

4. KARNATAKA ELECTRICITY REGULATORY COMMISSION

No.16, C-I Millers Tank Bed Area,
Vasanth Nagar Bengaluru, 560052
Karnataka, India

... Respondent No.4

Counsel on record for the Appellant(s) : Ayush P. Shah
Vignesh Adithiya S for App. 1

Counsel on record for the Respondent(s) : Joseph Aristotle.S for Res. 1

Joseph Aristotle.S for Res. 2

Darpan K.M. for Res. 3

JUDGMENT

(PER HON'BLE MRS. SEEMA GUPTA, TECHNICAL MEMBER)

1. The instant appeal is preferred by the Appellant- M.R.Shivaswamy challenging the order dated 10.10.2017 ("impugned order") passed by the Karnataka Electricity Regulatory Commission, Bengaluru ("KERC/the State Commission/Commission"), whereby the State Commission has denied the Appellant the agreed tariff of Rs.9.56 per unit for his renewable solar power plant by upholding the order of Respondent No.3 in fixing the tariff at Rs.5.67 per unit, which according to the Appellant is below the agreed rate of tariff.

The facts that led to filing of this petition, in brief, are stated as under:

2. The Appellant is an entrepreneur, who owns a brick manufacturing unit at Anchechomanahalli, Kadur Taluk, Chikkamangaluru District, Karnataka. The Respondent Nos.1 and 2 are the State Government of Karnataka. Respondent No.3 is the distribution company in the State of Karnataka. Respondent No.4 is the Karnataka Electricity Regulatory Commission.

3. The Government of Karnataka, in order to harness the potential solar energy in the State, had vide notification dated 22.05.2014 introduced the Karnataka Solar Policy 2014-2021. In connection therewith, the Government of Karnataka proposed to meet the solar targets under different segments; one of which notified under the policy was the Grid Connected Roof Top Projects whereby the minimum target was set to achieve 400 MW of generation projects.

4. In terms of the above policy of the Government of Karnataka, various electricity supply companies in Karnataka floated their respective schemes and guidelines, inviting for the Grid Solar RTPV system on Net-metering basis. In response thereto, the Appellant filed an application on 03.12.2015 with Respondent No.3 for the establishment of a Solar Roof Top Photo Voltaic Plant (SRTPV Plant) with generating capacity of 490 kWp on the roof top of the premises. Subsequent thereto, on 10.12.2015, the Appellant entered into a Power Purchase Agreement (“PPA”) with Respondent No.3 wherein it was mentioned that the Respondent No.3 will pay Rs.9.56 per unit KWh as the tariff to the Appellant for the net metered energy.

5. After obtaining loan from Sri Udayaravi Southarda Credit Co-operative Limited, Tippur and by investing his personal funds, the Appellant constructed the SRTPV. Thereupon vide its letter dated 01.06.2016, the Appellant intimated the Chief Electrical Inspector about the completion of the work and stated that the plant is ready for inspection and grant of approval by Chief Electrical Inspector (“CEI”). However, no action was taken by CEI.

6. The Appellant has also informed Respondent No.3 through e-mail dated 11.06.2016 stating that the installation of the SRTPV was complete and that the documents have been submitted to CEI for getting work

commissioning completion report. Further, vide letter dated 23.07.2016 Respondent No.3 admitted and informed the Appellant that the SRTPV was ready for functioning on 03.06.2016 and the delay was attributable to the Chief Electrical Inspector, Karnataka. Though the Appellant vide letter dated 18.10.2016 requested the State Commission to direct the concerned officer for immediate action for issuance of completion report, the Appellant received a letter dated 11.01.2017 from Respondent No.3 stating that the tariff has been revised from Rs.9.56 per unit kWh to Rs.5.67 per unit kWh, on account of the delay on the part of the Appellant in completing the project. Being aggrieved thereby, the Appellant approached the Commission by filing a Petition No. 29 of 2017, which was contested by Respondent No. 3 by relying upon its guidelines for SRTPV and the order of the State Commission dated 02.05.2016. State Commission dismissed the petition filed by the Appellant by its order dated 10.10.2017; aggrieved thereby, the Appellant preferred the present appeal before this Tribunal.

Appellant submissions

7. Learned counsel for the Appellant submitted that the Impugned Order dated 10.10.2017, passed by the KERC, is liable to be set aside, and that the Appellant's 490 kWp Solar Rooftop Photo voltaic system should be permitted to operate at the tariff rate of Rs. 9.56 per unit, as specified under the PPA dated 10.12.2015. Learned counsel for the Appellant further submitted that as per the Guidelines for Grid Solar RTPV System on Net – metering basis for MESCOM officials (in short “**MESCOM Guidelines**”), the sequence of events for the installation of the SRTPV system are as follows: Approval for installation by the concerned AEE/EE is granted upon submission of a technical report; Work Completion Report must be submitted within 180 days from the issuance of the approval letter; upon completion of

the SRTPV installation work, PPA is required to be executed. In the present case, however, Respondent No.3 MESCOM has not adhered to its own guidelines: the PPA was executed on 10.12.2015 while Installation approval was granted by MESCOM vide its letter dated 11.12.2015; the PPA signed on 10.12.2015 does not specify a time frame for commissioning of the solar plant; however this approval letter unilaterally imposes a requirement to commission the SRTPV plant within 180 days, contrary to MESCOM's own guidelines, which stipulate the submission of a Work Completion Report within 180 days.

8. Furthermore, it is an undisputed fact that the Appellant undertook the installation work and had its solar plant was ready for commissioning on 03.06.2016 and the Appellant applied for approval from the Electrical Inspectorate on 07.06.2016. Therefore, in accordance with MESCOM's Guidelines, the Appellant submitted the Work Completion Report within 180 days from the date of approval; any delay in the commissioning of the solar plant after 07.06.2016 is not attributable to the Appellant. Infact, Respondent No 3-MESCOM in its letter dated 26.08.2016 to the KERC, has explicitly stated that *"In view of the above facts, I am directed to request approval of the Hon'ble Commission for commissioning the plant at an extended date beyond the scheduled date of commissioning in respect of the above stated consumer as the delay caused is beyond his control and is unintentional."*

9. Learned counsel for the Appellant further submitted that the tariff Order dated 02.05.2016, stipulates that *"The Commission also considers it necessary to ensure that only those diligent investors who take expeditious steps to commission projects benefit from fixed generic tariff regime during the control period and not those who merely express their intention to do so*

without taking any effective steps for commissioning projects.” In view of the above, the Appellant submits that it took all necessary timely steps for the installation of the plant within the stipulated 180-day period and submitted the Work Completion Report in accordance with MESCOM’s guidelines.

10. By referring to the judgment in “**Smt. A. Jayamma v. State of Karnataka**”, dated 20.03.2024 in Appeal No. 137 of 2022 and connected matters, learned counsel for the Appellant stressed that in the said case, this Tribunal has held that, when BESCOM itself breached its guidelines by executing the PPA prior to obtaining installation approval, it cannot now contend that the appellants have violated those guidelines by failing to commission their plants within the prescribed 180-day period. Further, this Tribunal had set aside the termination of the PPAs by BESCOM’s, and also disregarded the subsequent PPAs, which the Appellants were constrained to sign. The legal principle established in that case is directly applicable to the present matter, where MESCOM, contrary to its own guidelines, unilaterally imposed 180 days commissioning period for the plant, although its guidelines only require the submission of a Work Completion Report within 180 days.

11. Learned counsel for the Appellant by drawing our attention to the decision in “**Chennamangathihalli Solar Power Project LLP v. Bangalore Electricity Supply Company**,” 2020 SCC Online APTEL 75, submitted that this Tribunal in the said case has held that the delay in receiving various approvals / clearances by the Govt. and its instrumentalities which were beyond the control of the Appellants should be treated as an event of *force majeure* therefor learned counsel for the Appellant prays that the appeal be allowed.

Respondent No.3 Submissions

12. Learned counsel for the Respondent No.3 submitted that 180-day period for the commissioning of the plant stands as an acknowledged fact. Accordingly, the Appellant had represented before the Commission that the project completion date was to be 10.06.2016. However, the said 180-day period actually lapsed on 09.06.2016 rather than on 10.06.2016. Therefore, though the Appellant was required to commission the plant within 180 days, it failed to accomplish the same.

13. Learned counsel for the Respondent No.3 submitted that erroneously the Appellant has alleged that Respondent No. 3 has disregarded its own guidelines i.e., MESCOM Guidelines '*Guidelines* concerning the procedural sequence citing that it was the work completion report which was required to be submitted within 180 days, rather than the commissioning of the plant itself. Appellant had further averred that the condition imposed by the letter dated 11.12.2015, stipulating that the approval would remain valid for 180 days, is not binding on it. Refuting the same, learned counsel for the Respondent No.3 contended that the Appellant has never contested the condition imposed by the letter dated 11.12.2015. There are no pleadings to that effect either before the Commission or before this Tribunal. It is well-established law that any conditions or extensions provided through letters and communications between contracting parties become integral to the agreement. Furthermore, as previously stated, the Appellant has indeed acknowledged that the plant was required to be commissioned within 180 days.

14. Contending that there is delay on the part of the Appellant, learned counsel for the Respondent No.3 asserted that the Appellant submitted the

work completion report only on 07.06.2016. The guidelines stipulate 7 (seven) working days from submission of the work completion report as the time within which approval shall be accorded. Therefore, the Commission has duly observed that the Appellant could not have reasonably anticipated the CEI to grant safety approval within a period of merely 2 days. This conclusion is further supported by the fact that the responsibility to secure all necessary approvals and clearances rested solely upon the Appellant. The Appellant has additionally asserted that the commissioning was significantly delayed due to the delay in obtaining safety approval and has placed reliance on “**Chennamangathihalli Solar Power Project LLP v. BESCO,**” 2020 SCC Online APTEL 75. Referring to this decision, learned Counsel for the Respondent No.3 contended that the Appellant would have been entitled to the benefit of this argument had the Work Completion Report been submitted on or before 02.06.2016, i.e., within the 7-day period stipulated by the guidelines. However, since the Appellant has only submitted the completion report on 07.06.2016, it cannot claim the benefit of any delay beyond the commissioning deadline.

15. Learned counsel for Respondent No.3 pointed out that the Appellant has already executed a subsequent PPA with the Respondent on 21.03.2017. The Appellant has nowhere stated that the said subsequent PPA is entered into under protest and has not made any prayers for setting aside the subsequent PPA. Therefore, in the absence of any such pleading or relief sought regarding the subsequent PPA, the Appellant's case is barred by Section 62 of the Indian Contract Act, 1872. Consequently, in view of the novation in contract, the Appellant is precluded from claiming payment of the tariff under the earlier PPA, which no longer remains in effect.

16. Learned counsel for Respondent No.3 drawing reference from the decision in “**A. JAYAMMA v. STATE OF KARNATAKA**”, (**APPEAL NO. 137/2022**), submitted that the procedure outlined in the guidelines assumed significance in *Jayamma*’s case owing to the fact that there was a gap of about 4 months between the PPA and BESCOM’s approval of the STRPV Installation application. In that case, while the PPAs were executed on 31.10.2015, approval was only granted on 15.04.2016. Consequently, the PPA holders in *Jayamma*’s case entered into a project development agreement with a developer only on 07.05.2016. This Tribunal, thus, held that the 180-day period would commence from the date of approval. Accordingly, contrary to the Appellant’s contention, this Tribunal did not dispense with the 180-day period but, indicated the day from which the same shall commence. Further, in the present case, the PPA was signed on 10.12.2015, and approval was granted on 11.12.2015. Thus, in accordance with *Jayamma*’s case, the 180-day period in this case would commence from 11.12.2015 rather than 10.12.2015, and would expire on 10.06.2016. The Appellant, however, failed to commission the plant within this timeframe and is therefore eligible only for the revised tariff as per the State Commission tariff order dated 02.05.2016.

Discussion and Analysis

17. Heard learned counsel for the Appellant and Respondent No.3 and the main issue contested by the Appellant is that their PPA dated 10.12.2015 does not have a completion time line and even considering the time line specified in guidelines, the Appellant has submitted the work completion report within 180 days from the Installation approval dated 11.12.2015 and delay in commissioning the solar plant was mainly on account of delay in granting approval by Chief Electrical Inspector, beyond the control of

Appellant and therefore it is a *force majeure* event and they should be given a tariff of Rs 9.56/kwh.

18. Per contra, learned counsel for the Respondent No.3 has contested that Installation approval granted vide letter dated 11.12.2015 specifies the condition to commission the SRTPV plant within 180 days, which was never contested by the Appellant. Learned counsel for Respondent No.3 also pointed out that the Appellant has already executed a subsequent PPA with the Respondent No. 3 on 21.03.2017, without protest, with applicable tariff of Rs 5.67/kWh and no relief has been sought for setting aside the subsequent PPA. Therefore, in the absence of any such pleading or relief sought regarding the subsequent PPA, the Appellant's case is barred by Section 62 of the Indian Contract Act, 1872.

19. We note that the State commission vide its order dated 10.10.2013 has determined the Tariff for Grid interactive Solar power plants including rooftop and small Solar Photo Voltaic power plants for control period of five years from 01.04.2013 to 31.03.2018; under which, after considering various factors, the State Commission has approved a Tariff of Rs 9.56/kWh for Rooftop and small Solar PV plants (other than those where tariff is discovered through bidding process) provided power Purchase agreements are entered into on or after 01.04.2013 and up to 31.03.2018. The Appellant signed the Power Purchase Agreement with Respondent No 3 on 10.12.2015 with tariff stipulated under Article 8.1 as given here under:

*"8 Commercial Settlement-
Tariff*

8.1 The MESCOM shall pay for the net metered energy at Rs.9.56 per (Unit) KWh as determined by the Commission from the date of synchronization of the SRPTV with the Distribution network. The tariff

is exclusive of all taxes, duties and levels & shall remain same as per the PPA conditions. The seller shall pay the electricity tax and statutory levels, if any”

20. The said PPA was to remain in force for 25 years from the date of the agreement, and the term was to be decided by the Appellant and Respondent No 3 up to a maximum period of 25 years. Our attention has been drawn by the learned counsel for the Appellant that there is no stipulation in the PPA for commissioning of the project in a particular time frame, it is a fact which has not been disputed by the Respondent No 3. Further, PPA also does not make any reference to the timelines as stipulated in the MESCOM Guidelines.

21. We note from the order of the State Commission dated 02.05.2016 regarding determination of Tariff and other norms for Solar rooftop and small Solar Photo Voltaic power plants that State commission undertook midcourse revision of tariff determined in 2013 in respect of Solar Rooftop and small Photovoltaic power plants considering substantial decline in solar panel price; most of Distribution companies have been able to achieve RPO to protect the interest of the consumers and to ensure financial viability of various Discoms.

22. The State Commission has also made observation that “*only those diligent investors who take expeditious effective steps to commission the projects benefits from fixed generic tariff regime during the control period and not those who merely express their intention to do so without taking any effective steps for commissioning of the project*”. In the said Tariff order dated 02.05.2016, Tariff applicable for above 100 kW and up to 500 kW (size equivalent to Appellant projects) rooftop and small PV power plants was approved as Rs 5.67 /KWH (without capital subsidy) and applicability of

the order dated 02.05.2016 was stipulated as under :

“5. Applicability of the Order:

The Commission, in supersession of its Order dated 10th October, 2013, decides that the norms and tariff determined in this Order shall be applicable to all new grid connected solar rooftop and small solar photovoltaic power plants, entering into Power Purchase Agreement (PPA) and commissioned on or after 2nd May, 2016 and up to 31st March, 2018.

In respect of plants for which PPAs that have been entered into prior to 1st May, 2016 and are commissioned within the period of time as stipulated by the ESCOMs concerned or the Commission prior to the date of issue of this Order, the tariff as per the Commission's Order dated 10th October, 2013 shall be applicable. Such plants shall be eligible for the revised tariff as per this Order if they are not commissioned within the stipulated time period and there shall be no extension in time period for commissioning them after the effective date of this Order “

23. On a bare reading of these stipulation, it appears that as regards the Appellant, the approved tariff as per previous order of State commission dated 10.10.2013 shall be applicable since PPA has already been signed prior to 01.05.2016 and no time line for commissioning of the solar project is stipulated in the PPA dated 10.12.2015.

24. We also take note that Respondent No. 3 has also acknowledged in its letter dated 26.08.2016 addressed to Secretary of the State commission that the Appellant undertook the installation work and had its system ready for commissioning on 03.06.2016 and the Appellant had applied for approval from the Electrical Inspectorate on 07.06.2016, however, there is delay in commissioning of the project from scheduled date of 09.06.2016, for reasons beyond the control of the Appellant and requested for extended commissioning of the project. Extract of relevant portion of the letter is reproduced below:

Para 4 *“On verification of the records furnished by the consumer, it is observed that the consumer has applied for approval of electrical inspectorate on 07-06-2016. However, the following sequence of communications between the consumer and the electrical Inspectorate cascaded the delay in commissioning of the project on the scheduled date of commissioning.*

- a) Consumer applied for approval for the drawings on 07-06-2016.*
- b) Electrical inspectorate sought certain clarifications from the consumer on 16-06-2016 for which consumer have furnished the replies on 17-06-2016.*
- c) Electrical Inspectorate communicated approval for the drawings on 20-06-2016.*
- d) Finally, the electrical inspectorate communicated electrical safety approval on 23-07-2016.*

Para 6 *However, from the para (4) above, it can be observed that the procedural delay in getting the approval of electrical. Inspectorate consequently caused the delay in commissioning of the project within the stipulated scheduled date of commissioning: otherwise the plant would have been commissioned on the scheduled date of commissioning.*

In view of the above facts, I am directed to request approval of the Hon'ble Commission for commissioning the plant at an extended date beyond the scheduled date of commissioning in respect of the above stated consumer as the delay caused is beyond his control and is unintentional”

25. However, the State Commission vide its letter dated 22.09.2016 declined to approve extended commissioning of the Appellants project citing as under;

26. Other contention raised by the Respondent No 3 is that in the approval dated 11.12.2015 granted for installation of Solar RTPV system of 490 kWp on the rooftop specifies that this approval is valid for 180 days from the date of letter and SRTPV system is to be commissioned within this period, failing which the approval shall be treated as cancelled as well as the guidelines which specifies that work completion report is to be given within 180 days from the date of issue of approval letter.

27. As already noted that MESCOM Guidelines only stipulates that the work completion report, along with the requisite documents are to be submitted within 180 days from the date of issue of approval; and it also mandates that approvals from the Chief Electrical Inspectorate, GoK are to be given within 7 (seven) working days from the date of submission. As such the guidelines also stipulate that after completion of SRTPV installation work, the consumer is required to execute a power purchase agreement with BESCOM.

28. In the present case, the letter for Installation approval was issued by Respondent No. 3 on 10.12.2015 and work completion report was submitted by Appellant on 07.06.2016, within the stipulated period of 180 days and as such Respondent No. 3 has signed the PPA on 10.12.2015, prior to the completion of installation work on 07.06.2016, contrary to the stipulation of MESCOM Guidelines. It has been held by this Tribunal in the Judgement in "**Smt. A. Jayamma v. State of Karnataka**", Judgment dated 20.03.2024 in Appeal No. 137 of 2022 "*when BESCOM was itself guilty of flouting its guidelines by executing the PPA before the grant of approval for installation, the BESCOM cannot be heard to say that the appellants have committed violation of their guidelines by not commissioning their plants within the stipulated period of 180 days*". This Tribunal in the said judgement

has set aside the termination of PPAs by BESCO. Respondent No 3 has contended that the judgment in *Jayamma* is inapplicable to the present case due to differing factual circumstances, as in *Jayamma*, the 180-day period was calculated from the date of the PPA (executed earlier), whereas, in this case, it is calculated from the date of approval. However, in our considered view, though the facts are different in present case as in this case Respondent No. 3 is counting 180 days from the date of approval for commissioning but the judgement dated 20.03.2024 is premised on the observation that BESCO being itself guilty of flouting its guidelines by signing PPA before granting approval is squarely applicable in this case as well.

29. Learned counsel for the Appellant placing reliance on the judgment in “***Chennamangathihalli Solar Power Project LLP v. Bangalore Electricity Supply Company***”, 2020 SCC Online APTEL 75 submitted that delay in receiving various approvals / clearances from the Govt. and its instrumentalities, which were beyond the control of the Appellants, should be treated as an event of *force majeure* and pleaded for delay in getting approval from CEI in their case as *force Majeure* event. Per contra, learned counsel for Respondent No3 contended that the benefit of *force majeure* could only be extended to the Appellant if the work completion report had been submitted within the seven days period prescribed by the MESCO Guidelines and the 180 days commissioning schedule given in Installation approval letter dated 11.12.2015, which was not challenged by the Appellant.

30. We are not able to accept this argument of Respondent No.3, firstly because the 180 days timeline for commissioning the plant was stipulated in the Installation approval letter dated 11.12.2015, even though not

questioned by the Appellant, is contrary to the MESCOM Guidelines which only mandate the submission of the work completion Report within 180 days from Installation approval. Secondly, the timeline specified in the Installation approval letter dated 11.12.2015 unilaterally, without the express consent of the Appellant, cannot override/substitute the provisions of PPA dated 10.12.2015, which does not specify any time line for commissioning.

31. As discussed above, in view of the fact that the Appellant signed the PPA before the State Commission order dated 02.05.2016, it gets governed by Tariff approved in the earlier order dated 10.10.2013 of the State commission and as per the provisions of the executed PPA. It is pertinent to note that while curtailing the Control period of earlier order dated 10.10.2013, the State commission also made observation that “ *while doing so , the State Commission has also considered necessary to ensure that, such an exercise does not cause undue hardship to those who have already committed to invest in the solar projects based on the tariff determined in the order dated 10th Oct 2013, with project being in advanced stage of implementation*”. We find that the Appellant has submitted the work completion report almost within one month of this order on 07.06.2016 thus, it appears their investment decision was based on the tariff determined in the State Commission order dated 10.10.2013, and their seriousness with regard to implementation has not been questioned, and as per the State Commission order also, such entities should not be put to undue hardship, especially when the Appellant has complied with the 180-day timeline for work completion as stipulated in the MESCOM Guidelines. The State Commission, in the impugned order has made observation that revised tariff as per the commission’s order dated 02.05.2016 was applicable to SRTPV projects commissioned during the period from 02.05.2016 to 31.03.2018, including those with PPAs executed

prior to 01.05.2016 but could not be commissioned within the stipulated timeline and since the Appellants project was commissioned on 24.05.2017, was entitled to a Tariff of Rs 5.67/kWh. However, in our considered opinion, the commission has erred in applying a tariff of Rs 5.67 /kWh on the basis of this observation, as no time frame was stipulated in the PPA and 180 days period stipulated in the MESCOM Guidelines pertains to submission of the work completion report, which has been complied with by the Appellant.

32. In view of the above deliberation, we are of the view that the Appellant should have been entitled for the tariff as specified in the State Commission order dated 10.10.2013, and impugned order is likely to be set aside, but we are constrained from passing such an order on account of following:

33. Respondent No 3, vide its letter dated 11.01.2017, informed the Appellant for applicability of the revised tariff as per the State Commission's order dated 02.05.2016 and requested the Appellant to sign revised agreement. On 07.02.2017, the Appellant filed a petition before the Karnataka Electricity Regulatory Commission (KERC) seeking to set aside Respondent No. 3's letter dated 11.01.2017, which fixed the revised Tariff as Rs 5.67 /Kwh, and requested to fix the tariff as per their PPA dated 10.12.2015. However subsequently, the Appellant executed a supplementary Agreement on 21.03.2017, agreeing with a tariff of Rs 5.67/kWh and subsequent to signing of PPA, solar project of the Appellant was commissioned on 24.05.2017 and report of Commissioning and Synchronising of the SRTPV system was issued by the Assistant Executive Engineer (Kadur Subdivision Mescom) on 30.05.2017. No reasons have been put forth on behalf of the Appellant regarding the time gap in synchronising of the plant on 24.05.2017, while CEI approval was accorded vide letter dated 23.07.2016. As such, we are not required to go into the

reasons and validity of supplementary PPA signed on 21.03.2017 as no documentary evidence has been placed by the Appellant that such a supplementary PPA has been signed under protest and same is not under challenge before us. In view of signing of supplementary PPA dated 21.03.2017 by the Appellant with Respondent No. 3 and agreeing to a tariff of Rs 5.67/kWh, we are unable to grant the relief as sought for by the Appellant.

34. In view of above discussion and deliberation, we dismiss the Appeal and tariff of the project and other terms and conditions shall be as per the signed PPAs. All associated IAs are disposed of. No order to costs.

Pronounced in open court on this 28TH Day of November, 2024

(Seema Gupta)
Technical Member (Electricity)

(Justice Ramesh Ranganathan)
Chairperson

REPORTABLE/~~NON-REPORTABLE~~

ts/ag