

No./37/2018

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

Dated: 11.11.2020

Present

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

OP No.15/2018

BETWEEN:

Messrs Adani Green Energy (UP) Limited,
A Company Registered under the
Provisions of the Companies Act, 2013
Adani House, Nr. Mithkhali Six Roads,
Navrangpura,
Ahmedabad-380 009.
(Represented by its Authorized Signatory)

... PETITIONER

[Represented by Smt. Poonam Patil, Advocate]

AND:

- 1) Hubli Electricity Supply Company Limited,
A Company Registered under the provisions of
Companies Act, 1956 having its Registered
Office at Navanagar, P.B. Road,
Hubli-580 025.
(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, kaveri 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 its Addl. Chief Secretary)

..... **RESPONDENTS**

[Respondents 1 & 3 represented by Indus Law for R-1, 3 Advocates;
Respondents 2 & 4 represented by Murugesh V Charati, Advocate]

ORDERS

1. This is a petition filed under section 86 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 PPA due to Force Majeure events referred as hereunder and affecting it;
- c) Grant concurrence to the Supplemental PPA dated 28.12.2016; and
- d) Declare that Effective Date under Article 3.1 of the PPA is the date on which the Supplementary PPA receives its concurrence from this Hon'ble Commission;

Alternatively

- d) Declare that the Effective Date under Article 3.1 of the PPA is the date on which the Supplementary PPA signed by the Petitioner and Respondent No.1 on 28.12.2016;
Alternatively
- d) Declare that the Effective Date under Article 3.1 of the PPA is the date on which the PPA approval letter of the Commission received by the Petitioner on 04.10.2016;
- 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 in force, against the Petitioner based on the previous understanding of the parties on the Effective Date and resultant COD;
- g) Direct the Respondent to make payment at the rate of Rs.4.79 per unit, as per Article 12.1 of the Power Purchase Agreement dated 28th June, 2016;
- h) Pass such other order/s including an order as to costs, to meet the ends of justice and equity.

2. The facts of the case 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-2 has invited proposals by its "Request for Proposal" dated 12.02.2016 (hereinafter referred to 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 17 Taluks for capacity of 290 MW through private sector participation.
- c) The Respondent-2 after evaluation of the proposals received from bidders, accepted the bid of Adani Green Energy Limited for development of 20 MW (AC) capacity of Solar project in Byadagi Taluk of Haveri District, and issued a Letter of Award (hereinafter called the "LoA") and Allotment Letter dated 30.05.2016 (Annexure-P1 produced by the Petitioner) to Adani Green Energy Limited, requiring, execution of Power Purchase Agreement.
- d) Adani Green Energy Limited accepted the LoA for development of 20 MW Solar PV project in Byadagi Taluk of Haveri District, vide its letter dated 08.06.2016 (Annexure-P2 produced by the Petitioner) 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 produced by the Petitioner) for setting up of the Solar Power Plant at Byadagi Taluk of Haveri 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-1186/16-17/1711 dated 04.10.2016 (Annexure-P4 produced by the Petitioner) communicated the

approval of the PPA subject to incorporating certain corrections/modifications by entering into a suitable Supplemental PPA. The said letter of the Commission was received by the Petitioner on 04.10.2016 (it ought to be on 12.10.2016). Accordingly, the Petitioner executed a SPPA dated 28.12.2016 (Annexure-P5 produced by the Petitioner) with 1st Respondent.

g) The Petitioner received the inter-connection approval from KPTCL/(Respondent-3) on 31.01.2018 (it ought to be 30.01.2018 as per (Annexure-P6) for connecting the project with the KPTCL grid at 110/33/11kv Byadagi Sub-station and successfully commissioned project on 30.01.2018 (Annexure-P15).

h) Clause 3.1 of the PPA defines the term "Effective Date" as under:

" 3.1 'Effective Date': This agreement shall come into effective from the of its execution by getting concurrence from KERC on the PPA and such date shall be referred to as the Effective Date".

i) 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 8 (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 the 1st Respondent (HECSOM).

- j) Article 21 of the PPA defines the term "Scheduled Commissioning Date" as twelve months (12) from the 'Effective Date'.
- k) That the Petitioner on 03.06.2017 (Annexure-P7) submitted documents in due compliance of the PPA clause 4.1 and 4.2 to the HESCOM (Respondent-1). The Petitioner communicated with the Additional Chief Secretary, Government of Karnataka (GoK), Energy Department vide its letter dated 30.05.2017 (Annexure-P8 produced by the Petitioner) 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 KRDEL, as sufficient compliance of the 'Conditions Precedent'.
- l) The Petitioner further addressed a letter dated 10.06.2017 (Annexure-P9 produced by the Petitioner) to the Respondent-1 requesting to accept documents submitted to the 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 Petitioner also requested for time extension of three months, if the submitted documents are not acceptable.
- m) In para 24 of the petition the Petitioner has stated that, the Respondent No.1 vide letter No. HESCOM/GM(T)/PTC/347/17-18/10245-47 dated 19.07.2017

(Annexure-P10 produced by the Petitioner), informed the Petitioner that it failed to fulfil the Conditions Precedent within 8 months' time period from the 'Effective Date' 29.09.2016 (It ought to have been 04.10.2016) and has claimed an amount of Rs.12 lakhs as damages towards the non-fulfilment of Conditions Precedent within 7 days from the date receipt of the letter and further informed the Petitioner that action will be taken to encash the Bank Guarantee of Rs.2,00,00,000/- furnished by the Petitioner at the time of execution of agreement towards damages. Here itself it may be noted that in Annexure-P10 dated 19.07.2017 there is no mention of payment of damages of Rs.12 lacks as averred in para 24 of the petition. In this Annexure-P10 dated 19.07.2017, the 1st Respondent (HESCOM) directed the Petitioner to approach, the KREDL or the Government to bring a written direction to the effect that the production of documents relating to land identified by the Petitioner, before KREDL, was itself sufficient, compliance of Conditions Precedent.

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. However, KPTCL, kept the connectivity approval process on hold for want of Commission's approval to the PPA in 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) KPTCL communicated the Tentative Evacuation Scheme approval vide letter dated 04.11.2016 (Annexure-P11 collectively) and regular connectivity approval on 05.12.2016 (Annexure-P11 collectively produced by the Petitioner). 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 01.06.2017 for issuance of Government Order under Section 95 of KLR (Amendment) Act, 2015, for acquisition of 117 acres 08 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-months from 'Effective Date' of the PPA i.e., 04.10.2016. The above said circumstance/events were not within the reasonable control of the Petitioner in the performance of its obligations under the PPA and it amount 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, 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:
- (i) For Purchase of land: Procedure under Section 109 of the Karnataka Land Revenue Act, 1964 is to be followed. The Application for purchase of land has to be submitted to the Managing Director, KREDL by the Petitioner, thereafter, KREDL issues a formal letter after processing it and sends it to Deputy Commissioner of the District concerned. Thereafter, the Petitioner has to follow it with concerned Deputy Commissioner's Office for Purchase of land from individual farmers and got its conversion into non-agricultural purpose.
 - (ii) 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 06.07.2017 and 31.07.2017 (Annexure-P12 collectively produced by the Petitioner) issued notice to the Respondent-1 in accordance with the Article 14.5 of the PPA on occurrence of the 'Force Majeure' events and requested to allow time extension for fulfilment of Conditions Precedent till issuance of an approval from Government of Karnataka permitting usage of lands for non-agricultural purposes or till project achieves its Commercial Operation Date, whichever is earlier.
- u) The Ministry of New and Renewable Energy (MNRE), on 28.07.2017 (Annexure-P13 produced by the Petitioner) 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-P14 produced by the Petitioner), once again requested to the 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 66 days (equivalent to delay by KPTCL for connectivity approval).

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 Supplementary PPA has modified the terms of the PPA. In other words, the original PPA is to be read together with the SPPA. The 'Effective Date' needs to be revised from 04.10.2016 to the date of signing of SPPA on 28.12.2016. 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 the commissioning 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 and 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 delays in the commissioning of the project.

f) The letter dated 04.10.2016 of the Commission approving the PPA was received by the Petitioner in Ahmedabad on 12.10.2016. Further, there was a delay of 66 days in granting approval by KPTCL (and also delay in land acquisition) and hence, the project was commissioned on 30.01.2018. In view of the same, the Petitioner requested for allowing the petition.

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

5. Respondent-1 & 3 filed common Objections contending as under:

a) The petition for declaration in respect of 'Effective Date' is highly untenable and not maintainable. The petition in the present form is not maintainable as there is no cause of action alleged by the Petitioner.

- b) There is no requirement of Supplemental PPA to be approved by the Commission. A Supplemental PPA is nothing but, an extension of the PPA which is an integral part of the original PPA. The Supplemental PPA itself states that it is part of the original PPA. The Commission has clearly stated in its letter dated 25.10.2016 (Annexure-1 produced by the Respondent-1 & 3) that there is no necessity for the approval of SPPA.
- c) The say of the Petitioner that due to non-approval of Supplemental PPA there was delay in completion of Conditions Precedent and commissioning the project, is after thought and to justify its own lackadaisical attitude.
- d) The say of the Petitioner that it was prevented from completion of Conditions Precedent due to Force Majeure Events, is false. The Petitioner was duty bound to finalize the project site even before making an application for power generation. Hence, the contention of the Petitioner that evacuation approval was must for finalization of the project site is contrary to the accepted procedure. The Petitioner did not immediately file the application for evacuation approval after the LoA was received from KREDL and there is process involved in the processing of the evacuation approval. Owing to such huge competition in the field of generation, the developer's applications are processed first come first serve basis, if all the other requisite conditions including furnishing documents and payment of fees are fulfilled.
- e) On 21.07.2016 (Annexure-2 produced by the Respondent-1 & 3) the Commission informed the Respondent No.2 that all the PPAs returned for want

of clarification. On 29.08.2016 (Annexure-3 produced by the Respondent-1 & 3) the commission accorded all the PPAs in principal approval and directed to resubmit PPAs for approval.

- f) The Petitioner issued letter to the Respondent No.3 on 31.08.2016 stating that due to some technical constraints, the land location of the project had changed from Byadagi village to Kaddaramandalagi village, and requested not to process its application dated 22.07.2016, and made another application for the confirmed location only on 31.08.2016 for evacuation approval. The processing fee intimation was issued on 06.09.2016 along with a request to furnish formal cash receipt for the facilitation fees paid to KREDL. On 14.09.2016 the Petitioner furnished details of payment of processing fee. Thereafter spot inspection, system studies were conducted and Tentative Evacuation scheme was issued on 04.11.2016 and Regular Evacuation Scheme given on 05.12.2016. Therefore, the above 3rd Respondent is not responsible for the delay.
- g) The Petitioner was well aware of the process of land procurement and conversion being a time consuming process and no extra-ordinary circumstances or inevitable situations have been highlighted by the Petitioner to seek an extension on the said ground. The Petitioner should have exercised due diligence and ensured the compliance of Conditions Precedent including land procurement in a prudent and efficient manner.

- h) The delay in commissioning has occurred solely due to the Petitioner's incapability to complete the Conditions Precedent on time, including land, labour and procure material on the site on time. It is oxymoronic to state that the delay in the project was on account of lack of approvals for land and evacuation approval.
- i) It is not the case of the Petitioner that such a clause of damages for non-compliance of Conditions Precedent is arbitrary or invalid. The Petitioner has not challenged the said clause. Admittedly, there is a delay in the completion of the Conditions Precedent and in such a case the say of the Petitioner that, is not liable to pay the damages is highly erroneous.
- j) The Respondent had no role to play in procurement of the land or the conversion of the said land. The Petitioner being well aware of the terms and conditions of the PPA did not achieve all necessary Conditions Precedent within the prescribed time.
- k) There was no requirement for the Petitioner to wait for the approval of the SPPA by the KERC to apply for conversion of the land on which it intended to put up the project.
- l) The allegations stated by the Petitioner cannot be termed as Force Majeure events as defined under the PPA. If the Petitioner was aggrieved by the event of Force Majeure, the same had to be notified to the Respondents within a period of 7 days as stipulated under PPA. No such notice of an event of Force Majeure has been issued to the Respondents. The Petitioner cannot seek

refuge under Force Majeure Clause of the PPA as the petition was hopelessly barred by time to notify the Respondents regarding these delays as per the Force Majeure clause under PPA. The Petitioner need not have waited to make an application for land conversion, when it had very well contemplated of a situation of setting up a project for power generation on the said land.

- m) It was the duty of the Petitioner to update the Respondents of the progress of the Conditions Precedent on a monthly basis. The Petitioner itself not having adhered to the obligations cast upon him under the PPA cannot allege default on the Respondent. It is denied that events leading to the delay were not within the reasonable control of the Petitioner and Petitioner was unable to fulfil Conditions Precedent.
- n) The say of the Petitioner that no meaningful progress is expected till the PPA is approved by the Commission, that in effect is not correct, since the PPA shall have effect only from the Effective Date i.e. Date of PPA approval by the Commission. The PPA, as it stands supplemented, by the supplemental PPA, has modified the terms of the PPA, that Effective Date, needs to be revised from the date of the approval of the PPA to the date signing of Supplemental PPA as granted to Developers who signed PPA, are baseless and denied.
- o) The SPPA requires approval as per the Law, is baseless and denied. The Supplemental PPA is not for cosmetic or grammatical changes but substantial changes, that particularly in view of the changes in the definition on Delivery Point, the Petitioner had to make substantial deliberations on whether to

continue with or shift the project sites, that the Petitioner waited for a long period for the approval SPPA to get certainty on the Delivery Points, that similarly there is a delay in according approval under Section 95 approval under Karnataka Land Revenue (Amendment) Act, 2015/ Section 109 KLR Act, 1964 approval, that the approvals were not accorded in the stipulated time are vexatious and hence denied. Hence the Respondent-1 & 3 prays for dismissal of the petition.

6. The Respondent No.2/KREDL contended that:

- a) Being nodal agency of the Government of Karnataka for facilitating the development of renewable energy in the state had called for the Request for Proposal (RfP) for the Development of 240 MW Solar Power Projects to be implemented in the 12 Taluks vide Notification dated 12.02.2016 for implementation of 290 MW capacity solar power projects and issued the letter of allotment dated 30.05.2016 in favour of Adani Green Energy Limited for commissioning of 20 MW (AC) Solar Power Plant in Byadagi Taluk of Haveri District.
- b) As per Government Order dated 05.10.2016 KREDL was directed to enter into a lease agreement with the land owners of the proposed Solar Project Parks, after the SPD obtaining necessary approvals and thereafter to sublease the lands to the SPD.

- c) The Petitioner presented the documents for verification and to execute the lease agreement. The KREDL then issued the letter to the Additional Chief Secretary Energy Department to issue Government order.
- d) The KREDL later issued a letter to the Deputy Commissioner, Haveri District, to issue an Official Memorandum in the name of land owners and no response is received from the Deputy Commissioner. Hence, the Respondent-2 could not obtain necessary clearances, to execute lease deed with the land owners. As such, the delay that has been occurred cannot be attributed to the Respondent-2. Hence, prayed for dismissal of the petition.

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

- a) The identification or acquisition land is required to be done by the developers. The Government of Karnataka passed an order dated 05.10.2016 (Annexure R-1 produced by the Respondent-4) directing the Respondent-2 (KREDL) to enter into lease with the land owners in order to facilitate the Developers and safeguard interest of land owners. In pursuance of the Government order dated 05.10.2016, the Petitioner submitted the documents to the Respondent-2 (KREDL) and KREDL in turn submitted, a proposal to the Respondent-4 to issue Government Order to that effect. Therefore, the Respondent-4. Government of Karnataka has issued the Notification according permission to the Respondent-2 to obtain the land on lease and sub-let the same to the Petitioner. After obtaining the Notification, the

Respondent-2 submitted the letter to the Deputy Commissioner and requested him to issue an Official Memorandum in the name of land owners. The Petitioner presented the documents to the Respondent-2 (KREDL) for verification and to execute lease agreement on 29.07.2017 (Annexure R-3 produced by the Respondent-4), 04.08.2017 (Annexure R-4 produced by the Respondent-4) and 01.09.2017 (Annexure R-5 produced by the Respondent-4). The Respondent issued letter to the Petitioner dated 30.08.2017 (Annexure R-6 produced by the Respondent-4) to produce the relevant documents to the Respondent-2.

- b) The Respondent-2 on 04.10.2017 (Annexure R-7 produced by the Respondent-4) issued a letter to the Respondent-4 (GoK) to issue Government order to that effect.
- c) On 19.10.2017 (Annexure R-8 produced by the Respondent-4) the Respondent-4 Government issued a Notification, according permission to Respondent-2 (KREDL) to obtain the land on lease and sublet the same to the Petitioner.
- d) The Respondent-2 after obtaining the notification issued a letter dated 15/17.11.2018 (Annexure R-9 produced by the Respondent-4) to the Deputy Commissioner, Haveri requesting him to issue an Official Memorandum in the name of land owners and there is no responses from the Office of the Deputy Commissioner.

- e) The Petitioner being the developer ought to have followed up with the Deputy Commissioner. On the contrary, the Petitioner remained silent and the same has caused the delay.
 - f) Clause 3.1 of PPA states that "this agreement shall come into effect from the date of getting concurrence from KERC on the PPA and such date shall be referred as the effective date"
 - g) As per clause 8.5 of the PPA "the Developer shall commission the project within 12 months from the Effective Date 04.10.2016 and scheduled commissioning the project was due on 04.10.2017. It is also not the obligation of the Respondent-4 and the Respondent-2 to get the approvals. The Respondent-2 and Respondent-4 have undertaken this exercise only to facilitate the Developer and hence, the delay in commissioning of the project is on the Petitioner and it cannot be attributed towards the Respondent-4.
 - h) All other Statements which are not specifically denied are hereby denied as false and no averment in the petition is admitted. Hence, the Respondent-4 prays for dismissal of the petition.
8. The Petitioner has filed the rejoinder, to the Objections filed by the Respondent-1 to 4. In its rejoinder, the Petitioner urged the following additional events/circumstances as 'Force Majeure' events for claiming extension of time to achieve the Conditions Precedent and commissioning the Solar Power Project, beside reiterating the averments made in the petition and denied the grounds raised by the Respondent.

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

The Petitioner has filed additional, documents along with the rejoinder. Both parties have filed documents as per the Memo's filed on different dates.

9. We have heard the learned Counsels for the parties. The Petitioner has filed written arguments.

10. From the above, 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 28.12.2016 would be approved by the Commission as the approval of the said SPPA was essential?

Or

(b) 28.12.2016 the date on which the said SPPA was executed?

Or

(c) 12.10.2016 the date on which the PPA approval letter dated 04.10.2016 was received by the Petitioner?

IssueNo.2: Whether the Petitioner has proved that the events or circumstance alleged by it amounts to 'Force Majeure' events entitling for extension of time for achieving the Conditions Precedent and Scheduled Commissioning Date?

Issue No.3: If issue No.2 is held either in affirmative or in negative, what should be the consequence as per PPA clauses?

Issue No.4: What Order?

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

12. 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 28.12.2016 would be approved by the Commission, as the approval of the said SPPA was essential?

Or

b) 28.12.2016, the date on which the said SPPA was executed?

Or

c) 12.10.2016, the date on which the PPA approval letter dated 04.10.2016 was received by the Petitioner?

a) 'Effective Date' is defined in Article 21.1 of the PPA as the date of approval of PPA by KERC. Further, Article 3.1 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 04.10.2016 (Annexure-P4), the Petitioner and the Respondent-1 were informed of the approval of the Commission to the PPA dated 28.06.2016 (Annexure-P3). Therefore, the date 04.10.2016 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 1st Respondent, 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 04.10.2016 (Annexure-P4) communicating approval of the 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 04.10.2016 (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 Byadagi Taluk of Haveri 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 04.10.2016 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 (Annexure R-1 produced by the Respondent 1 & 3) addressed to the Government

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

13. IssueNo.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?

14. The Petitioner has contented in the petition that the following events/circumstances as a 'Force Majeure' and they are not under the reasonable control of the Petitioner.

- I. Delay in granting approval of PPA and evacuation approval;
- II. Delay in grant of land conversion order.

15. In the rejoinder and in the written arguments, the Petitioner relied on the following events/circumstance as 'Force Majeure' events.

- I. Demonetization;
- II. Goods and Service Tax (GST);
- III. Delay in clearance of imported Solar Module by the Custom Authorities at Mumbai and Chennai Ports.

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

17. Regarding: Delay in granting approval of PPA and evacuation approval:

- 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 Conditions 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 21.07.2016 (Annexure-R2) addressed to the 2nd Respondent (KREDL) and dated 29.08.2016 (Annexure-R3) addressed to the Additional Chief Secretary to Government, Energy Department by this Commission would explain the reasons for the delay in approving the PPAs. These two letters were produced by the 3rd Respondent (KPTCL) would make it clear that the KREDL had not furnished the clarifications within time for the irregularities in conducting the bid proceedings, 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) The Petitioner had undertaken to develop 20 MW Solar Project at Byadagi Taluk of Haveri District. The LoA was issued on 30.05.2016 (Annexure-P1 produced by the Petitioner) and the Petitioner acknowledged acceptance of the terms and conditions of the LoA through letter dated 08.06.2016 (Annexure-P2 produced by the Petitioner). The Petitioner required to search for the lands, required for establishment of the Solar Power Project after examining the availability of evacuation scheme approval 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 project to the nearest Sub-station. For this purpose, the Developer has to search a suitable location.
- d) The Petitioner has made application dated 22.07.2016 & 23.07.2016 to the 3rd Respondent for grant of tentative evacuation scheme to 20 MW Solar project at Byadagi Taluk of Haveri District. The 3rd Respondent granted the tentative evacuation scheme on 04.11.2016 (Annexure-P11 collectively produced by the Petitioner). The Petitioner gave its acceptance to tentative evacuation scheme approval on 14.11.2016, and requested to issue regular evacuation scheme approval and the 3rd Respondent granted regular evacuation scheme approval on 05.12.2016 (Annexure-P11 collectively produced by the Petitioner). It is the contention of the Petitioner that even though it filed an application for granting tentative evacuation scheme approval on 22.07.2016 & 23.07.2016, the 3rd Respondent granted on 04.11.2016

(Annexure-P11 collectively produced by the Petitioner). The Commission has approved the PPAs on 04.10.2016 and the 'Effective Date' begins from the date of approval of the PPA by the Commission. Hence, the question of considering that Commission caused delay in approving the PPA does not arise. As already noted above, the PPA was approved within reasonable time of its submission to the Commission.

- e) The 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 29.08.2016 (Annexure-3 produced by Respondent 1 & 3) returned all the PPAs to ESCOMs and 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. It can be seen from the tentative evacuation scheme approval dated 04.11.2016 (Annexure-P11 collectively produced by the Petitioner). Thereafter the Petitioner had given acceptance letter to KPTCL on 14.11.2016. As noted in the above paragraph, the KERC has returned all the PPAs for want of clarification and on 29.08.2016 (Annexure-3 produced by Respondent 1 & 3), but the Commission accorded in-principle, approval to all the PPAs. Thereafter, PPA

has been approved by the Commission on 04.10.2016 (Annexure-P4 produced by the Petitioner). The tentative evacuation scheme was granted on 04.11.2016 (Annexure-P11 collectively produced by the Petitioner). After receipt of the acceptance of the tentative evacuation approval (14.11.2016) the Regular Evacuation Scheme was granted on 05.12.2016 (Annexure-P11 collectively).

- f) The Petitioner has issued letter dated 31.08.2016 to the 3rd Respondent stating that due to some technical reasons/constraints the land location of the project has changed from Byadgi to Kaddaramandalagi village and requested not to process its application dated 22.07.2016 for evacuation approval. The processing fee intimation was issued to them/him on 06.09.2016 and the Petitioner paid the same on 14.09.2016. After spot inspection to system studies Tentative Evacuation Scheme approval was given on 04.11.2016 and Regular Evacuation Scheme approval on 05.12.2016. From the above facts, it can be said that, 14.09.2016 may be considered as the date on which KPTCL could proceed with the Evacuation Scheme approval. therefore, there is a delay of 82 days in Evacuation Scheme approval.

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

- a) The Respondent-4 in, Statement of Objections has contended that the land identification, and due diligence is to be done by the Developer. The Petitioner in its petition had stated that on 01.06.2017 (para 27 and Memo dated 26.11.2019) it has requested to the KREDL for issuance of Government

Notification under Section 95 of KLR (Amendment) Act, 2015 for acquisition 117 acres 08 guntas land on lease. Annexure-P7 shows that the Petitioner submitted the following:

- I. Acknowledgment of Section 95 application Submitted to and REDL;
- II. Consent letters from the land owners to lease their land for Solar Project;
- III. Sworn affidavit for possession of land.

- b) The land 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 KLR Act,1961 and 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 agreement for 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.
- c) As per 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 the Developer for establishing the Solar Project.

- d) According, to (Annexure-R3 produced by the Respondent-4) the Petitioner has identified about 106 acres 15 guntas of land for the project and farmers have given authorization to lease land to KREDL for further Sub-lease to the Petitioner for period of 30 years for erection of Solar Power Plant and accordingly the Petitioner has taken the consent letters from land owners, for 106 acres 15 guntas land in favour of KREDL.
- e) The 2nd Respondent (KREDL) after obtaining the documents on 17.05.2017 from the Petitioner, issued a letter dated 29.05.2017 (Annexure-P8 collectively produced by the Petitioner) to the Additional Chief Secretary to Government, Energy Department, requesting to authorize the 2nd Respondent (KREDL) to take the lands on lease from the farmers and to sub-let the same in favour of the Petitioner. Thereafter, the Government issued a Notification on 19.10.2017(Annexure-R8 produced by the 4th Respondent) authorizing the 2nd Respondent (KREDL) to take the land from the farmers and to sub-let the same in favour of the Petitioner. The 2nd Respondent(KREDL) wrote a letter dated 07.11.2017 (Document No.3 produced by the Petitioner along with Memo dated 26.11.2019) to the Deputy Commissioner, Haveri District, Haveri, requesting to pass an order for conversion of lands from agriculture to non-agriculture purpose. The 2nd Respondent (KREDL) in its Statement of Objections in Paragraph 9, has stated that subsequent to issuing letter to the Deputy Commissioner, Haveri District, Haveri, this 2nd Respondent (KREDL) did not get the necessary clearances from the Deputy Commissioner, Haveri District,

Haveri, to enable this 2nd Respondent (KREDL) to take lease deed with the land owners in order to sub-let the same to the Petitioner. This would show that the Deputy Commissioner, Haveri District, Haveri, has not yet issued the required order for conversion of land from agriculture to non-agriculture purpose pursuant to the letter issued by the 2nd Respondent (KREDL).

- f) (i) The Petitioner has filed land related Documents i.e., consent letters from the farmer's/land owners authorizing KREDL for further sub-lease in favour of the Petitioner. (ii) List of lands, vide its letter dated 01.06.2017 (Document No.1 produced by the Petitioner along with Memo dated 26.11.2019).
- g) The Petitioner wrote another letter dated 29.07.2017 along with Revenue documents such as: - a) RTC copies, b) Mutation copies, c) Encumbrance Certificate, d) Akarbandh, e) Tipanni, with a request to process the file to Government for issue Notification. The Government of Karnataka issued Notification on 19.10.2017 (Document No.2 produced by the Petitioner along with Memo dated 26.11.2019) permitting KREDL to sub-lease land to the Petitioner. The Managing Director KREDL wrote a letter dated 07.11.2017 (Document No.3 produced by the Petitioner along with the Memo dated 26.11.2019) to the Deputy Commissioner Haveri District, Haveri to issue deemed conversion order within 15 days after obtaining conversion fee. The Deputy Commissioner Haveri District, Haveri issued intimation to land lords to pay the conversion fee on 17.01.2019 (Document No.4 produced by the Petitioner along with Memo dated 26.11.2019. There are no records available,

to show that whether the Deputy Commissioner Haveri District, Haveri has issued land conversion order or not. On perusal of lease deeds dated 15.05.2019 and 10.7.2019 (Document No.5 produced by the Petitioner along with Memo dated 26.11.2019), it appears that the land owners have paid the conversion fee on 08.02.2019. However, on the perusal of relevant records available on, records, it is noticed that the MD, KREDL, has submitted application to the Deputy Commissioner Haveri District, Haveri, on 07.11.2017, for deemed conversion but after a lapse of more than a year, the Deputy Commissioner Haveri District, Haveri, has intimated the land owners vide letter dated 17.01.2019 to pay the land conversion charges. This shows that the Deputy Commissioner Haveri District, Haveri, has taken a lot of time to decide the matter for land conversion.

- h) From the above date matrix, it is crystal clear that Deputy Commissioner Haveri District, Haveri, has taken more than one and half year to issue deemed conversion order, which is not with the reasonable control of the Petitioner. Therefore, we are of the opinion that, there is much force in the arguments of the learned Advocate for the Petitioner that there is inordinate delay in issuance of land conversion order from the Deputy Commissioner Haveri District, Haveri, which is not under the reasonable control of the Petitioner.

19. Regarding; Demonetization:

According to the Petitioner, due to Demonetization, all the business activities at the ground level were stalled for a period of 2 to 3 months. Demonetization impacted the land acquisition phase.

20. Regarding; Goods and Service Tax (GST):

- a) The Petitioner contended that some of the exemptions which were provided on goods required for execution, construction and operation of Solar Project are ceased to exist as the project was actually affected due to GST induced disruptions for a period of 3 to 4 months.
- b) Regarding Demonetization and GST, the learned Advocate for the Petitioner (in his Rejoinder filed on 25.06.2019) relied upon the judgment and order dated 28.08.2018 between Messrs Mytrah Abhinav Power Private Limited Vs. Southern Power Distribution Company of Telangana Limited and Others, passed by the Hon'ble Telagana Electricity Regulatory Commission, Hyderabad, wherein it is held as under:-

“The incidents mentioned by the petitioner have some force to treat them as non-political events, which included labour difficulties mentioned in Article 9.1 (b) (i) of PPAs as one of the force majeure events. Further, Article 9.1 (a) of PPA clearly mentions that if the “events and circumstances are not within the affected party's reasonable control and were not reasonably foreseeable and the effects which the affected party could not have prevented by prudent utility practices or, in the case of construction activities, by the exercise of reasonable skill and care. Any events or

circumstances meeting the description of force majeure which have the same effect upon the performance of any of the solar power project set up in accordance with solar policy announced by GOTS under the competitive bidding route and which therefore materially and adversely affect the ability of the project or, as the case may be the DISCOM to perform its obligations hereunder, shall constitute force majeure with respect of the solar power developer or the DISCOM, respectively" which clearly encompasses the reasons given by the petitioner for the delay of 244 days as events termed as force majeure. The petitioner had no control or domain over the incidents mentioned causing delay in completing the project and therefore the delay cannot be totally attributable to the petitioner.

- c) Having regard to the facts of the case on hand, we rely on the above said order of Telagana Electricity Regulatory Commission, Hyderabad (TERC). We are of the considered opinion that Demonetization and Goods and Services Tax have an impact on the implementation of the project.

21. Regarding; Delay due to wrong classification of Solar modules:

- a) There was an extraordinary delay in clearance of Solar modules imported through Chennai Port and Nahava Sheva Port, by the Petitioner for its projects in Karnataka, due to wrong classification HSN Code and Solar PV Modules by the respective Customs Authorities.
- b) The Petitioner, to substantiate its above contention has produced; (i) Public Notice issued by Commissioner of Customs, NS-V dated 29.09.2016 (Annexure-P20); (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-P21); (iii) Summons dated 27.09.2017 (Annexure-P22) 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-P23); and (v) A Letter dated 31.10.2017 (Annexure-P24) addressed to the Deputy Commissioner of Customs, Chennai. It appears from the records that these documents (Annexure-P21 & 22) pertain to the project situated at Nalwar village in Chitapur Taluk, Kalburgi District of and the project situated at Galipura Kaval, Holenarasipura Taluk in Hassan District respectively, were not pertaining to the Petitioner's project. Hence, we are unable to accept the say of the Petitioner that wrong classification of Solar Modules caused delay in commissioning the Solar Power Project.

22. Regarding; Extension of Time: Article 5.7 deals with circumstance under which extension time for commissioning the project shall be granted.

5.7 Extension of Time:

5.7.1 *In the event that the Developer is prevented from performing its obligations under Clause 5.1 by the Scheduled Commissioning Date due to:*

- a) Any HESCOM Event of Default; or*
- b) Force Majeure Events affecting HESCOM; or*
- c) Force Majeure Events affecting the Developer*

The Scheduled Commissioning Date and the Expiry Date shall be deferred, subject to the limit prescribed in Clause

5.7.2 and Clause 5.7.3 for a reasonable period but not less than 'day for day' basis, to permit the Developer or HESCOM through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the Developer or HESCOM, or till such time such Event of Default is rectified by HESCOM.

5.7.2 In case of extension occurring due to reasons specified in clause 5.7.1 (a), any of the dates specified therein can be extended, subject to the condition that the Scheduled Commissioning Date would not be extended by more than 6 (Six) months.

5.7.3 In case of extension due to reasons specified in Article 5.7.1 (b) and (c), and if such Force Majeure Event continues even after a maximum period of 3 (three) months, any of the Parties may choose to terminate the Agreement as per the provisions of Article 16.

If the Parties have not agreed, within 30 (thirty) days after the affected Party's performance has ceased to be affected by the relevant circumstance, on the time period by which the Scheduled Commissioning Date or the Expiry Date should be deferred by, any Party may raise the Dispute to be resolved in accordance with Article 18.

5.7.4 As a result of such extension, the Scheduled Commissioning Date and the Expiry Date newly determined shall be deemed to be the Scheduled Commissioning Date and the Expiry Date for the purposes of this Agreement.

- a) It is evident from the above that due to reasons specified under Article 5.7.4, the Schedule Commissioning Date could be extended up-to 6 (Six) months and as a result of such extension, the newly determined Scheduled Commissioning Date and Expiry date shall be deemed to be the Scheduled Commissioning Date and the Expiry date for the purposes Agreement.
- b) The delays in Evacuation Approval, the grant of land conversion order, Government Notification permitting KREDL to Sub-lease land to the Petitioner on 19.10.2017 (Annexure-document No.2 produced by the Petitioner vide Memo letter dated 26.11.2019) and delay in conversion of land are in our opinion the events/circumstance, not under the reasonable control of the Petitioner. There is absolutely no explanation by the 3rd Respondent for delay in granting evacuation scheme after lapse of nearly 2½ (Two and half) months.
- c) The learned Advocate for the Petitioner relied upon Annexure-P32 & P33 (collectively). The Government of Karnataka, vide its letter dated 15.09.,2017 addressed to all the Managing Directors of ESCOMs, to gave direction to take a decision on the extension of time in accordance with law. The extract of the letter is as under:

ಆದ್ದರಿಂದ, ಎಂ.ಎನ್.ಆರ್.ಇ. ರವರ ಪತ್ರ ದಿನಾಂಕ: 28.07.2017ರ ಪ್ರತಿಯನ್ನು ತಮ್ಮ ಮಾಹಿತಿ ಮತ್ತು ಮುಂದಿನ ಸೂಕ್ತ ಕ್ರಮಕೈಗೊಳ್ಳಲು ಈ ಪತ್ರದೊಂದಿಗೆ ಲಗತ್ತಿಸಿದ್ದು, ಸದರಿ ಎಂ.ಎನ್.ಆರ್.ಇ. ರವರ ಪತ್ರದಲ್ಲಿ ನೀಡಿರುವ ಸೂಚನೆಯಂತೆ ವಿಳಂಬವಾಗಿರುವ ಸೌರ ವಿದ್ಯುತ್ ಯೋಜನೆಗಳಿಗೆ ಕಾಲಾವಧಿ ವಿಸ್ತರಿಸುವ ಬಗ್ಗೆ ನಿಯಮಾನುಸಾರ ಪರಿಶೀಲಿಸಿ ಕೂಡಲೇ ಅಗತ್ಯ ಕ್ರಮ ಕೈಗೊಳ್ಳುವಂತೆ ಕೋರಲು ನಿರ್ದೇಶಿತನಾಗಿದ್ದೇನೆ.

d) Further, the learned Advocate for the Petitioner relied upon letter dated 15.09.2017 (Annexure-P33 collectively produced by the Petitioner) addressed to the Secretary, KERC, Bengaluru. The relevant portion of the letter is as under:

“ನವೀಕರಿಸಬಹುದಾದ ಇಂಧನ ಮೂಲಗಳಲ್ಲಿ ಒಂದಾದ ಸೌರ ವಿದ್ಯುತ್ ಯೋಜನೆಗಳನ್ನು ಪ್ರೋತ್ಸಾಹಿಸಿ ಪರಿಸರ ಮಾಲಿನ್ಯ/ಜಾಗತಿಕ ತಾಪಮಾನವನ್ನು ತಗ್ಗಿಸುವ ನಿಟ್ಟಿನಲ್ಲಿ ಕರ್ನಾಟಕ ರಾಜ್ಯವು ಸೌರ ವಿದ್ಯುತ್ ಉತ್ಪಾದನೆಯಲ್ಲಿ ದೇಶದಲ್ಲಿಯೇ ಮುಂಚೂಣಿಯಲ್ಲಿರುತ್ತದೆ. ಆದ್ದರಿಂದ, ಈಗಾಗಲೇ ತಮ್ಮನ್ನು ಕೋರಿರುವಂತೆ ಮತ್ತು ಕೇಂದ್ರ ಸರ್ಕಾರದ ಪತ್ರದಲ್ಲಿ ನೀಡಿರುವ ಸೂಚನೆಯಂತೆ ವಿಳಂಬವಾಗಿರುವ ಸೌರ ವಿದ್ಯುತ್ ಯೋಜನೆಗಳಿಗೆ ಕಾಲಾವಧಿ ವಿಸ್ತರಣೆಗೆ ಅನುಮೋದನೆ ನೀಡಿ ಆದೇಶ ಹೊರಡಿಸುವಂತೆ ಕೋರಲು ನಿರ್ದೇಶಿತನಾಗಿದ್ದೇನೆ”.

e) At the cost of repetition, we would like to reiterate that even though the Petitioner has filed application on 01.06.2017 and 29.07.2017 along with Revenue records to the KREDL (2nd Respondent), the Government issued Notification on 19.10.2017 permitting the 2nd Respondent (KREDL) to sub-lease the land to the Petitioner, and 2nd Respondent (KREDL) wrote a letter to the Deputy Commissioner Haveri District, Haveri, on 07.11.2017, (Document N0.3 produced by the Petitioner along with Memo dated 26.11.2019) and in turn the Deputy Commissioner Haveri District, Haveri, issued intimation to the land lords on 17.01.2019 and till date no conversion order was issued by the Deputy Commissioner Haveri District, Haveri.

f) The learned Advocate for the Petitioner relied upon the MNRE letter dated 28.07.2017 of Ministry New and Renewable Energy, Government of India New Delhi, (Annexure-P13 produced by the Petitioner), relevant portion of the letter reads as under:

It is also be clarified that if in a project equipment's/materials have been purchased/ordered and substantial advances paid as per original completion date, and there is a delay on part of the state organizations regarding land, transmission or any such reasons, the extension of the project may be allowed.

- g) In similar set of facts, the Hon'ble Appellate Tribunal for Electricity vide its order dated 14.09.2020, in Appeal No.351 of 2018 between Chennamangathihalli Solar Power Project LL.P. and BESCOM and Others held at Para 8.15 as under:

"In view of the above, we are of the considered opinion that considering facts and circumstances of the matter, the first Respondent was justified in extending COD up to six months as per the relevant provision (clause 2.5) of the PPA. Besides, it is also crystal clear that the approvals / clearances from various Govt. instrumentalities were accorded after considerable delays (of 7-8 months) which in turn attributed to delay in commissioning of the solar projects. As these approvals were beyond the control of the Appellants, the State Govt. and first Respondent have rightly considered them as an event of force majeure and accordingly granted approval for COD extension."

- h) It is pertinent to mention here that, in spite of Notices regarding 'Force Majeure' events by the Petitioner dated 06.07.2017, 31.07.2017 (Annexure-P12 collectively) and 02.08.2017 (Annexure-P14), the 1st Respondent has not chosen to reply. In our opinion either the 1st Respondent (HESCOM) should have accorded approval for extension or denied it in writing with adequate reasons, but 1st Respondent

(HESCOM) failed to act upon, the request. Hence, it may be deemed/presumed that the 1st Respondent (HESCOM) has not denied extension of time.

- i) We have gone through relevant material on the issue placed before us and carefully considered the submission of learned Counsel for both the parties. Subsequent to completion of various scrutiny formalities, the PPA signed on 28.06.2016 which provided a guaranteed tariff of Rs.4.79 kWh and completion period of 12 months. The said PPA was approved by the Commission on 04.10.2016. As per guidelines issued by the Government of Karnataka a number of Approvals/clearances/sanctions were required in the process of settings of Solar Project such as financial closures, approval for conversion of land from the Agricultural purpose to non-Agricultural purpose to be used for setting of a Solar Power Project, approval for grid connectivity, approval from Chief Electrical Inspector for charging of the line, permission to purchase or lease the land etc. While going through the matrix of various dates/events, it is pertinent to notice that the approval from the Government instrumentalities received by the Petitioner, after a lapse of considerable time which in turn became the impediments in timely commissioning of the Solar Project. For instance, Government Notification permitting KREDL to Sub-lease the lands to the Petitioner issued by the concerned authorities only on 19.10.2017, tentative power evacuation approval come to be granted on 04.11.2016 and regular evacuation scheme approval was granted on 05.12.2016. With these events/dates, and also taking into consideration of substantial investment on the project for implantation

of the project it become almost certain that COD of project cannot be achieved as per the schedule.

- j) According to PPA, the total completion period of 12 months from the 'Effective Date' was provided considering all the activities including various approvals, procurement of equipment, installation and commissioning a final safety clearance from Chief Electrical Inspector for charging line etc. It is noticed by us that in receiving approval from Government instrumentalities for land conversion, tentative/regular scheme approvals, acquisition of land, conversion of land from Agricultural to non-Agricultural etc., the Petitioner not only faced severe difficulties but also considerable delay of more than 8 months.
- k) Therefore, we are of the opinion that (i) Delay of two and half months in giving evacuation approval, (ii) Delay due to de-monetization and introduction of GST (iii) Delay in land conversion by the Deputy Commissioner Haveri District, Haveri, and (iv) lackadaisical attitude of the Respondent No.1 (HESCOM) in not taking action on the request of the Petitioner to give extension of time in pursuance of Article 5.7 of PPA, were 'Force Majeure' events not within reasonable control of the Petitioner and the Petitioner is justified in not fulfilling Conditions Precedent and SCOD within stipulated time.
- l) Therefore, we are of the opinion that, the Petitioner has proved that the events or circumstances narrated by the Petitioner in the petition are 'Force Majeure' events which are not under the reasonable control of the Petitioner, and the Respondent should have responded to the request for extension of time for

achieving Conditions Precedent and Schedule Commissioning Date. But failed to do so. Therefore, the Petitioner is entitled for extension of time for achieving the Conditions Precedent and Schedule Commissioning Date. Hence, we answer issue No.2 in the affirmative.

23. Issue No.3: If issue No.2 is held either in affirmative or in negative, what should be the consequence as per PPA clauses?

a) We have already held that Issue No.2 in affirmative. As per the PPA signed on 28.06.2016 provided a guaranteed tariff of Rs.4.79 per unit. The Petitioner has commissioned the project on 30.01.2018. The Petitioner has requested to the 1st Respondent to extend the time to fulfil the Conditions Precedent and Scheduled Commissioning of Date vide letters dated 06.07.2017 & 31.07.2017 and its references (Annexure-P12 produced by the Petitioner) and dated 02.08.2017 and its references (Annexure-P14 produced by the Petitioner). It is pertinent to note that the Petitioner has requested to the 1st Respondent before, Scheduled Commissioning of Date i.e., 03.10.2017/04.10.2017. But, it appears that the 1st Respondent has not given any response. For that the Petitioner cannot be held responsible. Hence, an adverse inference can be drawn against the 1st Respondent (HESCOM) and the extension of time prayed for by the Petitioner can be deemed to have been granted by the 1st Respondent. Therefore, we are of the opinion that the Petitioner is entitled for the agreed tariff of Rs.4.79 per unit as per the Article 12.1 of the PPA.

b) The learned Advocate for 1st & 3rd Respondent relied upon the ruling reported in (2017) 1 Supreme Court Cases 487 between All India Power Engineer Federation and Others Vs. Sasan Power Limited and Others. We have gone through the rulings. The facts of the case are quite different from the case on hand.

c) Having regard to the principles laid down by the Hon'ble APTEL, in its order dated 14.09.2020 in Appeal No. 351 of 2018, we are of the considered view that the Petitioner has not commissioned the project within the stipulated time, due to 'Force Majeure' events as mentioned in the aforesaid paragraphs. Therefore, the Petitioner is entitled for a tariff of Rs.4.79 per unit as per Article 12.1 of the PPA. Hence, we answer Issue No.3 accordingly.

24. Issue No.4: What Order?

For the above reasons, we pass the following:

ORDER

a) The petition is allowed.

b) The Petitioner is entitled for a tariff of Rs.4.79 per unit as per Article 12.1 of the PPA dated 28.06.2016.

Sd/-
(SHAMBHU DAYAL MEENA)
Chairman

Sd/-
(H.M. MANJUNATHA)
Member

Sd/-
(M.D. RAVI)
Member