

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI**

(APPELLATE JURISDICTION)

**APPEAL NO. 271 OF 2015 &
IA NO. 438 OF 2015**

Dated: 20th November, 2018

Present: HON'BLE MR. JUSTICE N.K. PATIL, JUDICIAL MEMBER
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER

IN THE MATTER OF

1. **Karnataka Power Transmission Corporation Ltd.,**
A company incorporated under the provisions
Of Companies Act, 1956
having its office at Kaveri Bhavan,
Bangalore – 5600009
Represented herein by its Executive Engineer **Appellant No.1**

2. **Mangalore Electricity Supply Company Ltd,**
Corporate Office at Paradigm Plaza, AB Shetty Circle
Mangalore – 575001
Represented by its Superintending Engineer **Appellant No.2**

VERSUS

1. **Soham Phalguni Renewable Energy Pvt Ltd.,**
HMG Ambassador Building (7th Floor)
137, Residency Road,
Bangalore 560025
Represented by its Director Mr. Sanjith S. Shetty

2. **Karnataka Electricity Regulatory Commission,**
6th & 7th Floor, Mahalaxmi Chambers,
No. 9/2, M.G. Road,
Bangalore 560 091
Represented by its Secretary **Respondents**

Counsel for the Appellant ... Mr. Sriranga S.
Ms. Sumana Naganand
Mr. Balaji Srinivasan
Ms. Pratiksha Mishra
Ms. Pallavi Sengupta
Mr. Mayank Kshirsagar

Counsel for the Respondent(s)... Mr. Ajay J. Nandalike for R-1

Respondent No.2
Served unrepresented

J U D G M E N T

PER HON'BLE MR. JUSTICE N.K. PATIL, JUDICIAL MEMBER

1. The Karnataka Power Transmission Corporation Ltd, Bangalore (in short, '**first Appellant**') and Mangalore Electricity Supply Company Ltd., Mangalore (in short, '**second Appellant**') questioning the legality and the validity of the impugned Order dated 05.12.2014 passed in OP No. 48/2012 on the file of the Karnataka Electricity Regulatory Commission, Bangalore (in short, '**second Respondent**'), and to grant such other orders as this Tribunal may deem fit in the facts and circumstances of the case, has filed the instant Appeal, being Appeal No. 271 of 2015, under Section 111 of the Electricity Act, 2003 wherein the second Respondent/State Regulatory Commission has directed revision of the tariff and modified the terms of the PPA entered into between Karnataka Power Transmission Corporation Ltd (first Appellant herein) and Soham Phalguni Renewable Energy Pvt Ltd (first Respondent herein). The

second Respondent/State Regulatory Commission has directed revision of the tariff even though no case has been made out for revision of the tariff, by the first Respondent. The first Respondent had sought a revision of tariff on the ground that due to delays in the commissioning of the project, the cost of the project had increased substantially and therefore, it was unable to achieve financial closure. It is an admitted fact that, the said delays were solely attributable to the first Respondent and that the Appellants were in no way responsible for the said delays. In spite of the same, the second Respondent/State Regulatory Commission has modified the terms of the PPA agreed upon. Being aggrieved by the same, the Appellants herein have presented this appeal before this Tribunal.

2. It is the case of the Appellant that, the first Respondent has filed a Petition under Section 62 of the Electricity Act, 2003, praying for revision of the tariff for its Mini Hydel Power Project (Project) from Rs.2.92 per unit [as agreed in the Power Purchase agreement (PPA) dated 26.11.2004 between Soham Phalguni Renewable Energy Pvt Ltd. (SPREPL) (first Respondent herein) and Karnataka Power Transmission Corporation Ltd (KPTCL) (first Appellant herein) to Rs.3.97 per unit and to direct the consequential amendment to the said PPA. At the fag end of the proceedings, the first Respondent has filed an Interim Application on

29.05.2014, praying for revising the tariff to Rs.4.34 per unit, instead of Rs.3.97 per unit contending that the first Respondent is a Company registered under the Companies Act, 1956, carrying on the business of developing, owning and operating Mini Hydel Projects in the State of Karnataka. Prior to 31.07.2010, the name of the first Respondent-Company was, "Mount Kailash Power Projects Pvt. Ltd.", instead of its present name as mentioned in Cause Title above.

3. The present promoters of the first Respondent-Company purchased the entire equity shares, as per Share Purchase Agreement dated 28.02.2008 from the earlier promoters, who had owned the entire Share Certificates. The procedure for share purchase was completed and Closing Memorandum dated 28.10.2009 was executed between the parties. Hence, things thus stood. The Government of Karnataka (GOK), vide Order dated 10.10.2002, accorded sanction to set up a Mini Hydel Plant of 6 Mega Watts (MW) capacity across Puchamoguru River at Mullibettu village in Mangalore, and vide Order dated 23.10.2003, enhanced the capacity of the Project to 10.5 MW. The first Respondent entered into an Agreement dated 10.11.2003 with the GOK, containing the terms and conditions agreed between the Government and the first Respondent regarding the development of the Project. The first Respondent entered into a PPA dated 26.11.2004 with the first Appellant

Respondent/KPTCL for sale of power. Under Article 5 of the PPA, the tariff for the sale of power was Rs.2.90 per unit, with an annual escalation of 2%.

4. As per Clause 12 of the Agreement dated 10.11.2003, the completion period of the Project was 48 months from the date of the said Agreement. Due to unavoidable circumstances the Project could not be completed within the said period, the then management of the first Respondent sought extension of time and the Government extended the time for three years from its Order dated 09.11.2006 for completion of the Project. The first Respondent management, except obtaining certain formal clearance Certificates from different authorities required for construction of the Project, virtually did not start the Project Construction Work, till it handed over the management to the present promoters of the first Respondent. The Government of Karnataka cancelled the allotment of the Project, vide its Order dated 19.06.2010, for non-completion of the Project within the prescribed time schedule.

5. The first Respondent management made a request to the GoK seeking revocation of the earlier cancellation of the allotment of the Project and for further extension of time. On consideration of the request of the first Respondent and taking into consideration the report of the

Karnataka Renewable Energy Development Limited (KREDL), the Government of Karnataka extended the time for completion of the Project till August, 2012, by revoking the earlier cancellation Order, vide its Order dated 29.10.2010. The learned counsel for the first Respondent submitted that, 80% of the Project work was completed and it would be ready for commissioning by November, 2014. Further, it is specifically contended that estimated total cost of the Project as on 12.12.2012, i.e., the date of filing of the Petition, was Rs.56.58 Crores and claimed a tariff of Rs.3.97 per unit. On 29.5.2014, i.e., the date of filing of the amendment application, the first Respondent projected the total expected cost for completion of the Project at Rs.65.34 Crores and claimed a tariff of Rs.4.34 per unit and filed the petition seeking the reliefs as stated supra.

6. After service of notice, the Respondents have appeared through their counsel and the second Appellant herein has filed the detailed reply contending that the PPA dated 26.11.2004 was entered into between the first Appellant/KPTCL and M/s. Mount Kailash Power Projects Pvt. Ltd. (as the first Respondent was then called) and submitted that the said PPA has been executed between the parties and, further, subsequently assigned by the first Appellant/KPTCL to the second Appellant/MESCOM, as per the Government Order.

7. That the delay in execution of the Project was attributable to the first Respondent as it failed to adhere to the construction schedule, and having availed all the benefits given by the Government, the first Respondent cannot seek revision of tariff by taking advantage of its own wrong. The Project ought to have been completed in the year 2007 itself, but the first Respondent has delayed the same nearly about four years. The rate of Rs.2.90 per unit fixed in the PPA was based on the relevant consideration of the facts. Therefore, having voluntarily entered into the PPA at the rate of Rs.2.90 per unit, the first Respondent is not entitled to re-fixation of the tariff. The first Respondent cannot seek re-fixation of tariff based on the generic Tariff Order dated 11.12.2009 for Renewable Sources of Energy, as the parameters considered are different. In the generic Tariff Order dated 11.12.2009, it is specifically mentioned that the Order applies to PPAs submitted for approval on or after 01.01.2010 and cannot be made applicable to the first Respondent's Plant, as the PPA of the first Respondent's Plant was approved by the second Respondent/State Regulatory Commission on 07.09.2004. It is specified in this order that in respect of PPAs already approved, the tariff and other terms in those PPAs would hold good for the period specified therein. If re-determination of the tariff is allowed, it would lead to a situation in which every generator would approach the second Respondent/State Regulatory Commission for similar reliefs, rendering the exercise of fixing the generic tariff futile.

8. Further, the Appellant contended that, the responsibility of establishing the Project within the stipulated time is on the first Respondent and the second Appellant cannot be made liable to pay additional tariff for failure of the first Respondent to manage its finances or to adhere to the time schedule. By delaying the Project, the first Respondent has wasted the natural resources of the State for several years and deprived the State from availing the benefit of power that could have been supplied from its Plant. The terms of the PPA executed are binding on both the parties, and the question of revising the tariff agreed between the parties would amount to re-writing the terms of the Contract. That the averments in the Petition with regard to the increase in the input costs are self-serving statements and that had the Project been implemented by the first Respondent as originally envisaged, these issues of escalated costs would not have arisen at all. The second Appellant has denied the estimated costs for completion of the Project, as stated by the first Respondent, and contended that they are self-serving averments. The averments made in the Interim Application filed by the first Respondent are denied by the second appellant. Therefore, the Appellants have prayed for dismissal of the Petition is devoid of merits.

9. The second Respondent/KERC heard the learned counsel appearing for the Appellant and the learned counsel appearing for the Respondent and after careful perusal of the pleadings available on record and other necessary relevant documents placed on record by the parties, opined that during arguments, the learned counsel for the Appellants have not disputed the fact that the tariff agreed in the PPA can be revised by the State Regulatory Commission, if there are material changes in the circumstances, provided the party seeking revision of tariff is not at fault and, further, contended that the first Respondent has not made good grounds for revision of tariff. On the other hand, the learned counsel for the first Respondent has submitted that, without there being any fault on the part of the first Respondent, the construction and completion of the project was delayed due to reasons beyond its control, and therefore, the tariff agreed in the PPA needs to be revised in the interest of justice taking into consideration the facts and circumstances of the case made out by the first Respondent.

10. On the basis of the pleadings available on file and the submissions made by the learned counsel for both the parties, as referred above, the second Respondent/State Regulatory Commission has framed issues for consideration, which are as follows:

- (a) Whether the first Respondent has made out grounds justifying revision of the tariff agreed in the PPA?
- (b) If the answer to issue No. (a) above is in the affirmative, what should be the generation tariff that could be allowed to the first Respondent's project?
- (c) What Order?

11. After thoughtful consideration of the submissions made by the learned counsel for the Appellant and learned counsel for the first Respondent, the same has been discussed in detailed in Para 7(a) to 7(f) of the impugned Order and specifically observed as pointed out by the learned counsel appearing for the first Respondent as agreed in the PPA and in the Agreement executed with the Government. The Government had extended the time for completion of the Project works on the ground made out by the Appellant and specifically taken into consideration the reports submitted by the KREDL and also taken the relevant provision regarding the period of completion of the project is contained in Clause-12 of the Agreement with the Government.

12. It is not in dispute that the Government has extended the time for completion of the Project from time-to-time, till August, 2014, on the requests of the first Respondent and also keeping in view the reports

submitted by KREDL. Therefore it can be inferred that the Government was satisfied with the reasons given by the first Respondent for the delay in the commencement and completion of the Project and also taken into consideration that the first Respondent has given a Performance Guarantee of Rs.3,00,000/- per MW. It is not disputed that the earlier Management of the first Respondent had not even commenced the Project works, except obtaining certain necessary approvals. The transfer of the management of the first Respondent was completed only on 28.10.2009. The actual progress of the Project started thereafter only and for the present, it is nearing completion stage. It is pertinent to note here that the second Appellant has not taken any action, calling upon the first Respondent to cure the Construction Defaults and to terminate the PPA. Taking all relevant facts into consideration and also judgment of the Hon'ble Supreme Court reported in (2011) 11 SCC 34, in the case of Transmission Corporation of Andhra Pradesh Limited and anr. v Sai Renewable Power Private Limited and ors, as held in paragraph 63 of the said Judgment, answered the issue in affirmative.

13. Regarding Issue No.2: the State Regulatory Commission after elaborately considering the case made out by the Appellant and the Respondents has given its findings in detail in para 8(a) to 8(j) and specifically pointed out in paras (c) to (h) and observed in 8(g) that, in the

present case, admittedly, the first Respondent has incurred the Project Cost during the five years period, i.e., from 01.01.2010 to 31.12.2014, when the generic Tariff Order dated 11.12.2009 was in force and the tariff of Rs.3.40 per KWhr was applicable for the Projects commenced and completed during the said period. The State Regulatory Commission also observed in para 8(j) that the first Respondent is entitled to the tariff of Rs.3.40 (Rupees Three and Paise Forty only) per KWhr, without any escalation, for the energy delivered at the Metering Point, for the first ten years from the COD. Accordingly, Issue No.(2) is answered.

14. On Issue No.3, the State Regulatory Commission, after having regard to the foregoing reasons, have passed the Order holding that the first Respondent shall be entitled to the tariff of Rs.3.40 (Rupees Three and Paise Forty only) per KWhr, without any escalation, for the energy delivered at the Metering Point, for the first ten years from the Commercial Operation Date, instead of the tariff indicated in Article 5.1 of the PPA dated 26.11.2004 and the parties shall effect the necessary amendment to the PPA dated 26.11.2004, in the above terms. With these observations, the petition filed by the first Respondent has been disposed of.

15. The Appellant not being satisfied with the impugned Order passed by the State Regulatory Commission/KERC assailing the impugned Order

on the ground that the order impugned passed by the State Regulatory Commission is unsustainable, illegal, arbitrary and liable to be set aside on the ground that the second Respondent/State Regulatory Commission has passed the impugned order on the basis of assumption that the Respondents before it did not dispute the fact that tariff agreed in the PPA can be revised by the State Regulatory Commission, if there are material changes in circumstances and provided the party seeking revision of tariff is not at fault. The State Regulatory Commission has erroneously overlooked the fact that the Appellant herein have clearly adverted to such a scenario in para 5 & 6 of the statement of reply, wherein the Appellants have categorically stated that question of revising the concluded contract would not arise and also specifically brought to the notice of the Tribunal the decision rendered by the Hon'ble Supreme Court in C.A. No. 13235 of 2012 in the matter of BESCO v Konark Power Pvt Ltd. wherein, in an identical situation, the Hon'ble Supreme court has been pleased to stay the operation of the order of this Tribunal wherein, this Tribunal has directed the parties to modify the terms of the PPA and in particular revise the tariff. Further, the Appellant herein in no uncertain terms stated that the delay in execution of the project can only be attributed to laxity on the part of the first Respondent herein. However, unfortunately, the State Regulatory Commission has failed to take both these aspects into

reckoning while deciding the issues in question. On this ground alone, the impugned order deserves to be set aside.

16. Further, it is the case of the Appellant that four important issues that arise for the consideration of this Tribunal are:

- (a) that the Appellants are acting in pursuance of a concluded contract between the first Appellant and the first Respondent, was the State Regulatory Commission right in directing the modification of the terms of the PPA?
- (b) Was the State Regulatory Commission justified in modifying the terms of the PPA de hors the terms of the PPA in the light of the fact that the Hon'ble Supreme Court of India is seized of the very same issue?
- (c) Whether the State Regulatory Commission justified in reviewing the original tariff by relying on later tariffs without considering the different circumstances under which the later tariff was fixed?
- (d) Whether the State Regulatory Commission justified in revising the tariff under the PPA even though it was the admitted position that the delays were due to the non performance of the obligations of the first Respondent?

17. By the impugned Order, the State Regulatory Commission has directed revision of tariff from Rs. 2.90 to Rs. 3.40/- per Kwhr without escalation for the first ten years from the commercial operation date and also consequently directed amendment of Clause 5.1 of the PPA. The impugned Order is contrary to the Regulation governing fixation of tariff and also the law laid down by the Hon'ble Supreme Court in respect of the power of the Regulatory Commission to revise the tariff specified in power purchase agreements. Therefore, learned counsel for the Appellant submitted that, the impugned Order passed by the second Respondent/State Regulation Commission cannot be sustainable and is liable to be set aside and felt necessitated to present this appeal.

18. **Per-contra**, learned counsel, Shri Ajay J. Nandalike, appearing for the first Respondent in his reply vehemently contended and denied the statements, allegations and averments made by the learned counsel for the Appellants in the memorandum of appeal, save and except to the extent specifically admitted therein and submitted that, the instant appeal filed by the Appellant is devoid of merit either under law or on facts. The conduct of the Appellant totally disentitles it for any equitable relief at the hands of this Tribunal. Further, he contended that, there is no legal infirmity or illegality in the impugned Order passed by the second

Respondent. The State Regulatory Commission after critical evaluation of the entire documents available on record and proposition of the oral as well as documentary evidences available on file and the prevailing laws of the land, by assigning the valid and cogent reasons, has allowed the petition filed by the first Respondent. The same does not call for any interference by this Tribunal in exercise of its Appellate Jurisdiction and thus the instant appeal is liable to be dismissed as devoid of merit at threshold.

19. After careful consideration of the submissions made by the learned counsel appearing for the Appellants and learned counsel appearing for the first Respondent and after going through the impugned Order passed by the second Respondent/State Regulatory Commission and perusal of the written submissions filed by learned counsel for the Appellant and learned counsel for the first Respondent, the issues arise for our consideration are as under:

- (I) Whether the first Respondent/Soham Phalguni Renewable Energy Pvt. Ltd. has made out grounds justifying revision of the tariff agreed in the PPA?

- (II) Whether the impugned Order passed by the second Respondent/State Regulatory Commission is sustainable in law?

Re: Issue No. (I):

20. The learned counsel, Shri Sriranga S., appearing for the Appellants, at the outset, submitted that, the term regarding 'Purchase Price' or 'Tariff' was agreed between the parties and that term was validly concluded. The increase in the cost of the Project was due to the delay on the part of the first Respondent that the first Respondent cannot take advantage of its own wrongful acts. Therefore, he submitted that, the increase in the construction cost of the Project cannot be a valid ground for revision of the tariff. The PPA was executed on 26.11.2004, and as per Article 4.1(iii) of the PPA, the first Respondent should have completed the Project within 24 (twenty four) months from the date of the Financial Closure, and that as per Article 2.1(c), the Financial Closure should have taken place within 3 (three) months from the date of signing of the PPA. Therefore, submissions of the learned counsel for the Appellants that, as per the terms of the PPA, the Project should have been completed within 27 (twenty seven) months from the date of the PPA. The terms and condition of the PPA provides for its termination by the second Appellant, in case the first Respondent does not achieve the Financial Closure within the stipulated time or it commits any Construction Default, as agreed by the parties.

21. The second Respondent has committed grave error directed revision of tariff from Rs 2.90 to Rs. 3.40/- per Kwhr without escalation for the first ten years from the commercial operation date and also consequently directed amendment of Clause 5.1 of the PPA. Therefore, the impugned order is contrary to the Regulation governing fixation of tariff and also the law laid down by the Hon'ble Supreme Court in respect of the power of the State Regulatory Commission to revise the tariff specified in power purchase agreements. In regard to this issue, power of the second Respondent/State Regulatory Commission to re-fix tariff in respect of existing PPA's was considered by the Hon'ble Supreme Court in Civil Appeal No. 5612/2012 in the matter of M/s BESCO v Konark wherein, the Hon'ble Supreme Court has considered Regulation 5.1 of the 2004 Regulations as well as Regulation 9 contained in the Regulations of 2011 and considered the contention of the BESCO that once the PPA was signed and approved by the State Regulatory Commission, by virtue of the first part of the proviso, the tariff approved by the State Regulatory Commission would continue to remain till the end of the contract period which cannot be varied as there was no power vested in the State Regulatory Commission under the 2004 Regulations and that the enlargement of the power by Regulation 9 of the 2011 Regulations was curtailed by the proviso to Regulation 9 which makes such power inapplicable to PPA's which were approved under the earlier Regulations.

The Hon'ble Supreme Court in para 11 to 14 of the said judgment came to the conclusion that Regulation 5.1 of the 2004 Regulations alone would apply in cases of parties in the said proceedings and there was no scope for the State Regulatory Commission to vary the tariff agreed between the parties and, accordingly, the order impugned in the said proceedings revising the said tariff was set aside.

22. In the present case, it is an admitted fact that the PPA was approved by the Regulatory Commission on 07.09.2004. Pursuant to the same, the PPA has been signed on 26.11.2004. there can be no doubt with regard to the fact that the approval was under the provisions of the KERC (Power Procurement from Renewable Sources) Regulation, 2004. The Hon'ble Supreme Court has considered power of the second Respondent/State Regulatory Commission in the light of the Regulations governing tariff fixation and the same fully covers the issue in question in favour of the Appellant.

23. Further, he quick to point out and submitted that, this Tribunal had an occasion to consider a similar issue in the matter of Gulbarga Electricity Supply Company Limited v KERC reported in 2016 SCC Online APTEL 40 and held in para 16 to 18 of the said judgment, this Tribunal has considered and followed the decision in the matter of Konark Power

Pvt Ltd. The order of this Tribunal makes it clear that the tariff in PPA's approved prior to 27.09.2004 cannot be altered by the Regulatory Commission. As stated supra, in the case in hand, the PPA has been approved on 07.09.2004 i.e. prior to the introduction of the Regulations of 2004. The decision of the State Regulatory Commission impugned in the present appeal is wholly without jurisdiction and liable to be vitiated.

24. Learned counsel appearing for the Appellant submitted that, when the proceedings in O.P. 48/2012 was pending before the State Regulatory Commission, the Civil Appeal in the matter of Konark Power Projects Limited was pending consideration before the Hon'ble Supreme Court. This aspect has been brought to the notice to the State Regulatory Commission and also provided copy of the interim order passed by the Hon'ble Supreme Court. In the circumstances, when the very issue with regard to the power of the Regulatory Commission to modify the tariff existing in a PPA was subject matter of proceedings before the Hon'ble Supreme Court and also subject matter of interim orders, the State Regulatory Commission ought to have stayed its hands and awaited the decision of the Hon'ble Apex Court instead of taking a decision on the very same issue. Reliance is placed in this regard on the judgment rendered in the matter of:

(a) D.K. Trivedi v Union of India reported in 1986 SC 1323 and

(b) Chavvi Mehrotra v Director General, Health Services reported in
1995 Supp 3 SCC 434

The action of the State Regulatory Commission in deciding the issue all over again is illegal and contrary to law hence, on this ground also the impugned Order passed by the State Regulatory Commission/second Respondent is liable to be set aside.

25. Further, learned counsel appearing for the Appellant submitted that, in answering issue No. (1) in para 7(f), the State Regulatory Commission has relied upon the judgment of the Hon'ble Supreme Court reported in 2011 11 SCC 34 in the case of Transmission Corporation of Andhra Pradesh Ltd & Anr v Sai Renewable Power Pvt Limited to come to the conclusion that in the light of the finding contained in para 63 of the said judgment, that purchase price indicated in a PPA is within the realm of contract subject to changes which are contractually and or even statutorily permissible. Based on the same, the State Regulatory Commission holds that the change in tariff is statutorily permitted in the present case. The said finding of the State Regulatory Commission is wholly erroneous and contrary to judgments of the Hon'ble Supreme Court and of this Tribunal mentioned above. On this ground also, the impugned order deserves to be vitiated.

26. Further, even otherwise, the impugned order is untenable and liable to be set aside for the reason that the State Regulatory Commission has taken note of the alleged cost incurred by the Respondent herein in para 2(e) and 8(c) of the impugned order to be Rs. 56.58 crores at the time of filing the petition and, thereafter, to be Rs. 65.34 crores at the time of completion of the project. These statements are not substantiated. The State Regulatory Commission has failed to take into reckoning the lack of the bonafides of the figures stated by the Respondent in the present proceedings and has instead proceeded to determine the tariff for the Respondents plant only on the basis of the period during which the cost was allegedly incurred by the Respondent, namely between 01.01.2010 and 31.12.2014, which falls within the control period of the 11.12.2009 generic order of the State Commission. The State Regulatory Commission has while reaching this conclusion failed to take into consideration the fact that the statements regarding investment are wholly unsubstantiated. In fact, although in para 8(c) the State Regulatory Commission comes to the conclusion that there is no material to justify the need for the expenditure incurred; the State Regulatory Commission erroneously proceeds to enhance the tariff payable. It is submitted that, the revision in tariff is not based on the facts placed before the State Regulatory Commission and, therefore, the impugned order deserves to

be set aside. The entire basis for re-fixation of tariff is flawed in view of which the impugned order ought to be set aside at threshold. It is, further, submitted that, the order impugned is one without jurisdiction and even otherwise the order impugned is baseless and liable to be set aside.

27. Per-contra, learned counsel, Shri Ajay J. Nandalike, appearing for the first Respondent submitted that, there were genuine grounds, which prevented it from commencing and completing the Project works, as agreed in the PPA and in the Agreement executed with the Government. He quick to point out and taken us through the order passed by the State Government where the Government has extended the time for completion of the project from time to time, till August, 2014, taking into consideration the bonafide shown in his representation and also upon consideration of the reports submitted by KREDL. Therefore, he submitted that, the Government after satisfied with the valid reasons given by the first Respondent for the delay in the commencement and completion of the Project extended the time for completion of the project. In the Government order dated 10.12.2012, it is stated that, apart from payment of the prescribed fee for grant of extension of time for completion of the Project, the first Respondent shall also give a Performance Guarantee of Rs. 3,00,000/- per MW. The earlier management of the first Respondent had not even commenced the Project works, except obtaining certain

necessary approvals only. The transfer of the management of the first Respondent was completed only on 28.10.2009. The actual progress of the Project started thereafter, and for the present, it is nearing in completion stage. He specifically pointed out that the second Appellant has not taken any action, calling upon the first Respondent to cure the construction defaults and to terminate the PPA. Therefore, he submitted that, analysis of the clause of the PPA stated that the Agreement will come into effect only on the fulfillment of the condition precedent mentioned in Article 2.1 are achieved and admittedly no financial closure had been achieved till November, 2012.

28. Further, he submitted that, in view of the non-fulfilment of the condition precedent, the Appellant had waived the same. The waiver was done vide the second Appellant's letter dated 11.04.2011 wherein, the first Respondent's request for cancellation of PPA for non-fulfilment of condition precedent was rejected. The PPA, therefore, came into effect only on 11.04.2011. Hence, the 2009 Regulations would apply to the present PPA and, consequently, the 2009 Tariff Order would apply.

29. As the second Respondent/KERC did not fix the tariff, it has every power to modify the PPA to fix the tariff. The tariff for the PPA was fixed by the Government of Karnataka under its Government Order and not by

the second Respondent/KERC. This fact is recorded in the Order of the second Respondent/KERC at page 13 of the impugned Order. This finding has not been questioned by the Appellants at all. Therefore, the second Respondent/State Regulatory Commission had to approve the tariff and without approval of the tariff by the second Respondent/State Regulatory Commission, the PPA did not have legal standing. The State Regulatory Commission has now fixed the tariff as per its generic tariff for renewable source of energy vide its Order dated 11.12.2009. The contention that State Regulatory Commission has no power to determine the tariff or modify the PPA entered into between the parties the submission is contrary to settled position of law as held by the Hon'ble Supreme court and this Tribunal in catena of judgments.

30. In the case of BSES Ltd v Tata Power Co. Ltd and Ors reported in (2004) 1 SCC 195, the Hon'ble Supreme Court has examined the law on the said point in para 16 & 17. Further, the Hon'ble Supreme Court in Transmission Corporation of Andhra Pradesh Limited and Anr v Sai Renewable Power Private Limited and Ors. reported in (2011) 11 SCC 34, in the similar facts and circumstances as the present case, approved the above proposition of law in para 61 to 64 wherein, it has held that, “.....
With these specific powers in the statute book itself, it cannot be said that procurement of power from the generating companies will not fall within

the ambit of powers and functions of the Regulatory Commission. It, as already noted, is a common body performing functions, duties and exercising powers under all these three Acts.” Therefore, in view of the well settled law laid down by the Hon’ble Apex Court and by this Tribunal also in host of the judgments, the proposition that State Regulatory Commission cannot fix the tariff and or modify the PPA is incorrect. Therefore, the order of the second Respondent/State Regulatory Commission is legally sustainable and interference by this Court does not call for.

31. Further, learned counsel for the first Respondent placed reliance on the judgment of the Hon’ble Apex Court in the case of BESCO v Konark reported in (2016) 13 SCC 515 at para 11 to 13 wherein, it is held that, **“11. When we applied Regulation 5.1, we find that the substantive Regulation does not empower the Commission to vary the tariff for purchase of electricity after its determination.....”** and in para 13, it has held that, *“.... power is vested with the Commission to vary the tariff is concerned, such power specifically provided for in the said Regulations will only operate prior to fixing of the tariff once the power purchase agreements concerned are ultimately concluded and the terms are agreed between the parties under the power purchase agreements,*

thereafter, in our considered opinion, Regulation 5.1 of the 2004 Regulations alone would apply in the case of the parties before us....”

32. Also he placed reliance on the judgment of this Tribunal in the case of Gulbarga Electricity Regulatory Commission Limited v Karnataka Electricity Regulatory Commission and Anr. reported in 2016 SCC online APTEL 40 wherein, this Tribunal in para 61 has observed that, *“The Supreme Court, in our opinion, did not consider the larger question whether concluded PPAs can be reopened by the State Commission by resorting to statutory provisions namely, Section 62(4) and 64(6) of the Electricity Act.”* and, further, observed that, *“Having regard to the embargo placed on the Commission by the said regulations the Supreme Court observed that once PPAs are concluded the tariff cannot be varied.”* Further, he placed reliance on the judgment of the Hon’ble Supreme Court, in para 16, which read thus:

“16. We have already referred to the relevant paragraphs of Konark hereinabove. It is true that in Konark the Supreme Court was concerned with 2004 Regulations which are applicable here. The Supreme Court considered Regulations 5.1 of the 2004 Regulations as well as Regulation 9 of the KERC (Power Procurement from Renewable Sources by Distribution Licensees and Renewable Energy Certificate Framework Regulations 2011 (“2011 Regulations”) and observed that Regulation 5.1 does not empower the Commission to vary the tariff

after its determination. The Supreme Court noticed that proviso to Regulation 9 of the 2011 Regulations creates embargo in so far as PPAs approved by the Commission which were covered by 2004 Regulations. The Supreme Court noted that while reading Regulation 5.1 of the 2004 Regulations along with Regulation 9 of the 2011 Regulations what emerges is, whatever terms agreed between the parties should continue to remain in force without any alteration at least for a period of ten years as provided under the PPAs between the parties therein. Having regard to the embargo placed on the Commission by the 2004 Regulations & 2011 Regulations the Supreme Court observed that once PPAs are concluded tariff cannot be varied. It is argued that since the same regulations are applicable here the State Commission could not have reopened the PPA.....

.....

18. The first proviso makes it clear that PPAs approved by the Commission, prior to the notification of 2004 Regulations shall continue to apply for such period as mentioned in those PPAs. Admittedly, 2004 Regulations were notified on 27/9/2004. The PPA in the case before the Supreme Court was approved in the year 2002. In this case the PPA is approved after 27/9/2004.

.....

19. But the State Commission adopted a very balanced approach and enhanced the tariff to Rs. 3.40 per KWhr from the date of filing of the petition i.e. 13/9/2013, for the first ten years from the COD. In the peculiar facts

and circumstances of the case we find no reason to interfere with the balanced approach.”

33. He submitted that, in view of the binding precedent of this Tribunal as well, the contention of the Appellant ought to be rejected. This judgment appreciates the approach of the second Respondent/State Regulatory Commission in applying the generic tariff to the generator’s case even when he sought project specific tariff. This judgment is also in consonance with Section 27(2) of the KER Act, 1999. The contention of the Appellant that this judgment supports the case of the Appellant is incorrect for the reasons as already stated above.

34. The learned counsel for the first Respondent, further, submitted that Konark case has been distinguished by the Hon’ble Supreme Court by holding that it is permissible for the Commission to vary the tariff in the facts of any given case in Gujarat Urja Vikas Nigam Limited v Tarini Infrastructure Limited and Ors reported in (2016) 8 SCC 743 wherein, in para 16, it is held that, *“When the tariff order itself is subject to periodic review it is difficult to see how incorporation of a particular tariff prevailing on the date of commissioning of the power project can be understood to bind the power producer for the entire duration of the plant life (20 years) as has been envisaged by Clause 4.6 of PPA in the case of Junagadh”*.

35. The learned counsel for the first Respondent submitted that, it is not in dispute that the Government has extended the time for completion of the Project from time-to-time, till August, 2014, on the requests of the first Respondent and also upon consideration of the report submitted by KREDL. Therefore, it can be inferred that the Government was satisfied. When the Government has extended the time for the purpose of completion of the project, it is not open for the Appellant to question the same, this is on having regard to contractual price or waiver as well as of the number of waiver as provided in the Power Purchase Agreement itself. Therefore, Power Purchase Agreement had never come into effect on account of non-fulfillment of the condition precedent it was only after commercial conditions became possible with the Power Purchase Agreement would come into effect. Furthermore, the entire project cost was incurred during the 4 years period from 01.01.2010 to 31.12.2014 when the generic tariff on 3.40/Kwhr was applicable. Hence, the contention of the Appellant that the earlier tariff would comply with the present Power Purchase Agreement is contrary to the terms of the Power Purchase Agreement itself as well as tariff order and the judgment of this Tribunal. Therefore, the impugned order passed by the second Respondent/State Regulatory Commission strictly in consonance with the relevant provisions of the Electricity Act and Regulations and taking into consideration the entire material facts available on record. The second

Respondent/State Regulatory Commission after thoughtful consideration of the facts made out by the learned counsel appearing for the first Respondent, has rightly justified in granting the relief sought for. The Appellant has failed to make out any case or good ground before this Tribunal to interfere in the impugned Order passed by the second Respondent/State Regulatory Commission. Hence, appeal filed by the Appellant may be dismissed with costs.

OUR CONSIDERATION AND ANALYSIS:

36. After thoughtful consideration of the entire relevant material available on record and the submissions of the learned counsel for the Appellants and learned counsel for the first Respondent, what is emerged that, whether the first Respondent has made a ground justifying the revision of tariff agreed in the PPA on the genuine grounds, which prevented it from commencing and completing the Project works within the prescribed limitation period, as agreed in the PPA and in the Agreement executed with the Government. It is significant to note that the Government has extended the time for completion of the project from time to time, till August, 2014 taking into consideration the bonafide shown in his representation and also upon consideration of the reports submitted by KREDL. The Government after being satisfied with the valid reasons given by the first Respondent for the delay in commencement and completion of the Project, in its Order dated 10.12.2012, mentioned that

the earlier management of the first Respondent had not even commenced the Project works, except obtaining certain necessary approvals only. The transfer of the management of the first Respondent was completed only on 28.10.2009. The actual progress of the Project started thereafter only and at present, it is nearing in completion stage. It is pertinent to note that it is a specific case of the first Respondent that the second Appellant has not taken any action, calling upon the first Respondent to cure the construction defaults and to terminate the PPA. The second Respondent, after thorough analysis of the clause of the PPA stated that the Agreement will come into effect only on the fulfillment of the conditions as referred in Article 2.1 are achieved and admittedly no financial closure had been achieved till November, 2012 is not in dispute. The second Respondent/KERC has rightly justified in taking note of the second Appellant's letter dated 11.04.2011 wherein, the first Respondent's request for cancellation of PPA for non-fulfilment of condition precedent was rejected. The PPA, therefore, came into effect only on 11.04.2011. Hence, the 2009 Regulations would apply to the present PPA and, consequently, the 2009 Tariff Order would apply. The said reasoning given by the second Respondent/KERC is well founded and well reasoned. We do not find any legal error or material irregularity.

37. It is, further, emerged from the material available on record that the second Respondent/State Regulatory Commission did not fix the tariff, and it has every power to modify the PPA to fix the tariff. The tariff for the PPA was fixed by the Government of Karnataka under its Government Order and not by the second Respondent/KERC. This fact is recorded in the Order of the second Respondent/KERC at page 30 of the impugned Order, which read thus:

“..We have heard the oral submissions made by the learned counsel for both the parties and have perused the pleadings and documents placed on record by the parties. During arguments, the learned counsel for the Respondents has not disputed the fact that the tariff agreed in the PPA can be revised by the Commission, if there are material changes in the circumstances, provided the party seeking revision of tariff is not at fault. He has submitted that such grounds for revision of tariff were not made out by the Petitioner. On the other hand, the learned counsel for the Petitioner has submitted that without there being any fault on the part of the Petitioner, the construction and completion of the Project was delayed due to reasons beyond its control, and therefore, the tariff agreed in the PPA needs to be revised.”

This finding has not been questioned by the Appellants at all. Therefore, the second Respondent/State Regulatory Commission had to approve the tariff and without approval of the tariff by the second Respondent/State Regulatory Commission, the PPA did not have legal standing. Therefore, the State Regulatory Commission has now fixed the

tariff as per its generic tariff for renewable source of energy vide its Order dated 11.12.2009. The contention that State Regulatory Commission has no power to determine the tariff or modify the PPA entered into between the parties, the said submission is contrary to the settled position of law laid down by the Hon'ble Supreme Court and this Tribunal in catena of judgments.

38. In view of the findings recorded by the second Respondent/State Regulatory Commission, the contention of the Appellants cannot be considered and liable to be vitiated on the ground that the second Respondent/State Regulatory Commission in applying the generic tariff to the generator's case even when he sought project specific tariff. Therefore, submission of the learned counsel for the Appellants placing reliance on the judgment does not apply to the facts and circumstances of the case in hand.

39. The learned counsel for the Appellant vehemently contended that, when the proceeding in O.P. 48/2012 was pending before the State Regulatory Commission, the Civil Appeal in the matter of Konark Power Projects Limited was pending consideration before the Hon'ble Supreme Court. This aspect has been brought to the notice to the second Respondent/State Regulatory Commission and also provided copy of the

interim order passed by the Hon'ble Supreme Court. This aspect has not been considered or appreciated by the second Respondent/State Regulatory Commission. The second Respondent/State Regulatory Commission ought to have stayed its hands and awaited the decision of the Hon'ble Apex Court instead of taking final decision in the matter. Therefore, he submitted that, the impugned Order passed by the second Respondent/State Regulatory Commission cannot be sustained and is liable to be vitiated.

The learned counsel for the first Respondent, inter-alia, vehemently contended that, in view of the recent judgment of the Hon'ble Apex Court in the case of Gujarat Urja Vikas Nigam Limited v Tarini Infrastructure Limited and Ors reported in (2016) 8 SCC 743 wherein, the Hon'ble Apex Court has distinguished Konark Power Project case holding that it is permissible for the Commission to vary the tariff in the facts of any given case wherein in para 16, held thus:

“When the tariff order itself is subject to periodic review it is difficult to see how incorporation of a particular tariff prevailing on the date of commissioning of the power project can be understood to bind the power producer for the entire duration of the plant life (20 years) as has been envisaged by Clause 4.6 of PPA in the case of Junagadh”

Therefore, learned counsel appearing for the first Respondent submitted that, the submissions made by the learned counsel for the

Appellants cannot be applicable to the facts and circumstances of the case in hand in view of the well settled law laid down by the Hon'ble Apex Court, and the second Respondent has rightly considered the matter and passed an appropriate order in accordance with law.

40. It is not in dispute that, the State Government has extended the time for completion of the project from time to time till August, 2014 on the request of the first Respondent and also taken into consideration the report submitted by KREDL. Therefore, it can be inferred that the Government was satisfied. When the Government has extended the time for the purpose of completion of the project and the Appellant has not questioned the same, the extension of time given by the Government reaches finality which is binding to the parties. After thorough analysis of the facts and circumstances of the case, it is emerged that, the Power Purchase Agreement had never come into effect on account of non-fulfillment of the condition precedent, it was only after commercial operations became possible with the Power Purchase Agreement would come into effect. Furthermore, the entire project cost was incurred during the 4 years period from 01.01.2010 to 31.12.2014 when the generic tariff of Rs.3.40/Kwhr was applicable. Therefore, the contention of the Appellant that the earlier tariff would apply with the present Power Purchase Agreement is contrary to the terms of the Power Purchase

Agreement itself as well as tariff order and the judgment of this Tribunal. Therefore, we are of the considered view that the impugned order passed by the second Respondent/State Regulatory Commission strictly in consonance with the relevant provisions of the Electricity Act and Regulations and the second Respondent/State Regulatory Commission after taking into consideration the entire material facts available on record and after appreciation of the oral and documentary evidence available on record, has rightly taken a balanced view and has passed the impugned Order. We are of the considered view that the second Respondent/State Regulatory Commission has rightly justified in granting the relief sought for by the Appellant. Therefore, the Appellant has failed to make out any case or good ground before this Tribunal to interfere in the impugned Order passed by the second Respondent/State Regulatory Commission. Hence, we answered issue No.1 against the Appellants.

Re: Issue No. (2):

41. The learned counsel for the Appellants, Shri Sriranga S., vehemently contended that the delay in execution of the project is attributable to the first Respondent as it failed to adhere to the construction schedule, and having availed all the benefits given by the Government, the first Respondent cannot seek revision of tariff by taking advantage of its own wrong. The Project ought to have been completed in the year 2007 itself,

but the first Respondent has delayed the same nearly about four years. It is significant to note that, in the instant case, there were genuine grounds made out by the first Respondent, which prevented it from commencing and completing the Project works, as agreed in the PPA and in the Agreement executed with the Government. The Government has extended the time for completion of the project from time to time, till August, 2014, taking into consideration the bonafide shown in his representation and also upon consideration of the reports submitted by KREDL and the delay in commissioning and completion of the project has been condoned and permission has been granted by its Order dated 10.12.2012. This bonafide reason has been rightly considered and appreciated by the second Respondent /State Regulatory Commission and taken balanced approach keeping in view the aim and object of the project. It has rightly justified by considering the specific submission of the learned counsel for the Respondents (Appellants herein) before the State Commission during his argument as referred in para 4 of the impugned Order that, “....the learned counsel for the Respondents has not disputed the fact that the tariff agreed in the PPA can be revised by the Commission, if there are material changes in the circumstances, provided the party seeking revision of tariff is not at fault.”

One more aspect to be borne in mind that this Tribunal had an occasion to consider a similar issue in the matter of Gulbarga Electricity Supply Company Limited v KERC reported in 2016 SCC Online APTEL 40 wherein, this Tribunal has held that, the State Commission adopted a very balanced approach and enhanced the tariff to Rs. 3.40 per KWhr from the date of filing of the petition for the first ten years from the COD and, further, held that in the peculiar facts and circumstances of the case we do not find any reason to interfere with the balanced approach taken by the State Regulatory Commission.

42. We are of the considered view that the first Respondent generates electricity by using renewable sources of energy must be kept in mind while dealing with the case in hand. There can be no dispute that the aim and object of the Act and the relevant Government policies is to encourage the projects based on renewable sources of energy. If an acceptable and genuine case is made out such projects should be helped. If such projects are made to close down; that will deprive the consumers of environmentally benign power. In the long run such approach will be harmful to the power sector and to the interest of the consumers. It must, however, be made clear that not in all cases can tariff be enhanced by reopening the PPA. The Appropriate Commission will have to examine the facts and circumstances of each case to see whether the generator

has made out a strong case for reopening the PPA and enhancing the tariff. In the instant case, the impugned Order passed by the second Respondent/State Regulatory Commission strikes a proper balance between the interests of all stakeholders. The second Respondent/State Regulatory Commission, after critically analyzing the facts and circumstances of the case and the case made out by the first Respondent, has rightly justified in fixing the tariff strictly in consonance with the relevant provisions of the Electricity Act, 2003 and Regulations. Therefore, we do not find any error, illegality or infirmity in the impugned Order dated 05.12.2014 passed by the second Respondent/State Regulatory Commission. The Appellants have failed to make out any good ground to interfere with the impugned Order. Therefore, we hold that the instant Appeal filed by the Appellants, is liable to be dismissed as devoid of merits. Accordingly, we answered the issue against the Appellants.

ORDER

Having regard to the factual and legal aspects of the matter, as stated supra, the instant Appeal, being Appeal No. 271 of 2015, filed by the Appellants, is dismissed as devoid of merits.

The impugned Order dated 05.12.2014 passed in OP No. 48/2012 on the file of the Karnataka Electricity Regulatory Commission, Bangalore is hereby affirmed.

IA NO. 438 OF 2015

In view of the Appeal No. 271 of 2015 on the file of the Appellant Tribunal for Electricity, New Delhi being dismissed, the relief sought in the IA, being IA No. 438 of 2015, does not survive for consideration.

Parties to bear their own costs.

PRONOUNCED IN THE OPEN COURT ON THIS 20TH DAY OF NOVEMBER, 2018.

(S.D. Dubey)
Technical Member

(Justice N.K. Patil)
Judicial Member

√ **REPORTABLE**

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