

**Kerala State Electricity Regulatory Commission**  
**Thiruvananthapuram**

**Present** : **Shri. Preman Dinaraj, Chairman**

**Adv. A.J. Wilson, Member (Law)**

**O.P.No. 76/2021**

**In the matter of:** Petition filed by M/s Elizabeth Conductors for the release of updated payments and payments withheld in lieu of penalty against delivery of purchase orders issued by the KSEB Ltd

**Petitioners:** **M/s Elizabeth Conductors,**  
**represented by Kunjumol Cherian, Managing Partner**  
Industrial Estate, Pappanamcode,  
Thiruvananthapuram-695019,

Petitioner

Represented by : Adv. Shayam Sekhar.

**Respondent:** **M/s Kerala State Electricity Board Limited,**  
**represented by its Chairman & Managing Director,**  
Vyduathi Bhavanam, Pattom,  
Thiruvananthapuram

Respondent

Represented by: Adv. B. Sakthidharan Nair

**Dates of Hearing:** **21.02.2022 & 22.02.2022**

**Order dated 25 .03.2022**

1. M/s Elizabeth Conductors, the petitioner filed a petition dated 09.12.2021, before this Commission with the following prayers:

- (a) To set aside Annexure A-21 Order issued by the respondent, to release the payments withheld in lieu of penalty with updated price as entitled to the petitioner.
- (b) To allow interest @12% for the withheld and updated payments as entitled to the petitioner.
- (c) To grant such other reliefs as this Commission may deem, fit and proper in the circumstances of this case.

## **2. Brief facts of the case**

(1) M/s Elizabeth Conductors (hereinafter referred to as the petitioner) is a partnership firm having its manufacturing unit registered as MSME unit at industrial Estate, Pappanamcode, Thiruvananthapuram which is also supplying AAC & ACSR conductors. It is supplying the conductors to the Kerala State Electricity Board Limited (KSEB Ltd) (hereinafter referred to as the respondent) for the last 30 years. The petitioner has obtained the following purchase orders from the respondent on the successful bid quoted by the petitioner.

*1.Order No. SCM 135/2017/-18/5067-dated 23/11/2017*

*2.Order No. SCM 131/IPDS/2017-18/5229-dated 30/11/2017*

*3.Addl Order (25 % Additional quantity) No. SCM 191/2017-18/6931-dated 8/02/2018*

*4.Order No. SCM DDUGJY/231/2017/-18/7605-dated 08/03/2018*

(2) According to the petitioner, the above said four orders were issued for the supply of certain quantity of ACSR Conductors. As per stipulation, the supply shall commence within 45 days from the date of Purchase Order and to complete the supply within 3 months thereafter. Moreover, there is provision for placing additional Orders/extension orders subject conditions. As per order No 1, the date of commencement of supply shall be from 6/1/2018 and date of completion shall be on or before 6/4/2018. Further, from the date of Purchase Order, 45 days has to be provided for commencement of supply of items. The petitioner's averment is that the said period of 45 days is provided for arranging the finance and for the procurement of raw materials. Banks will provide necessary credit facility only after receipt of confirmed Purchase Orders from the KSEB Ltd, since the Partnership concern being an MSME unit.

(3) Earlier, the Respondent KSEB Ltd had issued Purchase Orders on regular intervals providing sufficient time line to perform one after another. However, contrary to this precedent, the respondent issued additional Purchase Orders with overlapping time schedules, resulting in lack of time for arrangement of funds, for procurement of raw material, for commencement of supplies and thus for completing the supply.

(4) The respondent issued the Purchase Order No.1 on 23/11/2017 and within 7 days, issued Purchase Order No.2. dated 30/11/2017. During the said period,

throughout India there was acute scarcity of raw material, especially availability of Steel core wire as well as EC grade Aluminium wire rods. Hence, the respondent was informed about the said acute scarcity of raw materials and requested to grant extension of time for one month, for the commencement date and delivery schedule as per letter dated 15.01.2018 (Annexure A-1). Again, in the midst of acute scarcity of raw materials the respondent issued an Additional Purchase Order No.3.dated 08.02.2018. Despite receipt of Annexure A1, the respondent failed to respond, which amounts to deemed acceptance of extension of time sought for. The petitioner sent a reminder letter dated 25/1/2018 (Annexure A2) highlighting the principle of deemed acceptance. The respondent again failed to respond. The Petitioner send a reminder letter dated 10/2/2018 referring both Annexures-A1&A2 and reiterated about deemed acceptance of extension of time and also sought for extension of time for commencement of supply and delivery schedule in respect of previous orders as per letter dated 10/2/2018 (Annexure A3). Further, the respondent issued another Purchase Order No-4 dated 08/03/2018. Since the respondent again failed to respond, the petitioner sends a reminder letter dated 12/3/2018 (Annexure-A4) referring both A1, A2 & A3 and reiterate about the deemed acceptance of time and also sought for extension of time for 75 days for commencement of supply and delivery schedule in respect of Purchase Orders No.1,2,3 & 4.

- (5) The Purchase Order No 1 was delivered on 6/4/2018, with 39 days of delay, and Purchase Order No.2 was delivered as on 12/5/2018, with 32 days of delay. Purchase Order No.3 was delivered as on 23/3/2018, with 15 days of delay and the Purchase Order No 4 was delivered as on 28/6/2018, with 69 days of delay. The respondent had received Annexure A1 to A4 and had accepted the delivery of materials without any objection.
- (6) In order to prove the acute shortage of raw materials throughout India, the petitioner produced copies of communications with suppliers as Annexure A5 & A6 and Annexure A7. On completion of supplies on every Purchase Order, the respondent is obliged to release 5% of the value. But the said 5% of the value was released by the respondent only on 27.11.2018 after substantial delay of 254 to 315 days in each case, as mentioned in Annexure A-8. According to the petitioner the delay was not due to any wilful negligence or omission, instead, it was only due to unforeseen/unprecedented shortfall or raw materials in the market. In turn, petitioner sent letter dated 10/5/2019 (Annexure-A-9), to the respondent to waive the penalty for the delay and to allow the updated price as on delivery of materials. But after 4

months of receipt of Annexure A9, the respondent denied extension of delivery schedule sought for, vide letter dated 6/9/2019 (Annexure A10).

- (7) The petitioner again sent detailed letter dated 28/10/2019 (Annexure- A-11) to the respondent explaining the unforeseen situation of shortage of supply of raw materials pan India. It was also requested to update the price against the corresponding raw material prices as on date of delivery and also sought for waiver of penalty as well, considering the unprecedented situation. The petitioner again sent letters reiterating the non- availability of raw material and also pointing out the Force majeure condition also. The delay condoned by the respondent due to the delay in inspection consequent to the insertion of new clause for third party inspection added in the 4<sup>th</sup> purchase was also reiterated by the petitioner vide his letter dated 12/12/2019 (Annexure-A-14). The petitioner sent another letter dated 18/03/2020 (Annexure-A-15) to the respondent requesting to release the withheld payments/penalty and for payment as per updated price. A representation submitted by the Steel Wire Manufactures Association of India before the Hon'ble Minister of Steel; Govt. of India dated 29/11/2017 informing acute shortage of raw materials pan India during the said period was also enclosed by the petitioner.
- (8) In response to Annexure A15, the respondent issued a reply dated 21/5/2020 (Annexure-A-16) rejecting the petitioner's request for extension of time and to waive the penalty. As against Annexure A16, the petitioner issued another letter containing explanation with copies of documents in support of his arguments as per letter dated 22/6/2020 (Annexure A17). But, without considering the explanation and documents, the respondent issued Annexure-A-21 letter dated 19-11-2020 rejecting all requests made by the petitioner to grant deliver extension on the following grounds:

***“Purchase orders were issued based on the bid quoted by the petitioner as per tender dated 28-06-2017 for 6925 km ACSR Raccoon Conductor, 13427 km ACSR Rabbit Conductor and 5995 km ACSR Weasel Conductors with delivery schedule in accordance with tender conditions. In clause 18, Part-1. ie; “Supply shall commence within 45 days from the date of purchase order and to complete within 3 months thereafter”..... All these firms had supplied ACSR conductors as per delivery schedule and no issue was reported regarding the shortage of raw materials..... The matter was taken up before the Board also.....”***

- (9) It was also informed that the request for extension of delivery schedule cannot be considered, as the firm is bound to supply the materials as per

clause 18 Part 1 of tender delivery schedule. Further similar other suppliers like M/s Cauvery Conductors, M/s Venad Conductors, M/s Shankar Conductors had supplied ACSR conductors as per delivery schedule and no issue was reported regarding shortage of raw materials. The matter was taken up before the Board and the Board has declined the request of the petitioner.

Aggrieved by the above decision of the respondent KSEB Ltd, the petitioner M/s Elizabeth Conductors filed the present O. P. before this Commission.

### **Hearing on the petition**

3. The Commission admitted the petition as O P No. 76/2021 and posted for hearing on 21.02.2022 through video conferencing. The first hearing of the petition was held on 21.02.2022. Adv. Shyam Sekhar. K.R represented the petitioner and Adv. B. Sakthidharan Nair represented the respondent. During the deliberations of the hearing, the petitioner challenged Annexure A-21 communication issued by the respondent. The petitioner submitted that the alleged delay on his part had occurred due to the acute shortage and non-availability of raw-materials. The petitioner had already produced sufficient documentary evidences to prove his claim.
4. The Counsel who represented on behalf of the respondent raised a contention regarding the jurisdiction of this Commission to entertain the petition stating that this has to be examined as a preliminary issue. It was further contented that the petitioner has not produced any documents relating to the contracts along with the petition to substantiate his claim. Hence, they requested to allow sufficient time to file reply affidavit incorporating their contentions in this regard.
5. During the deliberations, the Chairman pointed out a shortcoming in the petition that the petitioner has not quoted any relevant Section of the Electricity Act, 2003 under which this petition is filed. Hence, the petitioner was directed to mention the relevant section of the Electricity Act, 2003 under which this petition was filed. The counsel who represented the petitioner sought sufficient time to answer the question. The Commission allowed the request and adjourned the petition to 22.02.2022 at 3 PM with a direction to submit the answer before this Commission and also to communicate the respondent before the time scheduled for next hearing. In pursuance of the said direction the petitioner submitted a copy of the Order issued by this Commission dated 26.05.2021 in OP No. 16/2021 as Exhibit No. 22.

6. The 2<sup>nd</sup> hearing of the petition was held on 22.02.2022. During the hearing, Adv. Shyam Sekhar. K. R who represented the petitioner has submitted before the Commission that the petition under challenge is filed under section 86 (k) of the Electricity Act, 2003, which reads as follows:

*(k) discharge such other functions as may be assigned to it under this Act*

7. During the hearing, the petitioner submitted before the Commission that as per Section 86 (k), the Commission is delegated with ample powers to discharge such other functions as assigned to the Commission under this Act. Further, he clarified that assignment shall be found from the scheme of the statute and the scheme of the statute assign certain functions to be performed by the Commission under section 86. Petitioner also submitted before the Commission that this Commission, in a similar kind of objection raised by the KSEB Ltd, has given a clear-cut answer regarding the scope and ambit of Section 86 in Order dated 26.05.2021 in O.P. No. 16/2021.

8. The petitioner also submitted that a copy of the Order has already been communicated to the respondent and also produced it before this Commission as Annexure A-22. Petitioner also brought to the attention of the Commission at page 9 of the Order which is extracted hereunder:

*(2) The Commission noted that the issues raised in this petition pertains to the tender floated by KSEB Ltd. for the procurement of conductors, viz. ACSR Wolf, ACSR Moose and ACSR Dog conductors. These conductors are intended for use in the transmission and distribution business of KSEB Ltd. The cost incurred for procuring these materials are reflected in the Capital Investment account of the respective business units of KSEB Ltd. The Commission noted that all such expenditure incurred by KSEB Ltd. is recovered through tariff in the form of interest on loan, depreciation, return on equity etc, and these costs are passed on to the electricity consumers of the State as tariff. While approving the capital investment in transmission and distribution, this Commission is duty bound to examine the prudence of the capital cost including the cost of materials.*

*The Commission is of the firm view that as a State Government owned Public Sector Undertaking, KSEB Ltd. is also duty bound to implement the Orders on preferences granted to the MSMEs in the State by the Government of Kerala. Any financial liability incurred while implementing the policy directions of the State Government is allowed by the Commission after prudence check.*

*(3) Considering all these facts in detail, the Commission is of the considered view that, as per Section 86 of the Electricity Act, 2003, this Commission has the jurisdiction to entertain the present petition filed by M/s Shankar Conductors Pvt. Ltd. against KSEB Ltd. which is related to the procurement of conductors for its Transmission and Distribution business.*

9. During the deliberations, the Commission sought clarification from the petitioner to clarify as to what are the real issues considered by this Commission under this Order dated 26.05.2021 in OP No.16/2021. In reply to the clarification sought for, the Petitioner brought the attention of the Commission regarding the following three issues involved in the O.P No. 16/2021 and submitted that the above-mentioned issues which are relevant in this petition also:

- (i) *No EMD or bid submission fee (cost of tender paper) should be required to be paid by MSMEs of Kerala as per the GO (P) No. 03/2016/SPD dated 18.02.2016. Hence, the tender of KSEB Ltd dated 04.02.2021 suitably amended accordingly.*
- (ii) *(ii) MSMEs of Kerala, who are registered by BIS, should be considered technically qualified and no factory inspection should be required. The tender form should be modified accordingly.*

The third issue is found by virtue of an amendment incorporated by the petitioner which is shown in the Order at page -10.

- (iii) *..... In the light of the above, the petitioner as a New Entrant was compelled to remit EMD @10% of the normal EMD amount and full amount of Bid Submission Fee, since they were apprehensive that otherwise their bid would be rejected by KSEB Ltd. on the grounds of non-remittance of EMD amount and full amount of Bid Submission Fee.*

10. The summary of the submissions made by the petitioner to substantiate his prayer during the deliberations of the hearing is given below:

**Jurisdiction and maintainability of the petition:**

- (a) As far as jurisdictional issue is concerned, this Commission adopting an inclusive interpretation with respect to transmission and distribution which is a scheme of the statute has given a clear-cut finding that this Commission has power to interfere as per section 86 of the Electricity Act, 2003. The transmission part is very important and for this purpose overhead lines are

required. Overhead lines are defined under section 68 of the Electricity Act. The overhead line's specifications etc are mentioned in the tender documents also. Based on the said specifications the petitioner is manufacturing the same and supplying to KSEB Ltd. So, it is an integral part of the transmission system. As such the action on the part of the KSEB Ltd cannot be segregated and the petitioner may not be directed to go for a regular suit under section 9 of the CPC or before the High Court under writ jurisdiction.

- (b) The petitioner is manufacturing and supplying the materials required by the KSEB Ltd for this purpose which are integral part of the transmission system. In the writ jurisdiction, the High Court is having a limited scope in such matters as it doesn't have a fact-finding mechanism. This Commission has ample powers under Section 86 of the Act to fulfill the conditions and aspirations and scheme of the statute as mentioned in the preamble of the statute. The preamble of the Electricity Act, 2003 is given below:

*An Act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalization of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto.*

- (c) The supply of materials to these are "connected and incidental there to" and statute has given ample powers to this Commission to consider those aspects which are connected and incidental thereto in respect of transmission, generation and distribution of electricity and trading. The petitioner invited the attention of this Commission to Section 2(19) of the Act which defines distribution system as shown below:

*(19) "distribution system" means the system of wires and associated facilities between the delivery points on the transmission lines or the generating station connection and the point of connection to the installation of the consumers;*

- (d) This distribution system is very important component and articles and materials required for the purpose of smooth functioning of the electricity and for fulfilling the very need of the consumers. This Commission has rightly considered the jurisdiction in the previous decision in O.P No.16/2021. In turn, financial prudence should be checked into even though



there is private contract between the licensees and the petitioner. The matters under challenge will affect the consumers who are depending upon the august organization called the KSEB Ltd and this Organization is being monitored under the aegis of this Commission. Pushing the parties to the civil jurisdiction or writ jurisdiction means the participants who are eager to supply goods for overhead lines, conductors etc. will be having a double burden. Hence, the maintainability issue should be decided in favour of the petitioner.

- (e) The Commission observed that the whole disputes has arisen as a result of contractual issues. Hence, the petitioner was asked to clarify as to whether there is any enabling provision/clause/section or subsection whereby the jurisdiction of the Indian Contract Act, 1872 has been superseded by the Electricity Act, 2003. In reply to the above clarification sought, the petitioner submitted the clarification as follows:
- (f) The Indian Contract Act, 1872 does not say that parties shall agitate their disputes in respect of the Contract on a particular forum. That can be decided by the parties to the Agreement. That is a solemn opportunity of parties coming before the Agreement consensus ad idem in respect of the jurisdictional factor also. Once a statutory authority is established a tender floated for supply of goods essential for the transmission of electricity, the Contract Act, 1872 never envisages such a condition. Conditionality of jurisdiction can be decided only by the parties to the proceedings and the parties to the proceedings is controlled by the statute. This present tender was floated under the Electricity Act, 2003. That is the enabling provision wherein KSEB Ltd has come up with a tendered document and hence the tender document comes under the ambit of the Electricity Act, 2003.
- (g) Interfering with the argument, the Commission sought clarification from the petitioner as to how the petitioner has reached such a conclusion that the tender document has been done in consonance with or in compliance or to carry forward the intent of the Electricity Act, 2003 and to explain the basis of that conclusion. In response to the clarification, the petitioner mentioned that the basis for such a conclusion is that the floating of the tender is to get four important materials or articles required for the transmission business of the tenderer.
- (h) In response to the Commission's direction to point out the specific provision in the Act which enable the Commission to interfere in the dispute, the petitioner pointed out section 86 (k) of the Electricity Act, 2003. Section 86 (k) is reproduced below:

*(k) discharge such other functions as may be assigned to it under this Act.*

The petitioner further submitted that the term ‘under this Act’ is very important. The powers of the Commission cannot be compartmentalized. The objective of the Commission has to be kept in mind while deciding the question of jurisdiction.

- 11.** The Commission observed that the word “assigned” is used to mean the powers assigned to the Commission either by the Act or Rules thereof or by the Appropriate Government. The State Government is the Appropriate Government as far as this Commission is concerned. But, the contractual obligation with a third party would not come within the purview. It is true that the MSME has been given certain benefits by the Government of Kerala. The reliefs sought by the petitioner in the petition are purely contractual issues between the supplier and the licensee. The Commission then asked the respondent to present their version regarding the issue of jurisdiction.

**12. The respondent advanced his arguments along the following lines:**

- (a) The petitioner not yet pointed out any particular enabling provision contained in the Act, Rules or Regulations. The decision taken by this Commission in O.P. No.16/2021 is against the petitioner, because the decision at para 16 specifically states that the Commission shall not interfere in the tendering process of the licensee. In that case, the petitioner abandoned their second prayer to modify the tender form in respect of the MSMEs of Kerala, who are registered by BIS, that they should be considered technically qualified and no factory inspection should be required, which is shown below:

*In view of the foregoing, the Commission is of the considered view that specifying the tender conditions to ensure the quality of the product and materials to be supplied by the bidders fall within the domain of the tendering authority. The tender document is a legally valid document and it cannot be modified to suit the prospective bidder’s requirements. The Commission will not normally intervene in the licensee’s tendering procedures, except when it is of the opinion that consumer interest is compromised or there is malafide intent.*

*Under these circumstances, the Commission has decided not to intervene in the tender conditions specified by the KSEB Ltd. in the tender dated 04.02.2021 for New Entrants.*

*The second prayer in the petition on not being pressed by the petitioner is rejected accordingly.*

(b) The concluding part of the order is that, “*the MSME of Kerala who registered by BIS should be considered as technically qualified and factory inspection should not be required*’ is rejected, due to the reasons discussed under paragraph 16 above.” This clear finding of the Commission in O.P No. 16/2021 that the Commission will not interfere in the tender conditions is a clear decision falling under the purview of Electricity Act, 2003.

(c) The challenge in the petition is the time schedule for the supply of materials. The delivery schedule is specified in the tender conditions. If it is compromised, that will adversely affect the consumer interest. The petitioner has advanced his contention to intervene in a matter, whereby the consumer’s interest is adversely affected. There is no ambiguity in Section 86 of the Act. The Commission is assigned with such other powers under the relevant provisions of the Act, the petition is not maintainable.

**13.** Interfering with the arguments the Commission sought clarification regarding the term “assigned to it” and “assigned under the Act.” Both counsels tried to clarify it. The respondent admitted the fact that certain inherent powers are vested in every Commission for which there is no specific provision. The Commission has inherent powers to interfere, if there is no specific provision, for the smooth functioning of the Commission. In response to the said observation, the petitioner submitted the following contentions:

(a) The respondent has mentioned an important point which is covered in the decision in O.P No. 16/2021 itself. There is a 3<sup>rd</sup> prayer in the said OP in last para of page 7 as shown below:

*‘Direct the respondent KSEB Ltd. to refund 10% EMD and full amount of Bid Submission Fee i.e. cost of tender documents, total Rs.2,48,710/- wrongly realized from it, within 10 days from the date of direction’.*

(b) In the final Order at para 14 the Commission specifically concluded that *KSEB Ltd. shall refund the EMD and Bid Submission Fee, wrongly remitted by the petitioner in the tender No. KSEB/SCM/eP/ 86/2020-21 dated 04.02.2021, amounting to Rs 2,48,710/-, within one month from the date of receipt of a formal request from the petitioner with details to facilitate the refund amount.*

(c) The Force majeure clause is available in all contracts. In this case, one of the parties to the contract proceeded violating their statutory obligations. Section 56 of the Indian Contract Act, 1872 says that the parties shall stop the

proceedings and further proceedings shall be initiated only after the obstacles are cleared. So, it is a statutory interdict.

- (d) In this case, that statutory interdict has been forgone or overlooked by one of the parties. Hence, the Commission can intervene. If the Commission will not intervene, that will throw the parties to other long drawn process whereby they may not get their grievance redressed since the Board is having the capacity and strength to fight their own case in different forums. The petitioners are the customers who are supplying objects and materials to KSEB Ltd and has approached this forum wherein there is speedy remedy available as per the Electricity Act, 2003. A narrow interpretation to discard the complainant from the ambit of Section 86 is the easiest way. Since there is a statutory violation done by one of the parties, then the Commission has to step-in.
- (e) The jurisdiction of Section 86 of the Electricity Act, 2003 has been elaborated in the KSERC (Conduct of Business) Regulations, 2003 issued by this Commission. The said Regulation is extracted hereunder:

*22. Initiation of proceedings. - Proceedings may be initiated under these Regulations in one of the following manners: -*

*(a) Suo motu by the Commission,*

*(b) Upon a petition filed by the Board or a licensee,*

*(c) Upon a petition filed by the Government of Kerala,*

*(d) Upon a petition filed by an affected party. Provided that the Commission shall have the right to decide or order that any party is not an affected party for the purpose of these Regulations.*

*Provided further that the proceedings under (a), (b), (c) and (d) above shall pertain to matters relating to the powers and functions of the Commission as assigned to it under Section 86 and other provisions of the Act.*

- (f) In the above-mentioned Regulations, other provisions of the Act and any person affected by it also mentioned therein. Hence, any kind of grievance against the distribution licensee i.e., KSEB Ltd can come up before the Commission. So, the petitioner who is supplying materials will fall under the ambit of transmission, distribution and generation and the petitioner is not a third person. The petitioner would come under the scheme of the Act, even though the petitioner would not come within the definition of “licensee” under

section 14. The petitioner admits that the materials were supposed to be supplied to KSEB Ltd within the time line as specified in the purchase order. The purchase order is for the purpose of two important items namely ISI marked aluminium conductor steel reinforced rabbit comprising of aluminium.

- (g) The petitioner also submitted that the four purchase orders were given during the period between November, 2017 and the last date March, 2018. From 11/2017, there was acute shortage of raw materials which has been brought to the notice of the KSEB Ltd within 10 days as stipulated under the contract itself. A letter has been sent by the petitioner to the respondent, but the other party to the contract was kept silent. In such a situation the principles of sub silence will apply. It shall be considered as a deemed acceptance under law. A letter sent to the respondent during 2017, was responded by KSEB Ltd only during 2019 i.e., after 2 ½ years. By this time, the petitioner had completed the supply. The supplies were completed by 2018 with 4 or 5 days of delay. The petitioner pointed out an important factor that during this period there was a Pan India scarcity of commodity i.e., raw material shortage.
- (h) As per the contract, the respondent had to be intimated by the petitioner and within 10 days, the petitioner had intimated the respondent that the delay is due to the pan India problem. It is not an individual specific problem. Throughout India, there was a scarcity of materials and hence the petitioner pleaded that they should be given extended time as given in the time schedule 2017. To this end, the petitioner sent multiple letters and finally after two years and after completion of the supply, the respondent replied that the supply was delayed.
- (i) All the raw material suppliers in India had given representation before the Ministry of Industry pointing out the material shortage, and requesting the Government to intervene to prevent dumping happening from the international market requiring intervention of the Ministry of External Affairs and Ministry of Industry. The petitioner has produced copy of such a letter before the KSEB Ltd and explained all these situations. All the parties similarly placed had also given representations.
- (j) The petitioner further submitted that force majeure clause contained in the tender notification envisages statutory obligation. As per the Contract Act, 1872, where there is such a Clause, parties shall make a full stop and proceed further only after the obstacle is removed. The petitioner concluded his pleading that the intervention of this Commission is necessary in this case since during the period a force majeure clause having statutory obligation has been violated by KSEB Ltd, one of the parties to the contract.

**14. Then the respondent KSEB Ltd replied to the contentions raised by the petitioner and concluded his arguments in the following lines:**

- (a) The dispute is within the exclusive jurisdiction of the Civil Court. Even the High Court will not interfere in the contractual matters wherein examination of evidence is necessary. In a plethora of decisions, various courts as well as the Supreme Court has held that the disputes in respect of contractual nature is within the exclusive jurisdiction of the Civil Court. So, this Commission has no jurisdiction to look into the dispute raised in the petition.
- (b) Regarding the force majeure contention, it is to be noted that along with the petitioner, the respondent has placed purchase orders on several other companies, which supplied the materials within the stipulated time. It was the responsibility of the petitioner to ensure sufficient raw materials before quoting in the bid. In this case, the scarcity of materials is not a force majeure clause.

**15. During the deliberations of the petitioner the Commission observed as follows:**

- (1) The whole dispute has arisen as a result of contractual issues. The functions of the State Commission are very clearly defined under section 86 of the Electricity Act, 2003. In the said section the Commission is expected to interfere or intervene in cases of disputes between the generator and the licensees. But no power is seen to have conferred up on the Commission to interfere in a contractual issue between generator and its contractors. Hence the Commission cannot interfere in cases in which the Commission has no jurisdiction.
- (2) The Commission pointed out that in Order dated 26.05.2021 in OP No.16/2021, the Commission has taken a considered decision regarding their intervention or otherwise. The Commission stated that they will intervene only in circumstances wherein that the consumer interest is compromised or there is malafide intent. The Commission sought clarification of the respondent as to whether the respondent has compromised the consumer interest or had any malafide intention.
- (3) The Commission observed that in OP No.16/2021, the prayer of the petitioner is to refund the EMD and bid submission fee wrongly remitted by the petitioner. That means the responsibility of the payment is not due to the

KSEB Ltd and the same is specifically mentioned therein. Secondly, the said direction issued by the Commission is to pay back the money wrongly remitted and clarified that the matter will not come under the provisions of the Indian Contract Act, 1872. The issue had originated consequent to the Orders issued by the State Government regarding the MSMEs which would come under the policies of the State Government or such other functions assigned to this Commission under this Act.

- (4) Appropriate Government “as defined under the Electricity Act, 2003 is the Government of Kerala as far as this Commission is concerned. It is also the primary responsibility of the Commission to ensure that all orders issued by the Government is strictly following the licensee. In the said Government Order, it is specifically mentioned that as per GO (P) No. 03/2016/SPD dated 18.02.2016, the MSMEs in the State of Kerala are exempted from remitting EMD and Bid Submission Fee while participating in the tenders floated by State Government Departments and Government owned PSUs, irrespective of whether the bidder is a New Entrant or not.
- (5) The Orders issued by this Commission to refund the EMD and Bid Submission Fee is not due to any contractual obligation. That amount was not wrongly realized but wrongly remitted by the MSME, which would not come under the Contract Act. The Commission pointed out that the Commission has not yet noticed any specific provision enabling the Commission to interfere in a contractual dispute between the licensee and the contractor. In OP No.16/2021, this Commission has intervened and issued an Order based on the only reason that the policy directive of the Government was not been faithfully carried out by the KSEB Ltd.

### **Analysis and decision of the Commission**

16. The Commission has examined the petition and the documents produced by the petitioner as Annexures in support of his arguments and the tender documents in detail. The pleadings of the petitioner as well as the objections raised by the learned counsel who appeared on behalf of the respondent KSEB Ltd is also examined. The reliefs sought by the petitioner is to set aside Annexure A-21 Order issued by the respondent and to release the payments withheld in lieu of penalty with updated price and also to allow interest @12% for the withheld and updated payments as entitled to the petitioner. As per the Annexure -A1 communication submitted by the petitioner, the scarcity of supply of raw materials was intimated to the petitioner as per letter dated 15.01.2018.

17. During the deliberations of the petition, the petitioner advanced his arguments to substantiate that this Commission has jurisdiction to entertain the petition in view of the observation made by the Commission in the Order dated 26.05.2021 in OP. No. 16/ 2021 and raised mainly the following two issues.

a) *This commission has jurisdiction to entertain the petition as per section 86 (k) of the Electricity Act, 2003 in view of the Order issued by this Commission in OP. No.16/2021.*

b) *The respondent has violated the force majeure condition contained in the tender document.*

18. As far as jurisdiction of the Commission to adjudicate up on the disputes involved in the present petition, it is to be examined as to whether the petitioner would come within the ambit of section 86 of the Act or whether the licensee has violated the orders issued by the appropriate Government so as to enable the Commission to intervene in the matter.

19. It is a settled legal position that the State Commission's jurisdiction to adjudicate up on the disputes is limited to Section 86 (1) (f) of the Electricity Act, 2003. But the Commission can intervene in a matter wherein the directions issued by the Government of India, Ministry of Power or the directions issued by the State Government are violated by a licensee.

20. The important objection raised by KSEB Ltd before this Commission is regarding the issue of jurisdiction and maintainability of the petition. KSEB Ltd has further contended that they have not violated the force majeure clause.

21. In view of the contentions and pleadings/objections made by the petitioner and the respondent KSEBL, the following four issues arise before this Commission for consideration:

1. **Whether the Commission has jurisdiction to adjudicate up on the disputes involved in this Petition and its maintainability?**
2. **Whether the Order dated 26.05.2021 issued by this Commission in OP No. 16/2021 is squarely applicable to this Petition?**
3. **Whether the failure on the part of the respondent KSEB Ltd in giving timely response to the requests made by the petitioner for extension of time limit amounts to "deemed acceptance"?**



**4. Whether the respondent KSEB Ltd has violated the force majeure conditions and if so, whether the Commission can intervene in the tender conditions?**

22. The above mentioned four issues are interrelated but each issue has to be examined and analysed. The main contentions made by the petitioner in support of the issue of maintainability of the petition and jurisdiction of this Commission during the deliberations of the hearings are follows:

1. This Commission has jurisdiction to entertain the petition in view of the Order issued by this Commission in OP No. 16/2021 dated 26.05.2021.
2. As per Section 86 (k) of the Electricity Act, 2003, the Commission is delegated with ample powers to discharge such other functions assigned to the Commission.
3. The petitioner even though would not come under the purview of the definition of licensee, they are manufacturing and supplying materials required for transmission and distribution of electricity which are connected and incidental there to.
4. The matters under challenge will affect the consumers who are depending up on KSEB Ltd.
5. The present tender was floated under the Electricity Act, 2003.
6. The delay on the part of the respondent KSEB Ltd in responding to the communications for time extension for supply amounts to deemed acceptance.
7. The petitioner was affected by force majeure clause and that statutory interdict has been forgone or overlooked by KSEB Ltd. Hence the Commission can intervene.
8. The petitioner being an affected party, the Commission can entertain the petition invoking Regulation 22 of the KSERC (Conduct of Business) Regulation, 2003.

**Issue No. 1**

**23. Whether the Commission has jurisdiction to adjudicate up on the disputes involved in this Petition and its maintainability?**

As mentioned earlier, during the deliberations of the petition, the Commission observed that the whole disputes has arisen consequent to contractual issues. The functions of the State Commission are very clearly defined under section 86 of the Electricity Act, 2003. In the said section, the

Commission is expected to interfere or intervene in cases of disputes between the generator and the licensees. As per Section 86 of the Electricity Act, 2003 power is seen to have conferred up on the Commission to adjudicate up on the disputes between generator and licensee. But, the Commission cannot interfere in cases, which the Commission has no jurisdiction.

- 24.** It is a settled legal position that State Electricity Regulatory Commission is competent to adjudicate upon the disputes between the licensees and generating companies only and to refer any dispute for arbitration as per Section 86 (1) (f) of the Electricity Act, 2003. Relevant provision is extracted hereunder:

***Section 86 - Functions of State Commission***

*(1) The State Commission shall discharge the following functions, namely: --*

*(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:*

*PROVIDED that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;*

*XXXXXXXXXXXXXXXXXXXXXXXXXXXX*

***(f) adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration;***

- 25.** In view of the above legal provision, to entertain the petition, the petitioner shall be a licensee or a generating company. But in the instant petition, the petitioner is neither a licensee nor a generating company but instead is a partnership firm having its manufacturing unit, registered as MSME unit, and supplying AAC & ACSR conductors to the respondent KSEB Ltd.

- 26.** In addition to the above, the contention raised by the petitioner that in view of Regulation 22, of the KSERC (Conduct of Business) Regulations, 2003 the Commission has jurisdiction to entertain the petition since the petitioner is an “affected party” is not correct. The said Regulation is extracted hereunder:

***22. Initiation of proceedings. - Proceedings may be initiated under these Regulations in one of the following manners: -***

- (a) Suo motu by the Commission,*
- (b) Upon a petition filed by the Board or a licensee,*
- (c) Upon a petition filed by the Government of Kerala,*
- (d) Upon a petition filed by an affected party.*

*Provided that the Commission shall have the right to decide or order that any party is not an affected party for the purpose of these Regulations*

***Provided further that the proceedings under (a), (b), (c) and (d) above shall pertain to matters relating to the powers and functions of the Commission as assigned to it under Section 86 and other provisions of the Act.***

The Regulation 21 clearly stipulates that the proceedings mentioned above shall pertain to matters relating to the powers and functions assigned to the Commission under Section 86 of the Electricity Act, 2003. Hence, the Commission hold such proceedings as it considers appropriate for discharge of its functions under this Act. The Commission during the deliberations of the hearing of the petition observed that the Commission shall intervene within the purview of the powers assigned to it and will not interfere in all matters.

- 27.** There is no provision in the tender conditions, authorising this Commission to adjudicate up on a dispute arising out of contractual obligations or to intervene or interfere in the tender process of the respondent KSEB Ltd in the said tender as and when a dispute arise between a private contractor and a licensee. In a similar case, the Hon'ble APTEL has held that the Commission has no jurisdiction to entertain a dispute between a private contractor (solar developer) and a licensee on the ground that section 86(1)(f) of the Electricity Act, 2003 which empowers the State Commission with the powers to adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration. The Solar Power Park Developer (SPPD) does not fall either in the category of a Generator or a Licensee. Relevant portion is extracted hereunder:

*The Appellant, on the basis of a private contract is challenging the very Electricity Act and it is challenging the jurisdiction of the Regulatory Commission on the basis of a private contract and by implication challenges the jurisdiction of the Hon'ble Tribunal.*

*3. We are clear in our mind that the present dispute cannot be resolved under the provisions of section 86(1)(f) which empowers the State Commission with the powers to adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for*

*arbitration. Undisputedly, the Solar Power Park Developer (SPPD) does not fall either in the category of a Generator or a Licensee under the provisions of the Electricity Act, 2003. As per the "Guidelines for Development of Solar Parks", the SPPD is entrusted with the development of the transmission network within the solar park as a captive/dedicated transmission system of the solar project developers of the park and therefore, is not a transmission Licensee.*

*(Saurya Urja Company of Rajasthan Limited vs. Rajasthan Electricity Regulatory Commission and Ors. (21.12.2021 - APTEL) : MANU/ET/0076/2021)*

Further, as held by the Hon'ble Supreme Court, the Commission can adjudicate upon the disputes between the licensees and generating companies and to refer any such dispute for arbitration. *(Maharashtra Electricity Regulatory Commission vs. Reliance Energy Ltd. and Ors. (14.08.2007 - SC): MANU/SC/7800/2007).*

*In view of the reasons mentioned above, this Commission is of the considered view that this Commission has no jurisdiction to adjudicate up on the disputes arise out of tender conditions between a private supplier and a licensee and hence this petition is not maintainable before this Commission and is liable to be rejected.*

## **Issue No.2**

**28. Whether the Order dated 26.05.2021 issued by this Commission in OP No. 16/2021 is squarely applicable to this petition so as to intervene in the disputes?**

**29.** As far as the 2<sup>nd</sup> question is concerned, it is to be noted that the petitioner's unit is manufacturing and supplying conductors to the respondent Kerala State Electricity Board Limited. The petitioner had obtained and accepted four purchase orders from the respondent KSEB Ltd on the successful bid quoted by the petitioner. The petitioner in support of his prayers, mainly contended that this Commission has intervened in a similar case i.e., in OP No. 16/2021 and the Commission issued Order dated 26.05.2021, which is applicable to the present situation also. In view of the above contention raised by the petitioner, it is to be examined as to whether the factual position contained in OP No.16/2021 and the decision taken therein are squarely applicable to the present petition.

30. During the deliberations of the petition, the petitioner mainly contended that this Commission has jurisdiction to intervene in the petition in view of the Order issued by this Commission in O.P No.16/2021. Hence in order to arrive a decision on the 2<sup>nd</sup> issue, it is to be examined as to whether the issues involved in the OP No.16/2021 and issues involved in the present OP are similar in nature.
31. The OP No. 16/2021 was filed by the petitioner M/s Shankar Conductors Pvt Limited for giving directions to KSEB Ltd with the following prayers:
1. *No EMD or bid submission fee (cost of tender paper) should be required to be paid by MSMEs of Kerala as per the GO (P) No. 03/2016/SPD dated 18.02.2016. Hence, the tender of KSEB Ltd dated 04.02.2021 suitably amended accordingly.*
  2. *MSMEs of Kerala, who are registered by BIS, should be considered technically qualified and no factory inspection should be required. The tender form should be modified accordingly.*
32. In the said petition, the 1<sup>st</sup> prayer was to implement an Order issued by the Government of Kerala vide GO. (P) No. 03/2016/SPD dated 18-02-2016, which had extended certain benefits to Micro, Small and Medium Enterprises and exempted MSMEs from payment of EMD, cost of tender forms etc.
33. During the hearing, **the Commission specifically clarified that, it does not intend to interfere in the procedure being followed by its distribution licensees to ascertain the capability of the bidders who participate in the tenders to supply materials and goods as per the requirements specified in the tender.** Relevant portion containing the analysis and decision is extracted hereunder:
- (1) KSEB Ltd is a deemed distribution licensee as per Section 14 of the Electricity Act, 2003. KSEB Ltd is also a company owned by the State Government. While carrying out its business, KSEB Ltd. is duty bound to implement the various policies, orders, preferences, exemptions etc. ordered by the Central and State Government which are consistent with the provisions of the Electricity Act, 2003.*
- The Commission is of the firm view that as a State Government owned Public Sector Undertaking, KSEB Ltd. is also duty bound to implement the Orders on preferences granted to the MSMEs in the State by the Government of Kerala. Any financial liability incurred while implementing the policy directions of the State Government is allowed by the Commission after prudence check.*

*(3) Considering all these facts in detail, the Commission is of the considered view that, as per Section 86 of the Electricity Act, 2003, this Commission has the jurisdiction to entertain the present petition filed by M/s Shankar Conductors Pvt. Ltd. against KSEB Ltd. which is related to the procurement of conductors for its Transmission and Distribution business.*

*After considering the issue holistically, the Commission has arrived at the conclusion that in the present tender, the petitioner being a MSME with Udyog Aadhar Registration is not required to remit the EMD and Bid Submission Fee for participating as a New Entrant. Hence, KSEB Ltd. shall refund the EMD and Bid Submission Fee amounting to Rs 2,48,710/- within one month from the date on which the petitioner formally requests KSEB Ltd. to refund the amount which they wrongly remitted while participating in the tender.*

*The Commission Chairman clarified that is the general approach of the Commission. However, since Government owned distribution licensees are wholly or substantially funded by public moneys and capital expenditure is generally reflected in the consumer tariff, the Commission reserves the right to intervene in cases involving protection of consumer interest.*

*(4) During the second hearing, the petitioner based on the Commission's clarifications did not press on their second prayer.*

*In view of the foregoing, the Commission is of the considered view that specifying the tender conditions to ensure the quality of the product and materials to be supplied by the bidders fall within the domain of the tendering authority. The tender document is a legally valid document and it cannot be modified to suit the prospective bidder's requirements. **The Commission will not normally intervene in the licensee's tendering procedures, except when it is of the opinion that consumer interest is compromised or there is malafide intent.***

**34.** Further, in the aforesaid Order, this Commission has specifically mentioned therein that this Commission will intervene in the licensee's tendering procedure, only in two circumstances i.e., where **consumer interest is compromised** or where there is **malafide intent**. Hence, in this case, in order to arrive a conclusion, the Commission has to examine whether the licensee has compromised the consumer interest or is there any malafide intent in the tender proceedings.

35. The Commission examined the tender condition clauses contained in the tender documents in detail. In the tender conditions, it is stipulated that timely delivery of materials is of prime importance. In the penalty clause, it is stipulated that penalty periods less than fifteen days will not be counted and period of 15 days and more will be counted as one month. Important provisions contained in the tender conditions are extracted hereunder:

**10) Contract Agreement: -**

***a) The successful bidder shall execute an agreement in the form prescribed by the KSEB Ltd in General Conditions of Contract (Ele.189) for the due fulfillment of the contract within the period to be specified by KSEB Ltd.....***

***12) Breach of contract:- In case the successful bidders, after having made partial supplies, fail to fulfill the contract in full or any of the materials is not supplied, such supplies may at the discretion of the purchasing officers be arranged by means of another bid/quotation or by negotiation or from the next higher bidder, and the loss if any, caused to the KSEB Ltd thereby shall, together with such sums as may be fixed by the KSEB Ltd towards damages, be recovered from the defaulting contractors.***

***25) Penalty: - Date of submission of Test Certificate will be treated as date of supply for the purpose of penalty calculation. If the delivery scheduled as per this order is not maintained, penalty at the rate of one percent for every month of delay subject to a maximum of ten percent on the all-inclusive rate minus taxes and duties (i.e., Basic price plus Freight and Insurance) of material supplied belatedly. If the materials are offered and inspected within the contractual delivery schedule the material will be accepted without imposing penalty, if they are delivered within 7 days from the date of issue of Material Despatch Clearance Certificate. This is not applicable for Price Variation.***

***For calculation of penalty periods less than fifteen days will not be counted and delay of fifteen days and above will be counted as one full month. Penalty will be recovered from the next running bill for short fall in delivery schedule.***

***Penalty is also applicable as stated above for belated replacement of materials rejected.***

***In the event of non-supply of the total quantity before due date, KSEB Limited reserves the right to terminate the contract to the extent of the quantity remaining undelivered at the risk and cost of the supplier. In case KSEB Ltd accepts belated supply after completion period of contract this will be regulated as per Clause '45' (Price re-fixation) below.***

***For calculation of penalty periods less than fifteen days will not be counted and delay of fifteen days and above will be counted as one full month. Penalty will be recovered from the next running bill for short fall in delivery schedule***

***39) Additional quantity: Purchase Order for an additional quantity up to 25% over and above the original ordered or tendered quantity will be placed if the supplier is willing to supply the additional quantity at the same rate, terms and conditions of the original order and accept KSEB Ltd's re-fixation clause such as price for this additional quantity shall be re-fixed if a fall in price occurs in the next tender opened during the delivery schedule fixed for this additional quantity. The material, if any, supplied after the scheduled delivery period of the 25% additional quantity will be accepted only on conditions that the price of such materials will be re-fixed taking into consideration of the rate of new tender/ Purchase order of such material on the date of actual supply or basic price as per this order whichever is lower. The Chief Engineer (SCM)'s decision in re-fixing the price will be final.***

***40) Price Re-fixation:- The materials, if any, supplied after the scheduled delivery period of the purchase order will be accepted only on condition that price of such materials will be re-fixed taking into consideration the rate of new tender/ purchase order for the material with same specification supplied and accepted by KSEB Limited The basic price as per the above new tender/ purchase order or the basic price as per Purchase order to be issued against the subject tender, whichever is lower will be applicable. The date of opening of bids of the new tender shall be treated as the effective date. The Chief Engineer (SCM)'s decision in re-fixing the price will be final.***

***41) The bid shall be governed by the General Conditions of Contract and schedule for the supply of materials (Ele.189) and the special conditions mentioned herein. IN CASE THERE IS ANY CONTRADICTION OR NON-CONFORMITY BETWEEN THE TWO, THE SPECIAL CONDITIONS MENTIONED HEREIN WILL PREVAIL.***

**36.** During the deliberations of the hearings the Commission observed that the whole issue was arisen consequent to contractual issues come within the ambit of Indian Contract Act, 1872. The functions of the Commission are very clearly defined under section 86 of the Electricity Act, 2003. The reliefs sought by the petitioner in the petition are purely contractual issues between



supplier and the licensee. Contractual obligations with a third party would not come within the purview of the Commission under the Electricity Act, 2003. The Commission will intervene in and shall interfere only in two circumstances i.e., when the consumer interest is compromised or there is malafide intent. It is the primary responsibility of the Commission to ensure that all Government orders issued by the Appropriate Government are strictly followed by the licensee. The Commission had intervened in OP No.16/2021 and issued direction to the licensee to refund the amount since he had wrongly remitted it while participating in the tender. The said decision is not due to any contractual obligation but in compliance to Government instructions in this regard for MSMEs.

37. But in the instant case, the petitioner himself has violated the tender condition by delaying the supply. Further, the petitioner has not produced any Order or document to prove that the respondent KSEB Ltd has compromised any consumer interest or there is malafide intent.

*In view of the above-mentioned reasons the Commission is of the considered view that the Order dated 26.05.2021 issued by this Commission in OP No. 16/2021 is not squarely applicable to this present petition also and hence the prayer of the petitioner to intervene in the tender conditions is liable to be rejected.*

**Issue No. 3.**

- 38. Whether the failure on the part of the respondent KSEB Ltd in giving timely response to the request of the petitioner for extension of time limit amounts to deemed acceptance?**

In this petition, the petitioner himself has admitted the fact that as per the Supply Orders issued by the licensee, certain quantity of ACSR Conductors had to be supplied to the licensee within a time frame as stipulated in the tender conditions. As per stipulation, the supply shall commence within 45 days from the date of Purchase Order and shall be completed within 3 months thereafter. There is also provision for placing additional orders/extension orders subject to conditions.

39. The petitioner has also admitted the fact that the first Purchase Order was delivered on 6/4/2018, with 39 days of delay, and 2<sup>nd</sup> Purchase Order was delivered as on 12/5/2018, with 32 days of delay, 3<sup>rd</sup> Purchase Order was delivered as on 23/3/2018, with 15 days of delay and the 4<sup>th</sup> Purchase Order was delivered as on 28/6/2018, with 69 days of delay. It is also contended

that the respondent had received Annexure A1 to A4 and had accepted the delivery of materials without any objection.

- 40.** The respondent KSEB Ltd as per Annexure-A-21 has informed the petitioner that as per clause 18 of the tender conditions, “Supply shall commence within 45 days from the date of purchase order and to complete within 3 months thereafter”. It was also clarified in the said letter that other similar firms have supplied ACSR conductors as per delivery schedule.
- 41.** Further as per the tender conditions, additional quantity material, if any, supplied after the scheduled delivery period, will be accepted only on conditions that the price of such materials will be re-fixed taking into consideration of the rate of new tender/ Purchase order of such material on the date of actual supply or basic price as per this order whichever is lower. After accepting the tender conditions, the petitioner cannot wriggle out of the contractual obligations, on the ground of delayed response from the respondent.
- 42.** From these facts ante, it is clear that the Purchase Order did provide for placing additional orders. However, the Commission notes that the petitioner was free not to accept these additional orders, in case he was not able to adhere to the terms and conditionality of the Purchase Order. No purchase order can be forced up on any supplier and the petitioner had full liberty to refuse these Orders. But the petitioner after accepting the Purchase Orders started writing letters to the respondent stating his difficulties in adhering to the delivery schedule. Timely delivery is the essence of a contract and hence has legal sanctity. Further, any extension of delivery period has to be defacto and not de jure. Mere non-response to the petitioner’s letters does not legally entitle him to presume “deemed acceptance” to his request nor does it have the effect of amending the relevant clause of the Purchase Order.

*Hence, the Commission is of the considered view that the contention raised by the petitioner regarding the “deemed acceptance” on the ground of delayed response from the respondent KSEB Ltd cannot be accepted and is liable to be rejected.*

#### **Issue No. 4**

- 43.** Whether the respondent KSEB Ltd has violated the force majeure conditions and if so whether the Commission can intervene in the tender conditions?

The Commission examined the contention raised by the petitioner that the petitioner has violated the **force majeure** conditions in detail. The Force Majeure condition contained in the tender document is extracted hereunder:

*38) Force Majeure Condition: - The supplier will not be liable for any liquidated damages for such delay due to force majeure conditions such as 10 days from the beginning of such delay due to force majeure conditions acts of God, acts of of public enemy, act of government, fire, floods, epidemics, quarantine, restrictions, riots, civil commotion and freight embargo, provided that supplier notify within, with valid proof for force majeure conditions. KSEB Ltd will verify that fact on merit and grant suitable extensions of delivery period if facts satisfy. The material, if any, supplied after the scheduled delivery period of the 25% additional quantity will be accepted only on conditions that the price of such materials will be re-fixed taking into consideration of the rate of new tender/ Purchase order of such material on the date of actual supply or basic price as per this order whichever is lower. The Chief Engineer (SCM)'s decision in re-fixing the price will be final.*

44. During the deliberations of the hearing, the petitioner raised a contention that acute shortage of raw materials has been intimated to the respondent KSEB Ltd within ten days as stipulated in the contract. But the respondent objected to the contention and submitted that as per the tender documents, shortage of raw material is not a ground to invoke Force Majeure condition. Further it was pointed out that the petitioner has not produced any evidence to substantiate his contention. Moreover, Annexure A-21 communication would show that the petitioner has violated the delivery schedule in accordance with tender conditions especially clause 18, which stipulated that “Supply shall commence within 45 days from the date of purchase order and to complete within 3 months thereafter”.
45. The Commission noted that the petitioner has not produced any document or evidence to prove that the respondent has violated the Force Majeure clause. Further this Commission has no jurisdiction to adjudicate up on the dispute arising out of the above contract. As per the documents produced by the petitioner “shortage of raw materials” is not a condition to invoke force majeure. A table prepared based on the Annexures produced by the petitioner containing the date of purchase order, date of extension sought for and period of delay is given below:

Sl No	Date of purchase Order	Date of extension sought for	Period of delay
1	23.11.2017	15.01.2018	52 days
2	30.11.2017	25.02.2018	56 days
3	08.02.2018	10.02.2018	2 days, No delay
4	08.03.2018	12.03.2018	4days, No delay

Hence, the contention raised by the petitioner that the respondent KSEB Ltd has violated the Force Majeure condition is not correct and is not legally sustainable due to the reasons discussed above and is liable to be rejected.

**46.** The present case involves disputes between a licensee and a private supplier MSME unit, arising consequent to the delay in supplying the materials within the time schedule fixed by the KSEB Ltd as per the tender conditions. As per the provisions of the Electricity Act, 2003 the Commission's jurisdiction to adjudicate up on the disputes is limited to Licensees and generating Companies. The petitioner is neither a licensee nor a generator so as to enable the Commission to invoke its adjudicatory powers. The petitioner has not produced any Order or direction issued by the Central Government or the State Government exempting the MSME unit condoning the delay in supplying the materials in relaxation of the tender conditions.

**47.** Further no evidence has been produced by the petitioner to prove that the respondent licensee has compromised the consumer interest or had any malafide intent so as to enable the Commission to intervene. Since the petitioner has accepted the tender conditions, issued by the licensee, the petitioner has the contractual obligations to supply the materials within the time schedule fixed by the licensee as per the tender conditions.

*In view of the reasons mentioned above, this Commission is of the considered view that in the present petition, the petitioner could not produce sufficient evidence to prove that the respondent KSEB Ltd has compromised the consumer interest or has any malafide intent so as to require any intervention of this Commission. Further, the factual position contained in the OP No.16/2021 and intervention made by this Commission vide Order dated 26.05.2021 is not applicable in this petition.*

In the circumstances mentioned above, the Commission has decided to reject all the reliefs sought by the petitioner in this petition.

### **Order of the Commission**

**48.**The Commission after examining the petition filed by M/s Elizabeth Conductors, all Annexures, tender documents, deliberations and arguments of both parties during the hearings, the relevant provisions of the KSERC (Conduct of Business) Regulations, 2003 and Electricity Act, 2003 and Order issued by this Commission in OP.No.16/2021 dated 26.05.2021, hereby order the following:

- (1) The reliefs sought by the petitioner to set aside Annexure A-21 Order and direct the respondent to release the payments withheld in lieu of penalty with updated price and to allow interest @12% for the withheld and updated payments to the petitioner is rejected, due to lack of jurisdiction of this Commission to entertain the petition due to the reasons mentioned above.
- (2) The additional prayer made by the petitioner to issue directions to the respondent and to intervene in the tender conditions in tune with the Order issued by this Commission dated 26.05.2021 in OP No.16/2021 is hereby rejected due to the reasons mentioned in the pre paras of this Order.

The petition is disposed off. Ordered accordingly.

**Sd/-**

**Adv. A.J. Wilson**  
**Member (Law)**

**Sd/-**

**Preman Dinaraj**  
**Chairman**

**Approved for issue**  
**Sd/-**

**C.R. Satheesh Chandran**  
**Secretary**