

No.N/1/2018

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

Dated: 10.07.2020

Present

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

OP No. 01/2018

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) Chamundeswari Electricity Supply Company Limited (CESC), A Company Registered under the provisions of Companies Act, 1956 having its Registered Office at Paradigm Plaza, A.D. Shetty Circle, Mangaluru-575 001.
(Represented by its Managing Director)
- 2) Karnataka Renewable Energy Development Limited (KREDL), A Company Registered under the provisions of Companies Act, 1956 having its Registered Office at No. 39, 'Shanthy Gruha' Bharat Scouts and Guides Building, Palace Road, Bengaluru-560 001.
(Represented by its Managing Director)

- 3) Karnataka Power Transmission Corporation Limited
(KPTCL) 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 (GoK),
Energy Department,
Room No. 236, 2nd Floor,
Vikasa Soudha,
Dr. B.R. Ambedkar Veedi
Bengaluru-560 001.
(Represented by its Additional Chief Secretary)

... Respondents

[Respondent No.1 & 3 M/s Just Law, Advocates
Respondent No.2 represented by Smt. Latha, Advocate
Respondent No.4 represented by Sri G.S. Kannur, Advocates]

ORDERS

1. This is a petition filed under Section 86 (1) (f) of the Electricity Act, 2003. The

Petitioner prays for the following reliefs:

- a) To call for records;
- b) To declare that the Petitioner was prevented from performing its obligation under the PPA due to 'Force Majeure' events affecting it referred in the petition;
- c) To grant concurrence to the Supplemental Power Purchase Agreement (SPPA for short) dated 26.11.2016: and
- d) To declare that 'Effective Date' under Article 3.1 of the PPA is the date on which the SPPA receives its concurrence from this Commission;

Alternatively

- d) To declare that 'Effective Date' under Article 3.1 of the PPA is the date on which the SPPA is signed by the Petitioner and Respondent No.1 on 26.11.2016;

Alternatively,

- d) To declare that 'Effective Date' under Article 3.1 of the PPA is the date on which the PPA approval letter of this Commission received by the Petitioner on 12.10.2016;
- e) If the Commission were to consider that there is a delay in fulfillment of the Conditions Precedent and commissioning of the project, the Commission may condone the inadvertent delay caused for the reasons beyond the control of the Petitioner due to 'Force Majeure' events affecting it in fulfillment of the Conditions Precedent and in achieving the Commercial Operation Date (COD) of the Project.
- f) To 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 in force, against the Petitioner based on the previous understanding of the parties on the 'Effective Date' and resultant COD;
- g) To direct the Respondents to make payment at the rate of Rs.4.92 per unit as per Article 12.1 of the Power Purchase Agreement (PPA) dated 28.06.2016; and
- h) To pass such other order/s including an order as to costs, to meet the ends of justice and equity.

2. The material facts stated by the petitioner, relevant for the disposal of the controversy involved in this case are as follows:

a) The 2nd Respondent Karnataka Renewable Energy Development Limited (KREDL) being the Nodal Agency of the 4th Respondent/ State of Karnataka (GoK), for facilitating the development of the renewable energy, had called for the Request for Proposal (RfP) for the development of 290 MW Solar Power Projects to be implemented in 17 taluks vide Notification dated 12.02.2016. M/s Adani Green Energy Limited, a Company registered under the Companies Act, 1956 was the selected bidder for development of 20 MW Solar Photo-Voltaic Project in Magadi taluk of Ramanagara district. The tariff discovered was Rs.4.92 per unit for the energy to be delivered. KREDL issued Letter of Award (LoA) and Allotment Letter dated 30.05.2016 as per Annexure-P1 to M/s Adani Green Energy Limited with terms and conditions to be fulfilled by the said selected bidder. Pursuant to the LoA (Annexure-P1), a Special Purpose Vehicle (SPV) was incorporated i.e., the petitioner, to develop the Solar project and to execute the PPA with the 1st Respondent. Accordingly, the petitioner and CESC entered into PPA dated 28.06.2016 (Annexure-P3). The PPA was approved by the Commission and the approval was communicated vide letter dated 27.09.2016 (Annexure-P4). The approval of the PPA was subject to certain corrections/modifications to be incorporated in the PPA by entering into a suitable SPPA between the parties as

mentioned in the said approval letter. Accordingly, the parties have executed the SPPA dated 26.11.2016 (Annexure-P5).

- b) The PPA provides that 'Effective Date' is the date of approval of the PPA by the Commission. The timeline fixed for achieving the Conditions Precedent is eight months and for achieving the commissioning of the project is twelve months, from the 'Effective Date'. Therefore, the Conditions Precedent is required to be achieved on or before 26.05.2017 and the project is to be commissioned on or before 26.09.2017. Admittedly, the petitioner has not able to fulfil the Conditions Precedent as well as the Scheduled Commissioning Date (SCD) within the time specified as noted above. The Solar Power Project is commissioned on 08.01.2018 as per the Commissioning Certificate Dated 09.01.2018 (Document No.6 produced by the petitioner on 19.12.2019). It can be seen that the petitioner could not achieve the timeline fixed for fulfilling one of the Conditions Precedent namely; the production of documents evidencing clear title and the possession of the extent of land required for the project in the name of the petitioner as stated in Article 4.2 (e) of the PPA, but has achieved the timeline fixed for fulfilling the other Conditions Precedent stated in Article 4.2.
- c) The Petitioner wrote letter dated 26.05.2017 (Annexure-P6) to the 1st Respondent (CESC) intimating the compliance of the Conditions Precedent and narrating the documents produced for meeting the

Conditions Precedent. This letter discloses that in respect of production of documentary evidence of title and possession of the lands required for establishing the Solar project, the petitioner could not file the application before KREDL as per State Government's guidelines for enabling KREDL to obtain conversion approval as required under Section 95 of the Karnataka Land Revenue Act, 1964 (KLR Act, 1964 for short), but has not yet obtained the land conversion order from the competent authority permitting to use the lands for non-agricultural purpose. This letter narrates that (i) Acknowledgement of Section 95 application submitted to KREDL; (ii) Consent letters from land owners to lease their lands for Solar Power project; and (iii) Sworn Affidavit evidencing possession of lands by the petitioner, were produced before CESC. The Petitioner wrote a letter dated 30.05.2017 (Annexure-P7) to the Additional Chief Secretary to Government, Energy Department, stating generally the reasons for non-production of documents evidencing clear title and possession of the extent of lands required for the project and requested the Government to direct the 1st Respondent to take cognizance of the documents submitted to KREDL, as sufficient compliance of the Conditions Precedent. The petitioner also wrote letter dated 09.06.2017 (Annexure-P8) to the 1st Respondent requesting to accept the documents submitted to KREDL for obtaining sanctions/ approvals under Section 95 of the Karnataka Land Revenue (Amendment) Act, 2015 [for short KLR (Amendment) Act, 2015] and under Section 109 of the Karnataka Land Reforms Act, 1961 (for short

KLR Act, 1961), as sufficient compliance of production of documents regarding clear title of the lands required for the Solar Power Project in the name of the Developer. In any case the 1st Respondent (CESC) not accepting the above request, to grant three months' time extension for production of the required conversion order.

- d) The 1st Respondent replied vide letter dated 13.06.2017 (Annexure P-9) stating that the developer had not fulfilled all the Conditions Precedent within eight months and granted ten days' time to comply remaining Conditions Precedent described in Annexure-1 to this letter, failing which the damages for delay in complying the Conditions Precedent would be recovered as per Article 4.3 of the PPA. Subsequently, the 1st Respondent wrote letter dated 28.06.2017 (Annexure-P10) to the petitioner stating that the reasons for the delay in fulfilling the Conditions Precedent narrated by the petitioner are not acceptable to this Respondent and to pay damages of Rs.12,00,000 as per Article 4.3 of the PPA within ten days from the date of this letter, failing which the performance security would be encashed to appropriate this amount. In response to the letter dated 28.06.2017, the petitioner replied as per letter dated 13.07.2017 (Annexure-P11) again requesting for time stating that the application for obtaining conversion order was still pending which amounted to 'Force Majeure' event. Further intimating that the petitioner would pay the damages demanded for by way of Demand Draft/NEFT and not to invoke the performance security.

- e) The petitioner issued notice of 'Force Majeure' events as per letters dated 06.07.2017 & 31.07.2017 (Annexure-P13) to the 1st Respondent requesting for extension of time in submission of documents relating to title deeds of the lands and also to withdraw the proposed claim for damages of Rs.12,00,000. The same request was made in the letter dated 02.08.2017 (Annexure-P16) addressed to 1st Respondent (CESC) not to impose damages under Article 4.3 of the PPA. Further, the 1st Respondent issued letter dated 27.12.2017 (Annexure-18) demanding payment of damages for non-fulfilment of Conditions Precedent as well as not achieving SCD, totally claiming Rs.2 crores within seven days from the date of the said letter.
- f) The Petitioner has alleged that the 'Effective Date' in the present case should be considered as the date on which the approval of the Commission for SPPA dated 26.11.2016 would take place. According to the petitioner, the SPPA in the present case requires approval of the Commission as the SPPA was entered into between the parties substantially modifying the terms of the PPA. Alternatively, the petitioner has alleged that the date of execution of the SPPA or the date on which the letter issued by this Commission intimating approval of the PPA was received by the petitioner should be treated as the 'Effective Date'. The Petitioner stated that Annexure-P4 dated 27.09.2016, the letter intimating approval of PPA, was received by it on 12.10.2016. Therefore, according to the petitioner, the 'Effective Date' in the present case cannot be

taken as 27.09.2016 as defined in the PPA, but in any of the subsequent dates as narrated above.

- g) The petitioner has contended that there is inordinate delay in granting evacuation scheme approval and in the letter dated 31.07.2017 addressed by the petitioner to the 1st Respondent, the said delay is stated to be seventy days.
- h) That there was delay by this Commission in approving the PPA dated 28.06.2016, which resulted delay in the progress of the project. Further, there was inordinate delay in the progress of the proceedings before the Deputy Commissioner, Ramanagara district, for conversion of agricultural lands for non-agricultural purpose.
- i) The petitioner has contended that the various delays stated above are 'Force Majeure' events and the petitioner is entitled to extension of time for fulfilling the Conditions Precedent and for commissioning the project beyond the stipulated period stated in the PPA. It has also contended that the PPA in question has come into existence as per the terms of competitive bidding and the tariff stated in the PPA is not subject to any variations as per the Generic Tariff Order passed by this Commission further that the Generic Tariff Order dated 30.07.2015, specifically excludes its applicability to the purchase of power under competitive bidding. The subsequent Generic Tariff Order dated 12.04.2017 is only a modification of the Generic Tariff Order dated 30.07.2015, thereby this too is not applicable.

j) Therefore, the petitioner has filed the present petition on 03.01.2018 praying for the reliefs noted above.

3. Upon notice, the Respondents appeared through their Counsels and filed separate Statement of Objections.

4. The gist of the Statement of Objections of 1st Respondent (CESC) can be stated as follows:

a) This Respondent denied the contention of the petitioner that it could not achieve Conditions Precedent or Scheduled Commissioning Date of the project within the stipulated time due to delay in approval of PPA and in evacuation scheme approval and contended that the same cannot be termed as a 'Force Majeure' event. That a bare perusal of the 'Force Majeure' Clause makes it evident that the delays sought to be termed as events of 'Force Majeure' are not in fact events that come under the purview of the said provision and they cannot be considered to be events of 'Force Majeure'.

b) This Respondent denied the contention of the petitioner that the 'Effective Date' should be considered as the date on which the SPPA would be approved or the date on which the SPPA was executed or the date on which intimation of the approval of the PPA was received by the petitioner. The 'Effective Date' should be considered as defined in the PPA and the petitioner cannot be permitted to alter the terms of the PPA to suit its needs. This fact is also clarified by this Commission vide letter dated 25.10.2016 (Annexure-R2).

- c) That there was delay in achieving the Conditions Precedent as well as in commissioning of the project. The project was commissioned on 08.01.2018 as evidenced by Commissioning Certificate dated 09.01.2018 (Annexure-R1).
- d) This Respondent has denied all other allegations made in the petition and contended that the petitioner is liable to pay the damages under Article 4.3 and liquidated damages under Article 5.8 of the PPA and that the petitioner would be entitled to tariff of Rs.4.36 per unit only in terms of the Generic Tariff Order dated 12.04.2017.
5. The gist of the Statement of Objections of 3rd Respondent (KPTCL) may be stated as follows:
- a) That on 22.07.2016, the petitioner has sought for evacuation scheme approval to evacuate 20 MW Solar Power to 66/11 kV Bychapura Sub-station of Magadi taluk in Ramanagara district. However, the petitioner did not pay the requisite fee for processing the file for evacuation scheme approval.
- b) That on 14.09.2016, the petitioner paid the processing fee, thereafter, the application was processed and the tentative evacuation scheme approval was issued on 07.11.2016 (Annexure-R3). On 14.11.2016, the petitioner communicated its acceptance to tentative evacuation scheme approval and thereafter regular evacuation scheme approval was given on 03.12.2016 (Annexure-R4).

- c) After the regular evacuation scheme approval dated 03.12.2016, the petitioner requested for change in connectivity approval from 66/11 kV Bychapura Sub-station to 66 kV Chikkaganganawadi Sub-station vide letter dated 13.03.2017 (Annexure-R5), 100 days after allotment of regular scheme approval. In order to facilitate the change in location, this Respondent issued yet another tentative evacuation scheme approval on 08.06.2016 and on acceptance of the terms and conditions of the said tentative evacuation scheme approval, the petitioner has issued regular evacuation scheme approval on 21.06.2017 (both marked at Annexure-P12).
- d) This Respondent has contended that there was no delay on its part in processing the evacuation scheme approvals and the petitioner has not disclosed the true facts and approached this Commission without clean hands. This petitioner has denied all other allegations made against it.
6. The gist of the Statement of Objections of 4th Respondent (GoK) may be stated as follows:
- a) This Respondent has issued Government Order No.EN 66 VSE 2016, Bengaluru, dated 05.10.2016 (Annexure-R1), in order to facilitate the Solar Power Project developers and also to safeguard the interest of the land owners. This Government Order authorizes the KREDL to obtain an agricultural land from agriculturists after obtaining the necessary

order under Section 109 of the Karnataka Land Reforms Act, 1961 (for short KLR Act, 1961) and sub-lease the said land to the Solar Power Project developers.

- b) That the procurement of land required for the Solar Power Project and obtaining of evacuation scheme approval from KPTCL shall be the responsibility of the Solar Power Project developer.
- c) That the petitioner as per its application dated 26.05.2017 (Annexure-R3) addressed to the Managing Director, KREDL, identified the lands required for establishment of Solar Power Project and requested KREDL to process the application for obtaining necessary orders. This application shows that the petitioner had identified 92 acres 34 guntas of land and had taken consent letters from the farmers. The application states that the list of the particulars of the lands identified is stated in Annexure-1 and the copy of regular evacuation scheme approval dated 03.12.2016 and copy of LoA issued by KREDL are also annexed at Annexures-2 & 3 to the said application dated 26.05.2017.
- d) Upon verification, it was ascertained by KREDL that the petitioner had not produced all the relevant documents and the petitioner was informed by KREDL vide letter dated 07.06.2017 (Annexure-R4) and letter dated 23.03.2019 (Annexure-R5) to submit the required documents. That in spite of these letters by KREDL, the petitioner failed to produce any documents and there was no communication from the petitioner to KREDL. Therefore, it is contended that the petitioner was

negligent in prosecuting the application dated 26.05.2017 (Annexure-R3) filed before KREDL.

7. a) The 2nd Respondent (KREDL) has filed its Statement of Objections stating that the petitioner presented the required documents for verification and to execute the lease agreement. Thereafter, this Respondent has issued a letter to the Additional Chief Secretary to Government, Energy Department to issue a Government Order to that effect. Accordingly, the Government has issued a Notification whereby permission was accorded to this Respondent to obtain the land on lease and to sub-let the same to the petitioner. This Respondent after obtaining the Notification issued a letter to the Deputy Commissioner, Ramanagara district, requesting him to issue an Official Memorandum in the name of the land owners. Further, that pursuant to the communication, there was no response from the Office of the Deputy Commissioner, Ramanagara district. Therefore, this Respondent could not obtain clearances to get the lease deed from the land owners in order to sub-let the same to the petitioner.
- b) One may notice that the Statement of Objections filed by the 2nd Respondent is quite inconsistent with the Statement of Objections filed by the 4th Respondent (GoK). The Statement of Objections of 2nd Respondent (KREDL) is very bald and vague and it does not specify the dates or the documents in support of the facts stated by it.

- c) The petitioner has filed Rejoinder to the Statement of Objections of 4th Respondent (GoK). The averments made by the 4th Respondent in its Statement of Objections to the effect that the petitioner had not furnished any documents to the KREDL in response to the two letters dated 07.06.2017 (Annexure-R4) and 23.03.2019 (Annexure-R5), are not denied in the said Rejoinder, but on the other hand, the petitioner at Page 6 of its Rejoinder stated that due to delay at KREDL, the petitioner decided to follow up directly with the concerned Deputy Commissioner for obtaining the permission for conversion of land from agricultural to non-agricultural purpose in the name of land owners. This fact clearly shows that the petitioner had not responded to the above two letters of KREDL, thereby there was no question of KREDL submitting the file to Government for issue of Notification or the Government in turn issuing any Notification etc., Therefore, one can say that the Statement of Objections filed by KREDL as noted above is incorrect.
8. The Petitioner has separate Rejoinders to each of the Statement of Objections filed by the Respondents.
- a) In the Rejoinder filed to the Statement of Objections filed by the 1st Respondent (CESC), the petitioner has pleaded further grounds, causing delay in commissioning of the project due to Goods & Services Tax (GST) implementation by Government of India (GoI) and due to introduction of Demonetization by GoI and due to wrong classification of modules

under DTH 8501 by the Customs Authorities at Mumbai and at Chennai Ports. Further, the petitioner contended that the liquidated damages cannot be recovered unless the party claiming the damages establishes the actual loss and the same being adjudicated by the competent authority.

- b) In the Rejoinder to the Statement of Objections filed by the 2nd Respondent (KREDL), the petitioner reiterated his case as stated in the petition.
- c) In the Rejoinder filed to the Statement of Objections of 3rd Respondent, the Petitioner has not denied the delay in paying the processing fee and the petitioner obtaining earlier evacuation scheme approval to 66/11 kV Bychapura Sub-station and later applying for fresh evacuation scheme approval to 66/11 kV Chikkagangawadi Sub-station.
- d) In the Rejoinder filed to the Statement of Objections of the 4th Respondent, the petitioner stated that due to delay at KREDL, the petitioner decided to follow directly with the concerned Deputy Commissioner for obtaining the conversion order.
- e) It can be seen that the petitioner has stated so many new facts in the Rejoinders which could not have been stated in the Rejoinder, but which should have been pleaded by way of further pleadings by amending the petition.

9. We have heard the learned counsels for both the parties. The petitioner has also filed written arguments.

10. From the rival contentions and the relevant pleadings, the following Issues arise for our consideration:

Issue No.1: Whether the Petitioner proves that the 'Effective Date' under the PPA for counting various timeframe for achieving different milestones under the PPA shall be treated as:

- a) The date of approval by the Commission of the SPPA dated 26.11.2016? 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 proves that there was delay in granting approval by the Commission of the PPA dated 28.06.2016 and also there was delay in granting evacuation scheme approval by the 3rd Respondent (KPTCL) and whether such delay led to delay in identifying the lands required for the Solar Power Project?

Issue No.3: Whether the petitioner was prevented from performing its obligations under the PPA due to 'Force Majeure' event in achieving Conditions Precedent or unable to produce the documentary evidence of having clear title and possession of the lands in its favour, required for establishment of Solar Power Project, due to delay in granting approval under Section 109 of the KLR Act, 1961 and under Section 95 of the KLR (Amendment)

Act, 2015, without valid reason by the Deputy Commissioner, Ramanagara district?

Issue No.4: Whether the petitioner has proved that the delay in commissioning the Solar Power Project was also due to:

(a) implementation of Goods & Services Tax (GST) Act, 2017 by the Government of India (GoI)?

(b) introduction of Demonetization by GoI? and

(c) wrong classification of modules under DTH 8501 by Customs Authorities at Mumbai and Chennai Ports?

Issue No.5: Whether the claim for liquidated damages is established by the 1st Respondent (CESC) as required under Section 74 of the Indian Contract Act, 1872?

Issue No.6: Whether the Solar Power Project of the Petitioner was liable for reduced tariff in the event of delay in commissioning of the project?

Issue No.7: To which relief the Petitioner is entitled to?

Issue No.8: What Order?

11. After considering the pleadings and documents of the parties and the submissions made by the learned counsel for parties, our findings on the above Issues are as follows.

12. Issue No.1: Whether the Petitioner proves that the 'Effective Date' under the PPA for counting various timeframe for achieving different milestones under the PPA shall be treated as:

a) The date of approval by the Commission of the SPPA dated 26.11.2016? 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?
- 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 Magadi taluk of Ramanagara district, 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 SPPA is essential. We note that 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 said corrections/ modifications 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 as per Annexure-R2 to the Objections filed by 1st Respondent (CESC).

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

13. Issue No.2: Whether the petitioner proves that there was delay in granting approval by the Commission of the PPA dated 28.06.2016 and also there was delay in granting evacuation scheme approval by the 3rd Respondent (KPTCL) and whether such delay led to delay in identifying the lands required for the Solar Power Project?

i) Regarding delay in granting approval of PPA by this Commission:

a) It is contended by the petitioner that the delay in approval of PPA by KERC has resulted delay in getting other required approvals. This contention cannot be accepted because as per the PPA, the 'Effective Date' is from the date on which KERC approves the PPA and the petitioner is required to achieve the Condition Precedent within eight months and Scheduled Commissioning Date within twelve months from the 'Effective Date'. Hence, delay in approving the PPA by KERC if any, will not affect the petitioner for the reason that time begins for achieving different milestones, from the date of approval of PPA by KERC.

b) Any of the Respondents has not made an attempt to explain the delay of nearly three months in approving the PPA by the Commission. However, the letters dated 22.07.016 (Annexure-R1) addressed to Managing Director, BESCO and dated 29.08.2016 (Annexure-R2) addressed to Additional Chief Secretary to Government, Energy Department by this Commission would explain the reasons for the delay in approving the PPAs. These letters produced by 3rd Respondent (KPTCL) would make it clear that the KREDL has not furnished the

clarifications within time, thereby the PPAs were ordered to be returned to ESCOMs and subsequently this Commission accorded in principle approval to PPAs on certain assurance given by GoK to amend the Solar Policy. Hence, there is no delay on the part of this Commission in approving the PPAs.

- c) Therefore, there is no substance in the say of petitioner that delay in PPA approval by KERC has resulted in delay in getting other required approvals.

ii) Regarding Delay in granting evacuation approval:

- a) In Para 27 & 28 of the petition, the Petitioner has alleged the facts, in support of its contention regarding delay in grant of evacuation approval. The petitioner has stated that it had applied for evacuation approval before 3rd Respondent (KPTCL) soon after issue of LoA dated 30.05.2016 and the regular evacuation scheme approval was granted on 03.12.2016 allowing evacuation of power from the project site to Bychapura Sub-station. The Petitioner itself has further alleged that it again requested 3rd Respondent (KPTCL) on 13.03.2017 (Annexure-R5) for issuing fresh evacuation scheme approval to 66/11 kV Chikkagangawadi Sub-station due to difficulties such as ROW, land procurement etc., The Petitioner has further stated that the 3rd Respondent (KPTCL) again processed the request and tentative evacuation scheme approval was granted on 08.06.2017 and the regular evacuation scheme approval on 21.06.2017. Both these

evacuation scheme approvals to 66/11 kV Chikkagangawadi Sub-station, are produced by the Petitioner at Annexure-P12.

- b) The above averments made by the petitioner itself would show that its request for evacuation scheme approval to 66/11 kV Chikkagangawadi Sub-station was made on 13.03.2017. Therefore, one can say that there was no delay on the part of 3rd Respondent (KPTCL) in issuing tentative and regular evacuation schemes approval on 08.06.2017 and 21.06.2017 respectively.
- c) The gist of the Statement of Objections of 3rd Respondent (KPTCL) is already narrated in Para 5 of this judgment. It is not necessary to repeat the same again. The said objection states that the application for evacuation scheme approval was filed on 22.07.2016, but the process fee was paid on 14.09.2016 and thereafter, tentative scheme approval was issued on 07.11.2017 (Annexure-R3) and after a week, the petitioner communicated its approval for the terms and conditions stated in the tentative evacuation scheme and thereafter, regular evacuation scheme was granted on 03.12.2016 (Annexure-R4). The 3rd Respondent (KPTCL) has also stated that the petitioner requested for change in evacuation scheme approval vide letter dated 13.03.2017 (Annexure-R5) after 100 days of issuing regulation evacuation scheme approval (Annexure-R4) requesting connectivity to 66/11 kV Chikkagangawadi Sub-station. Therefore, the 3rd Respondent (KPTCL) has contended that there was no delay on its part in processing the evacuation scheme

approval and the petitioner has not disclosed the true facts and approached this Commission without clean hands.

d) The contents of the letter dated 13.03.2017 (Annexure-R5) explains the reasons for applying change in connectivity approval to 66/11 kV Chikkagangawadi Sub-station. The Petitioner has not specifically contended with required ingredients that the reasons stated in this application amounted to 'Force Majeure' events, but unnecessarily blamed the 3rd Respondent (KPTCL).

e) For the above reasons, we hold that there was no delay in issuing evacuation scheme approvals.

iii) Regarding delay in identifying the lands required for the Solar Power Project:

a) The Petitioner has contended that the delay in issuance of approvals of the PPA by this Commission and the evacuation scheme by KPTCL led to delay in identifying the lands required for establishing the Solar Power Project. This contention of the petitioner has no basis. Before applying for issuance of evacuation scheme approvals to any Sub-station, the petitioner has to identify the lands where the project would be established and has to furnish Topo Sheet of the situation of the project site and the Sub-station to which the power would be evacuated. This fact is made clear in the application dated 13.03.2017 (Annexure-R5). The contents of this application would show that while applying for evacuation scheme approval for first time, the petitioner had identified 100 acres of land at Madalaraypalya village in Magadi taluk,

Ramanagara district. Subsequently, while applying for evacuation scheme approval for second time, the petitioner had identified 100 acres of land at Gejjerguppe village in Magadi taluk of Ramanagara district and had signed MoU with the land aggregator for procurement of the said extent. It is also stated that a Topo Sheet map showing the project site and the Sub-station location was annexed to the application filed requesting for evacuation scheme approval.

b) The 2nd evacuation scheme approvals were granted on 08.06.2017/ 21.06.2017. The petitioner in its letter dated 26.05.2017 (Annexure-P6) addressed to 1st Respondent (CESC) in respect of land related documents stated that it had produced consent letters from land owners to lease their lands for Solar Power Project and the sworn affidavit evidencing the possession of the lands. If really the petitioner had identified the lands only after evacuation scheme approvals, it could not have stated in its letter dated 26.05.2017 (Annexure-P6) that it had already identified the lands and obtained the possession of the same.

c) For the above reasons, we hold that the say of the petitioner that it had to identify the lands required for the Solar Power Project after issue of evacuation scheme approvals appears to be not true.

iv) For the above reasons, we hold Issue No.2 in negative.

14. Issue No.3: Whether the petitioner was prevented from performing its obligations under the PPA due to 'Force Majeure' event in achieving Conditions Precedent or unable to produce the

documentary evidence of having clear title and possession of the lands in its favour, required for establishment of Solar Power Project, due to delay in granting approval under Section 109 of the KLR Act, 1961 and under Section 95 of the KLR (Amendment) Act, 2015, without valid reason by the Deputy Commissioner, Ramanagara district?

- a) In Para 35 & 36 of the petition, the petitioner has stated the cumbersome process to be followed while obtaining an order under Section 109 of the KLR Act, 1961 and under Section 95 of the KLR (Amendment) 2015. The allegations in the petition would show that the petitioner intended to obtain the lands required on sub-lease basis from KREDL as per the procedure specified in Government Order No.EN 66 VSE 2016, Bengaluru, dated 05.10.2016 produced at Annexure-R1 by 4th Respondent (GoK). As per this Government Order, the petitioner has to identify the lands required and obtain the consent of the land holders for lease of the land in favour of KREDL and thereafter, has to apply before KREDL for obtaining an order under Section 109 of the KLR Act, 1961 and under Section 95 of the KLR (Amendment) Act, 2015 for conversion of agricultural land into non-agricultural purpose. The petitioner has not specifically stated in the petition, the date on which it applied before KREDL as required for obtaining land conversion order. The letter dated 26.05.2017 (Annexure-P6) shows that the petitioner had obtained an acknowledgement for having filed an application before KREDL to obtain land conversion order.

b) The Statement of Objections of 4th Respondent (GoK) shows that the petitioner filed application dated 26.05.2017 before KREDL as per Annexure-R3 stating that the petitioner had identified 92 acres 34 guntas of land and had taken consent letters from the farmers and had produced certain other documents. Further, it shows that upon verification it was ascertained by KREDL that the petitioner had not produced all the relevant documents like consent letters from land owners, revenue records relating to the said lands etc., and the petitioner was asked by KREDL to produce the same to proceed further with the application. Further, it shows that the petitioner had not furnished the said required documents in spite of issuing letters dated 07.06.2017 (Annexure-R4) and dated 23.03.2019 (Annexure-R5) by KREDL. The petitioner has not denied the said fact. Therefore, it was contended by the 4th Respondent (GoK) that the petitioner was negligent in prosecuting the application dated 26.05.2017 (Annexure-R3) filed before KREDL. We have already noted that though the KREDL had given a different version in its Statement of Objections, regarding filing of application and forwarding the same to the Deputy Commissioner, Ramanagara district, for further action etc., the say of KREDL was incorrect.

c) Out of the documents produced by the petitioner on 26.12.2019, the Document No.1 dated 24.09.2018, an application filed before the Deputy Commissioner, Ramanagara district, by the petitioner requesting for conversion of agricultural lands, would make it clear that the

petitioner had abandoned the application filed before KREDL for conversion of land and its sub-lease. Subsequently, as per Document No.2 dated 04.07.2019, the petitioner was intimated to pay the conversion fee. The other documents produced by the petitioner on 19.12.2019 would show that it had paid the conversion fee on 19.07.2019 and lease deeds were executed by the land owners. These facts would establish that petitioner approached the Deputy Commissioner belatedly on 24.09.2018, long after the date specified for meeting Conditions Precedent.

d)Therefore, one can say that the petitioner has failed to establish that it was unable to produce the documentary evidence of having clear title and possession of lands in its favour required for establishment of Solar Power Project, due to delay in granting land conversion order by the Deputy Commissioner, Ramanagara district, without any valid reasons.

e) For the above reasons, we hold Issue No.3 in negative.

15. Issue No.4: Whether the petitioner has proved that the delay in commissioning the Solar Power Project was also due to:

(a) Implementation of Goods & Services Tax (GST) Act, 2017 by the Government of India (GoI)?

(b) Introduction of Demonetization by GoI? and

(c) Wrong classification of modules under DTH 8501 by Customs Authorities at Mumbai and Chennai Ports?

16. Before dealing each of the above mentioned items in Issue No.4, we may note that the petitioner has not pleaded any of these grounds in the petition. In the guise of filing Rejoinder to the Statement of Objections filed by the 1st Respondent, the petitioner has stated these grounds in the Rejoinder for the first time. The petitioner has filed the present petition before this Commission on 03/04.01.2018. The events relating to the above grounds had already occurred well before the filing of the petition. If really, these grounds were available for the petitioner at the time of filing the petition, the petitioner would not have omitted to allege these grounds in the petition. There is no explanation by the petitioner for which reason it had not alleged these grounds in the petition. In the absence of a proper explanation for not pleading these grounds in the petition, a subsequent application for amendment of the pleadings for inclusion of these grounds is not maintainable. A new ground cannot be pleaded in the Rejoinder. Even if such a new ground is alleged in the Rejoinder, the same should be rejected from any consideration. The Petitioner is represented by an Advocate. Therefore, the petitioner cannot contend that it was not acquainted with the rules of pleadings. The non-inclusion of these grounds in the pleadings either initially or by way of amendment, leads to an inference that these grounds were not well founded and thereby the petitioner had not taken the pain to include it either in the petition or by way of amendment of the petition. If the new ground is included in the petition by way of amendment, the other side will have an opportunity to say its version on such ground. Therefore, these grounds made out in the

Rejoinder are to be rejected out rightly. However, we will deal with the merits of these grounds on the basis of the facts pleaded in the Rejoinder.

17. Regarding implementation of Goods & Services Tax (GST) Act, 2017 by the Government of India (GoI)?

- a) The petitioner has stated that there was a slow-down from July, 2017 to September, 2017 in manufacturing and service industry across the country due to introduction of GST. The petitioner has relied on the Official Memorandum (OM) dated 27.06.2018 issued by MNRE, but has not produced the full text of this OM. This OM was issued on the request of the Solar Power Developers, to SECI/NTPC/other Implementing Agencies, for grant of extension of time on case to case basis. It is made clear in this OM that the extension of time could be given for the Solar Power Project Developers provided they furnish all documentary evidence establishing that they were actually affected due to GST induced disruptions in the period for which extension of time has been claimed.
- b) In the present case, the petitioner has not produced any documentary evidence in support of its claim to establish that it was actually affected due to GST induced disruptions during the period from 01.07.2017 to 31.08.2017.
- c) Therefore, we hold that the petitioner has failed to establish that introduction of GST has affected the progress of its project.

18. Regarding Introduction of Demonetization by Govt?

- a) The petitioner has stated that Demonetization adversely affected the progress of the project work for 2-3 months from 08.11.2016, as land acquisition and project activities were affected causing delay considerably. Except for the 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 cannot accept that demonetization adversely affected the progress of the project of the petitioner from 08.11.2016 to the end of January, 2017.
- b) In the present case, the petitioner has not purchased the extent of lands required for the project, but had taken it on lease, that too long after the expiry of period affected by Demonetization. The petitioner has stated that it had placed purchase orders of solar modules, inverters, transformers and mounting structures as stated in the letter dated 26.05.2017. However, the petitioner has not stated the actual dates of the purchase orders of these things. If really, these purchase orders were placed during the affected period of demonetization, it would have certainly produced the evidence regarding the dates of these purchase orders.
- c) For the above reasons, we hold that the petitioner has failed to establish that demonetization had adversely affected the progress of the project.

19. Regarding Delay due to wrong classification of solar modules:

- a) The petitioner in the Rejoinder at Paras 72 to 80 has stated certain facts regarding the delay in clearance of imported solar modules by Customs authorities at Mumbai and Chennai Ports due to wrong classification of solar modules by the said authorities. These allegations are not supported by any documentary evidence. The petitioner could not aver in these paragraphs, the period for which there was delay in getting the solar modules due to wrong classification, except saying that there was enormous delay. It was required for the petitioner to say the exact period of delay due to this reason.
- b) The petitioner has mentioned about the dispute with regard to both Mumbai and Chennai Customs authorities. It cannot be made out from the pleadings whether the modules which were sought to be released related to this project alone or to some other projects.
- c) Hence, this ground for seeking extension of time is not established by the petitioner and the same is rejected.

20. For the reasons stated above, we answer Issue No.4 in negative.

21. Issue No.5: Whether the claim for liquidated damages is established by the 1st Respondent (CESC) as required under Section 74 of the Indian Contract Act, 1872?

- a) The petitioner has contended that without proof of actual damage or loss a party cannot recover liquidated damages stated in the contract. The law on this subject is discussed in detail in the decision cited in (2015) 4 SCC 136 between *Kailash Nath Associates Vs. Delhi Development*

Authority and Another. The summary of the principles stated in paragraph 43 of this judgement reads as follows:

"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 Section 73 of the Indian Contract Act, 1872.

43.3 Since Section 74 of the Indian Contract Act, 1872 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 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 dispenses 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."

- b) The petitioner has relied upon other judgements of Hon'ble Supreme Court in *Union of India Vs. Rampur Distillery (AIR 1973 SC 1098):: (1973) 1 SCC 649* and in *Fateh Chand Vs. Bal Kishan Dass AIR 1973 SC 1098*. We think it is not necessary to discuss the above decisions, as in *Kailash Nath Associates* the above cases are considered before laying down the law stated in it as noted above.
- c) In the case of non-supply of energy by a generator to the distribution licensee, it is not possible to prove the actual damage or loss. Therefore, if the contract provides a genuine pre-estimate of damage or loss, the defaulting party is liable to pay the liquidated damages without proof of actuals loss or damage.

d) The definition clause in article 21.1 of the PPA defines "Damages" shall have the meaning set forth in Sub Clause (w) of clause 1.2.1. The said sub clause (w) reads as follows:

"the damages payable by either party to the other of them, as set forth in this agreement, whether on per deim basis or otherwise, are mutually agreed genuine pre-estimate loss and damage likely to be suffered and incurred by the party entitled to receive the same and are not by way of penalty".

e) The petitioner has not led any acceptable evidence to infer that the liquidated damages agreed in the PPA are in the nature of penalty.

f) For the above reasons, we hold the Issue No.5 in affirmative.

22. Issue No.6: Whether the Solar Power Project of the Petitioner was liable for reduced tariff in the event of delay in commissioning of the project?

As per Article 5.1.1(c) of the PPA the petitioner had to commission the project within the Scheduled Commissioning Date i.e., within twelve months from the 'Effective Date'. Therefore, the petitioner had to commission the project on or before 26.09.2017. The project was commissioned on 08.01.2018 as per Commissioning Certificate. We find that there is delay in commissioning the solar power project of the petitioner. We have held in the preceding paragraphs that the petitioner was not prevented by any 'Force Majeure' events in commissioning the project. Under Article 12.2 of the PPA, if there is delay in commissioning of the project and there is a change in applicable tariff, the tariff for the

project will be the lower of the tariff agreed in the PPA or the KERC applicable tariff as on the Commercial Operation Date. The Generic Tariff Order dated 12.04.2017, would apply for the project, wherein the tariff fixed is Rs.4.36 per unit. Hence, the solar power project of the petitioner is liable for reduced tariff of Rs.4.36 per unit, the tariff prevailing on the date of commissioning of the project as contended by the 1st Respondent (CESC). Hence Issue No.6 is held accordingly.

23. Issue No.7: To which relief the Petitioner is entitled to?

In view of the various findings given above, the petitioner is not entitled to any of the reliefs prayed for by it.

24. Issue No.8: What Order?

For the above reasons, we pass the following:

ORDER

- a) The petition is dismissed holding that the petitioner is not entitled to any of the reliefs claimed in the petition;
- b) The petitioner is entitled to only reduced tariff of Rs.4.36 per unit for the energy injected into the Grid from the Solar Power Project.
- c) The petitioner is liable to pay damages as provided in Article 4.3 and 5.8 of the PPA.

sd/-
(SHAMBHU DAYAL MEENA)
Chairman

sd/-
(H.M. MANJUNATHA)
Member

sd/-
(M.D. RAVI)
Member

