

No.N/382/2017

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

Dated 27.07.2020

Present

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

OP No. 206/2017

BETWEEN:

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

... Petitioner

[Represented by Smt. Poonam Patil, Advocate]

AND:

1) Chamundeshwari Electricity Supply Company Limited
A Company Registered under the
provisions of Companies Act, 1956 having its
Registered Office at No.29, Vijayanagara,
2nd Stage, Hinkal,
Mysuru-570 017.
(Represented by its Managing Director)

2)Karnataka Renewable Energy Development Limited
A Company Registered under the
provisions of Companies Act, 1956 having its
Registered Office at No. 39, 'Shanthi Gruha"
Bharat scout and Guides Building, Palace Road,
Bengaluru-560 001.
(Represented by its Managing Director)

- 3) Karnataka Power Transmission Corporation Limited
A Company Registered under the
provisions of Companies Act, 1956 having its
Registered Corporate Office,
Cauvery Bhavan, K.G. Road,
Bengaluru-560 009.
(Represented by its Managing Director)
- 4) State of Karnataka,
Department of Energy,
Room No.236, 2nd Floor,
Vikasa soudha,
Dr. B.R. Ambedkar Veedhi,
Bengaluru-560 001.
(Represented by Addl. Chief Secretary)

..... **RESPONDENTS**

[Respondents 1 & 3 represented by Just Law, Advocates;
Respondents 2 & 4 represented by Sri G.S. Kannur, Advocate]

ORDER

1. This is a petition filed under section 86 (1)(f) of the Electricity Act, 2003, praying for the following reliefs to:
- a) Call for records;
 - b) Declare that the Petitioner was prevented from performing its obligation under the Power Purchase Agreement (hereinafter called as PPA) due to 'Force Majeure' events affecting it;
 - c) Grant concurrence to the Supplemental Power Purchase Agreement (hereinafter called as SPPA) dated 26.11.2016;
 - d) Declare that the 'Effective Date' under Article 3.1 of the PPA is the date on which the SPPA receives its concurrence from this Commission;
 - e) If the Commission were to consider that there is a delay in fulfilment of the Conditions Precedents and commissioning the project, the Commission may be pleased to condone the inadvertent delay caused for the reasons beyond the control of the petitioner due to 'Force

Majeure' events affecting it in fulfilment of the Conditions Precedent and in achieving the Commercial Operation Date (COD) of the project;

- f) Direct the Respondents not to levy any Liquidated damages and not to take any other or incidental coercive measures under the PPA or under any other law for the time being force, against the petitioner based on the previous understanding of the parties on the 'Effective Date' and resultant COD;
- g) Direct the Respondents to make payment at the rate of Rs.4.79 per unit, as per Article 12.1 of the Power Purchase Agreement dated 28.06.2016; and
- h) Pass such other order/s including an order as to costs, to meet the ends of justice and equity.

2. The facts mentioned in the Petition are:

- a) The Petitioner is a company incorporated under the Companies Act, 2013, a 100% subsidiary of Adani Green Energy Limited and is primarily engaged in the business of setting up of power plants and generation of electricity.
- b) The Respondent No.2 invited proposals by its "Request for Proposal" dated 12.02.2016 (hereinafter referred as RfP) prescribing the technical and commercial conditions for selection of bidders for undertaking development of solar PV ground mounted power plants in Karnataka to be implemented in various taluks for capacity addition of 1,200 MW through private sector participation.

- c) Respondent No.2 after evaluation of the proposals received from bidders, accepted the bid of Adani Green Energy Limited for development of 20 MW capacity of solar project in T. Narasipura taluk of Mysore district and issued a Letter of Award (hereinafter called the "LoA") and Allotment Letter dated 30.05.2016 (Annexure-P1) to Adani Green Energy Limited, requiring, execution of PPA.
- d) Adani Green Energy Limited accepted the LoA for development of 20 MW Solar PV project in T. Narasipura taluk, Mysuru district, vide its letter dated 08.06.2016 (Annexure-P2) and as per clause No.2.1.1 of the RfP, proposed to execute the Project through Special Purpose vehicle (SPV), Adani Green Energy (UP) Limited, i.e., the Petitioner.
- e) Thereafter, the Petitioner executed a PPA with Respondent-1 on 28.06.2016 (Annexure-P3) for setting up of the Solar Power Plant at T. Narasipura taluk, Mysuru district. The PPA was forwarded by the Respondent-1 to the Commission for approval.
- f) The Commission vide its letter No.KERC/S/F-31/Vol-1169/16-17/1648 dated 27.09.2016 (Annexure-P4) communicated the approval of the PPA subject to incorporating certain corrections/modifications by entering into a suitable SPPA. The said letter of the Commission was received by the Petitioner on 12.10.2016. Accordingly, the Petitioner executed a SPPA dated 26.11.2016 (Annexure-P5) with 1st Respondent.

- g) Clause 3.1 of the PPA defines the term "Effective Date" as the date of concurrence of KERC for the PPA.
- h) As per Article 4.2 of the PPA, the Solar Project Developer (SPD), is required to achieve the Conditions Precedent, i.e., financial closure, obtain evacuation approval and documentary evidence of having clear title and possession of the land, required for the Project in the name of Developer within eight months from the Effective Date of the PPA, unless such completion is affected by any force majeure event, or if any of the activities is specifically waived in writing by 1st Respondent.
- i) Article 21 of the PPA defines the term "Scheduled Commissioning Date" as twelve months (12) from the 'Effective Date'.
- j) The petitioner communicated with Additional Chief Secretary, Government of Karnataka (GoK), Energy Department vide its letter dated 30.05.2017 (Annexure-P8) relating to fulfilment of conditions precedent under the PPA and submitted that the process for land procurement and approval under Section 95/109 of the Karnataka Land Revenue Act, 1964 Karnataka Land Reforms Act, 1961 respectively, is a time consuming process and beyond the control of Developers. The Petitioner requested the Government of Karnataka (GoK) to intervene in the matter and direct the ESCOMs to take cognizance of the documents submitted to KREDL, as sufficient compliance of the 'Conditions Precedent'.

- k) The Petitioner further addressed a letter dated 09.06.2017 (Annexure P-9) to 1st Respondent requesting to accept documents submitted to Respondent-2 (KREDL) for approval under Section 95/109 of the KLR Act, 1964 and KLR Act, 1961 respectively as sufficient compliance of Conditions Precedent. The Respondent No.1 vide letter dated 13.06.2017 (Annexure-P10) informed the petitioner regarding non-compliance of Condition Precedent. The Petitioner also requested for time extension of three months, if the submitted documents are not acceptable.
- l) The 1st Respondent vide its letter dated 28.06.2017 (Annexure P-11) informed the petitioner that the land acquisition details and land conversion details have not been furnished and therefore, in this regard penalty will be levied as per the PPA, for non-fulfilment of Conditions Precedent.
- m) The petitioner in its letter dated 13.07.2017 (Annexure-P12) has given an undertaking that in the unlikely event of unfavourable response from the GoK in this matter regarding levy of damages, the petitioner undertakes to pay the damages imposed by 1st Respondent vide letter dated 28.06.2017.
- n) The Petitioner had, immediately after issuance of LOA, even before the signing of PPA and approval of the PPA by the Commission, approached the KPTCL for connectivity approvals on 11.07.2016. However, KPTCL kept the connectivity approval process on hold for want of Commission's approval to the PPA in the light of Commission's communication returning all the PPAs to ESCOMs. In the absence of Commission's approval and

Transmission connectivity approvals, the Petitioner was unable to progress on the land acquisition activities. Hence, the Petitioner lost precious time in project execution for no fault of it but due to delay in the process of getting approval of PPA from the Commission and withholding of the connectivity permissions by KPTCL.

- o) Despite the best efforts from the Petitioner, KPTCL had given connectivity approval on 05.12.2016 (Annexure-P13 collectively) and due to this, there was consequential delay in acquisition of lands and various Government approvals.
- p) After getting the regular connectivity approval from KPTCL, the petitioner initiated land acquisition activity and approached KREDL on 25.05.2017, for issuance of order under Section 95 of KLR (Amendment) Act, 2015, for acquisition of 102 acres 39 guntas of land on lease. The said Order from the Government authorities is awaited. This has resulted in delay in obtaining the clear title and possession of the land, required for the project within 8 (eight) months from effective date of the PPA i.e., 27.09.2016. The above said circumstances/events were not within the reasonable control of the petitioner in the performance of its obligations under the PPA and it amounts to 'Force Majeure' under Article 14 of the PPA.
- q) The definition of 'Force Majeure' cannot be restricted to a few examples set out in Article 14.3 of the PPA and the illustrations are not exhaustive and the intention of the parties was to save the performing party from the consequences of anything over which the affected party has no control

and as a result of which it was rendered incapable of performing the contract.

r) As per Article 5.7 of the PPA, the Scheduled Commissioning Date and expiry date of the PPA needs to be deferred for the period during which such 'Force Majeure' event subsists and the SPD is prevented from performing its obligations under Article 5.1.

s) For land acquisition, the following process needs to be followed:

For Purchase of land: Procedure under Section 109 of KLR Act,1964 is to be followed. The approval has to be obtained at the individual District Deputy Commissioner level, only after KREDL issues a formal letter for processing the application called the facilitation letter.

For Lease of land: KREDL scrutinises all land documents and forwards the same to the Department of Energy for issuance of Government Notification/Order under Section 95 of KLR (Amendment) Act, 2015. Post this Government Notification, the concerned Deputy Commissioner issues a demand note for payment of conversion fees. After paying of the conversion fees, the Lease between the farmer/land owner & KREDL will be registered. Thereafter, the Lease/sub-lease will have to be registered between the SPD and KREDL. These activities involve collection and collation of huge amount of documentation from the taluk offices and involves numerous steps. Moreover, for the land extent beyond the ceiling limit of 20 units, Cabinet Approval of Karnataka Government is required. The whole process takes 5 to 6 months or even more time for KREDL.

t) The Petitioner considering the above facts, on 06.7.2017 and 31.07.2017 (Annexure P-14 collectively) issued notices to the Respondent-1 in accordance with the Articles 14.5 and 5.7 of the PPA on occurrence of the 'Force Majeure' events and requested to allow time extension for fulfilment of Conditions Precedent till issuance of approval from GoK permitting usage of lands for non-agricultural purposes or till project achieves its Commercial Operation Date, whichever is earlier. The Petitioner also requested Respondent-1 to withdraw its letter dated 28.06.2017 imposing levy of penalty.

u) The Ministry of New and Renewable Energy (MNRE), on 28.07.2017 (Annexure P-15), taking due cognizance of the fact that the delay in connectivity permissions, land approvals and 'Force Majeure' events can delay project implementation, has informed the State Governments that competent authorities can allow extension of time as per contractual agreements.

v) In the light of the MNRE's letter, the Petitioner on 02.08.2017 (Annexure P-16), once again requested Respondent-1 in terms of Article 5.7 of PPA to provide relief by granting extension of time in submission of documents on fulfilling Conditions Precedent and achieving SCOD by at least 106 days (equivalent to delay by KPTCL for connectivity approval).

w) The 1st Respondent vide its letter dated 02.08.2017 (Annexure P-17) communicated that the delay in getting the land for the project and connectivity approval cannot be accepted as 'Force Majeure' event as

per Article 14.3 of the PPA and informed to adhere to the Scheduled Dates stipulated in PPA.

3. Apart from the above, the petitioner urged the following grounds:

a) There was considerable delay in approval of PPA by the Commission. No meaningful progress is expected till the PPA is approved by the Commission. The original PPA has been substantially modified by the SPPA and the original PPA is to be read together with the SPPA. The Effective Date, needs to be changed from 27.09.2016 to the date of signing of SPPA, i.e., 26.11.2016. Unless the SPPA is approved, the Effective Date does not commence. As SPPA is yet to be approved, there is no question of levying penalty or liquidated damages.

b) In view of the changes in the definition on Delivery Point in the SPPA, the Petitioner had to make substantial deliberations on whether to continue with or shift the project site/s. The Petitioner waited for a long time for the approval of the SPPA to get certainty on the Delivery point/s. Since, approval was not accorded to the SPPA, the Petitioner was contemplating to commission the project as per the original PPA. This caused substantial delays. In order to confer certainty on the investment, the SPPA needs to be approved by the Commission. Hence, the Effective Date should be considered from the date of approval of the SPPA.

- c) The delay in grant of PPA approval and connectivity approval beyond reasonable time, is not within reasonable control of the Petitioner and therefore is a 'Force Majeure' event under Article 14 of PPA.
- d) As per Article 5.7 of the PPA, SCOD and expiry date of PPA needs to be deferred for the period for which such 'Force Majeure' event subsists.
- e) The tariff under the PPA is discovered through competitive bidding. Hence, it is not vulnerable to the variations in the generic tariff effected vide different Generic Tariff Orders. The generic tariff order dated 30.07.2015 specifically excludes its applicability to the projects under competitive bidding. Since the subsequent Generic Tariff Order dated 12.04.2017 is only a modification of the earlier order, this too is not applicable to the petitioner's case. Hence, there is no resultant impact on the tariff for delay in the commissioning.
- f) The letter dated 27.09.2016 of the Commission approving the PPA was received by the Petitioner in Ahmedabad on 12.10.2016. Further, there was a delay of 106 days in granting approval by KPTCL and also delay in land acquisition. Hence, the project was commissioned on 02.10.2017.
- g) The petitioner further contended that though the interconnection approval was given by KPTCL on 26.09.2017 for connecting the project with KPTCL Grid, since the commissioning team of the utility was under extreme pressure to commission other projects too during the same period, the commissioning team started their process on 27.09.2017 itself. However,

they came late and in the meantime, it became dark. Hence, could not complete the commissioning process. They charged the petitioners remote bay, sealed meters, etc., and went back. Thereafter, 28th, 29th, 30th September and 1st October, 2017 were continuous Government holidays, so no Government officers/officials were available and with great difficulty the petitioner got commissioned the plant on 02.10.2017.

4. Upon issuance of Notice, the Respondents appeared through their Counsel and filed Statement of Objections.

5. The gist of the Statement of objections filed by the Respondent No.1 is as follows:

a) The 1st Respondent admitted that the Adani Green Energy Limited, is the successful bidder for establishment 20 MW Solar Power Plant at T. Narasipura taluk in Mysuru district and accordingly, LoA was issued on 30.05.2016 and the Adani Green Energy Limited, accepted the LoA on 08.06.2016 and the petitioner, the SPV of Adani Green Energy Limited, executed the PPA on 28.06.2016 and the same was approved by the Commission on 27.09.2016.

b) On 27.10.2016, the petitioner was granted with tentative evacuation scheme and regular evacuation scheme was granted on 05.12.2016 and SPPA was executed on 26.11.2016 and the petitioner commissioned the plant on 02.10.2017. The 1st Respondent further contended that on 26.05.2017, the petitioner furnished certain documents in order to comply with the Conditions Precedent stipulated in the PPA. However, the

petitioner did not produce any documents showing that the petitioner was in clear possession of land on which it intends to execute the project.

- c) The 1st Respondent vide letters dated 13.06.2017 and 28.06.2017 called upon the petitioner to fulfil the Conditions Precedent in terms of PPA, failing which the action in terms of Article 4.4 of the PPA will be taken.
- d) The relationship between the parties is governed strictly by the terms of the contract. The terms of the PPA spell out the time frame for commissioning, the 'Effective Date' of the PPA, the period within which conditions precedent have to be achieved and the penalty that follows due to non-adherence to the timelines of the PPA.
- e) As per Article 4 of the PPA, the petitioner is required to satisfy conditions precedent within eight months from the 'Effective Date'. Therefore, the Petitioner was required to achieve Conditions Precedent on or before 26.05.2017. One of the Conditions Precedent was that the Petitioner had to furnish documentary evidence of having the clear title and possession of the land required for the project in the name of the developer. However, the Petitioner has not produced any document showing that the clear title and possession of land till date. It was only on 25.05.2017, that the Petitioner made a request to KREDL for issuance of notification under Section 95 of the Karnataka Land Revenue Act, 1964. The petitioner has not taken steps within reasonable time to achieve Conditions Precedent. Therefore, the Petitioner has not acted in a diligent manner and the delay can only be attributed to the Petitioner.

- f) The PPA sets out the 'Force Majeure' events, in Article 14. It is settled position of law that delays in obtaining approvals by the petitioner cannot be considered to be events of 'Force Majeure'. Further, Article 5.1 clearly sets out the obligations of the Developer and states that it is the responsibility of the developer to obtain all clearances, consents etc. Hence, knowing fully well of its obligations under the contract, the Petitioner is attempting to take advantage of its own wrong, which is impermissible in law and ought not to be permitted.
- g) The petitioner was required to achieve SCOD by 26.09.2017 as per Article 8.5 of the PPA. The Petitioner has commissioned the Plant on 02.10.2017. The reason assigned for the delay in commissioning of the project cannot be attributed to this Respondent.
- h) The 1st Respondent further contended that the petitioner has not achieved the Conditions Precedent and Scheduled Commissioning Date within the stipulated timeframe under the PPA. Therefore, the 1st Respondent issued letters dated 27.12.2017 demanding the petitioner to pay the liquidated damages of Rs.52 lakhs as per Article 4.3 and 5.8 of the PPA within seven days from the date of letter and the petitioner communicated vide letter dated 27.12.2017 to recover the applicable damages from the energy bills raised by the petitioner. Accordingly, 1st Respondent received Rs.52 lakhs from the energy bills of the petitioner for the month of November 2017.

- i) The petitioner is attempting to bypass its obligations under the PPA by filing this petition. The PPA clearly states that in the event of delayed execution of the project, as per Article 12 of the PPA the petitioner would only be entitled to a tariff of Rs.4.36 per unit in terms of the Commission's order dated 12.04.2017, which is the order that is applicable at the time when the petitioner commissioned its plant, since there is variation in the KERC tariff.
- j) The petitioner was well aware of the terms of the PPA prior to executing the same and the say of the petitioner that the date on which SPPA is signed or the date on which the petitioner received letter from the Commission approving the PPA should be considered as 'Effective Date' does not flow from the PPA between the parties. The petitioner cannot be permitted to alter the terms of the PPA merely to suit its needs. This is especially so as the Commission has clarified vide its letter dated 25.10.2016 (Annexure-R2) that no separate approval is required for the SPPA.
- k) The 1st Respondent further contended that the say of the petitioner that the procurement of land under Section 95 and 109 of the Karnataka Land Revenue Act, 1964 and Karnataka Land Reforms Act, 1961 respectively, is a time consuming process and beyond the control of the petitioner is untenable. For the reason that the onus of obtaining all necessary approvals was on the petitioner as per Article 5.1.1 of the PPA.
- l) The petitioner filed an application for issuance of Government Order under Section 95 of the KLR Act for acquisition of 102 acres 39 guntas of land at

belated stage and was not diligent in executing the project. The petitioner is not entitled for extension of time as it is not affected by any 'Force Majeure' events and letter dated 06.07.2017 and 31.07.2017 cannot be considered as 'Force Majeure' notice under Article 14.5 of the PPA.

- m) All the averments not specifically traversed and contrary to the above contentions are denied.
- n) Article 5.7 stipulates the circumstances in which the Petitioner can be granted extension of time to commission the project. The Petitioner is entitled to extension of SCOD in cases of default by the Respondent, 'Force Majeure' events affecting the Petitioner and the Respondent. In this case, the delay in commissioning the plant can in no manner be attributed to the reasons stipulated in Article 5.7 of the PPA. Therefore, the Petitioner is not entitled to any extension of SCOD under Article 5.7 of the PPA.
- o) The Petitioner has to pay damages to the Respondent in the event of failure to achieve conditions precedent and SCOD within the stipulated time frame in accordance with Articles 4.3 and 5.8 of the PPA. Hence the petition be dismissed.

6. The Statement of Objections on behalf of 2nd Respondent is as follows:

The Petitioner wrote a letter dated 25.05.2017 to the 2nd Respondent seeking issuance of required Government Notification and on verification it was noticed that the petitioner had not produced consent letters of farmers

and all the relevant documents and it was communicated to the petitioner vide letter dated 07.06.2017 (Annexure-R2B). Petitioner produced the documents to 2nd Respondent for verification and execute lease agreement on 16.11.2017 (Annexure-R2C). Since the 2nd Respondent found irregularities in the documents produced by the petitioner, the Respondent issued a letter dated 11.12.2017 (Annexure-R2D) informing the petitioner to rectify them and submit documents afresh. In spite of it, there was no further communication from the petitioner. Therefore, the delay caused in achieving the Conditions Precedent can be attributable only to the petitioner. Hence, the 2nd Respondent requested that the petition may be dismissed.

7. The gist of the Statement of Objections filed by the 3rd Respondent (KPTCL) are as under:

a) The 'Effective Date' of PPA should be the date on which the SPPA receives the concurrence from the Commission is absolutely vexatious as there is no requirement of a SPPA to be approved by the Commission. The Commission has clarified on this matter vide letter dated 25.10.2016 (Annexure-1). The SPPA is nothing but addendum to the original PPA. It is denied that because the 'Effective Date' now stands revised by execution of the SPPA and unless SPPA is approved the 'Effective Date' does not commence for the reason that SPPA need not be approved, by the Commission. This contention of the petitioner is nothing but a clear

after thought on the part of the petitioner in order to justify its own careless attitude.

- b) The allegation of the petitioner that there was inordinate delay in procurement of the evacuation approval are false and baseless. The petitioner did not immediately filed application for evacuation approval after the LOA was received from KREDL. Firstly, 2nd Respondent invited taluk-wise bid for 1,200 MW Power Generation and afterwards, 2nd Respondent had sought Sub-station wise feasibility report. On 27.02.2016, the KPTCL issued Sub-station wise feasibility report. This created ambiguity in processing the application for evacuation approvals to different Sub-stations. For want of clarification in this behalf and certain other issues, the Commission returned all the PPAs to ESCOMs vide letter dated 21.07.2016 (Annexure-2).
- c) On 29.08.2016 (Annexure-R3) the Commission directed that the PPA must be re-submitted for approval. Thereafter the 3rd Respondent (KPTCL) processed the application of the petitioner seeking approval of evacuation on fast track basis and issued tentative evacuation scheme. The petitioner was well aware of the process of land procurement and conversion being a time consuming process and no extraordinary circumstances or inevitable situation have been highlighted by the petitioner to seek extension of time. The allegation that pendency of approval of SPPA and delay in seeking approval of the land conversion, there was significant delay on the part of Government authorities which

was beyond the control of the petitioner are highly vexatious. In fact, the petitioner should have exercised the due diligence and ensured the compliance of Conditions Precedent. If the petitioner is not happy with certain clauses of the Conditions Precedent, it would have challenged before appropriate forum. The Respondents are put under serious prejudice, if the petitioner fails to comply with the Conditions Precedent within the stipulated time as the consumers will have to face brunt of the lackadaisical action of the petitioner.

d) The reasons stated by the petitioner cannot be termed as 'Force Majeure' events as defined under the PPA. Moreover, the petitioner has not notified 'Force Majeure' events within seven days as per the terms of the PPA to the Respondents and one issued, was hopelessly barred by time. It was the duty of the petitioner to update the respondents of the progress of the Conditions Precedent on monthly basis. The petitioner itself not having adhered to the obligations cast upon it under the PPA cannot allege default on behalf of the Respondent.

e) The petitioner has ignored the obligations cast upon him under the PPA to submit and update the Respondents about completion of the project on a monthly basis and cannot alleged default on behalf of the respondents. Further, the Hon'ble Supreme Court of India, in All India Power Energy Federation Vs. Sasan Power Limited has held that the tariff of electricity will eventually affect the consumers. The Entities cannot be made to suffer loss due to action/ inaction of the petitioner generator.

Hence, the petitioner is entitled to get lower tariff applicable on the date of commissioning of its project. In view of above, the 3rd Respondent requested that the petition may be dismissed.

8. The gist of the Statement of Objections filed by the 4th Respondent (GoK) are as under:

a) The Petitioner for the 1st time identified the lands and submitted a list to KREDL vide letter dated 25.05.2017 (Annexure-R3 collectively) in respect of lands to an extent of 102 acres 39 guntas for which agreement to lease entered into.

b) Pursuant to the receipt of the letter, KREDL addressed a letter dated 07.06.2017 (Annexure-R3 collectively) to the petitioner stating that all the relevant documents were not produced. The Petitioner presented the documents to 2nd Respondent vide its letter dated 16.11.2017 (Annexure-R4). Again, on verification of documents by the 2nd Respondent, it is noticed that the petitioner has produced the defective documents. Hence, the 2nd Respondent issued letter dated 11.12.2017 (Annexure-R5) to rectify the defects and thereafter there is no communication from the petitioner.

9. The Petitioner has filed the Rejoinder to the Objections filed by the 3rd & 4th Respondent, reiterating the averments made in the petition, besides denying the grounds raised by the Respondents. The petitioner has filed further documents along with the Rejoinder. Both parties have filed documents as per the Memo's filed on different dates.

10. We have heard the learned counsels for the parties. The Petitioner and 3rd & 4th Respondents have filed written arguments.

11. From the Pleadings and rival contentions raised by the parties, the following Issues arise for our consideration:

Issue No.1: Whether the petitioner proves that the 'Effective Date' under Article 3.1 of PPA should be treated as:

- a) The date on which the SPPA dated 26.11.2016 would be approved by the Commission, as the approval of the said SPPA was essential? or
- b) 26.11.2016, the date on which the said SPPA was executed? or
- c) 12.10.2016, the date on which the PPA approval letter dated 27.09.2016 was received by the petitioner?

Issue No.2: Whether the Petitioner has proved that the events or circumstances alleged by it amount to 'Force Majeure' events entitling for extension of time for achieving the Conditions Precedent and Scheduled Commissioning Date?

Issue No.3: Whether the petitioner proves that the project was ready for commissioning on 26.09.2017 itself, but commissioning team of Respondent No.1 & 3 were under extreme pressure to commission other projects?

Issue No.4: If Issue No.2, is held either in affirmative or in negative, what should be the consequences as per PPA clauses?

Issue No.5: What Order?

12. After considering the submission of the parties and the material on record, our findings on the above Issues are as follows:

13. Issue No.1: Whether the petitioner proves that the 'Effective Date' under Article 3.1 of the PPA should be treated as:

a) The date on which the SPPA dated 26.11.2016 would be approved by the Commission, as the approval of the said SPPA was essential? or

b) 26.11.2016, the date on which the said SPPA was executed? or

c) 12.10.2016, the date on which the PPA approval letter dated 26.09.2016 was received by the petitioner?

a) 'Effective Date' is defined in Article 21.1 of the PPA as the date of the approval of PPA by the KERC. Further, Article 3.1 of the PPA mentions the Effective Date with reference to the PPA as '*this agreement shall come into effect from the date of getting concurrence from KERC on the PPA and such date shall be referred to as the Effective Date*'. In the present case vide letter dated 27.09.2016 (Annexure-P4), the petitioner and the 1st Respondent were informed of the approval of the Commission to the PPA dated 28.06.2016 (Annexure-P3). Therefore, the date 27.09.2016 has to be considered as the Effective Date for the purpose of interpreting the relevant clauses in the PPA. The PPA does not provide that the date of receipt of intimation regarding approval of the Commission to the PPA or the date on which the SPPA is signed by the petitioner and the Respondent No.1 in case the execution of such SPPA is needed, could be considered as the 'Effective Date'. Therefore, the contention of the petitioner is not acceptable.

- b) The petitioner has contended that, as the letter dated 27.09.2016 (Annexure-P4) communicating approval of Commission for the PPA in question directed to incorporate certain corrections/modifications in the PPA by entering into a suitable SPPA, the execution of SPPA and also the approval of such SPPA is essential. Further, it is contended that when the execution of such SPPA and its approval by the Commission is required, such dates should be considered as the Effective Date.
- c) The letter dated 27.09.2016 (Annexure-P4) signed by the Secretary of this Commission communicates approval of the Commission to the PPA dated 28.06.2016 executed between the parties in respect of development of 20 MW (AC) Solar Power Project in T. Narasipura taluk, subject to certain corrections/modifications being incorporated in the said PPA by entering into a suitable SPPA. Therefore, it can be said that the approval of PPA dated 28.06.2016 communicated by letter dated 27.09.2016 is absolute subject to incorporating the corrections/modifications. For the purpose of incorporating the corrections/modifications, the execution of a SPPA is required. There is no direction given to the parties that after entering into the SPPA, the same should be again got approved by the Commission. It cannot be said that the approval of the Commission to the PPA takes effect only after effecting the corrections/modifications suggested, as the corrections/modifications suggested to be carried did not materially alter the rights and liabilities of the parties. Hence, the contention of the petitioner that

the SPPA requires approval cannot be accepted. This aspect was clarified by the Commission in a subsequent letter dated 25.10.2016 addressed to the Government (Annexure-1 to the Objections filed by Respondent-3).

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

14.Issue No.2: Whether the petitioner has proved that the events or circumstances alleged by it amount to 'Force Majeure' events, entitling for extension of time for achieving the Conditions Precedent and Scheduled Commissioning Date?

The petitioner has relied upon the following events or circumstances, as Force Majeure Events for claiming the extension of time to achieve the conditions precedent and commissioning the solar plant:

- (i) Delay in granting evacuation approval;
- (ii) Delay in grant of land conversion order;

15. We deem it proper to consider the events one after the other and give our findings, as hereunder.

16. Regarding: Delay in granting Evacuation approval:

- a) The petitioner had undertaken to develop 20 MW Solar Power Project in T. Narasipura taluk. The LoA was issued on 30.05.2016 (Annexure-P1) and the petitioner acknowledged the acceptance of the terms and conditions of the LoA through letter dated 08.06.2016 (Anexure-P2). The petitioner was required to search for the lands required for establishment

of the Solar Power Project after examining the availability of evacuation scheme to transmit the power from the Solar Power Project to the KPTCL Sub-station. Therefore, for establishing a Solar Power Project, the required extent of land should be available as well as the possibility of evacuating the power from the project to the nearest Sub-station. For this purpose, the Developer has to search a suitable location. The land can be either purchased or taken on lease for the required period.

- b) The petitioner has made application dated 14.07.2016 and 22.07.2016 to the 3rd Respondent for grant of tentative evacuation scheme to 66/11 kV Talakadu Sub-station. The 3rd Respondent granted the tentative evacuation scheme on 27.10.2016 (Annexure-P13 collectively). The petitioner gave his acceptance to the tentative evacuation scheme on 14.11.2016 and requested to issue the regular evacuation scheme approval and the 3rd Respondent granted regular evacuation scheme approval on 05.12.2016 (Annexure-P13 collectively) i.e., within a month. It is the contention of the petitioner that even though he filed an application for granting tentative evacuation scheme approval, the 3rd Respondent granted on 27.10.2016 (Annexure-P13 collectively). It is pertinent to note that on 22.07.2016, the PPA was not approved by the KERC and hence the question of considering the application dated 22.07.2016 does not arise. The PPA has been approved by the KERC on 27.09.2016 (Annexure-P4) and the 3rd Respondent granted the tentative evacuation scheme approval on 27.10.2016 (Annexure-P13 collectively).

Hence, we are not inclined to accept the arguments of the learned Advocate for the petitioner that there is inordinate delay in granting evacuation scheme approval.

- c) KPTCL in its Statement of Objections has stated that on 27.02.2016 it had furnished Sub-station wise Feasibility Study Report to KREDL; that the allotments of PPA were done Taluk-wise and not sub-station wise and this created ambiguity in processing the applications for Evacuation of power to different Sub-stations; that for want of clarification, the Commission vide letter dated 21.07.2016, returned all the PPAs to ESCOMs (Annexure-R2 produced by KPTCL) and later on 29.08.2016 (Annexure R-3 produced by KPTCL) the Commission accorded in-principle approval to all the PPAs and clarified that KREDL would co-ordinate with KPTCL and ESCOMs for efficient power evacuation scheme from the Solar Power Projects. The Commission also directed that all the PPAs must be re-submitted for obtaining approval. A copy of the letter dated 29.08.2016 is produced as Annexure-R3 by KPTCL. It can be seen from the tentative evacuation scheme approval dated 27.10.2016 (Annexure-P13 collectively) that the petitioner had made an application for KPTCL seeking evacuation approval on 22.07.2016. As noted in the above paragraph, the KERC has returned all the PPAs for want of clarification and on 29.08.2016 (Annexure-R3), the Commission accorded in principle, approval to all the PPAs. Thereafter, PPA has been approved by the Commission on 27.09.2016 (Annexure-P4). The

tentative evacuation scheme was granted on 27.10.2016. The regular evacuation scheme was granted on 05.12.2016 (Annexue-P13 collectively), after receiving acceptance of the petitioner to the temporary evacuation scheme on 14.11.2016.

- d) From the above facts, it can be said that KPTCL has granted the Tentative Evacuation Scheme as well as Regular Evacuation Scheme approvals in a reasonable time. Therefore, the allegation that KPTCL caused delay in granting evacuation approval is untenable.
- e) According to the petitioner, the entire process of land identification in and around the Sub-stations consumed a considerable amount of time. The Commission notes that the PPA was a part of the bidding document and the timelines for achieving conditions precedent and commissioning the project and the consequences for delay were known to the petitioner at the time of bidding. The petitioner should have been prudent and ascertained the availability of lands in the vicinity of the Sub-stations within 3-4 months from the date of issuance of LoA. From the sequence of events mentioned above, we hold that there was inordinate delay by the petitioner in identifying the proper location of the project and applying for Evacuation approval which could have been avoided, if the petitioner had taken proper timely steps in identifying the lands.

17. Regarding: Delay in grant of land conversion order:

- a) The Respondent-4 has contended that the petitioner approached KREDL on 25.05.2017 requesting to obtain an order of land conversion. The petitioner has stated that on 26.05.2017 (Annexure-P7) it had submitted to 1st Respondent the land related documents namely; (i) acknowledgement of Section 95 application submitted to KREDL; (ii) Consent letters from the land owners; (iii) Agreement to lease signed with the land owners; and (iv) sworn affidavit for possession of lands, apart from producing the other documents to evidence the fulfilment of Conditions Precedent as per PPA.
- b) Now, the question is whether filing an application before KREDL on 25.05.2017 for taking further action by KREDL to obtain an order under Section 95 of the KLR Act, 1964 amounts to sufficient compliance of Conditions Precedent in relation to production of documentary evidence of clear title and the possession of lands required for the project in the name of the petitioner. Though, the LoA was issued on 30.05.2016, the petitioner could finally locate the lands belatedly near Talakadu Sub-station and addressed a letter to KREDL in this regard on 25.05.2017. As already noted, Conditions Precedent were required to be complied with on or before 26.05.2017. The petitioner has not explained the delay in identifying the lands. Hence, we note that the petitioner cannot bring the event of delay in identifying the lands under any of the provisions of 'Force Majeure' events under Article 14 of PPA.

c) The lands required for the project could be either purchased or taken on lease by the petitioner. For purchase of lands, the petitioner has to obtain permission under Section 109 of the KLR Act, 1961. The GoK had issued a Circular bearing No.RD 01 LRM 2016 dated 22.02.2016 facilitating grant of permission under Section 109 of the KLR Act, 1961 and to obtain conversion of such lands for non-agricultural purpose within a timeframe. The GoK had issued Notification dated 05.10.2016 permitting KREDL to enter into lease of lands with the land owners and to obtain conversion of such agricultural land for non-agricultural purpose and thereafter to sub-lease the same to the Developer in order to facilitate development of Solar Project. The petitioner opted to obtain the land on sub-lease instead of purchasing the lands from the owners. Sub-para (D) of the Circular No.RD 01 LRM 2016 dated 22.02.2016 issued by the Principal Secretary to Government, Revenue Department, reads as follows:

“D – The permission under Section 109 of the Karnataka Land Reforms Act, 1961 shall be brought under SAKALA with time prescribed for its delivery being within 60 days.”

d) Under the Notification dated 05.10.2016, KREDL has to follow the procedure stated in Circular No.RD 01 LRM 2016 dated 22.02.2016 for obtaining an order under Section 109 of the KLR Act, 1961 for purchase of agricultural land and its conversion and thereafter has to sub-lease the land to Developer for establishing the Solar Project. Therefore, one can say that a definite timeframe of 60 days is prescribed for obtaining an order under Section 109 of the KLR Act, 1961. Had the petitioner

applied to KREDL, at least 60 days before the date on which Conditions Precedent had to be achieved and there was a delay by the concerned authorities in processing the same or granting the approval, the date of application to KREDL by the developer, could be considered as the date of fulfilment of the production of the documentary evidence of having clear title and possession of the lands required for the project. Hence, in the present case, had the petitioner applied to KREDL at least 60 days before 26.05.2017, the date on which the Conditions Precedent should have been fulfilled, we could have considered whether making such application and producing the application to Respondent No.1 would amount to fulfilment of the Conditions Precedent within the stipulated time. Therefore, in our considered opinion, it is not possible to hold that the petitioner approaching KREDL on 25.05.2017 (Annexure-R3 collectively) for getting conversion of land etc., is sufficient fulfilment of the Conditions Precedent relating to production of documentary evidence of the title and possession of the lands required.

e) Article 14.4 of the PPA, stipulates 'Force Majeure' exclusions. Any non-performance caused due to negligence, omissions, errors, failure to comply with an Indian Law and breach or default under the Agreement cannot be termed as a 'Force Majeure' event. The Petitioner has not taken steps within reasonable time frame to obtain necessary approvals. Hence, the averment that the Petitioner could not complete the project

within the stipulated time frame as it was affected by the 'Force Majeure' event is untenable and denied.

- f) Article 14.5 of the PPA sets out the procedure to be followed for notification of an event of 'Force Majeure' and requires issuance of a notice of 'Force Majeure' within seven days of occurrence of such event. The Petitioner admittedly has not issued such notices within seven days as contemplated in the PPA. It is settled law that when the terms of a contract contemplate issuance of a notice of 'Force Majeure' and the same is not followed, the 'Force Majeure' clause cannot be deemed to be invoked.
- g) The petitioner is seeking for a relief under the head of the 'Force Majeure' and inadvertent delay, but has failed to produce the documents to prove the said contention. There is no provision under the PPA and RfP for time extension and retention of the agreed tariff under the head of inadvertent delay.
- h) The petitioner could not have expected that when it moved the KREDL on 25.05.2017, an order for conversion of land could have been passed and in turn, lease of land in its favour could have been granted on or before 26.05.2017, the last date for fulfilment of the Conditions Precedent.
- i) The petitioner has not produced the copies of the consent letters, said to have been obtained from the land owners to lease their lands for the Solar Project of the petitioner which were said to have been annexed to the application dated 25.05.2017 filed before the KREDL. The Respondent

No.4 has produced a copy of the said letter dated 25.05.2017 (Annexure-R3) which shows that the consent letters of land owners are not produced along with it. The petitioner is required to establish that the very same lands in respect of which consent letters were issued, were finally converted and sub-let to it. The petitioner has produced agreements of lease dated 17.06.2017, 14.07.2017 and 01.10.2018 vide Memo dated 28.11.2019. However, it cannot be ascertained that these documents relate to the lands in respect of which consent letters were said to have been obtained from the land owners, while filing the application dated 25.05.2017 before the KREDL. The Document No.3 produced by the petitioner on 26.11.2019, shows that the petitioner had made an application on 04.09.2018 (Document No.3) before the Deputy Commissioner, Mysuru, seeking deemed conversion order under Section 109 of the KLR Act, 1961 and Section 95 of the KLR Act, 1964. It appears that the orders of the Deputy Commissioner, Mysuru, are still awaited.

j) The learned Advocate for the petitioner in her Rejoinder and written arguments urged the following events/circumstances as 'Force Majeure' events for claiming extension of time to achieve the Conditions Precedent and commissioning the Solar Power Projects:

- i) Introduction of GST;
- ii) Demonetization;
- iii) Delay due to wrong classification of Solar modules.

18. Introduction of GST:

- a) The petitioner contended that some of the exemptions which were provided on Goods required for execution, construction and operation of Solar Power Projects are ceased to exist.
- b) The petitioner has not produced any documentary evidence in support of its claim to establish that its project was actually affected due to any GST induced disruptions for a period of 3-4 months. Therefore, we hold that the petitioner has failed to establish that introduction of GST has affected the progress of its project.

19. Demonetization:

- a) According to the petitioner, due to Demonetization, all the business activities on the ground level were stalled for a period of 2 to 3 months. Demonetization impacted the land acquisition phase.
- b) Regarding demonetization, the petitioner has argued that demonetization has adversely affected the project for 2 to 3 months from 08.11.2016 as land acquisition and project activities were delayed considerably. Except vague averment, no definite instances are mentioned to demonstrate as to how the progress of the project was affected due to demonetization. Therefore, without adequate proof, we are unable to accept that demonetization adversely effected the progress of the project of the petitioner.

20. Delay due to wrong classification of Solar modules:

- a) There was an extraordinary delay in clearance of Solar modules imported through Chennai Port and Nahva Sheva Port, by the petitioner for its projects in Karnataka, due to wrong classification of HSN Code and Solar PV Modules by the respective Customs Authorities.
- b) The petitioner, to substantiate its contention has produced; (i) public notice issued by Commissioner of Customs, NS-V dated 29.09.2016 (Annexure-P24); (ii) A letter addressed to M/s Wardha Solar Maharashtra Private Limited, dated 27.07.2017 by the Deputy Commissioner of Customs, INDEV CFS NS-V (Annexure-P25); (iii) summons dated 27.09.2017 (Annexure-P26) issued by Appraiser of Customs, Special Intelligence and Investigation Branch; and (iv) reply given by the petitioner to the Deputy Commissioner (Customs), Chennai dated 06.10.2017 (Annexure-P27); and (v) a letter dated 31.10.2017 (Annexure-P28) addressed to the Deputy Commissioner (Customs), Chennai. We have gone through these documents. On perusal of these documents, we could not find any material to establish that these documents were pertains to the project to be established by the petitioner in Karnataka. Moreover, the dates of these documents show that they were issued just 4-5 days before and after commissioning the plant. Replies were given by the petitioner to the authorities after commissioning the project. These facts go to show that at the time of commissioning the Solar project, in Karnataka, these modules could not have been utilized, since

the project was already commissioned. Therefore, we are unable to accept the contention of the petitioner that there was extraordinary delay in clearance of Solar modules imported by the petitioner.

21. It is pertinent to note that these events/circumstances were not pleaded by the petitioner in its original petition. In the Rejoinder filed by the petitioner casually referred these grounds, no details as to how these grounds impacted the fulfillment of Conditions Precedent and implementation of project were provided. In the written argument only, the petitioner elaborately narrated about the above grounds.
22. We note that the project was commissioned on 02.10.2017 as per letter dated 14.11.2017 (Annexure-R1 produced by Respondent No.1 on 12.07.2018). Therefore, it can be stated that the commissioning of the project was not delayed on account of non-receipt of land conversion order and hence, this cannot be construed as a 'Force Majeure' event, affecting the implementation of the project.
23. We are of the opinion that the petitioner has failed to establish that it could produce the acceptable documentary evidence establishing the title and possession of the lands required within the period prescribed for fulfilling the Conditions Precedent.
24. For the reasons stated above, we hold that the petitioner had not established that the delay in granting evacuation approval; delay in grant of land conversion order; introduction of GST, demonetization and delay due to wrong classification of Solar modules by the Customs Authorities at

Chennai and Nahava Sheva Ports are not within the reasonable control of the petitioner and they amount to 'Force Majeure' events. Hence, we answer Issue No.2 in negative.

25. Issue No.3: Whether the petitioner proves that the project was ready for commissioning on 26.09.2017 itself, but the commissioning team of 1st and 3rd Respondents, were under extreme pressure to commission the other projects?

a) It is the contention of the petitioner that the plant was ready for commissioning on 26.09.2017 and due to extreme pressure on commissioning team to commission other projects, started their process on 27.09.2017 itself. However, they came late and in the meantime, it became dark and they charged only petitioner's remote bay, sealed the meters etc., and went back and thereafter, on 28th, 29th, 30th September, 2017 and 01.10.2017 were continuous Government holidays and no Government officials were available. This particular fact was specifically not denied by the Respondents in their Statement of Objections.

b) We have perused the List of Government Holidays for the calendar Year-2017, especially for the month of September and October 2017 and found that 29th September (Mahanavami), 30th September (Vijaya Dashami), 1st October (Sunday) and 2nd October (Mahatama Gandhi Jayanthi) were Government Holidays, but 28.09.2017 was not a Government Holiday as alleged by the petitioner. Therefore, 26th, 27th and 28th September, 2017 were not Government holidays and the

petitioner cannot take advantage of the holidays falling on 29th, 30th September, 2017 and 1st October, 2017.

c) We have gone through the relevant provisions in this regard, contained in Article 1.2 of the PPA relating to interpretation: which read as follows:-

“1.2.1 In this Agreement, unless the context otherwise requires,

a).... to i).....

j) References to a “business day” shall be construed as a reference to a day (other than a Sunday) on which banks in Mysore are generally open for business;

k)

l)

m) Any reference to any period commencing “from” a specified day or date and “till” or “until” a specified day or date shall include both such days or dates; provided that if the last day of any period computed under this Agreement is not a business day, then the period shall run until the end of the next business day;”

d) From the above clauses of interpretation relating to business day and computation of any period commencing from a specified day or date and till or until a specified day or date shall include both such dates or days, provided that if the last day of any period computed under this agreement is not a business day, then the period shall run until the end of the next business day.

e) In the present case, the Commission has communicated the approval of the PPA on 27.09.2017 which should be considered as ‘Effective Date’. Article

8.5 of the PPA provides that the Developer shall commission the Project within 12 (twelve) months from the 'Effective Date'. Therefore, the project should have been commissioned on or before 26.09.2017. Admittedly, the project was not commissioned on 26.09.2017, but it was commissioned on 02.10.2017.

f) Further contention of the petitioner that on 26.09.2017 itself, the plant was ready for commissioning, but the commissioning team of 1st & 3rd Respondents did not visit the spot is not supported by any documentary evidence. Therefore, this version of the petitioner cannot be accepted. Apart from it, we may peruse the requirements of issuing notice before the Solar Power Project was to be synchronized to the grid system as stated in Article 8.1 of the PPA. This provision states that "the Developer shall provide at least 40 (Forty) days advanced preliminary written notice and at least 20 (twenty) days advance final written notice to CESC, Mysuru of the date on which it intends to synchronize the Power Project into the Grid System. Therefore, the petitioner cannot claim as of right that it was ready for commissioning the project on the last day of the prescribed period i.e., 26.09.2017 for commissioning the project and say that the commissioning team of 1st & 3rd Respondents could not attend the commissioning work due to pressure of work. The above provision makes it clear that the preliminary written notice as well as the final written notice should be given in advance giving sufficient time to the 1st Respondent. Therefore, even assuming that the petitioner was ready for commissioning the project on 26.09.2017 and the commissioning team of 1st & 3rd Respondents could not

attend it due to pressure of work, the petitioner cannot take advantage of it, unless it established the issuance of notices as required.

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

26. Issue No.4 If Issue No.2, is held either in affirmative or in negative, what should be the consequences as per the PPA clauses?

a) Issue No.2 is found to be held in negative that the petitioner is not entitled to extension of time to achieve the Conditions Precedent or commissioning the project, under the 'Force Majeure' clause of the PPA. Whenever there is delay in achieving the Conditions Precedent and Scheduled Commissioning Date, the Solar Project Developer would be liable for payment of damages under Article 4.3 and liquidated damages for delay in commencement of supply of power under Article 5.8 of the PPA.

b) The Petitioner has alleged that, the proof of loss or damage, arising out of breach of contract, is essential, even when the Liquidated Damages are provided for in a contract, relying on the case laws mentioned in the Written arguments and Section 74 of the Indian Contract Act, 1872.

c) We note that in the decision of the Hon'ble Supreme Court, reported in (2015) 4 SCC 136, in the case of *Kailash Nath Associates Vs. Delhi Development Authority and others*, it is held that, where it is possible to prove actual damage or loss, such proof is not dispensed with and in cases where damage or loss is difficult or impossible to prove, the liquidated amount named in the contract, if it is a genuine pre-estimate,

can be awarded. We are of the considered opinion that, in the present case, it is difficult or impossible to prove the actual damage or loss and that the liquidated damages named in the contract is a genuine pre-estimate of the damage or loss sustained.

- d) We also note that, in this case, there was an option to the Respondent-1 to terminate the PPA when the project was not commissioned within time, but this option was 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 Management Company Limited Vs. Renew Clean Energy Private Limited and another*, the Hon'ble Supreme Court has held that, where the contract provides for claiming damages and also for termination of the contract for the delayed performance, the damages in terms of the Agreement could be claimed, instead of taking steps for the termination of the Agreement and in such circumstances, the Liquidated Damages as per the Agreement could be awarded. Therefore, we are of the considered view that, even without there being any proof of the actual damage or loss, the Liquidated Damages, as agreed to, could be awarded, where steps for termination of the contract is not taken. We also note that, the quantum of the Liquidated Damages mentioned in the PPA is reasonable.
- e) Further, as a consequence of delay in commissioning of the project beyond the Scheduled Commissioning Date, the project would be liable

for applicable tariff as on the Commercial Operation Date, if any, as provided in Article 12.2 of the PPA. It would be appropriate here to note the relevant parts of Article 12 of the PPA dated 28.06.2016, which are hereunder:

- a) Article 12.1 states that “the developer shall be entitled to receive the tariff of Rs.4.79/kWh of energy supplied by it to CESC, Mysore in accordance with terms of PPA during the period between COD and the expiry date.”
- b) Article 12.2 of PPA envisages that as a consequence of delay in commissioning of the project beyond the Scheduled Commissioning Date, subject to Article 4, if there is change in the KERC applicable tariff, the changed applicable tariff for the project shall be the lower of the following:
 - i) Tariff at in clause 12.1 above
 - or
 - ii) KERC applicable Tariff as on the commercial Operation Date.
- f) The “Commercial Operation Date” is defined under Article 21.1 of PPA as under:

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

g) 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 12.04.2017 is only modification of the earlier order, which is not applicable to the petitioner's case. We have perused the contents of the Revised Tariff Order dated 12.4.2017, which is applicable to Grid Interactive Megawatt Scale Solar Power plants for Financial Year 2018. The clause 4 of the Tariff Order dated 12.4.2017 inter alia says that:

Clause 4. ii – “This tariff determined shall also be applicable to those grid connected megawatt scale solar power PV Plants for which PPAs were entered into before 1st April, 2017 but are not commissioned within the specified Commercial Operation Date (COD) and achieve COD during the period from 1st April, 2017 to 31st March, 2018.”

h) In the instant case the petitioner has entered into PPA on 28.06.2016 and Commissioned the project on 02.10.2017 and agreed to the terms of Power Purchase Agreement dated 28.06.2016 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 CESC and could have challenged it before appropriate forum.

- i) We rely upon the *Civil Appeal No.1220 of 2105 (Gujarat Urja Vikas Nigam Limited Vs. EMCO Limited and an others)* decided on 2.2.2016, 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 5.20 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 (the PPA), there is a possibility of the first Respondent not being able to commence the generation of electricity within the "control period" stipulated in the first tariff order. It also visualised that for the subsequent control period, the tariff payable to the project/power producer (similarly situated as the first Respondent) could be different, in recognition of the said two factors, the PPA clearly stipulated that in such a situation, the 1st Respondent would be entitled only the lower of the two tariffs---

- j) We are of the opinion that the petitioner has failed to establish any 'Force Majeure' event to claim extension of time for achieving the Conditions Precedent or SCOD. In the instant case, 20 MW Solar Power Plant of the petitioner at Akkaur village in T. Narasipura taluk, Mysuru District was

synchronized to KPTCL Grid at 66/11 kW Talakadu Sub-station on 02.10.2017 at 13.35 Hrs. This project should have been commissioned on or before 26.09.2017 as per terms of PPA. Tariff agreed in the PPA dated 28.06.2016 was of Rs.4.79/kWh, but KERC has revised the tariff of Rs.4.36 per unit for grid interactive megawatt scale solar power project by its Tariff Order dated 12.04.2017, which is applicable to this project as per provisions of Article 12.2 of the PPA, because this solar project is commissioned on 02.10.2017 subsequent to the KERC Tariff order dated 12.04.2017. Therefore, as per Article 12.2 of the PPA, the petitioner is entitled to get the reduced tariff of Rs.4.36 per kWh.

k) Therefore, Issue No.4, is held accordingly, holding that the petitioner is not entitled to any reliefs.

27. Issue No.5: What Order?

For the foregoing reasons, we pass the following.

ORDER

- a) The petitioner is not entitled to any of the reliefs claimed in the petition;
- b) The petitioner is entitled to get reduced tariff of Rs.4.36 per kWh as per terms of Article 12.2 of PPA dated 28.06.2016 as per revised tariff order dated 12.4.2017 issued by KERC for grid connected megawatt scale PV solar Plants and for the energy supplied to the 1st Respondent from the Commercial Operation Date, during the term of PPA;

c) The petitioner is liable for payment of damages as per Article 4.3 of the PPA and liquidated damages for delay in commencement of supply of power to the 1st Respondent as per Article 5.8 of the PPA.

sd/-
(SHAMBHU DAYAL MEENA)
Chairman

sd/-
(H.M. MANJUNATHA)
Member

sd/-
(M.D. RAVI)
Member