

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY  
(Appellate Jurisdiction)**

**APPEAL NO. 335 OF 2018 & IA NO. 1414 OF 2018 &  
IA NO. 277 OF 2023**

**Dated: 30.05 .2024**

**Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson  
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member**

**IN THE MATTER OF:**

**Pinpoint Energy K1 Private Limited**

Through Managing Director  
No. 3009/2, 2<sup>nd</sup> Main,  
19<sup>th</sup> Cross, K.R. Road  
B.S.K. 2<sup>nd</sup> Stage  
Bangalore – 560070

**.....Appellant**

**Vs.**

1. **Karnataka Electricity Regulatory Commission,**  
Through Secretary  
No.16, C-1, Millers Tank Bed Area,  
Vasanth Nagar, Bengaluru – 560052, India
2. **General Manager (Ele), Power Purchase  
Bangalore Electricity Supply Company Limited (BESCOM),**  
Corporate Office, K.R. Circle,  
Bengaluru-560001, India. **.....Respondent(s)**

Counsel for the Appellant(s) : Ms. Abiha Zaidi  
Mr. Gautam Swarup  
Mr. Vineet Gupta  
Ms. Shruti Choudhary

Counsel for the Respondent(s) : Ms. Sumana Naganand  
Mr. Balaji Srinivasan  
Ms. Aishwarya Choudhary  
Ms. Garima Jain  
Mr. Tushar Kanti Mohindroo  
Ms. Nidhi K.

Mr Abhijeet Kumar Pandey  
Ms. Nidhi Gupta  
Ms. Samiksha Jain  
Ms. Pallavi Sengupta  
Mr. Sidhant Kohli for R-2

## **J U D G M E N T**

### **PER HON'BLE MR. SANDESH KUMAR SHARMA, TECHNICAL MEMBER**

1. The captioned appeal has been filed by the Appellant namely Pinpoint Energy K1 Private Limited challenging the order dated 12.06.2018 (in short "Impugned Order") passed by the Karnataka Electricity Regulatory Commission (in short "KEREC" or "State Commission") in OP No. 121 of 2017 which *inter alia* upheld the legality and validity of notices dated 03.03.2016 and 17.08.2016 (in short "Impugned Notices") issued by Respondent No.2 seeking to (a) terminate the Power Purchase Agreement dated 06.02.2014; and (b) impose a penalty and encash the entire sum of Performance Security amounting to Rs.3,87,50,000/- furnished by the Appellant, which actions were subject matter of challenge before the State Commission in the impugned proceedings.

### **PARTIES**

2. The Appellant is a Special Purpose Vehicle (SPV), promoted by Heidelberg Solar Private Limited and Solar AG (the Consortium) for development of 5MW capacity Solar PV Project in Chikkaballapur District, awarded by the Karnataka Renewable Energy Limited (KREDL), the Nodal

Agency of the Government of Karnataka for facilitating the development of renewable energy in Karnataka.

3. The Karnataka Electricity Regulatory Commission, the Respondent No.1 herein, is discharging its duties as per section 86 of the Electricity Act 2003.

4. The Bangalore Electricity Supply Company Limited (BESCOM), Respondent No.2 herein, is responsible for power distribution in a specified area, and is one of the five supply companies under the Karnataka Power Transmission Corporation Limited (KPTCL) *inter-alia* BESCOM is responsible for the transmission, distribution, and supply of electricity to the various districts of Karnataka.

### **Submissions**

5. **The Appellant submitted as under:**

6. **Initial delays wholly attributable to Respondent No.2:** At the very outset, Respondent No.1 has failed to appreciate that the PPA executed between the parties contemplated a clear project period of twelve (12) months for project implementation, which period was *prima facie* not granted to the Appellant for completion of the project, the admitted fact by Respondent No.2 is that even though the PPA was signed by 06.02.2014, the executed version of the PPA, or even a copy thereof was not provided to the Appellant till more than four (4) months after signing thereof, i.e. on 27.05.2014.

7. The Appellant requested several times seeking the approved copy of the PPA, however, the same were not acceded to, and accordingly, the Appellant not only lost out on securing land for the project from willing buyers, but also

failed to meet its other timelines for completion of the project, despite the same, Respondent No.2 failed to consider any of the repeated and urgent requests of the Appellant to extend the Scheduled Commissioning Date by an appropriate period.

8. As such, delays in the completion of the project and achieving timelines contemplated in the PPA were attributable to the conduct of Respondent No.2, which clear fact has not been appreciated by Respondent No.1 in the Impugned Order.

9. **Piecemeal extensions ought not to be considered:** Admittedly, Respondent No.2 granted minor piecemeal extensions, of not more than three (3) to four (4) months each, to comply with the Conditions Precedent, and also for project completion, however, such extensions were of little or no assistance to the Appellant as completion of project timelines and securing financing for the same required a minimum project timeline of a full twelve months, which was not granted by Respondent No.2 on account of its own actions, it is, therefore, not open to Respondent No.2 to take advantage of its own failure to supply the executed version of the PPA and cause delays in the project, and attributing the said delays to the Appellant.

10. **Clear event of Force Majeure not considered:** The Impugned Order furthermore, has failed to appreciate that delay in the completion of the project was a direct consequence of a 'force majeure' event as contemplated in the PPA, and as such, could not be attributable to the Appellant while computing the project completion timelines, specifically, it is clearly borne out by the record that conversion of the land identified by the Appellant, and clearly notified to Respondent No.2, was not accorded approval by the Deputy Commissioner,

as a consequence of which the sale deeds could not be executed between the Appellant and land owners, the said order of the Deputy Commissioner has been subsequently challenged, and been stayed by the Karnataka Appellate Tribunal in Revenue Appeal Nos.1015/2015 and 1016/2015.

11. Such facts clearly constitutes an event of 'force majeure' in terms of Clause 14.3(e) of the PPA, which includes the "*refusal to renew or grant without valid cause, any clearance, licence, permit, authorization, approval, or exemption required by the Developer.. to perform their respective obligations under this Agreement..*", such event of force majeure expressly entitles the Appellant-Developer to relief from meeting the project completion timelines contemplated in the PPA, and as such, and failure to meet such timelines ought not to be held attributable to the Appellant.

12. Further, to this affect, apart from the clear purport of the PPA itself, there are clear rulings of this Tribunal in identical facts and circumstances, that failure to secure such approvals from relevant statutory authorities would constitute an event of *force majeure* and ought not to be included while computing the project completion timelines of the developer.

13. In view of the above, the actions of Respondent No.2 are clearly illegal, arbitrary and contrary to law governing the contract, and ought to have been set aside and in failing to strike down and set-aside such actions of Respondent No.2, Respondent No.1 has clearly erred, wherefore the Impugned Order deserves the interference of this Tribunal.

14. Further, the Appellant has raised following questions of law for our consideration: -

- I. Whether the Respondent No. 1 State Commission has erred in failing to appreciate that significant delay of four months was caused to the Appellant in providing the executed PPA, thereby limiting the Appellant's ability to execute the project on time?
- II. Whether Respondent No.1 State Commission has erred in failing to appreciate that the withholding of approval by the Deputy Commissioner and inability to convert the lands earmarked for the project, constituted an event of *force majeure* in terms of Article 14.3 of the PPA, and thereby entitling the Appellant to relief in terms of Article 14.7 thereof?
- III. Whether the Respondent No.2 has illegally and arbitrarily encashed the Performance Security furnished by the Appellant, notwithstanding that the delays and events of default alleged by the Respondent No.2 were, either partly or in whole, attributable to the conduct of Respondent No.2 itself or the occurrence of a force majeure event?

**15. The Appellant submitted as under:**

16. The Respondent No. 2, BESCO, submitted that "Time is the essence of the contract" and delay in achieving deadlines cannot be attributed to alleged delay in receipt of signed copy of the PPA, delay is solely due to failure of the Appellant in not achieving the condition precedent i.e. acquisition of land.

17. Further, submitted that the PPA requires ownership or lease hold rights for at least 30 years in the name of the Developer as evidence of clear possession of required land for the project, however, in the letter dated 14.11.2014, the Appellant has admitted that the delay in financial closure was due to non-completion of acquisition of land, in fact, the impugned order

records that till the time of passing of the impugned order the Appellant was not in possession of any alternate land.

18. Accordingly, argued that the BESCO is justified in issuing the impugned default notice for termination, in line with the Article 4.1 of the PPA, which provides for achievement of Conditions Precedent within 180 days from the Effective Date (06.02.2014) i.e., till 05.08.2014, further, Article 16.1.1(a) of the PPA provides for termination of the PPA in case the Appellant fails to achieve SCOD beyond 120 days from the deadline to achieve SCOD i.e., till 05.02.2015, SCOD to be achieved within 12 months from effective date as per Article 8.5, it is relevant to note that that the Appellant never even achieved the condition precedent.

19. Article 5.8.3 of the PPA provides that the maximum time allowed for achieving SCOD, with payment of Liquidated Damages shall be limited to 16 months from the 'Effective Date' and if the achievement of SCOD is delayed beyond 16 months, it shall be considered as a Developer's Event of Default and the provisions of Article 16 of the PPA shall apply.

20. The BESCO, further, submitted that there is no element of force majeure involved, it has been recorded in the Impugned Order that there was no reason for the Appellant to be aggrieved as conversion to the extent of land sought by the land-owners was granted by the DC, the conversion of land was not granted only for kharab land i.e., government land over which the land owners had no right, even, the Appellant has admitted that approval was granted for conversion of land for 4 acres in Survey No. 46 and 16 acres 3 guntas in Survey No. 50, the approval was withheld only for 5 acres 12 guntas of kharab land, thus, failure to obtain land conversion approval by the Deputy

Commissioner does not amount to a force majeure event as contemplated under the said Article 14.

21. The Appellant did not issue any notice of force majeure within one week as required under Article 14.5.1, further, no step was taken by the Appellant to mitigate the effect of dispute over land, therefore, imposition of liquidated damages and invocation of bank guarantee is lawful, additionally, the Article 5.8.1 of the PPA, entitles the Respondent herein to levy damages on the Appellant for delay in commencement of supply of power and delay in fulfilment of the Conditions Precedent, thus Liquidated damages of Rs. 2,20,00,000/- (Rupees Two Crores Twenty Lakhs Only) remain to be recovered from the Appellant, accordingly, the Respondent No. 2 issued notice seeking liquidated damages on 16.08.2016 but failed to recover it due to stay order dated 26.08.2016 granted in favour of the Appellant by the High Court of Karnataka in WP 46441/2016, subsequently, the said Writ Petition was dismissed on 06.07.2023 for being non-maintainable.

22. Consequently, the Respondent No. 2 has recovered Rs. 23,25,000/- for delay in conditions precedent and Rs.1,67,50,000 for delay in COD in the following order:

S. No.	Bank Guarantee	Total Amount (Rs.)	Amount invoked (Rs.)
1.	0002BG00211514 (Expired on 31.12.2016)	77,50,000	23,25,000 for delay in Conditions Precedent 12,50,000 for delay in COD
			35,75,000



2.	0002BG00211414 (Expired on 31.12.2016)	1,55,00,000	-
3.	0002BG00211614 (Expired on 31.12.2016)	1,55,00,000	1,55,00,000 for delay in COI

23. The following table sets out the list of events which are of relevance herein:

SL. NO.	DATE	PARTICULARS	PAGE NO.
	05.03.2013	KREDL, vide a Request for Proposal, invited applications from prospective bidders for development of 130MW Solar Thermal Power/Solar PV power plants in the State of Karnataka.	Annexure A2, Pg 60-226 of the Appeal Paper Book
		The Consortium submitted its proposal for the development of a 5MW capacity solar power plant in Bagepally, Chikkaballapur District, Karnataka.	
	23.08.2013	KREDL issued Letter of Award.	Annexure A3, Pg 227-228 of the Appeal Paper Book
	17.12.2013	KREDL issued Letter of Allotment.	Annexure A3, Pg 229 of the Appeal Paper Book
	06.02.2014	Respondent No.2 and the Appellant entered into a Power Purchase Agreement (hereinafter referred to as "PPA") for the development of a 5MW capacity solar power plant in Bagepally, Chikkaballapur District,	Annexure A4, Pg 232-294 of the Appeal Paper Book

		Karnataka and furnished bank guarantees to the tune of Rs. 3,87,50,000/-.	
	28.02.2014	PPA was approved by the State Commission.	
	01.08.2014	Appellant sought extension of time for fulfilment of Conditions Precedent as set out in the PPA and commissioning of the project.	Annexure A7, Pg 297-298 of the Appeal Paper Book
	05.08.2014	Original Deadline to achieve Conditions Precedent as per the PPA.	
	13.08.2014	Respondent No.2 extended the timeline for fulfilment of Conditions Precedent to 31.12.2014, subject to a condition that SCOD remains unchanged i.e., on 05.02.2015.	Annexure A8, Pg 299 of the Appeal Paper Book
	14.11.2014	Appellant once again requested the Respondent No.2 for extension of SCOD to 27.05.2015.	Annexure A9, Pg 300-301 of the Appeal Paper Book
	29.11.2014 & 06.01.2015	Respondent No.2 informed that no extension of time can be granted.	Annexure A10 and A11, Pg 302-304 of the Appeal Paper Book
	09.01.2015	Appellant requested the Respondent No.2 for extension of time again despite the Respondent's earlier refusal.	Annexure A12, Pg 305 of the Appeal Paper Book
	31.01.2015	Respondent No.2 rejected the Appellant's request for extension.	Annexure A12, Pg 305 of the Appeal Paper Book
	05.02.2015	Original Scheduled Commissioning Date (SCOD) as per PPA dated 06.02.2014	

23.02.2015	Respondent No.2 issued Official Memorandum thereby levying penalty by way of Rs. 23,25,000/- on non-fulfilment of the Conditions Precedent.	Annexure A13, Pg 306-307 of the Appeal Paper Book
03.03.2015	Appellant addressed a letter to the Respondent No. 2 enclosing the copies of the Agreement of Sale of 21 acres of land on which the project was to be established.	Annexure A14, Pg 310 of the Appeal Paper Book
05.03.2015	Appellant, once again requested the Respondent No.2 for extension of time till April 2015 to achieve financial closure and till December 2015 to achieve SCOD.	Annexure A14, Pg 308-309 of the Appeal Paper Book
06.03.2015	Respondent No.2 requested ICICI bank to encash the bank guarantee of Rs. 23.25 lakhs.	
20.03.2015	Due to repeated requests, Respondent No.2 granted 6 months' extension to the Appellant to achieve SCOD; Revised SCOD was 05.08.2015.	Annexure A15, Pg 311-312 of the Appeal Paper Book
02.07.2015 & 15.07.2015	Appellant again requested Respondent No.2 for extension of time of the SCOD by an additional 6 months, i.e. upto 06.02.2016.	Annexure A16, Pg 313-318 of the Appeal Paper Book
14.08.2015	Respondent No.2 granted 3 months' extension of time to the Appellant, i.e upto 25.11.2015.	Annexure A16, Pg 313-318 of the Appeal Paper Book

17.08.2015	District Commissioner, Chikkaballapur District accorded its approval for conversion of 3.25 acres of land but it did not accord approval to 13 guntas of 'A' Kharab land.	Annexure A17, Pg 319-347 of the Appeal Paper Book
25.11.2015	Final extended deadline for achieving SCOD as granted vide letter dated 14.08.2015.	
09.12.2015	Appellant amended the bank guarantee, along with extension of the date of expiry as well as the date of expiry of claim up to 31.12.2016.	
	In the interregnum, the Appellant challenged the District Commissioner's order dated 17.08.2015 before the Karnataka Appellate Tribunal in Revenue Appeal No. 1015 of 2015 and Revenue Appeal No. 1016 of 2015.	
04.02.2016	Karnataka Appellate Tribunal stayed the District Commissioner's order dated 17.08.2015.	Annexure A18, Pg 348-349 of the Appeal Paper Book
25.02.2016	Respondent No.2 issued Official Memorandum levying penalty by way of performance security to the tune of Rs. 1,55,00,000/- for delay in commissioning the project.	Annexure A19, Pg 350-352 of the Appeal Paper Book
01.03.2016	Respondent No.2 requested the ICICI bank to encash the bank guarantee of Rs. 1,55,00,000/- and partially encash bank guarantee for Rs. 12,50,000/-. In furtherance to the same, the said Respondent has received a total sum of 1.67 crores.	

03.03.2016	Respondent No.2 issued a Default Notice and levied liquidated damages under Article 5.8 of the PPA to the tune of Rs. 1,67,50,000/- on account of delay in achieving the Conditions Precedent, SCOD and COD as set out in the PPA and further requested the Appellant to cure the defect within 60 days, or the PPA shall be terminated thereafter.	Annexure A21, Pg 360-362 of the Appeal Paper Book
04.03.2016	Appellant requested the Respondent No.2 to withdraw the letter dated 25.02.2016 levying penalty.	Annexure A20, Pg 353-359 of the Appeal Paper Book
21.04.2016 & 27.04.2016	Appellant requested the Respondent No.2 to withdraw the Default Notice dated 03.03.2016.	Annexure A22, Pg 363-372 of the Appeal Paper Book
27.04.2016	Respondent No.2 rejected the Appellant's request.	Annexure A22, Pg 363-372 of the Appeal Paper Book
17.08.2016	Respondent No.2 issued Official Memorandum levying a penalty of Rs. 2,20,00,000/- for delay the COD in terms of Article 5.8.	Annexure A23, Pg 373-375 of the Appeal Paper Book
25.08.2016	Aggrieved by the same, Appellant filed a petition No. 46441/2016 before the Karnataka challenging the Default Notices.	

26.08.2016	Karnataka High Court passed an interim order	Respondent No.2 not to implement the Default restraining them from invoking the bank guaran	Annexure A24, Pg 376-377 of the Appeal Paper Book
18.07.2018	Appellant filed a petition OP No. 121/2017 before	Commission. The Appellant sought the following therein: Declaration of the default letter dated 03.03.2015 Grant of extension of time of an additional 1 year from the date of the State Commission's order; Declaration that the invocation of bank guarantee dated 09.12.2015 as illegal Other orders in the interest of justice and equity	Annexure A26, Pg 380-400 of the Appeal Paper Book
12.06.2018	The State Commission, vide the Impugned Order	OP No. 121/2017 while holding that even though an extension of time was granted by Respondent No. 2, the Respondent has not achieved much progress and the Appellant is not diligent in executing the project as it failed to complete the project. Further, the State Commission allowed the Bank Guarantees were encashed well before the date of filing of the petition on 18.07.2017, therefore the Respondent should have been for recovery of the amount from Respondent, after paying the appropriate Court fees. The Respondent's declaration, without praying for recovery of the amount, is not maintainable. Accordingly, the relief sought, is not maintainable. Accordingly, the petition was dismissed.	Annexure A1, Pg 31-59 of the Appeal Paper Book
09.08.2018	Aggrieved by the afore-mentioned Impugned Order	State Commission, the Appellant has filed an Appeal.	Pg 1-30 of the Appeal Paper Book

24. It is submitted that the Appellant has failed to commission the project within the SCOD i.e., 05.02.2015, the Respondent, vide letter dated

14.08.2015, granted extension of time to the Appellant to commission the Project till 25.11.2015, however, the Appellant continue to fail in commissioning the Project even within the revised SCOD, therefore, the Respondent was constrained to issue the default notice dated 03.03.2016 in accordance with Article 16.3.1 of the PPA, the same is produced below for ready reference:

*“16.3.1. Upon the occurrence and continuation of any Developer Event of Default under Article 16.1, ESCOM shall be entitled to terminate this agreement by issuing a notice stating its intention to terminate this agreement (ESCOM Preliminary Default Notice), which shall specify in reasonable detail, the circumstances giving rise to the issue of such notice.”*

25. The said notice is in complete compliance of the requirements prescribed under the afore-mentioned clause, furthermore, the State Commission has held under Para 7(f) of the Impugned Order, that:

*“7(f) .....*

*During the pendency of the proceedings, when questioned about the status of the project, the learned counsel for the Petitioner informed that, alternative lands are being identified. It can be inferred that, the Project is in a very preliminary stage of implementation, despite lapse of more than two years from the date of execution of the PPA. We note that, the contract is frustrated due to lapse of time. The commissioning of the Project would be impossible, unless the lands are identified and all approvals are obtained by the Project Developer. If the lands are not procured within a reasonable time, the contract is to be treated as void, for a supervening impossibility and the parties*

*are discharged from performing the contract. It is for this reason that, Articles 5.8.3 and 16.3 provide for termination of the contract. The Respondent cannot be found fault with, for the action taken to terminate the PPA.”*

26. Therefore, it is submitted that the said default notice is issued well within the bounds of the law as well as the PPA, moreover, the said default notice was issued only after giving several extensions to the Appellant based on its requests and upon failure to achieve the deadlines despite the extensions, hence, the contention that the said demand is illegal, arbitrary and issued in violation of the principles of natural justice is wholly untenable and deserved to be rejected.

27. It is the contention of the Appellant that the delay in achieving the deadline for conditions precedent and SCOD is attributable to the delay in obtaining land conversion approval and that the same amounts to a force majeure event.

28. In this regard, it is submitted that Article 4.2(f) of the PPA lays down the Conditions Precedent and casts an obligation upon the Appellant to have a clear title and possession of land upon which the Project is to be established, it is submitted that the said condition precedent is required to be satisfied by the Developer, i.e the Appellant herein.

29. Furthermore, the Appellant under the garb of Article 14 i.e., events classified as force majeure events, cannot claim that the non-grant of the land conversion approval by the Deputy Commissioner is a force majeure event. Article 14 clearly sets out an exhaustive list of events which are to be termed as force majeure events, failure to obtain land conversion approval by the



Deputy Commissioner does not amount to a force majeure event as contemplated under the said Article.

30. The responsibility of establishing the Project is solely on the Appellant and if the land identified by the Appellant cannot be used for the intended purpose, the same cannot be a reason for exempting the Appellant of its contractual obligations.

31. Without prejudice to the above, it is submitted that even if for the sake of arguendo, it is assumed that non-grant of land conversion approval amounts to a force majeure event under Article 14.3, the Appellant has failed to adhere to the terms of the PPA and the procedure set out for invocation of the force majeure clause under Article 14.5.

32. As per Article 14.5, in order to invoke the force majeure clause, a notice is to be issued "as soon as reasonable predictable, but no longer than 7 days after the date on which such party knew or should reasonably have known of the commencement of the event of force majeure", it is a settled law that when the contract provides for a certain procedure to be followed, non-adherence to the same vitiates any claim and in the present case, the Appellant has clearly failed to issue a force majeure notice as contemplated in the PPA, the same has also been noted by the State Commission at Para 7(f) of the Impugned Order, as "no Notice, as contemplated under Article 14.5 of the PPA, notifying the force majeure event, was given by the Developer to the Respondent".

33. In this regard reliance is also placed on the decision of this Tribunal in *Himachal Sorang Power Ltd v. CERC & Anr [2015 SCC OnLine APTEL 148]* wherein it was affirmed that unless the procedure contemplated in the force majeure clause is adhered to, the said clause cannot be invoked.

34. Additionally, even Article 5.7.3 provides for termination of the agreement by either of the parties in a situation where in the event of force majeure continues to exist even after a maximum period of three months.

35. Therefore, it is submitted that the impugned order of the State Commission is a well-reasoned order and the same ought not to be interfered with.

36. Article 5.8.1 of the PPA, entitles the Respondent herein to levy damages on the Appellant for delay in commencement of supply of power and delay in fulfilment of the Conditions Precedent, in the present case, the Appellant failed to achieve the Conditions Precedent within the stipulated time frame and extended time-frame and further failed to commission the project even within the revised SCOD thereafter, therefore, the Appellant who is solely responsible for the delay, is liable to pay damages in accordance with the terms of the PPA.

37. In furtherance to the same, Article 4.4(b) of the PPA provides for invocation of the performance security in the event of failure to achieve the Conditions Precedent, in the present case, the Appellant has failed to fulfil the Conditions Precedent despite being granted several extensions, further, it must be noted that as per the terms of the PPA, no notice is required to be issued prior to invocation of liquidated damages and encashment of the Bank Guarantees, therefore, the invocation of Bank Guarantee by the Respondent herein is lawful and there exists no violation of the principles of natural justice as contended by the Appellant.

38. Insofar as the present status of the Bank Guarantee is concerned, it is submitted that the said bank guarantee lapsed on 31.12.2016.

39. Therefore, in light of the above submissions, it is submitted that the Impugned Order of the State Commission ought to be upheld and the reliefs sought in the present appeal are wholly untenable and deserve to be rejected.

**Our Observation & Conclusion**

40. We find merit in the submissions of the Respondent No. 2, BESCOM, the Appellant has failed in performing the contract, on the other hand, the Appellant could place any reasonable justification in achieving the “**Condition Precedent**” even till date the hearing was concluded before us.

41. Further, non-acquisition of land is not only a default with respect to “**Condition Precedent**” but also start of the project in time.

42. Further, in the light of the submissions of the Respondent No.2, BESCOM, this Tribunal by Order dated 18.07.2023 directed as under:

“

**ORDER**

*Oral submissions have been completed both by Ms. Abiha Zaidi, learned Counsel for the Appellant and Ms. Garima Jain, learned Counsel for the 2<sup>nd</sup> Respondent. Both Counsel seek ten days’ time to file their gist of submissions. During the course of hearing, it has been brought to our notice that, pursuant to the Interim Order passed by the Karnataka High Court in the year 2016, invocation of Bank Guarantee by the 2<sup>nd</sup> Respondent was stayed; and, as against the total Bank Guarantee furnished for Rs. 3.875 Crores, the 2<sup>nd</sup> Respondent has already encashed Rs. 77 Lakhs leaving BGs for Rs. 3.10 Crores uncashed till then.*

*It is only, thereafter, that the Appellant approached the Regulatory Commission in the year 2017 and, on their Petition being dismissed, they invoked the jurisdiction of this Tribunal in the year 2018. **The Interim Order passed by the Karnataka High Court continued to remain in force till WP No. 46441 of 2016 was dismissed on 30.06.2023 on the ground that it was not maintainable.***

*The material on record does not show whether the Appellant had extended the validity of these Bank Guarantees, and whether the Bank Guarantees furnished by the Appellant earlier are still valid or have expired. **Both Ms. Abiha Zaidi, learned Counsel for the Appellant and Ms. Garima Jain, learned Counsel for the 2nd Respondent, state that they would ascertain and inform this Tribunal, by the next date of hearing, as to whether the subject Bank Guarantees are still alive or whether their validity has expired; and if it has been extended then till which date; and if it has expired, the date on which it had.***

*Reference was made during her oral submissions, by Ms. Abiha Zaidi, learned Counsel, to the Appellant having entered into a Lease Agreement, and to have executed on 21.04.2016 a Lease Deed in respect of 30 acres of land in Mylanahalli, Challakere Taluk. **A copy of the said Lease Deed has not been filed along with the Appeal.***

*The period for which such a Lease Agreement was entered into is required to be ascertained for the schedule to the Power Purchase Agreement required the Developers to have Lease hold rights for at-least 30 years. It is also not known whether or not the subject Lease Deed has been registered.*

*Ms. Abiha Zaidi, learned Counsel for the Appellant, undertakes to produce a copy of the said Lease Agreement, and inform this Tribunal whether or not the said Lease Deed was registered; and, if so, to produce a copy of the Registered Lease Deed.*

*The aforesaid information, along with the gist of submission, shall be filed by the next date of hearing.”*

43. In the light of the submissions of the Respondent No. 2 that the Appellant failed to achieve the “**Condition Precedent**” even till date the hearing has been held, where as Article 4.1 of the PPA provides for achievement of **Conditions Precedent** within 180 days from the Effective Date (06.02.2014) i.e., till 05.08.2014.

44. However, the Appellant countered the submission by stating that the Appellant has “**entered into a Lease Agreement, and to have executed on 21.04.2016 a Lease Deed in respect of 30 acres of land in Mylanahalli, Challakere Taluk.**”

45. To ascertain the facts, this Tribunal directed the Appellant to furnish a copy of the “Registered Lease Deed”, before the next date of hearing.

46. The next hearing was held on 07.08.2023, wherein, the Appellant submitted that “**the lease deed, as detailed in the letter of the Appellant dated 21.04.2016, does not exist.**” accordingly, this Tribunal passed the following Order:

“

#### ORDER

*The Appellant had initially furnished a Bank Guarantee for Rs.3,87,50,000/- (Three Crore Eighty-Seven Lakh Fifty Thousand*

only) out of which, one of the Bank guarantees was for Rs.77,50,000/- (Rupees Seventy-Seven Lakh Fifty Thousand only). For the delay on the part of the Appellant in complying with the conditions precedent, a sum of Rs.23,25,000/- (Twenty-Three Lakh Twenty-Five Thousand only) was encashed by the 2nd Respondent. This sum of Rs.23,25,000/- was replenished by the Appellant resulting in the Bank Guarantee representing the originally furnished sum of Rs.77,50,000/-.

Out of the Bank Guarantees furnished for Rs.3,87,50,000/-, a further sum of Rs.1,67,50,000/- (One Crore Sixty-Seven Lakh Fifty Thousand only) was encashed on the ground that the Appellant had delayed commissioning of its plant, leaving the balance sum of Rs.2,20,00,000/- (Rupees Two Crore Twenty Lakh only) of the Bank Guarantee un-encashed. **It is this amount of Rs.2.20 crores which the 2nd Respondent had sought to encash on termination of the Power Purchase Agreement.** However, they were disabled from doing so, in the light of the interim order passed by the Karnataka High Court on 26.08.2016. The said interim order continued to remain in force till the Writ Petition was itself dismissed by Order dated 06.07.2023. **During the interregnum, the validity of the Bank Guarantee for Rs.2.20 crores expired on 31.03.2016.**

**Ms. Garima Jain, learned Counsel for the 2nd Respondent, would submit that, even if the Appeal were to be dismissed, there is no amount available for recovery towards Liquidated Damages of Rs.2.20 crores. On the other hand, Ms. Abiha Zaidi, learned Counsel for the Appellant, would submit that, though the Bank Guarantee may not have been extended, the said amount of Rs.2.20 crores is still lying with ICICI Bank, Sobha Pearl**

**Branch, 1st Floor, West Wing, No. 1, Commissariat Road, Bangalore, PIN-560025.**

*While Ms. Garima Jain, learned Counsel for the 2nd Respondent would contend to the contrary, Ms. Abiha Zaidi, learned Counsel for the Appellant, seeks time to enable her to file an affidavit of the authorised representative of the Appellant asserting to the fact that this sum of Rs.2.20 crores is lying with the ICICI Bank at the afore-said address. **Learned Counsel for the Appellant further submits that the lease deed, as detailed in the letter of the Appellant dated 21.04.2016, does not exist.***

47. We, strongly condemn the conduct of the Appellant, the Appellant not only failed in performing the contract but also tried to defend its case by misleading this Tribunal, it is not only a false statement made before this Tribunal that the Appellant has already signed a Lease Agreement for land, however, on being asked to produce a copy of such agreement, it was complete reversal.

48. Once the Appellant has failed in achieving the “*Condition Precedent*”, the Respondent No. 2 has all the rights under the PPA to terminate the PPA, and therefore, the State Commission rightly approved the termination of PPA by the Respondent No. 2, the relevant extract has already been quoted in the preceding paragraphs, however for clarity again reproduced as under:

“7(f) .....

*During the pendency of the proceedings, when questioned about the status of the project, **the learned counsel for the Petitioner informed that, alternative lands are being identified.** It can be inferred that, the Project is in a very preliminary stage of*

*implementation, despite lapse of more than two years from the date of execution of the PPA. We note that, the contract is frustrated due to lapse of time. The commissioning of the Project would be impossible, unless the lands are identified and all approvals are obtained by the Project Developer. If the lands are not procured within a reasonable time, the contract is to be treated as void, for a supervening impossibility and the parties are discharged from performing the contract. It is for this reason that, Articles 5.8.3 and 16.3 provide for termination of the contract. The Respondent cannot be found fault with, for the action taken to terminate the PPA.”*

49. We find no infirmity in the Impugned Order, *inter-alia*, deserves to be upheld.

50. During the hearing, it has also come to our notice that the Bank Guarantee(s), as furnished by the Appellant, have been lapsed, the State Authorities/BESCOM failed to perform diligently, in ensuring the Bank Guarantee be kept live by the Appellant, however, at this stage we cannot pass an order on this aspect.

51. However, as informed by the Appellant that “***though the Bank Guarantee may not have been extended, the said amount of Rs.2.20 crores is still lying with ICICI Bank, Sobha Pearl Branch, 1st Floor, West Wing, No. 1, Commissariat Road, Bangalore, PIN-560025.***”, the Respondent No. 2 should ensure recovery of the said amount, in case the statement made by the Appellant is true, it is the public money as such all efforts should be made by the Respondent.



**ORDER**

For the foregoing reasons as stated above, we are of the considered view that the present appeal being Appeal No. 335 of 2018 filed by the Appellant is devoid of merit and is dismissed.

The Impugned Orders dated 12.06.2018 passed by Karnataka Electricity Regulatory Commission in Original Petition No. 121 of 2017 is upheld.

Pending IAs, if any, shall stand disposed of in above terms.

**PRONOUNCED IN THE OPEN COURT ON THIS 30<sup>th</sup> DAY OF MAY, 2024.**

**(Sandesh Kumar Sharma)  
Technical Member**

**(Justice Ramesh Ranganathan)  
Chairperson**

*pr/mkj*