

No. N/94/2018

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

Dated: 30.12.2021

Present

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

OP No.39/2018

BETWEEN:

Celestial Solar Solutions Private Limited,
A Company incorporated under
Companies Act, 1956 and
Having its Registered Office at
5th Floor, Surya Towers, Sardar Patel Road,
Secunderabad-500 003.
Represented by its Manager.

...PETITIONER

[Represented by Sri Shridhar Prabhu, Advocate
for Navayana Law Offices]

AND:

1. Mangalore Electricity Supply Company Limited,
MESCOM Bhavana, Kavour Cross Road, Bejai
Mangalore-575 004
Represented by its Managing Director.
2. Karnataka Power Transmission Corporation Limited,
Kaveri Bhavan, K.G. Road,
Bengaluru-560 009]
Represented by its Managing Director.
3. Karnataka Renewable Energy Development Limited
No. 39, "Shanthi Gruha"
Bharat Scouts and Guides Building,
Palace Road, Gandhi Nagar,
Bengaluru-560 001.
Represented by its Managing Director.

...RESPONDENTS

[Respondents 1 & 2 represented by Sri Shahabaaz Hussain,
Advocate, for Precinct Legal Advocates]

[Respondent No.3 represented by Sri Murugesh V Charati, Advocate]

ORDERS

1. The petitioner M/s Celestial Solar Solutions Private Limited being aggrieved by the Commission letters to MESCOM dated 15.03.2017 (Annexure-A in WP) and 16.03.2017 and MESCOM letter dated 10.04.2017 (Annexure-B in WP) to the petitioner, challenged these letters before the Hon'ble High Court of Karnataka in WP. No. 53060/2017 (GM-KEB).
2. The Hon'ble High Court of Karnataka after hearing the counsels of petitioner and respondents, disposed the writ petition No. 53060/2017 on 05.04.2018 considering the Annexure- A and B as provisional and directed the petitioner to file it's reply to Annexure-A within a period of two weeks from the date of order before the KERC and the Commission shall consider the same in accordance with law and after providing an opportunity of hearing to the petitioner and to take appropriate decision in as much as the approval sought for SPPA.
3. As per the direction of the Hon'ble High Court of Karnataka, the petitioner had filed his representation on 19.04.2018 before the Commission for the following reliefs;
 - a) To approve the SPPA dated 15.12.2016 executed between MESCOM and petitioner company modifying the original PPA only to record the changed location to Channamanagathihalli

village, Chellakere taluk, Chitradurga district, without altering the tariff and other terms and conditions contained therein;

- b) To declare that tariff of Rs.7.12/- per unit is applicable in terms of PPA since tariff order dated 30.07.2015 is not applicable on those projects in respect of which the tariff is discovered through competitive bidding process and for the reasons that the tariff order dated 30.07.2015 excludes the projects which are commissioned between 01.09.2015 to 31.03. 2018 for which the PPAs have been entered into and submitted for approval to KERC prior to 01.09.2015;
- c) To declare that on the basis of difficulties faced in terms of approval by KPTCL, land acquisition and change of location, MESCOM rightly extended the scheduled commissioning date to 11.02.2018;
- d) To direct MESCOM to refund/release all amounts illegally deducted on account of applicable of lower tariffs along with Damages and Liquidated Damages illegally imposed on the company; and to
- e) Provide sufficient opportunity of hearing in person.

4. Brief facts of the representation/petition.

- (i) The petitioner is a company incorporated under the Companies Act having its registered office at the address shown in the cause title, the petitioner is a special purpose vehicle (SPV) incorporated by M/s Surana Telecom & Power Limited, the successful bidder for setting up the 10 MW Solar Power Project at Tingloor Village, Madhugiri taluk, Tumkuru District as per LOA.

- (ii) Pursuant to the Development of Solar Power Project in the state of Karnataka, the 3rd respondent- Karnataka Renewable Energy Development Limited (Herein after called as KREDL) being a nodal agency, invited Request for Proposal (RfP) dated 30.05.2014 for allotment of projects for development of 500 MW of Solar Thermal /Solar PV Power Plants in the state by way of competitive bidding process. M/s Surana Telecom & Power Limited participated in the bid and became a successful bidder for development of 10 MW capacity of Solar Project at Tingloor Village, Madhugiri taluk, Tumkuru District. The KREDL issued a letter of award (LOA) on 19.11.2014 to M/s Surana Telecom & Power Limited and for sale of energy at Rs. 7.12 per unit. (As per Annexure-G in the WP No. 53060/2017). M/s Surana Telecom & Power Limited has made the petitioner as its Special Purchase Vehicle (SPV) for execution of the project.
- (iii) In terms of the LOA, the PPA was executed on 12.02.2015 which was later approved by KERC on 04.05.2015. Thereafter, an addendum to the PPA dated 12.02.2015 was issued and the same was executed on 06.07.2015 effecting certain amendments.
- (iv) On 30.04.2015, the petitioner sought approval for evacuation scheme for the project location at Kudrikotagi village Yalburga taluk in koppal district from KPTCL, (It may be noted that as per LOA, the project had to be executed at Tingloor Village, Madhugiri taluk, Tumkuru District) despite submitting the requisite documents, until June 2015 KPTCL did

not give the requisite approval and sought new set of documents, thus delayed the approval process.

(v) Faced with the challenges of land acquisition issues, petitioner requested the KREDL for a change of location from the originally allotted location to another location in Koppal District, KRDEL permitted by its letter dated 09.06 .2015 for change in location, a tentative Evacuation Scheme Approval was also granted by KPTCL on 27.08.2015.

(vi) The petitioner had to submit periodical the monthly progress report on the Condition Precedent as enumerated under the PPA. However, faced with difficulties in obtaining certain approvals and permissions from Government agencies and also experienced serious challenges in acquisition of land, petitioner could not fulfil the Conditions Precedent within the time specified under the PPA and hence in January 2016, petitioner requested MESCOM to allow an extension of time by six months to fulfil the Conditions Precedent under the PPA. In response, considering the genuine difficulties on 12.02.2016 MESCOM has extended the extension of time up to 11.08.2016 for compliance of Conditions Precedent. (MESCOM's letter produced as Annexure- W in the WP)

(vii) The petitioner having faced acute difficulties in project implementation due to the land acquisition problem, on 03.05.2016 again submitted a

request to the KREDL seeking change of location to another location in Chitradurga district (Annexure-X in WP) and the same was approved by KREDL on 18.05.2016 (Annexure-AA). Consequently, petitioner had requested KPTCL on 03.05,2016 for approval of Evacuation Plan to the changed location at Chitradurga to record the change of location. (Annexure-Y in WP)

(viii) The petitioner faced lot of challenges in obtaining evacuation approval from KPTCL and land acquisition, petitioner requested the MESCOM on 18.06.2016 (Annexure-AD in WP, however, as seen from the Annexure –AD it is the request for signing SPPA) for extension of by four months till 11.12.2016 for commissioning the project in the new location. In response, MESCOM accorded its approval to extend the period for commissioning the project by four months up to 11.12.2016. As per Clause 5.7 of the PPA MESCOM granted extension for commissioning and as per Clause 5.7.4 of the PPA MESCOM approved the revised commissioning date to be 11.12.2016. (Copy of the letter dated 08.08.2016 issued by MESCOM placed as Annexure-AF in WP, the same letter is placed in this representation as Annexure-C)

(ix) On 23.08.2016 MESCOM wrote a letter to KERC requesting for granting approval to the SPPA dated 27.07.2016 with respect to the change of location. Petitioner stated that the project commissioning date was already extended, however, MESCOM did not make any reference to

the applicability of new tariffs. (The letter dated 23.08.2016 is placed as Annexure-AG in WP)

- (x) On 21.10.2016 for the first time MESCOM wrote a letter to the petitioner that the tariff will be applied as per the prevailing KERC order. The said letter mentioning downward provision of tariff is not applicable as per grounds stated in the writ petition and the representation herein.
- (xi) On 27.10.2016, the petitioner had issued advance notice to MESCOM for synchronization of their project as required under the_PPA. The advance notice was given with intended date of synchronization as 08.12.2016 in anticipation that all the works under the scope of KPTCL would be completed on time. The KPTCL granted a Regular Evacuation Scheme Approval to the petitioner's project vide letter dated 28.10. 2016. (The letter dated 27.10.2016 enclosed as Annexure-AK and the KPTCL letter dated 28.10. 2016 enclosed as Annexure-AL in WP)
- (xii) On 11.11.2016, petitioner submitted a comprehensive set of documents in proof of its compliance of Conditions Precedent to MESCOM (Annexure-AM in WP). On 18.11.2016 the petitioner issued a final notice for synchronization of the project as required under the PPA that the Solar plant will be synchronised to Grid on 08.12.2016. (The letter enclosed as Annexure-AN in WP)

(xiii) The project work was further slowed down during November 2016 on account of demonetization decision taken by Central Government which had an adverse impact to various activities of the project. On 29.11.2016, petitioner had submitted a detailed recommendation to MESCOM with respect to the project progress and difficulties and Force Majeure events with a request to approve extension of the scheduled date of commissioning. In the representation, various issues were stated such as delay in Bay allotment, estimation and construction approval and evacuation approval by various Government Department and others. (The letter dated 29.11.2016 is enclosed as Annexure- D in the representation)

(xiv) Petitioner stated in the letter dated 29.11.2016 that the evacuation approval application was submitted to KPTCL on 03.05.2016 and the said approval was pending for no fault of the petitioner. It is stated that the Tentative Evacuation Scheme was granted on 22.10.2016 followed by letter for Regular Evacuation Scheme vide letter dated 28.10.2016. As per the scheme, petitioner was required to carry out necessary modification/alteration/repairs/replacement/rectification for putting up 66 kV terminal Bay to facilitate termination of the 66 kV evacuation line at 66/11 kV Dyavaranhalli Sub-station as per the directions and approval of KPTCL along with payment of necessary supervision charges. Immediately, the petitioner vide letter dated 03.11.2016 submitted the drawings of the 66 kV terminal Bay with metering and

control equipment to KPTCL. The petitioner requested the KPTCL vide letter dated 11.11.2016 for approval to start the Bay Construction work at the Sub-Station immediately as it was most critical to Commission the Project by Scheduled COD i.e., 11.12.2016. However, the permission was not granted and it was informed that the work can only be started after receipt of required approvals and payment of fees.

(xv) On 05.12.2016, the KPTCL granted approval for the adoption of Sub-Station structure and the Equipment Mounting Structure Drawings in connection with Evacuation Scheme developed by the petitioner. On 06.12.2016, the KPTCL granted approval to the single line diagram layout and consequently approved the layout drawings in connection with the Evacuation Scheme. (The letter dated 05.12.2016 enclosed as Annexure- AP in the WP, the same letter produced in the representation as Annexure-E)

(xvi) In response to the petitioner letter dated 29.11.2016 in which petitioner sought extension of time narrating the Force Majeure and difficulties faced by the petitioner in obtaining approvals and permissions from the KPTCL as mentioned above, MESCOM approved extension of time in its letter dated 07.12.2016, granting permission for commissioning the project upto 11.02.2017 as per Clause 5. 7.4 of the PPA. (As per Annexure- AR in WP and the letter produced in this representation as Annexure-F).

(xvii) The petitioner again wrote a letter dated 09.12.2016 to KPTCL for getting the estimate letter and the Bay extension work permission letter. The petitioner stated that to expedite the commissioning of the project, the said permission was absolutely essential and after such permissions the company would be able to order the equipment which will be then be delivered and installed.

(xviii) As per Clause 6 of the PPA, the MESCOM agreed to provide support and facilitate the company in the implementation and operation of the project including assistance in procuring applicable permits required from any Government agencies for implementation and operation of the project. In fact, the company faced great hardship in obtaining the approvals and permissions from KPTCL. Despite these difficulties, the Petitioner completed its project work within 11.02.2017, the revised scheduled date of commissioning.

(xix) On 14.12.2016, Petitioner Company issued a letter to MESCOM to inform the subsistence of Force Majeure. Despite follow ups, the KPTCL did not issue the requisite permission letter, as a result of which Petitioner company could not carry out the Bay extension work, the delay in commissioning the project was fully on account of KPTCL's inaction in giving the Bay extension work approval to the company. The petitioner further stated that the provisions relating to tariff as per Clause 12.2 of the PPA and damages/ liquidated damages as per Clause 4.3 and 5.8 shall be applicable as per the revised Scheduled

Commissioning date of 11.02.2017 and that the tariff of Rs. 7.12 per unit as per PPA shall remain valid if the project is commissioned by 11.02.2017, without any implication of Damages/Liquidated Damages as per the Clause 4.3 and 5.8 of the PPA. (As per Annexure- AS in WP).

(xx) The Supplemental PPA dated 15.12.2016 was executed between MESCOM and the petitioner modifying the original PPA only to record the changed location and did not make any reference to the applicability of new tariff and/or the issue of revision of tariff. (Copy of the SPPA produced as Annexure- AU in the WP, the same is in the representation as Annexure-G)

(xxi) On 19.12.2016, the petitioner received a letter from KPTCL regarding the Bill of Material for the proposed Terminal Bay of the Petitioner Company, (The letter is enclosed as Annexure- AV in the WP). On 27.12.2016, the company wrote a letter to the KPTCL requesting for the extension of the validity of the Evacuation Approval. Finally, on 09.01.2017, KPTCL granted an extension up to 11.02.2017 for the regular Evacuation Approval Scheme of the company. On 11.01.2017 KPTCL permitted the Petitioner Company to take up the construction of 66 KV Terminal Bay. KPTCL also directed the Petitioner Company to complete the work within 11.02.2017. (Copy of the letter produced as Annexure- AY in WP and the same is in this representation as Annexure-H)

(xxii) The petitioner company took up the work by securing the necessary materials. On 17.01.2017, the petitioner company wrote a letter to

KPTCL seeking material instructions waiver at factory and arrange for the safety inspection for the enlisted material, which was allowed by the KPTCL.

(xxiii) On 11.02.2017, the petitioner's project was successfully commissioned subsequent to the grant of approval by the Chief Electrical Inspectorate to the Government of Karnataka on 07.02.2017. Accordingly, KPTCL granted commissioning certificate dated 13.02.2017 certifying the commissioning of petitioner's project on 11.02.2017. (Annexure-AAC in writ petition) The petitioner company issued a letter dated 16.02.2017 to MESCOM intimating about the successful commissioning of its project on 11.02.2017.

(xxiv) On 02.03.2017 MESCOM wrote a letter to KERC requesting its approval to the Supplemental PPA dated 15.12.2016. MESCOM in its letter explained various project events and enabling provisions for change of location by the petitioner along with KREDL's letter granting approval to the change of location. It is pertinent to mention here that issue of revision of tariff has been introduced later and is an afterthought. (Annexure-AAE in the WP)

(xxv) On 10.04.2017, MESCOM enclosed a letter of KERC dated 15.03.2017, wherein, KERC had directed MESCOM to incorporate a new term in the Supplemental PPA which is extracted here in below:

"The Scheduled Commissioning date of the said Solar Project is on 11.08.2016. If the COD of the project is likely

to be achieved beyond the Scheduled Commissioning date, lower tariff of Rs. 6.51/- per unit is applicable, as per the terms of the PPA. This has to be mentioned in the SPPA provided the other binding terms of the original PPA, like fulfilment of Conditions Precedent are complied with"

(xxvi) The Commission's direction has serious implication on the entire project viability of the company. The impugned communication is not valid on the following grounds:

(a) The communication dated 15.03.2017 is contrary to the PPA dated 12.02.2015. MESCOM itself has extended and approved the revised Commissioning date to 11.02.2017 after considering the Force Majeure events and delay as provided in Clause 5.7 of the PPA. The Scheduled Commissioning date was newly determined as 11.02.2017. The PPA provides that if the scheduled commissioning date has been extended as per Force Majeure events and the parties mutually agreed upon the newly determined Scheduled Commissioned date, the original tariff as specified in the PPA would be Applicable. The revised and reduced tariff cannot be sought to be imposed upon the petitioner's company when the company has commissioned its project within the revised Scheduled Commissioning date of 11.02.2017. in view of this mutual agreement post commissioning of the project there is no scope

for this unilateral downward revision, as effected by MESCOM on the basis of letter dated 15.03.2017 by KERC.

(b) The impugned communication is based on the KERC Tariff Order dated 30.07.2015 in modification of its earlier Order dated 10.10.2013. The said Tariff Order is not applicable on those projects in which the Tariff is discovered through competitive bidding processes. Without prejudice, if at all any Tariff Order is made applicable and PPA rate of Rs. 7.12 per unit is not followed, the company should then be granted tariff as per Rs. 8.40 per unit in terms of Tariff Order dated 10.10.2013 which was in force at the time when the PPA was entered into i.e., on 12.02.2015. (As per Annexure- AAF in WP, the same is produced in this representation as Annexure-I)

(c) The Tariff Order dated 30.07.2015 at Clause 3 sub para 2 provide that with respect to the project that are Commissioned during the period from 01.09.2015 to 31.03.2018 for which the PPAs have been entered into and submitted to the Commission prior to 01.09.2015 for approval, the Tariff as per the said agreements shall be applicable. In the instant case, the PPA was entered on 12.02.2015 and submitted to KERC which was subsequently approved by KERC on 04.05.2015. As per PPA the tariff which was determined through competitive bidding process was Rs. 7.12 per unit. Consequently, the petitioner

company is entitled to the tariff of Rs. 7.12 per unit as agreed under the PPA. In the very opening paragraph of the Tariff Order dated 30.07.2015, it is mentioned that tariff determined is not applicable to the projects discovered through competitive bidding process.

(d) The petitioner company's tariff is discovered through a transparent process of competitive bidding under Section 63 of Electricity Act, 2003. In fact, Section 63 of the Act has overriding effect on Section 62 and Section 64 so KERC does not get to determine the tariff in case of competitive bidding but has to adopt the tariff since it is based on competitive bidding. However, through the impugned communication dated 15.03.2017, KERC is imposing a tariff at the time of approving the Supplemental PPA dated 15.12.2016 which was intended to only record the change of location and which was approved and executed between MESCOM and the petitioner company.

(e) The PPA already approved by KERC between the petitioner and MESCOM. Accordingly, the MESCOM has powers to grant change of location and extend the time lines for execution of the project as per the PPA. Hence there is no requirement of KERC to further approval of the PPA.

- (f) The MESCOM after extending the SCOD, forwarded the Supplemental PPA dated 15.12.2016 to KERC only with reference to the change of location and the said Supplemental PPA excluded any reference to the applicability of new tariff and /or reference to the issues of revision of tariff.
- (g) The impugned communication not marked with the petitioner company and did not enable the petitioner to put forth their views regarding the extension allowed by MESCOM and answering to the issues raised in the communication letter. In fact, MESCOM was to provide its response to the letter of KERC dated 15.03.2017 which it did not do, as result of which, the petitioner company faced financial adversities to the tune of illegal deduction of tariff and Damages/ Liquidated Damages of more than Rs.10 Crores till filing of the representation.
- (h) The petitioner urged the following grounds in the petition.
- (i) The provisions of the PPA do not envisage any requirement of obtaining any approval of extension of time by KERC and such requirement is an additional requirement, directed to be imposed now.
- (ii) The letter dated 16.03.2017 and 05.04.2017(Commission's letters under challenge in WP) cannot be applied retrospectively, especially when the scheduled

commissioning date has been extended and approved by MESCOM itself at an earlier date vide its letters dated 08.08.2016 and 07.12.2016. MESCOM cannot change its stand post commissioning of the Project more so when commissioning has been duly achieved within such extended Scheduled Commissioning Date.

(iii) Consequently, the MESCOM's letter dated 18.05.2017 is bad in law, since after granting of permission for extension as per PPA MESCOM cannot come back at a later date mentioning that time extension requires approval of KERC and that revised tariff is applicable. Such a proposition would go against the basic tenet of law and established principles of law of estoppel, waiver and acquiescence.

(iv) Unless specifically provided for, any law including any Rule or Regulation or Order is deemed to have a prospective operation only and cannot be made operative from a retrospective date. The project of the petitioner company was commissioned on 11.02.2017 and KERC communication was issued on 16.03.2017 and 05.04.2017 on the basis of which MESCOM issued its letter dated 18.05.2017, the said communications cannot have a retrospective operation and cannot be applied upon the petitioner's companies project at a later date.

(v) On 11.02.2017, company pumped the energy and raised the invoices at Rs. 7.12 per unit as per PPA. By letter dated 02.06. 2017, MESCOM has sought to collect Damages and Liquidated Damages to the extent of Rs. 5.61 Crores for non-complying of the Conditions Precedent and non-achievement of COD within the Scheduled Date. MESCOM stated that as per KERC's letter dated 16.03. 2017, it did not allow extension of time granted for commissioning of the project and hence adjusted the invoice amount towards liquidated damages.

(vi) That MESCOM itself had extended the commissioning date, it cannot later reverse its stand, in such circumstances, Damages and Liquidated Damages cannot be imposed on Petitioner Company. On 28.06.2017, petitioner had requested the MESCOM to withdraw/ amend its letter dated 02.06.2017 so has to refund the Damages and Liquidated Damages and to make payment as per Rs 7.12 per unit, however, there was no response made to us. The differential amount is receivable along with interest or late payment surcharge as per PPA, subject to certain directions on account of rebate etc.,

(vii) That as per Clause 13.7 of PPA, MESCOM did not raise any dispute. The PPA provides for procedure to be followed for

disputing the bill which MESCOM did not follow and hence Bills raised by the petitioner company are conclusive and as a result the petitioner company is entitled to full claim as per the invoices raised. Clause 13.7.2 of the PPA provides that in case MESCOM disputes any monthly bill, it shall pay 95% of the disputed amount.

5. Upon issuance of notice after registering the representation of the petitioner, the Respondents have appeared through their counsels and filed their statement of Objection which are noted as under;

6. The gist of the statement of objection filed by the 1st respondent-MESCOM is as follows.

(a) 1st respondent-MESCOM, that the petition is devoid of any merits and needs to be dismissed in limine and contended that the delay in commissioning of project is primarily attributable to the negligent act of the petitioner and not otherwise claimed by the petitioner.

(b) The petitioner is attempting to take refuge under the Force Majeure clause of the PPA in order to justify the delay in COD and non-performance of its liability for the following reasons,

(i) The petitioner has delayed in initiating the project implementation work till 30.04. 2015 and as required under RfP and the PPA dated 12.02.2015. the application for evacuation approval for the original location at Tingaloor Village, Madhugiri Taluk in Tumkuru

District was in KPTCL filed on 30.04.2015 but failed to submit the requisite documents till June 2015 to enable KPTCL to process the application.

- (ii) That while the Evacuation Approval was in processed for the original location in Tingaloor Village, Madhugiri Taluk in Tumkuru District, the petitioner requested KREDL for a change of location to a place in Koppal district, that the KREDL granted approval for change of location on 09.06.2015 to Kudrukotagi Village, Yalaburga Taluk, Koppal District. The petitioner applied for evacuation scheme for the new location on 27.08.2015 which is more than 45 days after approval was granted to original location.
- (iii) The petitioner citing issues with regard to land acquisition, made an application on 03.05.2016 to the KREDL, requesting for another change of location to Chitradurga district was approved by KREDL on 18.05.2016. The second request of petitioner for change of location was made 13 months after the PPA was executed, shows the negligent attitude of the petitioner.
- (iv) The application for change of location of the project cannot be considered as there was timeline for commissioning of the project and the delay due to frequent change of location, as in this case, it is not covered under the Force Majeure clause of the PPA. That

the Force Majeure clause is extended and applicable only to renew or maintain required licenses or legal approvals and not for frequent shift of location citing land issues and the petitioner should have studied the feasibility of the land before applying for the project with KREDL.

- (v) The petitioner had applied for the Evacuation Scheme approval on 03.05.2016 for a location in Chitradurga District and Supplemental PPA to record the change of location in Chitradurga District was executed on 27.07.2016 and the delays are mainly due to frequent change of location and the procedure for evacuation approval takes about two months and due to the decision of the petitioner it took about 15 months in obtaining the Evacuation Approval and it can only be attributable actions of the petitioner.
- (vi) The petitioner in its letter dated 18.06.2016 requested MESCOM for Extension of Schedule Commissioning Date up to 11.12.2016 and the same was approved vide its letter dated 08.08.2016 subject to the compliance of Clause 5.8 and 12.2 of the PPA. The extension of time upto 11.12.2016 is for complying with Conditions Precedent under Article 4.2 and for achieving SCOD. The letter makes no difference to the Clause 5.7 as claimed by the petitioner.

- (vii) The petitioner again requested on 29.11.2016 for further extension of time and approved the extension of time upto 11.02.2017 vide its letter dated 07.12.2016, subject to the clause 4.3, 5.8, and 12.2 of the PPA. MESCOM stated that it has repeatedly informed the petitioner about its liability towards payment of damages applicability of reduced tariff.
- (viii) The petitioner commissioned the project on 11.02.2017 and it was six months after the Scheduled Commissioning Date of 11.08.2016. On 02.03.2017 MESCOM requested KERC for its approval to the Supplemental PPA executed on 15.12.2016. The Respondent, having made its stand clear on the applicability of the new tariff rates and the liability to pay damages, did not deem it necessary to mention it again in the SPPA, which was solely executed to record the change of location.
- (ix) The Petitioner taking into account of the extension of time accorded by MESCOM, contended that the effective date of PPA is 11.02.2017, which is highly erroneous and contrary to the provision 3.1 of the PPA.
- (x) Admittedly, the PPA was executed on 12.02.2015 and as per Article 3.1 of the PPA and Effective Date is date of signing PPA, that the petitioner being the signatory to the PPA and having consented to the terms of PPA is now estoppel under law to make contentions in direct contradiction to the terms of PPA.

- (xi) The petitioner company is legally bound to pay the liquidated damages as per Clause 5.8 of the PPA and cannot arbitrarily invoke Force Majeure Clause to escape its liability. Clause 5.7.1 is not attracted in the instant case as the delay in commissioning the project is due to the negligent actions of the petitioner. The petitioner is liable to pay the Liquidated Damages as per Clause 5.8 of the PPA.
- (xii) The Petitioner's averment that the tariff under PPA was fixed subsequent to the bidding process, the same is not amenable to generic tariff orders passed by this Commission from time to time as per the provisions of Section 63 of the Act, which is misleading and erroneous.
- (xiii) The Petitioner's contention that the preamble of generic tariff order dated 30.07.2015 has excluded itself from being applied to those projects in respect of which the tariff is discovered through competitive bidding process, and therefore, the tariff of Rs 6.51 per unit as per the said order shall not be levied on the project of Petitioner, which is a result of competitive bidding process. This averment of the Petitioner is once again misleading and erroneous.
- (xiv) The Petitioner while relying on the generic order of the Commission and the Section 63 of the Act, has omitted to rely on

or consider the relevant terms of the PPA on applicability of the tariff. The Clause 12 .1 and 12.2 of the PPA reads as:

12.1-- "The Developer shall be entitled to receive the tariff of Rs.7.12/KWh of energy supplied by it to MESCOM in accordance with the terms of this Agreement during the period between COD and expiry date."

12.2-- "Provided further that if as a consequence of delay in Commissioning of the project beyond the scheduled commissioning date, subject to Article 4, there is a change in KERC Applicable Tariff, the changed Applicable Tariff for the project shall for the project shall be the lower of the following:

i. Tariff at in clause 12.1

ii. KERC applicable tariff as on the Commercial Operation Date.

- (xv) On perusal of the above provisions reveals that the parties have agreed and subjected to the revised tariff as per PPA approved by the Commission, in the event of delay in achieving COD.
- (xvi) That Section 63 of the Electricity Act excludes the applicability of generic tariff order as a matter of law but does not restrict the parties to the contract from agreeing to such generic tariff order in the event of delay in achieving COD. In the instant case, in line with the provisions of the Section 63 of the Act, the tariff was not fixed as per the generic tariff laid down by the Commission, but was fixed as per the competitive bidding process. Such being the case, tariff rate as per Article 12 was subjected to the project

commissioning within the SCOD and beyond that, the generic tariff of the Commission was made applicable by mutual consensus.

- (xvii) The Electricity Act, 2003 does not mandate the applicability of generic tariff orders on projects resulting from competitive bidding process, but in this case, it is legally binding and enforceable terms of PPA. In terms of the PPA, the applicable tariff in the instant case is Rs. 6.51 per unit, which was the prevailing tariff of the Commission as on the date of delayed commissioning of the project.
- (xviii) The petitioner has averred that the Commission does not have power to regulate or validate the extension of time on the ground that the Commission is not privy to the contract, which is erroneous in law and is liable to be dismissed.
- (xix) It is a settled principal of law that every contract is subject to the applicable statutes and any provision of the contract contradicts any law is void to that extent. In the instant case, the Electricity Act, 2003 under Section 86(b) requires the Commission to regulate electricity purchase and procurement process of the distribution licenses including the price at which electricity shall be procured from the generation companies or licenses or from other sources through agreements for distribution and supply within the state. The purpose of Section 86(b) of the said act is abundantly clear in

empowering the Commission to regulate the PPA and the clauses thereof, and prays for dismissal of the petition.

(xx) The learned Counsel for respondent has submitted the following citations as mentioned in the Written Arguments.

1. PTC India Limited Vs Gujarat Electricity Regulatory Commission and Another, MANU/0119/2014; 2014 ELR (APTEL)1243.
2. Lanco Kondapalli Power Limited Vs Andhra Pradesh Electricity Regulatory Commission MANU/ET/0004/2015; 2015 ELR (APTEL)755.
3. Bharat Sanchar Nigam Limited Vs Reliance Communication Limited (2011)1 SCC 394.
4. ONGC Vs Saw Pipe Limited, (2003)5 SCC 705
5. ACB (India) Limited Vs Gujarat Electricity Commission and Others.

7. The Respondents no. 2 in its statement of objection has contended as follows;

(a) The Petitioner has alleged that there is delay of 5 months on the part of this Respondent in approving power evacuation is denied as false. The events with regard to the approval of power evacuation in the instant case is produced hereunder:

(b) On receipt of application on 03.05.2016, for evacuation approval, a letter was addressed to the Petitioner from KPTCL on 12.05.2016, seeking clarification on change in location from Tingloor Village, Madhugiri taluk, Tumkuru District to Chennamangathihalli village,

Challakere Taluk, Chitradurga District, as the LOA was granted for Tingaloor village. (The letter dated 18.05.2016 is produced as Annexure R1)

- (c) A letter was received from Respondent No.3 -KREDL on 12.05.2016 containing no objection to change in location of petitioner's project. Subsequently, KPTCL proceeded with processing of the evacuation application of the petitioner. (The letter is produced as Annexure R2.)
- (d) Upon scrutiny of the application, it was found that the petitioner had not submitted the PPA along with the application. The submission of PPA is a mandatory requirement for approval of the application and the Petitioner submitted the Supplemental PPA vide letter dated 03.08.2016. (The letter is produced as Annexure R3)
- (e) Thereafter, the application of the Petitioner was processed and an intimation to pay processing fee was sent to the petitioner vide letter dated 25.08.2016. (The letter is produced as Annexure R4.)
- (f) The Petitioner has remitted the required processing fees on 07.09.2016 and a letter from the petitioner confirming the same is produced as Annexure R5.
- (g) Thereafter, spot inspection was conducted by this respondent on 23rd and 24th September, 2016 and a tentative evacuation approval was communicated to the petitioner vide letter dated 22.10.2016. The letter

produced as Annexure R6 and on 28.10.2016, the regular evacuation approval was issued to the petitioner.

(h) It can be seen from para 5,9, and 11 of the letter of the petitioner addressed to the Commission, the Petitioner applied for extension evacuation approval on 27.12.2016, which is 15 days after SCOD, displaying the callousness on the part of petitioner in expediting the process and not being diligent in its process to achieve completion of project within SCOD. Subsequent to the request of petitioner on 27.12.2016 for extension of evacuation approval, approval was granted on 09.01.2017.

(i) The Petitioner requested for provisional interconnection vide letter dated 09.02.2017 and the same was accorded by this Respondent vide letter dated 11.02.2017. (Copies of the letters produced as Annexure R7 and R8.)

(j) From the above submissions of KPTCL, it is clear that KPTCL has not delayed the process of approving power evacuation approval to Petitioner project. The KPTCL has acted diligently and the time taken in processing the evacuation application is very reasonable. Accordingly, prayed for dismissal of the petition.

8. The Respondent No. 3, in its statement of objection has contended as follows;

- (a) This respondent being a nodal agency of the Government of Karnataka for facilitating the development of renewable energy in the state of Karnataka had called for the request for proposal (RfP) for the development of 500 MW Solar Power in the State of Karnataka, by its "Request for proposal" or "RFP" dated 30.05.2014. This respondent issued letter of allotment to the successful bidders for implementation of 500 MW capacity solar power projects. As such, this respondent has issued letter of allotment dated 19.11.2014 in favour of M/s Surana and Telecom & Power Limited to constitute a Special Purpose vehicle (SPV) as per clause 2.1.16 of the RfP. Accordingly, Surana Telecom & Power Limited formed an SPV by name Celestial Solar Solutions Private limited for commissioning of solar power plant of 10MW in Tingloor Village, Madhugiri Taluk, Tumkuru District.
- (b) Pursuant to the issuance of letter of allotment from this respondent, the Petitioner herein had to execute PPA with MESCOM within 30 days. As such, the PPA was executed with the respondent No.1 on 12.02.2015.
- (c) Petitioner sought for change of location to this respondent on 03.05.2016 to permit them to change of project site from Tingaloor village, Tumakuru District to Chennamangathihalli village, Challekere Taluk, Chitradurga District. The respondent has permitted the said location change vide its letter dated 18.05.2016.

(d) The Petitioner has entered into a PPA with the respondent No.1. Therefore, it is for the respondent No.1-MESCOM to counter the allegations made against them.

9. The petitioner has also filed re-joinder to the statement of objection filed by the 1st respondent-MESCOM and reiterated the contentions raised in the petition. Petitioner and 1st respondent counsels have filled their written submission also.
10. We have heard the counsels of both parties and perused the documents placed by them and from the pleadings and submissions of the parties the following issues would arise for our consideration.

Issue No.1: Whether the Petitioner proves that there was delay in evacuation approval by KPTCL, acquisition of land and change in location, due to which the delay was caused by respondents in terms of PPA?

Issue No.2: Whether the grounds urged for extension of time for achieving the Conditions precedent and commissioning of the plant are within the provisions of Force Majeure conditions of PPA?

Issue No.3: Whether the 1st Respondent is entitled to liquidated damage as per Articles 4.3 and 5.8 of the PPA?

Issue No. 4: Whether the Supplemental Power Purchase Agreement dated 15.12.2016 requires the approval of the Commission or otherwise?

Issue No. 5: Whether the petitioner is entitled for the Tariff of Rs. 7.12 per unit for the energy delivered or what should be the Tariff as per terms of the PPA?

Issue No. 6: What order?

11. Considering the arguments addressed by the learned counsel for the parties and the pleadings, records and the written arguments of both parties, our findings on the above issues are as follows;

12. **Issue No.1:** Whether the Petitioner proves that there was delay in evacuation approval by KPTCL, acquisition of land and change in location, due to which the delay was caused by respondents in terms of PPA?

13. We proceed to consider issue No.1 for analysing and answering the issues involved therein.

a. Petitioner has submitted that PPA was entered into between MESCOM and M/s Celestial Solar Solutions Private Limited on 12.02.2015 for development of 10 MW Solar Power Project located at Tingaloor village, Madhugiri taluk, Tumkuru District, Karnataka and the PPA was approved by KERC on 04.05.2015. That the Commission informed the parties to affect some corrections/ modifications to be made in the PPA. Accordingly, the parties have entered into an addendum on 06.07.2015.

b. As per article 3.1 of the PPA the 'Effective Date' is defined as "this Agreement shall come into effect from the date of its execution by

both the parties and such date shall be referred as the Effective Date''

In the present case, the PPA was executed on 12.02.2015. Therefore, the date 12.02.2015 is to be considered as 'Effective Date' for the purpose of interpreting the relevant clauses in the PPA. As per Article 4.1 of the PPA the developer has to comply the Conditions Precedent within 365 days from the date of 'Effective Date', unless such completion is affected by any Force Majeure event or if any of the activity is specifically waived in writing by the MESCOM. As per Article 8.5 of the PPA, the developer has to commission the project with 18 months from the effective date.

- c. The petitioner has relied upon the following grounds for delay in commissioning its solar power project and seeking for extension of time:
- a) Delay in granting evacuation approval;
 - b) Delay in Acquisition of land and change in location of site and
 - c) Delay on account of Demonetisation.

We will proceed to examine these issues raised by the petitioner in its petition and give our findings accordingly in subsequent paras.

(1) Regarding: Frequent change in location/ site for the project: -

- (a) As per PPA dated 12.2.2015 entered between Petitioner and the Respondent No.1 i.e. MESCOM (hereafter referred as Respondent) the petitioner is supposed to set up a 10 MW Solar

Power Project at Tingaloor village, Madhugiri Taluk, Tumkuru District, Karnataka, in terms of LoA and PPA. On 30.4.2015(Ref. (1) of Annexure-R in WP), the petitioner has requested 2nd Respondent, KPTCL (hereafter referred as KPTCL) for approval of evacuation scheme for setting up a solar plant at Tingaloor Village, Madhugiri Taluk, Tumkuru District. The KPTCL asked the petitioner on 18.05.2015 to submit the requisite documents required for considering the Evacuation Scheme approval (Annexure-R in WP). On 22.05.2015 the petitioner submitted few documents to KPTCL for seeking evacuation approval, but the KPTCL stated that the documents submitted by the petitioner are incomplete to process them for evacuation approval (Ref. 2 in Annexure-S in WP).

- (b) Meanwhile the petitioner made a request on 03.05.2015 to the Managing Director, KREDL for permitting the SPV to change the project site from Tingaloor village, Madhugiri Taluk to Chennamanagthihalli village, Challekeri Taluk, Chitradurga District for their 10 MW solar power project. Accordingly, the KREDL has intimated on 18.05.2015 to Chief Engineer (Planning & Coordination) KPTCL stating that as per the clause 1.1.10 of RfP, change in location is admissible. Hence, KREDL has no objection for considering of the request for evacuation approval with respect to the present project location as

requested by M/s Celestial Solar Solutions Private Limited (Annexure-R2).

(c) As contended by the Respondent that the SPV formed as per RfP has not made any efforts to work towards commencement of the project till 30.4.2015, when the SPV sought approval from KPTCL from evacuation scheme at Kudrikotagi village, Yelburga Taluk in Koppal District and requisite documents were not submitted until June. The Respondent contended that though there is a provision for change in location, it is also expected of the SPV to act prudently in choosing a location so as to avoid future changes. The fact that the SPV made a second request for change of location after 13 months after the PPA was executed, goes a long way in establishing the negligent attitude carried by the SPV from beginning. Further, contends that the application of SPV to shift the location of the project in first place cannot be considered as requirement for commissioning of the project and is not covered under Force Majeure Clause of the PPA.

(d) The Commission notes that the petitioner has made an Agreement to sale with Mr. Ravindra on 17.07. 2015 comprising Agricultural land measuring 7 Acres 14 guntas at Survey no. 74 of Kudrikotagi village, Yelbugra Taluk, Koppal District (Annexure-J filed along with Re-joinder by the petitioner).

Further, it is noted that the petitioner got permission to purchase land measuring 44 Acres 32 Guntas at Channamangathihalli village, Challekere Taluk, Chitradurga District from the Deputy Commissioner, Chitradurga District on 20.10.2016 vide DC Office Letter No.LRM-CLR-CR:10/2016-17 and also got conversion from agriculture to non-agriculture purpose on 20.10.2016(1st document in Annexure-AM in WP) from the Deputy Commissioner, Chitradurga District.

- (e) On the perusal of relevant records, it shows that the petitioner has taken lots of time to locate the site and shifted its project from one place to another place for setting up of its project within stipulated time line in order to fulfil the conditions precedent. It could be seen from the relevant documents that KREDL gave No Objection Certificate for change in location within 10 days' time, as sought for by the petitioner. There is no record placed by the petitioner to know as to whether any delay on the part of Revenue Department in giving Land Purchase permission under Section 109 of the Karnataka Land Reforms Act and conversion of Agriculture land to non-agriculture purpose. Without producing material document in this regard an adverse inference cannot be drawn against the Revenue Authorities for getting delay in seeking the land purchase permission and Non-Agriculture conversion

permission from the Revenue Department. In view of above facts, the contentions of the petitioner that change in location and acquiring the land for the project has caused delay in achieving the COD and fulfilling the Conditions precedent will not attract force majeure provisions of the PPA is not tenable and liable to be rejected.

(2) Regarding Delay in granting evacuation approval:

- (a) The petitioner has submitted an application on 30.04.2015 (Ref.No.1in Annexure-R in WP) to KPTCL for approval of evacuation scheme originally located at Tingloor Village, Madhugiri Taluk in Tumkuru District as per the location mention in Letter of Award (LoA) with incomplete documents. Petitioner instead of furnishing the additional documents to KPTCL as desired by it for processing the proposal for evacuation approval but has submitted another request letter on 22.05.2015 (Ref.No.1in Annexure-S in WP) for approval of evacuation scheme for 10 MW Solar Power Project to be located at Kudrikotagi Village, Yalburga Talkuk, Koppal District, Karnataka.
- (b) On 08.06.2015, KPTCL requested the petitioner to comply with the terms & conditions of LOA in order to consider his request for evacuation proposal to furnish a letter from KREDL for approved change in location since location of the LOA

location and the location requested for evacuation of power differ. In response to letter of KPTCL, the petitioner has sent a copy of Agreement for sale. Therefore, KPTCL once again requested to furnish a copy of NOC from KREDL for change in location and also the details of promoters and their shareholdings in the SPV, duly certified by the Company Secretary as per conditions of LOA. Only after furnishing the above information, the proposal for the evacuation scheme and the intimation for processing fee will be processed at KPTCL end (Annexure-S in WP).

(c) On 09.06.2015 KRDEL consented for change of location of this solar project at Kudrikotagi Village, Yalaburga Taluk, Koppal District and intimated to Chief Engineer (ET) P&C, KPTCL (Annexure-T in WP).

(d) On 03.08.2016 the petitioner submitted a copy of SPPA with request to accord the power evacuation approval (Annexure-R-3). petitioner submitted a copy of SPPA dated 27.7.2016 on 03.08.2015 to KPTCL for change of Project location to Chennammagathihalli Village, Challekere taluk, Chitradurga District with a request to accord power evacuation approval to connect the project through 66 KV line of distance 5 KM for injection at KPTCL 66/11 KV Dyavaranahalli Substation in Channammanagthihalli (Annexure-R-3).

- (e) On 25.08.2016 KPTCL asked the petitioner to remit process fee for the proposed 10 MW power project at Chennammagathi halli Village in Chitradurga District (Annexure- R-4).
- (f) On 07.09.2016 the petitioner paid the processing fee (Annexure- R-5).
- (g) On 22.10.2016 KPTCL granted tentative evacuation scheme approval to be executed by the petitioner under self-execution for the proposed at Chennammangthahalli village at the own risk and cost of the petitioner (Annexure- R-6) and Regular Evacuation Scheme approval on 28.10.2016 (Annexure-AL in WP).
- (h) On 05.12.2016, KPTCL gave approval for adoption of 66 kV Station and Equipment Mounting structure drawings in connection with the work of providing 66kV Line Terminal Bay at existing 66/11 kV Dyavarannahalli Substation in Challekere as requested by the petitioner vide its request letter dated 24.11.2016 (Annexure-AP in WP).
- (i) On 06.12.2016 (Annexure-AQ in WP), KPTCL has accorded approval of SLD, Layout and Sectional layout Drawings to the petitioner as asked by him vide letter dated 26.11.2016 (Ref.4 in Annexure- AQ in WP).

- (j) On 09.02.2017 the petitioner requested the Chief Engineer (Ele), Planning & Coordination, KPTCL for synchronization/ Interconnection Approval of 66 KV Terminal Bay at 66 kV/11 kV Dyavarannahalli Substation for 10 Mw power project (Annexure-R 3).
- (k) On 11.02.2017, KPTCL accorded the provisional Interconnection approval for the project on 11.02.2017 and this solar power project commissioned on 11.02.2017 (Annexure-R 8).
- (l) It is pertinent to note here that whenever the petitioner has asked various approvals from KPTCL i.e. Respondent No.2, the KPTCL has taken prompt action on its part to accord approvals within a reasonable period. The Commission notes that the petitioner has delayed in submission of requisite information sought by the KPTCL and not furnished the relevant documents such as a copy of PPA, Land details which are essential for seeking such technical approvals and petitioner has changed the project location twice from the original place Tingloor village, Maadhugir Taluk, Tumkuru District to Kudrikotagi village, Yalburga Taluk, Koppal District and then finally to Chennammagathihalli Village, Challakre Taluk of Chitradurga District. The frequent change in site location is the main cause of delay in commissioning its project. Moreover, it is the responsibility on the part of Developer to get all clearance

from the concerned authorities as envisaged under Article 5.1.1(b) of the PPA. We are of the considered opinion that there are no delays occurred on the part of KPTCL in giving the Tentative Evacuation /Regular Evacuation approval/Layout drawings, provisional Interconnectivity approvals for different places. Therefore, the petitioner cannot blame and put onus on the KPTCL for not fulfilling Conditions precedent and not adhering to the Scheduling Commissioning Date as agreed upon while signing the PPA. Moreover, the petitioner has not followed the prudent utility practices while executing its project. Keeping the above stated facts, the petitioner seeking relief under Force Majeure clause for extending Scheduled Commissioning date and asking approval of SPPA does not come for its rescue and absolves its obligations as mandated under Article 5.1.1 of the PPA.

(m) The petitioner has relied upon the Judgment of Hon'ble Appellate Tribunal for Electricity in Chennammangathahalli Solar Power Project LL.P vs, Bangalore Electricity Supply Company & another, Appeal No.351 of 2018. Order dated 14.09.2020, wherein the Hon'ble Tribunal has observed that there was considerable delay of 7-8 months on the part of Government instrumentalities for according necessary approvals for the petitioner but in the instant case, the facts

are different as in this present case the KPTCL has accorded all technical approvals within a reasonable period. Therefore, the contention of the petitioner that due to delay in getting evacuation, bay erection approvals from KPTCL has delayed the commissioning the solar power project to be considered as Force Majeure event and SCOD time may be considered. This contention of the petitioner in this regard is liable to be rejected.

(3) Regarding: Delay on account of Demonetisation:

- (a) The petitioner has submitted that their project work was slowed down during November,2016 and onwards, on account of demonetisation decision taken by the Central Government which had an adverse impact to various activities in respect of the project. On 29.11.2016, they submitted a detail representation to MESCOM containing the project progress and difficulties and Force Majeure events encountered by them with a request to approve extension of the scheduled date of commissioning (Annexure-AO in WP).
- (b) Respondents have not made any submission in this regard and also the petitioner has not produced any reliable material to establish that the Demonetisation has really affected the progress of construction of its solar power project, without having supporting documents/materials to consider the

request of the petitioner to treat this event as Force Majeure for extension of SCOD, is not tenable.

(4) Therefore, Issue No.1 is answered in negative.

14. **Issue No.2:** Whether the grounds urged for extension of time for achieving the Conditions precedent and commissioning of the plant are within the provisions of Force Majeure conditions of PPA?

(1) Before proceeding to consider this issue, we may note the relevant part of "Force Majeure" as stated in Article 14 of the PPA which set out as under:

ARTICLE 14: FORCE MAJEURE

14.1 Definitions

14.1.1 In this Article, the following terms shall have the following meanings:

14.2 Affected Party

14.2.1 An Affected Party means ESCOM or the Developer whose performance has been affected by an event of Force Majeure.

14.3 Force Majeure

14.3.1 A 'Force Majeure' means any event or circumstance or combination of events 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, lightning, earthquake, landslide, cyclone, flood, volcanic eruption, chemical or radioactive contamination or ionising radiation, fire or explosion (to the extent of contamination or radiation or fire or explosion originating from a source external to the Site);
- b) an act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, riot, insurrection, terrorist or military action, civil commotion or politically motivated sabotage;
- c) compulsory acquisition in national interest or expropriation of any Project Assets or rights of the Developer or of the Contractors;
- d) any judgment or order of any court of competent jurisdiction or statutory authority made against the Developer in any proceedings for reasons other than (i) failure of the Developer to comply with any Applicable Law or Applicable Permit, or (ii) on account of breach of any Applicable Law or Applicable Permit or of any contract, or (iii) enforcement of this Agreement, or (iv) exercise of any of its rights under this Agreement by the Government or

e) unlawful or unauthorized or without jurisdiction revocation of, or refusal to renew or grant without valid cause, any clearance, license, permit, authorization, no objection certificate, consent, approval or exemption required by the Developer or any of the Contractors to perform their respective obligations under this Agreement and the Project Agreements; provided that such delay, modification, denial, refusal or revocation did not result from the Developer's or any Contractor's inability or failure to comply with any condition relating to grant, maintenance or renewal of such clearance, license, authorization, no objection certificate, exemption, consent, approval or permit.

14.4 Force Majeure Exclusions

14.4.1 Force Majeure shall not include (i) any event or circumstance which is within the reasonable control of the Parties and (ii) the following conditions, except to the extent that they are consequences of an event of Force Majeure:

- a) Unavailability, late delivery, or changes in cost of the plant, machinery, equipment, materials, spare parts or consumables for the Power Project;
- b) Delay in the performance of any Contractor, sub-Contractor or their agents; ‘
- c) Non-performance resulting from normal wear and tear typically experienced in power generation materials and equipment;

- d) Strikes at the facilities of the Affected Party;
- e) Insufficiency of finances or funds or the agreement becoming onerous to perform; and
- f) Non-performance caused by, or connected with, the Affected Party's:
 - i. Negligent or intentional acts, errors or omissions;
 - ii. Failure to comply with an Indian Law; or
 - iii. Breach of, or default under this Agreement.

14.5 Notification of Force Majeure Event

14.5.1 The Affected Party shall give notice to the other Party of any event of Force Majeure as soon as reasonably practicable, but not later than seven (7) days after the date on which such Party knew or should reasonably have known of the commencement of the event of Force Majeure. If an event of Force Majeure results in a breakdown of communications rendering it unreasonable to give notice within the applicable time limit specified herein, then the Party claiming Force Majeure shall give such notice as soon as reasonably practicable after reinstatement of communications, but not later than one (1) day after such reinstatement.

Provided that such notice shall be a pre-condition to the Affected Party's entitlement to claim relief under this Agreement. Such notice shall include full particulars of the event of Force Majeure, its effects on the Party claiming relief and the remedial measures proposed. The Affected Party shall give the other Party regular (and not

less than monthly) reports on the progress of those remedial measures and such other information as the other Party may reasonably request about the Force Majeure Event.

14.5.2 The Affected Party shall give notice to the other Party of (i) the cessation of the relevant event of Force Majeure; and (ii) the cessation of the effects of such event of Force Majeure on the performance of its rights or obligations under this Agreement, as soon as practicable after becoming aware of each of these cessations.

14.6 Duty to Perform and Duty to Mitigate

14.6.1 To the extent not prevented by a Force Majeure Event pursuant to Article 14.3, the Affected Party shall continue to perform its obligations pursuant to this Agreement. The Affected Party shall use its reasonable efforts to mitigate the effect of any Force Majeure Event as soon as practicable.

14.7 Available Relief for a Force Majeure Event

Subject to this Article 14:

- a) no Party shall be in breach of its obligations pursuant to this Agreement except to the extent that the performance of its obligations was prevented, hindered or delayed due to a Force Majeure Event;
- b) every Party shall be entitled to claim relief in relation to a Force Majeure Event in regard to its obligations, including but not limited to those specified under Article 5.7.1;

- c) For avoidance of doubt, neither Party's obligation to make payments of money due and payable prior to occurrence of Force Majeure events under this agreement shall be suspended or executed due to the occurrence of Force Majeure Event in respect of such Party.
- d) Provided that no payments shall be made by either Party affected by a Force Majeure Event for the period of such event on account of its inability to perform its obligations due to such Force Majeure Event.

(2) The timeline for implementation of the project is governed by the terms and conditions of the Power Purchase Agreement signed by the parties viz., Celestial Solar Solutions Private Limited and Mangalore Electricity Supply Company Limited. The PPA was signed on 12.02.2015. The Term of the agreement is 25 years from the commercial operation date. The effective date is defined as the date of signing the PPA i.e. 12.02.2015. As per article 3.1, the petitioner is required to achieve the Conditions precedent within 365 days i.e., on or before 11.02.2016 and to Commission the project within 18 months from the date of signing i.e., on or before 11.08.2016.

(3) It would be appropriate to mention the relevant provisions of the PPA pertaining to Conditions precedent. Article 4 of the PPA deals with the Conditions precedent procedure. The part of the Article 4 of Condition Precedent is set out as under:

“4.1 Conditions Precedent

Save and except as expressly provided in Article 4, 14, 18, 20 or unless the context otherwise requires, the respective rights and obligations of the parties under the Agreement shall be subject to the satisfaction in full of the Conditions precedent specified in this clause 4 (the “Conditions precedent”) by the Developer within 365 (Three Hundred and Sixty Five) days from the effective Date, unless such completion is affected by any Force Majeure event, or if any of the activities is specifically waived in writing by MESCOM.

4.2 Conditions precedent for the Developer

The Conditions precedent are required to be satisfied by the Developer shall be deemed to have been fulfilled when the Developer shall have:

- (a) obtained all consents, Clearances and Permits required for supply of power to MESCOM as per the terms of this Agreement;*
- (b) Not applicable,*
- (c) achieved Financial Closure and provided a certificate to MESCOM from the lead banker to this effect;*
- (d) made adequate arrangement to connect the Power Project switchyard with the interconnection Facilities at the Delivery Point;*
- (e) obtained power evacuation approval from Karnataka Power Transmission Company Limited (“KPTCL”) / MESCOM, as the case may be;*

(f) produced as per the requirements set out in Scheduled, the documentary evidence of having the clear title and possession of the land required for the Project in the name of Developer;

(g) fulfilled Technical Requirements for Solar PV Project as per the format provided in Schedule 2 and also provides the documentary evidence for the same;

4.2.1 Developer shall make all reasonable endeavours to satisfy the Conditions Precedent within the time stipulated and MESCOM shall provide to the Developer all the reasonable co-operation as may be required to the Developer for satisfying the conditions precedent.

4.2.2 The Developer shall notify MESCOM in writing at least once a month on the progress made in satisfying the Conditions Precedent. Developer shall promptly inform the MESCOM when any Conditions Precedent satisfied by it.

4.3 Damages for delay by the Developer

In the event that the Developer does not procure fulfilment of any or all of the Conditions Precedent set forth in Clause 4.2 within the period of 365 days and the delay has not occurred for any reasons attributable to MESCOM or due to Force Majeure, the Developer shall pay to MESCOM Damages in an amount calculated at the rate of 0.2% (zero point two per cent) of the Performance Security for each day's delay until the fulfilment of such Conditions Precedent, subject to a maximum period of 30 (thirty) days. On expiry of the said 30 (thirty) days, MESCOM of its discretion may terminate this Agreement."

(4) It may be noted that the petitioner ought to have fulfilled the Conditions precedent on or before 11.02.2016 for procurement of land, Financial Mobilisation of funds from the financial institutions, Evacuation approvals and obtaining Interconnection Facility at the Delivery Point from the KPTCL as envisaged under sub-clause (a) (b) (c) (d) (e) of Article 4.2 of PPA and shall notify MESCOM in writing at least once a month on the progress made in satisfying the Conditions Precedent as per Article 4.2.2. On the perusal of the material records produced by both the parties, this Commission observes that the petitioner requested MESCOM for extension of time for six (6) months to fulfilment of Conditions precedent vide letter No. CSPL/MESCOM15-16/12 dated 12.01.2016 and dated 02.02.2016 & 08.02.2016 (Annexure-V in WP Colly) there in, it has been mentioned that the petitioner is facing a lot of challenges in acquisition, obtaining clear title, position, and conversion of land required for execution of the project in Karnataka due to which they are not in position to furnish documentary evidence for the same and to fulfil the Conditions precedent in the time specified in the PPA. It could be noted here that the petitioner has asked MESCOM for extension of time one month before the time line set for fulfilling the Conditions precedent. Further, it is observed that the superintending Engineer (Ele) (C&RP) MESCOM address a letter on 12.02.2016 (Annexure-W in WP) to the petitioner stating that to satisfy of Conditions precedent as per Article 4.2 of the PPA the petitioner has not submitted the following documents. (i) Land

Conversion Documents (ii) the documents regarding achievement of financing closure; (iii) Clearance from GP for establishment of project, (iv) Environmental clearance and (v) certificate by the competent revenue/ registration authority for acquisition / ownership/ vesting of the land in the name of developer and the copy of these documents to be notarize and submitted to his office. It is further noticed from this letter that without assigning a cogent reasons the Superintending Engineer (Ele) has communicated to petitioner that MESCOM has granted 6 months time in addition to the time period of 365 days provided in PPA for fulfilment of Conditions precedent subject to the Scheduled commissioning date as per PPA dated 12.02.2015 remains unaltered i.e., the project should be commissioned on or before 11.08.2016. Further, in case of any delay in commissioning the project the petitioner is liable to pay damages as per Article 4.3 of the PPA for delay in achieving Conditions precedent in addition to the liquidated damages as per Article 5.8 of the PPA for delay in commencement of injecting power supply to the grid.

- (5) The Commission notes that the petitioner has not submitted any monthly progress made by him in satisfying the Conditions precedent to the MESCOM. The Commission further observes that there is no record placed by the petitioner to show that it has sent the monthly progress report for achieving the Conditions precedent within the stipulated time frame as envisaged under Article 4.2.2 of the PPA.

(6) It is pertinent to note at reference No. 5 in the letter written by Superintending Engineer (C& RP), Corporative Office, MESCOM on 04.07.2016 (Annexure-AE in WP) addressed to the respondent, wherein, it is found that the petitioner had written a letter on 18.06.2016 for Extension of Scheduled Commissioning Date of the project. In this regard, the MESCOM informed the petitioner that you have requested to extend the Schedule commissioning date of the project by four (4) months i.e., up to 11.12.2016. The Extension of Schedule Commissioning Date of the project is against the objective of the PPA, it can only be considered under the circumstances envisaged in the clause 5.7 of the PPA. In case, the delay is due to not of the nature in line with clause 5.7 of the PPA, the delay caused in commissioning of the project will be attributed to the SPV for which they are liable to MESCOM in terms of clause 5.8 and 12.2 of the PPA for payment of damages/ liquidated damages and also resulting in tariff implication. Accordingly, it was requested to adhere to the time schedule prescribed for fulfilment of Conditions precedent and also to commissioning of the project on the schedule date i.e., on or before 11.08.2016. such being the case, the Superintending Engineer (C& RP), Corporative Office, MESCOM on 08.08.2016 (Annexure-AF in WP) addressed to the petitioner company intimating that Extension of time by four (4) months i.e., up to 11.12.2016 for commissioning the project at Channamanagthihalli village challakere Taluk, Chitradurga District subject to the condition

that the validity of all the Bank Guarantees furnished to MESCOM shall be extended up to 12 months from the revised commissioning date.

(7) On 29.11.2016, (Annexure-AO in WP) the petitioner wrote a letter to Managing Director (MD), MESCOM vide letter No. CSSPL/MESCOM/NOV/16-17/2 seeking further Extension of Time of the scheduled Commercial Operation Date mentioning the delay in getting of evacuation approval, bay allotment approval and mentioning that delay in commencement of its project is solely attributable to procedural time required for obtaining the approval from the concerned departments and time taken by the departments for according approvals may be considered under Force Majeure in pursuance of this letter the Superintending Engineer (Ele) (Com) MESCOM address a letter dated No. SEE(Com I)/EE(EBC)/AEE(EBC)/F-224/16-17/4404 dated 07.12.2016 (Annexure-AR in WP) mentioned that already Extension of Time extended by four (4) months i.e., up to 11.12.2016 for commissioning of the project (MESCOM letter dated 08.08.2016, Annexure-AF in WP). Further, in this letter, the MESCOM has mentioned that "in order to avoid frustration of the contract, MESCOM is allowing another two (2) months time up to 11.02.2017 for commissioning of the project subject to compliance of the clauses 4.3, 5.8 and 12.2 of the PPA. Further it is observed that vide its letter we noticed that the petitioner wrote a letter to the Managing Director (MD) on 14.12.2016 vide letter No. CSSPL/MESCOM/DEC/16-17/1 in

reply to the MESCOM's letter dated 07.12.2016 requesting to treat this letter as the Force Majeure notice as per Clause 14.5 of the PPA. Further, it was informed that the delay in commissioning of the project is due to Force Majeure conditions, it is understood from your letter that the provisions related to tariff as per clause 12.2 of the PPA and liquidated damages as per clause 4.3 and 5.8 shall be applicable as per the revised Scheduled Commissioning Date of 11.02.2017 and tariff of Rs.7.12 per unit as per the PPA shall remain valid if the project is commissioned by 11.02.2017, without any implication of liquidated damages as per clause 4.3 and 5.8 of the PPA.

- (8) The petitioner has contended that there is a delay on KPTCL in giving evacuation approval, bay erection approval in time which as caused delay in commencement of its project and sought extension of time for achieving for fulfilling the conditions precedent and commissioning the project in the extended time for which the respondent No.1 has accepted the claim of Force Majeure events and granted the extension of time initially for 4 months up to 11.12.2016 for achieving completion of project as per (Annexure – AF in WP) and second time on 07.12.2016 for 2 months of extension of time up to 11.02.2017 for completion of project (Annexure – AR in WP). We are unable to accept the contention of petitioner. Any extension of time beyond Scheduled Commissioning Date, to commission a power project, has a bearing on the tariff payable. The tariff determination/fixation of

time for the electricity, is not an adversarial proceedings. The consumer who is not a party to the proceedings, ultimately pays for the supply of electricity and, therefore, is the most affected party. The Commission is required to safeguard such consumers' interest. While upholding the role of the commission, as a regulator and custodian of the interest of consumers, the Hon'ble Supreme Court, in the case of All India Power Engineers Federation Ltd Vs. Sasan Power Ltd., reported in (2017) 1 SCC 487, has held that, even if parties to a contract (generating company-seller of energy and distribution licensee – purchaser of energy) waive a certain term affecting the tariff, the Commission, as a custodian of the consumers' interest, has to intervene and exercise its regulatory powers. Accordingly, we hold that, the Commission has the mandate and powers to scrutinize the correctness and legality of the extension of time, granted by 1st Respondent (MESCOM).

- (9) In the instant case, the Commission notes that the respondent sought details from the petitioner for providing/to furnish monthly progress report in compliance of Article 4.2.2 and the requisite documentary evidence for achieving the conditions precedent (Annexure O in WP) but the petitioner has not submitted any progress report on monthly basis as mandated under Article 4.2.2 of the PPA. Despite this, the Respondent No.1 has extended time for achieving Conditions precedent for six months in addition to 365 days as provided under PPA vide letter dated 12.02.2016 (Annexure-W in WP) and Extension of

Time for SCOD vide letters dated 08.08.2016 & 07.12.2016 for a period of four (4) and two (2) months respectively (Annexure-AF in WP and Annexure – AR in WP). It could be seen from the said letters of the Respondent No.1 wherein; without cogent reasons they have extended the time of six (6) for achieving Conditions precedent. The Respondent No.1 has extended Scheduled Commissioning Date initially four months and subsequently, two months in a routine manner without citing any substantial evidence for commissioning the power project of the 10 MW Solar PV Project at Channammanagathihalli Village, Challakere Taluk, Chitradurga District. Therefore, we hold that the extension six (6) months for achieving Condition precedent and six (6) months for SCOD by the Respondent No.1 is not acceptable and therefore liable to be rejected. Hence, we reject the extension of time granted for fulfilment of Conditions precedent and the Scheduled Commissioning Date. Facts of the instant petition is totally different from the case relied on by the petitioner in Appeal No. 351/2020. For the foregoing reasons, the judgment relied upon by the petitioner passed by the Hon'ble Appellate Tribunal for Electricity in Chennammanagathahalli Solar Power Project LL.P vs, Bangalore Electricity Supply Company & another, Appeal No.351 of 2018. Order dated 14.09.2020 is not applicable to the case on hand.

(10) Therefore, Issue No.2 is answered in negative.

15. **Issue No 3:** Whether the 1st Respondent is entitled to liquidated damage as per Articles 4.3 and 5.8 of the PPA?

(a) The petitioner has submitted that the demand of Rs.6,00,000 towards liquidated damages for delayed compliance of the Conditions precedent and Rs.5,55,00,000 towards liquidated damages for delay in achieving of the COD levied by the MESCOM and that amount adjusted from the energy bills starting from months of March 2017 to be refunded.

(b) The petitioner has filed a rejoinder on 11.02.2021 stating that the respondent was never entitled for damages from the petitioner, since liquidated damages stipulated by encashment of Performance Bank Guarantee under the PPA is not a genuine pre-estimated loss, but the same was penalty. It is pertinent to note that the PPA states in Clause 1.2.1(w) as follows:

“– The damage payable by the either party to the other of them, as set forth in this Agreement, whether on per diem basis or otherwise, are mutually agreed genuine pre-estimated loss and damage likely to be suffered and incurred by the party entitled to receive the same and are not by way of penalty (“Damages”).--

(c) However, the Respondent has penalised the petitioner at its discretion even though the project was commissioned within the extended Scheduled Commissioning Date. The petitioner craves leave to refer

in details to Sections 56, 73 and 74 of the Indian Contract Act,1872.

Section 74 of the Contract Act is extracted below:

“74. Compensation for breach of contract where penalty stipulates for- When a contract has been broken, if a sum is named in the Contract as the amount to be paid in case of the such breach, or if the contract contents any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so trained or, as the case may be, the penalty stipulated for.”

(d) Further submits that when there is a claim for damages or invocation of Bank Guarantee for claim of damages by the respondents, it is necessary to interpret liquidated damages as per the Indian Law with consideration of Sections 73 and 74 of the Indian Contract Act. As per the aforesaid provisions and various judgments of the Hon'ble High Courts and Supreme Court.

(e) The Petitioner placed reliance on the following Judgments:

(i) Union of India vs. Rampur Distillery AIR 1973 SC 1098:(1973)1 SCC 649

(ii) Fateh Chand vs. Bal Kishan Dass AIR 1973 SC 1098 and Kailash Nath Associates vs. DDA (2015) 4 SCC 136, in this judgment inter alia held that it is necessary that the damages can be

awarded only if respondents plead and prove that the breach of contract has resulted in loss or damages to the Respondents, which has not been done by the MESCOM in the instant case. It is submitted that Section 74 of the Act does not distinguish between stipulated by way of "liquidated damages" and by way of "penalty". It provides for uniform principle applicable in both the case.

(f) The Respondent No.1 in its written statement of objection dated 25.10.2018 in Para 3(f) submitted that the SPV after creating inordinate delays in the completion of the project, requested the Respondent for extension of Scheduled Commissioning Date up to 11.12.2016. The same was allowed by the Respondent subject to the compliance of Clause 5.8 and 12.2 of the PPA by letter dated 08.08.2016. The Respondent in this letter has unequivocally made clear that the extension of time is subjected to the developer agreeing to pay the liquidated damages as per clause 5.8 and assenting to the tariff rate as per the Clause 12.2. Such being the case, all uncorroborated claims of the SPV citing that the Respondent has made no mention of the applicable tariff rates are liable to be rejected.

(g) In Para 11 of the statement of objection stated that the SPV is legally bound to pay the liquidated damages as per Clause 5.8 of the PPA and cannot arbitrarily invoke force majeure clause to escape its liability. It is clearly established that the provisions of Clause 5.7.1 are

not attracted in the instant case as delay in commissioning the project is solely assignable to the negligent actions of the SPV.

(h) Further, the Respondent No.1 has submitted its written arguments stating that the petitioner has claimed that the levy of liquidated damage by the Respondent is opposed to Section 74 of the Indian Contract Act for the reason that the Respondent have purportedly not suffered any loss owing delay in commissioning of the project and such loss is a pre-condition for levy of liquidated damages. The said claim of the petitioner is denied as untenable. The Respondent further averred that Section 74 of the Indian Contract Act provides that the party breaching the contract is obligated to pay the damages stipulated for, whether or not actual damage or loss is proved to have been caused. In the instant case, the liquidated damages in the PPA are the damages stipulated for and the petitioner is bound to pay the same having violated its duty to supply contracted energy from the SCOD.

(i) The learned Counsel for petitioner relied upon the following decision, in support of his contention on this issue:

- “i) (1964) 1 SCR 515: AIR 1963 SC 1405 between Fateh Chand v.s Balakishan Dass (particularly Paragraph 15)*
- ii) (1973) 1 SCC 649 between Union of India v. Rampur Distillery & Chemical Co.,*
- iii) (2011) 1 SCC 394 between Bharat Sanchar Nigam Limited v. Reliance Communication Limited.*

iv) (2015) 4 SCC 136 between Kailash Nath Associates v. Delhi Development Authority and Another.”

(j) In Kailash Nath Associates case, the Hon'ble Supreme Court of India, on consideration of the various authorities has summarized the principle, in paragraph 43 of its judgment, which reads thus:

“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* in Section 73 of the Contract Act.

43.3 Since Section 74 awards reasonable compensation for

damage or loss caused by a breach of contract, 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 dispensed 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."

(k) The Respondent No.1 denied the averments made by the petitioner.

The following decisions are relied upon by the Respondents:

- i) PTC India Limited Vs. Gujarat Electricity Regulatory Commission and Another MANU/ET/0119/2014: 2014 ELR (APTEL) 1243 Paras 43-53);
- ii) Lanco Kondapalli Power Limited Vs. Andhra Pradesh Electricity Regulatory Commission MANU/ET/0004/2015: 2015 ELR (APTEL) 755;

iii) Bharat Sanchar Nigam Limited vs. Reliance Communications Limited (2011) 1 SCC 705.

iv) ONGC vs. Saw Pipe Limited (2003) 5SCC 705.

v) ACB (India) Limited Vs. Gujarat Electricity Regulatory Commission and Others (in Appeal No.279 of 2015 decided on 18.01.2019)

(l) In the decision of Bharat Sanchar Nigam Limited Vs. Reliance Communications Limited, the Hon'ble Supreme Court of India at paragraph 53 has noted as follows:

“53. Lastly, it may be noted that liquidated damages serve the useful purpose of avoiding litigation and promoting commercial certainty and therefore, the court should not be astute to categorize as penalties the clauses described as liquidated damages. The principle is relevant to regulatory regimes. It is important to bear in mind that while categorizing damages as “penal” or “liquidated damages”, one must keep in mind the concept of pricing of these contracts and the level playing field provided to the operators because it is on costing and pricing that the loss to BSNL is measured and, therefore, all calls during the relevant period have to be seen.”

(m) We note here that, in this case, there was an option for the Respondent No.1 to terminate the PPA when project was not commissioned within stipulated time period i.e. 18 months from the date of approval of PPA by the KERC, but this option has not exercised and the project was

allowed to be commissioned by granting extension of time. In the decision reported in (2018) 6 SCC 157, in the case of Madhya Pradesh Power Generating Company Limited vs. Renew Clean Energy Private Limited & 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 delay performance, the damages in terms of the Agreement could be claimed, instead of taking steps for termination of the Agreement and that, under such circumstance, the Liquidated Damages as per Agreement could be awarded.

(n) We have gone through the pleadings and citations relied upon by the parties on this issue. The issue arises here that whether the liquidated amount named in the contract/PPA is genuine pre- estimate of damage or loss?

(i) The contention of the petitioner is that the respondent has not suffered any loss for non-supply of energy within stipulated time frame and the respondent never entitled for damage from the petitioner, since liquidated damages stipulated by encashment of performance guarantee and adjustment from the electricity bills raised by the petitioner is not a genuine pre estimated loss, but same is a penalty. This Commission notes that the petitioner has to compliance to fulfil the Conditions precedent within 365 days from the date

of signing of PPA and to commission the solar power project within 18 months period i.e., on 18.06.2016. In the instant case, the petitioner ought to have achieved the Conditions precedent on or before 11.02.2016 but actually taken land Possession on 28.10.2016 after lapse of 8 months after the target date for achieving Conditions precedent and not fulfilled the Conditions precedent set out under Article 4 of the PPA and to be Commissioned its project on or before 11.08.2016 but project actually commissioned on 11.02.2017.

- (ii) In view of above facts, it is pertinent to note that when there is a term contained in a contract entered between parties regarding the payment of liquidated damages, the initial presumption is that the quantum of liquidated damaged fixed is a genuine pre estimate of the damage or loss in the case of the breach of the term of the contract. It would be appropriate to mention the relevant part of the Article which deals with liquidated damages for delay in commencement of supply of power to MESCOM i.e. Respondent No.1 in the instant case.

“As per Article 5.8.1 of PPA- If the developer is unable to commence supply of power to MESCOM by the Scheduled Commissioning Date other than the reasons specified in Clause 5.7.1, the Developer shall pay to MESCOM,

Liquidated Damages for the delay in such commencement of supply of power and making the Contracted Capacity available for dispatch by the Scheduled Commissioning Date as per following:

- a. For delay up to one month an amount equivalent to 20% of the Performance Security.
- b. For the delay of more than one (1) month and up to two months an amount equivalent to 40% of the total Performance Security.
- c. For the delay of more than two months and up to three months an amount equivalent to 40% of the performance Security.

Article 5.8.2. In case the Developer delays the achievement of Commercial Operation Date beyond 3 months, the Developer shall pay to MESCOM, the liquidated damages at rate of Rs. 50,000 per MW per day of delay for the delay in such commissioning. Provided that the Developer shall be required to make such payments to MESCOM in advance on a week basis for the period of delay."

- (iii) It may be noted here that the Definition Clause in Article 21.1 of the PPA defines "Damages" shall have meaning set forth in Sub-clause (w) of Clause 1.2.1. The said Sub-clause (w) reads as follows:

"The damages payable by the either Party to the other of them, as set forth in this Agreement, whether on per diem basis or otherwise, are mutually agreed genuine pre-estimated loss and damage likely to be suffered and incurred by the Party entitled to receive

the same and are not by way of penalty (the "Damages")

(o) In the instant case, the petitioner has not led any acceptable evidence to infer that the liquidated damages agreed in the PPA are in the nature of penalty. We place reliance on the Supreme Court Judgement in case of Madhya Pradesh Power Management Company vs. Renew Clean Energy Private Limited & another. Therefore, we are of the considered view that, even without being any proof of actual damages or loss, the Liquidated damages, as agreed to, could be awarded, where steps for termination of the contract is not taken.

(p) For the above reasons, we hold that the Issue No.3 in affirmative.

16. **Issue No. 4:** Whether the Supplemental Power Purchase Agreement dated 15.12.2016 requires the approval of Commission or otherwise?

(1) It may be noted that consequent on the change of location from Tingaloor Village, Madhugiri Taluk, Tumkur District to Kudrikotagi Village, Yelaburga taluk Koppal District and then to Channamagathihalli Village, Challakere Taluk, Chitradurga District, the petitioner and the MESCOM had entered into a Supplementary PPA dated 27.07. 2016 (Annexure-AC in WP) for incorporating the change of location and submitted to the Commission for its approval on 23.08.2016 (Annexure-AG in WP), that the Commission addressed a

letter to MESCOM on 02.09.2016 for furnishing the NoC from KREDL and incorporating the 'new project location where power project location appears in the original PPA', for considering the approval of SPPA. Thereafter, MESCOM submitted the Supplemental PPA (Annexure-AC in WP) dated 15.12.2016 (and not the 27.07.2016 SPPA earlier submitted to KERC) for approval of the Commission on 02.03.2017 (Annexure-AAE in WP) after the commissioning of the plant on 11.02.2017, as can be ascertained from KERC's letter dated 15.03.2017. In the KERC letter dated 02.09.2016 (typed as 02.09.2015 in Ref. No. 5 in Annexure-AAE in WP) informed the MESCOM to make some correction regarding project location and to furnish the NoC from KREDL for consenting for change of location. Whereas the parties to PPA have entered an entirely different SPPA dated 15.12.2016 incorporating the same change of location and also other alterations were made. It is not clear as to why a different SPPA is done instead of correcting the 27.07.2016. As the delay condonation by the respondent was not in the notice of the Commission when SPPA was submitted 2nd time on 02.03.2017, Commission noticing the delay in achieving the Conditions precedent and Scheduled COD, informed the MESCOM to incorporate the applicable reduced tariff.

- (2) The Hon'ble High Court in its order dated 05.04.2018 considering the facts and circumstances, stated that it would be appropriate to consider the communications A and B as provisional and the

petitioner shall file reply to annexure A and the KERC is directed to consider the reply in accordance with law and after providing an opportunity of hearing the petitioner, to take appropriate decision on approval sought for SPPA. All rights and contentions of the parties are left open to be adjudicated before KERC.

- (3) In accordance with the orders of the Hon'ble High Court of Karnataka, at Bangalore in WP 53060/2017, KERC was directed to consider the SPPA dated 15.12.2016 as per law. The petitioner has stated in para 5,9 and 10 of the representation that the subject SPPA is signed only to record the changed location but contrary to the claims, it is noticed that the parties have also inserted in page-3, sub-para 2, that on signing of SPPA all other terms of original PPA dated 12.02.2015 will remain unaltered. As stated in the above paragraph, after scrutinising the subject SPPA, it is noticed that the parties have not only incorporated the change of location to Channamanagathihalli but also includes the terms and conditions of the PPA dated 12.02.2015 to remain unaltered. This indicates that Article 12 of PPA remains same which would give rise to a claim for original tariff of Rs 7.12 per kWh. However, the tariff issue is dealt with separately by this commission as per law and in terms of the PPA and tariff issue cannot form part of the SPPA. The commission agrees to approve the SPPA only to the extent of change in location and as stated herein, the tariff issue will be addressed separately in this order.

(4) It may be noted that contrary to prayer of the petitioner claiming for approval of SPPA dated 15.12.2016, in para 7.3 (v) contended that the SPPA dated 15.12.2016 is only for change of location and that there is no requirement for KERC to further approve the PPA.

(5) Therefore, the Issue No.4 is answered accordingly.

17. **Issue No.5:** Whether the petitioner is entitled for the Tariff of Rs.7.12 per unit for the energy delivered or otherwise, then what should be the Tariff as per Terms of the PPA?

(1) The petitioner submitted in its representation stating that the petitioner's project tariff is discovered through a transparent process of competitive bidding under Section 63 of the Electricity Act, 2003. In fact, Section 63 of the Act has overriding effect on Sections 62 and 64 in so far as the KERC does not get to determine the tariff in case of competitive bidding but has to adopt the tariff since it is based on competitive bidding. However, through the impugned communication dated 15.03.2017, KERC is imposing a tariff at the time of approving the Supplemental Power Purchase Agreement dated 15.12.2016 which was intended to only record the change of location and which was approved and executed between MESCOM and us.

(2) The MESCOM under the PPA has already approved by KERC has complete powers to extend the time lines for execution of the project as per the PPA. Hence, there is no requirement for KERC to further

approve the SPPA. The MESCOM after extending the SCOD, forwarded the Supplemental PPA dated 15.12.2016 to KERC only with reference to the change of location and the said Supplemental PPA excluded any reference to the applicability of new tariff and/or reference to the issue of revision of tariff. The petitioner has executed PPA on 12.02.2015 which was later approval by the KERC 04.05.2015. Therefore, tariff of Rs.7.12 per unit arrived under Section 63 of the Electricity Act 2003, through a transparent process may be retained can considered to reduce as the Respondent No.1 MESCOM has extended the scheduled commissioning date up to 11.12.2016 and 11.02.2017 and the project has commissioned on 11.02.2017.

- (3) The respondent No.1 has contended that the petitioner has commissioned the project on 11.02.2017, 6 months after the scheduled commissioning date i.e.,11.08.2016. On 02.03.2017, the respondent wrote a letter to KERC to requesting its approval to the SPPA executed on 15.10.2016. The respondent, having made its stand clear on the applicability the new tariff rates and the liability to pay damages, did not deem its necessary to further mention it again in the SPPA, which was solely executed to recorded change of location. Further the respondent submitted that it has allowed for extension of time only to avoid frustration of the contract, and as made it crystal clear that the extension of the time was granted subject to applicability of latest tariff rate and payment of liquidate damages for failing to comply the

conditions of the PPA. The petitioner has further contended that the generic tariff order of this Commission dated 30.07.2015 in its preamble as exclude itself from being applied those project in respect of which the tariff is discovered through competitive bidding process and therefore, the tariff of Rs. 7.12 per unit as per the said order shall be levied on the project of petitioner, which is a result competitive bidding process. This averment of the petitioner is once again misleading and erroneous. Since the petitioner has commissioned project after six (6) months period from the date of scheduled commissioning date. Therefore, it is eligible for the varied lower tariff prevailing at the date of commencement of the project as envisaged under article 12.2 of the PPA which is binding on both the parties, therefore in terms of PPA, the applicable tariff in the instant case is Rs.6.51 per unit which was the prevailing tariff fixed by this Commission as on the date of commissioning of the project.

- (4) The Commission observes that the petitioner has commissioned its project after the delay of 6 months from the date of SCOD as agreed in the PPA. As per Article 12 of the PPA which deals with applicable tariff. The abstract the article is reproduced below:

“12.1 The developer shall be entitled to receive the Tariff of Rs. 7.12 kWh of energy supplied by it to MESCOM in accordance with the terms of this Agreement during the period between COD and the Expiry Date.

12.2 Provided further that as 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

- or-

(ii) KERC applicable tariff as on the Commercial Operation Date."

(5) The "Commercial Operation Date" is defined under Article 21.1 of the 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"

(6) The petitioner contended that the tariff under the PPA is discovered through competitive bidding. Hence, it is not vulnerable to variations in the generic tariff effected vide different Generic Tariff Orders. The tariff Order dated 30.07.2015 is only modification of the earlier order which is not applicable to the petitioner's case. We have perused contents of the Generic Tariff Order dated 30.07.2015, in the matter of Determination of tariff for Grid Interactive Megawatt Scale Solar Power Plants. The clause 3 of the tariff order dated 30.07.2015 inter-alia says that:

Clause 3 : In view of the above, the Commission, in modification of its Order dated 10th October, 2013,

decides that the norms and tariff determined in this Order shall be applicable to all new grid connected MW scale solar PV and solar thermal power plants, entering into Power Purchase Agreement (PPA) on or after 1st September, 2015 and getting commissioned during the period from 1st September, 2015 to 31st March, 2018 for which PPAs have not been entered into, prior to 1st September, 2015.

In respect of the projects that are commissioned during the period from 1st September, 2015 to 31st March, 2018 for which PPAs have been entered into and submitted to the Commission prior to 1st September, 2015 for approval, the tariff as per the said agreement shall be applicable.

The tariff determined in this Order shall be applicable for the term of the PPAs entered into in respect of projects covered by this Order.

However, the tariff in respect of rooftop and small solar PV plants would continue as per the Commission's Order dated 10th October, 2013.

- (7) In the instant case, the petitioner has entered into PPA on 12.02.2015 and commissioned the project on 11.02.2017 and agreed to the terms of PPA dated 12.02.2015 wherein clause 12.2 of PPA envisaged the applicability of varied tariff as determined by the KERC as on the Commercial Operation Date. If the petitioner is not accepting the terms of PPA on later stage, then it is not tenable at this juncture, it

could not have accepted during the time of entering PPA with MESCOM and could have challenged before appropriate forum.

(8) As a consequence of delay in commissioning of the project beyond the Scheduled Commissioning Date, the project would be liable for lower tariff or the two tariffs as provided in Article 12.2 of the PPA.

(9) We rely upon the Civil Appeal No.1220 of 2015 (Gujrat Urja Vikas Nigam Limited Vs. EMCO Limited and an Others) decided on 02.02.2016, where in Hon'ble Supreme Court of India has held, as follows:

“31. Apart from both the respondent No.2 and the Appellant tribunal failed to notice that the 1st 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 31st December 2011, GUVNL shall pay the tariff as determined by the Hon'ble GERC for solar power project effective on the date of commissioning of solar power project of above mentioned tariff, **whichever is lower,**”*

The said stipulation clearly envisaged a situation where notwithstanding the contract between the parties (in PPA), there is a possibility of the 1st respondent not being able to commence the generation of electricity within the “control period” stipulated in the first tariff order. It also visualised that for the subsequent control period, the tariff payable to the project/power produced (similarly situated as the 1st respondent) could be different, in

recognition of the said two factors, the PPA clearly stipulated that in such a situation, the 1st respondent would be entitled only the lower of the two tariffs---"

- (10) we are the considered opinion that the petitioner has failed to establish any "Force majeure" event to claim Extension of Time for achieving the Conditions precedent or Scheduled Commissioning Date. In the instant case, 10 MW Solar Power Plant of the petitioner in Channammanagathihalli Village, Challakere Taluk, Chitradurga District, was commissioned on 11.02.2017 as per Commissioning Report (Annexure- AAC in WP). This project should have been commissioned on or before 11.08.2016 as per PPA. The Tariff agreed in the PPA dated 12.05.2015 was of Rs.7.12 per kWh, but KERC has revised the Tariff of Rs.6.51 per kWh for Grid Interactive Megawatt Scale Solar Power Plants by its Tariff Order dated 30.07.2015, which is applicable to this project as per the provisions of Article 12.2 of the PPA, because this solar project is commissioned on 11.02.2017 subsequent to the KERC Tariff Order dated 30.07.2015. Therefore, as per Article 12.2 of the PPA, the petitioner is entitled to get the reduced tariff of Rs.6.51 per kWh.
- (11) This Commission places reliance on Order dated 02.02.2016 passed by the Hon'ble Supreme Court Judgment in Civil Appeal No.1220 of 2015 (Gujrat Urja Vikas Nigam Limited Vs. EMCO Limited and an Others), wherein it held that if the developer not being the able to commence the generation of power or electricity within stipulated time as

prescribed in PPA, then would be entitled only the lower or two tariffs. Therefore, in view of as above and provision of 12.2 of the PPA, we hold that the petitioner's project is entitled to the Tariff of Rs. 6.51 per kWh for the term of the PPA as per Generic Tariff Order dated 30.07.2015, which is varied tariff as on the date of commissioning the project. Therefore, issue No.5 is held accordingly, holding that the petitioner is not entitled to any reliefs.

18. **Issue No.6:** 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.6.51 per kWh (Rupees Six and paisa Fifty-One) only per kWh, the varied tariff as applicable on the date of commissioning of the petitioner's Solar Power Project, as fixed by the Commission in the Order dated 30.07.2015, 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 Article 4.3 and 5.8 of the PPA.

sd/-
(SHAMBHU DAYAL MEENA)
Chairman

sd/-
(H.M. MANJUNATHA)
Member

sd/-
(M.D. RAVI)
Member