

No.N/384/2017

**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. 204/2017

BETWEEN:

M/s Paramapujya Solar Energy Private Limited,
A Company registered under the
provisions of the Companies Act, 2013
Seventh Floor, Wing B,
Sambhav House, Judges Bungalow,
Bodakdev,
Ahmedabad-380 015.
(Represented by its Authorized Signatory)

... Petitioner

[Represented by Smt. Poonam Patil, Advocate]

AND:

1) Gulbarga Electricity Supply Company Limited
(GESCOM), A Company Registered under the
provisions of Companies Act, 1956 having its
Registered Office at Station Main Road,
Kalaburagi.
(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 scout 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 Indus Law, Advocates
Respondent No.2 represented by Sri Rakshit Jois, Y.P. Advocate
Respondent No.4 represented by Sri G.S. Kannur, Advocate]

ORDERS

1. This is a petition filed under Section 86 (1) (f) of the Electricity Act, 2003
praying 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 stated in the petition;
- c) To grant concurrence to the Supplemental Power Purchase
Agreement (SPPA for short) dated 26.12.2016: 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 Hon'ble
Commission;

- e) If the Commission were to consider that there is a delay in fulfillment of the Conditions Precedent and commissioning 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 of the Project.
- f) To pass such other order/s including an order as to costs, to meet the ends of justice and equity.
- g) To direct the 1st Respondent (GESCOM) to pay the petitioner for the energy delivered at the tariff of INR 5.35 per kWh as per Article 12.1 of the PPA dated 28.05.2016.

NOTE: Prayer (g) was inserted by the Petitioner vide order dated 16.01.2020 passed by the Commission.

2. The material facts stated by the petitioner, relevant for the disposal of the controversies 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 Request for Proposal (RfP) for the development of 1,200 MW Solar Power Projects to be implemented in 60 taluks vide Notification dated 20.11.2015. M/s Paramapujya Solar Energy Private Limited, a Company registered under the Companies Act, 2013 the single business entity was the successful bidder for development of 10 MW capacity of Solar PV Ground Mount Project in Shorapur taluk of Yadgir district. The tariff discovered was Rs.5.35 per unit for the energy to

be delivered. KREDL issued Letter of Award (LoA) and Allotment Letter dated 23.03.2016 (Annexure-P1) to the said M/s Paramapujya Solar Energy Private Limited with terms and conditions to be fulfilled by the said selected bidder. Accordingly, the petitioner and GESCOM entered into PPA dated 28.05.2016 (Annexure-P2). The PPA was approved by the Commission and the approval was communicated vide letter dated 06.10.2016 (Annexure-P3). 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 26.12.2016 (Annexure-P4).

- 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 05.06.2017 and the project is to be commissioned on or before 05.10.2017. Admittedly, the petitioner has not able to fulfil the Conditions Precedent within the time specified as noted above. However, the Solar Power Project in question was commissioned on 05.10.2017 as per the Commissioning Certificate Dated 09.10.2017 (Annexure-P12). 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 30.05.2017 (1st Document in Annexure-P6) to the 1st Respondent (GESCOM) 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 able to file the application to 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) Agreement to lease signed with the land owners; (ii) Acknowledgement of Section 95 application submitted to KREDL; (iii) Consent letters from land owners to lease their lands for Solar Power project; and (iv) Sworn Affidavit evidencing possession of lands by the petitioner; were produced before KREDL. Subsequently, the petitioner produced one more document namely; NoC from Gram Panchayat to 1st Respondent vide letter dated 05.06.2017 (2nd Document in Annexure-P6). The Petitioner wrote another letter dated 10.06.2017 (Annexure-P7) to the 1st Respondent (GESCOM) stating that it had identified 53.85 acres of land at Vanakihala village of Shorapur taluk in Yadgir district and

submitted an application with required particulars before KREDL and the KREDL has accepted the application for processing the same. Further, the petitioner narrated in this letter the tedious procedure to be adopted while obtaining an order under Section 109 of the Karnataka Land Reforms Act, 1961 (KLR Act, 1961 for short) and under Section 95 of the Karnataka Land Revenue (Amendment) Act, 2015 [KLR (Amendment) Act, 2015 for short]. Therefore, the petitioner requested to kindly accept the documents submitted to KREDL for obtaining an order under Section 109/95 of the above said Acts, as sufficient compliance of Conditions Precedent with regard to production of documents of clear title and possession of lands required for the Solar Power Project in the name of the petitioner. Further, requested that in the extreme event of GESCOM not accepting the above said request, at least to grant three months' extension of time for fulfilment of the said Conditions Precedent, since obtaining conversion order, was a time consuming process and was beyond the control of the petitioner.

- d) The petitioner issued notice of 'Force Majeure' events as per letters dated 06.07.2017 & 31.07.2017 (Annexure-P9) to the 1st Respondent requesting for extension of time of 266 days in submission of documents relating to title deeds of the lands on the ground that there was delay of 266 days by KPTCL for issuance of regular evacuation scheme approval.

- e) 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 26.12.2016 (Annexure-P4) would take place. According to the petitioner, the SPPA in the present case requires approval of the Commission as the SPPA entered into between the parties was substantially modifying the terms of the PPA.
- f) The petitioner has contended that there was inordinate delay of 266 days in granting evacuation scheme approval by KPTCL. This Commission had approved the PPA on 06.10.2016 (Annexure-P3) whereas the petitioner approached the KPTCL for evacuation approval on 25.06.2016, i.e., well in advance. Subsequently, the tentative evacuation scheme dated 28.10.2016 was communicated. Despite the best efforts by the petitioner, the KPTCL had given regular evacuation scheme approval dated 20.05.2017 (Both tentative and regular evacuation schemes approvals are marked as Annexure-P8).
- g) That there was delay of more than four months by this Commission in approving the PPA dated 28.05.2016 and there was delay of 266 days for issuance of the regular evacuation scheme approval by the KPTCL, which hampered the progress of the project, particularly the identification of the lands required for the project. Further, there was inordinate delay in the progress of the proceedings before the Deputy Commissioner, Yadgir district, for conversion of agricultural lands for non-agricultural purpose. That the petitioner was able to approach KREDL on 13.04.2017

for getting issuance of land conversion order under Section 95 of the KLR (Amendment) Act, 2015. However, till date, the said order is awaited. Therefore, the petitioner contended that it had lost precious time for project execution, for no fault on its part, but due to the delay caused by others as noted above.

h) 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 beyond the stipulated period stated in the PPA.

j) Therefore, the petitioner has filed the present petition on 26.10.2017 praying for the reliefs noted above.

3. Upon notice, the Respondents appeared through their Counsels and 1st Respondent (GESCOM) & 3rd Respondent (KPTCL) filed common Statement of Objections and 2nd Respondent (KREDL) & 4th Respondent (GoK) have filed separate Statement of Objections.

4. The gist of the Statement of Objections filed by 1st Respondent (GESCOM) & 3rd Respondent (KPTCL) can be stated as follows:

a) These Respondents denied the contention of the petitioner that it could not achieve Conditions Precedent within the stipulated time due to delay in approval of PPA and delay in issuance of evacuation scheme approval and the same cannot be termed as a 'Force Majeure' events.

- b) These Respondents denied the contention of the petitioner that the 'Effective Date' should be considered as the date on which the SPPA would be approved. They contended that 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. That there is no need for approval of the SPPA by the Commission and the SPPA by itself mentions that it is only a part of the original PPA and nowhere under the law and in any other document submitted by the petitioner, is there a requirement of getting an approval of the SPPA. This fact is also clarified by this Commission vide letter dated 25.10.2016 (Annexure-A).
- c) It is contended that there was delay in achieving the Conditions Precedent of the project. The petitioner had not got the land converted within the stipulated time duration as required under the PPA.
- d) The allegation of the petitioner that the evacuation scheme approval was a must for the finalization of the project site was not true. On the contrary, it was the duty of the petitioner to finalize the project site at least before making an application for issuance of evacuation scheme approvals. The petitioner being well aware of the terms and conditions of the PPA did not achieve all the necessary Conditions Precedent in the prescribed time, though managed to commission the project in time.
- e) These Respondents have denied all other allegations made in the petition and contended that the petitioner is liable to pay the damages under Article 4.3 of the PPA. It is contended that even if the petitioner was

aggrieved by an event of 'Force Majeure', the same had to be notified to the Respondents within a period of seven days as stipulated under PPA. No such notice of an event of 'Force Majeure' has been issued to the Respondents herein. The allegations of the petitioner that there was delay in getting approval of the land conversion on the part of the Government authorities are highly vexatious.

f) That the allegations to the effect that there could be no meaningful progress was expected till the PPA was approved by the Commission is baseless and hence denied.

g) Therefore, the 1st & 3rd Respondents prayed for the dismissal of the petition.

5. 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 on lease an agricultural land from agriculturists after passing of the necessary order under Section 109 of the KLR Act, 1961 and then to sub-lease the said land to the Solar Power Project developers.

- b) That the procurement and identification of land required for the Solar Power Project and obtaining the evacuation scheme approval from KPTCL shall be the responsibility of the Solar Power Project developer.
- c) That in accordance with the said Government Order dated 05.10.2016 (Annexure-R1), the petitioner herein presented the documents to the 2nd Respondent (KREDL) for verification and to execute lease agreement. The 2nd Respondent (KREDL) submitted its proposal to this 4th Respondent (GoK) to issue a Government Order to that effect. Thereafter, the 4th Respondent (GoK) has issued a Notification according permission to the 2nd Respondent (KREDL) to obtain the land on lease and sub-lease the same to the petitioner. After obtaining the Notification, the 2nd Respondent (KREDL) submitted a letter to the Deputy Commissioner, Yadgir district and requested him to issue an Official Memorandum in the name of the land owners, for conversion of agricultural land for non-agricultural purpose.
- d) Subsequently, the Deputy Commissioner, Yadgir district, issued letter dated 30.12.2017 (Annexure-R12) to the 2nd Respondent (KREDL) intimating that a sum of Rs.11,72,853/- would be the land conversion fee and asking the 2nd Respondent (KREDL) to intimate the land owners to pay the said amount and on receipt of the land conversion fee, the land conversion order would be issued.
- e) That in the meantime, one Muddaiah Hiremat, the GPA holders of land owners issued a letter informing the 2nd Respondent (KREDL) regarding

withdrawal of his consent earlier given for leasing the land in favour of KREDL. The 2nd Respondent (KREDL) intimated the petitioner to make payment of conversion fee and also informed the withdrawal of consent by the said Muddaiah Hiremat. On account of the aforesaid reasons, the KREDL could not execute the lease deeds with the land owners and in turn, execute the sub-lease in favour of the petitioner.

f) The 4th Respondent (GoK) has produced Annexures-R4 to R8, the correspondences that had taken place between the petitioner and the 2nd Respondent (KREDL). We shall consider these documents in detail at appropriate stage. Annexure-R9 dated 03.06.2017 is the letter addressed by KREDL to the Additional Chief Secretary to Government, Energy Department, requesting to issue the necessary Notification to enable to apply before the Deputy Commissioner, Yadgir district, for grant of land conversion order. Annexure-R10 dated 13.07.2017 is the Notification issued by GoK, as requested by KREDL. Annexure-R11 dated 30.08.2017 is the letter addressed by KREDL to the Deputy Commissioner, Yadgir district, requesting to pass necessary land conversion order. As already noted, Annexure-R12 dated 30.12.2017 is the intimation sent by the Deputy Commissioner, Yadgir district, to KREDL to arrange for the payment of land conversion fee.

6. The gist of the Statement of Objections of 2nd Respondent (KREDL) may be stated as follows:

- a) The 2nd Respondent (KREDL) has also stated the same facts as stated by the 4th Respondent (GoK).
- b) In addition, the 2nd Respondent (KREDL) has produced Annexure-R2 (F) dated 17.01.2018, a letter written by Muddaiah Hiremat, the GPA holder of the land owners to it, intimating the withdrawal of consent earlier given on behalf of the land owners. Annexure-R2 (G), is the letter dated 02.02.2018 written by KREDL to the petitioner intimating to pay the land conversion fee and also intimating the withdrawal of consent by Muddaiah Hiremat, the GPA holder.
- c) The further progress in respect of payment of land conversion fee etc., are pleaded in the written argument filed by the 2nd Respondent (KREDL) on 30.01.2020.
- d) In the said written argument at Paragraph 13, it is stated that KREDL intimated the petitioner to make payment vide letter dated 02.02.2018 [Annexure-R2 (G)] and thereafter obtained on 05.02.2018 the challan and demand drafts submitted by the petitioner. However, the Official Memorandum dated 28.06.2018 was issued by the Deputy Commissioner, Yadgir district and the permission from the Deputy Commissioner, Yadgir district was obtained vide letter dated 25.09.2018. Further, the petitioner made payment of lease rent only on 05.12.2018 and intimated the same vide letter dated 06.02.2019.

e) In the said written argument at Paragraph 14, it is stated that KREDL entered into the lease deeds with the farmers on 18.05.2019 and on the same day executed to sub-lease in favour of the petitioner.

f) Therefore, the 2nd Respondent (KREDL) contended that there was no delay on its part.

7. The Petitioner has filed separate Rejoinders to the Statement of Objections filed by the Respondent No.2 & 4 and has filed common Rejoinder to the Statement of Objections of the Respondent No.1 & 3.

a) In the Rejoinder filed to the Statement of Objections filed by the 1st Respondent (GESCOM) and 3rd Respondent (KPTCL), the petitioner has pleaded at Paragraph 12, that subsequent to commissioning of 10 MW Solar Power Project in question, power was being injected into the Grid and the invoices were raised every month at the tariff of Rs.5.35 per kWh as agreed in PPA, however, the 1st Respondent (GESCOM) has started paying @ Rs.4.63 (4.36?) per kWh, contending that the project started injecting power into the Grid from 06.10.2017 and the said date should be considered as the Date of Commercial Operation. The petitioner has contended that the 1st Respondent (GESCOM) has adopted a wrong interpretation.

b) In the Rejoinder at Paragraphs 13 & 14, the petitioner has contended that even assuming the date of commissioning of the project as 06.10.2017, the petitioner has achieved the Scheduled Commissioning

Date, relying on the judgment of the *Hon'ble Appellate Tribunal in its order dated 08.05.2019 in Appeal No.332 and 333 of 2018 titled as ES Solar Private Limited & Another Vs. Bangalore Electricity Supply Company Limited (BESCOM) and Others.*

c) The petitioner has also raised the legal plea in the Rejoinder stating that the 1st Respondent (GESCOM) could not have levied liquidated damages without proof of actual damage or loss caused to it and relied upon certain decisions noted in Paragraph 65 of the Rejoinder.

d) The other averments made in the Rejoinder are nothing but the reiteration of the pleadings already made in the petition.

8. In the Rejoinders filed to the Statement of Objections of 2nd and 4th Respondents, the petitioner has not made out any substantial facts to be noted, except the facts already noted.

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

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

Issue No.1: Whether SPPA dated 26.12.2016 requires any approval by the Commission and such approval date should be considered as the 'Effective Date' under Article 3.1 of the PPA?

Issue No.2: Whether the petitioner was prevented from performing its obligations under the PPA due to 'Force Majeure' events in

achieving Conditions Precedent or unable to produce the documentary evidence of having the clear title and possession of the lands in its favour, required for the establishment of Solar Power project, due to any 'Force Majeure' event/s alleged by it?

Issue No.3: Whether the petitioner is liable to pay damages for non-fulfilment of the Condition Precedent of producing the documentary evidence of clear title and possession of the land required for the establishment of Solar Power project?

Issue No.4: Whether there is any delay in achieving the Scheduled Commissioning Date? and if so, whether the Solar Power Project of the Petitioner is liable for reduced tariff?

Issue No.5: What Order?

11. After considering the pleadings and also the documents produced by the parties on different dates and the submissions made by the learned counsel for parties our findings on the above Issues are as follows.

12. Issue No.1: Whether SPPA dated 26.12.2016 requires any approval by the Commission and such approval date should be considered as the 'Effective Date' under Article 3.1 of the PPA?

a) 'Effective Date' is defined as the date of the approval of PPA by the KERC. Such definition can be seen in Article 21.1 of the PPA. Article 3.1 of the PPA also explains 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 as per Annexure-P3 letter

dated 06.10.2016, the petitioner and the 1st Respondent were informed of the approval of the Commission to the PPA dated 28.05.2016 (Annexure-P2). Therefore, the date 06.10.2016 is to be considered as the 'Effective Date' for the purpose of interpreting the different clauses in the PPA. The PPA does not provide that the date of approval of the Commission to the SPPA, in case the execution of such SPPA is needed could be considered as the 'Effective Date'.

b) The petitioner has contended that as the letter dated 06.10.2016 (Annexure-P3) communicating approval of Commission for the PPA in question directed to incorporate certain corrections/modifications in the said 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, those dates could be considered as the 'Effective Date'.

c) The letter dated 06.10.2016 (Annexure-P3) signed by the Secretary of this Commission states that "I am directed to communicate approval of the Commission to the Power Purchase Agreement dated 28.05.2016 executed between GESCOM and M/s Paramapujya Solar Energy Private Limited in respect of development of 10 MW (AC) Solar Power Project in Shorapur taluk, Yadgir district, Karnataka, subject to the following corrections/modifications being incorporated in the said PPA by entering into a suitable SPPA". The Commission notes that the

corrections or modifications did not materially alter any clause of the PPA, in so far as the implementation of the project was concerned. Therefore, it can be said that the approval dated 06.10.2016 of the PPA is absolute, subject to incorporating the corrections or modifications. For the purpose of incorporating the corrections or modifications the execution of a SPPA is required. There is no direction given to the parties that after entering into this SPPA, the same should be again got approved by the Commission. It cannot be said that the approval of the Commission takes effect only after effecting the corrections or modifications suggested. As stated, the corrections or modifications suggested to be carried out are not materially altering the rights and liabilities of the parties. This aspect is clarified by letter dated 25.10.2016 (Annexure-A) of the Commission produced by the 1st & 3rd Respondents along with their Statement of Objections. The contention of the petitioner that the SPPA requires approval cannot be accepted.

d) For the above reasons, we hold Issue No.1 in negative.

13. Issue No.2: Whether the petitioner was prevented from performing its obligations under the PPA due to 'Force Majeure' events in achieving Conditions Precedent or unable to produce the documentary evidence of having the clear title and possession of the lands in its favour, required for the establishment of Solar Power project, due to any 'Force Majeure' event/s alleged by it?

14. The petitioner has relied upon the following events as the 'Force Majeure' events in its favour, causing delay in production of documentary evidence of having the clear title and possession of the lands within the specified period:

i) Delay in identifying the lands required for the establishment of Solar Power Project due to;

a) Delay in granting approval of PPA by this Commission;

b) Delay in granting evacuation scheme approvals;

ii) 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, Yadgir district.

15. Now, we shall consider the 1st ground urged by the petitioner. The petitioner has contended that there was delay in granting approval of PPA by this Commission and there was also delay in granting evacuation scheme approvals by the 3rd Respondent (KPTCL), thereby there was delay in identifying the lands required for the establishment of the Solar Power Project. The 1st & 3rd Respondents have denied the said contention of the petitioner. They contended that the timeline fixed for achieving the Conditions Precedent starts from the date of approval of the PPA, thereby even assuming that there was some delay in approval of the PPA, the same cannot be a ground for the petitioner. This contention of the 1st & 3rd Respondents appears to be acceptable. Further, these Respondents contended that after identifying the lands required for the Solar Power Project, the petitioner had to file the application for issuance of

evacuation scheme approvals, describing the situations of the lands where Solar Power Project would be established and the Sub-station to which power is to be evacuated. This contention of the Respondents also appears to be correct. A project developer has to identify the lands as well as the Sub-station before applying for issuance of evacuation scheme approvals. In fact, the application to be filed for evacuation scheme approvals should contain the Topo Sheet of the situation of the lands and the Sub-station. In the present case, the tentative evacuation scheme was issued on 28.10.2016 and the regular evacuations scheme was granted on 20.05.2017. Even assuming that there is delay in issuing the regular evacuation scheme after issue of the tentative evacuation scheme, the same has not affected the identification of lands required for the Solar Power Project, for the reasons stated above. Therefore, the 1st ground urged by the petitioner is to be rejected.

16. Now, we shall consider the 2nd ground urged by the petitioner.

- a) According to the petitioner, land acquisition process is tedious and cumbersome one especially for non-agriculturist like the petitioner and this process would cause undue delay without valid reason. The said grievance of the petitioner appears to have some force, in view of the preamble stated in Circular No.RD 01 LRM 2016 dated 22.02.2016 issued by GoK and the G.O. No.EN 66 VSE 2016, Bengaluru dated 05.10.2016 produced as per Annexure-R1 by the 4th Respondent (GoK). Therefore, the GoK has issued the said Circular and G.O.

prescribing the guidelines to be followed in granting permission under Section 109 of the KLR Act, 1961.

b) Now, the question is whether filing an application before KREDL by the petitioner for taking further action by it, to obtain an order under Section 109 of the KLR Act, 1961 and under Section 95 of the KLR (Amendment) Act, 2015 amounts to sufficient compliance of Conditions Precedent in relation to production of documentary evidence of clear title and possession of lands required for the project in the name of the petitioner. The Statement of Objections of 4th Respondent (GoK), discloses the following facts: That the petitioner has at the earliest filed the application dated 14.12.2016 (Annexure-R6) received by KREDL on the next day, for obtaining the necessary orders regarding land conversion and lease. In response to Annexure-R6, the KREDL noted certain observations in its letter dated 13.01.2017 (Annexure-R4). Thereafter, the petitioner by its letter dated 13.04.2017 (Annexure-R7) complied with the observations noted by KREDL in its letter dated 13.01.2017 (Annexure-R4). Again vide letter dated 08.05.2017 (Annexure-R5) KREDL noted the following observations to be complied with by the petitioner for taking further needful action:

- 1) All RTCs have encumbrances, the RTCs should be free from all encumbrances;
- 2) The extent of land in RTC column 3 & 9 are not matching, column 9 extent is not in accordance with the Akarband in Sy. No.44; and

- 3) The extent of land details in Akarband & RTC are not matching and the Kharab extent 0-18 G missing in the RTC of Sy. No.45.

In reply to the letter dated 08.05.2017 (Annexure-R5), the petitioner clarified the observations vide its letter dated 18.05.2017 (Annexure-R8). Thereafter, the KREDL in its letter dated 03.06.2017 (Annexure-R9) requested the Additional Chief Secretary to Government, Energy Department for issue of the required Notification to proceed further. As already noted, the Government issued Notification dated 13.07.2017 (Annexure-R10) and then, KREDL requested vide letter dated 30.08.2017 (Annexure-R11), the Deputy Commissioner, Yadgir district, to pass appropriate orders for conversion of lands.

- c) We have gone through the above documents and on consideration of the facts revealed in them, we are satisfied that the letter dated 14.12.2016 (Anneuxe-R6) written by the petitioner to KREDL requesting to take further action for conversion of land, itself can be considered as the valid application.
- d) This Commission has already considered in similar previous cases, the effect of GoK Circular No.RD 01 LRM 2016 dated 22.02.2016 and Government Order dated 05.10.2016. The Commission has come to the conclusion that, had the petitioner applied to KREDL at least sixty 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 beyond sixty days, the date of filing 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 sixty days before 05.06.2017, the date on which the Conditions Precedent should have been fulfilled, we could consider whether filing of such application would amount to fulfilment of the Conditions Precedent within the stipulated time. As already noted, the petitioner has filed such application on 14.12.2016 itself much earlier to sixty days before 05.06.2017, the date on which the Conditions Precedent should have been fulfilled.

e) In the letter dated 14.12.2016 (Annexure-R6), the petitioner has identified 50.34 acres of lands in Sy. Nos.44, 45 & 46 of Vanakihala village of Shorapur taluk in Yadgir district. Normally, the said extent of land is sufficient for setting up of the 10 MW Solar Power Project. The said letter further states that the land owners agreed to lease the said lands to KREDL and further to sub-lease the lands to the petitioner from KREDL for setting up of the Solar Power Project. Further it also states that Due Diligence of the said lands has been got conducted by the petitioner. It also states that the following documents are attached with this letter:

- a) Application;
- b) Land Schedule;
- c) Village MAP with Marked Boundaries;

d) Revenue Documents:

- i) RTC (Latest);
- ii) Mutation Copies;
- iii) Akarbad;
- iv) Tippani Copy;

e) Owners details:

- i) KYC Copy
- ii) GPA copy;
- iii) Sale Deed Copies.

f) The GoK issued Notification dated 13.07.2017 (Annexure-R10) for 52.03 acres of land authorizing the KREDL to obtain the required land conversion order in respect of Sy. No.44, 45 & 46 of Vanakihala village and to take the said lands on lease from the owners and in turn, to sub-lease the same to the petitioner.

g) The queries/observations made by the KREDL in different letters are not material. Little discrepancies in the revenue records of the lands have no effect of discrediting the application filed by the petitioner under letter dated 14.12.2016.

h) Therefore, for the reasons noted in the above Sub-paragraphs (d) to (g), on the 2nd ground alleged by the petitioner, we hold Issue No.2 in affirmative.

17. Issue No.3: Whether the petitioner is liable to pay damages for non-fulfilment of the Condition Precedent of producing the documentary evidence of clear title and possession of the land required for the establishment of Solar Power project?

As Issue No.2 is held in affirmative, Issue No.3 does not arise for consideration.

18. Issue No.4: Whether there is any delay in achieving the Scheduled Commissioning Date? and if so, whether the Solar Power Project of the Petitioner is liable for reduced tariff?

a) The 1st Respondent (GESCOM) in its pleadings has not disputed the commissioning of the project in question on 05.10.2017. The project was to be commissioned within twelve months from the 'Effective Date'. The 'Effective Date' in the present case is 06.10.2016, the date on which the PPA was approved by this Commission. Therefore, the project in question commissioned on 05.10.2017 is to be considered as the project which achieved the Scheduled Commissioning Date.

b) It appears that the 1st Respondent (GESCOM) while making the payment against invoices towards supply of energy, appears to have thought that the project should be taken as commissioned on 06.10.2017 but not on 05.10.2017 for the reasons that there was no injection of energy to the Grid on 05.10.2017.

c) The petitioner has contended that the 1st Respondent (GESCOM) has adopted a wrong interpretation and in the Rejoinder at Paragraphs 13 & 14, contended that even assuming the date of commissioning of the project as 06.10.2017, the petitioner has achieved the Scheduled Commissioning Date, relying on the judgment of the *Hon'ble Appellate Tribunal in its order dated 08.05.2019 in Appeal No.332 and 333 of 2018*

titled as ES Solar Private Limited & Another Vs. Bangalore Electricity Supply Company Limited (BESCOM) and Others. On perusal of the said judgment of the Hon'ble ATE, one has to accept the contention of the petitioner. In this judgment, it is held that while computing the period of twelve months, the date of event is to be excluded. In the present case, the date of event is 06.10.2016, the date of approval of the PPA by this Commission. Hence, if 06.10.2016, is excluded twelve months is to be counted from 07.10.2016. Then the Scheduled Commissioning Date would fall on 06.10.2017.

d) For the above reasons, we hold Issue No.4 in negative.

19. Issue No.5: What order?

For the above reasons, we pass the following:

ORDER

The petition is allowed to the following extent holding that:

- a) The 1st Respondent (GESCOM) shall pay to the petitioner for the energy delivered from the Solar Power Project of the petitioner from the date of commissioning of the said project at the tariff of Rs.5.35 per kWh as agreed in the PPA.
- b) The Petitioner is not liable to pay any damages under Article 4.3 of the PPA;

sd/-
(SHAMBHU DAYAL MEENA)
Chairman

sd/-
(H.M. MANJUNATHA)
Member

sd/-
(M.D. RAVI)
Member

