APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 294 of 2015 AND

IA NOS. 142 OF 2016 & 546 OF 2018

Dated : 29th March, 2019

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

IN THE MATTER OF :-

SRM POWER PRIVATE LIMITED
No. 2, Kalpana Chawla Road,
5th Main, 4th Cross,
Sanjay Nagar, Bhoopasandra,
Bengaluru- 560 001. ….APPELLANT

Versus

1) BANGALORE ELECTRICITY
SUPPLY COMPANY LIMITED
K.R. Circle,
Bengauru- 560 001.

2) MANGALORE ELECTRICITY
SUPPLY COMPANY LIMITED
Paradigm Plaza,
3rd Floor, A.B. Shetty Circle,
Pandeshwara,
Mangaluru- 575 005.

3) CHAMUNDESHWARI ELECTRICITY
SUPPLY CORPORATION LIMITED
No. 927, L.J.Avenue,
New Kantharaj Urs Road,
Saraswastjhipuram,
Mysuru- 575 005.

4) HUBLI ELECTRICITY
SUPPLY COMPANY LIMITED
P.B.Road,
Navanagar,
Hubbali- 580 029.

5) GUJBARGA ELECTRICITY
SUPPLY COMPANY LIMITED
Gulbaraga Main Road,
Kalaburagi- 585 101.

6) Karnataka Electricity Regulatory
Commission
M.G.Road,
Bangalore- 560 001
Karnataka ….RESPONDENTS

Counsel for the Appellant(s) : Mr. Basava Prabhu S. Patil, Sr. Adv.
Mr. Ankit Shah
Mr. Geet Ahuja

Counsel for the Respondent(s) : Mr. Sandeep Grover
Ms. Pankhuri Bhardwaj
Ms. Vaishanavi Rao
Ms. Ragima R. for R-2 & R-4

J U D G M E N T

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

1. SRM Power Private Limited, Appellant herein, questioning the validity, legality and propriety of the Impugned Order dated 26.02.2015 in O. P. No. 15 of 2013, passed by the Karnataka

Electricity Regulatory Commission, Bengaluru (hereinafter called '**the KERC)**, [**Respondent No. 6],** has filed the instant Appeal under Section 111 (1) & (2) of the Electricity Act, 2003 pressing for the following reliefs :-

(a) That this Hon'ble Tribunal be pleased to set aside the Impugned Order dated 26.02.2015 passed by the KERC in Petition No. 15 of 2013;

(b) That this Hon'ble Appellate Tribunal be pleased to pass such other order(s) as the Hon'ble Appellate Tribunal may deem just and proper in the interest of justice and equity.

Brief Facts :

2. The brief facts leading to the instant Appeal are as follows :-

i) The Appellant has filed the OP No. 15 of 2013 and prayed for determination of tariff as per the agreement entered into between the Appellant and the second Respondent/MESCOM dated 15.6.2006 and determine a tariff of Rs. 5.52/KWH with effect from the date of commercial operation

of the Appellant for duly considering the actual project costs and other parameters and grant such other reliefs as this Hon'ble Commission deem fit in the facts and circumstances of the case in hand contending that the Appellant was permitted as per the Commission's Order dated 13.2.2004 to set up a small hydro power project of 2 MW capacity at Mudigere Taluk, Chickmagalore District across Somavathi. The capacity of the project was enhanced to 6 MW on 4.11.2004 on the basis of a detailed project report produced by the Appellant and the recommendations made by the Karnataka Renewable Energy Development Limited (KREDL).

ii) Thereafter, the Appellant entered into a Power Purchase Agreement on 16.6.2006 with second Respondent/MESCOM. The tariff agreed to between the parties under the PPA is Rs. 2.80 per KWH for a period of 10 years from the COD. The term of the PPA is for 20 years. The tariff

from 11 year onwards is to be fixed by the sixth Respondent/KERC as per the PPA. .

iii) The project work was commenced in the year 2005-06. The original cost as per the project was Rs. 26 crores. Due to unavoidable circumstances, the Appellant contended that the project faced problems in execution and consequently it overshot period and cost of the project. The cost-overrun was to the tune of Rs. 8.04 crores.

iv) Further, it is the case of the Appellant that during testing, the Head Race Conduit burst out due to faulty technical design and construction and consequently the generation of the electricity was delayed beyond the control of the Appellant and due to non-servicing of the loan, the accounts with all the three banks became NPA.

v) Then the promoters transferred the assets and liabilities of the Appellant company to the Gilada

Group of Companies in June, 2006 for Rs. 36 crores. The new promoters had to raise further loan and total cost incurred increased to Rs. 45 crores. Finally, the project achieved commercial operation in October, 2011.

vi) The Appellant contended that there is a delay of nearly five years in commencing the project and consequently there was an increase in the project cost to Rs. 45 crores and tariff agreed under the PPA was not viable and therefore, the Appellant has prayed for re-fixing the tariff at Rs. 5.52 per KWH for 10 years from the COD.

vii) Due to the facts and circumstances of the case, the Appellant felt constrained to file the Petition for redressing his grievance on 29.04.2013.

viii) Upon serving notice, the Respondents appeared through their counsel and the second Respondent has filed Statement of Objections contending that the major portion of the project work had been

completed before 2008-09 and that the bursting of the Head Race Conduit was admittedly due to faulty design and construction due to which the Appellant has incurred further cost and that could not be a ground for seeking revision of the tariff. The Appellant had been making attempts to get a higher tariff determined under the generic Tariff Order dated 11.12.2009 by pretending to make out a case for the applicability of the said generic Tariff Order, wherein the tariff for the Mini Hydel Projects was determined at Rs. 3.40 per KWh and that the Appellant had produced self-serving documents to establish the escalated Project Cost. The second Respondent contended that the petition filed by the Appellant is liable to be dismissed being devoid of merits.

3. The Sixth Respondent/KERC after hearing the learned counsel appearing for the Appellant and the counsel appearing for the Respondents and on the basis of the pleadings available on record

and the stand taken by the respective parties, framed following issues:-

(i) Whether the Petitioner has made out a case for re-determination of the tariff for its Project; and

(ii) What Order?

4. After careful consideration of the facts and circumstances of the case and the case made out by the Appellant and the Respondents as discussed in para 7(a) to (g), the sixth Respondent/KERC has recorded the reasoning in para 7(h) of the Impugned order and accordingly . The KERC's views and analysis read thus :-

> "We are of the considered opinion that there is every possibility of the Petitioner having shown an escalated amount pertaining to the Project Cost (or not being prudent in incurring it) and that, in any case, the additional cost incurred for the repairs of the Head Race Conduit, damaged because of the faulty technical design and construction, and the additional interest paid to the financiers due to delay in

commencing the Project, is not relevant for re-determination of the tariff now sought by the Petitioner. The Petitioner has to proceed against its contractor for the faulty technical design and construction of the Head Race Conduit and other civil works of the Project, for claiming compensation for the losses incurred due to it. These additional expenditures cannot be reimbursed to the Petitioner by way of a hike in tariff, because of the negligence of the contractor of the Petitioner or lack of due diligence by the Petitioner in ensuring proper technical design and construction of its Project within the original cost. As already held earlier, the Petitioner cannot be allowed to benefit from its own fault. For all practical purposes, the Project work was completed by the end of 2009. Therefore, the Petitioner is entitled only to the generic tariff for Mini Hydel Project applicable during that time, as determined by this Commission in its generic Tariff Order

dated 18.1.2005, and it is not entitled to any other higher tariff. Accordingly, Issue No.(1) is held in the negative."

5. Not being satisfied with the impugned Order passed by the sixth Respondent/KERC, the Appellant herein felt necessitated to present the instant Appeal for our consideration.

6. The learned Senior Counsel appearing for the Appellant contended that the factual matrix of the case is - the difficulty faced by the Appellant in completion of the Project, the reasons for its delay and cost and time over-runs which have occurred due to unavoidable reasons. The factual background of the case in hand becomes even more important for rebutting the specific stand taken by the respondent discoms that the cost over-run is due to the Appellant's fault alone has got no justification on the ground that the Appellant has specified the entire development of the project from its inception till achievement of COD which shows that the project was delayed

due to various factors beyond the control of the Appellant and specifically due to delay in grant of lease of forest land, delay in felling of trees by the forest department, delay in grant of environmental clearance by the government, difficult terrain and additional cost due to breach in head race conduit. The breach in head race conduit was only one amongst several factors which had caused delay in commissioning of the Project. Even the cost overrun of about 4-4.5 crores due to breach of head race conduit could not be attributable to fault on the part of the Appellant. Even ignoring the cost incurred in repairing the breach in head race conduit, the Appellant's project cost comes to about 40 crores i.e. 6.6. crores per MW for which a reasonable tariff must be paid to the Appellant. Further the counsel appearing for the Appellant contended that recognizing the difficulties faced by the Appellant, the Government of Karnataka accorded its extension until 30.6.2010 taking into consideration the difficulties pointed out by the Appellant. The Appellant had already incurred 3476 lakhs i.e., 5.7 crores per MW and thus at least a reasonable tariff considering capital cost of 5.7 per MW must be granted to the Appellant. Owing to the fact that supplementary PPA dated 4.7.2011

was entered into between the respondent discom and Appellant duly agreeing to extend the date of COD until 30.6.2010, while having complete knowledge of delay in project and increase in capital cost, the respondent discom cannot now deny reasonable tariff to the appellant and has got no justification for the same. The sixth Respondent, KERC has erred in finding that for all practical purposes, the project was complete by end of 2009 and the same is based on surmises and conjectures on the ground that the Government of Karnataka has extended the time from 23.9.2009 to 30.6.2010. If the Plant was ready by end of 2009, there would have been no occasion to extend the date until 30.6.2010.

7. It is significant to note that the Govt of karnataka vide letter No. 52NCE 2004, dated 13.02.2004 allotted the project to the Appellant for establishment of 2 MW Mini Hydel Project across Somvathy River at Samse Village, Chickmanglur District and on 4.11.2004 the capacity of the project was enhanced by the Govt of Karnataka to 6MW.

8. On 30.11.2004, an Agreement was entered into between the Govt of Karnataka and the Appellant for establishment of the project and other terms and conditions. Clause 2 of the same recognizes that the Appellant may take the land on lease from the government and also from private persons. On 18.01.2005, the Tariff Order of the State Commission was issued determining tariff for mini Hydel projects at Rs. 2.80/KWH and the same was based on the capital cost of Rs. 3.9 crores per MW. On 25.4.2005, an Official Memo was issued by the Karnataka Renewable Energy Development Limited granting 'Technical Clearance' for the project at an estimated cost of Rs. 2698 lakhs. It is pertinent to note that the estimated cost itself was 4.49 crores per MW which is more than the capital cost approved for he project in the generic tariff order dated 18.1.2005. This was because the project was to be set up in difficult terrain across Somvathy River and some part of the forest land was also required for the project.

9. On 7.12.2005, the Appellant wrote a letter to the Principal Chief Conservator of Forests seeking for the lease of the 5 acres of forest area required for the project. The letter clearly states that the Appellant has already required 7 acres of private land and that the 5 acres of forest land is required for the project The Appellant vide letter dated 14.11.2005 requested revised evacuation scheme to be approved which was approved by the KPTCL on 6.12.2005. During 2005-06, the Appellant entered into agreements with third parties for 'civil construction works' and also for 'supply of Electro Mechanical Equipment' for the project. During this period, the Appellant also secured various term loans from banks for the project – Limit of 790 lakhs on 31.8.2005, Term loan of 7 crores from State Bank of Mysore on 9.11.2005 and Term loan of 90 lakhs from State Bank of Hyderabad on 24.6.2006.

10. For development of the project post PPA and until COD, a PPA was executed on 15.6.2006 between the Respondent Discom and the Appellant and the same was approved by the Sixth Respondent,

KERC vide letter dated 3.7.2006. The SCOD agreed under the PPA was 24 months from the date of financial closure or 3 months from the date of execution of PPA, whichever is later. The tariff was agreed at Rs. 2.80/KWH for first 10 years from the date of COD. From 11th year onwards, the tariff as determined by the sixth Respondent KERC would apply to the project. This aspect of the matter has not been taken into consideration by the sixth Respondent, KERC in view of the facts and circumstances of the case from the inception of the Project till the achievement of the COD and the impugned Order passed by the sixth Respondent KERC suffered from the factual and legal infirmities on the ground that the sixth Respondent KERC has erred by not appreciating that the Project was delayed due to various factors beyond control of the Appellant. Further, he vehemently submitted that the Project was completed in May 2010 and during trial run, there was a breach in head race conduit resulting in failure of the trial run and further delay in commissioning the project. For repairing the head race conduit, the appellant had to incur further cost of Rs. 4-4.5 crores. Even if the same has to be ignored, the Commission

ought to have granted a reasonable tariff considering the actual capital cost of Rs. 40 crores.

11. The counsel appearing for the Appellant contended that the delay has been caused due to several factors and the entire burden would be attributable to the Appellant and therefore the Commission has erred in presuming that there are chances of Appellant having shown escalated amount. There is no reason shown in the impugned order as to why such a presumption is taken by the Commission even when the Appellant has submitted a duly audited statement before the Commission coupled with due diligence report and techno-viability report. The judicial note of this aspect ought to have been taken by the Commission and it ought to have appreciated and taken a liberal and balanced view with realistic approach and considered the case of the Appellant for granting the reliefs sought by the Appellant.

12. The counsel appearing for the Appellant vehemently contended that the sixth Respondent KERC has committed gross injustice by

observing that the appellant should sue the contractor for faulty technical design. It is a matter of fact that the head race conduit was found to have technical breach. No reasonable generator would intentionally purchase a defective equipment/machinery. To substantiate his submissions, he placed reliance on the Judgment of this Tribunal in case of Gulbarga Electricity Supply Company Ltd v. KERC 2016 SCC Online APTEL 40 where the facts were that a third party KNNL delayed in construction of barrage required for the project and the discoms argued that the generator must sue the third party for its delay wherein this Tribunal, after considering the rival contentions of the parties, opined that though second Respondent's Plant was ready for commissioning it could not be commissioned because the barrage was not constructed by KNNL in time. We have detailed the difficulties faced by the second Respondent on account of four years' delay in construction of the barrage for which it was not responsible. Wherein the second Respondent prayed for determination of tariff at Rs. 7.05/KWH instead of Rs. 2.80/KWH. But the State Commission adopted a very balanced approach and enhanced the tariff to Rs. 3.40/KWH from the date of filing of the petition, i.e., 13.9.2013 for the

first 10 years from the COD. In the peculiar facts and circumstances of the case we find no reason to interfere with this balanced approach.

The said ratio of the Judgment of this Tribunal in case of Gulbarga Electricity Supply Company Limited is aptly applicable to the facts and circumstance of the case in hand. Therefore, the sixth Respondent KERC erred in not considering that the Appellant could not be denied reasonable tariff for sustaining its business when the Government of Karnataka had itself, recognizing the difficulties faced by the Appellant, accorded its extension until 30.6.2010. By 30.6.2010, the Appellant had already incurred 3476 lakhs, i.e., 5.7 crores per MW and thus at least a reasonable tariff considering capital cost of 5.7 Croresper MW must be granted to the appellant. The approach tantamount to denying benefit of the extensions given by the government to the Appellant's project. It creates a situation where on the one hand the government, after recognizing genuine difficulties of the project, grants extension and on the other hand, the Commission takes away the benefit by leaving the appellant to suffer with unviable tariff. Similar contention has also been dealt with by this Tribunal in Karnataka Power Transmission Corporation Ltd and

Ors v. Soham Phalguni Renewable Energy Pvt Ltd and Ors decided on 20.11.2018 in Appeal 271/2015 wherein para 40 of the said Judgment, this Tribunal observed that 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 upon the parties.

He further vehemently submitted that there is no substance in the submission made by the counsel appearing for the Respondent and the reasoning given by the Sixth Respondent/KERC in the impugned order. As such, the Order cannot be sustainable and is liable to be set aside.

13. The counsel appearing for the Appellant submitted regarding preliminary objection raised by the learned counsel appearing for the Respondent Discom that whether the state commission has jurisdiction to re-determine tariff agreed under the PPA and contended that at the outset, this issue, though raised as preliminary objection in reply filed before this Tribunal by the respondent discom, was fairly given up/not pressed by the respondent discom during submissions.

14. In response to the issue raised by the learned counsel appearing for the respondent discom for the first time in Appeal that whether the Appellant's letter dated June 28, 2011 and earlier OP No. 6 of 2010 filed by the Appellant, operates as resjudicata and estoppels against the appellant from claiming higher tariff or not, the counsel appearing for the Appellant contended that the preliminary objection of the Appellant on this issue is that the same was never raised before the commission nor does the impugned order deals with the same. The impugned order mentions the dismissal of OP No. 6/2010 as a matter of fact and does not deal with it as an issue in the

impugned order for the simple reason that the same was not raised before it.

Regarding OP 6/2010, the counsel appearing for the Appellant submitted that the Appellant had filed OP 6/2010 praying for MESCOM to sign a fresh PPA as per generic tariff determined by this Commission in its generic tariff order dated 11.12.2009 on the ground that the earlier PPA has become void as the petitioner has not complied with condition precedent stipulated in the said PPA. The petition was dismissed by order dated 3.2.2011 on the ground that the petitioner could not take benefit of its own fault. The impugned order mentions the dismissal of OP 6/2010 as a fact and does not deal with it as an issue in the impugned order for the simple reason that the same was not raised before it. It is well settled that an earlier proceeding acts as resjudicata only when the same issue was raised, discussed and answered in the earlier proceeding. In the instant case, the issue arising in OP 6/2010 was entirely different from the one at hand in the instant case.

From plain reading of the grounds taken in OP 6/2010 along with its prayer, one can easily discern that the issue in OP 6/2010 was altogether different from the one in the instant case. The same is also very evident from the logic that the OP 6/2010 was filed in February, 2010 - much before achievement of the COD in October 2011. Thus the Appellant could not have raised the ground of increase in capital cost of the project for claiming increase in tariff.

15. Regarding letter dated June 28, 2011, the learned counsel appearing for the Appellant contended that the Respondent discom has argued that in the letter dated 28.6.2011, the appellant has not sought revision in tariff. The respondent discom also argued that the Appellant's claim of higher tariff was raised for the first time by the Appellant in its communication dated 25.01.2013, which is after two years from the supplementary PPA dated 4.7.2011. The counsel appearing for the Appellant humbly submitted that it is correct that the issue of increase in tariff was raised for the first time by communication dated 25.1.2013 and all the correspondences before

the said date were pertaining to two issues – (i) Amendment in PPA in the definition of metering point in accordance with revised evacuation scheme approved by KPTCL; and (ii) Amendment to PPA in the definition of schedule commercial operation date so as to extend it upto 30.6.2010 as approved by the government of Karnataka. Therefore, the counsel appearing for the Appellant submitted that the counsel appearing for the second Respondent Discom is misreading the communication dated 28.6.2011 by contending that the Appellant agreed not to change the PPA tariff. In fact PPA tariff was never the subject matter of those correspondences. Be that as it may, the respondent discom has miserably failed to show any document whereby the Appellant had foreclosed/given up its right to approach the sixth Respondent/KERC for claiming higher tariff. The submission of the Appellant is defeated by its own communication dated 25.1.2013. The letter dated 15.3.2013 is the reply of the respondent discom to the Appellant's communication dated 25.1.2013 (As per Annexure A-9 at page 211 of the Paper book) through which the appellant had requested the respondent discom to revise the tariff to Rs. 5.52 per unit. In its reply, the respondent does not state that the

cost and time overrun is due to appellant's default or that the appellant is estopped from claiming higher tariff on dismissal of OP No. 6/2010 or on the ground of appellant's communication dated 28.6.2011.

16. On the other hand, the respondent discom simply replies that the appellant's request for revision of tariff is not acceptable and the tariff offered is as per approval of the sixth Respondent/KERC and any change can be made by the sixth Respondent/KERC only. The learned Senior counsel appearing for the Appellant further submitted that the respondent discom is estopped from raising these issues for the first time in the appeal as they were neither raised in its reply letter dated 15.3.2013 nor in its reply filed before the sixth Respondent/KERC.

17. Having regard to the facts and circumstance of the case as stated supra, the impugned order passed by the sixth Respondent/KERC is liable to be set aside

18. ***Per contra,*** Shri Sandeep Grover, learned counsel appearing for Respondent Nos. 2 & 4, most respectfully submitted that the impugned order does not suffer from any legal infirmity or error in any manner whatsoever, much less as contended by the Appellant in the present Appeal. As a matter of fact, the impugned order herein deals with the issues of law and the facts placed before the sixth Respondent/KERC by the Appellant herein in detail and the sixth Respondent/KERC had rightly justified in dismissing the Petition filed by the Appellant after duly considering all the aspects and therefore, interference by this Tribunal does not call for.

19. The counsel appearing for the Respondent Nos. 2 & 4 at the outset submitted that the Appellant is estopped by resjudicata to re-agitate the issues which had already attained finality.

While it is not disputed that the Government of Karnataka had granted extension of time to the Appellant herein for completing and commissioning the project, it is important to draw this Tribunal's

attention to Appellant's communication dated 28.06.2011. In the said letter, the Appellant herein has expressly stated that in the Supplemental Agreement dated 04.07.2011 ("**Supplemental PPA"**) sought to be executed, the Appellant is not claiming any revision in tariff as stipulated in clause Article 5.1 of the PPA.

Further, the Supplemental PPA is placed in record by the Appellant as part of additional documents. It is clearly discernable that Article 5.1 was not even sought to be amended by the Appellant herein. Having entered into the Supplemental PPA on 04.07.2011, it is a matter of record that the Appellant sought revision in the tariff post facto, that too, after a lapse of almost 2 years. It is not in dispute that the Appellant for the first time, approached the answering Respondents herein, seeking revision in the tariff only on 25.01.2013, which request was rejected on 15.03.2013. He also referred to page 121 of the additional documents filed by the Appellant along with I.A. No. 546 of 2018. Nowhere has the Appellant explained the reason for not having sought revision in the tariff for almost 2 years. This also shows that the revision sought in the tariff is only an afterthought, knowing

fully well that the same is impermissible and unsustainable in law in view of its own letter dated 28.06.2011. He further referred to paras 4, 8, 9 of the Statement of Objections filed by Respondent No. 4 before this Tribunal. He submitted that, therefore, the Appellant has not made out any case on merits to consider the reliefs sought in the instant Appeal.

20. The counsel appearing for Respondent Nos. 2 & 4 also placed reliance on the Original Petition No. 6 of 2010 filed before the Sixth Respondent/KERC by the Appellant as specifically contended in page 11 of the additional documents filed by the Appellant along with IA No. 546 of 2018 and at paras 16, 19, 20 and 21 of the said Petition. The pleadings in the Original Petition No. 6 of 2010 clearly and unequivocally demonstrate that the Appellant had sought revision in the tariff on account of delay in completing and commissioning of the project. The said petition was dismissed by the Commission vide order dated 03.03.2011.

The present appeal arises out of the Order passed by the sixth Respondent/KERC in the Petition, which is at page 21-32 of

the additional documents. A perusal of the relief sought (at page 32 of the additional documents), in juxtaposition to the relief sought in OP No. 6 of 2010 makes it clear beyond any iota of doubt that the relief in both petitions is identical viz. seeking revision/re-determination of tariff.

In view of the OP No. 6 of 2010 having been dismissed by the sixth Respondent/KERC vide Order dated 03.03.2011 and the Appellant having not challenged the said order, the Appellant is now estopped in law and on facts from seeking re-determination/revision of tariff, as sought to be done in the Petition before the Commission and/or before this Tribunal by way of the present appeal. Therefore, the Appeal filed by the Appellant is liable to be dismissed on the above grounds.

21. The counsel appearing for the Respondent Nos. 2 & 4 vehemently submitted that the delay in completion and commissioning of project is solely attributable to the Appellant alone.

It is a matter of record and expressly admitted by the Appellant all along that the project could not be completed and commissioned on time due to repeated bursting of head race conduit. It is also an undisputed fact that the installation of the head race conduit as also complete construction of civil structure, erection, installation of machinery and equipment and maintenance at the plant in question, was solely and exclusively the responsibility of the Appellant herein. It therefore does not lie in the mouth of Appellant to gain benefit/advantage out of its own faults like faulty machinery or equipment or repeated bursting of head race conduit.

It is pertinent to note here that the relevant facts have been duly considered and discussed in detail by the Commission in the impugned order herein, more specifically at para 7 (a) to 7 (e) of the impugned order. Therefore, there is no infirmity in the impugned order passed by the Commission insofar as the factual issues are concerned. On this ground also, the Appeal filed by the Appellant is liable to be dismissed.

22. The counsel appearing for the Respondent Nos. 2 & 4 submitted that this Tribunal being an appellate body, ought not re-appreciate the facts and it is a matter of record that the Appellant has not raised any grievance that the sixth Respondent/KERC has not taken into consideration the relevant facts and evidence brought/placed before the sixth Respondent/KERC.

In fact, to the contrary, the Appellant has placed additional facts and documents before this Tribunal at the appellate stage, with the objective of demonstrating that the delay was due to acts beyond the control of the Appellant. It is needless to say that the Appellant has miserably failed to make out the said case, despite seeking to rely on the said additional documents and evidence.

Even otherwise, this Tribunal being an appellate authority ought not to interfere in the findings on the facts of the case. Therefore, the appeal merits dismissal on this score as well as per the statement of objections filed by the Respondent No. 4 before this Tribunal.

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23. The counsel appearing for the Respondent Nos. 2 & 4 submitted that re-determination of tariff is not advisable where the larger public interest is involved. To substantiate his submissions, he placed reliance on the judgment of the Hon'ble Supreme Court in *All India Power Engineer Federation vs Sasan Power Limited and Others,* reported at (2017) 1 SCC 487, wherein it is, *inter alia* held at para 26 that *'On the facts of this case, it is clear that the moment electricity tariff gets affected, the consumer interest comes in and public interest gets affected. This is in fact statutorily recognized by the Electricity Act in Sections 61 to 63 thereof. Under Section 61, the appropriate Commission, when it specifies terms and conditions for determination of tariff, is to be guided inter alia by the safeguarding of the consumer interest and the recovery of the cost of electricity in a reasonable manner."*

24. He further submitted that in view of the above settled position as laid down by the Hon'ble Apex court, this Tribunal ought not interfere with the Order impugned herein and hold the Appellant entitled to the tariff as agreed under the Power Purchase

Agreement dated 15.06.2006. It is no more res integra that the larger public/consumer interest is served when the tariff rate is lower, than otherwise.

25. Finally, the counsel appearing for the Respondent Nos. 2 & 4 submitted that the judgments in *Gulbarga Electricity Supply Company Limited vs Karnataka Electricity Regulatory Commission and Another,* dated 26.05.2016 in Appeal No. 87 of 2015("**Gulbarga Judgment**") and *Karnataka Power Transmission Corporation Limited and Others vs Soham Phalguni Renewable Energy Private Limited and Others*, dated 20.11.2018 in Appeal No. 271 of 2015 ("**Soham Judgement**"), are not applicable to the facts and circumstances of the present case and the reliance placed by the counsel appearing for the Appellant has got no substance nor any assistance to substantiate the ratio taken in the Appeal on the ground that the facts of the Gulbarga Judgment are distinct and independent from that of the present appeal and hence cannot be relied upon. The para 19 of the said judgment clearly records that the Appellant therein was not responsible for

the delay caused, and the same was attributable to a third party contractor namely KNNL, which is not the case in the present appeal, where the delay was admittedly attributable to the Appellant herein. The Soham Judgment is also not applicable in the present case.

26. The counsel appearing for the Respondent Nos. 2 & 4 further submitted that the Hon'ble Apex Court, in *Bhavnagar University vs Palitana Sugar Mill Private Limited*, reported at (2003) 2 SCC 111, at Para 59 has held that a slight difference in facts or additional facts would make a substantial difference in the precedential value of a decision. Thus, in view of the said settled position of law and even otherwise, the judgments relied upon by the Appellant are not applicable in the present case, and ought to be rejected by this Tribunal. Therefore, he submitted that the impugned order passed by the sixth Respondent/KERC is strictly in accordance with law and as per the relevant provisions of the Electricity Act, 2003. The Appellant has failed to make out any case on merits and hence the

Appeal filed by the Appellant may be dismissed as devoid of merits.

27. We have heard the learned Senior counsel appearing for the Appellant, Shri Basava Prabhu S. Patil and the learned counsel appearing for the Respondent Nos. 2 & 4, Shri Sandeep Grover and we have considered the grounds and written submissions of the Appellant and the Respondents and perused the impugned order passed by the sixth Respondent/KERC carefully and on the basis of the pleadings available on the file, the issue that arises for our consideration in the instant Appeal is that whether the impugned order passed by the sixth Respondent/KERC is sustainable in law or not.

28. The principal submission of the learned Senior Counsel appearing for the Appellant, at the outset, is that their main ground for seeking re-determination of tariff is that there has been a cost-overrun and time-overrun in the project of the Appellant for reasons which were beyond the control of the Appellant, like—

- Cost overrun due to hike in construction cost.
- Unexpected change in evacuation scheme resulting in laying of HTUG cable.
- Non-availability of construction material in the nearby vicinity of the project area.
- Difficult terrain.
- Increase in interest During Construction (IDC) etc., the project cost has abnormally increased.
- Burst of Head Race Conduit, during the testing period, due to faulty technical design and construction. Due to this, the project ran into a turbulent phase and the cost including the interest cost rain out of control. Due to non-servicing of the loan, the accounts with all the three banks became NPA.
- Acquisition of forest land.
- Availability of less working period due to heavy rains in the region.

29. He further submitted that all the aforementioned reasons have led to a cost overrun and the time overrun and all the said reasons have been mentioned in the communication sent by the Appellant to the Respondents. The said reasons and communications were part of the records before the sixth Respondent/KERC and the same have not at all been considered by the sixth Respondent/KERC in the impugned order. Hence, the impugned order passed by the sixth Respondent/KERC is liable to be set aside.

30. The Counsel appearing for the Appellant further submitted that the Respondent Nos. 2 & 4 have taken an objection before the sixth Respondent/KERC and also before this Tribunal that the sixth Respondent/KERC does not have any power to re-determine tariff once the same has been fixed. However, the Appellant has placed reliance on the law laid down by the Hon'ble Supreme Court of India in the case of Gujarat Urja Vikas Nigam Limited Vs. Tarini Infrastructure Ltd., (2016) 8 SCC 743, wherein the Hon'ble Court has held that the Court must lean in favour of flexibility and not

read inviolability in terms of PPA insofar as the tariff stipulated therein as approved by the Commission is concerned and further held that it is a sound principle of interpretation to confer such a power if public interest dictated by the surrounding events and circumstances requires review of the tariff.

He further placed reliance on a judgment passed by this Tribunal in the case of Gulbarga Electricity Supply Company Ltd. Vs. Karnataka Electricity Regulatory Commission and Ors., in Appeal No. 87 of 2015 dated 26.5.2016, wherein it is held that if an acceptable and genuine case is made out, such green projects should be helped. If such projects close down, that will deprive the consumers of environmentally benign power. In the long run such approach will be harmful to the power sector at large and to the consumers in particular.

Further, the Respondents in their reply have also admitted the position that the project of the appellant has been delayed and because of which there has been a cost overrun in the project. In fact, the Respondent No. 4 has specifically stated in its reply that

the cost of the project has increased by 74% over the originally estimated cost.

31. The counsel appearing for the Appellant further submitted that the sixth Respondent/KERC has not taken into account the aforesaid grounds and stand of the Appellant seeking re-determination of tariff and have wrongly held that the cost overrun and the damage in the head race conduit is not relevant for redetermination of tariff for the Appellant in the instant case. However, under the said facts and circumstances, the sixth Respondent/KERC, before one month of the passing of the impugned order in the present matter, has allowed the redetermination of tariff of the similar facts and circumstances in the case of Gulbarga Electricity.

32. Finally, the counsel appearing for the Appellant submitted that the Respondent Nos. 2 & 4 have granted extensions to the Appellant for completing the project after considering the reasons as stated by the Appellant and hence the Respondents cannot

now deny re-determination of tariff on the same grounds. This aspect of the matter has neither been looked into nor considered nor appreciated by the sixth Respondent/KERC. Therefore, the order impugned passed by the sixth Respondent/KERC is liable to be vitiated.

33. The learned counsel appearing for the Respondent Nos. 2 & 4, at the outset, contended that the Appellant is estopped by resjudicata to re-agitate the issues which had already attained finality on the ground that the sixth Respondent/KERC vide Order dated 3.3.2011 passed in OP No. 6/2010 The said OP has been dismissed and the Appellants have not challenged the said Order. Therefore, the Appellant is now estopped in law from seeking re-determination/revision of tariff, as sought to be done in the Petition before the sixth Respondent/KERC and/or before this Tribunal in the present Appeal.

Further, he submitted that the delay in completion or commissioning of the project is solely attributable to the Appellant alone on the ground that the Appellant himself categorically

admitted that he could not complete or commission the project in time due to the repeated bursting of the head race conduit and it is also an undisputed fact that the installation of the head race conduit as also complete construction of civil structure, erection, installation of machinery and equipment and maintenance at the plant in question, was solely and exclusively the responsibility of the Appellant alone. It therefore does not lie in the mouth of Appellant to gain benefit/advantage out of its own faults like faulty machinery or equipment or repeated bursting of head race conduit. This fact has been considered by the sixth Respondent/KERC in the impugned order wherein it has rightly justified by denying relief sought by the Appellant.

The sixth Respondent/KERC, after due appreciation of the oral and documentary evidence and other materials on record, had denied the appellant to avail any benefit from its own fault and therefore any interference by this Tribunal does not call for. Hence, the Appeal merits dismissal on this ground also.

34. Further, the counsel appearing for the Respondent nos. 2 & 4 vehemently submitted that the reliance placed on the Judgments of the Apex Court and this Tribunal by the Counsel appearing for the Appellant is not applicable to the facts and circumstances of the case in hand. The facts of the case are distinct and independent from that of the present appeal and hence cannot be relied upon and further he was quick to point out and placed reliance on the judgment of the Apex Court in the case of *All India Power Engineer Federation vs Sasan Power Limited and Others,* reported at (2017) 1 SCC 487, as held in para 26 thereof. On this ground also, the Appeal filed by the Appellant is liable to be dismissed.

Our Consideration and Analysis

35. After thoughtful consideration of the principal submissions of the learned Senior counsel appearing for the Appellant and the counsel appearing for the Respondent Nos. 2 & 4 as stated supra and after perusal of the Order Impugned passed by the sixth

Respondent/KERC what emerged that the Appellant has taken several grounds in its Petition before the Commission and also placed reliance on the Judgments of the Apex Court and this Tribunal and specifically contended that the delay has been caused due to unavoidable circumstances and he vehemently brought to the notice of the sixth Respondent/KERC that one month earlier, the sixth Respondent/KERC has re-determined the tariff in respect of similar facts and circumstances of the case of Gulbarga Electricity but in the instant case denied on the sole ground of delay and latches on the part of the Appellant and non-commissioning of the project and that there is a fault on the part of the Appellant regarding installation of head race conduit. It is significant to note that the Appellant has filed the application before the Government of Karnataka for extension of time for completing the project on account of several factors as stated supra and the same has been considered and accepted and the time has been extended. It is pertinent to note that on account of the design and construction defects in the head race conduit, it has been busted not once but twice and while obtaining clearance from

various technical and other departments, the delay has also been caused. The sixth Respondent/KERC ought to have taken holistic approach of the matter and balanced view on the ground that when the Government of Karnataka has extended the time for the purpose of the completion of the project and the Respondents have not questioned the same, the extension of the time given by the Government reaches finality which is binding on all the parties and the Commission ought to have taken note of the well-settled law laid down by the Apex Court and this Tribunal in catena of judgments, keeping in view that there can be no dispute that the object of the said Act and the relevant Government policies is to encourage the projects based on the renewable sources of Energy. If an acceptable and genuine case is made out, such projects should be helped. If such projects close down, that will deprive the consumers of environmentally benign power. This aspect of the matter is lacking in the impugned order passed by the sixth Respondent/KERC. Therefore, without going any further into the merits and demerits of the case, we are of the considered view that the order impugned passed by the sixth

Respondent/KERC cannot be sustainable and is liable to be vitiated.

36. Further, after careful perusal of the order impugned, what emerged, is that there is no detailed discussion or reasoning, nor prudent checks in the matter are coming forth. Keeping in view the facts and circumstances of the case as stated above, the order impugned passed by the sixth Respondent/KERC is liable to be set aside and the matter requires reconsideration afresh.

ORDER

37. Having regard to the facts and circumstances of the case s stated supra, the instant Appeal filed by the Appellant is allowed, the order impugned passed by the sixth Respondent/KERC dated 26.2.2015 passed in OP 15/2013 on the file of the sixth Respondent/KERC Bengaluru is hereby set aside.

38. The matter stands remitted back to the sixth Respondent/KERC for reconsideration afresh and pass appropriate order in accordance with law after affording reasonable opportunity of hearing to the Appellant and the Respondent Nos. 2 & 4 and other interested parties and dispose of

the same as expeditiously as possible, at any rate, within a period of six months from the date of appearance of the parties.

The Appellant and the Respondent Nos. 2 & 4 and other interested parties are directed to appear personally or through their counsel without notice on April 30, 2019 before the KERC, Bengaluru.

All the contentions of the Appellant and the Respondents are left open.

IA NOS. 142 OF 2016 & 546 OF 2018

39. In view of the instant Appeal being disposed of, the reliefs sought in IA Nos. 142 of 2016 & 546 of 2018 do not survive for consideration and hence the instant IAs stand disposed as having become infructuous.

Parties are to bear their own costs.

Order accordingly.

PRONOUNCED IN THE OPEN COURT ON 29TH Day OF MARCH, 2019.

(S. D. Dubey)
Technical Member

(Justice N.K. Patil)
Judicial Member

√**REPORTABLE /** ~~**NON-REPORTABLE**~~

Bn