IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 319 of 2019 &
IA NOs. 1564 OF 2019, 1566 of 2019 & 1915 of 2019

Dated: 6th March, 2020

Present: Hon'ble Mr. Ravindra Kumar Verma, Technical Member

Hon'ble Mr. Justice R.K. Gauba, Judicial Member

In the matter of:

M/s. Sudhakara Infratech Private Limited
Metro Residency, 304
Rajbhavan Road, Hyderabad - 500 082,
Telangana
Through its Authorised Representative **... Appellant**

Versus

1. **Uttar Pradesh Electricity Regulatory Commission,**
   Through its Secretary,
   Vidyut Niyamak Bhawan,
   Vibhuti Khand, Gomti Nagar,
   Lucknow- 226010,
   Uttar Pradesh.

2. **Uttar Pradesh Power Corporation Limited,**
   Through Its Managing Director,
   Shakti Bhawan,
   14, Ashok Marg,
   Lucknow- 226001,
   Uttar Pradesh.

3. **Uttar Pradesh New & Renewable Energy Development Agency**,
   Through its Director,
   Vibhuti Khand, Gomti Nagar,
   Lucknow- 226001,
   Uttar Pradesh.

4. **Uttar Pradesh Power Transmission Corporation Limited,**
Through its Managing Director,
7th Floor, Shakti Bhawan,
14, Ashok Marg,
Lucknow- 226001,
Uttar Pradesh.

5. **Dakshinanchal Vidyut Vitran Nigam Limited,**
Through its Managing Director,
Urja Bhavan,
NH-2 (Agra-Delhi Bypass Road), Sikandara,
Agra – 282002
Uttar Pradesh **... Respondents**

Counsel for the Appellant(s)	:	Mr. Sourav Roy Mr. Ruchir Ranjan Rai
Counsel for the Respondent(s)	:	Mr. C.K. Rai Mr. Sachin Dubey for R-1 Mr. Aashish Gupta Mr. Varun Byreddy Mr. Arjun Pall for R-2 Mr. Puneet Chandra for R-4 Mr. Pradeep Misra Mr. Manoj Kr. Sharma for R-5

J U D G M E N T

PER HON'BLE MR. JUSTICE R.K. GAUBA, JUDICIAL MEMBER

1. Against the backdrop of validity of certain acts of the third Respondent (Procurer) encashing the Performance Bank Guarantee and terminating the Power Purchase Agreement (PPA) being questioned by the Appellant (Developer), the issues of the propriety of the approach of

the first Respondent – Uttar Pradesh Electricity Regulatory Commission (hereinafter referred to variously as *"UPERC"* or *"State Commission"* or "*Commission"*) – to the process of adjudication and the general expectation of its neutrality particularly at the stage of an appellate scrutiny of its decision by this Tribunal have come up for consideration in this appeal.

2. Sometime in the year 2013, the Government of Uttar Pradesh had framed Solar Policy for the State of Uttar Pradesh with the objective to promote the Renewable Energy Sector. The third Respondent i.e. Uttar Pradesh New & Renewable Energy Development Agency (hereinafter also referred to as *"UPNEDA"*) had been setup in 1983 as a registered society under the Department of Additional Sources of Energy of the Government of Uttar Pradesh, it being tasked with the responsibility of formulation and implementation of the programmes for development of non-conventional sources of energy including solar energy. In pursuance of the objectives of Solar Policy of 2013, UPNEDA had issued a Request for Proposal ("*RFP"*) on 31.01.2015 for procurement of 215 MW power grid connected Solar PV Power Projects through Tariff Based Competitive Bidding Process, the intent being to select Solar PV Power Project Developers on behalf of the second Respondent i.e. Uttar Pradesh Power Corporation Limited ("*UPPCL"*). After the process of

bidding, the selectees were to enter into Power Purchase Agreements ("*PPAs")* with UPPCL.

3. The Appellant is a company incorporated under the provisions of Companies Act, 1956. It is a Generating Company ("*GENCO*") within the meaning of Section 2(28) of Electricity Act, 2003. It participated in the competitive bidding process as aforesaid and, after meeting the eligibility requirement, was selected among others by UPNEDA, for construction, operation, maintenance and supply of power from Solar PV Power Project having installed capacity of 5 MW, the project awarded to it to come up at Haiderpur, Tehsil Kalpi, District Jalaun, Uttar Pradesh which falls in the Bundelkhand region of the State of Uttar Pradesh. It may be mentioned here that, by reasons of its location, the power project to be developed by the Appellant would eventually have connectivity with the fifth Respondent i.e. Dakshinanchal Vidyut Vitran Nigam Limited ("*DVVNL" or "Discom")*, it being engaged in the business of distribution of electricity within the area in question.

4. The bid of the Appellant for supply of solar power at Rs. 7.860/kWh for a period of 12 years had been accepted. In the follow-up on the RFP and the bid process, the Appellant entered into a Power Purchase Agreement (PPA) with UPPCL on 02.12.2015, the PPA

mentioning the above said tariff rate, this being followed by execution, on 15.10.2016, of a connectivity agreement between the Appellant (Developer) and fourth Respondent Uttar Pradesh Power Transmission Corporation Limited ("*UPPTCL*" or "*Transco*"), it being the obligation thereunder of the latter (UPPTCL) to construct transmission lines for connecting the Solar Power Project ("*SPP")* which was to be developed by the Appellant to the nearest 132/33kv substation and also to construct evacuation system at the sub-station.

5. The PPA dated 02.12.2015 specified the Scheduled Commercial Operation Date ("*SCOD")* as under:

> "SCOD *shall be a date, 13 months from the Effective Date, when the Solar PV Project* is *required* to *be commissioned as per the terms and conditions of the PPA"*

6. The SCOD concededly was intended to be computed taking the date of the agreement (02.12.2015) as the *"effective date"* and, thus, the SCOD would be 02.01.2017.

7. There is no dispute as to the fact that in terms of the Solar Policy of the State, while taking the aid and assistance from private developers for adding to the capacity of renewable energy for certain regions of the State of Uttar Pradesh had taken upon itself the responsibility to bear the

expenditure for construction of transmission lines and sub-stations of Transco/ Discom. This condition was incorporated in the PPA dated 02.12.2015 thus:-

> *"4.3.7. For the projects coming in Bundelkhand region and Purvanchal region (Mandals - Azamgarh, Basti, Gorakhpur, Varanasi, Devipatan and Faizabad) of the state of Uttar Pradesh, expenditure on the construction of transmission line and substation at the Transco/Discom end will be borne by Government of Uttar Pradesh as mentioned in the Solar Policy of Uttar Pradesh 2013."*
>
> *[Emphasis supplied]*

8. The Connectivity Agreement (or Transmission Agreement) dated 15.10.2016 entered into by UPPTCL – State Transmission Utility ("*STU*") with the Appellant was essentially pursuant to the above stipulation in the PPA, the obligation of the STU having been spelt out as under:-

> *"1.1(d) The party of the First part shall be required by SIPL to construct interconnection facilities, at the point of connectivity, located in sub-station/switchyard of the party of the First part. The party of the First part shall inform the cost for construction of said interconnection facilities, on turnkey basis, together with terms and conditions to SIPL who shall pay the amount within one (1) month to the party of the First part. As agreed by the parties, ownership of such interconnection facilities at the point of connectivity shall be deemed to have been vested in the party of the First Part by SIPL. The said interconnection facilities shall be operated and maintained by the party of the First part and its operation and maintenance cost shall be included in the transmission charges in the ARR to be filed by the party of the First part."*

9. In terms of the requirement of Section 63 of the Electricity Act, 2003, the project being developed through bidding process, the tariff

quoted by the developer in the bid, and accepted by the procurer had to be "*adopted*" by the State Commission subject to it reaching satisfaction in its respect in accordance with law. The matter (Petition No. 1110/2016) came up before the State Commission against this backdrop. Thirteen developers, including the Appellant herein, were respondents before the Commission. It was brought out that there had been delay in completion of various projects under the said scheme, six of them including that of the Appellant, having not been commissioned. It appears UPPCL intended to terminate the PPAs of the developers who were in default, petitions having been preferred by the parties in question against pre-termination notices, this including a petition of the Appellant, which were pending at that stage.

10. By proceedings held on 12.01.2018, the State Commission took up the matter not only for adoption of the tariff discovered through bidding process but also the petitions challenging the pre-termination notices, including the petition (No. 1225/2017) of the Appellant herein. It may also be added, for benefit of later discussion, that one other such petition (No. 1171/2017) pertained to another developer viz M/s Pinnacle Air Pvt. Ltd., New Delhi.

11. The State Commission passed an Interim Order dated 23.01.2018 taking note, *inter-alia*, of the submissions of the Appellant expressing inclination "*to complete the project*" requiring "*three months time*" after *"adoption"* of tariff, referring to pre-termination notice having been issued ignoring the "*progress made in the project*" and the discussions held wherein it (the developer) had agreed to reduce the tariff to Rs. 7.02/unit.

12. For reasons into correctness of which we need not enter, the State Commission was of the view that the tariff of Rs. 5.21/unit for a period of twelve years would be appropriate for the six developers whose projects were delayed. By Order dated 23.01.2018, it set down the matter for public hearing before finally adopting the tariff under the Electricity Act, 2003. The following directions in the Order dated 23.01.2018 have, however, become the bone of contention between the parties and, thus, need to be quoted verbatim:

> *"Those bidders who agree to accept the adopted tariff after the public hearing will be given 5 months time to complete the project and the procurers will also be under an obligation to complete the evacuation system within that time. If any of these bidders is not able to commission the project within the 5 months time the procurer will be at liberty to terminate the PPA and encash the performance bank guarantee."*
>
> *[Emphasis supplied]*

13. The State Commission passed the Final Order under Section 63 of the Electricity Act, 2003, also dealing with the issue of pre-termination notices, on 12.02.2018, the operative part, which is subject matter of the dispute, reading thus:-

> *"9. In view of above, the Commission adopts the tariff of Rs. 5.07 per unit for a period of 12 years and for remaining 13 years APPC with a ceiling of Rs. 5.07 will be applicable as per the terms of the PPA already signed. The PPAs of these six bidders shall be amended to give effect to the adopted tariff. Those bidders who are not willing to accept this adopted tariff shall be allowed to quit from the PPA and their bank guarantees would be returned.*
>
> *The Commission in its earlier order had allowed five months' time for Commissioning of the projects but this will be subject to completion of evacuation system by the procurers otherwise the Commissioning date will automatically be extended without any penalty."*
>
> *[Emphasis supplied]*

14. Both parties to PPA i.e. Appellant (Developer) and third Respondent (UPPCL or the Procurer) agreed to proceed further and, thus, modified the PPA by entering into Amended Power Purchase Agreement (Amended PPA) on 22.03.2018. Referring to the order passed by the State Commission as above, the relevant portion thereof reads thus:-

> *"1- The SPP shall be entitled to receive a tariff of Rs. 5.07 per unit instead of Rs.7.680/kWh of PPA dated 02-12-2015 and hence clause 9.1.1 is being amended as below:*
>
> *"The SPP shall be entitled to receive a Tariff of Rs. 5.07 per Kwh for the energy supplied Point during a Contract Year pertaining to the Contracted Capacity for the initial 12 years and for remaining 13 years APPC with ceiling of Rs. 5.07 will be*

applicable as per the terms of the PPA already signed on 02.12.2015"

2- The time period for fulfilment of conditions subsequent under Article 3.1 of PPA as well as COD of the plant shall now be 5 months but this will be subject to completion of evacuation system by the procurers otherwise the Commissioning date will automatically be extended without any penalty as per UPERC order dated 12-02-2018.

3- The validity of Bank Guarantee earlier submitted by the seller shall be proportionately extended for the same amount with extended period and the grace period for six months.

All other terms and conditions of PPA dated 02-12-2015 shall remain unaltered followed by this amendment as per UPERC order dated 12-02-2018.

This Amended PPA is subject to submission of Bank Guarantee within stipulated period."

[Emphasis supplied]

15. There is no dispute between the parties as to the fact that the period of five months for commissioning of the project, as envisaged in the Final Order dated 12.02.2018 of the State Commission, would have to be construed to commence from the date of execution of the Amended PPA on 22.03.2018 and thus, the new SCOD agreed to by both parties would be 21.08.2018.

16. Admittedly, the project was not completed by the Appellant within the said period – there not being much progress beyond the procurement of land with its equity funds (to the tune of Rs.821.40 lakhs) – and thus, the new SCOD (21.08.2018) was also missed.

17. Reference has been made by the Appellant to certain difficulties in arranging the finance for the project which contributed to delay on its part. It appears that it had initially entered into a loan arrangement with Power Finance Corporation ("*PFC*") the sanction whereof had lapsed. It was constrained to enter into a fresh loan agreement now with Indian Renewable Energy Development Agency ("*IREDA*"), such sanction for a term loan of Rs. 1916.60 lakhs having been accorded on 24.05.2018, two months after execution of Amended PPA. The IREDA, however, also expressed reservations for disbursement of the loan pointing out by its e-mail communication dated 10.10.2018 to the Appellant that it had failed to commission the project within the periods stipulated by Amended PPA dated 22.03.2018.

18. The dispute between the parties started with letter dated 02.11.2018 from UPNEDA to the Appellant pointing out that the project had not been completed even till "29.10.2018", there being a delay of 70 days. Referring in this context to the consequences of non-fulfilment of conditions subsequent, as stipulated in Clause 3.2 of the PPA reading thus:-

> *"3.2* ***Consequences of non-fulfilment of conditions subsequent***
>
> *3.2.1 In case of failure to achieve Commissioning/Schedule Delivery Date, provision of RfP/PPA as mentioned below shall apply:*

A. ***Upto 10 MW Solar PV Projects***

b. *Delay above One (1) month:*

For not achieving Commissioning/Schedule Delivery Date or not achieving the timelines mentioned above UPNEDA/ Procurer(s) shall encash the Bank Guarantee (BG) in the following manner:

i. *Delay up to two (2) months - 20% of the total Performance bank guarantee.*

ii *Delay of more than two (2) months and up to three (3) months - 40% of the total Performance Bank Guarantee in addition to BG in clause-i above."*

19. In the above communication, reference was made to a verification made by the Project Officer on 27.10.2018, the default leading to encashment of two Performance Bank Guarantees to the total extent of Rs. 90 lakh. By communication dated 05.11.2018 UPNEDA called upon the concerned banker (State Bank of India, Hyderabad) to remit the amount of money to the extent of which the Performance Bank Guarantees had been invoked.

20. On 12.11.2018, the Appellant took exception to the invocation of the Bank Guarantee by addressing a letter to UPNEDA seeking withdrawal of the above mentioned communications, seeking COD extension till 30.12.2018, pointing out the difficulties vis-a-vis finance arrangement with IREDA, also stating thus:-

"06. Further we are continuously observing the status of evacuation arrangement at the substation and are presuming to get it ready by the end December 2018 and are also In plan of

completion of the project by that time have not applied for any COD extension for which we deeply regret ourselves and request your good office to kindly oblige our fault in this matter and excuse us for the same."

[Emphasis supplied]

21. The Appellant approached the Civil Court by Arbitration O.P. No. 2440 of 2018 for interim relief under Section 9 of Arbitration and Conciliation Act, 1996 *vis-a-vis* the invocation of the Bank Guarantees. It was granted interim stay Order *ex-parte* on 19.11.2018. But, it appears that before the order could be served the bank had remitted the amount to the extent the Bank Guarantees had been encashed.

22. On 22.11.2018, the Appellant addressed another communication to UPNEDA seeking its assistance in obtaining COD extension so that the project could be completed at the earliest pointing out the extent to which it had made financial commitments in the project and the progress made, terming the punitive action initiated as arbitrary, unilateral, unjustified and against the terms of PPA, with specific reference to the Amended PPA and Order of the State Commission dated 12.02.2018, also stating that "*the evacuation system is not ready as on date and hence the scheduled COD is yet to be known"*.

23. Since nothing was forthcoming from the side of the respondents, the Appellant took the dispute to the State Commission by filing Petition

No. 1386 of 2018 under Section 86(1)(f) of the Electricity Act, 2003, impleading UPPCL and UPNEDA as first and second opposite party in addition to the bank (third opposite party) praying for following reliefs:

> *"(a) Issue necessary order or direction to Opposite Party No. 2 to remit amount of Rs.90.00 Lacs (Rs. 60.00 Lacs + Rs. 30.00 Lacs) to Opposite Party No. 3 for providing Performance Bank Guarantee of Rs. 90.00 Lacs on behalf of the Petitioner and;*
>
> *(b) Issue necessary order or direction to Opposite Party No.2 to declare that the delay, if any in comnencen1ent of supply from the proposed solar plant is on account of delay in completion of evacuation system obligated upon Opposite Party No.1 and is a Procurers Event of Default and*
>
> *(c) Issue necessary order to Opposite Party No. 2 not to invoke any other Performance Bank Guarantee provided by the Petitioner till the date of SCOD subject to Petitioner extending the date of Performance Bank Guarantee before expiry of its date of validity and;*
>
> *(d) order Opposite Party No.2 to immediately construct complete evacuation system in terms of Connection Agreement dated 15.10.2016 entered into between the Petitioner and UPPTCL and; or*
>
> *(e) pass any or such further orders as deemed fit and proper by this learned Commission in the facts and circumstances of the case."*

24. The petition of the Appellant was dismissed by Order dated 12.06.2019 of the State Commission, which is impugned by the appeal at hand.

25. It may be mentioned here that after the impugned decision had been rendered by the State Commission dated 12.06.2019, the second

Respondent issued an Order on 16.07.2019 terminating the PPA. The Appellant by the present appeal seeks relief not only qua the invocation of the Bank Guarantees and the impugned order of the State Commission but also respecting the termination of PPA.

26. It is revealed by the material on record that in the proceedings before the State Commission, the contesting respondents (UPPCL and UPNEDA) took the position that the transmission line had been completed on 31.08.2018, prior to the inspection of the project site on 27.10.2018 showing lack of progress on the part of the Appellant. Along with the affidavit submitted on behalf of the UPNEDA some material inclusive of Inspection Report dated 28.10.2018 and certain photographs were submitted. Besides this, reliance was also placed on certification by the contractor regarding completion of the transmission line.

27. It appears that, while the matter was pending before the State Commission, some interim direction had been issued for extension of the Bank Guarantees. The Appellant did not take any steps in this regard.

28. The impugned order reveals that after hearing on the petition of the Appellant on 11.12.2018, notices had been issued to the respondents for 18.12.2018. Some hearing took place on certain dates.

The matter was to be heard thereafter on 28.05.2019 but, on that day, a request was made for adjournment since the arguing counsel for the Appellant was not available. The request was opposed by UPPCL and UPNEDA with submission that it had been "*proved beyond doubt*" that evacuation system had been constructed while the Appellant had not carried out any work on the ground. Taking note of these submissions, the petition was dismissed on the basis of the following reasoning:-

> *"11. The Commission on the basis of available documents on record and arguments placed by both the parties is of the view that the Petitioner has failed to carry out the work on the site and has not extended even the remaining BGs despite orders of this Commission. Their arguments of non availability of Evacuation System cannot be accepted because the respondents have submitted documentary evidences which prove beyond doubt that the evacuation system is already in place. Therefore the Petitioner cannot be granted any relief."*
>
> *[Emphasis supplied]*

29. We may observe at this stage that in earlier part of the impugned order (para 8), the State Commission has mentioned submission by the respondents of letter dated 31.08.2018 from the contractor certifying completion of the work of transmission line, this being supported by completion certificate of Bays. From the scrutiny of the material which has been placed before us, we find that the certificate dated 31.08.2018 of the contractor was shown the light of day only on 21.12.2018 when the Executive Engineer issued a certificate to that effect on its basis.

30. In sharp contrast, we may note at this very stage that even while the dispute was pending adjudication before the State Commission, the Appellant had continued to take steps for completion of the project with participation even of the representatives of the respondent UPPTCL and DUVNL as late as 22.02.2019 when inspection of certain equipment was carried out in the premises of a supplier in District Alwar, Rajasthan, copy of the minutes of which exercise have been submitted with additional documents presented by IA No. 47 of 2020.

31. In earlier part of this judgment, we have referred to delayed project of another developer named *Pinnacle* whose participation was also at stake in the proceedings before the State Commission leading to Final Tariff Order being passed on 12.02.2018. At the hearing on the appeal, it was brought out that the said other developer (*Pinnacle)* had also suffered more or less similar fate and had approached the State Commission with prayer for extension of time for completion, invoking its jurisdiction by Petition No. 1380 of 2018 under Section 86(1)(b) & (f) of the Electricity Act, 2003. The petition of *Pinnacle* was decided by the State Commission by Order dated 05.03.2019. From copy of the Order passed in the said other matter, we observe that the contention of *Pinnacle* for seeking extension of time was also founded in its averment with regard to obligation of the respondent Transco to put up an

evacuation system. The only objection raised by the respondent Transco in the case of the other entity was for tariff to be further reduced as per the prevailing market rate. The State Commission, however, granted the relief to *Pinnacle* observing thus:-

> *"6. Keeping in view the status of the project and the willingness of the Petitioner the Commission agreed to allow the petitioner to put up the power plant by 15th April 2019 subject to imposition of liquidated damages as per the PPA. The Commission also directed UPPCL to provide connectivity to the Petitioner from 33KV Kanduni substation on payment of cost of Bay within next 15 days from the date of this order. The Petitioner shall also deposit cost of laying the 132KV transmission line to UPPCL in next 15 days. The Commission made it clear that no further extension will be granted. The 33KV connectivity shall continue till the 132 KV transmission system is in place."*
>
> *[Emphasis supplied]*

32. During the course of hearing, reliance was placed by both sides on certain material, inclusive of photographs of the site, showing progress or lack of progress on the part of the Appellant on one hand and the Transco on the other concerning their respective obligations. It appears that some such material had also been placed by the Appellant before the State Commission for its consideration.

33. Having perused the available material with the assistance of the learned counsel on both sides, we are of the considered view that the State Commission has failed to discharge its obligations as a statutory adjudicatory authority in a fair or just manner. The request for

adjournment on 28.05.2019 may be assumed to be unjustified. But then, the discretion to disallow adjournment does not mean the Commission possessed unbridled power, jurisdiction or authority in law to pass a wholly unreasoned or unreasonable order, particularly one which smacks of inconsistency.

34. The Commission has failed to hold a proper inquiry into the questions of fact which arose in the dispute adjudicated by it. While the developer (Appellant) was not disputing that the project had not been completed, it had placed before the Commission certain reasons which were projected to be beyond its control. The respondents, we note, had made no serious comment *vis-a-vis* the difficulties suffered by the Appellant in securing disbursement of loan first from PFC and then from IREDA. The impugned order is silent on such aspect. The Appellant had approached the Commission with an assertion that evacuation system and transmission line had not been readied and this was sought to be refuted by certification which came to the fore on 04.12.2018, long after the dispute had come up, and also long after the Bank Guarantees had been encashed. The authenticity of such proof was not scrutinized. It is unacceptable that such material could be taken as proof "*beyond doubt"* only because the counsel for the opposite party could not turn up at the hearing. A formal inquiry into the questions of fact was called for,

particularly in the face of the fact that in the communications exchanged leading to the encashment of the Bank Guarantees the respondents had not even claimed that they had carried out the development of transmission line and evacuation system in terms of their obligation under the contract.

35. A lot of argument was raised as to the meaning and import of the operative parts of the Orders dated 23.01.2018 and 12.02.2018 of the State Commission in terms of which the six delayed projects were given extension. As noted earlier, the extension of five months' time for completion of the project was assured by the State Commission to all the willing developers (in default) by Order dated 23.01.2018 clarifying at the same time that it will be the obligation of the procurers as well "*to complete the evacuation system <u>within that time</u>*", Clearly, the time for making progress, in terms of Order dated 23.01.2018, would run parallel for both sides. The confusion, however, seems to have arisen because in the Final Order dated 12.02.2018, the State Commission while granting five months' time (as assured earlier) for commissioning of the projects qualified it by using the expression that such obligation "*will be <u>subject</u> to completion of evacuation system by the procurers".*

36. It is the argument of the Appellant that use of the expression "*subject to"* renders the Amended PPA a contingent contract. It is the submission of the Appellant that the developer could not be found to be in default till the procurer had carried out its obligation (by completion of evacuation system) and notified it formally to the former. If these arguments were to be accepted, it would mean the developer had been granted five months' time for completion of the project after the procurer had developed the evacuation system. We cannot accept this argument because such uncertainty in the matter of extension of time could never have been intended.

37. We do find the language employed by the State Commission in Final Order dated 23.01.2018 to be loose and vague creating some confusion. But, read alongside the previous Order dated 23.01.2018, there can be no doubt as to the fact that both sides were obliged to make parallel progress, one not having the luxury of inaction or of sitting idle letting the other party commit financially without a definite period of completion being in sight. But then, given the fact that the final order also spoke of automatic extension "*without any penalty"* being the consequence flowing from non-completion of evacuation system, the procurer could not be conceived to be vested with the authority to hold the other side in default without first notifying the discharge of the

obligation on its part. This is a situation wherein the invocation of the Bank Guarantees and subsequent termination of the PPA by communication dated 16.07.2019 must be held to be bad in law.

38. The Appellant had approached the State Commission feeling aggrieved by premature encashment of Bank Guarantees. It had made endeavour to demonstrate before the State Commission that it was facing financial difficulties on account of non-disbursement of loan that had been sanctioned. No doubt, the Appellant failed to replenish the Bank Guarantees during the pendency of the matter before the State Commission. But, it was unfair to deny relief to it on such account given the financial distress that was suffered it having already applied substantially its equity funds to the project

39. The prime submission of the Appellant is that, by virtue of the directions in the final order dated 12.02.2018 under Section 63 of the Electricity Act, 2003, in absence of proof that evacuation system had not been completed or made functional, the time for completion of project by the developer stood "*automatically extended*", it being made clear by the said very order that such automatic extension for the developer would be "*without any penalty*". Though, while claiming extension without incurring any penalty, it is also contended that fair dispensation

demanded that possibility of imposition of liquidated damages in terms of the contract be examined. It is pointed out that such was the recourse adopted in the case of *Pinnacle*. In view of the course that we choose to adopt in the dispute at hand, we do not wish to express any opinion as to whether the Appellant was entitled for extension with or without any penalty being imposed.

40. The Electricity Regulatory Commission has been conferred with various responsibilities that include adjudication upon the disputes between licensees and generation companies in terms of Section 86(1)(f) of Electricity Act, 2003. When it sits as an adjudicatory authority over a dispute brought before it, it is expected to act responsibly and render its best judgment dispassionately in accordance with law following the principles of natural justice. An effective hearing, a just and equitable approach and consistency in the decision making are hallmark of fair justice. We record disappointment over the manner in which the State Commission has embarked upon its adjudicatory function in the matter at hand. Not only effective opportunity was denied to the Appellant but also conclusions were reached on untested material without a proper inquiry.

41. The contentions of the Appellant that without formal inspection note being proved in terms of the relevant Regulations, a conclusion could not have been reached about the completion of the evacuation system went un-headed.

42. The decision in the case of similarly placed other developer (*Pinnacle)* stands in sharp contrast to the approach of the same Commission in the case of the Appellant herein. It will not be inappropriate for us to hold that the decision in the case at hand suffers from vice of whimsical approach and arbitrariness. The impugned order declining any relief to the Appellant, thus, must be set aside.

43. The Appellant had approached the State Commission at a stage when the Bank Guarantees had been invoked adding to its financial burden. This had set the stage for termination of PPA which event occurred after the State Commission had rendered its decision. While we find the impugned order of the State Commission bad in law, it will be incomplete justice not to give any relief vis-a-vis termination of the PPA. That being a consequence flowing directly from the same set of facts as had led to the impugned act of encashment of the Bank Guarantees, suitable orders need to be passed in such respect as well.

44. In above context, we may quote, with advantage, the following observations of Supreme Court in *Pasupuleti Venkateswarlu v. The Motor & General Traders,* reported as *(1975) 1 SCC 770*:-

> *"We feel the submissions devoid of substance. First about the jurisdiction and propriety vis-a-vis circumstances which come into being subsequent to the commencement of the proceedings. It is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding. Equally clear is the principle that procedure is the handmaid and not the mistress of the judicial process. If a fact, arising after the lis has come to court and has a fundamental impact on the right to relief for the manner of moulding it, is brought diligently to the notice of the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy. Equity justifies bending the rules of procedure, where no specific provision or fair play is violated, with a view to promote substantial justice--subject, of course, to the absence of other disentitling (actors or just circumstances. Nor can we contemplate any limitation on this power to take note of updated facts to confine it to the trial Court. If the litigation pends, the power exists, absent other special circumstances repelling resort to that course in law or justice. Rulings on this point are legion, even as situations for applications of this equitable rule are myriad. We affirm the proposition that for making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the court can, and in many cases must, take cautious cognizance of events and developments subsequent to the institution of the proceeding provided the rules of fairness to both sides are scrupulously obeyed."*
>
> *[Emphasis supplied]*

45. In *Kedar Nath Agrawal (Dead) and Ors. V. Dhanraj Devi (Dead) by Lrs. And Ors., (2004) 8 SCC 76*, the legal position, as Appellant, is reiterated thus:-

> *"16. In our opinion, by not taking into account the subsequent event, the High Court has committed an error of law and also an error of jurisdiction. In our judgment, the law is well settled on the*

point, and it is this: the basic rule is that the rights of the parties should be determined on the basis of the date of institution of the suit or proceeding and the suit/action should be tried at all stages on the cause of action as it existed at the commencement of the suit/action. This, however, does not mean that events happening after institution of a suit/proceeding, cannot be considered at all. It is the power and duty of the court to consider changed circumstances. A court of law may take into account subsequent events inter alia in the following circumstances:

(i) The relief claimed originally has by reason of subsequent change of circumstances become inappropriate; or

(ii) It is necessary to take notice of subsequent events in order to shorten litigation; or

(iii) It is necessary to do so in order to do complete justice between the parties.

[Re: Shikharchand Jain vs Digamber Jain Praband Karini Sabha & Ors, (1974) 1 SCC 675 : (1974) 3 SCR 101], SCCp.681, para 10.)"

[Emphasis supplied]

46. This judgment would have reached conclusion at this stage but for the way the learned counsel for the State Commission was at the lead at the hearing on appeal attempting to defend the impugned order, the counsel for the other respondents taking a backseat, this giving rise to questions about the role of the State Commission before the appellate forum.

47. As said before, Electricity Regulatory Commissions are established under the Electricity Act, 2003 to discharge the functions specified in law which include the responsibility to *"adjudicate upon the*

disputes" -- as conferred upon the State Commission by Section 86(1)(f) and upon the Central Commission by Section 79(1)(f). In carrying out the adjudicatory function, the Electricity Regulatory Commission (State or Central) acts as a neutral statutory authority. It must, however, be borne in mind that the Commissions also discharge certain other functions, including that of framing Regulations, the power in which regard is conferred by Sections 178 and 180 of the Electricity Act, 2003. It is well settled that in discharging the adjudicatory function, the Commission is bound not only by the statutory provisions but also by the Regulations framed by it which are in the nature of subordinate legislation and, thus, having the force of law. Aside from the binding effect of the Regulations on the Commission, in adjudicating upon a dispute, the Commission is expected to take a non-partisan approach. If there is a dispute on facts, it must hold a proper inquiry inclusive of, if so required, by calling for evidence. The evidence presented by both the sides has to be subjected to such judicial scrutiny as any other adjudicatory forum would undertake. There can be no preferential acceptance of the evidence of one side over that of the other. The appreciation of evidence requires total neutrality.

48. It must also be said that after the Electricity Regulatory Commission has rendered its decision in the adjudicatory process over

the dispute, it is expected to be dispassionate about it. Assuming it has discharged its responsibility to the best of its fair judgment, the matter in so far as it concerns the Commission should end there. Its judgment would speak for itself. There would be no need for it to be expected to "*defend"* its decision subject, of course, to some just exceptions.

49. The decision of the Electricity Regulatory Commission is subject to remedy of appeal before this Tribunal under Section 111 of the Electricity Act, 2003. The Appeal before this Tribunal, as in any other litigative process, is continuation of the proceedings before the forum whose decision is under challenge by such appeal. As is well accepted, based on sound principles of fair justice, it not being a matter of personal stake for the forum of first instance, ordinarily it has no role to play to put in "*contest"* before the appellate forum. The only obligation of the forum of first instance is to make the record of its proceedings available to the appellate authority as and when required or called for. The exceptions to this general rule could include a case wherein personal bias or misconduct is attributed to the member(s) of the adjudicatory forum whose decision is being assailed. In such situation, going by the fundamental principles of natural justice, an occasion may arise – rarely so – for the appellate forum to call for a response so that no one is condemned unheard.

50. One another exception would be cases where the tariff order passed by the Regulatory Commission is challenged by the party on whose petition such decision was rendered, there being no identifiable objector. In such cases, generally speaking, the prudence check undertaken by the Commission is questioned necessitating an opportunity to be given for the approach taken to be defended by it.

51. Some guidance can be taken from more or less similar scheme of the Competition Act, 1998 which was enacted with the objective of limiting the role of market power that might result from substantial concentration in a particular industry. The said law aims to ensure fair competition in India by prohibiting trade practices with cause appreciable adverse effect on the competition in market within India. For such purposes, it establishes a quasi-judicial body known as Competition Commission of India ("*Competition Commission"*). The Competition Commission is conferred with wide powers including of investigation, adjudication and enforcement. Its orders are subject to the remedy of appeal before a Tribunal constituted under Section 53-A.

52. Questions as to whether the Competition Commission is a necessary party at the stage of appeal before the aforesaid appellate Tribunal had come up, alongside other issues, in the matter leading to

judgment of Hon'ble Supreme Court reported as *Competition Commission of India v Steel Authority of India Limited and Another [(2010) 10 SCC 744*]. The Supreme Court took note of the settled principles that a "*necessary party"* is one without whom no order can be made effectively and a "*proper party*" is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceedings. It noted that the Competition Commission is also entitled in law to commence proceedings "*suo motu"*. In context of proceedings initiated suo motu, it was held that the Competition Commission is a "*necessary party*" in appeal. For other cases, the Hon'ble Supreme Court observed that the Competition Commission would be a proper party since that would help in complete, effective and expeditious disposal, its participation being useful because of its status of being "*an expert body".*

53. The status of the Electricity Regulatory Commission is comparable to that of the Competition Commission. Both are bodies comprising of Members aided and assisted by persons who hold the requisite expertise in the matters related to power industry. But, this does not mean that the Electricity Regulatory Commission becomes a necessary party in every appeal brought to this Tribunal. Whether or not it is necessary party would regulate and control its obligation to respond or

participate at the stage of appeal. Ideally, in cases where it is a proper or *proforma party* or, to put it more clearly, in cases where dispute seeking resolution is between two other parties, it should not waste its resources (and that includes financial resources) by joining the litigative process unless and except in situations where in this Tribunal specifically seeks its assistance.

54. Experience has shown that in the appeals brought before this Tribunal, the Electricity Regulatory Commissions (Central or State) are impleaded as party respondents as a matter of routine practice. Similar is the array of parties in the appeal at hand. No doubt, the Electricity Regulatory Commission is conceived by the law to be "*a body corporate"* to be known by the name specified. The Commissions are declared to be entities which may, by the said name, "*sue or be sued"* [Section 76(3) and Section 82(2) of Electricity Act, 2003]. But, it has to be remembered that possibility of the Commission suing or being sued is remote; this arising may be in the context of contracts in which it may enter for the purposes of its effective functioning.

55. Our attention was also drawn to the provision contained in Section 124 of Electricity Act, 2003 which confers the right on the party aggrieved (Appellant) against the order of the Commission to take

assistance of a legal practitioner and also on the Commission to "*authorise one or more legal practitioner of any of its officers to act as presenting officer"* to "*present the case*" on its behalf with respect to any appeal before this Tribunal. In our view, the right conferred on the Commission to engage a legal practitioner giving him authority to appear before this Tribunal in an appeal is general in nature. It ought not be converted into a matter of routine practice permitting its intervention in the appellate scrutiny of each case. In the above context, we may note that this Tribunal does not merely sit in appeal over such decisions of the Tribunal as are challenged by appeals. We are also conferred with jurisdiction that is akin to that of a revisional forum in terms of Section 111(6) of Electricity Act, 2003. We may examine the "*legality, propriety or correctness"* of any order of the Commission (and of the adjudicatory officer). We are also vested with the power of general superintendence in terms of Section 121 that enables us to "*issue such orders, instructions or directions"* as may be deemed fit to secure "*performance"* of the "*statutory functions*" by the Electricity Regulatory Commission.

56. We are of the view that in an appeal bringing challenge before this Tribunal under Section 111 of the Electricity Act, 2003 against orders passed in its adjudicatory function by an Electricity Regulatory Commission, such Commission need not be impleaded as party

respondent, not the least so as to be shown in the array of such respondents as are expected to put in contest. If the contentions urged in the appeal, or petition, presented to this Tribunal, the propriety of the procedure adopted by the State Commission in a matter brought to it is questioned or if any personal bias or misconduct is attributed to any Member of the Commission having seisin of the dispute, it undoubtedly would be essential to implead the State Commission as a party respondent. Save for such exceptional situations, it is inappropriate to implead the Electricity Regulatory Commission as a contesting party to the appeal – also for the reason that by such impleadment the Commission is put to unnecessary strain of engaging a legal representative to appear and defend its order. We reiterate that, an order passed by the adjudicatory authority – judicial or quasi-judicial – ordinarily defends itself and does not need submissions of the adjudicatory authority to be heard in such regard unless a case for exceptions in the nature mentioned earlier is made out. We may also add that, by being impleaded as a party respondent to the appeal assailing a decision rendered by the Commission in a dispute between two parties, it is prompted to present its side through a legal practitioner to unfairly cross the bounds of circumspection of neutrality.

57. For the foregoing reasons, we direct as under:-

(a) In appeals presented to this Tribunal under Section 111 of the Electricity Act, 2003, the Electricity Regulatory Commission whose order is sought to be assailed shall not ordinarily be impleaded as a contesting party respondent, only such parties as were the disputants before the Commission to be so shown in the fray.

(b) If propriety of the procedure adopted by the Commission is not challenged and the issues raised concern the merits of the contentions of the opposite disputant, the Commission may be shown as a respondent but be qualified by use of the expression "*proforma party*".

(c) In case the tariff order or an order passed *suo motu* by the Commission is sought to be assailed, there being no other disputant or identifiable objector, this creating to a situation where only Electricity Regulatory Commission can be shown on the other side, the Commission may be impleaded as the solitary party respondent that is to be called upon to respond.

(d) If personal bias or misconduct is attributed to the Member(s) of the Electricity Regulatory Commission, it will be incumbent on the Appellant to implead the Regulatory

Commission as a respondent which is expected to come up and respond.

(e) In all such matters where the Electricity Regulatory Commission is shown as a *proforma party* respondent, there shall be no obligation on the part of the Commission to appear in response to the notice on the appeal, its responsibility being restricted to making the relevant record available if and when called for.

58. The above directions would regulate the appeals instituted before this Tribunal in future. It must, however, be added, for removal of doubts, if any, that the above directions are not to be misconstrued as inhibiting the Electricity Regulatory Commission from participation at the stage of appeal. Whether or not there is a need for participation is a matter that would have to be considered and a call taken thereupon by the concerned Commission having regard to the facts and circumstances of each case. We only wish to under-score the fact that in cases where the Commission was deciding a dispute between two parties, it being a neutral adjudicatory body should feel dispassionate about it and avoid wasting its resources or running the risk of being perceived as partisan.

59. For the reasons and conclusions set out earlier in context of the appeal at hand, the impugned order dated 12.06.2019 of the State Commission is set aside. The encashment of performance bank guarantees was improper, unjust and unfair. The termination of PPA dated 16.07.2019 by the respondent is also held to be unfair and unjust and, therefore, treated as *non-est*.

60. The request of the Appellant for extension of time for completion of the project is remitted to the State Commission for adjudication in accordance with law. For this, the State Commission shall hold an appropriate inquiry so as to ascertain and determine the progress made by the respondent Transco vis-a-vis the transmission line and evacuation system and also the reasons explained by the Appellant for lack of progress on its part granting such reasonable time as may be found to be just and proper for completion of the project such that the resources applied so far by both sides do not get wasted. The respondent UPNEDA shall forthwith refund the amount realized by it from the banker of the Appellant by encashment of the performance bank guarantees with interest calculated at 9% per annum from the date of having received credit till refund. Upon receipt of such refund, the Appellant shall, in turn, be obliged to get the bank guarantees

replenished and revalidated, keeping the same alive in terms of its obligation under the contract which continues to subsist.

61. The parties are directed to appear before the State Commission for further proceedings in pursuance of the above directions on 15.04.2020,

62. The appeal and IAs, if any pending, are disposed of in above terms.

PRONOUNCED IN THE OPEN COURT ON THIS 6TH DAY OF MARCH, 2020.

(Justice R.K. Gauba)
Judicial Member

(Ravindra Kumar Verma)
Technical Member

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