

No.N/357/2017

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

Dated: 09.08.2021

Present

Shri Shambhu Dayal Meena : Chairman

Shri M.D. Ravi : Member

O.P. No.189/2017

BETWEEN:

Atria Solar Power Private Limited,
A Company Registered under the
Companies Act,1956, having its Registered
Office at "Atria Power", 1st Floor,
No 11, Commissariat Road,
Bengaluru-560 025.

.... PETITIONER

(Represented Sri Shridhar Prabhu, Advocate for Navayana Law Office)

AND

1. Karnataka Renewal Energy Development Limited (KREDL),
No.30, Shanti Gruha,
Bharath Scouts & Guides Building,
Palace Road,
Bengaluru-560 001.
2. Gulbarga Electricity Supply Company Limited,
A Company Registered under the Provisions of
companies Act, 1956 having its Registered Office at
Station Road,
Kalaburagi-585 102.
3. Karnataka Power Transmission Corporation Limited,
Kaveri Bhavan
Kempegowda Road,
Bengaluru-560 009.

4. Union of India,
Ministry of New and Renewable Energy Resources,
Block-14, CGO Complex,
Lodhi Road,
New Delhi-110 003.

... **RESPONDENTS.**

[R1 represented by Sri Rakesh Joshi Y.P, Advocate,
R2 represented by Sri Murugesh V Charati Advocate,
R3 represented by Advocates for Indus Law,
R4 represented by Sri Pradeep Singh, Advocate]

ORDERS

1. This is a petition filed under Section 11 (2) Read with Section 86(1)(e) of the Electricity Act, 2003 praying for the following reliefs to:
 - a) Call for records;
 - b) Set aside the letter GESCOM issued a letter dated 16.08.2017 produced herein as Annexure-P6;
 - c) Approve the Supplementary PPA dated 19.01.2017 produced herein as Annexure-P5; and
 - d) Pass such other and incidental orders as are appropriate in the interest of justice and equity.;

2. The brief facts set out in this petition are as under:
 - a) The Karnataka Renewable Energy Development Limited (KREDL), the Nodal Agency for the Development of Renewable Energy projects in the State of Karnataka, issued a request for proposal from various eligible entitled developers for development of Solar Power Projects in the State of Karnataka.

 - b) The ATRIA Power Corporation Pvt Limited submitted its bid on 24.11.2011, wherein, it offered a discount in tariff of 0.3 paise per unit

on this Hon'ble Commission's then approved applicable tariff of Rs.11.35 per unit for developing a 10 MW Solar Thermal Power Plant to be located in Haveri District in Karnataka.

- c) One of the terms and conditions of the Letter of Award dated 8.6.2012 was that the Company was required to set up a Special Purpose Vehicle (SPV) and execute a Power Purchase Agreement (PPA) within 30 days from the date of Award. Furthermore, the Company was required to provide an irrevocable Bank Guarantee for a total value of Rs.5.03 crores in favor of the concerned ESCOM. The Letter of Award (LoA) dated 08.06.2012 is produced as Annexure-P1.
- d) The M/s ATRIA Power Corporation Pvt Limited complied with the bid conditions and constituted M/s ATRIA Solar Power Pvt Limited, Petitioner herein as the SPV for development of 10 MW Solar Thermal Power Project at Nelavagulu village in Haveri Taluk at a tariff of Rs 11.32 / Kwh and petitioner agreed for furnishing the Performance Bank Guarantees (PBG) as required under the LoA. On the request of the petitioner, KREDL approved the time extension of additional 30 days to the time already provided in the LoA. Thereafter, the PPA dated 30.08.2012 came to be executed between the petitioner and the GESCOM. The PPA dated 30.08.2012 is produced as Annexure-P2. (It is to be noted that the copy of the PPA produced as Annexure P2 does not bear any date and only stamp paper is dated 30.8.2012.

However, it is mentioned in the petition that the date of signing PPA as 30th August 2012.)

- e) The PPA dated 30.08.2012 was approved by KERC vide letter dated 04.03.2013 wherein Commission has proposed certain corrections / modifications to the conditions of PPA.
- f) GESCOM requested the petitioner to come forward for effecting the modification to the PPA vide GESCOM letter dated 20.03.2013 and subsequent reminders dated 28.03.2013, 24.05.2013 & 14.03.2014.
- g) The petitioner instead of signing SPPA as suggested by GESCOM, through its letter dated 12.03.2014 requested for executing SPPA incorporating the change of location from the original location from Haveri District to Pavagada in Tumakuru District. The petitioner's letter dated 12.03.2014 is produced as Annexure-P3.
- h) The entire subject of change of location etc. proposed by the Petitioner was placed before the 51st Board Meeting of the GESCOM held on 29.05.2014, wherein, GESCOM's Board resolved as follows:
 - a) To agree for change of location to Pavagada in Tumakuru District.
 - b) Take steps for recovery of penalty of Rs.30.18 lakhs towards non-fulfillment of the condition specific as per the PPA.
- i) Accordingly, a letter dated 26.08.2014 was addressed to the petitioner to remit the penalty of Rs.30.18 lakhs within 15 days. It was

intimated further that if penalty is not remitted as directed it shall be recovered out of the Bank Guarantees held by GESCOM. In that event, the petitioner was required to replenish Bank Guarantee within 30 days from encashment.

- j) The GESCOM by its letter dated 28.09.2014 conveyed the approval for change of location from Haveri to Pavagada in Tumakuru District and requested the petitioner to come forward for execution of the SPPA. The subject of the delay in fulfilling condition precedent and execution of SPPA, for change of location was once again placed before the 52nd Board Meeting held on 17.11.2014. In this Board Meeting, it was resolved that:

"Approval has already been communicated for change of location of the project. Board felt the Petitioner should take effective step for implementation of the project in order to consider any request in the matter for extension of time without penalty for fulfilment of condition precedent."

- k) In response to GESCOM's letters imposing penalty, the petitioner by its letter dated 23.09.2014 had urged GESCOM that SPPA signed with location change and time extension was without any penalty for the following reasons:

- a) Due to difficulties in meeting the technology challenges and project implementation issues in the Solar Thermal Projects;

- b) Due to uncertainty involved in the project and low involvement of the host state in resolving the project issues;
 - c) Without addressing the critical issue of water availability which has been resolved with the selection of dry technology for cooling, thereby reducing the water requirement - associated delay caused due to the same.
- l) The financing challenges seen as a most critical aspect which has been partly overcome by starting the project with the corporate funds. The petitioner's inability to mobilise further funds on project due to the challenges in finding fund / finance in the power sector in general and especially under Jawaharlal Nehru National Solar Mission given the track record of Solar Thermal Projects.
- m) The subject of time extension for achieving the condition precedent and the commissioning was again placed before 53rd Board Meeting held on 07.02.2015. Considering the basic difference between Solar Photo Voltaic project and Solar Thermal Project, the GESCOM Board noted that subsequent to the 51st Board Meeting held on 29.05.2014, the Government of India made a detailed review and provided extension of time to Solar Thermal Projects situated in several states. The Board noted that serious developers need to be supported as in the case of Solar Thermal projects. Taking all the above factors into account GESCOM Board resolved that in respect of the Petitioner's project, the following proposals shall be considered.

- a) To reckon the period for compliance of conditions precedent, consequent to the change of location, from Haveri to Pavagada with effect from 08.09.2014 to 28.02.2015;
 - b) To retain the original implementation period of 21 months from the date of implementation of all conditions precedent and to reckon the same from 01.03.2015 to 31.12.2016, keeping all other terms and conditions of the PPA unchanged.
- n) In order to give effect to the above revised understandings as resolved in the GESCO Board, another SPPA dated 28th April 2015 was executed between the petitioner and GESCO for Change of Location and extension of the COD upto 31.12.2016. This SPPA was approved by the Commission on 08.06.2015. The copy of the SPPA dated 28.04.2015 enclosed as P4 to the petition.
- o) In view of the challenging time line given by GESCO and the new and complex technology being used, the Petitioner sought further extension of time upto December, 2018 vide request letter dated 07.12.2016 and the petitioner has narrated the following reasons:
- i. The developer has faced challenges from the various international vendors who have expressed long lead times especially with regard to supply of critical equipment such as the salt pumps, SGS and turbines;

- ii. The developer has designed the world's largest parabolic solar collector and is awaiting certification by CSP services this week;
- iii. The use of molten salts in lieu of traditional medium of oil for generation of steam is the first such experiment in the world. The developer has collaborated with a team from Spain for this project. The design teams in India and Spain who have been working on this technology have perfected the design and on the basis of this, the manufacturing of the solar troughs has commenced. Each component in a trough is unique in design and differs from all the other components. All these have been individually tested for all the required parameters and eventually have about 1500 such solar troughs for the 10 MW plant at Pavagada in Tumakuru District.
- iv. There was an inordinate delay by the revenue authorities for according the order of conversion of land use from agricultural to non-agricultural. This has been concluded by the district revenue authorities after a span of nearly 14 months from the date of submission of application for land use conversion;
- v. Execution of PPA, evacuation approval and other statutory approvals have also contributed to substantial delay in the project;
- vi. The sub-soil contained huge boulders and rocky sub-strata during the phase of evacuation and leveling. The mammoth task of making the land suitable for use has been time-consuming and has been made ready for usage, after overcoming obstacles at every stage; and

- vii. The developer has accepted the challenge of setting up of Solar Thermal Project in anticipation that they can fast track the imports and meet the deadlines. However, the foreign suppliers requested longer lead times, had its impact on the project timelines, as this critical technology is unavailable domestically and the had no choice but to import the same.

- p) Petitioner Company and the 2nd respondent GESCOM executed yet another SPPA dated 19.01.2017 agreeing for the revised SCOD upto 31.12.2018. The SPPA dated 19.01.2017 is produced as Annexure-P5 to the petition.

- q) The SPPA dated 19.01.2017 signed for time extension till 31.12.2018 was sent for the approval of the Commission by GESCOM by its letter dated 28.01.2017 and this SPPA was rejected and returned by the Commission vide letter dated 20.02.2017.

- r) In view of rejection of approval to SPPA dated 19.01.2017 vide Commission letter dated 20.02.2017, GESCOM issued letter dated 16.08.2017 proposing the following:
 - i. Levy liquidated damages to the extent of 100% performance security i.e., Rs.5,03,00,000/- (Rupees five crores and three lakhs only) which you have to pay to GESCOM within 10 days from the date of this notice for delay of three months in achieving COD i.e. for not achieving COD on or before 31.12.2016, failing which GESOCM will be constrained to encash the entire

Performance Bank Guarantee of Rs.5.03 crores without further notice.

- ii. Levy of liquidated damages at the rate of Rs.50,000 per MW per day for delay from 01.04.2017 to 31.07.2018 (122 days) has to be paid, which is equivalent to 6.10 crores (Rupees Six crores ten lakhs only).
 - iii. This shall be treated as Preliminary Default notice as per Art.16.3.1 of the intention of GESCOM to terminate the PPA executed with GESCOM on 30.12.2012 as you have not achieved the revised COD even after 212 days from the revised scheduled COD. A copy of GESCOM's letter dated 16.08.2017 produced as Annexure -P6 to the petition.
- s) The above decisions of GESCOM, communicated to the petitioner by the impugned letter dated 16.08.2017, are considered as detrimental to the development of Solar Thermal Technology in general and to the petitioner's project in particular as it is a special project which in fact cannot be treated like any other the Solar PV projects. However, GESCOM's letter has given a big jolt to the plans of the petitioner.
- t) Apart from the above issues raised in the petition, the petitioner also urged the following other grounds / facts which are as hereunder:
- l) That the impugned letter issued by GESCOM is highly illegal, untenable, arbitrary and is issued without consideration of the factual situation faced by the petitioner.

- II) The GESCOM has totally ignored the fact that the petitioner has faced challenges from the various international vendors who have expressed long lead times especially with regard to supply of critical equipment such as the salt pumps, SGS and turbines. The petitioner has designed the world's largest parabolic solar collector.
- III) That the use of molten salts in lieu of traditional medium of oil for generation of steam is the first such experiment in the world. The design teams engaged by the petitioner in India and Spain have been working on this technology and the teams have perfected the design and manufacturing of the solar troughs on this basis has commenced. Each component in a trough is unique in design and differs from all the other components. All these have been individually tested for all the required parameters and eventually have about 1500 such solar troughs for the 10 MW plant at Pavagada in Tumakuru District. Hence, it is natural that the project will get delayed.
- IV) GESCOM ought to have considered the inordinate delay by the revenue authorities in approving the conversion of land use from agricultural to non-agricultural. The district revenue authorities have taken about 14 months from the date of submission of application for conversion of land use.
- V) GESCOM ought to have considered the delays in execution of PPA, evacuation approval and other statutory approvals which have led to the delay in execution of the project. Further, the clearing of huge

boulders and rocky sub-strata found during levelling of the land also caused substantial delay in execution.

- VI) The developer has accepted the challenge of setting up Solar Thermal Project in anticipation that they can fast track the imports and meet the deadlines. However, the foreign suppliers requested longer lead times has impacted the project timelines. The petitioner had to import the technology as it is not available indigenously.
- VII) The SPPA dated 19.01.2017 clearly elucidates the sequence of events right from the award of the project up to the date of execution of the SPPA. This SPPA is a consequence of the decision taken by GESCOM Board based on expert committee which looked into the project progress.
- VIII) This Commission had approved many SPPAs earlier to the one rejected. The genuine delays should have been considered by this Commission by providing an opportunity of hearing, in which case, the petitioner would have explained the circumstances those led to the delay, as there was no negligence from petitioner side.
- IX) The GESCOM has not communicated to the petitioner the letter written by this Commission rejecting the approval to the SPPA. The Petitioner should have been given an opportunity for explaining its views before rejection of approval to the SPPA or otherwise GESCOM should have sought for an opportunity of hearing to both parties before the Commission before rejection of SPPA.

3. Upon notice, the respondents appeared through their counsel, and filed statement of objections as follows:
 - a) KREDL, the Respondent No.1, has submitted that KREDL is the nodal agency of the Government of Karnataka invited proposals through its "Request for proposal" (RfP) to undertake development of 80 MW capacity of solar power in the state wide paper notification dated 09.08.2011. KREDL issued the letter of allotments to 9 successful bidders for implementation of 70 MW capacity solar power projects including this petitioner vide letter of allotment dated 08.06.2012 for commissioning of solar power plant of 10 MW at Nelavagulu village, Ranebennur Taluk, Haveri District at a quoted tariff of Rs.11.32 paise/Kwh.
 - b) On 01.10.2013 this petitioner addressed a letter this respondent KREDL and sought permission to change the project site from Nelavagulu Village, Ranebennur Taluk, Haveri District to Pavagada Taluk of Tumakur District as the petitioner was not successful in acquiring the land required for the project. In response to this letter, KREDL vide letter dated 11.10.2013 accorded no objection for change of project site.
 - c) The petitioner has entered into a power purchase agreement with the respondent No.2, GESCOM and therefore, it is for the respondent No.2 herein has to counter the allegations made against GESCOM.

4. The gist of the statement of objection filed by the 2nd Respondent GESCOM, are as follows:
- a) The petitioner has filed the present petition seeking for setting aside the letter issued by this respondent vide dated 16.08.2017 (Annexure P-6) and also sought approval for the Supplementary PPA dated 19.01.2017 in which the extension of time was granted by this Respondent No 2.
 - b) The 2nd Respondent GESCOM informed the Allottee through a letter dated 29.08.2012 to set up a special Purpose Vehicle (SPV) and also to sign PPA within 30days of LOA in terms of RFP and LOA. The petitioner did not comply with the above terms and requested for extension of the time by the KREDL which was approved and vide letter dated 30.08.2012 petitioner was instructed to execute a Power purchase agreement (PPA). The Petitioner also requested the KREDL for additional 30 days more for furnishing the Performance Bank Guarantee (PBG).
 - c) The PPA was signed 30.08.2012 and clause 3.1 of it states that "this agreement shall come into effect from the date of its execution by both the parties and such date shall be referred to as effective date". The developer was required to commission the project within 29 months from the effective date as per clause 8.5 of the PPA, i.e. on 30.01.2015.

- d) The Commission vetted the agreement and suggested certain modifications. The GESCOM addressed a letter dated 20.03.2013, 24.05.2013 to the petitioner and requested to come forward for effecting the modifications.
- e) On 12.03.2014 the Petitioner requested the respondent for change of location due to non-availability of grid at Harihar. The petitioner also requested for the change of location from Harihar to Nagalapura Village, Pavagada Taluk. The government of Karnataka approved the change of location to the petitioner.
- f) After the request of the Petitioner, the respondent GESCOM in its 51st Board meeting held on 29.05.2014 approved for change of location and to recovery of penalty of Rs. 30.18 lakhs for non-fulfilment of conditions specific as per PPA. It is submitted that on 26.08.2014 the respondent letter addressed to the Petitioner to remit penalty of Rs. 30.18 lakhs within 15 days. On 08.09.2014 and 23.09.2014 respondent has conveyed approval for change in location and requested for SPPA.
- g) The 2nd Respondent, (GESCOM) in the 52nd Board meeting held on 17.10.2014 observed that the approval has already been communicated for change of location and the developer should take effective steps for implementation of the project.

- h) The 2nd Respondent (GESCOM) in its 53rd Board meeting held on 07.02.2015 noted that the developer had not yet submitted any progress report of implementation of the project and in this connection, the Board also noted that there is basic difference between Solar photo voltaic project and Solar thermal project. The Board further opined that Solar Thermal project developers need to be supported and directed that the GESCOM officials shall visit the site and to submitted report to the Board of Directors in the subsequent Board meeting. It was also resolved to retain the original implementation period of 21 months from the date of compliance of condition precedent and reckon the SCOD from 01.03.2015 to 31.12.2016 keeping all other terms and conditions of the PPA unchanged. Accordingly, the petitioner and GESCOM signed SPPA on 28.04.2015.
- i) Petitioner in its letter dated 19.12.2016 yet again requested the GESCOM for extension of time upto December 2018 and GESCOM communicated its approval on 31.12.2016 extending time upto 31.12.2018 and also signed SPPA on 19.01.2017. This SPPA dated 19.1.2017 sent to Commission for approval was rejected for the reason that GESCOM has not furnished the present status of progress project along with supporting documents and sought further clarification on the status of project progress.

- j) As per the decision of the GESCO Board, it had deputed Executive Engineer, MRT, Bellary & Executive Engineer, Hospet who have visited project site on 04.09.2017 submitted their observations as noted below:
- i) No terminal bay is constructed.
 - ii) Out of 46 towers proposed only 22 Nos are erected no stringing of conductor.
 - iii) No men and labour at work site.
 - iv) Power transformer of 12.5MVA and glass tube containers are found at site.
 - v) Few line materials were stored like tower parts, ACSR conductor were store adjacent to 66/11kv MUSS Y.N. Hosakote.
- k) Consequent on rejection of approval to the SPPA dated 19.01.2017 by the Commission, GESCO issued letter dated 16.08.2017 intimating levy of liquidated damages of the performance security of Rs.5,03,00,000/- (Rupees Five Crores and Three Lakh only) and informed to pay the same within 10 days from the date of GESCO notice dated 16.08.2017, for delay of three months in achieving COD (i.e. by 31.12.2016) and further informed the petitioner that if he failed to remit the LD, GESCO will encash the entire performance Bank Guarantee of Rs.5.03 Crores without further notice. And also informed further levy of liquidated damages at the rate of Rs.50,000 per MW per day for delay from 1.04.2017 to 31.7.2017 (122 days), which works out to about Rs. 6.10 crores (Rupees Six Crores ten lakhs only).

GESCOM also informed the petitioner that said letter shall be treated as preliminary default notice as per Article 16.3.1 regarding its intention to terminate the PPA executed with GESCOM on 30.12.2012 as the petitioner have not achieved revised SCOD even after 212 days from the revised SCOD.

- l) On 30.10.2017 GESCOM requested the Corporation Bank, Bengaluru for encashment of Bank Guarantee and the bank acknowledged for having received the original Bank Guarantee on 03.11.2017. At the same time, the petitioner approached this Commission seeking interim order which was granted by this Commission on 03.10.2017 till the subsequent date of hearing. On 29.11.2017 a letter was addressed to the Petitioner to renew the Bank Guarantee of Rs 5.03 Crores which shall be validity from 31.12.2017 to 31.12.2018.
- m) In the meanwhile, the petitioner filed the Writ Petition WP No.44041/2018 before Hon'ble High Court of Karnataka challenging the order 18.09.2018 passed by this Commission (date of Commission order is mentioned as 27.9.2018 in the objection statement which in fact is the date of filing WP). The Hon'ble High Court has passed order dated 05.10.2018 allowing the respondent GESCOM to encash the Bank Guarantee to the extent of 50% of BG of Rs. 5.03 Crores, i.e., to an extent of Rs. 2.50 Crores and directed to file proof of compliance of the direction before this Commission.

- n) The Executive Engineers Regulatory Affairs and TA&QC visited the project site on 02.05.2018 as per OM dated 26.04.2018 and submitted the report along with photographs. As per the report of the Engineers, there was no progress and found only barren land, no men and material at site and further stated that the status as on the date of previous visit was continued. The site in-charge Engineer stated that the material was shifted to another site belonging to M/s Atria Solar Power (P) Ltd. There is no progress in implementing the project by the petitioner. As the petitioner has not executed the project despite extension of time allowed, the respondent requested the Commission to terminate PPA by invoking article 16.1.1(a)(e) of PPA and stated that the petitioner shall also be liable to pay Liquidated Damage and penalties in terms of PPA.
- o) The PPA clearly sets out the events which are force majeure events in Article 8 of the PPA. Perusal of the said clause would make it evident that the delays sought to be termed as events of force majeure such as delays in obtaining approvals cannot be considered to be events of force majeure. Further, Article 5.1 clearly sets out the Obligations of the Developer. Accordingly, it is the responsibility of the Developer to obtain all clearances, consents etc. petitioner well aware of its obligations under the contract, is now attempting to take advantage of its own wrong, That the same is impermissible in law and ought not to be permitted. Further, Article 14 also states that in the event of a

force majeure situation, petitioner has to adhere the procedure set out in the contract which the petitioner has not followed. It is settled law that when the contract sets out a procedure to be followed in order to invoke the force majeure clause, non-adherence of the same vitiates the said claim. For this reason, also the contentions urged deserve rejection.

- p) The Petitioner is attempting to bypass its obligations under the PPA. It ought to be noted that the Respondent herein is a Public utility and non-receipt of electricity within the stipulated time frame comes at a Price. The Petitioner ought not to be absolved of its obligations and duties under PPA on the ground of delay, which is in fact caused wholly and solely by the Petitioner itself.
- q) That the petitioner has not made any objectionable averments against GESCOM to claim force majeure events on grounds of delay by the respondent GESCOM. Therefore, the averments attributing the delay to GESCOM must not be considered. The PPA clearly sets out the events which are force majeure events in Article 14 of the PPA. Perusal of the said clause would make it evident that the delays sought to be termed as events of force majeure clause. Delays in obtaining approvals cannot be considered to be events of force majeure. Further, Article 6.1 clearly sets out the obligations of the developer. It clearly states that it is the responsibility of the developer to obtain all clearances, consents etc. The Petitioner has failed to

follow the procedure set out and for this reason also the contentions urged deserve rejection.

- r) The fixation of the tariff and the time extension for the project falls within the domain of the KERC. That there has been no delay on the part of this respondent and the Petitioner has been communicated with all the required information well within the time. The Petitioner also submitted an application for the allotment of the Project agreeing to all conditions of allotment and fixation of tariff and hence the claim for PPA Tariff in present petition is not maintainable. Moreover, petitioner has not commissioned the project to deliberate on the allowable tariff.
 - s) The Petitioner is not entitled for the relief sought in the present Petition and also not entitled for extension of time. The developer cannot absolve from the deduction the liquidated damages as the Petitioner has not commissioned the project and is not is entitled for any relief and is liable to pay the liquidated damages.
5. The gist of the 3rd Respondent statement of objection is as hereunder:
- a) The records produced by the petitioner shows that the petitioner is in default of every timeline envisaged in the Power Purchase Agreement dated 30.08.2012 and the Supplementary Power Purchase Agreement dated 28.04.2015 (hereinafter referred to as the 'SPPA'). The Petitioner has sought numerous extensions of time for

commissioning of the Plant and till date has failed to achieve commissioning. Notwithstanding the numerous defaults brought to the notice of the petitioner time and again by the other respondents in the petition, respondent No.3 restricts its objections to the factual aspect of the application for the evacuation scheme and the grant of the evacuation approval.

- b) The allegations with regard to delay in the grant of the evacuation scheme and evacuation approval are false and denied. The petitioner is making false statements regarding the delayed grant of the evacuation approval merely as an after-thought to hide its own defaults. All allegations are concocted and are an attempt to disguise the delays and defaults on the part of the petitioner in failing to meet the requirements under the PPA dated 30.08.2012 and SPPA dated 28.04.2015. It is a matter of record that the Petitioner has failed to fulfil the conditions precedent to the PPA dated 30.08.2012. The Petitioner now seeks to manipulate its own delays and defaults and is an afterthought.
- c) The allegation that the delay in the evacuation approval caused substantial delay in commissioning of the plant is false. The Petitioner caused a delay of 10 months in making a request for allotment of land despite already having been granted the regular evacuation approval as on 18.05.2015. This and any delay are solely attributed to

the Petitioner and Respondent No.3 cannot be held responsible for the same.

- d) The Petitioner made an application for the evacuation approval for the said project on 28.10.2014. The Petitioner failed to provide the pre-requisite documents for the evacuation approval along with the application. Respondent No.3 addressed a letter dated 12.11.2014 requesting for furnishing the requisite documents such as the SPPA. The copy of the letter dated 12.11.2014 is produced as Annexure I to the objection statement.
- e) The Respondent processed the application of the petitioner on fast track basis and issued a Tentative Evacuation scheme for the Plant by letter dated 16.01.2015. The letter dated 16.01.2015 is produced as Annexure II. The same is accepted by the Petitioner only on 05.02.2015. Respondent No.3 once again reminded the Petitioner to submit the SPPA with the extended COD as the time for issuance of the regular evacuation scheme had lapsed as on 30.01.2015 as per the terms of the PPA. The Petitioner responded 4 months later by its letter dated 04.05.2015 and submitted the SPPA dated 28.04.2015. It is submitted that the Petitioner himself delayed in executing and submitting the SPPA with GESCOM.
- f) After processing the documents, Respondent No.3, issued a regular evacuation scheme to the Petitioner by its letter dated 18.05.2015.

A copy of the regular evacuation Scheme is produced as Annexure III.

g) Despite the grant of the regular evacuation scheme as early as 18.05.2015, the Petitioner after a period of 10 months, by its letter dated 06.01.2016 requested for allotment of land for the construction of one 66 kV terminal bay at the 66/ 11kV S/s Y.N. Hosakote. This letter dated 06.01.2016 is produced as Annexure IV. After a period of 10 months from issuing the regular evacuation approval on 18.05.2015, the petitioner belatedly requested for allotment of land for construction of Terminal Bay for reasons not known to this respondent No.3. However, the land was immediately allotted in the 54th terminal bay allotment committee meeting held on 21.01.2016. The Petitioner himself has delayed the execution of the project and now making allegation that obtaining the evacuation approval caused significant delay in the progress of the project, which is false, misleading and blatantly wrong. The delay is attributed solely to the Petitioner and the Respondent No.3 cannot be held responsible for the negligence and wanton acts of the Petitioner.

h) The allegations made at para 17 (v) and 26 of the main petition that the evacuation approval has contributed to substantial delay in execution of the project is false, frivolous and concocted by the Petitioner. The Petitioner fails to disclose that it had caused a delay of more than 10 months in making a request for allotment of land for TB

after the regular evacuation was granted to the Petitioner. The delay in the execution of the project is caused by the acts of the Petitioner and the allegations are afterthought.

- i) All other allegations made in the petition against respondent No. 3 which are not specifically traversed in the above paras are denied as false and are not attributable to this Respondent.
6. We have heard the oral submissions of the learned counsel for the parties. The learned counsel for the petitioner has also filed the written submission along with the citations referred in it on behalf of the petitioner.
7. The petitioner and 2nd Respondent have filed various memos on different dates. The petitioner filed the rejoinder on 04.12.2019 wherein the facts are reiterated as made in the petition.
8. From the pleadings and submissions made by the parties, the following Issues would arise for our consideration.

Issue No 1: Whether the Petitioner has made out a case for extension of time for achieving the Conditions Precedent and the Commissioning of the project on the ground of force majeure?

Issue No 2: Whether the petitioner proves that the levy of liquidated damages as per article 5.8 of the PPA in GESCOM letter dated 16.08.2017 (Annexure P-6) is arbitrary in nature, if so, whether the imposing of

entire liquidated damages by the 2nd respondent (GESCOM) is proper?

Issue No. 3: Whether the Supplemental Power Purchase Agreement dated 19. 01. 2017, required approval as per Article 3.1 of the PPA?

Issue No. 4: To which relief the petitioner is entitled for?

Issue No. 5: What Order?

9. After considering the submission of the parties and the material on record and pleadings, our findings on the above issues are follows.

10. **Issue No. 1:** Whether the Petitioner has made out a case for extension of time for achieving the Conditions Precedent and the Commissioning of the project on the ground of force majeure?

a) The petitioner has agreed to the terms and conditions of letter of award and allotment dated 08.06.2012 vide bidder's letter dated 29.8.2012 before entering into the PPA. Accordingly, the PPA was signed between the petitioner and 2nd respondent (GESCOM) on 30.08.2012. As per Article 4.1 of the PPA, the conditions precedent was required to be achieved within 240 days from the date of PPA., unless such completion is affected by force majeure event or if any of the activities specifically waived in writing by GESCOM.

b) It can be seen from the statement of objection filed by KREDL, the petitioner has requested on 01.10. 2013 for approval for change of

location of the project site from Nelavagulu village, Ranebennur Taluk, Haveri District to Pavagada Taluk, Tumakur District as they could not get the required land for the project in Haveri. In response to the request of the petitioner for change of location of the project vide letter dated 01.10.2013, KREDL granted no objection on 11.10.2013 for changing the location of the project. Thereafter, the petitioner on 12.03.2014 requested the 2nd Respondent (GESCOM) for modification in the original PPA to incorporate change of location as approved by KREDL and to execute SPPA accordingly.

- c) As per the request of the petitioner, the 2nd Respondent (GESCOM) placed the matter before the 51st board meeting held on 29.05. 2014 for approval of change of location and to recover penalty for non-fulfilment of condition precedent in terms of PPA. The approval of the Board was conveyed to the petitioner on 08.09.2014 and 23.09.2014 by the 2nd Respondent and requested to enter into SPPA. In the 52nd Board meeting held on 17.10.2014 observed that the decision of the 51st Board meeting has been already communicated to the petitioner and the developer should take effective steps to implement the project within the specified time. In the 53rd Board meeting held on 07.02.2015, it was noted that the petitioner has not made available the progress of the project and taking note of the special type of the Solar Thermal Project, which was considered as different from the Solar photovoltaics project, has decided to depute

the officials to visit the project site and submit the progress report to the Board in the next meeting. It was also resolved to retain the original implementation period of 21 months from the date of condition precedent i.e. from 01.03.2015 to 31.12.2016 to achieve SCOD and all other terms and conditions of the PPA to remain unchanged.

- d) On 28.04.2015, the petitioner executed the SPPA with the 2nd respondent GESCOM to reckon the period of compliance of condition precedent consequent to change of location and to achieve SCOD within 21 months from the date of compliance of condition precedent and retain all other terms and condition as in the PPA. As agreed in the provisions of SPPA, the petitioner has to achieve condition precedent by 28.02.2015 and to achieve SCOD by 31.12.2016. In spite of the extension of time granted to the petitioner by the 2nd Respondent for achievement of condition precedent as well as SCOD, the petitioner again requested on 19.12.2016 for extension of time upto 31.12.2018 to complete the project. As per the request of the petitioner, the 2nd Respondent again extended the time upto 31.12.2018 and accordingly signed the second SPPA on 19.01.2017. On 28.01.2017 GESCOM sent the SPPA dated 19.1.2017 for approval of the Commission and the Commission returned the same on 20.02.2017 for not furnishing present status of the project and

supporting documents and also seeking clarification from the 2nd respondent GESCOM.

- e) GESCOM deputed the Executive Engineers Regulatory Affairs and TA&QC to the project site who visited on 02.05.2018 and submitted the report along with photographs. As per the report of the Engineers, there was no progress and found only barren land, no men and material at site and further stated that the status as on the date of previous visit was continued. The site in-charge Engineer stated that the material was shifted to another site belonging to M/s Atria Solar Power (P) Ltd. The photographs establishes that it is a vacant site and no materials were available at the site. Again, on 29.08.2018, the Section Officer Nagalamadike visited the project site and sent status report and the photographs which shows that there was no progress in the project site. The photographs furnished by the developer does not match with the project site. For which the petitioner replied on 28.06.2018 stating that without filing detailed statement of objection to the main petition has filed memo with creptic averments and default notice dated 16.08.2017 issued by the 2nd respondent is under challenge in the present petition and the documents are not authenticated. Further the petitioner has produced some documents including photographs on 28.06.2018 by a separate memo. On 18.09.2018 the 2nd respondent has countered the memo dated 28.06.2018 and produced the original photographs

along with letter addressed to the Secretary KERC on 01.09.2018 by the CEE, GESCOM including the reply to the directions of KERC to update on the status of project. The Chief Engineer's letter discloses the factual status of a project. For having received the status from the 2nd Respondent, the petitioner has not disputed the factual situation. Since there was no objection / dispute from the petitioner regarding the facts on record, KERC can come to the conclusion that there is no progress in the project as on the date of filing the memo dated 18.09.2018 by GESCOM.

- f) With regard to 16.08.2017 default notice issued by the 2nd Respondent, the same was challenged by the petitioner before the Hon'ble High Court of Karnataka in writ petition No. 44041/2018. After hearing both sides, the Hon'ble High Court has disposed off the petition on 05.10.2018 with observation, as per paras 6 to 9

“6. The petitioner is even now free to support its case with relevant and cogent evidence that it would be in a position to set up the said Solar Thermal Plant at the site in question and commence its commercial production before the cutoff date 31.12.2018 for seeking the approval of the Supplementary PPA which issue is pending before the Respondent-KERC.

7. The petitioner is also directed to revalidate its Bank Guarantee of Rs.5.03 Crores having its currency at least up to 31.12.2018.

8. *The Respondent-GESCOM shall be entitled to encash the said Bank Guarantee to the extent of 50% of the said Bank Guarantee of Rs.5.03 Crores, namely, to the extent of Rs.2.50 crores and both the parties shall produce the proof of compliance with these directions before the Respondent-KERC.*

9. *Upon such proof being furnished, the Respondent-KERC is requested to consider the case of both the sides objectively and fairly on their relevant evidence and pass appropriate orders on merit in the matter preferably before the end of the year 2018"*

The 2nd respondent filed another memo dated 29-01-2019 with certain documents to update on the compliance to the direction by the KERC on 04.12.2018. The 2nd Respondent also addressed the petitioner on 02.05.2019 with a request to renew the Bank Guarantee and the intimation of the same to the KERC on 13.05.2019.

g) It can be observed that as per the statement of objection filed by the 3rd respondent KPTCL on 06.08.2019, the petitioner failed to furnish necessary requisite documents along with the application dated 28.10.2014 for evacuation approval and the KPTCL addressed petitioner on 12.11.2014 to furnish the supporting documents. On 24.11.2014 the petitioner remitted the processing fee and thereafter, on 16.01.2015 the tentative evacuation approval was granted which was accepted by the petitioner on 5.2.2015 and regular evacuation was approved on 18.05.2015. The petitioner requested on 06.01.2016

for land allotment for construction of terminal bay after a lapse of more than 10 months.

- h) The 2nd Respondent has also filed detailed statement of objection on 03.10.2019 which discloses that the petitioner has not followed the procedure as per the terms of the PPA and the obligations envisaged therein. Further, the petitioner has also not followed the procedures set out in Article 14 of the PPA to claim force majeure event. The petitioner has not produced any material evidence and cogent reasoning to claim force majeure situation while filing the petition and in the rejoinder to the statement of objection of the respondents. Even at the time of argument by both advocates have admitted that the project has not yet completed as on the date. The petitioner could have taken note of the extension of time granted by the respondent for achieving condition precedent as well as Schedule Commissioning of the project and as per the terms agreed in the original PPA and supplemental PPA executed the project. However, even today the petitioner failed to achieve both condition precedent as well as SCOD to claim time extension under force majeure clause.
- i) For the above reasons, we hold Issue No.1 in the negative.

11. **Issue No. 2:** Whether the petitioner proves that the levy of liquidated damages as per article 5.8 of the PPA in GESCOM letter dated 16.08.2017 (Annexure P-6) is arbitrary in nature, if so, whether the imposing of entire liquidated damages by the 2nd respondent (GESCOM) is proper?

a) Admittedly, the petitioner could not achieve the condition precedent within 240 days from the effective date and also commissioning of the plant within the scheduled commissioning within the extended time as agreed between the parties in the original PPA as well as the SPPA. As already noted, the petitioner has not completed the project. The learned counsel for the petitioner submitted that in view of a new and complex technology being used, this project cannot be treated like routine Solar PV projects. The petitioner is extremely serious about the implementation of the project but not admitting to the facts that the respondent is entitled for liquidated damages from the petitioner. It was also argued that the petitioner is not entitled to claim the liquidated damages as stipulated under PPA, by way of encashment of performance Bank Guarantee as the claim is not a genuine pre-estimated loss, but the same is in the nature of penalty. This claim for LD is also opposed to Sec 74 of the Indian Contract Act, 1872. If the force majeure event or impossibility to perform as contained under section 56 of the Contract Act is not accepted, then reasonable compensation is to

be claimed and paid. Unless the respondent GESCOM establishes that it has suffered purported actual loss and the same is adjudicated, the amount cannot be termed as a due and enforceable. In support of this contention, the learned counsel for the petitioner relied upon the decision in *Union of India vs Rampur Distillery*, AIR 1973 SC 1098, where in it was held that " The party to a contract taking security deposit from the other party to ensure due performance of the contract is not entitled to forfeit the deposit on the ground of default when no loss is caused to him in consequence of such relief".

- b) The learned counsel for 2nd Respondent (GESCOM) has not denied the proposition of law. However, he has contended that in a case where there is breach of terms of the PPA regarding supply of energy, the distribution licensee has a right to claim the liquidated damages without leading any evidence in proof of actual damages suffered due to the breach of such terms. Further, the counsel submitted that in the case of supply of energy to the Distribution Company, it is very difficult to lead any evidence in proof of the actual damages sustained. Therefore, he submitted that the PPA would contain a term regarding payment of liquidated damages predetermined by the parties, for breach of any particular terms of contract. Further he submitted that without requiring any evidence,

the Commission has to presume the loss occurred to the 2nd Respondent (GESCOM) as agreed in the Article 5.8 of the PPA.

c) In view of the above submission by the learnt counsel for the 2nd Respondent (GESCOM), the petitioner counsel also placed reliance of the following judgements, on the principles regarding recovery of damages.

- i. Kailash Nath Associates V/s DDA reported in (2015)4 SCC, P.136.
- ii. Union or India V/s Raman Iron Foundry, reported in AIR 1974.
- iii. Hassan Thermal Power Pvt. Ltd., V/s State of Karnataka SC 1265.
- iv. Green Hills Exports (Pvt) Ltd., and Members V/s Coffee Board, Bangalore.

d) In this regard, the Commission notes that the summary of the principle stated in para 43 of the judgment of the Hon'ble Supreme Court of India, in the case of " Kailash Nath Associates vs Delhi Development Authority reported in 2015(4) SCC 136, is extracted herein at para 43 of the judgement as follows:

"43. On a conspectus of the above authorization, the law on compensation for breach of contract under section 74 can be stated as follows:

43.1 Where a sum is named in a contract as liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is genuine pre-estimate of damages fixed by both parties and found

to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding to the amount stated. Similarly, in cases, where the amount is fixed in the nature of penalty, only reasonable compensation can be awarded not exceeding to the penalty is so stated. In both cases, liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.

- 43.2. Reasonable compensation will be fixed on well-known principle that are applicable to the law of contract, which are to be found inter alia Section 73 of Indian Contract Act, 1872.*
- 43.3. Since Section 74 of Indian Contract Act, 1872 awards reasonable compensation for damages or loss caused by a breach of contract, the damages or loss caused is a Sine-Qua non for the applicability of the section.*
- 43.4. The Section applies whether a person is a Plaintiff or Defendant in a suit.*
- 43.5. The sum spoken of may already be paid or be payable in future.*
- 43.6. The expression "whether or not actual damages or loss is proved to have been caused thereby" means where it is possible to prove actual damages or loss, such proof is not dispensing with. It is only in cases where damages or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimated of damages or loss, can be awarded.*

43.7. Section 74 will apply to cases of forfeiture of earned money under a contract. Where, however, forfeiture taken places under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application.

- e) On perusal of the reasons and the findings given in the case of Oil and Natural gas corporation limited vs Saw Piper Limited reported in (2003) 5 SCC 705, we are of the considered opinion that the 2nd Respondent can claim the liquidated damages as per Article 5.8 of the PPA without leading any evidence or proof of loss sustained by it. In this regard, we may note para 66 and 68 of the above cited judgement of the Hon'ble Supreme Court of India which reads as follows.

Para-66 "In Maula Bux case ((1969) 2 SCC-554, Maula bux vs Union of India) the court has specifically held that it is true that in every case of breach of contract the person aggrieved by beach is not required to prove actual loss or damage suffered by him before he can claim a decree and the court is competent to award reasonable compensation in a case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. The court has also specifically held that in case of breach of some contracts it may be impossible for the court to assess compensation arising from breach"

Para -68 from the aforesaid discussion, it can be held that: "

- 1) *Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same.*
 - 2) *If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/ compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay compensation and that is what is provided in Section 73 of the Contract Act.*
 - 3) *Section 74 is to be read along with Section 73 and therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damages suffered by him before he can claim a decree. The court is competent to award reasonable compensation in case of breach even if no actual damages proved to have been suffered in consequences of the breach of a contract.*
 - 4) *In some contracts, it would be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimated by the parties as the measure of reasonable compensation."*
- f) In the case of non supply of energy by generator to the distribution licensee, it is not possible to prove the actual damages or loss. Therefore, if the contract provides a genuine pre-estimate of

damage or loss, the defaulting party is liable to pay the liquidated damages without proof of loss of damage.

- g) It may also be noted that the interpretation of clause in Article 1.2.1 (w) of the PPA provides as follows.

1.2.1. In this agreement, unless the context otherwise requires

(a) to (v)

(w) The damages payable by either party to the other of them, as set forth in this agreement, whether as per diem basis or otherwise, are mutually agreed genuine preestimated loss and damage likely to be suffered and incurred by the party entitled to receive the same and are not by way of penalty (Damage) and

(x)

The petitioner has not produced any material to infer that the liquidated damages stated in Article 5.8 of the PPA is in the nature of penalty. On the other hand, the terms of the PPA would show that it is a genuine pre-estimated of the damages payable for non-supply of energy within the specified time.

- h) For the above reasons, we hold the first part of the Issue No.2 in negative and the second part in affirmative.

12. **Issue No 3:** Whether the Supplemental Power Purchase Agreement dated 19.01.2017, required approval as per article 3.1 of the PPA?

- a) In this regard, the Commission has returned the SPPA on 20.02.2017 without approval for the reason that GESCO has not furnished the present status of the project along with necessary supporting documents on the status of the project and sought clarification from the 2nd Respondent (GESCOM). Therefore, the 2nd Respondent issued default notice dated 16.08.2017 as per Annexure P6 of the petition and the same is under challenge in the present petition. The petitioner also challenged very same notice before the Hon'ble High Court in Writ Petition No. 44041/2018 and the same was disposed on 05.10.2018. In para 6 of the judgement, the Hon'ble High Court has observed that the petitioner is even free to support its case with relevant and cogent evidence that it would be in a position to set up the said Solar Thermal Power Plant at the site in question and commence its commercial production before the cutoff date 31.12.2018. Further it is ordered that upon such proof being furnished, the Commission is directed to consider the case of both the parties objectively and fairly on their relevant evidence and pass appropriate orders on merits in the matter.
- b) It is evident from the materials submitted before the Commission that the petitioner has failed to adhere to the extended time and commission the project within the extended time as noted in the Hon'ble High Court Order. In view of the same, the SPPA dated 19.01.2017 cannot be considered for approval.

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

13. **Issue No. 4:** To which relief the petitioner is entitled for?

In view of the above findings, we hold that the petitioner is not entitled to any of the reliefs prayed for.

14. **Issue No. 5:** What Order?

For the above reasons, we proceed to pass the following.

ORDER

a) The petitioner is not entitled to any of the reliefs prayed for in the petition. Accordingly, the impugned order/notice dated 16.08.2017 issued by 2nd respondent as per Annexure-P6 is upheld and the 2nd respondent (GESCOM) is at liberty to recover the Liquidated Damages.

b) Accordingly, the petition is disposed of.

Sd/-

(SHAMBHU DAYAL MEENA)
Chairman

Sd/-

(H.M. MANJUNATHA)
Member

Sd/-

(M.D. RAVI)
Member