

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

**APPEAL No. 110 of 2019**

Dated : 16<sup>th</sup> May, 2025

Present: Hon'ble Mr. Sandesh Kumar Sharma, Technical Member  
Hon'ble Mr. Virender Bhat, Judicial Member

**In the matter of:**

**Tungabhadra Solar Parks Private Limited**  
23, Barakhamba Road  
New Delhi - 110001  
Appellant

...

*Versus*

1. **Karnataka Electricity Regulatory Commission**  
No. 16 C-1, Miller Tank Bed Area  
Vasanth Nagar, Bengaluru – 560052  
Through its Secretary
2. **Gulbarga Electricity Supply Company Limited**  
Station Road, Kalaburagi  
Karnataka – 585101  
Through its Managing Director  
Respondents

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Counsel for the Appellant(s) : Sidharth Silwal  
Vikas Dutta for App. 1

Counsel for the Respondent(s) : S. Sriranga Ld. Sr. Adv.  
Sumana Naganand  
Garima Jain  
Nidhi Gupta  
Tushar Kanti Mohindroo  
for Res. 2

## **J U D G M E N T**

### **PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER**

1. The Appellant is aggrieved by the Order dated 17<sup>th</sup> December 2018 passed by 1<sup>st</sup> Respondent – Karnataka Electricity Regulatory Commission (hereafter referred to as “the Commission”) thereby holding the Appellant not entitled to extension of time for achieving the conditions precedent and upholding the imposition of penalty upon the Appellant by the 2<sup>nd</sup> Respondent in terms of Article 4.3 of the PPA executed between the Appellant and the 2<sup>nd</sup> Respondent.

2. The Appellant was incorporated as a special purpose vehicle by the single business entity i.e Marikal Solar Parks Private Limited (now renamed as FS – India Devco Private Limited) for developing the 20 MW solar power project allotted at Chikkodi Taluk in Belagavi District, State of Karnataka. The Marikal Solar Power Parks Private Limited in short (“Marikal”) was one of the successful bidders in the bidding proceedings conducted by the Karnataka Renewal Energy Development Limited (KREDL) in accordance with the terms of the Request for Proposal (RFP) dated 20<sup>th</sup> November, 2015 for development of three units each of 20 MW capacity solar power project at three different locations viz., Chokkodi Taluk in Belagavi

District, Naragund Taluk in Gadag District and Basavana Bagewadi Taluk in Vijayapura District respectively. As noted above, the Marikal promoted and incorporated the Appellant as the special purpose vehicle for developing the 20 MW solar power project at Chokkodi Taluk in Belagavi District. In the same way, the Marikal promoted and incorporated two other SPVs for developing the remaining two solar power project. This appeal is concerned with the 20 MW capacity solar power project allotted in the Chikkodi Taluk for which Appellant was incorporated as SPV.

3. It may be noted here that by way of clarifications issued by KREDL, certain amendments were carried out in the draft PPA as explained in the following table :-

Old Clause	Amended Clause
Clause 21.1. “ <b>Effective Date</b> ” shall mean date of signing of this Agreement.	“ <i>Effective Date</i> ” shall mean date of <b><i>Approval of PPA by KERC.</i></b>
Clause 21.1. “ <b>Scheduled Commissioning Date</b> ” shall mean 18 months from the Effective Date.	“ <b>Scheduled Commissioning Date</b> ” shall mean <i>12 months from the Effective Date.</i>

4. It appears that the change in the effective date from the signing of the Power Purchase Agreement (PPA) to the date of approval of the PPA by the Commission was carried out so as to specifically exclude the period taken by the Commission to approve the PPA and

to ensure that the bidders/developers would not be under any undue pressure to achieve the Scheduled Commercial Operation Date (SCOD) in case the approval of PPA from the Commission takes time. Thus, time granted to achieve the SCOD would only commence when the PPA is approved by the Commission. As a necessary sequitur, the period allowed for commissioning of the project was reduced from 18 months to 12 months from the effective date i.e. the date of the approval of the PPA by the Commission.

5. KREDL issued a Letter of Award (LOA) and allotment letter dated 23<sup>rd</sup> March, 2016 in favour of Marikal which contained the direction to execute the PPA with the 2<sup>nd</sup> Respondent within 30 days from the date of receipt of LOA. However, the addendum dated 11.04.2016 was issued by the KREDL to the LOA thereby granting an extension of 60 days to the Appellant and other similarly placed bidders for the execution of the PPA from the date of receipt of the LOA subject to certain restrictions as stated in the addendum.

6. PPA was executed between the Appellant and the 2<sup>nd</sup> Respondent on 3<sup>rd</sup> June, 2016. As per Clause 3.1 of the PPA, the agreement came into effect from 25<sup>th</sup> May, 2016 and such date has to be referred to as the “Effective Date”.

7. The PPA was approved by the Commission on 7<sup>th</sup> October, 2016 with the direction to the parties to execute a supplementary PPA incorporating therein the corrections/modifications suggesting by the Commission. Accordingly, a supplementary PPA dated 30<sup>th</sup> December, 2016 was executed between the parties.

8. It is pertinent to note here that in view of the Office Memorandum (OM) dated 27<sup>th</sup> May, 2016 issued by KREDL, the project developers taking benefit of the time extension granted vide addendum dated 11<sup>th</sup> April, 2016 were required to achieve the COD within 12 months from 25<sup>th</sup> May, 2016 i.e. the “Effective Date” as mentioned in the PPA and not within 12 months from the date of approval of PPA.

9. Accordingly, the Appellant approached the Commission by way of Review Petition No. 7 of 2017 with the prayer that the above noted condition in OM dated 27<sup>th</sup> May, 2016 may be declared invalid and not binding on the Appellant. Additionally, a direction was also sought by the Appellant for amending the PPA to the effect that the effective date shall be “the date of approval of the PPA by the Commission” instead of 25<sup>th</sup> May, 2016 as mentioned in Article 3.1 of the PPA. The petition of the Appellant was allowed by the Commission vide order

dated 13<sup>th</sup> July, 2017. Accordingly, the parties executed 2<sup>nd</sup> supplementary PPA dated 10<sup>th</sup> August, 2017 incorporating “Effective Date” as 7<sup>th</sup> October, 2016.

10. The Appellant and the 2<sup>nd</sup> Respondent appear to be blaming each other for delay in execution of the 2<sup>nd</sup> supplementary PPA. According to the Appellant, the delay in handing over the approved PPA along with the supplementary PPA as well as the 2<sup>nd</sup> supplementary PPA on the part of the 2<sup>nd</sup> Respondent caused delay in achieving the different mile-stones due to which it was unable to receive the evacuation and connectivity approvals in time from KPTCL and accordingly was unable to initiate the land acquisition process. On the contrary, according to the 2<sup>nd</sup> Respondent it was the Appellant who failed to acquire land for the power project for about 8 months from the date of execution of PPA which led to change of project location on numerous occasions and consequently caused delay in achieving the conditions precedents by the Appellant. The 2<sup>nd</sup> Respondent also vide notice dated 27.07.2017, levied Liquidated Damages in the amount of Rs.12 lacs on the Appellant for delay in achieving the conditions precedent.

11. It is in these circumstances that the Appellant approached the Commission by way of Petition No. 145 of 2017 with the prayer for grant of extension of time of 125 days w.e.f. 7<sup>th</sup> October, 2016 for fulfilling its obligations and conditions precedent. Another prayer was made by the Appellant for setting aside of notice dated 27<sup>th</sup> July, 2017 issued by the 2<sup>nd</sup> Respondent demanding a sum of Rs.12 lakhs from the Appellant towards damages.

12. The Commission had framed following three issues for its consideration:-

(1) *Whether the Petitioner is entitled to the extension of time, for achieving the Conditions Precedent?*

(2) *Whether the imposition of penalty on the Petitioner, by the Respondent, is valid or not?*

(3) *What Order?*

13. All the three issues were decided by the Commission against the Appellant vide the impugned order dated 17<sup>th</sup> December, 2018. The Commission held the petitioner not entitled for extension of time for achieving the conditions precedent and upheld the imposition of damages upon it by the 2<sup>nd</sup> Respondent vide letter dated 27<sup>th</sup> July, 2017. On issue No. 3, while holding the Appellant not entitled to any

relief, the Commission placed reliance upon its previous order dated 23<sup>rd</sup> October, 2018 passed in O.P. No. 18 of 2018. We find it apposite to extract here the discussion of the Commission on issue No. 3 :-

“ 10. **ISSUE No.(3)** : What Order?

a. *During the pendency of these proceedings, the Petitioner has filed the Commissioning Certificate dated 06.10.2017, issued by the Executive Engineer (Ele.), TL & SS Division, KPTCL, Chikkodi, certifying that the Solar Power Project was commissioned on 06.10.2017, along with the Minutes of Meeting prepared at the time of commissioning of the Project. However, we note that, in the said Minutes of Meeting, it is noted that there was no injection of power from the Solar Power Project into the Grid, due to low Solar radiation because of cloudy and rainy weather conditions. 06.10.2017 was the last day for achieving the SCOD. In OP No.18/2018, decided by this Commission on 23.10.2018, this Commission has taken the view that, injection of power into the grid is essential, for the valid commissioning of the Project and in case there is no such injection of power into the grid, the date of commissioning should be considered as the date, on which the actual injection of power into the grid has taken place. The delay in commissioning of the Solar Power Project, would entail certain consequences, as provided under the PPA. The Respondent has*



*to consider this aspect of the case, in light of the findings given in OP No.18/2018, for claiming the available reliefs, for the delay in commissioning the Project.”*

14. It appears that in view of these observations of the Commission in the impugned order, the 2<sup>nd</sup> Respondent reduced the tariff of Appellant's power project from Rs.5.46/kwh to Rs.4.36/kwh on the ground that the Appellant did not Commission the project on the Scheduled Commissioning Date and accordingly has been paying the energy charges to the Appellant at reduced rate of Rs.4.36/kwh.

15. We have heard Learned Counsel for the Appellant and Learned Senior Counsel appearing for the 2<sup>nd</sup> Respondent. We have also perused the written submissions filed by the Learned Counsels.

16. During the course of the arguments in the appeal, it has been brought to our notice that the order dated 23<sup>rd</sup> October, 2018 passed by the Commission in O.P. No. 18 of 2018 has been set aside by this Tribunal vide judgement dated 8<sup>th</sup> May, 2019 in Appeal Nos. 332 & 333 of 2018. It was also brought to our notice that the said judgement of this Tribunal has been upheld by the Hon'ble Supreme Court vide judgement dated 3<sup>rd</sup> May, 2021 which is reported as Bangalore Electricity Supply Company Limited (BESCOM) Vs. E.S. Solar Power Private Limited and others (2021) 6 SCC 718.

17. Learned Counsel for the Appellant submitted that since the amount of Rs.12 lakhs imposed as damages by the 2<sup>nd</sup> Respondent from the Appellant vide notice dated 27<sup>th</sup> July, 2017 has already been adjusted by the 2<sup>nd</sup> Respondent from the payment of the invoices raised by the Appellant for the month of December, 2018. The Appellant is willing to and hereby foregoes its claim on this aspect and the only dispute which survives between the parties would be with regards to the refund of Rs.29,37,88,815/- to the Appellant as on 30<sup>th</sup> November 2014 together with such other shortfall amount due from 2<sup>nd</sup> Respondent on account of reduction in tariff payable to the Appellant from Rs.5.46/kwh to Rs.4.36/kwh in view of the above noted judgement of this Tribunal and the Hon'ble Supreme Court.

18. It is also argued on behalf of the Appellant that the observations made by the Commission on issue No. 3 in paragraph No. 10 of the impugned order were totally uncalled for and in doing so, the Commission has not only mis-directed itself but has also over-reached its jurisdiction in deciding the issues raised before it. It is pointed out that the 2<sup>nd</sup> Respondent had never alleged before the Commission that the Appellant's project did not achieve commissioning on 6<sup>th</sup> October, 2017 and had even accepted the

commissioning certificate dated 6<sup>th</sup> October, 2017 without any demur. It is also argued that these observations have been made by the Commission without hearing the parties on the issue of delay in commissioning of the project as well as reduction in tariff and, therefore, cannot be sustained.

19. We feel no hesitation in concurring with these submissions made on behalf of the Appellant. The issues which had cropped up for adjudication of the Commission have already been noted in paragraph No. 12 herein above. The issue with regards to the delay in commissioning of the project by the Appellant or reduction in tariff for the power project of the Appellant was neither raised before the Commission nor argued by the parties. Therefore, it is amply clear that the observation of the Commission in paragraph No. 10 of the impugned order on issue No. 3 are not only beyond the pleadings of the parties but also absolutely uncalled for. The same have been rendered without hearing the parties merely on the basis of previous order dated 23<sup>rd</sup> October, 2018 passed by the Commission in O.P. No. 18 of 2018.

20. Further, these observations of the Commission have lost their credence as the order dated 23<sup>rd</sup> October, 2018 passed by the

Commission in O.P. No. 18 of 2018 has been set aside by this Tribunal in judgement dated 8<sup>th</sup> May, 2019, Appeal Nos. 332 & 333 of 2018. The relevant portion of the judgement is quoted herein below:-

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

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

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

*has to be 17.10.2017. Therefore, the 12 months have to be calculated from 18.10.2016 to 17.10.2017.*

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

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

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

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

21. Even the appeal filed by Bangalore Electricity Supply Company Limited (1<sup>st</sup> Respondent in the Appeal before this Tribunal) against the said judgement dated 8<sup>th</sup> May, 2019 has been dismissed by the

Hon'ble Supreme Court vide judgement dated 3<sup>rd</sup> May, 2021 reported as Bangalore Electricity Supply Co. Ltd. Vs. E.S. Solar Power (P) Ltd. & ors. (2021) 6 SCC 718. The relevant portion of the judgement of the Hon'ble Supreme Court is extracted herein below:-

*“Reduction of applicable tariff is permissible under Article 12.2 of the PPA only when there is delay in commissioning of the Project beyond the Scheduled Commissioning Date. As discussed above, there is no dispute that the Scheduled Commissioning date shall be 12 months from the effective date. There is no quarrel between the parties that the effective date is 17.10.2016. The interpretation clause contains three provisions which are 1.2.1 (k), 1.2.1 (l) and 1.2.1 (m). According to 1.2.1 (k), any reference to a month shall mean a reference to a Calendar month as per the Gregorian Calendar. 1.2.1 (l) provides that references to any date or period shall mean and include such date, period as may be extended pursuant to the agreement. As per Article 1.2.1 (m), any reference to any period commencing from a specified date and until the specified day shall include both such day or dates. The other crucial provision which has to be taken note of is the definition of the expression ‘Month’ in Article 21.1 of the agreement. Month has been defined to mean a period of 30 days and excluding (the date of the event) where applicable, else a Calendar month. We are not concerned with 1.2.1 (l), in this case as there is no question of any extension of any period pursuant to the agreement. 1.2.1 (k) indicates that any reference to a month shall mean reference to a Calendar month. Reverting to the definition of “month”, it is clear that a month shall mean either 30 days where applicable or a Calendar month. In this case, there is no dispute that 12 Calendar months have to be taken into account for determining the Scheduled Commissioning Date. The crucial expression in the definition of “month” is “excluding the date of the event”. If the date of*

*the event i.e. 17.10.2016 is excluded, the Scheduled Commissioning Date would be 17.10.2017. We do not agree with the conclusion of the Commission that the definition of month is with reference only to one month and not more which is a wrong reading of the provision. The Commission applied 1.2.1 (m) which refers to a period commencing from a specified date to a specified day for the purpose of including the date of the event. In our view, the Commission has committed an error in applying 1.2.1 (m) when the provision that is applicable is 1.2.1 (k) read with the definition of month in Article 21.1. There is a specific mention of “twelve months” in the definition of ‘SCOD’ and Article 1.2.1 (k) categorically provides that any reference to a “month” shall be a calendar month. Applicability of Article 1.2.1 (k) excludes the operation of Article 1.2.1 (m) to the facts of this case.*

22. Hence, the impugned observations of the Commission contained in paragraph No. 10 of the impugned order on issue No. 3 cannot be sustained as those are not only erroneous but also totally uncalled for in the wake of the dispute brought before the Commission, and hence are hereby set aside.

23. The Appeal is hereby disposed of with liberty to the Appellant to approach the Commission again for determination of tariff for its power project at Rs.5.46/kwh as well as for recovery of shortfall in tariff from the 2<sup>nd</sup> Respondent on account of reduction in tariff by the 2<sup>nd</sup> Respondent from Rs.5.36/kwh to Rs.4.36/kwh. The Commission shall dispose off the petition in the light of the judgement dated

08/05/2019 of this Tribunal in Appeal Nos. 332 & 333 of 2018 as affirmed by the Hon'ble Supreme Court vide judgement dated 03.05.2021 in Bangalore Electricity Supply Co. Ltd. Vs. E.S. Solar Power (P) Ltd. & ors. (2021) 6 SCC 718, within four months from the date of this judgement.

Pronounced in the open court on this 16<sup>th</sup> day of May, 2025.

(Virender Bhat)  
Judicial Member

(Sandesh Kumar Sharma)  
Technical Member (Electricity)

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*REPORTABLE / ~~NON-REPORTABLE~~*  
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