

BEFORE THE A.P. STATE ELECTRICITY REGULATORY COMMISSION

MONDAY, THE TWENTY FIFTH DAY OF APRIL  
TWO THOUSAND TWENTY TWO

PRESENT:

HON'BLE SRI JUSTICE C.V. NAGARJUNA REDDY, CHAIRMAN  
SRI P. RAJAGOPAL REDDY, MEMBER  
SRI THAKUR RAMA SINGH, MEMBER

**O.P.No.48 of 2020**

Between :

Guttaseema Wind Energy Company Pvt. Ltd.

... Petitioner

And

APSPDCL

... Respondent

This O.P. having come up for hearing on 02-02-2022 in the presence of Sri Sanjay Sen, Senior Counsel, representing Sri M.V. Pratap Kumar, learned Counsel for the petitioner and Sri P. Shiva Rao, learned Standing Counsel for the respondent and upon hearing the arguments of both the Counsel, the Commission made the following :

**ORDER:**

The petitioner pleaded that it is a Company incorporated under the Companies Act 1956 and involved in the business of generation of electricity from renewable sources (wind) of energy; that the Government of India enacted Electricity Act 2003 (for brevity "the 2003 Act") in the place of Indian Electricity Act 1910, Electricity Supply Act 1948 and the Electricity Regulatory Commission Act 1948; that the statement of objects and reasons of the 2003 Act, *inter alia*, provide for private sector participation in generation,

transmission and distribution of electricity and aimed at promoting efficient and environmentally benign policies; and that Sections 61(h) and 86(1)(e) and other provisions of the 2003 clearly stipulate the necessity for promotion and generation of electricity through renewable sources of energy. It was further pleaded that in terms of Section 3 of the 2003 Act, the Central Government formulated National Electricity Policy (NEP) and notified the same on 12-02-2005 which envisaged an urgent need to promote generation of electricity based on non-conventional renewable energy sources and allow a sustained growth of these generation activities.

The petitioner further pleaded that in accordance with the policies of the State Government and in accordance with the provisions of the 2003 Act, it was accorded sanction to set up wind power project of 80 MW; that accordingly the petitioner entered into Power Purchase Agreement (PPA) with the respondent-DISCOM on 09-05-2016; that as per the PPA, the respondent agreed to purchase the power generated from the wind power project of the petitioner @ Rs.4.84/- per unit as per the order dated 26-03-2016 for a period of 25 years from the Commercial Operation Date (COD); that this Commission vide orders dated 25-05-2016 consented to the PPA; and that thereafter the petitioner obtained all the approvals and permissions including the approval for power evacuation at the interconnection facility to the pooling substation to set up the 80 MW

capacity wind power project at Borampalli, Rudrampalli, Egalavanka and Basavapuram in Anantapur District. It was further pleaded that the petitioner requested APTRANSCO's approval for evacuation of power for Borampalli 220 kV SS for its wind power project; that accordingly, APTRANSCO issued letter dated 12-03-2018 to the petitioner granting approval for evacuation of power from the petitioner's project for connecting to Borampalli sub-station at 220 KV level through the pooling substation of M/s. Saipuram Wind Energies at East Kodepalli; that pursuant to the approval granted by APTRANSCO, on 21-03-2018 the respondent issued synchronization permission for 10 MW out of 80 MW of wind power and that the first unit of the project was commissioned on 22-03-2018.

It was further pleaded that an amendment agreement to the PPA dated 09-05-2016 was executed between the petitioner and the respondent on 13-08-2018 for incorporating the change of location of the wind power project from Palakonda Hills in Anantapur and YSR Kadapa District to Borampalli, Rudrampalli, Elagalavanka and Basavapuram in Anantapur District for speedy implementation of the project; that the amendment to the PPA was consented to by this Commission on 20-09-2018; that thereafter the respondent approved synchronization for another 10 MW (2x5) Wind Turbine Generators and vide letter dated 01-02-2019 permitted recording of the energy meter reading and carrying out synchronization in coordination

with APTRANSCO and thus another 10 MW out of 80 MW was commissioned on 07-02-2019 at Rudrampalli, Borampalli, Yelagallavanka and Basavapuram villages in Anantapur District; and that vide letter dated 23-02-2019, the respondent certified the synchronization and commissioning of 10 MW out of 80 MW. It was further pleaded that the petitioner informed the respondent on 29-05-2019 that the installation and construction work in respect of another 20 MW capacity was completed in all respects and requested for issue of work completion report for processing of synchronization approval; that the CEIG certified the readiness of the electrical installations and accorded approval on 4-6-2019 for energizing the 20 MW WTGs and the petitioner informed the respondent that it has received the CEIG approval in respect of another 20 MW and accordingly on 11-06-2019 requested the respondent to arrange for synchronization approval. It was further pleaded that on 11-06-2019, the SE/O, Anantapuram Circle informed the CGM (Projects & IPC) of the respondent that the petitioner received the approval of CEIG in respect of 20 MW; that however the respondent has not taken any steps for synchronization of another 20 MW which was ready for commissioning since May 2019; that on 30-11-2019, the petitioner issued another letter to the respondent informing that it had completed the project works in respect of another 20 MW capacity and requested it to accord approval for synchronization; that the

respondent deliberately has not assisted and had not provided necessary support as stipulated in Article 6.2 of the PPA to the petitioner for achieving synchronization and COD of another 20 MW capacity; that the said acts of the respondent are clearly in breach of Articles 6.2(ii) and (iii) of the PPA and that therefore the respondent is liable to pay damages for the losses suffered by the petitioner from June 2019 in the form of loss of generation of valuable wind power from the additional 20 MW capacity till date. It was further pleaded that the petitioner performed its obligations as per the PPA and achieved the COD for 20 MW out of 80 MW within the stipulated time and was ready to commission another 20 MW in June 2019 itself; that despite the best efforts of the petitioner, the respondent, without assigning any reason, has not permitted synchronization of another 20 MW; that the failure of the respondent to grant synchronization approval has severely impacted the petitioner and that as a result of the arbitrary inactions of the respondent and breach of reciprocal promise of the respondent, the petitioner was constrained to keep the works relating to the balance 40 MW on hold. It was further pleaded that on 20-07-2020, the petitioner received notice bearing Lr.No.APSPDCL/TPT/CGM/IPC/GM/IPC/EEE/F456/D.No.86420, dated 01-07-2020 from the respondent and pursuant thereto the respondent unilaterally amended the PPA dated 09-5-2016 by limiting the capacity of the project to 20 MW; that in the said letter, the respondent alleged that notice

dated 04-01-2020 was issued to the petitioner towards non-commissioning of the balance 60 MW against the total capacity of 80 MW as per the PPA dated 09-05-2016; that the petitioner has not received any such letter dated 04-01-2020 as claimed by the respondent; that the respondent also alleged that the petitioner has not completed the project within 24 months' period and because of the same, the PPA dated 09-05-2016 was being limited to the synchronized capacity of 20 MW instead of 80 MW w.e.f. the date of the notice; that these allegations of the respondent are totally false and baseless and that the respondent arbitrarily issued the letter dated 01-07-2020 by deliberately ignoring the fact that the issue of approval for synchronization of 20 MW is pending with the respondent itself.

The petitioner further pleaded that it has invested more than Rs.330/- crores for setting up the project despite heavy odds and difficulties; that the petitioner is and has always been ready and willing to perform its obligations under the PPA and supply wind power to the respondent; that the petitioner has already commissioned 20 MW and has mobilised men and material for the commissioning of another 20 MW and upon the respondent providing approval as requested by the petitioner; that the petitioner will complete the remaining 40 MW and that therefore the impugned letter dated 01-07-2020 issued by the respondent may be set-aside.

It was further pleaded that it is common knowledge that the world is affected by the pandemic caused due to Covid-19; that in January 2020, the World Health Organization (WHO) declared Covid-19 as a pandemic; that the GoI, on 19-02-2020 also stated that Covid-19 would be considered as a natural calamity and treated as *force majeure*; that the GoI, MNRE passed order dated 20-03-2020 declaring that the delay on account of disruption of supply chains due to the spread of Covid-19 as a *force majeure* event; that the Ministry of Home Affairs passed order dated 24-03-2020 imposing lockdown from 25-03-2020 to prevent the spread of Covid-19 in India and extended the same upto 03-05-2020; that the GoI, MNRE also issued order dated 17-04-2020 to the effect that with respect to all RE projects, the lockdown period will be treated as a *force majeure* event and the completion of the lockdown will be extended by a period equivalent to the lockdown period and an additional period of 30 days; that the GoI further extended the lockdown in containment zones across India upto 30-06-2020 and that the GoI, MNRE further clarified that the lockdown will be treated as such from 25-03-2020 to 31-05-2020.

In the O.P., the petitioner has specifically raised the following grounds:

- (i) The impugned letter dated 01-07-2020 is in violation of the principles of natural justice inasmuch as neither the procedure stipulated in the PPA was followed nor prior notice to show cause

was issued to the petitioner in relation to the allegations set out in the impugned letter.

- (ii) The impugned letter is vitiated in as much as the letter dated 04-01-2020 which is claimed to have been issued by the respondent was not received by the petitioner.
- (iii) Without prejudice to the contentions raised above, the action of the respondent in issuing the impugned letter and limiting the capacity under the PPA to 20 MW out of 80 MW, thereby terminating the PPA to the extent of 60 MW unilaterally is illegal and contrary to the terms of the PPA.
- (iv) The impugned letter of the respondent is vitiated as it is not permissible for the respondent to unilaterally amend or to restate the terms of the PPA which is a bilateral contract between the respondent and the petitioner.
- (v) The respondent failed to see that the petitioner had completed the works for commissioning of additional 20 MW capacity as notified by the petitioner to the respondent vide letters dated 29-05-2019, 11-06-2019 and 20-11-2019.
- (vi) The respondent further failed to see that the respondent had accorded approval for commissioning of 20 MW out of 80 MW on 07-02-2019 and that the request of the petitioner for commissioning of the additional 20 MW capacity is pending with the respondent and in the absence of the respondent complying with its obligations to provide the synchronization approval for the said 20 MW, the petitioner cannot be expected to perform his part of the contract to commission the additional 40 MW.
- (vii) The impugned letter issued by the respondent is vitiated inasmuch as the respondent failed to see that the petitioner had obtained



all the approvals necessary for commissioning of additional 20 MW capacity including the certification from CEIG and that it was the respondent which has failed to come forward and grant approval for synchronization of the said 20 MW capacity.

- (viii) The arbitrary actions of the respondent to limit the PPA to 20 MW are wholly perverse and illegal inasmuch as reference to Article 9.1 of the PPA is wholly incorrect as the respondent has misconstrued the provisions of the PPA. There was no default on the part of the petitioner as alleged or otherwise. Further, there is no provision in the PPA that enables the respondent to unilaterally alter or amend the PPA and limit the capacity to 20 MW.
- (ix) The respondent failed to see that the petitioner had made huge investments for setting up the project by taking loans from banks and that the aforesaid actions of the respondent in unilaterally altering/terminating the PPA has adversely affected the project and project works have come to a stand-still.
- (x) The impugned letter was further issued when the entire country is in the grip of Covid-19 pandemic and life had come to a stand-still as a result thereof. Thus the impugned letter falls foul of the orders/circulars issued by the GoI and the National Disaster Management Act and the orders passed by the Hon'ble Supreme Court of India and other Courts to provide succour to the needy and also allowed status quo to be maintained till normalcy is restored.
- (xi) The impugned letter of the respondent is de hors the provisions of the PPA and in gross violation of the NEP 2005, NTP 2016, the provisions of the 2003 Act and the 2008 Wind Policy, 2015 Wind Policy and 2018 Wind Policy of the GoAP.

The respondent filed a counter pleading that the petitioner initially contemplated 80 MW wind power project at Palakonda Hills of Anantapur District on 13-09-2012 and obtained connectivity approval to Chakrayapta sub-station; that subsequently on 07-05-2013, the petitioner obtained approval from NEDCAP for 80 MW and entered into agreement on the same day with the time limit upto 06-05-2015 to commission the project; that on 16-05-2015, NEDCAP has issued time extension for completing the project upto 06-05-2016; that, again on 18-12-2015 the Executive Director (Planning) of APTRANSCO has accorded connectivity approval for 80 MW project at Palakonda Hills to be connected to Goddu Marri substation in lieu of Chakrayapeta substation; that the on 20-04-2016 and 15-07-2017, the petitioner obtained NEDCAP's approval for extension of time upto 06-05-2017 and 20-04-2018 for completion of the project; that until then there was no contemplation or intendment or agreement with the respondent to supply the said power from the project to the Discoms; that in the meanwhile this Commission issued Regulation No.1 of 2015 on 31-07-2015 fixing the norms for generic tariff and on 01-08-2015 tariff order deciding the wind power tariff @ Rs.4.84 ps per unit in respect of the projects established in FY 2015-16.

It was further pleaded that on 09-05-2016, the petitioner entered into PPA with the respondent for establishment of 80 MW project at Palakonda

Hills to supply power to the respondent; that this Commission vide its orders dated 25-05-2016 has granted consent to the PPA dated 09-05-2016; that indisputably within two years from the date of PPA, the petitioner had completed 10 MW only and thus the petitioner committed default in respect of the balance 70 MW; that subsequently on 07-02-2019 the petitioner has completed another 10 MW capacity, totalling 20 MW out of 80 MW; that the 10 MW capacity completed on 07-02-2019 is beyond the stipulated period as per the PPA and the NEDCAP extended time limit upto 20-04-2018 and that in fact the said 10 MW project also could not have been accepted but due to inadvertence the same was accepted.

It was further pleaded that subsequently the petitioner could not complete the balance capacity of the project; that the failure of the petitioner has triggered the effect of Articles 6 and 9 of the PPA and thus the PPA in respect of the balance capacity of 60 MW is liable for termination and that therefore the respondent issued notice dated 04-01-2020 proposing to limit the PPA for 20 MW only and to terminate the PPA in respect of the balance capacity. It was further pleaded that during March 2017, in the bidding process conducted for procurement of wind power, the tariff was discovered at Rs.3.42 ps, due to the development in technology in the production of wind power turbines and increased hub height; that during the further course of time, the tariff was discovered at Rs.2.43 ps. per unit by the

year 2019 and during the year 2020 it was reduced to Rs.2/- per unit; and that therefore, in public interest, the respondent issued notice dated 04-01-2020 as to why the PPA shall not be confined to 20 MW as against 80 MW on the ground that the petitioner committed default and thereafter vide letter dated 01-07-2020 it was finally decided not to procure power in respect of the balance 60 MW capacity of the project. It was further pleaded that the claim of petitioner that it has not received letter dated 04-01-2020 is an afterthought and that in fact the petitioner has received the notice.

That during the FY 2018-19, the respondent could not pay the monthly power purchase bills because of the fact that the power purchase cost in A.P. was very much higher when compared to Gujarat State etc; that the respondent having found that the wind power tariff determined by this Commission through its tariff orders was on higher side, on 30-09-2018 the respondent filed O.P.No.17 of 2019 for reduction of tariff in respect of which PPAs which were entered by then including the petitioner and the same is pending before this Commission; that pending disposal of the O.P. which may take long time, the respondent has issued (notice) to all the VRE Power Developers including the petitioner requesting them to come forward to reduce the tariff from Rs.4.84 ps to Rs.2.43 ps; that the wind developers have challenged the said notice in W.P.No.9844 of 2019 & Batch; that prior to the said Writ Petition, the wind power developers have also challenged the very

entertainment of O.P.No.17 of 2019 by this Commission in W.P.No.2401 of 2019 & Batch; that the Hon'ble High Court of A.P., passed common order dated 24-09-2019 dismissing W.P.No.2401 of 2019 & Batch and directed this Commission to proceed with the hearings in O.P.No.17 of 2019; that considering the fact that the respondent could not pay the monthly power supply bills from June 2018 onwards, the Honourable High Court has directed it to pay tariff @ Rs.2.43 ps. per unit in respect of the pending and future bills as an interim measure until disposal of O.P.No.17 of 2019; that the respondent is unable to pay monthly power supply bills even as per the said interim order and that the monthly power supply bills from 01-04-2020 are pending for payment. It is also further pleaded that the respondent/DISCOMS have suffered losses of Rs.35,000 crores; that their borrowing capacity has also exhausted; and that in spite of their best efforts for getting loans and the GoAP also providing guarantee for securing loans, the financial institutions are not coming forward to grant loans. That during the course of time, the Central Electricity Authority in its report dated 01-01-2018 stated that there is hidden cost of burden of more than Rs.2/- towards adequacy cost, balancing cost and Grid integration cost on the Discoms in procurement of VRE power; that considering all the aforesaid facts viz., default of the petitioner in completing the project within two years from 09-05-2016, critical financial position of the respondent, huge surplus

power availability from the sources which have binding PPAs with the DISCOMS and more particularly from wind power with a capacity of 4900 MW, the hidden cost burden in procuring the VRE power, there is no option to the respondent than not to procure any more power from the VRE generators except from the projects already completed and that therefore it has issued notice on 04-01-2020 to the petitioner and later the impugned notice dated 01-07-2020 absolutely in terms of the PPA and the Electricity law in force.

While replying to the specific pleas of the petitioner in para 5(j) to (m) of the O.P., the respondent pleaded that the request dated 29-05-2019 of the petitioner seeking synchronization of 20 MW was not accepted as the same was in breach of the terms of the PPA and that even the request dated 30-09-2019 reiterating its earlier request was also not accepted for the same reason. In reply to para 5(n) to (p), the respondent pleaded that it is incorrect to state that the additional 20 MW capacity was ready in June 2019 itself and the petitioner is put to strict proof of the same; that it is incorrect that the petitioner has suffered huge losses in the form of loss of generation and that although the respondent was obliged as per the terms of the PPA to grant synchronization, it has deliberately refused the same. That as a matter of fact, it is the petitioner who has committed default in completion of the project by 15-07-2017; and the NREDCAP extended upto 06-05-2018 and,

therefore. the petitioner is precluded from challenging the action of the respondent for not granting synchronization; that as per Article 9 of the PPA, since admittedly there was default in achieving the COD by 09-05-2018, the PPA is liable to be terminated and that therefore the respondent rightly refused to procure the power in respect of the balance capacity and issued the impugned notice. Replying to para 5(r) to (v) of the O.P., the respondent denied the claim of the petitioner that it has invested Rs.330 crores as baseless and false; that the petitioner having committed breach of the provisions of the Indian Contract Act is precluded from seeking enforcement of the terms of the PPA; that the other averments about Covid-19 pandemic are irrelevant as the petitioner committed default by May 2018 itself; that the Hon'ble Supreme Court in a recent Judgment held that extension (of time) because of Covid-19 applies only to the organizations which are diligent and the stipulated date did not fall prior to March 2020 and that therefore all the claims of the petitioner in relation to Covid-19 are irrelevant for the issue involved. In reply to the grounds raised in the O.P., the respondent denied that the impugned letter is in violation of the principles of natural justice; that as the impugned letter was preceded by notice dated 04-01-2020, there is absolute compliance of the terms provided in Article 9 of the PPA. It is denied that there was no default on the part of the petitioner in completion of the project as per Article 6 of the PPA; that the claim of the petitioner that

the action of the respondent is in violation of the NEP, NTP, Wind Policies of the GoAP and the provisions of the 2003 Act is baseless besides being incorrect; that the preamble of the NEP at paras 1 and 2 clearly state that the object is to supply power at a reasonable rate to the rural India and that therefore permitting the petitioner to supply power to the DISCOMS @ Rs.4.84 ps per unit offends the said policy.

The petitioner filed rejoinder wherein adverting to para-2 of the counter it was pleaded that the petitioner entering into an agreement with NREDCAP for establishment of a wind power project at Palakonda Hills is irrelevant inasmuch as the PPA with the respondent was executed on 09-05-2016 for the purposes of setting up of 80 MW Wind Power Plant at Palakonda Hills, Anantapur District and that therefore the allegation that there was no contemplation or intendment or agreement with the respondent for the supply of power from the project to A.P. DISCOMS is factually incorrect and denied. The petitioner denied the averments of para-5 of the counter as incorrect. It was further pleaded that 10 MW out of 80 MW was completed and synchronized on 21-03-2018; that an amendment agreement to the PPA was executed between the petitioner and the respondent on 13-08-2018 for incorporating the change of location of the wind power project from Palakonda Hills to Borampalli, Rudrampalli, Egalavanka and Basavapuram in Anantapuram District for speedy



implementation of the project and the amendment to the PPA was consented by this Commission on 20-09-2018; that subsequent to the amendment of the PPA, another 10 MW was synchronized on 01-02-2019 vide letter dated 23-02-2019 and the respondent certified the synchronization and commissioning of a further 10 MW and that therefore the averment that the petitioner had completed only 10 MW within two years and committed default is incorrect and denied inasmuch as by virtue of the amendment agreement dated 13-08-2018, the time period for completion of the project stood extended and the same was also accepted by the respondent and had approved the commissioning of additional 10 MW out of 80 MW on 07-02-2019 itself and that therefore the averment that the commissioning of 10 MW is beyond the stipulated period as per the PPA and the NREDCAP extended the time limit of 20-04-2018 is incorrect and denied. That the further averment that the respondent accepted the commissioning of the additional 10 MW by inadvertence is also misconceived and denied inasmuch as the respondent was aware that the PPA stood amended by virtue of the amendment agreement and that therefore the time period for completion of the project also stood extended.

The averments of para-6 of the counter are denied as incorrect. It was further pleaded that the averment that the petitioner could not complete the balance capacity of the project; that therefore the same has triggered the

effect of Articles 6 and 9 of the PPA and that the PPA is liable for termination are denied as incorrect. It is further pleaded that the respondent failed to see that the petitioner had informed the respondent on 11-06-2019 itself that another 20 MW capacity was completed in all respects and requested for issue of work completion report; that the respondent further failed to see that CEIG certified the readiness of the electrical installations and accorded approval on 04-06-2019 for synergizing 20 MW and that on 11-06-2019 the respondent acknowledged that CEIG approval was also received by the petitioner and that therefore the averment that the petitioner could not complete the balance capacity of the project is denied as incorrect. That the further averment that the respondent issued notice dated 04-01-2020 for limiting the PPA for 20 MW is also misconceived inasmuch as it is the specific case of the petitioner that it has not received any such letter.

The petitioner denied the averments in para-7 of the counter as incorrect. It was further pleaded that the explanation provided by the respondent for confining the PPA to 20 MW as against 80 MW is misconceived as the said reasoning or explanation is not forthcoming from the notice dated 04-01-2020; that the averments in para-7 reveal that the notice dated 04-01-2020 was issued for extraneous and irrelevant reasons and not for the alleged default on the part of the petitioner; that the respondent has resorted to reneging from the committed terms of the PPA

and the tariffs set out therein and that therefore the issuance of termination letter is vitiated for being malafide in nature. The petitioner denied the averments in para-8 of the counter as incorrect and reiterated that it has not received the letter dated 04-01-2020.

It was further pleaded that the contents of para-9 of the counter are misleading and therefore they are denied. It was further pleaded that the averments in the said paragraph relate to the alleged steps taken by the respondent for reduction of the wind power tariff and the same are not connected with the subject matter of the present O.P; that OP No.17 of 2019 pending before this Commission and the related proceedings in the Writ Appeals before the Hon'ble High Court are entirely irrelevant to the present issue of arbitrary and illegal termination of the PPA by the respondent; and that notwithstanding the steps taken by the respondent to file OP No.17 of 2019, it is incumbent on the respondent to comply with its obligations under the PPA and provide synchronization approval in accordance with the terms of the PPA. The petitioner denied the averments in paras 10 and 11 of the counter as incorrect and put the respondent to strict proof of the same.

While denying the averments of para-12 of the counter as incorrect, the petitioner pleaded that the said averments clearly support the case of the petitioner that the issuance of the impugned notice dated 01-07-2020 is vitiated in law as being actuated by extraneous considerations; that the

alleged default of the petitioner was used as a ruse to further the real intention of the respondent to stop procurement of power from renewal energy generators and that the difficulty in complying with the terms of the contract will not permit the respondent to unilaterally repudiate the contract. As regards the averments in para-15 of the counter, the petitioner denied that its request dated 29-05-2019 seeking synchronization of additional 20 MW was not accepted since the same is in breach of the terms of the PPA, as an afterthought as the respondent never informed the petitioner that its request for synchronization was not being considered due to the alleged delay. In this regard, the petitioner pleaded that the respondent had on 11-02-2019 accorded its approval for synchronization for additional 10 MW out of 80 MW.

The averments of para-16 are denied as incorrect. It was further pleaded that the averment that the project in respect of 20 MW was not ready in June 2019 is incorrect and misconceived as the petitioner had received the CEIG's approval on 04-06-2019 and the same was also acknowledged by the respondent on 11-06-2019. The petitioner denied the averment that it has committed default of its obligation in completion of the project by 09-05-2018 and therefore it is precluded from challenging the action of the respondent as incorrect. It was further pleaded that the respondent is estopped from contending that the petitioner has defaulted on

the terms of the contract inasmuch as the respondent itself had granted synchronization approval on 11-02-2019 for additional 10 MW out of 80 MW thereby signifying that the respondent has accepted that the time period for completion of contract has been extended by two years from the date of the amendment agreement. The petitioner further denied the averment that it admitted that there was default in achieving COD under the PPA that therefore the contract is liable for termination as incorrect. The petitioner denied the averments of para-17 as incorrect. It was further denied that the petitioner having committed breach is precluded from seeking enforcement of the terms of the PPA. It was pleaded that the petitioner has always been ready and willing to perform its obligations under the PPA and that the petitioner is awaiting the synchronization approval so as to enable it to provide power to the respondent. It was denied that the petitioner committed defaults from May 2018 and that therefore the averments about Covid-19 are irrelevant. It was pleaded that in the light of the amendment agreement, the time period for completion of the project stood extended and the extended period fell within the period of Covid-19 and that therefore the petitioner is entitled to the benefit of force majeure event that has been declared due to Covid-19. While denying the averments of para-18 of the counter, it was pleaded that the petitioner has not received the notice dated 04-01-2020 and that therefore it is not permissible for the respondent to

contend that the termination notice was preceded by the show cause notice. The petitioner denied the averments of para-19 and pleaded that it has made out a prima facie case for grant of interim reliefs and the main reliefs as well as set out in the O.P.

Having regard to the respective pleadings of the parties, the following points emerge for adjudication:

- 1) Whether the petitioner is entitled for synchronisation of the third unit of 20 MW Wind Power capacity as required by it, vide its letter dated 29-5-2019?
- 2) Whether the petitioner is entitled to approval and commissioning of the balance 40 MW Wind Power capacity out of the 80 MW, of which PPA dated 9-5-2016 was entered?

**Re Point No.1:**

Mr.Sanjay Sen, learned Senior Counsel for the petitioner, submitted that in pursuance of the approval granted by the NREDCAP, the petitioner initially proposed to establish 80 MW wind power unit at Paklakonda Hills in Anantapur and YSR Kadapa Districts; that, however, at the request of the petitioner, the NREDCAP accepted the petitioner's proposal for change of location to Borampalli, Rudrampalli, Elagalavanka and Basavapuram in Anantapur District, and that, accordingly, the NREDCAP has granted its approval and that an amended PPA was entered by the petitioner with the respondent, which was approved by this Commission after expiry of the original period for completion of the project. He has further submitted that

after obtaining CEIG approvals, the petitioner addressed a letter dated 29-5-2019 to the Chief General Manager (Projects & IPC) of the respondent to provide them the work completion report to enable synchronization of the third unit and to start power generation for exporting to grid. The learned Senior Counsel further submitted that after certain initial correspondence, the Chief General Manager (Projects & IPC) of the respondent, vide: his letter dated 01-7-2020 declined the petitioner's request and limited the wind power project synchronized capacity to 20 MW as against 80 MW of total project capacity. The learned Senior Counsel pointed out that the alleged notice dated 04-1-2020 referred to in the said letter dated 01-7-2020 was not received by the petitioner and that, at any rate, reliance on Article 9.1 of the PPA dated 09-5-2016 for resorting to the aforementioned action of limiting the capacity to 20 MW is not proper, legal and valid. In support of his submission, the learned Senior Counsel placed heavy reliance on the Explanation to Article 9.1 of the PPA read with Article 1.4. The learned Senior Counsel further submitted that, as envisaged by the Explanation to Article 1.4 of the PPA, in respect of the non-conventional based power projects, the date of synchronization of the first unit of the project will be treated as the Commercial Operation Date (COD) of the Project and that, therefore, the first unit of the project having been synchronized on 22-3-2018, i.e., well within the period of two years from the date of signing of the PPA, the petitioner is

entitled to the approval of the synchronization of the balance capacity even if they were not completed within the period of two years. The learned Senior Counsel further submitted that the respondent itself has approved synchronization of the second unit of 10 MW (2x5 MW) WTGs on 1-2-2019 i.e., much after expiry of the two years period and that by this conduct the respondent is estopped from insistence on adherence to two years period for completion of the entire project. The learned Senior Counsel also placed reliance on the conduct of the respondent in accepting the amendment of PPA for the entire capacity of 80 MW after the expiry of the two years period and submitted that having entered into the amended PPA on 13-8-2018, it does not lie in the mouth of the respondent to turn around and deny synchronization to the third unit of 20 MW capacity on the ground that the same was not made ready within the period of two years.

Per contra, Sri P.Shiva Rao, learned Standing Counsel for the respondent, has submitted that having entered into the PPA exclusively for the establishment of wind power project by the petitioner, it is bound to adhere to the timelines stipulated in the PPA for the completion of the Project. He further urged that due to the admitted failure to complete the entire project of 80 MW capacity within the period of two years, the petitioner is not entitled to insist on synchronization of the balance capacities, including the third unit, after expiry of the two years period from



the date of entering into the PPA. The learned Standing Counsel further submitted that allowing synchronization of 10 MW beyond the agreement period was itself a mistake and that the petitioner cannot insist that the same mistake shall be allowed to be repeated in the case of the third and subsequent units.

We have carefully considered the respective submissions of the learned counsel for the parties. In pursuance of the petitioner's application dated 11-4-2011 for allotment of wind farm of 80 MW capacity in Palakonda Hills, Anantapur and Kadapa Districts, the State Government has accorded approval for the same, vide: its letter dated 13-6-2012. The NREDCAP, which is the Nodal Agency, sanctioned the said project subject to various conditions through its proceedings No.NREDCAP/WE/Guttaseema/261/2013, dated 07-5-2013. On the same day, the petitioner entered into an agreement with NREDCAP.

The petitioner entered into the PPA on 09-5-2016 with the respondent. Almost at the fag-end of the second extension period, the petitioner approached NREDCAP through its letter dated 5-2-2018 proposing change of location of the project from Palakonda Hills to Borampalli, Rudrampalli, Egalavanka and Basavapuram villages in Anantapur District. Vide its proceedings dated 07-02-2018, the NREDCAP has approved the change of location.

Following the NREDCAP approval of change of location, amended PPA was entered by the petitioner with the respondent on 13-8-2018, whereunder, *inter alia*, Clause 1.13 of the PPA, dated 9-5-2016 was amended by substituting the name of the location from Palakonda Hills to Rudrampalli, Borampalli, Egalavanka and Basavapuram villages in Anantapuram District. Consequent changes relating to pooling or receiving sub-stations were also carried out. This Commission, vide its proceedings dated 20-9-2018 communicated its consent to the said amendment.

With the above facts in mind, the submissions of the learned Senior Counsel for the petitioner shall be considered.

The learned Senior Counsel has mainly emphasized that even though Article 9.1 of the PPA has stipulated the period of two years from the date of signing of the agreement for achieving the COD, the said Article shall be read in conjunction with the Explanation to Article 1.4.

For proper appreciation, these terms of the PPA are reproduced hereunder:

“Article 9.1. The Wind Power Producer shall achieve Commercial Operation Date within two years from the date of signing of the Agreement, default of which, the Agreement is liable for termination and the same can be done at the option of DISCOM with due notice”.

“Article 1.4. Commercial Operation Date (COD) means, with respect to each Generating unit, the date on which such Generating unit is declared by the Wind Power Producer to be operational, provided that the Wind Power Producer shall not declare a Generating Unit to be

operational until such Generating unit has completed its performance acceptance test as per standards prescribed.

Explanation: In respect of Non-conventional based power projects the date of synchronization of the first unit of the project will be treated as the Commercial Operation Date of the project.”

It is very clear from Article 9.1 that it postulates that the Wind Power Producer shall achieve the COD within two years from the date of signing the agreement, in default of which the agreement is liable to termination at the option of the respondent. Article 1.4 refers to COD in respect of each Generating Unit as the date as declared by the Wind Power Producer to be operational after completion of performance acceptance test as per the prescribed standards. Having thus stipulated in unequivocal fashion that COD will be reckoned with reference to each unit, Explanation to Article 1.4, however, created an ambiguity. It is stipulated therein that in respect of non-conventional based power projects, the date of synchronization of the first unit of the project will be treated as the COD of the project. As rightly submitted by Mr.P. Shiva Rao, learned Standing Counsel for the respondent, when the PPA is entered in respect of a Wind Power Project, which itself is a non-conventional based power project, addition of the Explanation defeats the main Clauses, i.e., Clause 9.1, which mandates that the Power Developer shall achieve COD within two years of entering into the PPA; and Clause 1.4, which, in unambiguous terms, provides for COD for each Generating Unit

separately. Thus, the Explanation renders Clause 9.1, which stipulated two years time limit for achieving COD, otiose.

In this context, we shall consider the scope of Explanation to a Clause, with reference to the position in law. In **S. Sundaram Pillai etc. Vs.**

**V.R.Pattabhiraman etc<sup>1</sup>**, the Honourable Supreme Court held:

“ ... It is now well settled that an Explanation added to a statutory provision is not a substantive provision in any sense of the term but as the plain meaning of the word itself shows it is merely meant to explain or clarify certain ambiguities which may have crept in the statutory provision. Sarathi in 'Interpretation of Statutes' while dwelling on the various aspects of an Explanation observes as follows:

"(a) The object of an explanation is to understand the Act in the light of the explanation.

(b) It does not ordinarily enlarge the scope of the original A section which it explains, but only makes the meaning clear beyond dispute."

(P. 329) Swarup in 'Legislation and Interpretation' very aptly sums up the scope and effect of an Explanation thus:

"Sometimes an explanation is appended to stress upon a particular thing which ordinarily would not appear clearly from the provisions of the section. The proper function of an explanation is to make plain or elucidate what is enacted in the substantive provision and not to add or subtract from it. Thus an explanation does not either restrict or extend the enacting part; it does not enlarge or narrow down the scope of the original section that it is supposed to explain. The Explanation must be interpreted according to its own tenor; that it is meant to explain and not vice versa."

(P.P. 297-298.) Bindra in 'Interpretation of Statutes' (5th Edn.) at page 67 states thus:

"An explanation does not enlarge the scope of the original section that it is supposed to explain. It is axiomatic that an explanation only explains and does not expand or add to the scope of the original section. The purpose of an explanation is, however, not to limit the scope of the main provision. The construction of the explanation must depend upon its terms, and no theory of its purpose can be

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<sup>1</sup>) AIR 1985 SC 582 = 1985 SCC (1) 591

entertained unless it is to be inferred from the language used. An 'explanation' must be interpreted according to its own tenor."

Dealing with the issue relating to conflict between two statutory provisions, the Honourable Supreme Court in **Union of India & Ors Vs. Dileep Kumar Singh**<sup>2</sup>, held:

"16. It is well settled that the provisions of a statute must be read harmoniously together. However, if this is not possible then it is settled law that where there is a conflict between two Sections, and you cannot reconcile the two, you have to determine which is the leading provision and which the subordinate provision, and which must give way to the other. This statement of the law is to be found in *Institute of Patent Agents & Ors. v. Joseph Lockwood*, 1894 A.C. 347 at 360. Lord Herschell, L.C., stated this, as follows:-

"Well, there is a conflict sometimes between two sections to be found in the same Act. You have to try and reconcile them as best you may. If you cannot, you have to determine which is the leading provision and which the subordinate provision, and which must give way to the other."

Though the above Judgments were rendered on interpretation of statutory provisions, we do not see any reason for not taking the same analogy in interpreting a contract document.

In our opinion, when there is a direct conflict between the leading term of the Contract and the Explanation, the leading term will gain precedence over the Explanation in order to preserve and protect the intendment of the leading term. When the leading term specifically refers to the COD of the Wind Power Units, the Explanation, which in generic sense refers to the non-conventional projects, lays down a directly contradictory condition, the Explanation is liable to be ignored as it defeats the purpose of the leading term.

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<sup>2</sup>) Civil Appeal Nos.2466-2467 of 2015 (Arising out of SLP (Civil) Nos.25568-25569 of 2014) dt.26-2-2015.

Interestingly, neither in the main O.P, nor in the rejoinder, the petitioner has raised a specific plea relying upon the Explanation to Article 1.4. It is only at the hearing that Mr. Sanjay Sen has placed reliance on the Explanation.

There is another reason to ignore the Explanation to Clause 1.4. The technology of Wind Power Projects undergoes rapid changes. With improvement of technology and reduction in cost of the plants, the power cost of Power Projects is coming down rapidly. The Tariff which was Rs.6.29 ps per unit in 2013-14, has gradually come down to Rs.3.46 ps per unit in 2017-18. In such a scenario, if the Project Developer, who quotes the tariff prevailing at the time of entering into the agreement is allowed unlimited time for achieving CODs at different times for different units, it will amount to depriving the Licensee of the opportunity of securing power at more competitive tariffs as the Developer will block the capacity for unlimited future periods and complete the project at his leisure. This not only affects the interest of the Licensees, but also allows undue advantage to the Developer, who may procure plants with better technology at cheaper rate at a later stage at higher tariff already fixed under the PPA. Such a situation adversely affects consumers' interests. Therefore, in our opinion, the leading term of the PPA i.e., Clause 9.1 stipulating the time for completion of the project must be strictly construed and adhered to.

As regards the submission of the learned Senior Counsel that as the COD of the second unit was allowed after expiry of the two years and the amended PPA for the entire capacity of 80 MW was entered after expiry of the two years period entered into by the respondent, the respondent is estopped from raising the objection for the COD of the third unit, in our opinion, the doctrine of estoppel has no application on the facts of the present case.

Section 115 of the Indian Evidence Act, 1872 posits the Principle of Estoppel. It postulates that when one person by his act or by declaration, has made another person believe something to be true and persuaded that person to act upon it, then in no case can he or his representative deny the truth of that thing. The mere fact that the respondent allowed the second unit to be synchronized beyond the period of two years, which the respondent has termed as a mistake, the same will not constitute estoppel for the third unit as the action of the respondent in allowing synchronisation was in respect of the second unit, which has nothing to do with the third unit. Moreover, one wrong will not make another right. Therefore, we do not find any merit in the submission of the learned Senior Counsel that the respondent's action constitutes estoppel.

As regards entering into the amended PPA, a perusal of the amended PPA would show that the only purpose for entering into the amendment is to incorporate the change in the location. All other conditions, including the capacity of the project, were allowed to remain as they were in the original PPA. The mere fact that the figure 80 MW has been incorporated as it is, it will not in any way advance the petitioner's case, because Articles 9.1 and 1.4 have not been amended.

In the light of the above discussion, the Commission has no hesitation to hold that as the petitioner failed to achieve the COD for the third unit within the stipulated period, it is not entitled to synchronize the said unit with the respondent's network and sell power to the respondent in pursuance of the PPA.

**Re Point No.2:**

It is not even the pleaded case of the petitioner that the balance capacity of 40 MW is grounded much less being ready for synchronization. For the same reasons, as discussed while dealing with Point No.1, the petitioner is not entitled for any relief in respect of the balance capacity of 40 MW also. This point is accordingly answered against the petitioner.

Before parting with the case, we may observe that while the petitioner is not entitled to get his third and subsequent units to be synchronized based on the existing PPA, this order would not preclude the



parties from renegotiating the terms afresh, enter into a fresh PPA as per the mutually agreed terms and seek approval of the PPA by the Commission.

Subject to the above observations, the O.P. is dismissed. No costs.

**Sd/-**  
**Thakur Rama Singh**  
**Member**

**Sd/-**  
**Justice C.V. Nagarjuna Reddy**  
**Chairman**

**Sd/-**  
**P. Rajagopal Reddy**  
**Member**