COURT-1

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APL No. 409 OF 2022

Dated: 29th April, 2025

Present : Hon`ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon`ble Ms. Seema Gupta, Technical Member (Electricity)

In the matter of:

Hero Future Energies Private Limited
Formerly Clean Solar Power (Hiriyur) Private Limited .... Appellant(s)
202, 1st Floor, Okhla Industrial Phase-II,
New Delhi – 110 020

Versus

1. **The Secretary**
Karnataka Electricity Regulatory Commission
No. 16, C-1, Millers Tank Bed Area,
Vasanth Nagar,
Bengaluru – 560 052 …. Respondent No.1
.

2. **The Managing Director**
Hubli Electricity Supply Company Limited
Corporate Office,
Navanagar, P.B. Road
Hubbali – 580 025 …. Respondent No.2

3. **Managing Director**
Karnataka Renewable Energy Development Limited
Regional Office Hubli,
BVB College Campus, Vidya Nagar …. Respondent No.3
ESCPG Block, Hubballi – 580 031

Counsel on record for the Appellant(s)	:	Hemant Singh Mridul Chakravarty Biju Mattam Sourav Roy Lakshyajit Singh Bagdwal Harshit Singh Supriya Rastogi Agarwal Chetan Kumar Garg Ankita Bafna Nehul Sharma Pawan Singh Syed Fazl Askari Alchi Thapliyal Lavanya Panwar Sanjeev Singh Thakur Indrayudh Chowdhury Jay Lal Arun Lal Akashaya Lal Gaurav Prakash Pathak for App. 1
Counsel on record for the Respondent(s)	:	Darpan K.M. for Res. 1 Shahbaaz Husain Fahad Khan Stephania Pinto Yeshwanth M Comar V.M. Kannan Harimohana. N Lalit Rajput for Res. 2 Sweta Ranjan Prashant Kumar Ray Vikram Nath Harshvardhan Jha Akshat Chaudhary for Res. 3

JUDGMENT

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

I.INTRODUCTION:

This Appeal is filed, by the Appellant-Generator, aggrieved by the order passed by the Karnataka Electricity Regulatory Commission ("KERC" for short) in OP No. 2 of 2017 dated 17.10.2017. The reliefs sought by the Appellant, in the present Appeal, are (1) to declare that the extension of 175 days, provided by the 2nd Respondent for achieving the commissioning of the Solar Project (vide its letter dated 17.10.2014) and as recorded in the Supplementary Agreement dated 20.10.2014, is in terms of Article 5.7.2 of the PPA; (2) to declare that the Supplementary Agreement dated 20.10.2015, executed by the Appellant and the 2nd Respondent, is deemed to have been approved by the KERC; and (3) to set aside the letter issued by the 2nd Respondent dated 12.03.2020 claiming liquidated damages for Rs.12,05,00,000/- (Rupees Twelve Crore Five Lakhs only); and, consequently, direct the 2nd Respondent to refund all amount/ money deducted by it towards Liquidated Damages pursuant to the impugned order dated 17.10.2017, including the amount/ money wrongfully withheld by the 2nd Respondent from the monthly energy bills/ invoices raised by the Appellant since May 2019.

II.FACTS TO THE EXTENT RELEVANT:

Before taking note of contents of the impugned order, passed by the KERC in OP No. 2 of 2017 dated 17.10.2017, it is necessary to briefly take note of facts and events, leading upto the passing of the impugned order, to the extent relevant.

The Appellant executed a Power Purchase Agreement ("PPA" for short) with the 2nd Respondent on 19.02.2014 which provided, among others, for resolution of disputes inter-se parties by arbitration. The 2nd Respondent sought approval of the KERC with respect to the PPA executed by them on 19.02.2014. The KERC, by its proceedings dated 13.03.2014, granted approved to the PPA, subject to deletion of Article 18.4 of the PPA which was the arbitration clause. By the time the KERC granted approval on 13.03.2014, 22 days had expired since execution of PPA on 19.02.2014. The 2nd Respondent herein communicated the approval granted by the KERC to the Appellant vide letter dated 29.03.2014, and called upon them to approach their office for modification of the PPA i.e. for deletion of the arbitration clause. It does not appear to be in dispute that this letter dated 29.03.2014, addressed by the 2nd Respondent to the Appellant, was received by the Appellant only on 04.04.2014.

The Appellant addressed a letter dated 11.04.2014 to the 2nd Respondent informing them that they would approach the office of the 2nd Respondent in the coming week, based on the 2nd Respondent's convenience and availability, to execute the revised PPA. It is relevant to note that this letter dated 11.04.2014 makes no reference to the Appellant seeking extension of the effective date by a further period of 22 days in the light of the time spent by the 2nd Respondent in obtaining approval of the KERC. It is for the first time by its letter dated 24.04.2014, addressed to the Managing Director, Karnataka Renewable Energy Development Limited, (a copy of which was marked to the Managing Director of the 2nd Respondent), that the Appellant informed them that, since lending

institutions considered PPA as effective only after approval from the Regulatory Commission, and as they were yet to receive the original PPA copy, they were unable to progress on the financing of the project. The Appellant requested that the present effective date be changed to the amended PPA execution date or the date of communication from the 2nd Respondent's office on KERC approval of the PPA. While the said letter was, no doubt, addressed to the 3rd Respondent-KREDL, it is not in dispute that the copy, marked to them, was received by the 2nd Respondent on 03.05.2014. On 24.04.2014, a meeting was held at the corporate office of the 2nd Respondent. In the said meeting, the Appellant request, for a change in the effective date, was denied by the officials of the 2nd Respondent.

On 12.05.2014, the Appellant issued a letter to the KERC intimating that it was yet to receive the signed copy of the PPA which resulted in the Appellant's inability to start work on the project finance. While this letter was addressed to the Commission, a copy thereof was marked to the 2nd Respondent. On 19.05.2014, the 3rd Respondent issued a letter to the 2nd Respondent to take necessary action. On 29.05.2014, the Appellant issued a letter to the 2nd Respondent seeking an appointment with them in order to carry out modifications in the PPA i.e. for extension of the effective date as well as for deletion of the arbitration clause. On 25.06.2014, the Appellant issued another letter to the KERC intimating that the 2nd Respondent was yet to carry out amendments of the PPA. Eventually, on 11.07.2014, an addendum was executed to the original PPA dated 19.02.2014 deleting the arbitration clause, and providing for extension for a period of 22 days (period between the date of the PPA and the date of

approval of the PPA by the Commission) which had already elapsed, to be taken into account for fixing the date of commissioning of the project as per Article 8.5 so also for considering the maximum time of extension as per Article 5.72 of the PPA, in the event of such an extension being sought by the Developer (Appellant herein). A copy of this signed addendum, with the seal of the 2nd Respondent, was communicated to the Appellant on 13.08.2014.

The Appellant commissioned its plant on 14.08.2015. Correspondence ensured thereafter, between the Appellant and the 2nd Respondent, for extension of the effective date for a total period of six months (which is the maximum period stipulated in the PPA for granting extension). Eventually, by its letter dated 17.10.2014, the 2nd Respondent provided the Appellant extension of five months and eight days for commissioning of the Solar Project. As a result, the Scheduled Commercial Operation Date, for the Appellant's Solar Project under the PPA, stood extended from 19.02.2015 to 13.08.2015. The Appellant thereafter, vide its letter dated 26.08.2015, requested the 2nd Respondent to enter into a Supplementary Agreement to reflect the change in location of the Solar Project, and to record therein the extension granted vide letter dated 17.10.2014. A Supplementary PPA was executed on 20.10.2015 which recorded the change in location of the Project as well as the extension of time granted by the 2nd Respondent to the Appellant for fulfilment of the conditions precedent, and for commissioning of the Solar project. Thereafter, by its letter dated 31.10.2015, the 2nd Respondent sought approval of the KERC with respect to the Supplementary Agreement executed by them on 20.10.2015. By its letter dated

18.11.2015, the KERC highlighted certain deficiencies in the Supplementary PPA, and informed the 2nd Respondent that the tariff, for the Solar Project should be revised downwards from Rs.7.47 per kWh to Rs.6.50 per kWh, which was the tariff applicable on the date of commissioning of the Solar Project.

The 2nd Respondent, while curing the deficiencies pointed out by the KERC, clarified, by its letter dated 06.01.2016, that the tariff for the Solar project was to remain at Rs.7.47 per kWh. In reply thereto, the KERC, by its letter dated 28.01.2016, informed the 2nd Respondent that it had not sought any clarification from them. The 2nd Respondent was directed to re-submit the Supplementary PPA after making the required amendments to the tariff. By its letter dated 08.02.2016, the 2nd Respondent called upon the Appellant to carry out modifications in the Supplementary PPA by revising the tariff of the Solar Project, as sought by the KERC.

The Appellant filed WP No. 27799 of 2016 before the Karnataka High Court to quash/ set aside the letter of the 2nd Respondent dated 08.02.2016 based on the KERC's letter dated 18.11.2015. The said Writ Petition was disposed of by the Karnataka High Court by its order dated 14.12.2016 granting the Appellant liberty to approach the KERC, after holding that the KERC was the appropriate forum to clarify and pass necessary orders with respect to the reliefs sought for by the Appellant.

The Appellant then filed OP No. 2 of 2017 before the KERC on 05.01.2017 seeking a declaration that the tariff of Rs.7.47 per kWh was applicable to Solar Projects as per the PPA. The Appellant also sought approval of the KERC to the Supplementary PPA executed between them

and the 2nd Respondent. It is pursuant thereto that the impugned order came to be passed on 17.10.2017.

While we shall take note of the contents of the impugned order in greater detail a little later, suffice it to note that the KERC, while declaring that the tariff of Rs.7.47 per kWh was applicable to the Appellant's project as per the PPA, denied extension of time of 180 days which the 2nd Respondent had granted the Appellant, and observed that necessary consequences, as per the terms of the PPA, shall follow. Pursuant to the said order passed by the KERC, the 2nd Respondent informed the Appellant, by e-mail dated 14.01.2020, that a sum in excess of Rs.6.53 Crores had been deducted by the 2nd Respondent from the invoices raised by the Appellant since May 2019 towards Liquidated Damages pursuant to the impugned order passed by the KERC. Thereafter, the 2nd Respondent vide its letter dated 12.03.2020, while relying on Article 5.8 of the PPA, informed that Liquidated Damages amounting to Rs.12.05 Crores had been levied for the delay of 176 days in commissioning the Solar Project; out of the total amount of Liquidated Damages, a sum of Rs.8.51 Crores had already been adjusted from the Appellant's monthly bills for the period from May 2019 to January 2020; and the remaining amount, of around Rs.3.54 Crores, would be recovered from the regular energy bills. The Appellant, thereafter, invoked the appellate jurisdiction of this Tribunal on 08.07.2020, seeking the reliefs referred to hereinabove.

III. IMPUGNED ORDER: ITS CONTENTS:

The Appellant herein had invoked the jurisdiction of the KERC by way of OP No. 2 of 2017 seeking the following reliefs: (a) to declare that the tariff of Rs.7.47 per kWh is applicable to the Appellant's project, as per the

PPA dated 19.02.2014 executed between the Appellant and the 2nd Respondent; and (b) to approve the Supplementary Agreement dated 20.10.2015 signed by the Appellant and the 2nd Respondent.

The KERC framed three issues: (1) Whether the petition was maintainable; (2) whether the Appellant's project was entitled to the tariff of Rs.7.47 per kWh as agreed in the PPA, despite the project not being commissioned within the Scheduled Date of Commissioning; and (3) whether the Appellant had made out a case for extension of time of 180 days for achieving the Conditions Precedent and Commercial Operation of the project.

On issue No. (1), the KERC answered in the affirmative and held that the petition was maintainable. On issue No. (2), the Commission, after extracting Article 12 of the PPA, observed that its earlier order dated 30.07.2017 reducing the tariff for MW scale solar project was applicable for the project commissioned after 01.09.2015; as the Appellant's project was commissioned on 14.08.2015, there was no cause for change in the applicable tariff for the project which was Rs.7.47 per kWh as mentioned in Article 12.1 of the PPA; the Commission was persuaded by the Office Note to the effect that, as the Appellant's project would be commissioned after 30.07.2015, the revised tariff of Rs.6.51 per kWh would be applicable, ignoring the fact that such tariff was effective only from 01.09.2015; the reason assumed by the Commission, in intimating the 2nd Respondent to incorporate the reduced tariff of Rs.6.51 per kWh, was incorrect; therefore, the intimation sent to the 2nd Respondent, on the basis of such a decision through the Commission's letter dated 18.11.2015 and 28.01.2016, was to be recalled; the proper course was to verify the sufficiency of the reasons

for extension of time; and they found no support in either the RfP or the PPA on the contention that the tariff, as on the date of the execution of the Supplementary Agreement, would be the tariff applicable to the Appellant's project. Issue No. (2) was also answered in the affirmative and, as a result, the Appellant was held entitled to be paid the higher tariff of Rs.7.47 per kWh.

On issue No. (3), the KERC noted the Appellant's contention that the delay in commissioning the project, which would include fulfilment of the Conditions Precedent, was solely due to inaction of the 2nd Respondent to carry out changes in the PPA executed on 19.02.2014, as sought by the Appellant; there was a delay in handing over of the signed PPA by the 2nd Respondent resulting in the project functioning being delayed, and change of location of the project as the land originally identified became unavailable. The Commission noted that the Appellant had taken 13.08.2014, the day it purportedly received the signed PPA as the effective date, and that it had to fulfil the Conditions Precedent by 12.02.2015 i.e. 180 days from such effective date.

After taking note of certain dates and events in the form of a table, and after referring to Article 21.1 of the PPA, the KERC held that, while a part of the PPA which provided for the signature of the parties to the PPA and also the witnesses clearly states that the PPA executed and signed by them was delivered to the parties, the Appellant chose not to raise the issue of non-delivery of the signed PPA to them by the 2nd Respondent immediately after execution of the PPA or the conditional approval of the PPA by the Commission; on the contrary, the Appellant was seeking amendment of the effective date of the PPA, though it was solely

responsible for the delay in execution of the addendum to the PPA only on 11.07.2014 in which the arbitration clause as directed by the Commission came to be deleted; a copy of such addendum was not submitted to the Commission; the said addendum provided for extension of the commissioning date by 22 days i.e. the period between the date of the execution of the PPA and the date of approval by the Commission of such PPA, though none of the terms of the PPA or the RfP provided for such extension; admittedly, after the addendum to the PPA was signed on 11.07.2014, a signed copy of the PPA along with the addendum had been given to the Appellant on 13.08.2014; and, while the Appellant had raised the issue of non-receipt of the original PPA, it was safe to assume that they were in possession of a photocopy of the PPA.

After referring to Articles 5.71, 16.2, and 14.4 to 14.7 of the PPA, the KERC observed that it was clear from the said force majeure clauses in the PPA that, non-receipt of the original PPA or its approval by the Commission was not a ground to claim extension of time on the ground of force majeure; the Appellant had failed to show that non-availability of the approved original PPA prevented or caused delay to the Appellant in the performance of its obligations under the PPA; procuring finance for the project and acquiring possession of the required extent of land for the project were the material obligations on the part of the Developer, which was not prevented from applying for Project Finance with the financiers, and for acquiring the requisite land for the project based on the photocopy of the signed PPA already available with them, and the conditional approval granted by the Commission; a prudent Developer would not wait for amendment of the PPA by the 2nd Respondent for initiating steps for

procuring Project Finance and acquiring the requisite land for the project; neither the RfP nor the PPA provided for amendment of the effective date of the PPA, and the Appellant alone was responsible for the delay in executing the Supplementary PPA so as to delete the arbitration clause as directed by the Commission; the 3rd Respondent could not have been deemed to have directed to amend the effective date of the PPA; the appellant had not given particulars of the date on which it had initiated steps to procure finance for the project, and having acquired the required land for the project; the pleadings were vague and evasive; the appellant had stated that, since no copy of the signed PPA was provided to them, and as the 2nd Respondent had failed to amend the effective date of the PPA, they were unable to procure the required extent of land for the project resulting in the commissioning of the project, beyond the date stipulated in the PPA, at a location different from the one originally envisaged; the appellant ought to have disclosed the progress achieved on various dates with regard to acquisition of land for its project; they had failed to disclose these particulars relating to land for the project, and similar particulars relating to Project Finance; and the appellant had failed to establish that it was wholly or partly prevented from acquiring the identified land for the project till receipt of the original PPA on 13.08.2014.

The KERC then noted the submission, urged on behalf of the 2nd Respondent, that the appellant, by not submitting the documents evidencing acquisition of land for the project within 180 days of the effective date mentioned in the PPA, had not satisfied clause 4.2(f) of the PPA; admittedly, the 2nd Respondent, otherwise, chose to extend the time for fulfilling the Conditions Precedent, and also for commissioning of the

project totally by 180 days beyond the date stipulated in the PPA; out of such 180 days, while 22 days could be taken as attributed by the parties towards the time taken for approval of the PPA by the Commission, for the remaining 158 days, as per the letter dated 17.10.2014 of the 2nd Respondent, the reasons stated were those mentioned by the appellant in its letter dated 12.09.2014, a copy of which had not been produced by either the Appellant or the 2nd Respondent nor were such reasons specifically elaborated by them in their pleadings; the process of approval of the PPA, after the submission of papers, would take some time, and when such time taken was reasonable, as in the present case, it cannot be a ground for extension of the effective date of the PPA, and when there are no terms providing for such extension either in the PPA or the RfP; therefore, the claim of the Appellant for extension of time for commissioning of the project towards time taken in obtaining approval of the PPA by the Commission, and the act of the 2nd Respondent in extending the date of commissioning by 22 days under Article 5.7.1 of the PPA, could not be accepted; and the addendum dated 11.07.2014 giving such extension had not been submitted to the Commission.

The KERC further observed that the question of extension of time, on the ground of force majeure, would arise only if it is established that the time taken in approval or not handing over the original PPA had delayed the financial closure or disbursement of the loan amount to the Appellant by the financier or acquisition of the required land by the Appellant; the Appellant had failed to establish such a case; the Appellant had not raised the issue of non-receipt of the signed original PPA directly with the 2nd Respondent, and it raised such an issue only with the 3rd Respondent and

the Commission; no proof had been produced by the Appellant that a copy of the letters, addressed to the 3rd Respondent and the Commission on this issue, was in fact served on or delivered to the 2nd Respondent; and their claim for extension of time under Article 5.7.1 of the PPA and the act of the 2nd Respondent in extending time, by its letter dated 17.10.2014, could not be accepted.

The Commission further observed that it had the power to review any action by the parties under the provisions of the PPA, if it affected consumer interest, and thereby public interest; in the present case, the wrong action of, extension of time under Article 5.7.1 of the PPA by the 2nd Respondent had resulted in waiver of damages payable by the Appellant for failure to fulfil the Conditions Precedent specified in Article 4.2 within the agreed period of time, and also the Liquidated Damages for delay in commencement of supply of power by the Scheduled Commissioning Date as per Article 5.8; there was no ground or reason for the 2nd Respondent to extend the time by 180 days for achieving the Conditions Precedent and Commercial Operation of the Project; and the Supplemental PPA dated 20.10.2015, which provided for such extension, could therefore not be approved. Issue No. (3) was answered in negative.

The Commission concluded holding that the Appellant's project was entitled to the tariff of Rs.7.47 per kWh, and they were not entitled to any extension of time for achieving the Conditions Precedent and commissioning the project; and, accordingly, held that necessary consequences as per the terms of the PPA shall follow.

IV. RIVAL CONTENTIONS:

Shri Buddy A. Ranganadhan, Learned Senior Counsel appearing on behalf of the Appellant, would contend that, in terms of the addendum signed by both parties on 11.07.2014, the Appellant was entitled for extension of 22 days from the date of the signing of the PPA i.e. 19.02.2014 till the said PPA was approved by the KERC on 13.03.2014; and it is settled law that the effective date under the PPA would commence only on the PPA being approved by the Appropriate Commission. Reliance is placed by the Learned Senior Counsel on (i) **Bangalore Electricity Supply Company Limited vs. Hirehalli Solar Power Project, LLP & Ors. (2024) SCC OnLine SC 2253;** (ii) the judgment of this Tribunal in **Hirehalli Solar Power Project, LLP vs. Bangalore Electricity Supply Company Limited (Judgment in Appeal No. 38 of 2019 dated 12.08.2021)**; (iii) **Azure Sunrise Private limited vs. Chamundeshwari Electricity Supply Corporation Limited (Judgment of this Tribunal in Appeal No. 340 of 2016 dated 28.02.2020)**; (iv) **Adani Power Limited vs. Punjab State Electricity Regulatory Commission (Judgment of this Tribunal in Appeal No. 167 of 2020 dated 25.09.2024).**

Learned Senior Counsel would further submit that the delay caused by the 2nd Respondent in amending the PPA, and providing for this extension of 22 days therein, had resulted in a further delay of five months and eight days which was recognised by the 2nd Respondent itself; it is in such circumstances that a Supplementary PPA was executed on 20.10.2015 expressly providing for extension of time by a further period of five months and eight days; the correspondent between the KERC and the 2nd Respondent, which necessitated the appellant having to invoke the jurisdiction of the KERC by filing OP No. 2 of 2017, related only to a

downward revision in tariff, and not with regards extension of time; the KERC, even without putting the appellant on notice and without giving them a reasonable opportunity of being heard in this regard, erroneously held that the appellant was not entitled for extension in time even for one day, and denied them the entire time extension granted by the 2nd Respondent under the addendum and the Supplementary PPA of a total of 180 days, which resulted in their being unjustly mulcted with Liquidated Damages for a sum of Rs.12.05 Crores (excluding GST); and such liquidated damages were unilaterally deducted by the 2nd Respondent from the monthly bills of the appellant causing them serious financial loss and grave hardship. Learned Senior Counsel, while contending that the impugned order necessitates being set aside, would also seek restitution for the unjustified loss caused to them as a result of the impugned order.

While fairly stating that the 2nd Respondent had executed a Supplementary PPA with the Appellant on 20.10.2015 providing for extension of five months and eight days, Shri V. M. Kannan, Learned Counsel for the 2nd Respondent, would submit that, since the Appeal preferred by the Appellant is against the impugned order passed by the KERC, the acts of the 2nd Respondent prior thereto matter little, and it is the validity of the order passed by the KERC which necessitates examination in this Appeal.

Shri V. M. Kannan, Learned Counsel, would further submit that, while it is no doubt true that in the light of the law declared by the Supreme Court and this Tribunal, the effective date would commence only from the date of approval of the PPA by the Commission, it is un-necessary for such an extension to be expressly stipulated in the PPA itself; the appellant had

needlessly and repeatedly sought incorporation of the extended date in the PPA, though the 2nd Respondent had informed them, in the meeting held on 24.04.2014, that they were not agreeable for such a provision being stipulated by way of an addendum to the PPA; and, while the Appellant may be entitled for extension by 22 days (the period from 19.02.2014 when the PPA was executed till 13.03.2014 when the approval was granted by the Commission), the Respondent-Commission was justified in denying them extension for the remaining five months and eight days period.

Shri V. M. Kannan, Learned Counsel, would seek to distinguish the judgments relied upon on behalf of the Appellant, and submit that, unlike in those cases where the relevant PPAs expressly stipulated that the effective date would only be from the date of approval of the PPA by the Commission, in the present case, the subject PPA specifically provides that the effective date would be from the date of signing of the PPA; such a clause in the PPA, in effect, makes the judgments relied on behalf of the Appellant inapplicable to the facts and circumstances of the present case; since the addendum to the PPA was signed by both the parties on 11.07.2014, and the Appellant was aware that such an addendum had been signed, their claim for extension for the period from 11.07.2014 till 13.08.2014. when a signed and sealed copy of the addendum was furnished to the Appellant, should also enure to their benefit by way of extension of time to achieve COD, is wholly unjustified; both the Regulatory Commission and this Tribunal have the jurisdiction to review the decision of the Discoms to grant extension of time; in the facts of the present case, the KERC has rightly held that the appellant is not entitled for extension of time; and imposition of Liquidated Damages on the Appellant is strictly in

terms of the PPA executed by the parties, and does not necessitate interference in Appeal.

V.ANALYSIS:

As noted hereinabove, the petition in OP No. 2 of 2017 was filed before the KERC to declare the tariff of Rs.7.47 per kWh as applicable to the Appellant's project as per the Power Purchase Agreement dated 19.02.2014; and to approve the Supplemental Agreement dated 20.10.2015. The Supplemental Agreement dated 20.10.2015 records, among others, that a PPA was executed on 19.02.2014, and an Addendum to the PPA was executed on 11.07.2014; the 2nd Respondent had, vide letter dated 17.10.2014, extended the due date of commissioning by a further 5 months 8 days, and had revised the commercial operation date to 18.08.2015; and the Karnataka Renewable Energy Development Limited (KREDL) had given its consent for change of location of the project as per clause 1.1.10 of the RfP vide letter dated 27.01.2015. The Supplemental Agreement then records the modification of the earlier PPA to provide that, in case of extension occurring due to reasons specified in clause 5.7.1(a), any of the dates specified therein can be extended, subject to the condition that the Scheduled Commissioning Date would not be extended by more than 6 (six) months; and further, extension of 5 months and 8 days was allowed by the letter of HESCOM dated 17.10.2014 which was annexed to the Supplemental PPA; and the Supplemental PPA shall be construed as part of the PPA executed on 19.02.2014 with an addendum dated 11.07.2014 with all other terms and conditions remaining unaltered and binding on both the parties.

By its letter dated 17.10.2014, while drawing the attention of the Appellant to certain clauses in the PPA regarding damages for the delay, extension of time etc, the 2nd Respondent informed them that, as per the afore-said provisions and to provide positive support for implementation of the Solar plant, they were according approval for extension of time as per the Appellant's request, and also as per the reasons mentioned by the Appellant in its letter dated 12.09.2014, for extension by a further period of 5 months and 8 days. After taking note of the fact that the date of the original PPA was 19.02.2014, and the date of the Addendum, whereby 22 days extension was granted, was 11.07.2014, and that further extension of 5 months 8 days was now being granted as per Clause 5.7.2, the 2nd Respondent informed the Appellant that the extended Commercial Operate Date would be 18.08.2015.

Since the Appellant herein had, in the Petition filed by them in OP No. 2 of 2017, specifically sought approval of this Supplemental PPA dated 20.10.2015, and as the Respondent–Commission is conferred the power, under Section 86(1)(b) of the Electricity Act, to regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies for purchase of power for distribution and supply within the State, we find it difficult to agree with the submission, urged on behalf of the Appellant, that it was impermissible for the KERC to examine the validity of the extension granted by the 2nd Respondent both in terms of the Addendum dated 11.07.2014, and thereafter in its letter 17.10.2014.

In this context, it is useful to note that, in the Addendum dated 11.07.2014 (a sealed and signed copy of which was communicated to the

Appellant on 13.08.2014), Article 18.4 of the PPA dated 19.02.2014 was deleted, and it was also provided therein that the period of 22 days i.e. the period between the date of the PPA and the date of approval by the KERC which had already elapsed, shall be taken into account for fixing the date of commissioning of the project as per Article 18.5 so also for considering the maximum time of extension as per Article 5.7.2 of the PPA in the event of such an extension being sought by the Developer.

Clause 5.7 of the PPA dated 19.02.2014 relates to extension of time and Clause 5.7.1 to 5.7.4 read thus:

"5.7.1 In the event that the Developer is prevented from performing its obligations under Clause 5.1 by the Scheduled Commissioning Date due to:

a) any HESCOM Event of Default; or

b) Force Majeure Events affecting HESCOM; or

c) Force Majeure Events affecting the Developer,

the Scheduled Commissioning Date and the Expiry Date shall be deferred, subject to the limit prescribed In Clause 5.7.2 and Clause 5.7.3 for a reasonable period but not less than 'day for day' basis, to permit the Developer or HESCOM, through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the Developer or HESCOM, or till such time such Event of Default is rectified by HESCOM.

5.7.2 In case of extension occurring due to reasons specified in clause 5.7.1 (a), any of the dates specified therein can be

extended, subject to the condition that the Scheduled Commissioning Date would not be extended by more than 6(six) months.

5.7.3 In case of extension due to reasons specified in Article 5.7.1(b) and (c), and if such Force Majeure Event continues even after a maximum period of 3(three) months, any of the Parties may choose to terminate the Agreement as per the provisions of Article 16. If the Parties have not agreed, within 30 (thirty) days after the affected Party's performance has ceased to be affected by the relevant circumstance, on the time period by which the Scheduled Commissioning Date or the Expiry Date should be deferred by, any Party may raise the Dispute to be resolved in accordance with Article 18.

5.7.4 As a result of such extension, the Scheduled Commissioning Date and the Expiry Date newly determined shall be deemed to be the Scheduled Commissioning Date and the Expiry Date for the purposes of this Agreement."

Clause 5.8 relates to Liquidated Damages for delay in *commencement of supply of power and Clause 5.8.1 to 5.8.3 read thus:*

"5.8.1 If the Developer is unable to commence supply of power to HESCOM by the Scheduled Commissioning Date other than for the reasons specified in Clouse 5.7.1 of the PPA, the Developer shall pay to HESCOM, 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.

b. For the delay of more than one (1) month and up to two months an amount equivalent to 40% of the total Performance Security.

c. For the delay of more than two and up to three months an amount equivalent to 40% of the Performance Security.

For avoidance of doubt, in the event of failure to pay the above-mentioned damages by the Developer entitles the HESCOM to encash the Performance Security.

5.8.2 In case the Developer delays the achievement of Commercial Operation Date beyond 3 (three)months, the Developer shall pay to HESCOM, the Liquidated Damages at rate of Rs 50,000/- (Rupees Fifty Thousand only) per MW per day of delay for the delay in such commissioning. Provided that the Developer shall be required to make such payments to HESCOM in advance on a week to week basis for the period of delay.

5.8.3 The maximum time period allowed for achievement of Commercial Operation Date with payment of Liquidated Damages shall be limited to 16 (sixteen) months from the Effective Date. In case, the achievement of COD is delayed beyond 16 (sixteen)/ months from the Effective Date, it shall be considered as an

Developer's Event of Default and provisions of Article 16 shall apply and the Power Project shall be removed from the list of selected projects in the event of termination of this Agreement."

As noted hereinabove, while Clause 5.7.1(a) refers to the 2nd Respondent's event of default, clause 5.7.1(b) refers to Force Majeure event's affecting the 2nd Respondent and clause 5.7.1(c) refers to Force Majeure Events affecting the Developer (Appellant). In terms of Clause 5.7.1 in the event any one of clauses (a) to (c) are attracted, then the Scheduled Commissioning Date and the expiry date shall be deferred subject to the limit prescribed, which under Clause 5.7.2, in case of extension occurring due to reasons specified in Clause 5.7.1(a), is that the Scheduled Commissioning Date would not be extended by more than 6 (six) months. Further, on any one of the events (a) to (c) of Clause 5.7.1 being attracted, the Scheduled Commissioning Date and the expire date shall be deferred for a reasonable period but not less than "day-for-day basis" to permit the Developer or HESCOM, through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the Developer or HESCOM, or till such an event of default is rectified by HESCOM.

While the PPA, no doubt, provides for extension of SCOD, the period for which such extension can be granted should be reasonable and should not be less than "day for day basis" subject to a maximum of six months. While no extension can be granted, in terms of Clause 5.7.1(a), for a maximum period beyond six months, computation of the period for which extension can be granted must not only be reasonable, but must also satisfy the "day for day" requirement.

While the KERC was, no doubt, entitled to examine the question whether the Supplemental PPA dated 20.10.2015 which provided for extension of 5 months 8 days was valid, and if not whether the Appellant was entitled to any extension at all and, if so entitled, the duration for which they were so entitled, the rules of natural justice required KERC to put the appellant on notice of the Commission's intention to delete the said clause in the Supplemental PPA granting them extension, and give them a reasonable opportunity of being heard in this regard.

As shall be elaborated later in this order, since the present Appeal is a continuation of the original proceedings before the KERC, we shall examine the rival submissions put-forth both on behalf of the Appellant and the 2nd Respondent regarding the period for which the Appellant is entitled to/ disentitled for extension. For a certain other period, for which further evidence is required to be brought on record, we intend to remand the matter to the KERC for its consideration afresh in accordance with law.

We have split the six month period of extension granted to the appellant by the HESCOM into four smaller periods, the first from 19.02.2014 till 04.04.2014, the second from 05.04.2014 till 03.05.2014, the third from 04.05.2014 till 11.07.2014, and the fourth from 12.07.2014 till 13.08.2014.

A.FIRST PERIOD: FROM 19.02.2014 TILL 04.04.2014:

As noted hereinabove, the original PPA was executed on 19.02.2014 and was approved by the KERC by its order dated 13.03.2014. The 2nd Respondent informed the Appellant, by its letter dated 29.03.2014 regarding the letter of the KERC dated 13.03.2014, and then called upon

the Appellant to approach the 2nd Respondent, in connection with the deletion of the arbitration clause under Article 18.4, with the seal and authorized signatory for signing the modified PPA. It is not in dispute that the Appellant received a copy of the said letter of the 2nd Respondent dated 29.03.2014 only on 04.04.2014.

i.JUDGEMENTS RELIED ON BEHALF OF THE APPELLANT:

In **Bangalore Electricity Supply Co. Ltd. v. Hirehalli Solar Power Project LLP, (2025) 1 SCC 435**, the Supreme Court noted that APTEL found that, although the application for grid connectivity and evacuation approval were submitted on 25.02.2016, the final approval was only given on 22.08.2016, after a lapse of five months; until this approval is given, the authorities will not prepare the bay SLD and layout drawings with estimation of bay erection; the bay intimation notice was received by the respondents only a few days before the original SCD, and it was 170 days after the grant of final evacuation approval; hence, there was a delay in the construction of the bay that was not caused by the respondents; relying on other decisions rendered by it earlier, APTEL held that the date of signing the PPA will not be the effective date; and, rather, the PPA becomes effective only when it is approved by the KERC which in this case was on 07.09.2015; and, hence, 18 months must be calculated from this date.

After considering the letter of the appellant dated 02.03.2017 that granted a six month extension to the respondents after considering its individual facts and circumstances, the Supreme Court observed that this grant of extension must be seen in the light of the Government's direction to DISCOMS dated 24.11.2016 to set up 3-member committees to consider

each request for extension; this shows that the appellant, after considering the specific case of the respondents, had itself accepted that they were entitled to the benefit of Article 2.5 read with Article 8.3 of the PPA; even before KERC, the appellant did not challenge the respondents' contentions; and, therefore, at the appellate stage before APTEL and this Court, the appellant could not be permitted to take a contrary stance and raise the plea that the delay was attributable to the respondents, and not covered by the force majeure clause or that there was non-compliance with the notice requirement under Article 8.3(*b*)(*i*). The contentions of the appellant that force majeure does not apply in this case, was rejected.

In **Hirehalli Solar Power Project, LLP vs. Bangalore Electricity Supply Company Limited (Judgment in Appeal No. 38 of 2019 dated 12.08.2021),** this Tribunal held that 18 months' time was set for completing the projects from the effective date; not much difference exists between the date of signing of the PPA and approval of PPA by the KERC; on 29.08.2015, PPA was signed between the parties and on 17.09.2015, KERC approved the PPA; as already held by this Tribunal in various judgments, the PPA becomes implementable only when it is approved by the Commission and not the date of execution of the PPA between the Developer and the BESCOM; and, therefore, 18 months had to be taken from 17.09.2015.

In **Azure Sunrise Private limited vs. Chamundeshwari Electricity Supply Corporation Limited (Judgment of this Tribunal in Appeal No. 340 of 2016 dated 28.02.2020],** this Tribunal noted the submission of the Appellant that the State Commission vide its Impugned Order had reduced extension of time of 137 days, granted by the distribution licensee, to only 25 days; the Appellant and CESCOM had entered into a power purchase

agreement on 2nd January, 2015 for execution of a 50 MW solar PV project; however, approval from the State Commission was pending; and the duly approved signed PPA was received by the Appellant only on May 21, 2015, i.e. after 137 days time.

It is in this context that this Tribunal held that the decision of State Commission, to reduce the extended time and tariff along with imposition of liquidated damages, was not sustainable in the eyes of law; and hence the Impugned Order deserved to be set aside.

In **Adani Power Limited vs. Punjab State Electricity Regulatory Commission (Judgment of this Tribunal in Appeal No. 167 of 2020 dated 25.09.2024),** this Tribunal expressed its inability to countenance the arguments raised on behalf of the Appellant to the effect that the parties to a PPA were bound to discharge their respective obligations under the same, irrespective of its approval by the appropriate Commission; it was sought to be contended that a PPA had to be acted upon even if it did not get approval from the appropriate Commission, and they did not agree.

After extracting Section 86(1)(b) of the Electricity Act, 2003, and Rule 8 of the Electricity Rules, 2005, this Tribunal observed that, as per Section 86(1)(b) of the Act, the State Commission is empowered to regulate the electricity purchase and procurement process of the Distribution Licensees including the price at which electricity is procured from the generating companies through power purchase agreements; therefore, a Distribution Licensee can procure/purchase power only in the manner and at the price as approved by the State Commission, upon satisfying the Commission about its requirement for such power; it is for the Commission to determine whether a Distribution Licensee actually requires the power for supply to its

consumers, and whether the rate quoted in the PPA is reasonable as well as in consonance with the market conditions, and whether the Distribution Licensee can obtain such power from other cheaper sources; and, thus, it is the State Commission which regulates the entire process of purchase and procurement of power by each Distribution Licensee in the State by virtue of the power conferred upon it under Section 86(1)(b) of the Electricity Act, 2003.

After extracting Regulation 46 of the Punjab State Electricity Regulatory Commission (Conduct of Business) Regulations, 2005, this Tribunal observed that this Regulation also made it mandatory for the Distribution Licensee, within the State of Punjab, to satisfy the Commission about its need for additional power procurement on a long-term basis, that such procurement is economical, and that the Distribution Licensee has made prudent and best efforts to minimize the cost of purchase; having regard to the clear legal position indicated by the above noted legal provisions, they could not agree with the arguments made on behalf of the Appellant that there was no need for approval of the State Commission in respect of a power purchase agreement, and the same had to be acted upon irrespective of such approval; such an interpretation certainly militated against the very object of the Electricity Act, 2003 in general, and Section 86(1)(b) of the Act in particular; and, in such a view, they were fortified by the following judgements of the Supreme Court as well as of this Tribunal, ie **(1) Tata Power Company Ltd vs Reliance Energy Ltd: (2009) 16 SCC 659; (2) Rithwik Energy Generation Pvt, Ltd vs Karnataka Power Transmission Corp. Ltd and others: 2011 ELR (APTEL) 1651; (3) Hinduja National Power Corporation Ltd vs Andhra**

Pradesh Electricity Regulatory Commission: (Judgement of ApTel in Appeal No. 41 of 2018 dated 07.01.2020); (4) Eswari Green Energy LLP vs Karnataka Electricity Regulatory Commission & others (Judgement of Aptel in Appeal No. 180 of 2018 and batch dated 13.11.2020).

This Tribunal held that, in view of the clear law laid down by this Tribunal and the Supreme Court in the above noted judgements, there was no escape from the well-founded conclusion that a PPA becomes effective only upon getting approval from the State Commission, and till then the parties are precluded from enforcing any rights or obligations under the same.

As held in the afore-said Judgments, the delay caused, in obtaining approval of the State Commission to the PPA, is required to be excluded in determining the Scheduled Commercial Operation Date; and, for this period, the Developer is entitled for extension of time.

In the impugned order, the KERC itself observed that, out of the total 180 days extension granted by HESCOM, 22 days could be taken as attributed by the parties towards the time taken for approval of the PPA by the Commission. Despite having so held, the KERC however chose to deny the appellant extension for the entire period of 180 days, including the afore-said 22 day period from the date of the PPA till its approval by the Commission. The KERC held that the process of approval of the PPA after the submission of papers would take some time, and when such time taken was reasonable, as in the present case, it cannot be a ground for extension of the effective date of the PPA, and when there are no terms providing for such extension either in the PPA or the RfP; therefore, the claim of the Appellant for extension of time for commissioning of the project towards

time taken in obtaining approval of the PPA by the Commission, and the act of the 2nd Respondent in extending the date of commissioning by 22 days under Article 5.7.1 of the PPA could not be accepted.

The KERC further observed that the question of extension of time, on the ground of force majeure, would arise only if it is established that the time taken in approval of the original PPA had delayed the financial closure or disbursement of the loan amount to the Appellant by the financier or acquisition of the required land by the Appellant; and the Appellant had failed to establish such a case. The afore-said observations of the KERC, in the impugned order, runs contrary to the declaration of law in the aforesaid judgements.

Further, it is only clauses (b) and (c) of Article 5.7.1 of the original PPA dated 19.02.2014 which relate to force majeure events, and not clause (a) which relates to any HESCOM Event of Default. Clause 5.7 of the PPA dated 19.02.2014, as noted hereinabove, relates to extension of time and clause 5.7.1 provides that, in the event that the developer is prevented from performing its obligations under clause 5.1 by the scheduled commissioning date due to (a) any HESCOM Event of Default, or (b) Force Majeure Events affecting HESCOM; or (c) Force Majeure Events affecting the Developer, the Scheduled Commissioning Date and the Expiry Date shall be deferred, subject to the time prescribed in Clause 5.7.2 and Clause 5.7.3 for a reasonable period but not less than 'day for day' basis. Even if force majeure events in terms of 5.7.1 (c) are not attracted, the Appellant is nonetheless entitled for extension if clause (a) of Article 5.7.1 is applicable, and the delay is said to have occasioned because of a HESCOM event of default.

The finding recorded by the KERC that it is not a force majeure event justifying extension of time matters little, since the delay for the afore-said period would fall within the ambit of clause (a) of Article 5.7.1 of the PPA. The Petition, seeking approval of the PPA dated 19.02.2014, was filed by the 2nd Respondent before the KERC, and it is they who communicated the decision of the KERC, in its order dated 13.03.2014 directing modification of the PPA, vide their letter dated 29.03.2014 which the appellant received only on 04.04.2014. The Appellant cannot be held responsible for any part of the delay from 19.02.2014 when they executed the PPA till they received the letter from the 2nd Respondent on 04.04.2014. Consequently, for the period from 19.02.2014 till 04.04.2014, the Appellant is entitled for extension of time and the impugned order passed by the Commission denying them extension for this period is contrary to authoritative pronouncement of law in the afore-said judgments.

The law, declared in the aforesaid judgments, is that the effective date would be the date of approval by the Commission, and not the earlier date on which the PPA was signed. This declaration of law is founded on Section 86(1)(b) of the Electricity Act, in terms of which the regulatory Commission is required to regulate the electricity purchase and procurement process, including the price at which electricity shall be procured from generating companies by a distribution licensee. The power conferred on the Commission, in terms of Section 86(1)(b) of the Electricity Act, is extremely wide, and the Commission not only has the power to decline grant of approval to the PPA, but it also has the power to direct modification thereof.

The observations of the KERC, that the process of approval of the PPA would take some time and cannot be a ground for granting extension of the effective date in the absence of any terms provided for such extension in the PPA or the RfP, is contrary to the law declared in the aforesaid judgments, and does not therefore merit acceptance. In the present case, the generator is the Appellant and the distribution licensee is the second Respondent. Without approval of the Commission, the PPA would not be effective and, consequently, any delay caused by the distribution licensee in obtaining approval of the Commission or the time taken before the Commission itself prior to grant of approval cannot, save a specific provision in the PPA to the contrary, be reckoned in computing the period within which the Appellant was required to achieve SCOD.

It is unnecessary for us to delve further into this aspect as it is fairly submitted on behalf of the second Respondent, and which submission accords with the observations of the KERC in the impugned order itself, that the Appellant would be entitled to extension of SCOD for the period between the date of execution of the PPA and the date of its approval. Since the Appellant was made aware of the order of the Commission, for the first time on receipt of the Appellant's letter dated 29.03.2014, on 04.04.2014, the appellant is justified in its claim for extension of the period between 19.02.2014 and 04.04.2014.

B.SECOND PERIOD: FROM 05.04.2014 TO 03.05.2014:

The second period is between 05.04.2014 and 03.05.2014. As noted hereinabove, the Appellant was intimated by the 2nd Respondent of the PPA being approved by the Commission on 13.03.2014 only on

04.04.2014. Thereafter, by its letter dated 11.04.2014, the Appellant informed the 2nd Respondent that they would like to approach the 2nd Respondent's office in the coming week, based on the convenience and availability of the 2nd Respondent, to execute the revised PPA. It is for the first time, by their letter dated 24.04.2014, that the Appellant had informed the Managing Director of the Karnataka Renewable Energy Development Limited that, as lending institutions consider PPA as effective only after approval from the Regulatory Commission and they were yet to receive the original PPA copy, they were unable to progress on the financing of the project until that day. The Appellant sought the help of KREDA to change the present effective date (PPA signing date) to the amended PPA execution date or till the date of communication from HESCOM office on KERC approval of the PPA. Though this letter was not addressed to the 2nd Respondent, a copy of the said letter was marked to the Managing Director of the 2nd Respondent.

Mr. V. M. Kannan, Learned Counsel for the 2nd Respondent, on instructions, would fairly state that the 2nd Respondent received a copy of the letter, of the Appellant dated 24.04.2014, on 03.05.2014. Since the 2nd Respondent was intimated for the first time, of the Appellant's requirement of the effective dated in the PPA being modified, only on 03.05.2014, the Appellant cannot be heard to contend that they are entitled for extension for the period 05.04.2014 till 03.05.2014, since the delay was solely on their part, and does not fall within the ambit of any one of clauses (a) to (c) of Article 5.7.1 of the PPA dated 19.02.2014. As the requirement is for extension on "day for day basis", this period of delay, which is solely

attributed to the Appellant, cannot be reckoned for the purpose of extending effective date.

We shall examine the third period from 04.05.2014 till 11.07.2014 a little later in this order.

C.FOURTH PERIOD: FROM 12.07.2014 TILL 13.08.2014:

The delay for the fourth period, ie from 12.07.2014 till 13.08.2014, is again a HESCOM event of default, falling within the ambit of clause (a) of Article 5.7.1 of the PPA, since the second Respondent had delayed making available, a signed and sealed copy of the agreement dated 11.07.2014, till 13.08.2014.

The fourth period is from 12.07.2014 till 13.08.2014. While it is no doubt true that the Addendum to the PPA was signed by the Appellant and the 2nd Respondent on 11.07.2014, it is not in dispute that the signed and sealed copy of the Addendum dated 11.07.2014 was communicated by the 2nd Respondent to the Appellant only on 13.08.2014. While the Appellant claims that it was disabled from proceeding further, since the Addendum dated 11.07.2014 which was signed and sealed on behalf of the 2nd Respondent, was received only on 13.08.2014, the submission urged on behalf of the 2nd Respondent by Mr. V. M. Kannan, Learned Counsel, is that the Addendum came into force on 11.07.2014 when both parties affixed their respective signatures to the Addendum, and it was un-necessary for the Appellant to wait till receipt of the signed and sealed copy to proceed further in the matter.

We must express our inability to agree with the submission, urged on behalf of the 2nd Respondent. Firstly, because it is only on the Agreement being signed and sealed on behalf of the authorized representative of the 2nd Respondent would it be an effective Agreement on which financial institutions and lenders would act upon. Secondly, the Appellant has, both in its letter 17.10.2014 and in the Supplementary PPA dated 20.10.2015, itself granted the Appellant extension till 13.08.2015 on this score. The 2nd Respondent cannot be permitted to take advantage of its own delay, in affixing the seal to the Addendum dated 11.07.2014 and in communicating the signed and sealed Addendum to the Appellant till 13.08.2014, to now contend that the appellant is not entitled for extension for this period.

In the impugned order, the KERC has denied the Appellant extension of time for the period 12.07.2014 till 13.08.2013, on the ground that the Appellant had not sought approval for the PPA dated 11.07.2014; the Appellant had not raised the issue of non-receipt of the original signed PPA directly with the second Respondent, and had raised such an issue with the third Respondent and the Commission; the Appellant had failed to establish that copies of the letters, addressed to the third Respondent and KERC, was served or delivered on the second Respondent; and, while the Appellant had raised the issue of non-receipt of the original PPA, it was safe to assume that, as they were in possession of a photocopy of the PPA, they were not prevented from applying for project finances with the financiers, and to secure requisite land for the project based on the photocopy of the signed PPA.

In so far as the issue of not seeking approval of the addendum dated 11.07.2014 is concerned, it is relevant to note that the said addendum only

relates to two aspects. Firstly, it relates to deletion of Article 18.4 of the PPA ie the Arbitration clause. This deletion is in compliance with the order of approval of the KERC dated 13.03.2014, and it was wholly unnecessary to obtain approval with respect to such deletion all over again. The other aspect in the addendum relates to recording that the period of 22 days, between the date of the PPA and the date of approval by the KERC, shall be taken into account for fixing the date of commissioning of the project in the event of an extension being sought by the developer. This clause is in accordance with the law declared in the aforesaid judgments.

We may not be understood to have held that, in all cases, parties are not required to obtain approval with respect to an addendum to the PPA. All that we have opined is that failure to obtain approval, in the facts and circumstances of the present case, is of little consequence, since the insertion accords with the law declared in the afore-said judgements which is that the PPA would be effective only on its approval by the Commission. In the present case the PPA in question was signed on 19.02.2014 and was approved by the KERC on 13.03.2014.

While some of the above-referred judgements may have been pronounced subsequent to the order impugned in this appeal, it must be borne in mind that the decision of the Supreme Court/APTEL, enunciating a principle of law, is applicable to all cases irrespective of its stage of pendency because it is assumed that what is enunciated by the Supreme Court / APTEL is, in fact, the law from the inception. (***M.A. Murthy* v. *State of Karnataka*, (2003) 7 SCC 517).** When the Supreme Court decides that the interpretation of a particular provision as given earlier was not legal, it in effect declares that the law as it stood from the beginning was as per its decision, and that it was never the law otherwise. (***Suresh Chandra***

***Verma (Dr.)* v. *Chancellor, Nagpur University*, (1990) 4 SCC 55; *P.V. George* v. *State of Kerala*, (2007) 3 SCC 557).**

In placing blame on the appellant, the KERC has failed to enquire from the 2nd respondent as to how they were justified in delaying furnishing a signed and sealed copy of the addendum, for over a month, from 11.07.2014 till 13.08.2014. A copy of the letters addressed by the appellant to the third respondent, seem to have been marked to the 2nd Respondent, and it is not as if the 2nd Respondent has denied receipt of such letters. Sri V.M. Kannan, Learned Counsel appearing on behalf of the 2nd Respondent, has acknowledged receipt, of the appellant's letter dated 24.04.2014, by the 2nd Respondent on 03.05.2014.

It does appear, from the impugned order, that the Appellant was not even furnished with the signed copy of the addendum dated 11.07.2014, since the KERC records in the impugned order that the appellant could have obtained finances and procured land on the basis of the photocopy of the said agreement. This finding, recorded by the KERC, does not stand to reason, since judicial notice can be taken of the fact that financial institutions would not sanction a loan, or disburse the sanctioned loan amount, on the basis of a photocopy of an agreement, nor can registration of land be effected on the basis of a photocopy. It is the signed and sealed original agreement which is required both for obtaining loans and for registration of land.

As it is evident that the Appellant was not furnished the original copy till 13.08.2014, and as a mere photocopy being made available is of little consequences, the appellant's claim for extension for the period from 12.07.2014 till 13.08.2014, when they received a signed and sealed copy

of the addendum dated 11.07.2014, must be held to be justified. The delay, in making available a copy of the signed and sealed addendum dated 11.07.2014, is a HESCOM event of default falling under clause (a) of Article 5.7.1 of the PPA dated 19.02.2014, and the question whether it is or is not a force majeure event is wholly irrelevant.

D.THIRD PERIOD: FROM 04.05.2014 TILL 11.07.2014:

In so far as the third period from 04.05.2014 till 11.07.2014 is concerned, the impugned order, passed by the KERC in OP No. 2 of 2017 dated 17.10.2017, records, among several other reasons for denying the Appellant extension of time, that the appellant was not entitled to extension of time as per the letter dated 17.10.2014 of the 2nd Respondent, as the reasons stated to have been mentioned by the Appellant in its letter dated 12.09.2014 had not been produced either by the Appellant or the 2nd Respondent nor were such reasons specifically elaborated by them in their pleadings.

A copy of the letter dated 12.09.2014 has been placed for our perusal by Mr. Buddy A. Ranganadhan, Learned Senior Counsel appearing on behalf of the Appellant, during the course of hearing of this appeal. The said letter refers to the PPA executed on 19.02.2014, the Addendum executed on 11.07.2014, receipt of the original PPA and Addendum from HESCOM on 13.08.2014, the Appellant's letter to HESCOM on 05.09.2014 requesting additional time of six months to meet the Conditions Precedent of the PPA, and the 2nd Respondent's response vide letter dated 09.09.2014. After referring to the afore-said letters, the Appellant stated, in their letter dated 12.09.2014, that, as addition time of 22 days had been

granted to them by the Addendum to the PPA on 11.07.2014 which was communicated to them on 13.08.2015, they be granted additional time of 5 months and 8 days for meeting the conditions stipulated in Article 4.2 of the PPA.

While it is true that a copy of the letter of the Appellant dated 12.09.2014 or their earlier letter dated 05.09.2014, as well as the 2nd Respondent's reply thereto dated 05.09.2014, were not placed on record, it must also be borne in mind that the correspondences which preceded the Appellant's filing the Petition in OP No. 2 of 2014, were not confined to these issues, but related largely to the reduction in the tariff stipulated in the original PPA dated 19.02.2014.

After executing the Supplemental PPA on 20.10.2015, the Appellant addressed letter dated 21.10.2015 to the KERC seeking approval of the Commission to the Supplementary PPA dated 20.10.2015. By its letter dated 18.11.2015, the KERC informed the 2nd Respondent that the main objective of executing the Supplemental Agreement appeared to be for modifying the recital item-C and Clause 5.7.2 of the original agreement dated 19.02.2014, for a change in location of the project and for extension of time for completion of the project respectively; the delay of HESCOM's event of default had not been furnished; the effective date of the PPA was 19.02.2014 and the project ought to have been completed before 18.02.2015; extension to an extent of 6 months i.e. up to 17.08.2015 was accorded by HESCOM; as on 17.08.2015, the applicable tariff of the project was not indicated in the PPA; as per the original PPA under Clause 12.5, the tariff indicated was 6.5 per kWh; the details mentioned in the recital of the Supplemental PPA were insufficient; it did not have details such as

approvals obtained for the project and correspondence made by the Company/ KREDL/ HESCOM on the changed location; approval of the Board of Directors had not been furnished; and the consent of KREDL/ HESCOM for the changed location had not been furnished. The 2nd Respondent was requested to re-submit the subject PPA in original duly considering the observations and modifying accordingly, for taking further necessary action.

In reply thereto, the 2nd Respondent, vide its letter dated 06.01.2016, informed the KERC that Article 5.7 was for force majeure event of the Appellant or HESCOM or any default; the Appellant had received the original PPA after KERC approval and affixing Common Seal of HESCOM on 13.08.2015; the Appellant had given a letter in detail regarding Financial Closure etc. dated 05.09.2014 (copy enclosed); so HESCOM being at default did not arise; as per Article 12.1, Rs.7.47 per unit is fixed for C.O.D & expiry date, and it holds good since, as per PPA, time extension of 6 months for commissioning was allowed; moreover, the MW scale commission determined Tariff rate was applicable for the projects commissioned after 01.09.2015 and up to 31.03.2018; and the Board of Directors' approval was not necessary, since the agreement was between HESCOM and the Appellant; and the consent of KREDL was enclosed.

In reply thereto, the KERC informed the 2nd Respondent that the Commission had not sought any clarification from them; the subject PPA dated 20.10.2015 was returned and should be re-submitted duly modifying it by considering the Commission's observations, made in its letter dated 18.11.2015 by incorporating the details in the Supplemental PPA. Pursuant thereto, the 2nd Respondent, by letter dated 18.02.2016,

requested the Appellant to approach their office for incorporation of suggestion made by the Commission as the same was required for modification of the Supplemental PPA dated 20.10.2015. It is pursuant thereto that the Appellant initially approached the Karnataka High Court and thereafter filed OP No. 2 of 2017 before the KERC.

It is no doubt true that the correspondence above referred, between the KERC and the 2nd Respondent, apart from reduction in tariff, also refers to extension of time in terms of Article 5.7.2 of the PPA. By way of the impugned order, the Appellant's justification for change in location and that they are entitled for original tariff as stipulated in the PPA dated 19.02.2014 has not been interdicted by the KERC. As a consequence of the impugned order, the 2nd Respondent has, pursuant to the KERC rejecting grant of extension of SCOD by six months (22 days as referred to in the Addendum dated 11.07.2014, and 5 months 8 days as referred to in the letter of the 2nd Respondent dated 17.10.2014 and the Supplemental PPA dated 20.10.2015), recovered Liquidated Damages for the delay of six months in achieving COD.

Whether the Appellant is justified in its claim for extension of SCOD for the period 04.05.2014 to 11.07.2014 would necessitate an elaborate and detailed examination of the correspondence between the Appellant and the 2nd Respondent, including the above referred letters to which the attention of the Commission has not been specifically drawn to. The submission, urged on behalf of the Appellant, for not placing all these documents on record before the KERC, is that they were neither put on notice in this regard nor were they given a reasonable opportunity of being heard on this score.

For this period from 04.05.2014 to 11.07.2014, the Appellant's claim for extension must be examined in terms of the PPA on a "day for day" basis. As noted hereinabove, the KERC has recorded, in the impugned order, that the parties had not even placed a copy of the letter dated 12.09.2014 before it. The said letter has been placed for our consideration for the first time at the stage of appeal. As noted hereinabove, the justification put forth on behalf of the Appellant for their failure to place a copy of the said letter, and copies of the letters referred to therein, is that they were not even put on notice by the Commission that their claim for extension, which the second Respondent had already granted in their favour, would be examined, much less were they given a reasonable opportunity of being heard; and, if they had been afforded such an opportunity, they would have placed all these documents for the Commission's consideration.

On the question whether this Tribunal, in the exercise of its appellate jurisdiction under Section 111 of the Electricity Act, is entitled to examine aspects not considered in the impugned order, it must be borne in mind that Section 111(1) of the Electricity Act enables a person aggrieved by the order made by the Commission to prefer an appeal to this Tribunal. Section 111(3) enables this Tribunal to pass such orders in the appeal as it thinks fit, confirming, modifying or setting aside the order appealed against. The power conferred on this Tribunal, under Section 111(3) of the Electricity Act, is akin to that of a first appellate Court in terms of Section 96 of the CPC, as this Tribunal is empowered to examine the validity of the impugned order both on facts and law.

This Tribunal can, in the absence of any procedure having been stipulated by it to the contrary, always be guided by the provisions of the CPC. Section 96 CPC provides for filing of an appeal from the decree by any court exercising original jurisdiction to the court authorised to hear appeals from the decisions of such courts. An appeal is a continuation of the proceedings of the original court. Ordinarily, in the first appeal, the appellate jurisdiction involves a re-hearing on law as well as on fact as invoked by an aggrieved person. The first appeal is a valuable right of the appellant, and therein all questions of fact and law are open for consideration by re-appreciating the material and evidence. The first appellate court is required to address all the issues and decide the appeal assigning valid reasons either in support or against by reappraisal, The court of first appeal must record its findings dealing with all the issues, considering oral as well as documentary evidence led by the parties. **(Ramnath Exports P. Ltd. vs. Vinita Mehta (2022) 7 SCC 678; Tata Power Delhi Distribution Ltd. vs. DERC (Order of APTEL in IA No. 1766 of 2022 in Appeal No. 334 of 2021 dated 23.03.2023).**

While an appeal to this Tribunal, under Section 111 of the Electricity Act, is a continuation of the original proceedings instituted before the Regulatory Commission, as the appellate jurisdiction of this Tribunal involves a re-hearing on law as well as on fact, and all questions of fact and law are open for consideration by re-appreciating the material and evidence, it also goes without saying that the jurisdiction exercised by this Tribunal is not in substitution of the original proceedings before the Commission, and this Tribunal need not, in each and every case, take upon

itself the task of adjudicating issues which were not even considered by the concerned Regulatory Commission.

The Appellant's claim for extension for this period from 04.05.2014 till 11.07.2014 ought to have been examined by the Commission, on a "day for day basis", in the first instance, before we were called upon to examine the same at the stage of appeal. Without delving in detail on whether this Tribunal should undertake an examination of issues for the first time at the appellate stage, and on the various facets of the rules natural justice, and as we are of the view that the extension to which the appellant is entitled during this period must be considered on a "day for day" basis, we deem it appropriate to remand the matter to the KERC for its consideration as to whether the Appellant is entitled for extension of time during the period 04.05.2014 to 10.07.2014 i.e. for a period of 2 (two) months and 6 (six) days. The KERC shall give the appellant a reasonable opportunity of filing an additional affidavit placing the documents which they seek to place reliance upon in this regard, and thereafter pass a reasoned order in accordance with law, after giving the respondents also a reasonable opportunity of being heard.

Suffice it to make it clear that we have only noted the rival contentions on whether or not the Appellant is entitled for extension for this period, and have not expressed any conclusive opinion on the Appellant's entitlement in this regard. The Appellant shall place all relevant material, on which they seek to place reliance in support of their claim for extension for this period. It would be open to the second and third Respondents, if they so choose, to raise all such objections as are available to them in law with respect to the Appellant's claim for extension during this period.

VI.RESTITUTION:

As noted hereinabove, the appellant is entitled for extension for the periods 19.02.2014 till 04.04.2014, and from 12.07.2014 till 13.08.2014. Consequently, imposition of liquidated damages on them by the 2nd Respondent for these periods, pursuant to the impugned order passed by the KERC, is illegal. The appellant is entitled for refund of the liquidated damages imposed on them for the afore-said periods. The direction issued to the 2nd respondent to refund liquidated damages by way of the order now passed by us will not, however, compensate the loss suffered by the appellant, on their being forced to suffer deduction from their monthly bills in this regard, a few years earlier. The appellant is, therefore, entitled for restitution for the wrong caused to them by the orders of the KERC. The maxim *"actus curae neminem gravabit:* would apply.In other words, the appellant is entitled for restitution, with respect to the loss caused to them as a result of the impugned order, since "*the act of the court should prejudice no one*".

In law, the term "restitution" is used in three senses: (i) return or restoration of some specific thing to its rightful owner or status; (ii) compensation for benefits derived from a wrong done to another; and (iii) compensation or reparation for the loss caused to another. (*Black's Law Dictionary*, 7th Edn., p. 1315). (**South Eastern Coalfields Ltd. v. State of M.P., (2003) 8 SCC 648; Clearsky Solar (P) Ltd. v. Karnataka ERC, 2024 SCC OnLine APTEL 50; The Law of Contracts by John D. Calamari & Joseph M. Perillo).** The principle of restitution has been statutorily recognized in Section 144 of the Civil Procedure Code, 1908 which speaks not only of a decree being varied, reversed, set aside or modified but also

includes an order on par with a decree; and the scope of the provision is wide enough to include therein almost all kinds of variation, reversal, setting aside or modification of a decree or order. (**South Eastern Coalfields Ltd. v. State of M.P., (2003) 8 SCC 648; Clearsky Solar (P) Ltd. v. Karnataka ERC, 2024 SCC OnLine APTEL 50).** Restitution sometimes refers to the disgorging of something which has been taken, and at times to compensation for injury done. Often, the result under either meaning of the term would be the same. Unjust impoverishment, as well as unjust enrichment, is a ground for restitution (**South Eastern Coalfields Ltd. v. State of M.P, (2003) 8 SCC 648; Blacks Law Dictionary, 7th Edn., p. 1315; Kotak Mahindra Bank Limited v. Station House Officer, 2015 SCC OnLine Hyd 285; The Law of Contracts by John D. Calamari & Joseph M. Perillo).**

The concept of restitution is a common law principle, and it is a remedy against unjust enrichment or unjust benefit. The core of the concept lies in the conscience of the Court which prevents a party from retaining the benefit derived from another which it has received. The obligation to restitute lies on the person or the authority that has received unjust enrichment or unjust benefit. (**State of Gujarat v. Essar Oil Ltd., (2012) 3 SCC 522; Kotak Mahindra Bank Limited v. Station House Officer, 2015 SCC OnLine Hyd 285; Halsburys Laws of England, 4th Edn., Vol. 9, p. 434).** The quantum of restitution, depending on the facts and circumstances of a given case, may take into consideration not only what the party excluded would have made, but also what the party under obligation has or might reasonably have made. **(South Eastern Coalfields Ltd. v. State of M.P, (2003) 8 SCC 648; Kotak Mahindra**

Bank Limited v. Station House Officer, 2015 SCC OnLine Hyd 285). The principle of restitution should be fully applied in a pragmatic manner in order to do real and substantial justice. (**Ramrameshwari Devi v. Nirmala Devi, (2011) 8 SCC 249; Siddavarapu Anantha Sigvarama Krishna Reddy v. Penna Cement Industries Limited, 2018 SCC OnLine Hyd 186).**

The principles, culled out from the judgements, in **Indian Council for Enviro-Legal Action v. Union of India, (2011) 8 SCC 161; State of Gujarat v. Essar Oil Ltd., (2012) 3 SCC 522; Citibank N.A. v. Hiten P. Dalal, (2016) 1 SCC 411; NTPC Ltd. v. CERC, 2023 SCC OnLine APTEL 27; Sahakari Khand Udyog Mandal Ltd. v. CCE & Customs, (2005) 3 SCC 738; Maharashtra State Elecy. Dist. Co. Ltd Versus Maharashtra Electricity Regulatory Commission : (Judgement in Appeal No. 15 of 2007 dated 05.02.2008); Central Bank of India Vs. Ravindra &Ors. (2002) 1 SCC 367; CIT Vs. Shyam Lal Narula (AIR 1963 Punjab 411; PTC India Limited v. Gujarat Electricity Regulatory Commission: (Judgement in Appeal Nos. 47 and 62 of 2013 dated 30.06.2016); Sovintorg (India) Ltd. vs. State Bank of India, (1999) 6 SCC 406**; **Mahanadi Multipurpose Industries vs. State of Orissa &Anr. AIR 2002 Orissa, 150;** and **Lanco Amarkantak Power Limited v. Haryana Electricity Regulatory Commission and others:(Order in Appeal No. 308 of 2017 dated 22.05.2019)**, are summarised thus: (i) interest is a natural corollary of any delayed payment, it is the return or compensation for the use or retention by one person of a sum of money belonging to or owed to another, and it is a charge for the use or forbearance of money; (ii) interest is payable in equity even in the absence of any agreement or

custom to that effect, though subject to a contrary agreement; a person, deprived of the use of money to which he is legitimately entitled, has a right to be compensated for the deprivation; and Section 34 CPC, which is based upon justice, equity and good conscience, authorizes grant of appropriate interest in the facts and circumstances of each case; and (iii) money not paid in time, but paid subsequently at a much later stage after lapse of several years, loses its real money value to a great extent, and is effectively less money paid; therefore, for equity and restitution, payments made at a later stage, of the amount due in the past, must be compensated by way of appropriate rate of interest so as to compensate for the loss of money value, and to safeguard the interest of the receiving party.

In the present case, the Appellant has been unjustly deprived of the money which they would have retained, but for the unwarranted recovery of Liquidated damages from them by the 2nd Respondent, pursuant to the order of the KERC, during the period 19.02.2014 to 04.04.2014, and again from 12.07.2014 till 13.08.2014. By the time these amounts are refunded, the present value of the money, the appellant was hitherto forced to part with towards payment of liquidated damages, would be significantly lower. The only manner in which they can be suitably restituted, for the loss caused to them in this regard, is by way of payment of appropriate interest.

The next question which necessitates examination is whether the appellant is entitled for simple or compound interest, the rate of interest to which they should be paid as compensation for the loss suffered on account of illegal imposition of liquidated damages and, if they are held entitled for compound interest, the periodic rests at which such interest should be compounded, whether it be quarterly, half-yearly or yearly.

Let us now take note of certain judgements on this aspect. In **Uttar Haryana Bijli Vitran Nigam Ltd. v. Adani Power (Mundra) Ltd., (2023) 2 SCC 624,** the Supreme Court, alluding to Reserve Bank of India Circulars dated 14-8-2003 and 3-3-2016 that provided for a borrower to pay interest to the lender on compound interest basis, noted the submission urged on behalf of Respondent 1 Adani Power, that, having borrowed money from banks to install the FGD unit and having paid compound interest on the borrowed sum, it was only seeking restitution for the interest incurred by it and paid to the banks at the same rate; and this was not a case of unjust enrichment.

The Supreme Court held that the restitutionary principles encapsulated in Article 13.2 of the PPA would take effect for computing the impact of change in law; in the instant case, Respondent 1 Adani Power had to incur expenses to purchase the FGD unit and install it in view of the terms and conditions of the environment clearance given by the Ministry of Environment and Forests; it had to arrange finances by borrowing from banks; the interest rate framework followed by scheduled commercial banks and regulated by Reserve Bank of India mandated that interest shall be charged on all advances at monthly rests; and, in this view of the matter, Respondent 1 Adani Power was justified in stating that, if the banks had charged it interest on monthly rest basis for giving loans to purchase the FGD unit, any restitution would be incomplete, if it was not fully compensated for the interest paid by it to the banks on compounding basis.

Following its earlier judgement in **Uttar Haryana Bijli Vitran Nigam Ltd. v. Adani Power (Mundra) Ltd., (2023) 2 SCC 624**, the Supreme Court, in **GMR Warora Ltd. vs. CERC : (2023) 10 SCC 401**, held that

grant of compound interest as carrying cost. on occurrence of the change in law event, was based on sound logic; the idea behind granting interest on carrying cost was aimed at restituting a party that is affected by a change in law event, and to restore it to its original economic position as if such a change in law event had not taken place; in order to restore the party, which had suffered an economic disadvantage as a result of the change in law event, to its original economic position it was in but for such change in law, it was permissible to grant them compound interest on carrying cost; application of restitutionary principles and privity of contractual obligations between the parties as contained in the PPA, may, in view of the consistent position of law declared by the Supreme Court, justify payment of compound interest even if there was no specific provision in the PPA for payment of compound interest.

In **GMR Warora Ltd. vs. CERC : (2023) 10 SCC 401,** the Supreme Court affirmed the judgment of this Tribunal, in **Adani Power Maharashtra Limited v. MERC** (Order in Appeal No. 40 of 2022 dated 22.03.2022), wherein the rate prescribed for LPS in the relevant Article of the PPA (i.e., SBI PLR plus 2%) was directed to be considered for recovery of carrying cost; and it was held that, unless the rate of interest applicable for LPS is granted, the Appellant cannot be restored to the same economic position it was in prior to the occurrence of the change in law event.

In **MSEDCL vs. MERC : (2022) 4 SCC 657,** the Supreme Court observed that Late payment surcharge is only payable when payment against monthly bills is delayed, and not otherwise; the object of LPS was to enforce and/or encourage timely payment of charges by the procurer; in other words, LPS dissuaded the procurer from delaying payment of

charges; and LPS cannot be equated with carrying cost or actual cost incurred for the supply of power.

The law on restitution vests expansive power in the court, but such power should be exercised to ensure equity, fairness and justice for both the parties. The court should adopt a realistic and verifiable approach instead of resorting to a hypothetical and presumptive value. In the context of restitution, the court should keep under consideration not only the loss suffered by the party entitled to restitution but also the gain, if any, made by the other party who is obliged to make restitution. No unmerited injustice should be caused to any of the parties. (**CITI Bank vs. Hiten P. Dalal : (2016) 1 SCC 411).**

In the absence of any express stipulation in this regard, there can be no hard-and-fast rule as to how much interest should be granted as a measure of restitution, and it would depend on the facts and circumstances of each case. Awarding of compound interest without examining the relevant factors may, in certain cases, lead to unjust enrichment by the party seeking restitution in the name of disgorgement of benefits purportedly derived by the other party. (**Suneja Towers Pvt. Ltd. vs. Anita Merchant : (2023) 9 SCC 194; Clariant International Ltd. v. SEBI, (2004) 8 SCC 524;** and **Alok Shanker Pandey v. Union of India, (2007) 3 SCC 545**).

While the Appellant may be entitled to claim compound interest as a measure of restitution in case they had paid compound interest while borrowing money to augment the short fall in revenue, as a result of the unjust recovery of liquidated damages from their monthly bills, they may

not be entitled, under the guise of restitution, to unduly enrich themselves in the process. For instance, if they had borrowed money at simple interest, paying them compound interest as a measure of restitution would undoubtedly result in their unjust enrichment, at the cost of the 2nd Respondent, which cost would, eventually, be borne by the consumers whose interest the KERC is obligated to protect under Section 61(d) of the Electricity Act. It is only for the loss suffered by them as a result of their being forced to pay liquidated damages for the above-referred periods, can the appellant seek restitution, and not beyond.

The extent of loss they have suffered, as a result of belated refund of the amount of liquidated damages recovered from them by the 2nd Respondent earlier, is a question of fact which necessitates examination on the basis of the documentary evidence adduced in this regard. The onus is on the Appellant to produce documentary proof to show that they are entitled to be compensated by way of compound interest, and payment of simple interest will not suffice. We may not be understood to have held that the interest, which the appellant is entitled as a measure of restitution, must be determined with absolute precision or with mathematical exactitude. All that we have held is that the Appellant must adduce documentary evidence to reasonably establish the quantum of loss suffered by them which necessitates being compensated with the appropriate rate of interest, be it simple or compound.

We may also not be understood to have held that the Appellant is disentitled for compound interest. In case the Appellant is able to establish that they had paid compound interest to borrow money from the banks for meeting the financial gap which they were forced to face, as a result of the

illegal recovery of liquidated damages from their monthly bills, they would be entitled to be compensated for such amount by payment of compound interest.

As there is no material on record to show how the Appellant had suffered a loss, consequent on recovery of liquidated damages from their monthly bills, we deem it appropriate to remand the matter, requesting the KERC to determine the interest, and the applicable rate thereof, to which the appellant is entitled to as a measure of restitution for illegal recovery of liquidated damages, for the afore-said periods, from their monthly bills, after permitting them to adduce documentary evidence in this regard. Needless to state that the 2nd Respondent shall also be given a reasonable opportunity of rebutting the contentions urged on behalf of the Appellant.

While the Appellant is entitled for refund of the Liquidated Damages paid by them, and for restitution by way of carrying cost/interest for the period 19.02.2014 till 04.04.2014, and thereafter from 12.07.2014 till 13.08.2014, they are disentitled for refund of the Liquidated Damages recovered from them by the 2nd Respondent relating to the period 05.04.2014 till 03.05.2014. The Appellant's entitlement for refund of the Liquidated Damages, and for restitution thereon by way of carrying cost/interest, during the period 04.05.2014 to 11.07.2014, must await adjudication afresh by the KERC.

We make it clear that we have not expressed any opinion on whether the carrying cost which the Appellant may be entitled to as a measure of restitution should be on simple interest basis or on compound interest basis or, if the Commission holds that they are entitled to be restituted by

payment of carrying cost on compound interest basis, whether the periodic rest, at which the compound interest should be computed, should be quarterly, half yearly or yearly, for these are all matters which the KERC must examine in accordance with law. Suffice it to make it clear that, while the Appellant would undoubtedly be entitled for restitution for the loss suffered by them as a result of imposition of Liquidated Damages, even for the period for which they were justified in seeking extension, they are not entitled to unjustly enrich themselves in the process.

VII. CONCLUSION:

The Appellant shall be entitled for extension for the period 19.02.2014 till 04.04.2014, and from 12.07.2014 till 13.08.2014. They are disentitled for extension for the period from 05.04.2014 till 03.05.2014. The matter is remanded to the KERC to examine the Appellant's claim for extension for the period 04.05.2014 to 11.07.2014, after affording them a reasonable opportunity of being heard. Respondents 2 and 3 may, if they so choose, put forth their objections to the Appellant's claim. The refund shall be made within 30 days of receipt of a copy of this order.

Besides refund of liquidated damages already recovered from them for the period 19.02.2014 till 04.04.2014, and for the period 12.07.2014 till 13.08.2014, the Appellant shall also be entitled for restitution by way of carrying cost/interest on the aforesaid amount required to be refunded to them. The KERC shall examine whether the carrying cost/interest, to be paid to the appellant as a measure of restitution, should be simple/compound, the applicable rate of interest to which they are entitled to, and, if it is compound, the periodic rests at which such compound

interest should be granted, whether it should be quarterly, half yearly or yearly.

The KERC shall pass appropriate orders in this regard on the basis of the documentary evidence adduced on behalf of the Appellant to justify the loss they have suffered as a result of the order passed by the Commission, pursuant to which the second Respondent had recovered liquidated damages from them. Suffice it to make it clear that the Appellant is only entitled for restitution for the loss suffered by them as a result of the impugned order, and not beyond.

The impugned order is set aside, the matter is remanded to the KERC for its consideration afresh, and the Appeal is, accordingly, disposed of in terms of the afore-said observations. All the IAs therein also stand disposed of.

Pronounced in the open court on this ***29th day of April, 2025.***

(Seema Gupta)
Technical Member

(Justice Ramesh Ranganathan)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~