the Petitioner was unable to execute the project as per

plan as these rains had damaged the equipment foundations and tower structural bases. The rains also caused interruption in the work at the project site and also water had clogged in the cable ducts. The civil structure were also damage. In order to reconstruct all the damaged work and to re-erect the equipment and tower structures, the Petitioner needed additional time of 3 months, and 3 months extension granted till 06.01.2018 and the Petitioner has completed and commissioned the project within the said extended time period. The Petitioner has submitted the photograph of the project site as a proof of damage in the plant site, which clearly shows the extent to which the rain had caused disruption of construction and installation activities over the site. This clearly falls within the force majeure events, which affected the developer, whereby, the developer is prevented from performing its obligation under Article 5.1 of the PPA. Article 5.7.1 provides that the SCOD shall be deferred subject to the limit prescribed in Article 5.7.2 and Article 5.7.3 for reasonable period but not less than day to day basis to permit the developer through the use of due diligence to overcome the effect of the force

majeure events affecting the developer. Article 5.7.2 provides that the extension shall be granted by not more than six months. In the present case the Petitioner has produced evidence on record to show that the project site and construction and installation work was hampered on account of rain which is a force majeure event, hence the benefit of the said Article 5.7 may be given to the Petitioner.

- b) Petitioner further stated that, if the above said aspects regarding the force majeure event is considered then the Petitioner would be entitled for extension of SCOD by six months without incurring any penalty regarding liquidated damages or change in the applicable Tariff. The Petitioner was granted extension of time by three months to commission the project and to apply to KERC with all the relevant grounds/documents for justifying the claims of extension of time under force majeure conditions of the PPA. The Petitioner's project in the question was already commissioned within the extended period of three months granted by the Respondent. Considering all these aspects, the present case is deserving case for approval of extension of time for achieving SCOD by three

months without any penalty and at the Tariff agreed in the PPA. In view of the above, the Petitioner prays to allow the petition as prayed for, in the interest of justice and equity.

5. Upon the notice, the Respondent appeared through his Counsel and filed statement of objections. In the said objections statement the Respondent has stated that, the Petitioner herein owns 20 MW Solar Power Plant at Gowribidanur Taluk, Chikkaballapur District Karnataka. KREDL vide request for proposal (RfP) dated 20.11.2015 had called bids for development of Solar Power Projects in 60 Taluks of Karnataka. The Petitioner being one of the successful bidder was issued with letter of award and allotment dated 23.03.2016 for development of 20 MW Solar Power Project at Gowribidanur Taluk.
6. Further it is stated that, on 03.06.2016 the Petitioner executed a PPA with the Respondent/BESCOM. KERC vide letter dated 07.10.2016 approved the PPA subject to certain modification. As per Article 3.1 of the PPA, the effective date is the date on which the Commission gives its concurrence to the PPA. The Petitioner herein was required to commission the Project within 12 months from the effective date as per Article 8.5 of the PPA. Therefore, the Petitioner was required to commission its project on or before 06.10.2017.

7. Further it is stated that, on 28.09.2017 the Petitioner herein requested for extension of two and half months time in order to achieve commissioning of project stating the reason of heavy rainfall which caused disruption and damage to the constructed property and the plan laid down to achieve functioning of the said project. On 17.11.2017 the Respondent approved the extension of time for 3months which is upto 06.01.2018 to the following conditions: -

- *To file a petition before the Commission, with all the relevant ground/documents for justifying the claims for extension of time under Force-majeure conditions of the PPA.*
- *The tariff applicable is as per Article 12 (clause 12.2) of PPA.*
- *At present, the prevailing varied tariff applicable as per KERC Tariff Order dated: 12.04.2017.*
- *The liquidated damages as per PPA clause 4.3 and 5.8 are applicable.*
- *The contract performance guarantees are valid upto 02.06.2018. Hence, the same are to be extended upto 02.09.2018 and extended CPGs are to be furnished within 15 days from the date of this letter.*

8. Further it is stated that in the objection statement, on 19.11.2016 a Supplementary PPA was executed with the Petitioner and on 27.09.2017 a second Supplementary PPA was executed between the Petitioner and the Respondent incorporating the modifications suggested by the Commission in respect of effective date. On 24.01.2018 KPTCL issued the Commissioning Certificate certifying that the Petitioners plant was interconnected to the KPTCL's substation on 06.01.2018.

The Petitioner has commissioned its plant within the extended scheduled commissioning date i.e., 06.01.2018 and the Petitioner claimed that he is entitled for tariff as agreed in the PPA.

9. Further the Respondent stated that, the contention taken by the Petitioner that there was heavy rainfall at the project site and was unable to execute the project as per plan due to damage to their equipment foundations and tower structural bases, and that the civil structures were also damaged, but the Petitioner failed to produce substantial evidence in proof of the same. Hence, these contentions taken by the Petitioner are denied by the Respondent as false.
10. Further it is the contention of the Respondent that, the Petitioner has produced few photographs which do not in any way point towards damage of civil structures or damage to tower structures. Further it is stated that, it is common knowledge that the month August and September are part of the monsoon season in Karnataka and rain should have been expected during that period. The Petitioner had tried to exaggerate the volume of the rain by calling it as the heaviest rainfall in the last 15 to 20 years. But has not produced one shred of proof for the same. In fact a simple Google search for the same would show that August 2013 was to time the rainfall was heaviest in Karnataka not August 2017.

11. The Petitioner in Para 8 of the petition has attempted to mislead this Commission that heavy rainfall clearly falls within the Force majeure events whereas Article 14.3 of the force majeure states as follows: -

“14.3.1 A force majeure means any event or circumstance or combination of events including those stated below which, wholly or partly prevents or unavoidably delays an affected party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices:

- a. Act of god, epidemic, extremely adverse weather conditions, lightening, earthquake, landslide, cyclone, flood, volcanic eruption, chemical or radioactive contamination or radiation or fire or explosion...”*

Under these facts and circumstances, the Petitioner is not entitled to an extension of six months without any penalty regarding liquidated damages or change in applicable tariff. With this the Respondent prays to dismiss the petition in the interest of justice.

12. In response to the statement of objections filed by the Respondent, the Petitioner has filed the rejoinder stating that, the Respondent is relying upon a report published regarding annual seasonal rainfall data in Karnataka during 2017 published by the Directorate of Economics and Statistics, Government of Karnataka and on the basis of the data in the

said report it is contended that the said statistics show that during the said period of August and September i.e., during South West monsoon, the said area experienced a deficit in rainfall. Further stated in response thereto, that the said rainfall statistics is a macro level statistic at District Level and Taluka level. The Petitioner has obtained micro level statistics from Karnataka State National Disaster Monitoring Centre (in short KSNDMC), i.e., daily rainfall data for the month of August and September 2017 in respect of Alakapura Village, where the project of the Petitioner is located. On perusal of this micro level data, the Respondent stated that the total rainfall received during the month of August and September 2017 in the said area is 410 mm. However, when the same is compared to the macro data the normal and actual rainfall for the entire Gowribidanur Taluk for 4 months i.e., from June 2017 to September 2017 is 321 mm as against the normal of 379 mm. Hence, on a comparison of the macro data with the micro data it is evident that there has been heavy rainfall in the village where the Petitioners project is located. Hence, reliance placed by the BESCO on macro rainfall data is misplaced and does not give the correct picture. Further it is stated that, the contention taken by the Respondent in his objection statement that heavy rainfall will not fall within force majeure

event under Article 14.3 of the PPA, this contention is based on a very narrow and impractical interpretation.

13. Further it is stated that, Clause 5.7 of PPA deals with extension of time and provides that in certain contingencies stated therein the developer can be granted extension of time by not more than 6 months. This extension when sought by the developer, it has to be decided by the BESCO as the PPA contract is between the Petitioner and the BESCO. When the developer seeks extension of time under Clause 5.7, then the BESCO has to decide whether to grant extension or not after taking into consideration all the relevant materials and KERC has no jurisdiction to intervene at that stage and BESCO had to take a decision on its own instead of writing to KERC which is contrary to the Clause 5.7 of the PPA which amounts to abdication of its rights under the PPA.
14. Further it is stated that, in response to the BESCO's letter dated 28.09.2017, KERC has by its letter dated 04.10.2017 directed the Respondent to in turn direct the Petitioner to approach the KERC after successful commissioning of the project by filing a petition. This direction of KERC has been communication to the Petitioner through a letter dated 17.11.2017 (Annexure D). The Petitioner contended that, the administrative direction of KERC issued to BESCO to direct the developers to file a petition before KERC for extension of time,

thereby prohibiting BESCO from taking a decision in terms of the PPA, is arbitrary and illegal.

15. The Petitioner stated that, the Hon'ble High Court of Karnataka in WP No. 51518/2016 decided on 27.08.2019 in a case where at the direction of the KERC, concerned ESCOM has rejected the request for extension of time has held that it is the ESCOM which has to independently considered the grant of extension of time in terms of the relevant Clause of PPA without seeing any direction or opinion from KERC. The direction issued to the Petitioner by KERC through BESCO directing the Petitioner to file a petition before the Commission justifying the claim for extension of time literally amounts to usurpation of power vested in BESCO under the PPA by KERC which is illegal as held by the Hon'ble High Court in WP No. 51518/2016 (Annexure A4). With this the Petitioner prays to allow the original petition in the interest of justice and equity.
16. We have heard the oral submissions of the Learned Counsel for both the parties and perused the records.
17. From the above pleadings and submissions made by the parties the following issues would arise for our considerations: -
 - a. Issue No. 1: - Whether the Petitioner has made out a case for extension of time of 3 months for achieving the conditions precedent and

the commissioning of the project on the ground of force majeure?

- b. Issue No. 2:- Whether the Petitioner has proved that due to heavy rainfall he could not achieve functioning of the project and it would fall under the definition of Force Majeure as per Article 14.3 of PPA?
- c. Issue No. 3:- Whether KERC has jurisdiction to entertain this petition in view of the observations made by the Hon'ble High Court of Karnataka in WP No. 51518-51519/2016 (GM-RES)?
- d. Issue No. 4:- For what relief the Petitioner is entitled to?
- e. Issue No. 5:- What Order?

18. Issue No. 3 is treated as preliminary issue, hence taken up for discussion.

19. Issue No. 3:- Whether KERC has jurisdiction to entertain this petition in view of the observations made by the Hon'ble High Court of Karnataka in WP No. 51518-51519/2016 (GM-RES)?

- a. During the course of arguments, the Learned Counsel for the Petitioner has submitted that, he has filed the present petition before the KERC seeking approval to the

extension of time of three months for achieving the SCOD granted by BESCO as per letter dated 17.11.2017 without any change of tariff in respect of the Petitioner's Solar Power Project in Gowribidanur Taluk, Cikkaballapura District as per the PPA dated 03.06.2016. According to Article 8.5 of PPA the Petitioner herein was required to commission the project within 12 months from the effective date. Therefore, he was required to commission the project on or before 06.10.2017. But due to heavy rainfall as contended in the petition, the Petitioner could not achieve the commissioning of the project thereby, the Petitioner requested for extension of two and half months time in order to achieve the commissioning of the project through a letter dated 28.09.2017. In turn the PPA, the Respondent approved the extension of time as per the directions issued by KERC for three months upto 06.01.2018 subject to the conditions mentioned in Annexure-D. Thereafter, on 24.01.2018 KPTCL issued the Commissioning Certificate as per Annexure-E, that the plant was commissioned on 06.01.2018.

- b. Further, the Petitioner has submitted that the PPA (Annexure-A) is entered into between the Petitioner and BESCO and the privity of contract is between himself and the BESCO only. As per Clause 5.7.2 of PPA which

deals with extension of time and provides that in certain contingencies stated therein the developer can be granted extension of time but not more than six months. This extension of time when sought by the developer has to be decided by BESCO as per the PPA contract is between the Petitioner and the Respondent. KERC has no jurisdiction to intervene at that stage and BESCO had to take a decision on its own instead of writing to KERC. But the action of BESCO in writing to KERC seeking for its directions instead of deciding on its own/independently, as to whether the Petitioner was entitled to extension of time as per Clause 5.7.2 is contrary to the terms of PPA and amounts to abdication of its rights under the PPA.

- c. Further it is the arguments of the Petitioner that in response to BESCO's letter dated 28.09.2017, KERC has by its letter dated 04.10.2017, directed BESCO to, in turn direct the Petitioner to approach the KERC after successful commissioning of the project by filing a petition. This direction of KERC has been communicated to the Petitioner by the Respondent through a letter dated 17.11.2017 (Annexure D). The administrative directions of KERC issued to BESCO is arbitrary, illegal and opposed to the terms of PPA. In this regard the Learned Counsel for the Petitioner has relied upon the decision of Hon'ble High

Court of Karnataka in WP No. 51518/2016 decided on 27.08.2019. The Learned Counsel has submitted that the direction issued to the Petitioner by KERC through BESCOM directing the Petitioner to file a petition before this Commission justifying the claim for extension of time literally amounts to usurpation of power vested in BESCOM under the PPA which is illegal, as observed in order cited above and submitted to pass suitable orders in the interest of justice.

- d. The Counsel for the Respondent has also submitted his arguments, as per his contentions taken in the objection statement but, not submitted any arguments on the judgement relied upon by the Learned Counsel for the Petitioner stated supra.
- e. We have gone through the decision of the Hon'ble High Court of Karnataka in WP Nos. 51518-51519/2016(GM-RES) held between Raghu Infra Private Limited and Asian Fab Tec Limited Vs Chamundeshwari Electricity Supply Corporation Limited and KERC, in which the Hon'ble High Court at para 15 has observed as follows:-

"15. A careful perusal of the contents of PPA between the petitioners and first respondent provides for extension of time. It is for the first respondent to consider independently without seeking any direction or opinion from the second respondent who is the approving

authority. After considering the material, it is for the first respondent to pass appropriate Orders and it is for the second respondent to approve the decision taken by the first respondent. Admittedly, the first respondent has not applied its mind independently in terms of the clauses mentioned in the PPA and proceeded to pass the impugned Order based on the directions issued by the second respondent, which is impermissible."

- f. As per above findings given by the Hon'ble High Court, the BESCO has to decide independently that, whether extension of time for commissioning of the project as prayed by the Petitioner could be granted or not. In this regard the BESCO cannot seek any direction or opinion from the KERC which is only approving authority on the decision taken by the BESCO.
- g. We have perused Annexure-D which is a letter written on 17.11.2017 by General Manager (Elec), Power Purchase, BESCO to the Petitioner, in which the Respondent has referred the letter written by KERC in letter No. KERC/S/F-31/VOL-1181/17-18/1088 dated 04.10.2017 (as reference No. 5) stated that, he is directed by the KERC to communicate the approval of BESCO to commission the project on or before 06.01.2018 subject to the conditions mentioned in that letter. Hence it is clear that, the BESCO has extended the time for 3 months in

commissioning the project upon the directions given by KERC which is not in accordance with the terms of PPA.

- h. It is to be observed that, though the Petitioner is relying upon the judgement of Hon'ble High Court as referred supra, the Respondent never objected to that proposition of law laid down by the Hon'ble High Court even though having knowledge about the judgement. Therefore, in view of the principles laid down by the Hon'ble High Court in the above referred decision, we are constrained to hold that the KERC at this stage has no jurisdiction to entertain this Petition. The Petitioner has to approach the BESCO for necessary action on the request made by him as per the principles laid down in the above case. With this we are of the opinion that the decision relied by the Learned Counsel for the Petitioner is aptly applicable to the case on hand, that the KERC cannot entertain the petition at this stage, thereby, this issue is answered in Negative.

20. Issue No. 1:- Whether the Petitioner has made out a case for extension of time of 3 months for achieving the conditions precedent and the commissioning of the project on the ground of force majeure?

Issue No. 2:- Whether the Petitioner has proved that due to that heavy rainfall he could not achieve functioning of the project and it would fall under the definition of Force Majeure as per Article 14.3 of PPA?

AND

Issue No. 4:- For what relief the Petitioner is entitled to?

21. Since the preliminary issue is answered in negative, there is no necessity to take up these issues for discussion, hence they are not answered.
22. Issue No. 5: What Order?
23. In view of the discussions made in Issue No. 3, we pass the following: -

ORDER

The Petitioner is hereby directed to approach the BESCOM/Respondent after receipt of this order and thereafter the Respondent has to take decision for extension of time by following the principles laid down by the Hon'ble High Court of Karnataka in WP Nos. 51518-51519/2016(GM-RES) dated 27.08.2019.

Sd/-
(SHAMBHU DAYAL MEENA)
Chairman

Sd/-
(H.M. MANJUNATHA)
Member

Sd/-
(M.D. RAVI)
Member