APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)

APPEAL NO. 328 of 2017

Dated : 21st February, 2019

PRESENT: HON'BLE MR. JUSTICE N.K. PATIL, JUDICIAL MEMBER
HON'BLE MR. RAVINDRA KUMAR VERMA, TECHNICAL MEMBER

IN THE MATTER OF :-

M/s Omega Infraengineers Pvt. Ltd.,
Through its Authorized Signatory
Shri Vikas Kashyap, SCO No. 274, Second Floor,
Sector 35-D,
Chandigarh –160 036 **…. Appellant**

Versus

1) **Punjab State Electricity Regulatory Commission**,
Through its Secretary,
SCO 220-221,
Sector-34-A,
Chandigarh - 160022

2) **Punjab State Power Corporation Ltd.,**
Through its Managing Director
The Mall, Patiala - 147001

3) **Punjab Energy Development Agency (PEDA),**
Through its Director,
Solar Passive Complex, Plot No. 1 & 2,
Sector-33-D, Chandigarh – 160 020. **…. Respondent(s)**

Counsel for the Appellant(s) **:** Mr. Tajender K. Joshi

Counsel for the Respondent(s) **:** Mr. Sakesh Kumar for R-1

Mr. Anand K. Ganesan
Ms. Swapna Seshadri,
Ms. Parichita Chowdhary, for R-2,

Mr. Aadil Singh Boparai for R-3

J U D G M E N T

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

1. M/s Omega Infraengineers Private Limited, Appellant herein, assailing the validity, legality and propriety of the Impugned Order dated 09.08.2017 in Petition No. 46 of 2014 (M), passed by the Punjab State Electricity Regulatory Commission, Chandigarh (hereinafter called '**the PSERC)**, [**Respondent No. 1],** has sought the following reliefs :-

(a) Allow the appeal and set aside/amend the impugned order dated 09-08-2017 passed by the State Commission in petition No. 26 of 2016 to the extent challenged in the present appeal.

(b) That the Commercial Operation Date of the Solar Project of the appellant may kindly be extended upto 24-1-2017 , the date on which the solar plant of 1 MW capacity of the appellant was commissioned, in accordance with Article 10 of the PPA read with Article 7.0 of the Implementation Agreement, with applicable tariff of Rs. 7.65 per kWh.

(c) That the impugned order may kindly be set aside/ amended to the extent the tariff of the solar plant of the appellant has been reduced to Rs. 5.09 per kWh from the bid price of Rs. 7.65 per kWh and the appellant may kindly be given save bid tariff of Rs. 7.65 kWh.

(d) That the impugned order may kindly be set aside/ amended and the penalty / liquidated damages imposed on the appellant, may kindly be set aside;

(e) That the impugned order may kindly be set aside/ amended to the extent the performance bank

guarantee, furnished by the appellant to the respondent No. 3/ PEDA, has been ordered to be forfeited.

(f) Further direction may be issued to the respondents to compensate the appellant for the period the plant could not be commissioned due to fault of the PSPCL though the plant was completed by the appellant and was ready for generation of energy.

(g) Further directions may kindly be issued to the respondent No. 3/ PEDA to refund the amount of Performance Bank Guarantee taken by it by invoking the Bank Guarantee.

(h) During the pendency of the present appeal before this Hon'ble Tribunal the operation of the impugned order may kindly be stayed.

(i) Pass such other order(s) as this Hon'ble Tribunal may deem just and proper in the facts and circumstances of the case.

2. The Appellant has framed the following questions of law for our consideration:-

i) Whether the Power Purchase Agreement was effective and bankable before its acceptance by the Punjab State Electricity Regulatory Commission as per clause 35 of the PPA?

ii) Whether the addition of clause 35 in the PPA does not amount to change in law?

iii) Whether the appellant is not entitled to extension of the Commercial Operation Date by 41 days, i.e. the time taken in approval of the PPA as per the clause 35 of the PPA?

iv) Whether the delay caused by the respondents No. 2 & 3 does not amount to Force Majeure Events?

v) Whether the grounds raised by the appellant in the petition which were out of its control, due to

which the delay occurred in the completion of the Solar Project does not amount to force majeure events?

vi) Whether the appellant is not entitled to get benefit of 52 days which were taken by the PEDA/ respondent No. 3, in approving the sketch / scheme of putting the solar panels on the rooftop of the Green House?

vii) Whether the State Commission was right in reducing the 93 days from the delay caused by the PSPCL in granting Grid Feasibility?

viii) Whether the benefit of 15 days in granting Grid Feasibility could be given to the respondent No. 2/ PSPCL , when the appellant has applied for the Grid Feasibility for a Grid Sub Station mentioned in the list of Grids of PSPCL attached with the RfP documents?

ix) Whether the appellant is not entitled to get extension of COD for the time period taken by the PSPCL in granting Technical Grid Feasibility i.e. 12-10-2015 the date when the PEDA approved the Sketches to 30-3-2016?

x) Whether the State Commission could reduce the bidded Tariff?

xi) Whether the State Commission was justified in reducing the bid tariff of Rs. 7.65 per kWh to lowest tariff arrived in the bid carried out in next bid for 50 MW Solar Plant?

xii) Whether there is any comparison in the solar plant of 1 MW of the appellant and the Solar Plant of 50 MW which bid in the next financial year?

xiii) Whether the State Commission could put any liability upon the appellant to liquidated damages to the respondent No. 2/ PSPCL without

calculating / determining the actual loss suffered by the PSPCL?

xiv) Whether any penalty of liquidated damages could be imposed upon the appellant , when there is a delay of 153 days on the part of the PSPCL in granting Grid Feasibility to the appellant and further the Grid Sub Station was not ready until 24-1-2017 though the solar plant of the appellant was completed on 7-11-2016?

xv) Whether the Performance Bank Guarantee furnished by the appellant could be forfeited by the respondent No. 3/ PEDA when the delay in completion of plant occurred due to the faults of the Respondents No. 2 & 3 and Force Majeure Events?

xvi) Whether the appellant is not entitled to get compensation from the respondent No. 2 for the period the plant could not be synchronized as the

Grid Sub Station was not ready and the appellant suffered the loss of generation of solar energy?

xvii) Whether the appellant is not entitled to get extension of Scheduled Date of Commercial Operation upto 24-1-2017 with same bid tariff of Rs. 7.65 per kWh, on the grounds mentioned in the appeal?

xviii) Whether the reasons given by the State Commission while ordering for forfeiture of performance Bank Guarantee, imposing Liquidated damages and reducing the tariff are sustainable in the eyes of law?

xix) Whether the reasons given by the State Commission for holding that the delay of 323 days occurred due to the fault of the appellant in commissioning of the project is sustainable in the eyes of law?

xx) Whether the appellant is not entitled to get the relief as prayed for?

3. The brief facts relating to the present case are as follows :-

(i) That the petitioner is a Private Limited Company duly registered under the companies Act, 1956 and a Generating Company within the meaning of Section 2 (28) of the Electricity Act, 2003.

(ii) That Punjab State Power Corporation Limited / respondent No. 2 , is a company incorporated under the Companies Act, 1956 and the distribution licensee in the state of Punjab and the successor in interest of the Punjab State Electricity Board after unbundling of the same alongwith Punjab State Transmission Corporation Ltd. (PSTCL).

(iii) That respondent No. 3, Punjab Energy Development Agency (PEDA) established under the Department of Science, Technology, Environment and Non-Conventional Energy Sources, Government of Punjab,

has been designated as the nodal agency for development of renewable energy projects in the State of Punjab under the said Policy. The Nodal agency is responsible for promotion and development of non-conventional and renewable sources of energy in the State of Punjab, including Solar, Mini hydro, Biomass / Agro-waste based power projects.

(iv) That the Punjab Energy Development Agency (PEDA) invited private developers/ companies to set up Solar Photovoltaic power projects for sale of power to the state utility (PSPCL), in the State of Punjab. PEDA invited Grid connected Rooftop solar Photovoltaic power developers for establishment of an aggregate 100 MW capacity Grid connected Rooftop solar projects in the State of Punjab and issued Request for Proposal (RfP) document.

4. The Appellant herein had filed the Petition under Section 86(1((f) of the Electricity Act, 2003 read with regulation 10, 69, 71 and

73 of the PSERC (Conduct of Business) Regulations, 2005 and regulation 85 of CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2012 (adopted by the PSERC) in its Order dated 19.07.2012 in suo-motu petition no. 35 of 2012) read with clause 19.1.0 of the Power Purchase Agreement dated 31.03.2015 and article 10 of the Implementation Agreement dated 28.03.2015 and Section 94 of the Electricity Act, 2003, for seeking project specific extension of period of commissioning of the project upto 31.08.2016 with applicable tariff of 7.65 per kWh.

5. The bids received from various developers were opened by the third Respondent/PEDA on 13.03.2015 and the third Respondent/PEDA allocated to the Appellant a total capacity of 53 MW Grid connected Rooftop solar PV power projects to various developers including 1 MW Rooftop Solar PV Power Project to establish a power plant and supply power at a Net Tariff of Rs. 7.65 (Rupees Seven and Sixty Five Paisa Only)/ kWh after providing a discount on generic tariff of Rs. 7.72/- per kWh. The third Respondent/PEDA accordingly issued a letter of award and thereafter

an Implementation Agreement (IA) was executed between the Appellant and the third Respondent/PEDA on 28.03.2015 and the first Respondent/PSERC executed the PPA dated 31.03.2015. As per the PPA, the date of commencement of supply, which is called the Scheduled Date of Commissioning (SCOD), is 10 months from the effective date (Art. 10.1.0, viz., PPA dated 31.03.2015).

6. The first Respondent/PSERC invited solar developers including the Appellant to sign the PPA only on 31.03.2015 but the second Respondent/PSPCL added a Clause bearing No. 35 in the PPA which was not the part of the PPA in the RfP document. In this Clause, it was mentioned that “PPA shall be effective & binding on the parties only upon approval of the PPA by the first Respondent/PSERC and the PPA shall be subject to such conditions as may be stipulated by the first Respondent/PSERC while granting such approval. The appellant and other Solar developers objected to the same but the appellant had no other option but to sign it. But the PPA was not effective and bankable. The PPA was ultimately approved by the firist Respondent/PSERC vide order dated 11-5-2015 and due to this

reason the appellant could not do any work for these 41 days. It is further the case of the Appellant that for 1 MW load a total roof of 1,00,000/- sq. ft. was required and that was not available despite the best efforts of the appellant. Therefore, having no option the appellant started persuading this issue with the third Respondent/PEDA and decided to construct a Green House and put the solar panels on the same. The said proposal could not be done without the approval of the third Respondent/PEDA and the appellant thereafter submitted Schematic Sketches of its design using green house rooftop for 1 MW Solar Panels for approval to the third Respondent/PEDA. The third Respondent/PEDA instead of approving the above said sketches submitted by the Appellant, raised a query directing the appellant to produce the Land Papers/ roof papers etc., though in the absence of the approval of the sketches the appellant could not provide the same at that time. But thereafter the appellant provided the documents on 31-8-2015 for the kind perusal of the third Respondent/PEDA. Again, the third Respondent/PEDA sent a communication dated 2-9-2015 raising objection that the lease papers had not been in favour of the Company and the papers submitted by the appellant were in the

name of the Company Director. Thereafter, there was no other option for the appellant and he again submitted lease deed papers executed in the name of the Company on 5-10-2015. Thereafter, the third Respondent/PEDA approved the sketches and granted the concurrence to set up the 1 MW SPV Power Plant on the Roof of Green House Sheds at Village Rurki District Fatehgarh Sahib vide communication dated 12-10-2015. The third Respondent/PEDA also sent the copy of this communication to the second Respondent/PSPCL for grant of Grid Feasibility. The Appellant also approached the second Respondent/PSPCL for grant of Grid Feasibility and the second Respondent/PSPCL, in turn, granted the Grid Feasibility vide communication dated 30-3-2016, though the Scheduled Date of Commissioning of Project was 31-1-2016. It is further the case of the appellant that in the mean time the third respondent/PEDA has initiated action for invoking the Performance Bank Guarantee of Rs. 40 Lac given by the appellant and so the appellant was constrained to file petition No. 26 of 2016 before the first Respondent/PSERC on 30-3-2016. The appellant wrote many communications, i.e. dated 14-7-2016,16-8-2016 and 31-8-2016

requesting the second respondent/PSPCL to complete the line and Grid Sub Station before 31-8-2016 but the second Respondent/PSPCL failed to do so.

It is the case of the Appellant that he completed the Solar Project in the first week of November, 2016 and the Chief Electrical Inspector , Punjab, inspected the plant of the appellant on 7-11-2016 and the Protection team of the second respondent/PSPCL visited and inspected the plant of the appellant on 9-11-2016 and found everything in order in the Pre-commissioning inspection. It is clear that the plant was complete on 7-11-2016. But it is the case of the appellant that the Grid Sub Station was not ready for synchronisation. The second Respondent/PSPCL issued a communication dated 23-1-2017 to the appellant and gave permission for synchronisation but till that date the meter at Grid Sub Station was not installed and sealed by MMTS team of second Respondent/PSPCL. Thereafter the meter at Sub Station was installed and sealed by MMTS team of the second Respondent/PSPCL on 24-1-2017 itself and the GSS was also completed on 24-1-2017 and thereafter the plant was synchronized on

24-1-2017. The appellant in the petition sought extension of the COD upto 24-1-2017 with the same applicable tariff of Rs. 7.65 per kWh.

The said matter had come up for consideration before the first Respondent/PSERC. The first Respondent/PSERC vide order dated 9-8-2017 dismissed the petition filed by the appellant wherein it held that the third respondent/PEDA is entitled to invoke the performance bank guarantee of Rs. 40 Lac given by the appellant. The first Respondent/PSERC further reduced the tariff of appellant's project from Rs. 7.65 per kWh to Rs. 5.09 per kWh on the ground that for the next year a project of 50 MW was offered at this lowest tariff. The first Respondent/PSERC further wrongly held that the appellant has delayed the project and so the second respondent/PSPCL is entitled to levy liquidated damages on the appellant for 263 days, after accounting for two months time for forfeiture of performance bank guarantee, at the rate provided in the IA/PPA and accordingly, the first Respondent/PSERC had dismissed the petition filed by the appellant. The said impugned Order passed by the first Respondent/PSERC is contrary to the case made out by the Appellant and without

appreciating the oral and documentary evidence available on the file and without any reference to the relevant documents which are available before the first Respondent/PSERC and is also contrary to the well-settled principles of law laid down by the Apex Court and this Tribunal and the same is against the principles of natural justice. Therefore, the Appellant felt necessitated to redress his grievances by way of presenting this Appeal.

7. ***Per contra,*** the learned counsel appearing for the Respondent Nos. 1, 2 & 3 have filed their detailed replies contending that the Appeal is devoid of any merit and is liable to be dismissed at the outset and submitted that the contents of the present Appeal are false and denied in toto. The core issue has been decided by the first Respondent/PSERC is on the reasons for the delay of the project and conclusion of the project being commissioned in the next financial year. The first Respondent/PSERC has examined each issue after due deliberations in the matter and after critical evaluation of the oral and documentary evidence available on record and held that the delay in the project was for reasons attributed to the Appellant alone.

In fact, the Appellant already accrued a substantial benefit for the PPA not being terminated despite of there being a specific clause to this effect. The second Respondent/PSPCL has chosen to continue to procure power from the Appellant subject to payment of liquidated damages for delay and applicable tariff being that of FY 2016-17, It is significant to note that as per the PPA, the project was required to be commenced within 10 months from the date of signing of the PPA, i.e., the SCOD was 30.01.2016. As a matter of fact, the project was commenced on 24.01.2017, i.e., with a delay of almost one year is not in dispute. Therefore the said delay is attributable to the Appellant alone. For the first 41 days upto 11.05.2015, when the PPA was approved by the first Respondent/PSERC, the Appellant did not do anything towards commissioning of the project while there was no bar on the same during the pendency of approval by the first Respondent/PSERC. It is pertinent to note that the Appellant took nearly 5 months to complete the land procurement formalities by changing the location thrice. The Appellant applied for grid feasibility clearance to second Respondent/PSPCL on 30.10.2015 while the last date for the said application was 29.07.2015. However, the same

could not be processed in the absence of finalization of the project site. The project site was incorporated in the PPA vide amendment dated 26.11.2015. Thereafter, after due concurrence with the concerned department, the Appellant was informed on 06.01.2016 regarding non-availability of space at 66 KV sub-station, Chorwala and also to intimate the alternate 66 KV grid sub-station for connecting its project. There was no undue delay on the part of PSPCL at this stage. Therefore, the delay has been caused at every stage on the part of the Appellant alone. It is pertinent to mention that clause 10.1.2 of the PPA envisages that the PPA will remain valid for the capacity commissioned within 15 months of the date of the PPA and the capacity for this purpose will stand revised accordingly. Therefore, PSPCL had the option of terminating the PPA with the Appellant due to the delay caused but due to the investment of the Appellant, the second Respondent/PSPCL did not exercise the said option and as a consequence of the PPA continuing the Appellant is required to pay the liquidated damages for the delay as well as the tariff applicable would be the tariff as prevalent in the year 2016-17 when the project was actually commissioned. The Appellant cannot

claim any vested right of a higher tariff in the facts and circumstances of the case in hand.

8. Further, it is the case of the Respondents that the first Respondent/PSERC has also balanced the equities to save the losses to the Appellant by precluding the Appellant to supply the electricity, subject however, to the payment of liquidated damages and the tariff for FY 2016-17 being applicable. In fact, the first Respondent/PSERC has attributed the delay of 263 days on the part of the Appellant though it is stated that the delay that ought to be attributed to the Appellant is much higher and reiterated as elaborated above. It is wrong for the Appellant to seek any further advantage by way of present this appeal.

The Appellant submitted that the first Respondent/PSERC has wrongly reduced the tariff from Rs. 7.65 per kWh to Rs. 5.09 per kWh. In this regard, it is stated that the tariff of Rs. 7.65/- was applicable only in the financial year 2015-16. The solar tariffs have been reducing substantially over a period of time is not in dispute. The generic station of the Appellant has actually been commenced only in

FY 2016-17. The tariff for the project to be commenced in the FY 2016-17 was also discovered and the said tyariff has been applied to the Appellant as well. The Appellants have already been given the benefit of supply of electricity by non-termination of the PPA over the persons who have established their plant in the year 2016-17 based on the bidding in the year 2015-16 and also to avoid the payment of liquidated damages for the delay, It is pertinent to note that the Appellant had not incurred any major cost till 31.3.2016. The Appellant has approached the relevant authority for grid feasibility clearance with a huge delay on 1.3.2016 and had got the clearance only on 31.3.2016.

It is further the case of the Appellant that the grid connectivity is an essential pre-requisite for the Appellant to begin any work for the project. While this is legally incorrect, the appellant himself admitted that he did not undertake any activity till such time the grid connectivity granted. Therefore, the Appellant cannot seek the same tariff when it has incurred the major expenditure after 31,3,2016 and is

liable to get lower discounted tariff for the FY 2016-17, i.e., Rs. 5.09 kWh.

9. The first Respondent/PSERC after due consideration of the entire relevant material on record and after appreciation of the oral and documentary evidence available on the file and the stand taken by the respective contending parties, on cogent reasons, has denied the relief sought by the Appellant rightly. There is no error or material irregularity in the impugned order passed by the first Respondent/PSERC. Therefore, interference by this Court does not call for. Hence, the Appeal filed by the Appellant is liable to be dismissed as devoid of merits.

The gist of the oral and written submissions of the learned counsel appearing for the Appellant, Shri R. S. Joshi

10. The learned counsel appearing for the Appellant contended that as per the IA and PPA the project was to be completed and synchronized upto 30-1-2016 and as per order dated 11-5-2015 for the purpose of tariff the project was required to be completed and

synchronized upto 31-3-2016. The PPA was executed on 31-3-2015 and as such for the purpose of tariff the appellant was having 365 days (from 1-4-2015 to 31-3-2016). The plant was completed on 7-11-2017 and it was synchronized on 24-1-2017. It is the case of the Appellant that this delay occurred due to the faults of the respondents and hence the force majeure events clause will apply. The appellant has filed petition under section 86 1(f) of the Electricity Act, 2003 for extension of commissioning period for the project by the time period which was delayed by the respondents or due to force majeure events. The appellant was not seeking any benefit for the period which was delayed by the appellant.

The submission of the learned counsel appearing for Appellant regarding non-effectivenes of PPA.

11. It is the case of the Appellant that the appellant is entitled to get clear 10 months for commissioning of the project and for the purpose of tariff the appellant was entitled to get clear 365 days. Ii is further the case of the Appellant that he could not do any work for first 41 days as the PPA was ineffective and non bankable.

That the second Respondent/PSPCL invited the Solar developers, including the Appellant, to sign the PPA only on 31-3-2015 only. The Appellant was shocked and surprised to see that second Respondent/PSPCL has inserted a new clause bearing No. 35 in the PPA, which was not the part of the PPA provided in the RfP document.

The appellant and the other similar Solar developers objected strongly to the same as the second Respondent/PSPCL should have got the PPA approved from the first Respondent/PSERC before its date of execution and it was now uncertain as to how much additional time will be required by the second Respondent/PSPCL in obtaining the approval of the first Respondent/PSERC. It is the case of the Appellant that the approval of the second and the third Respondents would have been obtained in 5-7 days time and the Appellant had been persuaded to sign the PPA in current form as the approval of the PPA from the first

Respondent/PSERC is yet to be obtained by second Respondent/PSPCL. Appellant was left with no option but to sign the PPA. It is the case of the Appellant that insertion of clause 35 in the PPA rendered it practically ineffective and non bankable, until it is approved by the first Respondent/PSERC.

The learned counsel appearing for the Appellant contended that the second Respondent/PSPCL filed petition No. 23 of 2015 before the first Respondent/PSERC seeking its approval to procure electricity from the solar projects and also to approve the PPAs. The first Respondent/PSERC vide its order dated 11-5-2015 allowed the petition and approved the PPAs. During this period of nearly one and a half month, the project and financial closure activities could not be progressed due to uncertainty / non-bankability of the PPA i.e for reasons beyond the control of the appellant and change in law. The appellant was not sure whether the PPA would be approved by the first Respondent/PSERC or not

and what conditions would be imposed by the first Respondent/PSERC.

Therefore, taking into consideration the above facts, the appellant sought benefit of these 41 days for the purpose of extension of COD. The first Respondent/PSERC, without any justification, had denied the benefit of 41 days to the appellant on the ground that that in the absence of documentary evidence to prove any loss/ delay suffered by the appellant due to time elapsed between the submission of petition by second Respondent/PSPCL and approval by first Respondent/PSERC no benefit is admissible to the appellant.

The counsel appearing for the Appellant submitted that there was an uncertainty. There are many occasions when the Respective State Commissions have not approved the power purchase agreements. So until the PPA is approved no developer could be expected to take risk to start any work

on finances. The bankers would also not consider the PPA bankable and would not give any financing. In the instant case the PPA was approved by the Commission on 11-5-2015 and only thereafter the appellant could start any activity. Therefore, the appellant was not required to produce any document to show that it had suffered any loss / delay on account of non-approval of the PPA. The clause 35 was very much clear that till the PPA was approved by the first Respondent/PSERC, it was not effective and binding. On this aspect, the first Respondent/PSERC lost sight of the settled principles of law that the Contract was conditional. Therefore, it is further submitted that there was change in law and the appellant was entitled to get the benefit of 41 days for the purpose of extension of COD.

12. The counsel appearing for the third Respondent/PEDA submitted that no notice of any force majeure event was given to it as per the terms of the IA and PPA. It is submitted here that purpose of notice of force majeure event

it informing the third Respondent/PEDA to check the factum of Force Majeure Event and to do needful to remove the force majeure events. It is submitted here that petition No. 23 of 2015 was filed by the second Respondent/PSPCL and the third Respondent/PEDA was respondent in the said petition. The appellant was not a party to the said proceedings. So there was no need to give any further notice to the third Respondent/PEDA.

He placed reliance on the judgment in case of 'Rithwik Energy Generation Pvt Ltd v. Karnataka Power Transmission Corpn. Ltd reported in 2011SCC Online APTEL 163 : [2011] APTEL 164 wherein this Tribunal had held that under Section 86(1)(b) of the 2003 Act, the distribution licensee has to obtain the consent of the State Commission for procurement of power against the PPA. Unless the State Commission gives its consent to the PPA, the distribution licensee cannot procure power under the PPA. will come into

effect only after obtaining the consent of the State Commission as held in para 10 of the judgment.

13. Further, he placed reliance on another judgment in the case of 'Tamil Nadu Generation and Distribution Corpn. Ltd. Vs. M/s Penna Electricity Ltd. & Anr. Reported in 2013 SCC Online APTEL 110 : [2013] APTEL 96 wherein this Tribunal has held that in the absence of approval of the PPA by the State Regulatory Commission, the PPA would not become binding contract (as held in para 22 to 32 of the said judgment). It was also mentioned that under Sec. 63 of the Electricity Act, 2003, the State Commission ought to have merely adopted the determined tariff. Even Section 63 of the Act, 2003 does not dispense with the mandatory approval of the PPA by the State Commission u/s 86 of the Act, as held in para 95(ii) of the said judgment.

Therefore, he submitted that this aspect of the matter has not been looked into nor considered nor appreciated by

the first Respondent/PSERC in the impugned order. Hence the impugned order passed by the first Respondent/PSERC is liable to be modified extending the benefit to the petitioner as prayed.

Submissions of the learned counsel appering for the Appellant for approval of sketches:

14. The learned counsel appearing for the Appellant submitted that upto 11-5-2015 the appellant could not do any work as it was not sure about the approval of the PPA by the first Respondent/PSERC in view of clause 35 of the PPA . It is further submitted that for 1 MW load a total roof of 1,00,000/- sq. ft. was required and that was not available despite the best efforts of the appellant. Having no option the appellant started discussing this issue with the third Respondent/PEDA and decided to construct a Green House and put the solar panels on the same. But this could not be done without the approval of the third Respondent/PEDA. This was totally a new and unique concept and after many

deliberations on this issue with third Respondent/PEDA officials and study of similar projects in foreign countries the appellant got prepared sketches/plans of this project and so it took some time and ultimately the appellant vide its communication dated 20-8-2015 addressed to the Sr. Manager of the third Respondent/ PEDA, submitted Schematic Sketches/Plans of its design using green house rooftop for 1 MW Solar Panels for approval. It is submitted respectfully that though in this design/ concept the structure cost to be borne by the appellant increased to four times because the appellant was required to first construct green house and then only panels could be put on it. The appellant again sent a communication dated 21-8-2015 to the third Respondent/PEDA seeking approval and also mentioned that the appellant has identified 4 Acres of Land on lease basis for the execution of this project and same would be taken after the design is approved by the third Respondent/PEDA.

The learned counsel further contended that as per IA Clause No. 4.1(vii) the roof top solar developers were required to submit the **complete locations / details of the rooftop of the building shed** on which the proposed Grid connected Solar PV plant is to be set up. **Thereafter PEDA was required to give its consent to the said location/ building/ shed rooftops** and there after the second Respondent/PSPCL would give the technical feasibility.

He further submitted that for approving the Schematic Sketches of its design using green house rooftop for 1 MW Solar Panels no land papers were required and without approval of the sketches the appellant could not take the land on lease but still the appellant submitted Land papers for setting up of 1 MW Rooftop solar power plant vide its communication dated 31-8-2015. The third Respondent/PEDA sent a communication dated 2-9-2015 stating that the lease papers has to be in favour of the Company and the papers submitted by the appellant were in the name of the Company Director. For compliance of the query raised by the third

Respondent/PEDA, the appellant took the risk and got the lease deed executed in favour of the Company and submitted the same to the third Respondent/PEDA on 5-10-2015. The third Respondent/PEDA vide its communication dated 12-10-2015 granted the permission to set up the 1 MW SPV Power Plant on the Roof of Green House Sheds at Village Rurki District Fatehgarh Sahib. In this process, there occurred a delay of 53 days on the part of third Respondent/PEDA for approving the proposal of the appellant for using the Green House Roof and not on the part of the Appellant.

The first Respondent/PSERC without taking into consideration the case made out by the Appellant, has wrongly observed that the appellant was required to submit the complete location/details of the rooftop of the building/shed on which the proposed project was to be set up and the land lease documents were required to be submitted within 120 days of signing of the PPA on 31.03.2015 i.e. upto 29.07.2015 and the same were submitted by the appellant

on 5-10-2015 and this delay of 68 days i.e. from 29-7-2015 to 5-10-2015 is on the part of the appellant. The first Respondent/PSERC lost sight of the fact that there is no doubt that within 120 days of the signing of PPA the appellant was required to submit details location of roof top of the building etc. and lease documents to the third Respondent/PEDA. Then, he submitted that as stated above, for first 41 days the appellant could not do any work and even could not take the rooftop etc. on lease as there was uncertainty about the approval of PPA. It is further submitted that it is an admitted fact that for 1 MW load a total roof of 1,00,000/- sq. ft. was required and the same was not available despite the best efforts of the appellant. So, the delay caused in getting the permission for constructing the greenhouse nd he is entitled to get the benefit of 53 days on account of the time taken by the third Respondent/PEDA in approving the sketches and designs and new proposals submitted by the Appellant.

Therefore, he submitted that this aspect of the matter has not been considered nor appreciated and on the contrary rejected the entitlement benefit of 53 days delay on account of othe delay caused by the third Respondent/PEDA. On this ground, the order passed by the first Respondent/PSERC is liable to be modified granting benefit of 53 days delay to the Appellant.

The learned counsel for the Appellant's submission regarding delay in granting grid feasibility/ Feasibility / Wrong Calculations by the State Commission.

15. The counsel submitted that the appellant filed the petition and sought extension of commissioning period for the period which was delayed by the respondents. The first Respondent/PSERC came to conclusion that the second Respondent/PSPCL caused delay in giving Grid Feasibility but while giving benefit of the said period, committed errors. The first Respondent/PSERC in its order noted that the second Respondent/PSPCL took 152 days in granting the grid feasibility and the second Respondent/PSPCL failed to give any cogent reasons for the delay in granting the technical grid feasibility clearance but whereas, the first

Respondent/PSERC wrongly held that for grant of grid feasibility clearance 15 days' time is required by the second Respondent/PSPCL. The second Respondent/PSPCL is bound to give feasibility clearance immediately because they have provided a list of Grid Sub Stations where the power could be evacuated in the RfP and the appellant has chosen a Grid Sub Station at Chaurwala Grid Sub Station as referred at Sr. No. 129 of the Grid List given in the RfP. Therefore, the appellant is entitled to get the benefit of 137 days for the purpose of extension of COD for all purposes.

The first Respondent/PSERC though mentioned in the impugned order that the delay of 137 days is on the part of the second Respondent/PSPCL is unexplained but still the first Respondent/PSERC wrongly held that there is a delay of 93 days on the part of the appellant in applying for Grid Feasibility (29-7-2015 to 30-10-2015) and deducted the same from the above said 137 days and gave the benefit of 44 days only. Therefore, the appellant was seeking benefit of delay caused by the second

Respondent/PSPCL only after 31-10-2015. For the purpose of tariff the plant was required to be commissioned from 31-3-2016 and in case the second Respondent/PSPCL had immediately given the Grid Feasibility, then the appellant had clear 5 months time to complete the plant, i.e., from 31-10-2015 to 31-3-2016. The first Respondent/PSERC has also noted that there is a delay of 152 days on the part of the second Respondent/PSPCL in granting feasibility clearance. In case 15 days time is deducted as held by the first Respondent/PSERC, required by the second Respondent/PSPCL for grant of feasibility clearance, so the appellant was entitled to get 137 days for completing the project after the date on which the grid feasibility was granted i.e. 30-3-2016. Therefore, the first Respondent/PSERC wrongly deducted 93 days from the 137 days. The reasoning given by the first Respondent/PSERC is contrary to the facts on record. The Appellant was not seeking any benefit before 31-10-2015 and seeking benefit of delay caused by the second Respondent/PSPCL only after 31-10-2015. As such the impugned

order is liable to be modified by the first Respondent/PSERC to that extent.

The submission of the learned counsel appearing for the Appellant regarding Delay in Grid Completion / Synchronisation permission / Wrong Calculations by the first Respondent/PSERC

16. It is the case of the Appellant that the appellant completed the project in the first week of November, 2016 and the Chief Electrical Inspector, Punjab, inspected the plant of the appellant on 7-11-2016 and the Protection team of the second Respondent/PSPCL visited and inspected the plant of the appellant on 9-11-2016 and found everything in order in the Pre-commissioning inspection.

From the above facts, it is clear that the plant was complete on 7-11-2016. But the Grid Sub Station was not ready for synchronisation. Therefore, appellant again wrote a communication dated 15-11-2016 to the SE-Planning-II of the second Respondent/PSPCL, Sirhind, Fatehgarh Sahib and requested the second Respondent/PSPCL to grant permission to

synchronise the plant and accordingly the second Respondent/PSPCL issued a communication dated 23-1-2017 to the appellant giving permission for synchronisation. Till that date the meter at Grid Sub Station was not installed and sealed by MMTS team of the second Respondent/PSPCL. Immediately, the appellant sent an email dated 23-1-2017 and then only the meter at Sub Station was installed and sealed by MMTS team of the second Respondent/PSPCL on 24-1-2017 itself and the GSS was also completed on 24-1-2017 subsequently.. Thereafter the plant was synchronized. It is very much clear as referred above, that the delay in commissioning after the solar project was completed i.e. 7-11-2016 occurred solely due to delay merely on the part of the second Respondent/PSPCL. Without any justification, the first Respondent/PSERC in its order stated that the appellant applied to the second Respondent/PSPCL for synchronization but there was delay on the part of the second Respondent/PSPCL. After giving 7 days to the PSPCL for taking time in granting permission for synchronization, the first Respondent/PSERC came to conclusion that there was a delay of 62 days on the part of the second

Respondent/PSPCL in giving synchronization permission to the appellant. Therefore, the first Respondent/PSERC committed an error and wrongly deducted 68 days from the extension period granted to the appellant. The first Respondent/PSERC wrongly calculated the extension period for which the appellant was entitled to get extension of COD for all purposes. Further, the first Respondent/PSERC wrongly held that the appellant is entitled to get benefit of total 106 days only (44 days on account of delay in granting technical grid feasibility clearance and 62 days on account of delay in permission for synchronization by the second Respondent/PSPCL. Without any justification, it further deducted 68 days from the above said 106 days on account of delay in submitting the land papers and held that the net benefit of 38 (106-68) days is to the account of the appellant. The said calculations done by the first Respondent/PSERC are totally wrong and illegal while giving deduction of only 38 days. Therefore, the impugned order passed is liable to be set aside by this Tribunal.

The learned counsel appearing for the Appellant vehemently submitted that the first Respondent/PSERC lost sight of the fact,

already mentioned above, that the appellant was entitled to get the benefit of 41 days due to change in law and then the benefit of 53 days on account of delay on the part of third Respondent/PEDA in approving the designs/sketches and then delay of 152 days on part of the second Respondent/PSPCL in granting Grid Feasibility and then whole delay after 7-11-2016 - the date when the solar plant was ready, to 24-1-2017 - the date when the plant was commissioned on part of the second Respondent/PSPCL. The delay caused by the third Respondent/PEDA and the second Respondent/PSPCL upto 30-3-2016 is very much clear from the following table :

Sr. No.	Activity	Date	Delay Days	Total delay
A	Signing of PPA	31-3-2015		
B	Approval of PPA	11-5-2016	41	
C	Letter to PEDA for concurrence of Sketches/ technology	20-8-2015/ 21-8-2015		
D	PEDA gave concurrence	12-10-2015	52 (D-C)	93
E	Letter to PSPCL for Grid Feasibility (As per PSERC)	30-10-2015		
F	Grid Feasibility by PSPCL	30-3-2016	152 (F-E)	245
	Total Days			245

Therefore, he submitted that the first Respondent/PSERC lost sight of the fact that for the purpose of tariff the appellant was

liable to complete the project upto 31-3-2016 and thus was having total 366 days. Out of these 366 days the respondents have taken 245 days for approving the project and in case the benefit of these 245 days is extended to the appellant and the date of commissioning is extended accordingly then it reaches to 1-12-2016. The appellant has completed the plant on 7-11-2016. It is very much clear that the delay after 7-11-2016 to the date of actual commissioning, i.e., 24-1-2017 is solely on the part of the second Respondent/PSPCL alone. As such the plant was completed well within the time and in case the Grid Sub Station had been ready, the plant could also have been synchronized within the extended period of commissioning. As such the impugned order passed by the first Respondent/PSERC is liable to be vitiated and this Tribunal may hold that the delay caused on the part of the second Respondent/PSPCL alone and not on the part of the Appellant and accordingly modify the order passed by the first Respondent/PSERC.

The submission of the learned counsel appearing for the Appellant regarding Performance bank Guarantee/Liquidated Damages

17. The learned counsel appearing for the Appellant submitted that the first Respondent/PSERC vide its order dated 9-8-2017 dismissed the above said Petition No. 26 of 2016 filed by the Appellant. The first Respondent/PSERC has erred in holding that the third Respondent/PEDA is entitled to invoke the performance bank guarantee of Rs. 40 Lacs given by the appellant. The first Respondent/PSERC further committed an error by holding that the appellant has delayed the project and so the second Respondent/PSPCL is entitled to levy liquidated damages on the appellant. The first Respondent/PSERC further erred in holding that there is a case for levy of liquidated damages for 263 days after accounting for two months time for forfeiture of performance bank guarantee, at the rate provided in the IA/PPA.

Further, the first Respondent/PSERC committed an error in holding that due to delay in completion of the project there could not be any solar power and so it could not contribute towards

procurement of sufficient power from solar projects by the second Respondent/PSPCL which remained deficit of the same to the tune of 77.41 MU for meeting solar Renewable Purchase Obligation for FY 2015-16. The first Respondent/PSERC further erred in holding that this tantamounts to a loss to the second Respondent/PSPCL and accordingly the second Respondent/PSPCL is entitled to levy liquidated damages on the appellant. It is respectfully submitted that as per PPA/ IA the plant was required to be commissioned within 10 months from the signing of PPA and thereafter the project could be commissioned within two months thereafter by forfeiture of the Performance Bank Guarantee by the third Respondent/PEDA and thereafter the project could be commissioned within the next 3 months i.e. 15 months from the date of signing the PPA with levy of liquidated damages by the second Respondent/PSPCL in terms of IA/PPA. In the instant case the plant was required to be completed upto 31-1-2016 without any penalty and forfeiture of Performance Bank Guarantee. With forfeiture of Performance Bank Guarantee the plant could be commissioned upto 31-3-2016 i.e. within 366 days. In the instant

case out of the above said 366 days the respondents have delayed for 245 days in giving the necessary permission. Therefore the first Respondent/PSERC ought to have extended the benefit of these 245 days to the Appellant. and the date of commissioning extended accordingly then it reaches to 1-12-2016 on the ground that the appellant has completed the plant on 7-11-2016 and the delay after 7-11-2016 to the date of actual commissioning i.e. 24-1-2017 is solely on the part of the second Respondent/PSPCL. In fact, the plant was completed well within the time and in case the Grid Sub Station had been ready then the plant could also have been synchronized with in the extended period of commissioning. So for the fault of the second Respondent/PSPCL the appellant could not be penalized on the ground that there is no fault on the part of the Appellant..

The first Respondent/PSERC has reiterated that the second Respondent/PSPCL is deficit of Solar Power Compliance to the tune of 77.41 MU but it is submitted here respectfully that this deficit could not be covered solely by the power contribution of the

appellant. He further submitted that the first Respondent/PSERC has referred that the second Respondent/PSPCL is also deficient of Solar Power Compliance to the tune of 77.41 MU but the first Respondent/PSERC has not referred that for covering this deficit whether the second Respondent/PSPCL has purchased Solar RE Certificates or has incurred any other loss. Therefore, the first Respondent/PSERC was required to assess the actual loss suffered by the second Respondent/PSPCL and only then any penalty could be imposed upon the appellant. Therefore, he respectfully submitted that the impugned order on the issue of PBG and Liquidated damages is also in violation of Article 14 of the Constitution of India and the said impugned order passed by the first Respondent/PSERC is not sustainable and is liable to be set aside.

The submission of the learned counsel appearing for the Appellant Regarding Reduction in Tariff:-

18. The learned counsel appearing for the Appellant submitted that the first Respondent/PSERC wrongly held that the tariff of Rs.

7.65 of the Solar Plant of the appellant was valid only upto 31.03.2016 in terms of the Order of the Commission dated 11.05.2015 in petition no. 23 of 2015 and the IA/PPA and the entitlement of the petitioner to the tariff of Rs. 7.65 per kWh was no longer valid. The first Respondent/PSERC lost sight of the fact that for the purpose of tariff the appellant was liable to complete the project upto 31-3-2016 and thus was having total 366 days. Out of these 366 days the respondents have delayed for 245 days and in case the benefit of these 245 days is extended to the appellant and the date of commission would deemed to have been extended and accordingly it would have reached to 1-12-2016. The appellant has completed the plant on 7-11-2016 and from the above facts, it is very much clear that the delay after 7-11-2016 to the actual date of commissioning i.e. 24-1-2017 is solely on the part of the second Respondent/PSPCL. As such the plant was completed well within the time and in case the Grid Sub Station had been ready then the plant could also have been synchronized within the extended period of commissioning. Therefore, the first Respondent/PSERC has, without any justification, reduced the

tariff of the appellant to Rs. 5.09 paisa against the bidded tariff of Rs. 7.65. Further, he submitted that for the F.Y. 2014-2015 the generic tariff of Rs. 7.72 per kWh was determined by the Commission and against this tariff the appellant had given its bid of Rs. 7.65 per kWh and same was accepted. For the FY 2015-16 the State Commission determined the generic tariff of Rs. 7.04 kWh for solar plants. The third Respondent/PEDA again held competitive bidding for the next year i.e. 2015-2016 and for this year the lowest tariff offered was Rs. 5.09 per kWh by one M/s Photon Ojas Pvt. Ltd. for 50 MW ground mounted Plant. On the basis of this lowest tariff the first Respondent/PSERC has reduced the tariff of the appellant to Rs. 5.09 per kWh without any justification and without analysing the case made out by the Appellant on the ground that the Appellant was not entitled for the extension of the period as prayed for still the tariff of the appellant could not be reduced to the lowest tariff arrived for next year. The first Respondent/PSERC is comparing a tariff offered by a ground mounted solar plant having capacity of 50 MW with a rooftop solar plant of 1 MW capacity. There is no comparison between these two comparables. The

financing capacity, bargaining capacity and transmission line etc. are totally different for 50 MW capacity and 1 MW capacity and both cannot be compared by any stretch of imagination. He further submitted that even the terms and conditions of both the RfPs are totally different.

Therefore, the first Respondent/PSERC lost sight of the fact that against the tariff of Rs. 7.72 per kWh the appellant was given discount of .07 paisa and in case, for arguments sake only, the appellant was not entitled to the extension and the tariff was required to be lowered then there could be only two ways. First way was to apply same discounting to the generic tariff arrived for next year i.e. Rs. 7.04 per kWh and second way was to determine the tariff on the basis of cost incurred by the appellant. But the method adopted by the first Respondent/PSERC is totally wrong and arbitrary and ss such the impugned order is liable to be set aside on this ground also.

He further submitted that the first Respondent/PSERC lost

sight of the fact that by late completion of the plant the cost of the plant has not come down. The major share of the total cost of the Solar plant is due to cost of Modules, Inverter and Transformer. The Appellant respectfully submitted that the appellant took final quotation from supplier of Modules in the month of November, 2015 and as per this quotation, rate of the modules was USD 420480. The appellant took the modules from the same supplier in the month of July, 2016 and these were supplied at the same rate. As per quotation dated 26-11-2015 of inverter the un-negotiated rate was Rs. 28,50,000/- and after negotiations the rate was settled for Rs. 27.03 Lacs and on this price the inverter was procured. It is further submitted that the order for Transformer was placed by the appellant in the month of February, 2016 at a rate of Rs. 9,80,000/-. So from these facts it is very much clear that the appellant did not get any benefit due to any reduction in price. This aspect of the matter has not been taken into consideration by the first Respondent/PSERC. Therefore, the impugned order passed for reducing the rate of tariff is not sustainable.

The submission of the learned counsel appearing for the Appellant Regarding Order dated 11-1-2019 passed by this Hon'ble Tribunal in A. No. 169 of 2015 titled as M/s Earth Solar Private Ltd. V/s PSERC and others.

19. Lastly, the learned counsel appearing for the Appellant submitted that the judgment of this Tribunal in case of M/s Earth Solar Private Ltd. V/s PSERC vide order dated 11-1-2019 passed in the A.No. 169 of 2015on the file of this Tribunal dismissed the appeal. The counsel vehemently submitted that this appeal was filed by M/s Earth Solar challenging the order passed by the State Commission whereby the State Commission though extended the commissioning period but lowered the applicable tariff. It is submitted here that the said judgment also supports the case of the appellant. Further, the learned counsel appearing for the Respondents, during the course of their submissions, placed reliance upon judgment passed by the Hon'ble Supreme Court in the case of Gujarat Urja Vikas Nigam Limited V/s Solar Semiconductor Power Company Pvt. Ltd. , (2017) 16 SCC 498 and submitted that the State Commission has no power to extend the control period.

The counsel further submitted that the said judgment of the Hon'ble Supreme Court held that the State Commission can not extend the control period while exercising its inherent powers. It is submitted here respectfully that in the present case the petition was filed before the first Respondent/PSERC under section 86(1)(f) of the Act and as such the state commission was having power to extend the Control Period. Therefore, the petition judgments of this Tribunal as well as of the Hon'ble Supreme Court s referred above are not applicable to the fcts and circumstances of the case in hand. Therefore, he prayed that in view of the submissions as stated supra, the impugned order passed by the first Respondent/PSERC may kindly be set aside and the relief prayed for in the Appeal may be allowed as prayed for or in the alternative, the impugned order may kindly be set aside, the matter may be remanded back to the State Commission for deciding it afresh after making the correct calculations of he delay caused by the Respondents and thereafter to re-determine the tariff as per law, in the interest of justice and equity or any other order for

direction of relief which this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case may also please be passed in favour of the Appellant.

The submission of the learned counsel appearing for the Respondent No. 1 regarding Approval of PPA by the first Respondent/PSERC on 11.05.2015

20. The learned counsel, Shri Sakesh Kumar, appearing for the Respondent No. 1, submitted that it was contended by the Appellant herein that the whole period during which the PPA was pending before the commission for the approval, ought to have been excluded while determining the COD of the appellant. It is stated that it was the duty of the second Respondent/PSPCL to get the approval done before the period starts running for the establishment of the project. It was further submitted that the financial closure and other project related activities could not progress due to the same. In response to this it is submitted that the appellant signed the PPA and ought to have taken the steps as per the contract, IA with PEDA and the PPA were duly signed. The first Respondent/PSERC considered this aspect and averred as follows:

> "The petitioner has not submitted any documentary evidence indicating that the works for execution of the project were hampered for want of approval/acceptance of the PPA by the

Commission on 11.05.2015. The Commission notes that clause 10.1.0 and clause 35.0.0 are concurrent and co-exist in the PPA. Article 7 of the IA signed by the petitioner with PEDA on 28.03.2015 stipulated the commissioning period of the project as 10 months from the date of signing the PPA. Further, as per para (d) on page-2 of the PPA, IA shall be treated as an integral part of the PPA.

The Commission has carefully considered the matter. The Commission is of the opinion that in the absence of documentary evidence to prove any loss/delay suffered by the petitioner due to the time elapsed between the submission of petition by PSPCL on 30.03.2015 for approval of purchase of power and tariff in the PPA by the Commission on 11.05.2015, no benefit on this account is admissible to the petitioner."

The submission of the learned counsel appearing for the Respondent No. 1 regarding Approval of design :

21. The learned counsel appearing for the Respondent No. 1, submitted that appellant himself has sought time since the design was not approved by the third Respondent/PEDA. It is submitted that it is for the developers to submit the complete location details of the project along with clause 6.2 (vi) of the implementation agreement.

The learned counsel appearing for the first Respondent/PSERC, after taking into consideration the above clause has decided accordingly, the relevant portion of which reads as follows :

> "The Commission notes that as per article 4.1(vii) of the IA, the petitioner was required to submit the complete location/details of the rooftop of the building/shed on which the proposed project was to be set up and the land lease documents were required to be submitted within 120 days of signing of the PPA on 31.03.2015 i.e. upto 29.07.2015. On 21.08.2015, the petitioner submitted the sketches of roof of green house sheds at village Purkhali, Distt. Ropar to PEDA seeking approval of the design. Thereafter, on 31.08.2015, the petitioner submitted land lease papers of village Bhaddal, Distt. Rupnagar to PEDA i.e. at a different location. The petitioner further changed the location of land of its own and submitted the lease deed dated 29.09.2015 to PEDA on 05.10.2015 for another changed location at village Rurki, Distt. Fatehgarh Sahib. As finally, the petitioner after changing the location of the project thrice submitted the requisite documents of land on 05.10.2015, the Commission is of the view that the period of 68 days from 29.07.2015, the date on which the requisite documents were required to be submitted as per RfP, upto 05.10.2015, the date on which the same were actually

submitted, is delay on the part of the petitioner on account of submission of requisite documents by the stipulated date. The Commission further notes that PEDA vide letter dated 12.10.2015 i.e. after 7 days of submission of lease deed documents finally, granted the concurrence to setup the 1 MW solar PV power project of the petitioner on the roof of the green house sheds at village Rurki, Distt. Fatehgarh Sahib, there was no delay on the part of PEDA on this account."

The submission of the learned counsel appearing for the Respondent No. 1 regardingTechnical grid feasibility clearance

22. The learned counsel appearing for the Respondent No. 1, submitted that the first Respondent/PSERC found that the appellant was to apply for grid feasibility clearance within 120 days from the date of signing of PPA which comes to 29/07/2015. However, the Appellant only applies for same on 30/10/2015which was granted by the second Respondent/PSPCL on 30/03/2016 hence the commission found that there was a delay on both side i.e. 93 days on the part of the appellant and 137 days on the part of second Respondent/PSPCL and therefore the commission prudently decided that the net of 44 days should be allowed to the appellant .The appellant had contended that the delay by the appellant ought not to have been set-off against the delay by the

second Respondent/PSPCL. It is further submitted that the commission is mathematically right in discounting the delay against each other by allowing the delay in favor of the appellant. Therefore, whatever the Appellant is entitled, the relief has been extended. Hence the Appellant cannot make out any grievance against the delay and same is liable to be rejected at the threshold.

The submission of the learned counsel appearing for the Respondent No. 1 regarding Commissioning of the Project

23. The learned counsel appearing for the Respondent No. 1, contended that It has been submitted by the appellant that the project was delayed as the bank refused to finance the project due to delay in grant of technical grid feasibility clearance by the second Respondent/PSPCL. It is admitted fact that the project was synchronized on 24/01/2017 that is much after the expiry of the controlled period on 31/03/2016. The first Respondent/PSERC considered on the same on the basis of the material available on records and the case made out by the parties, and has considered as under;

"The Commission notes that the project was completed on 07.11.2016 and the same was inspected by Chief Electrical Inspector on the same date. The protection team of PSPCL visited and inspected the plant on 09.11.2016. The petitioner applied to PSPCL for the grant of permission for synchronization of the

project on 15.11.2016. PSPCL granted the permission for synchronization on 23.01.2017 and the meter at sub-station was installed and sealed by MMTS on 24.01.2017. The project was synchronized on 24.01.2017. The petitioner applied for synchronization on 15.11.2016. Considering a period of 7 days as sufficient for granting permission for synchronization by PSPCL i.e. upto 22.11.2016, the period from 22.11.2016 to 23.01.2017 when the synchronization permission was actually given by PSPCL i.e. 62 days is attributable to PSPCL as delay on this account.

In view of the above, the Commission allows benefit of total 106 days to the petitioner i.e. 44 days on account of delay in granting technical grid feasibility clearance and 62 days on account of permission for synchronization by PSPCL. After deducting 68 days on account of delay by the petitioner in submission of requisite land documents to PEDA, the net benefit of 38 (106-68) days is to the account of the petitioner.

The project was commissioned on 24.01.2017 against the scheduled date of commissioning as 30.01.2016 i.e. 361 days after the due date. After allowing net benefit of 38 days as brought out above in favour of the petitioner, the Commission finds that the project was commissioned with a delay of 323 (361-38) days. As such, forfeiture and encashment of performance bank guarantees is warranted in terms of IA/PPA. Accordingly, the stay on forfeiture and

encashment of PBGs granted by the Commission earlier is hereby vacated.

Further, due to the delay in completion of the project, it could not contribute towards procurement of sufficient power from solar projects by PSPCL which remained deficit of the same to the tune of 77.41 MU for meeting solar Renewable Purchase Obligation for FY 2015-16 as per details furnished in petition no. 61 of 2016 filed by PSPCL. This tantamounts to a loss to PSPCL. Accordingly, PSPCL is also entitled to levy liquidated damages. In terms of IA/PPA, the scheduled date of commissioning of the project was 30.01.2016. The project could be commissioned within next two months with forfeiture and encashment of PBGs by PEDA in terms of IA/PPA. Further, the project could be commissioned within the next 3 months i.e. 15 months from the date of signing the PPA with levy of liquidated damages by PSPCL in terms of IA/PPA i.e. upto 30.06.2016. Thereafter the project was liable to be cancelled. The Commission is of the view that since the project was not cancelled on 30.06.2016 and allowed to be commissioned on 24.01.2017, there is a case for levy of liquidated damages for 263 (323-60) days after accounting for two months time for forfeiture of bank guarantees at the rate provided in the IA/PPA."

The learned counsel appearing for the first Respondent further submitted that the first Respondent/PSERC has rightly held that the project of the appellant was not commissioned in the specified controlled period and therefore was justified in re-determining the tariff to the next available tariff in accordance with the relevant provisions of the Electricity Act, 2003 and other provisions. The reasoning of the first Respondent/PSERC in this regards reads as follows :

> "The Commission notes that the tariff of Rs. 7.65 per kWh of the petitioner's project was determined through competitive bidding process undertaken by PEDA on the basis of discount to be offered by the bidders on the generic tariff of Rs. 7.72 per kWh determined by the Commission for FY 2014-15 and the tariff was valid till 31.03.2016. For FY 2015-16 also, PEDA conducted the competitive bidding process on the same basis of discount to be offered by the bidders on the generic tariff of Rs. 7.04 per kWh for FY 2015-16 determined by the Commission wherein the lowest tariff discovered was Rs. 5.09 per kWh and approved by the Commission in its Order dated 10.06.2016 in petition no. 31 of 2016 and the same is valid upto 31.03.2017. Under the circumstances brought out in the foregoing paras, the Commission considers the petitioner's project akin to such projects. PEDA submitted that the developer benefitted due to the falling prices of solar PV modules and the tariff of the

project was required to be determined afresh. PSPCL pleaded that the project should be allowed lowest tariff of Rs. 5.09 per kWh determined in the next bidding process carried out by PEDA. Accordingly, the Commission finds it just and fair to fix the tariff for the petitioner's project as Rs. 5.09 per kWh which shall be payable by PSPCL to the petitioner for purchase of electricity from the project."

24. The learned counsel appearing for the first Respondent/PSERC submitted that in the light of the well-reasoned order passed by the first Respondent/PSERC by assigning valid and cogent reasons no error or legal infirmity has been committed as contended by the Appellant's counsel and therefore interference by this Tribunal doe not call for and the Appeal filed by the Appellant may be dismissed as devoid of merits.

The submission of Shri Anand K. Ganesan, learned counsel appearing for the Respondent No. 2/PSPCL

25. Shri Anand K. Ganesan, learned counsel appearing for the second Respondent/PSPCL at the outset submitted that there is no merit whatsoever in the present appeal and the same is liable

to be dismissed with costs on the ground that Appellant is only seeking to take undue benefit of its own actions by claiming a project specific **ti**me extension by more than a year while still maintaining the same tariff of Rs. 7.65/kWh. The claim of the Appellant of a force majeure condition is misconceived and liable to be rejected at the threshold

26. The learned counsel appearing for the second Respondent/PSPCL at the outset vehemently submitted that the issues raised in the present appeal are squarely covered by the Judgment of this Hon'ble Tribunal dated 11.01.2019 in Appeal No. 169 of 2015 – **Earth Solar Private Limited** v **Punjab State Electricity Regulatory Commission & Ors.**, This Hon'ble Tribunal considered the very same issues for the previous round of bidding of solar projects and the prayer was for project specific extension of control period. This Hon'ble Tribunal after due and ciritical evaluation of the oral and documentary evidence available on the file, has held in paragraphs 9 & 10 of the said Judgment as under : –

> *"We are of the considered opinion that having regard to its own order dated 14.11.2013 and terms and conditions provided in the IA/PPA, the State Commission has passed the impugned order in accordance with law and considering all the aspects*

associated therein. We thus, do not find any error, much less material irregularity or any legal infirmity in the impugned order. Hence, interference of this Tribunal is not called for."

27. Further he submitted that in the light of the judgment of the Hon'ble Supreme Court in the case of Gujarat Urja Vikas Nigam Limited v. Solar Semiconductor Power Company Pvt Ltd, (2017) 16 SCC 498 while dealing with the precise issue of extension of control period and claim for higher charges in terms of the earlier tariff order has held as under:

"39. *The Commission being a creature of statute cannot assume to itself any powers which are not otherwise conferred on it. In other words, under the guise of exercising its inherent power, as we have already noticed above, the Commission cannot take recourse to exercise of a power, procedure for which is otherwise specifically provided under the Act.*

40. *Extension of control period has been specifically held to be outside the purview of the power of the Commission as per EMCO [Gujarat Urja Vikas Nigam Ltd. v. EMCO Ltd., (2016) 11*

SCC 182 : (2016) 4 SCC (Civ) 624] . This appeal is hence, allowed. The impugned orders are set aside. However, we make it clear that this judgment or orders of the Appellate Tribunal or Commission shall not stand in the way of Respondent 1 taking recourse to the liberty available to them for redetermining of tariff if otherwise permissible under law and in which case it will be open to the parties to take all available contentions before the Commission."

Therefore he submitted that the above judgment applies in all force to the present case and the appeal is liable to be dismissed on this ground alone.

28. The counsel appearing for the second Respondent/PSPSCL submitted that even otherwise, there is no case for the Appellant. The issue that has been decided by the first Respondent/PSERC is on the reasons of the delay of the project and the consequences of the project being commissioned in the next financial year. The first Respondent/PSERC has examined each of the issues and held that the delay in the project was for reasons attributable to the Appellant alone. In fact, the Appellant has already accrued a substantial benefit in the PPA not being terminated despite there being a specific clause to this effect, while the second

Respondent/PSPSCL has chosen to continue to procure power from the Appellant subject to the payment of liquidated damages for the delay and the applicable tariff being that of 2016-17.

The learned counsel contended that the first Respondent/PSERC has also balanced the equities to save the losses to the Appellant by permitting the Appellant to supply electricity, subject however to the payment of liquidated damages and the tariff for 2016-17 being applicable.

The first Respondent/PSERC has in fact only attributed a delay of 263 days to the Appellant, though it is stated that the delay that ought to be attributed to the Appellant is much higher as elaborated hereunder. It is also wrong for the Appellant to seek any further advantage by way of redressing grievances in the present appeal.

It is also contended by the Appellant that the first Respondent/PSERC has wrongly reduced the tariff from Rs. 7.65 per kWh to Rs. 5.09 per kWh. In this regard, it is stated that the tariff of Rs. 7.65/- was applicable only in the financial year 2015-16. The solar tariffs have been reducing substantially over a period of time. Since the Appellant's project has been commissioned in FY 2016-17. Therefore, the tariff of the said year has been applied to the Appellant by the first Respondent/PSERC by assigning valid and cogent reasons in the impugned order.

The learned counsel contended that even assuming there was force majeure in the present case, the tariff has to be re-determined by the first Respondent/PSERC as per Article 10.5 (iv) of the Implementation Agreement, which reads as under -

> *"ix) In case commissioning of the project is delayed due to force majeure conditions stated above and the same are accepted by the competent authority, the due dates for encashment of performance security and imposition of liquidated damages shall be extended accordingly. In case the delay affects the COD of the project and it gets extended to the next financial year then the tariff payable shall be as determined by PSERC."*

29. Therefore, the claim for force majeure does not help the case of the Appellant to claim that the existing tariff of Rs. 7.65 per unit should be continued. It is pertinent to note that the Appellant has not provided the notice within 5 days of the alleged force majeure event. This requirement of notice is in Article 10.4 of the Implementation Agreement and the same is mandatory. The notice is required to be issued for a specific purpose, namely, to enable the other party to factually verify the claims of the Appellant and see whether there is factually a force majeure event, whether

steps can be taken to mitigate it etc. It would have been possible for the second Respondent/PSPCL / the third Respondent/PEDA to see whether the facts stated by the Appellant amount to a force majeure or not.

To substantiate its submissions, he contended that there is a mandatory requirement of notice as the Agreement between the parties has been upheld by the Hon'ble Tribunal in the case of Talwandi Sabo Power Limited v. Punjab State Power Corporation Limited, Appeal No. 97 of 2016 dated 03.06.2016 in paragraphs 29 to 31 which read as under:

> *"29. It is submitted that clauses of the PPA such as Article 4 which relate to the development of project are designed to ensure that the COD agreed under the PPA is adhered to and since the project has to be executed in a timely manner the intermediate notice period/timeline cannot be used for the purpose of delaying scheduled commercial operation date. It is contended that timelines provided in Article 6.1.1 are directory in nature. It is not possible for us to accept this submission. It is true that projects have to be executed in a timely manner. But that cannot be done by bypassing mandatory provision of notice which has a purpose and which is not an empty*

formality. Article 4 relates todevelopment of the project. Article 4.1 relates to the seller's obligation to build, own and operate the project. Article 4.1.1 uses the words "subject to the terms and conditions of this agreement". Therefore development of the project is also subject to the timelines prescribed under various provisions of the PPA which include Article 6.1.1 & 6.2.2. Pertinently Article 6.1.1 uses the expression 'shall'. In our opinion therefore provision of notice contained in Article 6.1.1 is mandatory in nature.

30. It is not possible to accept the submission that there is no need for separate notices of 60 days and 30 days for each unit because notice is required to be given in respect of only the first unit. If notice contemplated under Article 6.1.1 was to be given only in respect of the first generating unit, Article 6.1.1 would have contained the words 'first unit' instead of 'a unit'. In this connection it is necessary to note that the term 'Scheduled Connection Date' has been defined as under:

……..

31. It is also important to note that stipulation contained in Article 6.1.1 cannot be said to have been changed by the parties without the approval of the Appropriate Commission, as the amendment to Article 6.1.1 will have financial implication. Purpose of giving notice of synchronisation is not only to enable PSPCL to arrange for the Interconnection and Transmission Facilities for evacuating power. The notice of synchronisation is also necessary for PSPCL to arrange its affairs to receive the contracted capacity under the PPA. It is required to make arrangements for procurement of power from various sources in advance. In the circumstances we are of the opinion that TSPL has not complied with Article 6.1.1 which is mandatory in nature. This view taken by the State Commission is perfectly legal."

He further submitted that it is not the case that the other parties were made aware of the alleged force majeure events of the Appellant in any other manner. As submitted hereinabove, the very purpose of providing the notice is to make the other party aware of the factual position to enable verification and see whether all mitigating steps are taken or not. In the circumstances,

the Appellant's case falls squarely contrary to the above decision of the Hon'ble Tribunal and is therefore unsustainable.

30. The learned counsel appearing for the second Respondent/PSPCL submitted that even on merits, there is no case for the Appellant. The various delays which are claimed by the Appellant for identification of site etc. are the sole responsibility of the Appellant and are therefore fully attributable to the Appellant lone. It is incorrect that 53 days were taken for approval of the land/site for installation. It is a fact that the Appellant has submitted the documents fully only on 05.10.2015 which were approved on 12.10.2015, i.e., within a period of 7 days. It is further stated that installation of a solar plant only takes a few months and extended time is provided to ensure all approvals etc. are obtained well within the time prescribed. These activities are the responsibility of the Appellant and hence cannot be excluded. It is further stated that the Agreements were required to be amended in view of location of the plant, which was the sole responsibility of the Appellant. The Appellant cannot seek to take advantage of the same on account of his lapses. Further, it emerges that there was no undue delay in the amendment to the PPA or the grid feasibility. It is not open to the Appellant to contend that all approvals are to be given in one day's time. It is significant to note that in fact the State Commission has given a substantial benefit to the Appellant by considering 137 days as being attributable to the

answering Respondent, which is erroneous. The State Commission has also attributed a period of 62 days as delay by the second Respondent/PSPCL for grant of synchronization permission, which is also erroneous. Therefore, the Appellant has failed to make out any case seeking relief in the hands of this Tribunal.

The submission of learned counsel appearing for the second Respondent/PSPCL Regarding Time taken for approval of PPA

31. The learned counsel submitted that the Appellant's contention that it could not go ahead with project work for 41 days after signing of the PPA because the PPA was not approved by the first Respondent/PSERC is wrong and denied. The said contention is misconceived because there was no bar on the Appellant to go ahead with the project work until the pendency of approval of PPA by the first Respondent/PSERC. In fact, even the preliminary work was not undertaken by the Appellant. It is also wrong and denied that the Article 35 of PPA regarding approval of PPA by the State Commission was inserted arbitrarily by the second Respondent/PSPCL since the Appellant had perused the PPA and had voluntarily signed the same with prejudice. It is incorrect on the part of the Appellant to contend that the need for approval of PPA by the first Respondent/PSERC rendered the PPA practically ineffective and non-bankable. The Appellant

should have continued with the project work when the PPA had been duly executed and the date of commissioning was agreed to be within 10 months of signing the PPA. The said clause was agreed upon with full knowledge of the legal position as envisaged under the Electricity Act. It is also further denied that the Appellant was assured that the PPA approval would be done in 5-7 days. The Appellant is making vague contentions against the settled principles of Electricity Law regarding approval of PPA by the first Respondent/PSERC.

32. The first Respondent/PSERC has rightly denied the benefit of 41 days from the date of signing of PPA to the approval of PPA by the first Respondent/PSERC, to the Appellant. In fact, the Appellant had not incurred any loss or delay because of the pending approval as is observed by the first Respondent/PSERC. The Appellant had voluntarily signed the PPA after agreeing to both the Scheduled Commercial Operation Date (SCOD) and Clause 35 of the PPA. Even if it is termed as a risk of uncertainty, the Appellant had taken the risk of uncertainty of the approval of the PPA while agreeing to commission the project within 10 months of signing of the PPA. There was no bar on the Appellant to carry on the project work after the date of signing of the PPA. It is denied that Clause 35 amounted to a change in law condition which could have restricted the operation of the project of the Appellant. There the said ground urged by the Appellant is unjusticiable and hence liable to be rejected.

The submission of learned counsel appearing for the second Respondent/PSPCL Regarding Time taken for grid feasibility clearance

33. As regards the grid feasibility clearance, it is submitted that the Appellant took nearly 5 months to complete the land procurement formalities by changing the location thrice. The Appellant applied for grid feasibility clearance to the second Respondent/PSPCL on 30.10.2015 while the last date for the said application was 29.07.2015. However, the same could not be processed in the absence of finalization of the project site. The project site was incorporated in the PPA vide amendment dated 26.11.2015 and after due concurrence with the concerned department, the Appellant was informed on 06.01.2016 regarding non-availability of space at 66 KV sub-station, Chorwala and also to intimate the alternate 66 KV grid sub-station for connecting its project. After that the Appellant approached the wrong authority (CE/TS) for seeking the said clearance. The second Respondent/PSPCL informed the Appellant vide communication dated 10.02.2016 to approach the appropriate authority, pursuant to which the Appellant applied to the correct authority i.e CE/Planning on 01.03.2016. The clearance was then granted by the second Respondent/PSPCL on 30.03.2016. It is pertinent to note that there was no intentional delay on the part of second Respondent/PSPCL in granting the grid feasibility clearance. A

substantial initial delay was made by the Appellant in finalization of the project site and thereafter, in approaching the appropriate authority. In any event, the first Respondent/PSERC has provided the benefit to the Appellant by attributing delay to the second Respondent/PSPCL. Therefore, the Appellant cannot seek any further benefit which is impermissible under the law.

34. The counsel further vehemently contended and denied that there was 152 days of delay on part of the second Respondent/PSPCL in granting the grid feasibility. He also further denied that the delay on part of the second Respondent/PSPCL should be calculated from 12.09.2015 when letter was sent to the second Respondent/PSPCL after the concurrence was given by the third Respondent/PEDA. In fact, the Appellant had changed the location of the project 3 times and the second Respondent/PSPCL had in pursuance of the letter dated 12.09.2015 communicated to the Appellant about the required amendment in the PPA to incorporate the location of the project. It is not possible to give the grid feasibility clearance until the project site is finalized, and therefore, the delay from 12.09.2015 until the amendment in PPA to incorporate the project location cannot be attributed to second Respondent/PSPCL. Moreover, the first Respondent/PSERC has also observed specifically the fault of the Appellant in changing the location thrice which had also led to substantial delay in submission of land documents for consideration.

The submission of learned counsel appearing for the second Respondent/PSPCL Regarding Computation of period of delay by the first Respondent/PSERC

35. The counsel contended that the Appellant has made vague and unreasonable contentions about the computation of delay by the first Respondent/PSERC. The contention of the Appellant that the delay should be computed after 31.10.2015 only supports the case of the second Respondent/PSPCL as the Appellant is directly praying not to consider the delay attributable to the Appellant in applying for the grid feasibility clearance on 30.10.2015 while the last date for the same was 29.07.2015. Therefore, there is no substance in the ground urged and the stand taken by the Appellant regarding computation of the period of delay by the first Respondent/PSERC and hence deserves to be rejected.

The submission of learned counsel appearing for the second Respondent/PSPCL Regarding Payment of liquidated damages

36. The counsel vehemently denied that the delay of 245 days is attributable to the Respondents. The Appellant is merely trying to wriggle out of its obligations to pay the liquidated damages and to seek the tariff applicable for FY 2014-15. The Appellant itself caused major delay in starting the project work, finalizing the location and applying late and to the wrong authorities for grid

feasibility clearance, among other causes. It is submitted that by 31.03.2016, the Appellant had effectively not done anything towards commissioning of the project and therefore, the first Respondent/PSERC has rightly held that the lowest discovered tariff of Rs. 5.09/kWh for FY 2015-16 be applied to the Appellant's project and the same is just and reasonable. The liquidated damages have been imposed according to Article 10.1.1 of the PPA according to which the second Respondent/PSPCL is entitled to levy liquidated damages for delay in commissioning of the project. The Appellant cannot unilaterally wriggle out of its obligations under the PPA to pay the liquidated damages. The Appellant has substantial deficit in its RPO compliance and further the solar power purchases can also be offset against the other RPO of the Appellant. The very fact that the liquidated damages are provided for is to dispense with the proof of actual damages. The Appellant has not made out any case regarding exemption from payment of liquidated damages. Therefore, there is no substance in the submission of the counsel appearing for the Appellant and the same is liable to be rejected.

The submission of learned counsel appearing for the second Respondent/PSPCL Regarding Tariff to be paid to the Appellant:

37. The counsel further contended that the The Appellant is not entitled to the tariff of Rs. 7.65 per unit after delaying the

commissioning of the project by around and year. The first Respondent/PSERC has rightly allowed the tariff of Rs. 5.09 per unit which is the lowest tariff for FY 2015-16. The Appellant cannot seek any benefit over the persons who have established their plant in the year 2016-17 based on the bidding in the year 2015-16. The tariff of Rs. 7.65/- was only till 31.03.2016 and for the subsequent period the new tariff had come into force without any hiatus or interruption in between. The first Respondent/PSERC could not have and has correctly not granted the higher tariff for the previous period to the Appellant. In any event, the Appellant had not done anything effective or incurred any major costs towards commissioning of the project by 31.03.2016 even going by the admission of the Appellant. The Appellant, by its own admission would have incurred all the major costs after obtaining the grid feasibility clearance in the month of March 2016.

In the circumstances as stated above, there is no merit for the Appellant to claim any tariff higher than as allowed by the first Respondent/PSERC, much less the tariff of Rs. 7.65/- per unit as being claimed.

He further vehemently submitted that the Appellant had participated in a competitive bidding process and had also unconditionally accepted the order of the first Respondent/PSERC approving the tariff. It is a well settled law that once a party participates in a bidding process accepting the terms of the tender,

it is not open to the party to then claim exemption or variation of the tender terms and conditions or otherwise contend that the terms and conditions are not applicable etc and the same is not permissible under the law. Therefore, he submitted that there is no merit in the present Appeal and the same is liable to be dismissed with costs upholding the order passed by the first Respondent/PSERC.

The submission of Shri Aadil Singh Boparai, learned counsel appearing for the Respondent No. 3/PEDA

38. The learned counsel, Shri Aadil Singh Boparai, appearing for the third Respondent/PEDA vehemently contended that the approval of the PPA by the first Respondent/PSERC is mandated under the Electricity Act, 2003 and ignorance of law cannot be an excuse, flowing out from the elementary jurisprudential principle of "Ignorantia juris non excusat". Section 86(1)(b) of the Electricity Act, 2003 provides that it is the mandate and the duty of the first Respondent/PSERC to regulate electricity purchase and procurement process of distribution licensee including the price at which the electricity shall be procured from the generation companies for purchase of power for distribution and supply within the state. Section 62 of the Electricity Act, 2003 compulsorily prescribes that the appropriate commission, i.e., the first Respondent/PSERC shall determine the tariff in accordance with

the provisions of the Act. Therefore, it cannot be the Appellant's case that the Respondents ought to bypass statutory provisions.

The Commission on carefully analyzing has concluded that the Appellant has miserably failed to furnish any documentary evidence or proof to show that pending approval of the PPA by the Commission, it was impeded or prejudiced from performing its obligations under the Implementation Agreement such as securing land, funds, placing orders for solar panels etc. The plea of force majeure on the ground of the pendency of the PPA before the first Respondent/PSERC is merely an afterthought to circumvent the terms of the contracts i.e, PPA and the IA.

Furthermore, it is an admitted case of the Appellant that no force majeure notice was sent to the Respondents on this ground in consonance with Article 10.4 of the IA. This is a belated attempt by the Appellant to evade contractual commitments. In the absence of a force majeure notice a provided under Art. 10 of the IA, the plea of force majeure is not sustainable in the eyes of law.

39. The counsel appearing for the third Respondent/PEDA vehemently contended that a bare reading of the tariff order dated 11.05.20115 passed by the first Respondent/PSERC clearly stipulates that the tariff approved i.e. Rs. 7.65 per kWh for the Appellant's project will only be valid if the entire capacity is commissioned on or before 31.03.2016. In the event of the project being commissioned after the said date i.e., 31.03.2016, the tariff shall be re-determined. In the present case, the project was commissioned on 24.01.2017 which is much after the control period provided under the tariff order and the IA. Art. 3(C) of the IA executed between the parties unequivocally provides that if the project COD crosses beyond the 31.03.2016, then this tariff shall cease to exist and the developer will be bound to get the tariff re-determined from the first Respondent/PSERC. It is necessary to indicate that Art. 10.5 of the IA (IX) prescribes that even in the event of a force majeure situation, in case the delay affects the COD of the project and it gets extended to the next financial year then the tariff payable shall be determined by the first Respondent/PSERC. All these Articles are mandatory in nature.

The Appellant has admittedly failed to follow the terms and conditions of the IA strictly as stated supra. Therefore, the Appellant is not entitled to any relief sought in the instant Appeal.

The counsel appearing for the third Respondent/PEDA further submitted that the Appellant was mandated to furnish full details along with the title papers, lease deeds, location of the project to third Respondent/PEDA in the name of the SPD(Company) within 120 days from the issue of the letter of award in terms of the IA as per Art. 6.2(VI). Failure to furnish such details will negate the sacrosanct and express terms of the contract, i.e., IA. The delay in commissioning of the project is on account of the lackadaisical approach of the Appellant in meeting the set time lines for the project. It is important to highlight that the third Respondent/PEDA cannot process and grant its approval in the absence of full land details/sale deeds of the project being furnished by the Appellant. Therefore, condoning the delay on the part of the third Respondent/PEDA for giving clearance will not be at the outset sustainable.

40. The counsel further contended that the delay in the commissioning of the project has been on account of the laxity demonstrated by the Appellant. The present matter is an eggregious case of delay wherein the Appellant failed to even meet its own anticipated deadlines. It is an admitted fact that the Appellant filed its amended petition twice before the first Respondent/PSEC for extension in the actual date of the commissioning of the project. In the min petition before the Commission, the Appellant sought an extension up till 31.08.2016. Thereafter since the Appellant was not able to meet its extended anticipated time lines, it again sought amendment of the petition seeking extension in the commissioning of the project up till 15.11.2016. In furtherance to this, the Appellant again sought further extension in the actual date of commissioning of the project up till 24.01.2017 when the project was commissioned. The chronology shows the casual approach adopted by the Appellant as it intended to benefit out of the declining value of the solar PV modules in the international market.

The first Respondent/PSERC has rightly concluded that the Appellant changed the location of the project site on more than three occasions. On 21.08.2015, the Appellant submitted the sketches of roof green house sheds at Village Purkhali, District Ropar. Thereafter, on 31.08.2015, the Appellant submitted land lease papers of Village Bhaddal, Rupnagar. The Appellant further changed the location of the site and submitted lease papers dated 29.09.2015 for a site at Village Rurki, District Fatehgarh Sahib. It is noteworthy to point out that the third Respondent/PEDA expeditiously process the file and granted it s concurrence to the Appellant after 7 days of submission of the lease papers i.e., 12.10.2015.

The aforesaid finding recorded by the first Respondent/PSERC in the impugned order is jut and reasonable and we do not find any error or any irregularity and therefore on this ground also the interference by this Tribunal does not call for.

41. The counsel appearing for the third Respondent/PEDA contended that this Hon'ble Tribunal in a recent judgment titled as "Earth solar Private Limited Vs. PSERC & Ors" bearing Appeal No. 169 of 2015 pronounced on 11.01.2019 has upheld the contention that the tariff of the project has to be re-determined in the event that the project is commissioned after the expiry of the control period, i.e., 31.03.2016. He further submitted that this Tribunal, in the said judgment has held that, "We have also taken note from the documents placed before us that it was a clear indication to all the project developers that in case their projects are not commissioned within the control period ending on 31.03.2015, the tariff shall be re-determined by the State Commission in line with the terms and conditions of the IA/PPA, a held in para 10.6 of the Earth Solar Judgment delivered by this Hon'ble Tribunal."

On this ground alone, the Appeal filed by the Appellant is also liable to be dismissed at the threshold.

Finally, the counsel appearing for the third Respondent/PEDA submitted that the terms of the IA and the tariff order dated 11.05.2015 clearly record that in the event that the project is commissioned after the control period, i.e., 31.03.2016, the tariff shall be re-determined by the first Respondent/PSERC. The Appellant's project was commissioned after an inordinate delay on 24.01.2017 is not in dispute whereas the scheduled date of commissioning of the project was 30.01.2016. In view of the aforementioned submissions, he most humbly submitted that the instant Appeal filed by the Appellant may be dismissed with costs.

OUR CONSIDERATIONS

42. We have heard the learned counsel appearing for the Appellant, Shri Tajender K. Joshi, the learned counsel appearing for the Respondents – Shri Sakesh Kumar for the first Respondent/PSERC, Shri Anand K. Ganesan for the second Respondent/PSPCL and Shri Aadil Singh Boparai for the third Respondent/PEDA for a considerable length of time and have also gone through the written submissions filed by the learned counsel

appearing for the Appellant and the learned counsel appearing for the Respondents carefully and after critical evaluation of the entire relevant material available on record, the following issues emerged for consideration in the instant Appeal.

ISSUE NO. 1

Whether the first Respondent/PSERC was correct in holding the Appellant responsible for delay in commissioning of the Solar Project without considering defaults on the part of the third Respondent/PEDA and the second Respondent/PSPCL?

ISSUE NO. 2

Whether the first Respondent/PSERC has acted beyond its jurisdiction by changing the tariff for delay in commissioning the project and for cause attributable to the nodal agency/Government and whether the tariff has been determined by way of a computation process as envisaged under relevant Provisions of the Electricity Act, 2003?

Our Findings and Analysis

RE : ISSUE NO. 1

43. After careful consideration of the submissions of the learned counsel appearing for the Appellant and the learned counsel

appearing for the Respondents, it is relevant to note that the subject procurement of power from the Solar Project was piloted by the nodal agency, the third Respondent/PEDA under NRSE Policy, 2012 of the Government of Punjab. The bids were invited from the developers and the Appellant was awarded a 4 MW solar project with a commissioning period of 13 months from the LOA which was subsequently extended by 45 days. The generic tariff alongwith the PPA was approved by the State Commission which, among others, stipulated that a generic tariff order shall be applicable upto 31.03.2015. As per the PPA executed between the parties, it was further envisaged that in case the commissioning period of the project gets delayed, the tariff shall be determined by the first Respondent/PSERC. It is not in dispute that the Appellant could not construct the solar project as per the terms and conditions of the Implementation Agreement / Power Purchase Agreement on account of final clearance and land use pattern and the project got delayed beyond the control period ending 31.03.2015 owing to one or the other reasons, primarily due to change of location of the land for three times at the request

of the appellant only and obtaining various statutory clearances / approvals from the competent authorities of the Respondents.

It is the case of the Appellant that he got the clearance / approvals after a delay has been caused because of slackness and inefficiency on the part of the third Respondent/PEDA being the nodal agency and the second Respondent/PSPCL. On the other hand, the respondents have vehemently contended that the role of the third Respondent/PEDA was that of a facilitating agency only and the sole responsibility for getting final clearance in respect of the approvals exclusively rested with the Appellant alone. The respondents categorically stated that the Appellant adopted casual approach for obtaining clearances and approvals from the respondents on one pretext or the other and it is an admitted fact that for the chosen project, the location has been changed for more than thrice and he did not take effective steps to pursue the Redressal of his grievances at different fora in a time-bound manner, which, in turn, resulted into a delay and latches on the part of the Appellant in receiving the clearance. Therefore, the

delay in construction and the commissioning of the project on the part of the Appellant is not in dispute.

Further, after careful evaluation of the entire material on records and the submission of the learned counsel appearing for the Appellant and the learned counsel appearing for the Respondents, what has emerged is that the Appellant has failed to complete the project as per the IA/PPA on account of not getting timely clearances and permissions from the competent authorities of the Respondents. Therefore, within the allotted time, the Appellant could not complete the project in spite of sufficient time accorded for achieving the target of the scheduled date of commissioning but it could not avail the benefit of the fact that it had its own private land. First time, it is shown thereafter that the third Respondent/PEDA has sent a letter that the land is not standing in the name of the Company. Thereafter, he transferred the same land in the name of the company. After transferring when he submitted the proposal, the third Respondent/PEDA has taken immediate action for resolving the impediments as and when

reported by the Appellant expeditiously. The contention of the Appellant is that the delay has been caused on the part of the Respondents for clearances/approvals. If that period is exempted, his entitlement to the relief sought has got neither any merit nor any substance in the case in hand.

In view of these facts, we are of the considered view that the claim of the Appellant for extension of COD of the project lacks any bonafide and the first Respondent/PSERC has passed the impugned order after critical evaluation of the entire material on records and after considering oral and documentary evidence and assigning valid and cogent reasons and taking into consideration the case made out by the Appellant and the Respondents. The reasoning given in the impugned order is well-founded and well-reasoned. Therefore, we do not find any error or irregularity, nor any perversity in the impugned order. Therefore, we are of the considered view that interference by this Tribunal does not call for. Hence, we answer the issue No. 1 against the Appellant.

RE ISSUE NO. 2

44. After thoughtful consideration of the submissions of the learned counsel appearing for the Appellant and the learned counsel appearing for the Respondents and after careful perusal of the impugned order passed by the first Respondent/PSERC now, what has emerged is that in the impugned order dated 09.08.2017, it specific and in clear terms stated that the tariff so agreed could be applicable only when the projects are commissioned before 31.03.2015. It is also significant to note that the Appellant has miserably failed in notifying the force majeure events, particularly, as per the terms and conditions of the IA read with the PPA and rather adopted a very liberal approach in pursuing statutory approvals as well as soliciting intervention of the Respondents in resolving the issues pending with various competent authorities of the Government Agencies/second Respondent PSPCL and the third Respondent PEDA. The active construction period has actually been put to the tune of 10 months whereas the time provided for commissioning of the project has been delayed substantially and the same is not in dispute. We also specifically

have taken note from the documents placed before us that it was the case of the project developers that their projects are commissioned within the control period ending 31.03.2015 and the same is not in dispute. The tariff shall be re-determined by the first Respondent/PSERC in line with the terms and conditions of the IA/PPA only. It is not in dispute that the tariff for subsequent control period has been considered by the first Respondent/PSERC based on the prevailing tariff discovered through the competent bidding process. We are of the considered view that having regard to its own earlier order and the terms and conditions provided in the IA/PPA, the first Respondent/PSERC has passed the impugned order strictly in consonance with relevant provisions of the Electricity Act, 2003 and the Regulations and considering all the aspects stated therein. Therefore, we do not find any incongruity or any material irregularity or any legal infirmity in the impugned order. Thus, we hold that interference by this Tribunal does not call for. Hence, the Issue No. 2 is answered against the Appellant accordingly.

45. The learned counsel appearing for the Appellant placed the reliance on the judgment reported in 2011 SCC Online APTEl 163 : [2011] APTEL 164 'Rithwik Energy Generation Pvt Ltd V. Karnataka power Transmission Corpn. Ltd and ' and ''Tamil Nadu Generation and Distribution Corpn. Ltd. Vs. M/s Penna Electricity Ltd. & Anr. Reported in 2013 SCC Online APTEL 110 : [2013] APTEL 96'.

We have gone through the relevant paragraphs pointed out by the learned counsel appearing for the Appellant – in the first case in para 10 and in the second case in paras 22 to 32 and para 95(ii) thereof. It is not in dispute nor there is any quarrel regarding the law laid down by this Tribunal and the Supreme Court. The said ratio of the judgments of the above cases are not applicable to the facts and circumstances of the case in hand.

Whereas the learned counsel appearing for the Respondent Nos. 1 to 3 inter alia contended and vehemently submitted that in

fact the issues raised in the present Appeal are squarely covered by the judgment of this Tribunal in its order dated 11.01.2019 passed in Appeal No. 169 of 2015 [Earth Solar Pvt Ltd v. PSERC & Ors] as held in para 10.6 reproduced hereinunder :

> ” *10.6 We have carefully considered the submissions of the counsel appearing for both the parties and also gone through the findings of the State Commission in the impugned order. What thus emerges therefrom that in the order dated 14.11.2013, it had been clearly stipulated that the tariff so agreed would be applicable only when the projects are commissioned before 31.03.2015. It is also relevant to note that the Appellant has miserably failed in notifying the force majeure event particularly as per procedures laid down in the IA read with PPA and rather adopted a very liberal approach in pursuing statutory approvals as well as soliciting the intervention of the Respondents in resolving the issues pending with various Govt. agencies. The active construction period has actually been to the tune of 4 months whereas the time provided for commissioning of the project was 13 + 1 ½ months. We have also taken note from the documents placed before us that it was a clear indication to all the project developers that in*

case their projects are not commissioned within the control period ending 31.03.2015, the tariff shall be re-determined by the State Commission in line with the terms and conditions of the IA/PPA. It is not a dispute that the tariff for the subsequent control period of Rs.7.19 has been considered by the State Commission based on the prevailing tariff discovered through competitive bidding process. We are of the considered opinion that having regard to its own order dated 14.11.2013 and terms and conditions provided in the IA/PPA, the State Commission has passed the impugned order in accordance with law and considering all the aspects associated therein. We thus, do not find any error, much less material irregularity or any legal infirmity in the impugned order. Hence, interference of this Tribunal is not called for."

46. Further, the learned counsel appearing for the second Respondent/PSPCL inter alia contended to substantiate his submissions and placed reliance on the judgment reported in '(2017) 16 SCC 498 : Gujarat Urja Vikas Nigam Ltd Vs. Solar Semiconductor Power Company (India) Pvt Ltd & Anr' as held in

paras 39 & 40 thereof and it is worthwhile to reproduce the same as hereinunder :

> ***"39.*** *The Commission being a creature of statute cannot assume to itself any powers which are not otherwise conferred on it. In other words, under the guise of exercising its inherent power, as we have already noticed above, the Commission cannot take recourse to exercise of a power, procedure for which is otherwise specifically provided under the Act.*
>
> ***40.*** *Extension of control period has been specifically held to be outside the purview of the power of the Commission as per EMCO [Gujarat Urja Vikas Nigam Ltd. v. EMCO Ltd., (2016) 11 SCC 182 : (2016) 4 SCC (Civ) 624] . This appeal is hence, allowed. The impugned orders are set aside. However, we make it clear that this judgment or orders of the Appellate Tribunal or Commission shall not stand in the way of Respondent 1 taking recourse to the liberty available to them for re-determining of tariff if otherwise permissible under law and in which case it will be open to the parties to take all available contentions before the Commission."*

After careful reading of the Judgments of this Tribunal and the Apex Court as stated supra and as rightly pointed out by the counsel appearing for the Respondents, the ratio of the Judgment of this Tribunal in the Earth Solar Private Limited case and that of the Supreme Court in the case of Gujarat Urja Vikas Nigam Limited is aptly applicable to the facts and circumstances of the case in hand. The first Respondent/PSERC, after thorough evaluation of the entire material on records and the case made out by the counsel appearing for the Appellant and the Respondents and after thoughtful consideration and also taking into consideration the relevant provisions of the Electricity Act, 2003 and relevant terms and conditions of the IA/PPA by assigning valid and cogent reasons recorded in the findings of the case has decided the case strictly in consonance with law. We do not find any error or legal infirmity or perversity in the impugned order. Therefore, interference by this Tribunal does not call for.

CONCLUSION

47. Therefore, we do not find any incongruity or material irregularity or legal infirmity in the impugned Order.

In fact, the impugned Order passed by the first Respondent/PSERC is in consonance with the preamble of the Electricity Act, 2003 and the Order is balanced in nature and thereby a very lenient view has been taken by the first Respondent/PSERC in the matter. The reasonable delay has been condoned in favour of the Appellant. This establishes beyond doubt that the reasoning assigned in the impugned Order is holistic. The first Respondent/PSERC has taken the balanced view to safeguard the interest of the consumers as well as the Appellant.

The impugned Order passed by the first Respondent/PSERC is well-founded, sound and well-reasoned. Therefore, we decline to consider the reliefs sought by the Appellant in the instant case. Taking into consideration all the relevant material in totality of the case, we hold that the issues raised in the instant Appeal are answered against the Appellant and the Appeal filed by the Appellant is dismissed as being devoid of merits.

ORDER

Having regard to the factual and legal aspects of the matter as stated supra, the Appeal filed by the Appellant is liable to be dismissed as being devoid of merits.

The issues raised in the instant Appeal are answered against the Appellant. The impugned Order dated 09.08.2017 passed by the first Respondent/PSERC in Petition No. 26 of 2016 and IA No. 18 of 2016 on the file of the Punjab State Electricity Regulatory Commission, Chandigarh is hereby upheld

The parties are to bear their own costs

PRONOUNCED IN THE OPEN COURT ON 21st Day of February, 2019.

(Ravindra Kumar Verma)
Technical Member

(Justice N.K. Patil)
Judicial Member

√**REPORTABLE / ~~NON-REPORTABLE~~**

Bn