

COURT-I

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

**APPEAL NO. 332 OF 2018 & IA Nos. 1591 & 1592 of 2018
&
APPEAL NO. 333 OF 2018 & IA Nos. 1593 & 1594 of 2018**

Dated: 8th May, 2019

**Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. S.D. Dubey, Technical Member**

**APPEAL NO. 332 OF 2018 &
IA Nos. 1591 & 1592 of 2018**

In the matter of:

IN THE MATTER OF:

1. ES Solar Private Limited,)
#55, Solar Tower, 6th Main, 11th Cross,)
Lakshmaiah Block, Ganganagar,)
Bengaluru - 560032)
2. Emmvee Photovoltaic Power Private)
Limited)
#55, Solar Tower, 6th Main, 11th Cross,)
Lakshmaiah Block, Ganganagar,)
Bengaluru - 560032)Appellants

Versus

1. The Managing Director,)
Bangalore Electricity Supply Company)
Limited (BESCOM),)
Corporate Office, K.R. Circle,)
Bengaluru – 560 001, Karnataka)
2. Karnataka Electricity Regulatory)
Commission, 37, MG Road, Yellappa)
Garden, Yellappa Chetty Layout, Ulsoor,)
Bengaluru, Karnataka 560001,)
represented by its Secretary) ... Respondents

APPEAL NO. 333 OF 2018 &
IA Nos. 1593 & 1594 of 2018

1. ES Sun Power Private Limited,)
#55, Solar Tower, 6th Main, 11th Cross,)
Lakshmaiah Block, Ganganagar,)
Bengaluru - 560032)

2. Emmvee Photovoltaic Power Private)
Limited)
#55, Solar Tower, 6th Main, 11th Cross,)
Lakshmaiah Block, Ganganagar,)
Bengaluru - 560032)Appellant(s)

Versus

1. The Managing Director,)
Bangalore Electricity Supply Company)
Limited (BESCOM),)
Corporate Office, K.R. Circle,)
Bengaluru – 560 001, Karnataka)

2. Karnataka Electricity Regulatory)
Commission, 37, MG Road, Yellappa)
Garden, Yellappa Chetty Layout, Ulsoor,)
Bengaluru, Karnataka 560001,)
represented by its Secretary) ... Respondents

Counsel for the Appellant(s) : Mr. Basava Prabhu Patil, Sr. Adv.
Mr. Ganapati Hegde
Mr. Gaurav Mandappa
Mr. Chirag Kher
Mr. Geet Ahuja

Counsel for the Respondent(s) : Mr. Balaji Srinivasan
Ms. Sumana Naganand
Mr. Siddhart Kohli
Ms. Garima Jain
Ms. Lakshmi Rao for R.1

JUDGMENT

(PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON)

1. These two appeals are taken up together since the parties; pleadings and controversy involved are exactly the same. Therefore, we dispose of these two appeals by a common judgment.

2. Appeal No. 332 of 2018 refers to 10 MW (AC) capacity of Solar PV ground mount project in Bidar Rural Taluk, District of Bidar in Karnataka. Appeal No. 333 of 2018 refers to 20 MW (AC) capacity of Solar PV ground mount project in Bagepalli Taluk, Chikkaballapura district in the state of Karnataka.

3. It's not in dispute that Appellant No.1 in both the appeals is the Special Purpose Vehicle (for short "**SPV**") constituted by Appellant No.2. In response to Request for Proposal (**RFP**) invited by Karnataka Renewable Energy Development Limited (**KREDL**) for selection of developers for undertaking development of solar projects, the Appellants submitted its bids and letter of Award came to be issued for both the projects on 31.03.2016. Power Purchase

Agreements came to be entered into on 23.05.2016 between first Appellant and the Respondent No.1 in both the matters. These Power Purchase Agreements came to be approved on 17.10.2016 by Karnataka Electricity Regulatory Commission (“**KERC/Commission**”) subject to certain modifications, referred to therein. In both the appeals, Appellant No.1 and Respondent No.1 entered into supplementary Power Purchase Agreements on 07.12.2016 wherein certain clauses of PPA came to be modified in accordance with the directions of KERC.

4. So far as Bidar project is concerned, on 16.10.2017 Minutes of the Meeting came to be drawn in terms of meeting between KPTCL officials, GESCOM officials and the representative of Appellant No.1 and commissioning certificate came to be issued on 25.10.2017 by KPTCL.

5. So far as Bagepalli project is concerned, Commercial Operation Date (“**COD**”) declaration came to be issued by Respondent No.1 on 23.11.2017 stating that COD was achieved on 17.10.2017.

6. Bills and invoices came to be raised on Respondent No.1 for the power supply from 16.10.2017 to 31.10.2017 at Rs. 6.10/kWh. Subsequent bills/invoices came to be raised for the power supplied to Respondent No.1 for subsequent months also claiming Rs. 6.10/kWh by the Appellants. The Appellants have begun supply of power to the State Grid on 16.10.2017, which is within the contractual period of 12 months for commissioning the project and achieving COD as agreed in terms of PPA. Therefore, the Appellants contend that they have achieved COD as agreed under PPA dated 23.05.2016.

7. However, while making payments by Respondent No.1 towards the bills and invoices raised in respect of Bidar project is concerned, the tariff came to be reduced to Rs. 4.36/kWh besides levying liquidated damages of Rs. 20 lakhs.

8. Similarly for Bagepalli project, the tariff came to be reduced to Rs. 4.36/kWh from Rs.6.10/kWh apart from levying liquidated damages of Rs.40 lakhs.

9. According to Respondent No.1, there was delay of one day in commissioning the project and achieving COD of the project, therefore the Appellant No.1 is liable for payment of liquidated damages as stated above apart from reduction of tariff to Rs.4.36/kWh as against Rs.6.10/kWh in terms of PPA.

10. The Appellants contend that the said action of Respondent No.1 amounts not only to arbitrariness but it was also unilaterally done without giving any opportunity of being heard to the Appellants. They further contend that in terms of PPA, if any dispute is raised in respect of bills/invoices, 95% of the said bill/invoice amount claimed has to be deposited. Without adhering to any of these terms of PPA, Respondent No.1 on its own cause has arbitrarily reduced the tariff. Therefore, the Appellants contend that this is nothing but unilateral and illegal action of Respondent No.1.

11. Challenging the action of Respondent No.1 in reducing the tariff and imposing liquidated damages, the Appellants approached KERC/Respondent No.2 by filing Original Petition No. 19 of 2018 so far as Bider project. Original Petition No. 18 of 2018 so far as Bagepalli project. In these petitions, the Appellants sought

declaration that the Appellants have commissioned the project and achieved COD within the specified time as per terms of PPA, and therefore, they are entitled for a tariff at Rs. 6.10/kWh and also challenged the imposition of liquidated damages.

12. This came to be contested by Respondent No.1 wherein they contended that there was delay of one day in achieving COD. According to the Appellants, they had filed number of documents to establish that the projects were commissioned as per PPA within 12 months from the effective date and also contended that the date of approval of PPA by KERC was to be excluded for reckoning 12 months from the effective date i.e., the date of event (date of approval of PPA by KERC). It is further contended that the Commission by its Order dated 23.10.2018 has erroneously held that the date of the event cannot be excluded for reckoning 12 months period for achieving COD. They further opined that the COD would fall on 16.10.2017 since 12 months would expire from the effective date of 17.10.2016. The Appellants contend that the Commission was not justified to hold that the COD was achieved on 17.10.2017 totally rejecting and ignoring the clinching documentary evidence such as certificate issued by KPTCL pertaining to Bidar and Bagepalli projects. They further contend that without there being any

opposition to these pleadings and documents produced by the Appellants, totally ignoring the evidence placed on record by the parties, substituting its own opinion Commission has erroneously passed the impugned order rejecting the plea of the Appellants. They further contend that the Commission has totally ignored the contention raised by the Appellants that 95% of the bill amount must be deposited in terms of PPA, if a dispute is raised with regard to bills. No reasons, whatsoever, are forthcoming so far as this claim of the Appellants is concerned. Aggrieved by the impugned order, the Appellants have approached this Tribunal by way of these appeals seeking for the following reliefs, raising detailed grounds of appeal based on the above contentions.

“Relief sought in Appeal No. 332 of 2018

- a) *That this Hon’ble Appellate Tribunal may be pleased to call for records in O.P. No. 19/2018 ;*
- b) *That this Hon’ble Appellate Tribunal may be pleased to set aside the Impugned Order dated 23.10.2018 passed by the KERC in O.P. No. 19/2018 and allow the Petition in terms of the prayers therein;*
- c) *That this Hon’ble Appellate Tribunal may be pleased to direct the Respondent No.1 to calculate the tariff at Rs. 6.10*

per KWh as per Article 12 of the PPA for the power purchased from the Appellants' Project and settle all present and future invoices of the Appellant No.1 at the contractual rate of Rs. 6.10 per KWh;

d) That this Hon'ble Appellate Tribunal may be pleased to direct the Respondent No.1 to calculate and pay the Appellant No.1 the difference in tariff payable for the electricity supplied till date by applying the tariff of Rs. 6.10 per kWh.;

e) That this Hon'ble Tribunal pass such other and further Orders as this Hon'ble Appellate Tribunal deems fit, in the interest of justice and equity.

Relief sought in Appeal No. 333 of 2018

a) That this Hon'ble Appellate Tribunal may be pleased to call for records in O.P. No. 18/2018;

b) That this Hon'ble Appellate Tribunal may be pleased to set aside the Impugned Order dated 23.10.2018 passed by the KERC in O.P. No. 18/2018 and allow the Appeal in terms of the prayers therein;

c) That this Hon'ble Appellate Tribunal may be pleased to direct the Respondent No.1 to calculate the tariff at Rs. 6.10

per KWh as per Article 12 of the PPA for the power purchased from the Appellants' Project and settle all present and future invoices of the Appellant No.1 at the contractual rate of Rs. 6.10 per KWh;

d) That this Hon'ble Appellate Tribunal may be pleased to direct the Respondent No.1 to calculate and pay the Appellant No.1 the difference in tariff payable on all bills raised till date for the electricity supplied by applying the tariff of Rs. 6.10 per kWh;

e) That this Hon'ble Appellate Tribunal direct the Respondent No. 1 to refund the Liquidated Damages imposed to the tune of INR 40 lakhs; and

f) That this Hon'ble Tribunal pass such other and further Orders as this Hon'ble Appellate Tribunal deems fit, in the interest of justice and equity.”

13. The Respondent No.1 has filed statement of objections in Appeal No. 332 of 2018 and also in Appeal No. 333 of 2018. They contend at the very outset that the Appeals are bereft of merit and deserve to be rejected. However, they admit so far as issuance of letter of Award in respect of two solar power projects referred to above, so also entering into PPA and later entering into

supplementary PPA in terms of modifications approved by the Commission. They further contend that the project had to be commissioned within 12 months from the effective date as per Article 8.5 of the PPA. They contend that the effective date is the date of approval of PPA by the Commission in terms of Article 21.1 of the PPA. Based on the definition of the term “Month” in Article 21.1 of the PPA by adopting any interpretation, the Appellants were required to commission their plants on or before 16.10.2017, which the Appellants have failed to achieve, therefore the Appellants were entitled to/eligible only for the lower tariff at Rs.4.36/kWh in terms of PPA. The material placed on record before State Commission did not indicate that the projects were commissioned on 16.10.2017. They further contend that there was no injection of energy into the Grid on 16.10.2017. The tariff was Rs.4.36/kWh in terms of State Commission’s Order dated 12.04.2017.

14. They further contend that the Respondents are entitled to liquidated damages in terms of Article 5.8.1 of the PPA, i.e., 20% of the performance security to Respondent No.1 for the delay in commissioning and supply of power up to one month. They further contend that the definitions in the PPA i.e., “COD” or “Commercial Operation Date” and “Delivery Point” clearly indicate that the project

is said to be commissioned only when it starts injecting power into the Grid. If the Appellants do not commence injecting energy into the Grid from 16.10.2017, it cannot be said that the project was commissioned within the scheduled commissioning date. Therefore, the Commission was justified in opining that the project was not commissioned within the scheduled period.

15. The State Commission was justified in referring to the definition of the term “month” and its reliance on Article 1.21 (m) clearly indicates that the Commission was justified in its opinion in the impugned order that is to say that the period of 12 months commencing from 17.10.2016 was to expire on 16.10.2017. They also contend that the Commission was justified in not linking achievement of commercial operation date with reference to Article 12.1 of the PPA.

16. The contents of Minutes of Meeting held on 16.10.2017 and the Certificate dated 23.11.2017 were properly taken into consideration by the Commission by opining that only after confirmation of injection of energy, the commissioning date of plant can be declared. Therefore, based on the data downloaded from the

main and check meters of the plant, which indicated energy being injected only on 17.10.2017 from 9.00 am onwards, the State Commission concluded that only that date and time of interconnection of the plant with the Grid mentioned in the commissioning certificate cannot be taken as date of commissioning of the plant. Hence, the Commission opined that there was delay of one day in commissioning the plant. It is contended that the Commission after analysing the facts with reference to various Articles like 21.1, 21.2, 1.4.2(a), 1.2.1(m), 13.7 has rightly concluded that in terms of PPA, the commencement of the project was delayed by one day i.e., beyond the scheduled date. According to the Respondent, the certificates relied upon by the Appellants will not assist the Appellants in any manner since such documents do not conclude that solar plant of the Appellants had achieved commercial operation date on 16.10.2017.

17. With reference to liquidated damages, learned counsel contend that in terms of Article 5.8 and Article 12.2 of the PPA, which set out in detail the consequences of delaying the supply of energy, the Commission was justified in imposing liquidated damages for the delay caused in commissioning the project. The action of the Respondents, therefore, in deducting the liquidated

damages from the monthly bills was justified. There is no admission of any kind as far as date of COD as 16.10.2017, since 'COD' means not only commissioning of the plant but it should coincide with the injection of power into the Grid. Since power could be injected into the Grid only on 17.10.2017, the certificate relied upon by the Appellants cannot be of any assistance to the Appellants. With these contentions learned counsel has sought for dismissal of the appeals.

18. We have heard learned counsel for the Appellant and learned counsel for Respondent No.1 at length on merits of these two appeals.

19. In order to understand the bone of contentions and opine accordingly "*whether there was delay in commissioning the project in terms of PPA or not*", certain definitions have to be referred to and understood. They are as under:

"Article 1.2.1

(m) any reference to any period commencing "from" a specified day or date and "till" or "until" a specified day or date shall include both such days or dates; provided that if the last day of any period computed under this Agreement is not a business

day, then the period shall run until the end of the next business day;

Article 1.4.2

Subject to provisions of Clause 1.4.1 in case of ambiguities or discrepancies within this Agreement, the following shall apply:

a) between two or more Clauses of this Agreement, the provisions of a specific Clause relevant to the issue under consideration shall prevail over those in other Clauses;

b) between the Clauses of this Agreement and the Schedules, the Clauses shall prevail and between Schedules and Annexes, the Schedules shall prevail;

c) between any two Schedules, the Schedule relevant to the issue shall prevail;

d) between any value written in numerals and that in words, the latter shall prevail.

Article 5.8

Liquidated Damages for delay in commencement of supply of power to BESCO

5.8.1 *If the Developer is unable to commence supply of power to BESCO by the Scheduled Commissioning Date other than for the reasons specified in Clause 5.7.1, the Developer shall pay to BESCO, Liquidated Damages for the delay in such commencement of supply of power and making the Contracted Capacity available for dispatch by the Scheduled Commissioning Date as per the following:*

a. For the delay up to one month an amount equivalent to 20% of the Performance Security.

.....

Article 12.1 & 12.2

12.1 *The Developer shall be entitled to receive the Tariff of INR 6.10/ kWh of energy supplied by it to BESCO in accordance with the terms of this Agreement during the period between COD and the Expiry Date.*

12.2 *Provided further that as a consequence of delay in Commissioning of the Project beyond the Scheduled Commissioning Date, subject to Article 4, if there is a change in KERC applicable Tariff, the changed applicable Tariff for the Project shall be the lower of the following:*

- i. Tariff at in Clause 12.1 above*
- or*
- ii. KERC applicable Tariff as on the Commercial Operation Date.*

Article 13.7.2

13.7.2 *If the BESCO disputes the amount payable under a Monthly Bill or a Supplementary Bill, as the case may be, it shall pay 95% of the disputed amount and it shall within fifteen (15) days of receiving such Bill, issue a notice (the "Bill Dispute Notice") to the invoicing Party setting out:*

- a) the details of the disputed amount;*
- b) its estimate of what the correct amount should be; and*
- c) all written material in support of its claim.*

“COD” or **“Commercial Operation Date”** *Shall mean the actual commissioning date of respective units of the Power Project where upon the Developer starts injecting power from the Power Project to the Delivery Point.*

*“**Delivery Point**” shall mean point or points at which power supplied into the Grid System. “*

*“**Effective Date**” shall mean date of Approval of PPA by KERC ;*

*“**Month**” shall mean a period of thirty (30) days from (and excluding) the date of the event, where applicable, else a calendar month.*

*“**Scheduled Commissioning Date**” shall mean 12 (twelve) months from the Effective Date.*

20. The point that would arise for consideration is:

“whether the project of the Appellants was delayed by one day in terms of Power Purchase Agreement and whether the Commission was justified in imposing liquidated damages on the Appellants for such delay in commissioning the project.”

21. The admitted facts in the present appeals are as under:

In order to boost the renewable energy sector and also to explore the generation of electricity through solar energy, the Government to meet the persistent power problems decided to undertake generation of 1200 MW (AC) of solar power in Karnataka through private sector participation. About 60 Taluks in the State of

Karnataka were identified, which had the potential to generate solar power of more than 20 MW.

22. Karnataka Renewable Energy Development Limited invited proposals vide its "Request for Proposal" on 20.11.2015 for selection of developers to develop solar projects in the said 60 Taluks. Admittedly, Bidar Rural Taluk in Bidar District and Bagepalli in Chikkaballapura district of State of Karnataka were among these 60 Taluks.

23. Accordingly, the Appellants made bid for development of 10 MWs capacity of Solar PV ground mounted project in Bidar Rural and 20 MW (AC) capacity of Solar PV ground mount project in Bagepalli. Since the Appellants were successful bidders for the development of the above said two projects, "Letter of Award" came to be issued in favour of the Appellants to act in accordance with the RFP.

24. It's not in dispute that the Appellant No. 1 and Respondent No.1 entered into a Power Purchase Agreement wherein several terms and conditions were indicated so also definitions which are

already referred to above. It's also not in dispute that the Commission approved the PPA with certain modifications, and by way of supplementary Power Purchase Agreement modified clauses came into existence.

25. According to the Appellants, in terms of Clause 8.5 of the PPA, the 'Scheduled Commissioning Date' under PPA is (12) months from the 'Effective Date'. The 'Effective Date' being date of approval of PPA by KERC i.e., 17.10.2016, the Scheduled Commissioning Date would be 12 months from 18.10.2016 to 17.10.2017 (after excluding first date of event i.e., approval of PPA by KERC). It is further argued that the project was duly completed within 12 months from the date of approval of the PPA and commissioning of the project took place on 16.10.2017, which is evident from the Minutes of the Meeting drawn by KPTCL so far as Bidar project is concerned. This meeting was attended to by officials of KPTCL, GESCOM and representative of Appellant No.1. However, according to the Appellants, the Executive Engineer (MRT), GESCOM made a written note to the effect that installation was synchronised on 17.10.2017. This was done in spite of objection and disagreement raised by the Appellants since synchronisation of the project has to happen before the project is commissioned.

26. It is also argued that the very fact that the projects were commissioned on 16.10.2017, it automatically goes to show that synchronisation was achieved earlier. They also relied upon Certificate dated 25.10.2017, which also records that the project was commissioned on 16.10.2017. According to the Appellants' counsel commissioning certificate records the details as to when the plants were synchronised and power was generated and supplied to the Grid line, which is conclusive proof of commencement of the project. The said certificate belongs to KPTCL, an independent authority, which has no stakes in the matter, therefore, has to be relied upon, which confirms the fact that the power was generated and supplied to the Grid on 16.10.2017 itself. When the bills for the months of October 2017 to February 2018 were raised calculating the tariff on contractual rate of Rs.6.10/kWh, Respondent No.1 sent payment vouchers back indicating that the tariff was reduced to Rs.4.36/kWh as against Rs.6.10/kWh. Apart from this Rs. 20 lakhs was deducted towards damages on the ground that there was delay in achieving COD. According to the Appellants' counsel this was uncalled for since there was no delay on the part of the Appellants in achieving COD in terms of the PPA. This reduction in tariff was due to Respondent No.1's opinion that COD was not achieved on

16.10.2017. According to the Appellants this action of Respondent No.1 was uncalled for, since the terms of PPA i.e., Article 13.7 clearly indicates that if there is any dispute with regard to bills/invoices raised by the Appellants, 95% of the amount claimed has to be deposited and then dispute has to be resolved. Therefore, learned counsel for the Appellants contend that contrary to the said terms of contract, Respondent unilaterally without complying with terms of Article 13.7 of the PPA not only reduced the tariff per kilowatt hour but also imposed Rs.20 lakhs towards so called liquidated damages so far as Bidar and Rs.40 lakhs so far as Bagepalli projects are concerned. Appellants further argued that this action of Respondent No.1 has left the Appellants high and dry in the matter of recovering their investment, leave alone return on investment, therefore, the Appellants contend that they are prejudiced with the illegal action of Respondent No.1, which resulted in the whole project being unviable.

27. When the Appellants approached the State Commission contending that the project was commissioned on 16.10.2017, Respondent No.1 came up with false statement by filing objections to the effect that the projects were commissioned not on 16.10.2017 but on 17.10.2017. In the objections, while calculating the period to

arrive at the commercial operation date in terms of PPA, Respondent No.1 has chosen twelve months, which is totally against the letter and spirit of the terms of PPA entered into between the parties. The Appellants also contend that not only before this Tribunal but also before the State Commission that even if the project of the Appellants were held to be commissioned on 17.10.2017 instead of 16.10.2017, the projects would still have been commenced within the stipulated time of 12 months since calculation of 12 months has to be done from 18.10.2016. This argument was on the ground that the date on which the approval of PPA was accorded by KERC shall be excluded. If calculation of one month is reckoned from 18.10.2016, 12 months period would end on 17.10.2017, when admittedly the COD was achieved as contended by Respondent No.1. This is substantiated by referring to Article 1.21(k) of the PPA, which defines the term "Month". Learned counsel for the Appellants submits that the term "Month" has to be with reference to calendar month as per Gregorian calendar and the term "Month" has been clearly defined in Article 21 of the PPA i..e, (i) period of 30 days from (and excluding) the date of event, where applicable; or (ii) a calendar month.

28. Therefore, according to the Appellants' counsel in order to interpret the intention of the parties to understand the contractual terms between the parties, one must gather the meaning from the very contract itself by understanding the language in its ordinary meaning. Therefore, the understanding of the term "Month" referred to in PPA is the date of the event i.e., approval of PPA which has to be excluded for calculating the period of 12 months. In terms of Black's Law Dictionary, the term "Month" would ordinarily mean calendar month, therefore, the Effective Date being the date of approval of the PPA and calculation of 12 months has to be from 18.10.2016 in order to understand whether the Commissioning of the project was within 12 months or not.

29. With these submissions, the Appellants' counsel placing reliance on the following cases has sought for allowing the appeals by setting aside the impugned order.

i) **STATE OF HIMACHAL PRADESH AND ANOTHER vs. HIMACHAL TECHNO ENGINEERS AND ANOTHER¹**

13. *Section (9) of General Clauses Act, 1897 provides that in any Central Act, when the word "from" is used to refer to commencement of time, the first of the days in the period of*

¹ (2010 (12) SCC 210)

time shall be excluded. Therefore the period of “three months from the date on which the party making that application had received the arbitral award” shall be computed from 13.11.2007

Re : Question (ii) 9.

14. *The High Court has held that “three months” mentioned in section 34(3) of the Act refers to a period of 90 days. This is erroneous. A “month” does not refer to a period of thirty days, but refers to the actual period of a calendar month. If the month is April, June, September or November, the period of the month will be thirty days. If the month is January, March, May, July, August, October or December, the period of the month will be thirty one days. If the month is February, the period will be twenty nine days or twenty eight days depending upon whether it is a leap year or not.*
15. *Sub-section (3) of Section 34 of the Act and the proviso thereto significantly, do not express the periods of time mentioned therein in the same units. Sub-section (3) uses the words “three months” while prescribing the period of limitation and the proviso uses the words “thirty days” while referring to the outside limit of condonable delay. The legislature had the choice of describing the periods of time in the same units, that is to describe the periods as “three months” and “one month” respectively or by describing the periods as “ninety days” and “thirty days” respectively. It did not do so. Therefore, the legislature did not intend that the period of three months used in sub-section (3) to be equated to 90 days, nor intended that the period of thirty days to be taken as one month.*
16. *Section 3(35) of the General Clauses Act, 1897 defines a “month” as meaning a month reckoned according to the British calendar.*

.....
18. *Therefore when the period prescribed is three months (as contrasted from 90 days) from a specified date, the said period would expire in the third month on the date corresponding to the date upon which the period starts. As a result, depending upon the months, it may mean 90 days or 91 days or 92 days or 89 days.*

Re: Question (iii)

19. *As the award was received by the Executive Engineer on 12.11.2007, for the purpose of calculating the three months period, the said date shall have to be excluded having regard to Section 12(1) of Limitation Act, 1963 and Section 9 of General Clauses Act, 1897. Consequently, the three months should be calculated from 13.11.2007 and would expire on 12.2.2008. Thirty days from 12.2.2008 under the proviso should be calculated from 13.2.2008 and, having regard to the number of days in February, would expire on 13.3.2008. Therefore the petition filed on 11.3.2008 was well in time and was not barred by limitation.”*

ii) **“RAMESHCHANDRA AMBALAL JOSHI VS. STATE OF GUJARAT²**

12. *The first question which calls for our answer is the meaning of the expression “month”: whether it would mean only a period of 30 days and, consequently, whether six months would mean a period of 180 days. The word “month” has been defined under Section 3(35) of the General Clauses Act to mean a month reckoned according to the British calendar. Therefore we cannot ignore or eschew the word “British calendar” while construing “month” under the Act. Accordingly, we are of the opinion that the period of six months cannot be calculated on 30 days in a month basis. Therefore, both the modes of calculation suggested by Mr.Ahmadi do not deserve acceptance and are rejected accordingly.*

.....

22. *Drawing a conclusion from the above mentioned authorities, we are of the opinion that the use of word “from” in Section 138(a) requires exclusion of the first day on which the cheque was drawn and inclusion of the last day within which such act needs to be done. In other words, six months would expire one day prior to the date in the corresponding month and in case no such day falls, the last day of the immediate previous month. Hence, for all*

purposes, the date on which the cheque was drawn, i.e., 31.12.2005 will be excluded and the period of six months will be reckoned from the next day i.e. from 1.1.2006; meaning thereby that according to the British calendar, the period of six months will expire at the end of the 30th day of June, 2006. Since the cheque was presented on 30.6.2006, we are of the view that it was presented within the period prescribed.”

30. As against this, Respondents by reiterating their contentions raised in the objections to the main appeal contend that the Appellants failed to comply with the terms of PPA so far as commissioning of the projects within twelve months from the effective date. According to them, as per the definition of the term “Month” as defined in Article 21.1 of the PPA, the Appellants were to commission the solar plants on or before 16.10.2017 whereas the Appellants have achieved the COD only on 17.10.2017, delayed by one day, therefore they are not entitled for tariff at Rs.6.10/kWh and are entitled for Rs.4.63/kWh. They also contend that since there is failure on the part of the Appellants to commence the plants in terms of PPA, therefore, they are liable to pay liquidated damages in terms of Article 5.8.1 of the PPA. To substantiate their arguments, the Respondents have relied upon following judgments.

- i) **“SATYA JAIN (DEAD) THORUGH LRS AND OTHERS VS. ANIS AHMED RUSHDIE (DEAD) THORUGH LRS³”**

³

2013 (8) SCC 131

“33. The principle of business efficacy is normally invoked to read a term in an agreement or contract so as to achieve the result or the consequence intended by the parties acting as prudent businessmen. Business efficacy means the power to produce intended results. The classic test of business efficacy was proposed by Lord Justice Bowen in *The Moorcock*. This test requires that a term can only be implied if it is necessary to give business efficacy to the contract to avoid such a failure of consideration that the parties cannot as reasonable businessmen have intended. But only the most limited term should then be implied – the bare minimum to achieve this goal. If the contract makes business sense without the term, the courts will not imply the same. The following passage from the opinion of L.J. Bowen in the *Moorcock* (supra) sums up the position”

ii) **“TRANSMISSION CORPN. OF ANDHRA PRADESH LIMITED AND OTHERS VS. GMR VEMAGIRI POWER GENERATION LIMITED AND OTHERS.”⁴**

*“26. A commercial document cannot be interpreted in a manner to arrive at a complete variance with what may originally have been the intendment of the parties. Such a situation can only be contemplated when the implied term can be considered necessary to lend efficacy to the terms of the contract. If the contract is capable of interpretation on its plain meaning with regard to the true intention of the parties it will not be prudent to read implied terms on the understanding of a party, or by the court, with regard to business efficacy as observed in *Satya Jain v. Anis Ahmed Rushdie*, as follows: (SCC pp. 143-144, paras 33-35)*

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business efficacy was proposed by Bowen, L.J. in Moorcock. This test requires that a term can only be implied if it is necessary to give business efficacy to the contract to avoid such a failure of consideration that the parties cannot as reasonable businessmen have intended. But only the most limited term should then be implied – the bare minimum to achieve this goal. If the contract makes business sense without the term, the courts will not imply the same. The following passage from the opinion of Bowen, L.J. in the Moorcock sums up the position: (PD p. 68)

‘... In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are businessmen; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances.’

34. Though in an entirely different context, this Court in United India Insurance Co. Ltd. v. Manubhai Dharamasinhbhai Gajera had considered the circumstances when reading an unexpressed term in an agreement would be justified on the basis that such a term was always and obviously intended by and between the parties thereto. Certain observations in this regard expressed by courts in some foreign jurisdictions were noticed by this Court in para 51 of the Report. As the same may have application to the present case it would be useful to notice the said observations: (SCC p. 434)

'51..."'... 'Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander, were to suggest some express provision for it in their agreement, they would testily suppress him with a common "Oh, of course!" (Shirlaw v. Southern Foundries (2926) Ltd., KB p. 227.)

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'... An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, formed part of the contract which the parties made for themselves.' (Trollope and Colls Ltd. v. North West Metropolitan Regional Hospital Board, All ER p. 268a-b.)"

(emphasis in original)

35. The business efficacy test, therefore, should be applied only in cases where the term that is sought to be read as implied is such which could have been clearly intended by the parties at the time of making of the agreement. ..."

31. Respondents also relied upon the Judgment of this Tribunal in Appeal No. 62 of 2013 dated 30.06.2014, wherein this Tribunal

opined that the amount stipulated therein was in the form of compensation for delay, which was pre-estimated loss caused by the breach of Agreement, which was clearly indicated in the agreement. Therefore, in terms of Agreement, this Tribunal opined that the pre-estimated compensation (damages) has to be paid.

32. In the case of ***Oil & Natural Gas Corporation Ltd vs. Saw Pipes Ltd.***⁵ pertaining to Sections 73 and 74 of the Contract Act their lordships analysed the principles and essentials for assessment of damages whenever breach of contract occurred. They held as under:

“In terms of Sections 73 and 74 of the Contract Act, it can be held that:

- (1) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same.*
- (2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.*
- (3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by*

⁵ (2003) 5 SCC 705

the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract.

- (4) *In some contract, it would be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation.”*

33. Based on the above circumstances and the case laws, learned Senior Advocate Mr. Naganand contends that since several terms/definitions have to be considered, are defined in the Contract (PPA), the merits of the appeal depend upon the terms of Contract and the Commission has rightly assessed the merits of the Petition and therefore, the impugned order does not warrant interference.

34. In respect of Appeal No. 332 of 2018, which pertains to Solar Power Plant at Bidar Rural Taluk in the district of Bidar in Karnataka, minutes of the meeting held on 16.10.2017 between KPTCL, GESCOM and ES Solar, the Appellant herein, clearly indicate that 10 MW Solar Power Plant (PV Modules with inverters and associated terminal equipments) has been commissioned on

16.10.2017 at 18.5 hours and installation was synchronised on 17.10.2017 at Satoli Village. Further, the solar project was interconnected to KPTCL grid at 33/11 kV GESCOM Manhali substation by commissioning the plant in the presence of GESCOM officials on 16.10.2017. The relevant portion of Annexure A.9 is as under:

“This is to certify that 10 MW solar plant under development of 1200 MW (AC) Solar power project in the state of Karnataka to be implemented in 60 Taluks of M/s ES Solar Pvt. Ltd. at Nagora Village, Bidar Rural Tq., Dist Bidar, comprising of Solar PV Modules with inverters and associated electrical equipments interconnected to 33KV/11KV GESCOM Sub-station Mannhali, has been commissioned on 16.10.2017 & assigned RR No:GIPP-20, having 33 KV metering point at 33/11KV GESCOM Sub-station Manhalli.”

35. So far as Appeal No. 333 of 2018 is concerned, the relevant portions in the minutes of the meeting in terms of Annexure A.8 dated 04.11 2017, reads as under:

“.....

1. KREDL, vide its letter no: KREDL/07/RPO/GC/1200MWs-269/2016/1346 dated : 31.03.2016 has awarded the 20 MW Solar Power Project in favour of M/s. E S Sun Power Pvt Ltd under Private Sector Participation to implement it in Bagepalli Taluk, Chikkaballapura District. The Chief Electrical Inspector to

Government, Government of Karnataka (Electrical Inspectorate), Bengaluru has accorded safety approval vide letter No: CEIG TEC BN/SPP No. 355/1/17-18, dated 13.10.2017 for safety of the 20MW SPP, 66/11KV S/s comprising of 1X20/22MVA PT with metering arrangement, 66KV SCOH line for 2.8 kms, and 66kv metering and protection bay at existing 66/11kv Chelur S/s.

- 2. The Chief Engineer (Elect), Planning & Co-ordination, KPTCL, Kaveri Bhavan, Bengaluru has conveyed the Provisional Interconnection approval for 20 MW Solar Power Project of M/s. E S Sun Power Pvt Ltd, Bengaluru, located at Bagepalli Taluk, Chikkaballapura District with KPTCL grid at 66kV voltage class to 66/11kV Chelur Sub Station for a period of One month from the date of intimation (16.10.2017) in accordance with the approved evacuation scheme and with terms & conditions, drawings and technical specifications, vide Letter No: CEE(P&C)/SEE(P1g)/EE(PSS)/KCO-93/81141/F-960/3855-72 dated 16.10.2017.*
- 3. The 66kV bay works pertain to the said 20 MW Solar Power Project of M/s. E S Sun Power Pvt Ltd; Bengaluru in 66/11kV Chelur Sub Station was inspected along with the KPTCL RT wing and BESCO MT wing. As specified in the Chief Engineer (Elect), provisional inter connection approval letter dated: 16.10.2017, BESCO MT wing has conducted the Pre-commissioning test for the H.T. Metering Cubical on 16.10.2017 in accordance with the BESCO norms and furnished the report, KPTCL RT wing has also witnessed the Pre-commissioning tests from 12.10.2017 to 16.10.2017 duly collecting the charges of Rs: 51920/- vide Rt No: 063 dated 10.10.2017, Book No.1 towards witnessing the Pre-commissioning tests of 66kV Metering & Protection of 66kV incoming line of 20 MW Solar Power*

Project of M/s. E S Power Pvt Ltd in accordance with the KPTCL norms and furnished the report.

4. After ensuring and ascertaining that, the evacuation work is completed as per the KPTCL standards and technical specifications, the interconnection of 20 MW Solar Power Project of M/s. E S Sun Power Pvt Ltd, Bengaluru, located at Bagepalli Taluk, Chikkaballapura District with KPTCL grid was done at 17.45 Hrs on 16.10.2017 at 66kV voltage class interface point at 66/11kV Chelur Sub Station as per the said Provisional Interconnection approval in the presence of all the members present in the meeting along with the SEE (Ele), Tr (Maint), KPTCL, BRAZ, Bengaluru and SEE (Ele), O&M Circle, BESCO, Kolar duly discussing the procedure for Line Clear, authorized persons etc.

7. The Executive Engineer (Elect), TL&SS Division, KPTCL, Gowribidanur and the Executive Engineer (Elect), O&M Division, BESCO, Chikkaballapura have taken the joint meter reading of both main and Check Meters initially before commissioning of the tariff meters and the readings are as detailed below.

SL No.	Parameters	Main Meter	Check Meter
1	Specifications	0.2S class, 1A, 66kv/3/110V/3V 200/1A, 50 Hz YOM: 09/2017 800 pulse/unit SECURE make, E3M024 Type Serial No:0364345	0.2S class,1A, 66kv/3/110V/ 3V 200/1 A, 50 Hz YOM: 09/2017 800 pulse/unit SECURE make, E3M024 Type Serial No: X0364346
2	Cumulative MWh (Import)	7.1	7.9
3	Cumulative MWh (Export)	1.4	1.4
4	Cumulative MV Ah (Import)	10.9	11.7
5	Cumulative MV Ah (Export)	2.0	2.0
6	Cumulative MV Arh (Lag) Export	4.7	4.7
7	Cumulative MV Arh (Lead) Export	0.7	0.7

10. *The Commercial Operation Date to be declared by the Executive Engineer (Elect), O&M Division, BESCO, Chikkaballapura, was also discussed in the meeting and the Executive Engineer (Elect), O&M Division, BESCO, Chikkaballapura, has agreed to issue the certificate, declaring the Commercial Operation Date duly observing the formalities and getting conformation from Executive Engineer (Elect), MT Division, BESCO, Bengaluru and SCADA Control Center SLDC, Bengaluru for having synchronized the 20 MW Solar Power Project of M/s. E S Sun Power Pvt Ltd, Bengaluru, located at Bagepalli Taluk, Chikkaballapura District with KPTCL grid with time and date of synchronization.”*

36. The Commercial Operation Date declaration is at Annexure A.9, the relevant portion of which reads as under:

“ Commercial Operation Date Declaration

This is to Certify that the 20 MW Solar Power Project of M/s ES Sun Power Private Ltd, No.55, Solar tower, 6th main, 11th cross, Lakshmaiah Block, Ganganagara, Bengaluru-560024, located at Debbaravaripalli village, Bagepalli taluk, Chikkaballapura district is interconnected with independent 66kv terminal bay and 66kv bulk metering point at 66kv Sub-station, Chelur on 16.10.2017 and RR No: BPIPP-01 assigned from the Assistant Executive Engineer (Ele), BESOM, Bagepalli Sub-Division. The Commercial Operation Date (COD) of the IPP is 17.10.2017 at 9.03 AM as per the SCADA integration information furnished by The Superintending Engineer (E), SCADA, KPTCL, Bangalore vide letter no. SEE/SCADA/EE(DSIGN)/AEE-Project/17-18/2071-73 Dated: 20.11.2017 and as per main and check meters downloaded data furnished by Executive Engineer (E), MT Division, BRAZ, Bangalore through email dated 15.11.2017 at 12.33 PM

This IPP is commissioned as per the provisional Interconnection approval accorded by the Chief Engineer (Elec), P&C, KPTCL, Bengaluru Vide Letter No: CEE(P&C)/SEE(P1g)/EE(PSS)/KCO-93/81141/F-960/13855-72 Dated 16.10.2017. And the Commissioning Approval accorded by the Chief Electrical Inspectorate to Government of Karnataka, Bangalore vide letter No. CEIG/TEC/BN-384/26946-51/17-18 Dated 13.10.2017.”

37. In terms of Annexure A.10, the Appellant wrote to the Executive Engineer on 20.12.2017 giving the following details.

“ Invertor 9173600707 (ABB)

- *Recording at 18.00 hours, 16th Oct 2017*
- *Generation recorded at above time: - 1.4 KWh.*

Invertor 9173600382 (ABB)

- *Recording at 18.03 hours, 16th Oct 2017*
- *Generation recorded at above time: - 1.5 KWh.*

Invertor 9173700709 (ABB)

- *Recording at 18.06 hours, 16th Oct 2017*
- *Generation recorded at above time: - 1.5 KWh.*

Invertor 9173600383 (ABB)

- *Recording at 18.07 hours, 16th Oct 2017*
- *Generation recorded at above time: - 1.3 KWh.”*

38. From reading of the above correspondence and the documents, it is clear that in respect of both the solar plants the commissioning dates are recorded as 16.10.2017. So far as Bidar Solar Plant is concerned, it was commenced in the evening i.e., at 18.05 hours, which means evening after 6.00 pm. Therefore it's quite

possible that there was no recording of quantum of power injected into the grid. So far as Bagepalli Solar Plant is concerned, in terms of Annexure A.10, mentioned above, there was recording of power generated at different points of time.

39. We also understand that synchronisation has to happen much prior to commissioning of the plant.

40. From a reading of these documents, it clearly indicates that officials of KPTCL and GESCOM state that the commissioning of the plants was on 16.10.2017. In terms of various definitions and the terms of agreement, scheduled commissioning date means 12 months from the effective date. The date of commissioning declared in terms of the above material is 16.10.2017 and not 17.10.2017.

41. Even if we assume the date of COD as 17.10.2017 as contended by the Respondents, we have to see when exactly the scheduled commissioning activity has to be considered whether it is 16.10.2017 or 17.10.2017.

42. In terms of the definition of “Month” in the PPA, it shall mean a period of 30 days from the date on which event happened (excluding the date of event). The judgments relied upon by the Appellants clearly indicate how this three months, six months or a month has to be construed in terms of British calendar and how one has to calculate or compute period of 12 months in the present appeal. The date of event in this case is approval of the PPA i.e., 17.10.2016. If the date of event is excluded for calculation, 12 months would commence from 18.10.2016, and the end of 12 months has to be 17.10.2017. Therefore, the 12 months have to be calculated from 18.10.2016 to 17.10.2017.

43. In view of the afore-stated discussion and reasoning, the commencement of the solar plants even if taken as 17.10.2017 as accepted and admitted by Respondents and Commission, the scheduled date of commissioning was done within the time limit prescribed under the agreements.

44. If the commissioning of the solar plants was done in time in terms of agreements, the Appellants have to get tariff of Rs.6.10 /kWh and not Rs.4.36/kWh.

45. Consequently, there is no default in the commissioning of the projects for the reasons stated above. Therefore, the question of payment of liquidated damages in terms of agreements also would not arise.

46. In view of the above discussion and reasoning, we are of the opinion that the impugned order has to be set aside by allowing the appeals. Accordingly, the appeals are allowed and the order dated 23.10.2018 passed in O.P. No. 18 of 2018 and O.P. No. 19 of 2018 is set aside. The Respondents shall read the whole calculations in terms of our opinion stated above.

47. There shall be no order as to costs. All the pending IAs shall stand disposed of.

48. Pronounced in the open court on this the 8th May 2019.

S.D. Dubey
[Technical Member]

Justice Manjula Chellur
[Chairperson]

Dated: 8th May, 2019

REPORTABLE/~~NON-REPORTABLE~~