

**APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)**

**APPEAL NO. 245 OF 2019 &
IA NO. 788 OF 2019**

Dated : 12th August, 2021

**Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. Ravindra Kumar Verma, Technical Member (Electricity)**

IN THE MATTER OF:

**Sirwar Renewable Energy Private Limited
H.No.2-2-20/L/7,
Flat No.203, Golden Towers-2, DD
Colony, Baghamberpet,
Hyderabad - 500 013**

.....Appellant

Versus

- 1. Karnataka Electricity Regulatory Commission
Through its Chairman,
9/2, 06th& 07thFloor,
Mahalaxmi Chambers,
M.G. Road, Bangaluru – 560001**
- 2. The Managing Director,
Karnataka Power Transmission
Corporation Limited, Transmission Zone,
Sedam Road,
Kalaburgai – 585105.**
- 3. The Managing Director -
Gulbarga Electricity Supply Company Limited
Station Main Road, Kalaburagi – 585102**
- 4. The Additional Chief
Secretary to Government of**

Karnataka,
Energy Department,
Vikasa Soudha,
Dr. Ambedkar Veedhi,
Bangaluru-560001

.....**Respondents**

Counsel on record of the Appellant(s) : Mr. Basava Prabhu Patil, Sr. Adv.
Mr Ujjal Banerjee
Mr Akash Khurana

Counsel on record of the Respondent(s) : Mr. S. Sriranga Subbanna
Mr. Balaji Srinivasan
Ms. Medha M Puranik
Mr. Pallavi Sen Gupta
Ms. Aishwarya Choudhary
Ms. Garima Jain
Ms. Deepthi P.R.
Ms. Sumana Naganand **for Res 2**

Mr. S. Sriranga Subbanna
Ms. Sumana Naganand
Mr. Balaji Srinivasan
Ms. Medha M Puranik
Ms. Pallavi Sen Gupta
Ms. Aishwarya Choidhary
Mr. Avimukt Dar
Mr. Gaurav Dani
Mr. Mohit Chadha
Mr. Vaishnavi Rao
Mr. Kshitiz Rao
Ms. Swati Mittal
Mr. Kshitij Parasha
Ms. Prevna Sharma **for Res 3**

Mr. Joseph Aristotle S. **for Res 4**

J U D G M E N T

PER HON'BLE MRS. MANJULA CHELLUR, CHAIRPERSON

1. The present appeal has been filed by the Appellant against the Impugned Order dated 04.09.2018 passed by Karnataka Electricity Regulatory Commission (hereinafter referred to as "**Commission**") in OP No. 128/ 2017 (hereinafter referred to as "**Impugned Order**").

FACTS OF THE CASE:-

2. The Karnataka Renewal Energy Development Limited invited applications for the development of renewable energy in Karnataka, under the individual landowner's farmer scheme for the purpose of setting up of solar power projects, as prescribed by the Government of Karnataka in its Notification dated 26.08.2014, wherein the terms and conditions of setting up of solar power project is subjected to farmers only.

3. Dr. Vijay Shankar, a land owning farmer also submitted his application online, for grant of license to establish a power plant with a generating capacity of 2 MWs.

4. It is submitted that Karnataka Renewal Energy Development Limited is a nodal agency of the Government of Karnataka for facilitating the development of renewable energy in the State of Karnataka. Scheme

mandated that an applicant should be owning a minimum extent of 5 acres for each mega watt applied for and also mandated that an individual farmer would not be entitled for more than 3 Mega Watts.

5. The said Dr. Vijay Shankar was selected on the basis of the first-come- first serve. The KREDL, which is a nodal agency after evaluation of the Applications received, decided to accept the Application for allotment of Solar Project for 2 MW. Accordingly, it issued a letter dated 16.03.2015 to set up 2 MW capacity Solar Power Project to be commissioned at Sy.No.184 of Sirwar Village, Manvi Taluk in Raichur District, subject to certain terms and conditions.

6. Dr. Vijay Shankar executed a Power Purchase Agreement dated 01.07.2015 (hereinafter referred to as "**PPA**") with the 3rd Respondent. This PPA was approved by this Commission vide its letter dated 31.08.2015. As per the said PPA, the effective date was defined as the date of signing of the PPA. The Scheduled Commissioning Date (SCOD) was defined as 18 months from 01.07.2015 (the Effective Date). Thus, the project proponent was supposed to commission the project by 31.12.2016.

Delay in getting approvals from the Government Authorities

I. Delay in getting the Land Conversion Approval

7. It is submitted that the Government of Karnataka through its Department of Revenue issued a circular bearing RD69LGP 2015 dated 01.12.2015, notifying the list of documents to be obtained by the Deputy Commissioner from the project proponents in order to grant the deemed conversion of the agricultural lands for the purposes of installation of solar power project.

8. It is pertinent to note that as per the said circular provided that certain documents were needed to be collected from the Applicants before permission for deemed conversion could be granted. The said documents *inter alia* included:-

- (a) Permission/Sanction letter from the Government for establishing Electricity generation Projects
- (b) Permission letter for having purchased Agricultural land under Section 109 of the Karnataka Land Reforms Act, 1961
- (c) Confirmation from the Authorities that the land did not fall under the PTCL (Prevention of Transfer of Certain Lands) and Land Acquisition Act
- (d) Permission Letter/Sanction from the Government/CREDL for production of Solar Energy
- (e) RTC in the name of Applicant

- (f) Confirmation from the Authorities that there was no violation of Land Grant rules.

9. It is submitted that until this circular was issued by the State Government there was no clarity on the policy and legislative framework on the installation of the Solar Power Projects.

10. Until this circular was issued by the State Government in December 2015, there was no clarity on the policy and legislative framework on the installation of the Solar Power Projects. The Appellant, in order to comply with the terms and conditions stipulated under Article 2 of the said PPA, had applied for obtaining of the above necessary consents, clearances, approvals and permits which were necessary for the execution and commission of the project and getting the land conversion approval.

11. The Applicant was diligent in getting the above approvals and approached the authorities for land conversion on 05.05.2016. However, the same was received only after a delay of more than 2 months i.e. 13.07.2016.

II. Delay in Execution and Approval of the Supplemental Power Purchase Agreement

12. The SPV was formed under the name 'SIRWAR RENEWABLE ENERGY PRIVATE LIMITED' the Appellant herein. Consequently, a Supplemental Agreement dated 05.07.2016 (hereinafter referred to as 'Supplemental PPA'), modifying the original PPA, came to be executed, wherein the said Dr. Vijay Shankar was on Board as Director, as mandated in the PPA. This supplemental PPA was approved by this Commission vide its letter dated 29.08.2016.

13. The Appellant made the request to incorporate the SPV by the name of Sirwar Renewable Energy Pvt. Ltd as early as 07.10.2015, however, there was no response from the Government Authorities,. In fact, the guidelines for executing a supplemental PPA were given only on 21.03.2016 ie., eight months after signing the original PPA dated 01.07.2015. The Supplemental PPA was thereafter signed on 15.07.2016 and KERC approval was again received belatedly on 28.08.2016 after a delay of one month and fifteen days.

14. In light of the aforementioned, it is submitted that despite of the fact that the Government was well aware of the fact that the farmers were not in a position to establish a power plant requiring an investment of about Rs. 15,00,00,000/- (Rupees Fifteen Crores Only) without forming SPV, the Government issued aforementioned guidelines after a considerable delay of

about 8 (Eight) months and further caused a delay of about 1 (One) months and 15 (Fifteen) days in approving the same.

15. The Bank Loan for Sirwar Renewable Energy Pvt. Ltd. was sanctioned for Rs. 100,000,000/- (Ten Crores rupees only) on 05.03.2016, but bankers refused any loan disbursement unless the supplementary PPA was approved by the KERC.

III. Delay in getting necessary approvals from KPTCL and Delay in getting the Evacuation Approval

16. SPD approached the KPTCL Gulbarga for grant of Evacuation Scheme Approval for its Power Project on 18.03.2016. However, there was delay on the part of KPTCL in giving the said approval. The tentative Evacuation Scheme approval was given on 18.06.2016 while the Regular Evacuation Approval was granted only on 06.09.2016. As such, there has been a delay of at least 3 months, if not 6 months on the part of authorities in granting the approval.

17. In fact the KPTCL-Respondent No. 2 was also aware about the position of the SPD and vide its Circular dated 26.09.2016, noted that Evacuation Approvals for applications of 1MW to 5 MW were getting inordinately delayed. It further directed that the regular evacuation scheme

to be communicated to the SPD immediately after the acceptance of Tentative Evacuation Scheme by the SPD.

Delay in getting the Approval for Single Line Diagram

18. It is submitted that vide Order dated 06.09.2016, Karnataka Power Transmission Corporation Limited (KPTCL), the 2nd Respondent herein, granted Regular Evacuation Scheme Approval to the Appellant's Project subject to certain terms and conditions, which included construction of 11 KV Overhead Line for a distance of 2 KM from the Appellant's Generating Station to 110/11-KV Sub-Station at Sirwar with Mysore Electrical Industries Limited (MEIL) make Switchgear (800A) Terminal Bay (BP Structure) along with required match Control Equipment as per the specification to be approved by KPTCL.

19. It is submitted that unless and until the Single Line Diagram and layout approval plan for the work of construction of Terminal Bay at the Sub-Station for Evacuation of the proposal of 2 MW power generated by the Appellant is accorded by KPTCL, the Appellant, technically could not procure the equipment from MEIL, the sole approved Vendor of KPTCL. The Appellant vigorously followed up with KPTCL after applying on 25.10.2016 to get the approval of Single Line Diagram and lay out plan.

However, the same did not come forth within reasonable time and KPTCL accorded approval to the Single Line Diagram only on 02.12.2016 i.e. after delay of almost One and Half Months.

Delay in Sparing the Land for the Construction of the Bay

20. The Appellant submitted all relevant papers/drawings/documents to KPTCL for construction of 11KV Terminal Line from the Generation Plant to the Sirwar Substation at 1101/ 11 KV S/Sirwar on 27.10.2016. However, KPTCL only in the Minutes of Meeting dated 26.11.2016 decided to spare available land for the construction of 11KV TB along with metering arrangement at 110/11KV Sirawar sub-station to the Appellant i.e. after a delay of one month. Further, the said- decision was communicated and necessary approval was given to the Appellant only on 09.12.2016. Hence there was a delay of more than One and half months which could be solely attributable to KPTCL.

IV. Delay in getting the Equipment from MEIL

21. The Appellant placed a Purchase Order on 27.09.2016 on MEIL, the sole approved Vendor of KPTCL for procurement of materials. Upon receipt of the Purchase Order from the Appellant, MEIL issued an acceptance letter

dated 18.10.2016 agreeing to supply the material. However, despite MEIL accepting the Purchase Order, it did not provide the equipment in time.

22. It is pertinent to note that had the MEIL equipment been provided to the Appellant in time, it would have been easily in a position to commission the Project by 31.12.2016 i.e the time period prescribed as per the PPA. In fact the Respondent No. 2 - KPTCL vide its internal communication dated 27.12.2016 to the Superintending Engineer (Elec), Transmission (W & M) Circle observed as under:-

"... Most of the works related to construction of the 11kv MCVCB for evacuation of the proposed 2MW solar power from Sri Dr Vijay Shankar, Director, M/s. Sirwar Renewable Energy Pvt. Ltd., to 110 kv Sis KPTCL Sirwar has been completed, only 11 KV MCVCB panel has to be supplied from M/s. MEI. Due to non-supply of the 11 KV MCVCB of MEI make in time to the site, the work has been stopped... "

23. In fact, the Appellant's bona fide approach is amply clear from the fact that after waiting for 3 months from the issuance of the Purchase order on 27.09.2016, when the MEIL was not in a position to deliver the MCVCB (and the Appellant could not get the equipment from any other place as per the terms), the Appellant itself wrote to KPTCL on 28.12.2016 asking it to provide a spare MCVCB from any of its sub stations so as to enable the Appellant to commission and synchronise the project at the earliest.

24. The KPTCL- Respondent No. 2 thereafter only on 31.12.2016 accorded approval for the diversion of the spare 11kv MCVCB feeder panel available at 110KV APMC Raichur to the Appellant.

25. It is imperative to mention herein that the breaker (for which the purchase order was placed on 27.09.2016) was provided to the Appellant only on 10.07.2017 i.e. nearly after a delay of almost 9 months.

Commissioning of Project

26. The Appellant made a detailed representation containing the project progress and difficulties and Force Majeure events encountered by the Appellant vide its letter dated 07.12.2016. In the said representation, various issues such as (a) delay in allotting permission towards town planning NOC, NA Conversion , bay allotment , estimation & construction approval and Irrigation Department etc. by various Government Departments delay due to self-funding route was indicated.

27. On 28.12.2016, the Appellant made another reminder representation requesting the 2nd Respondent to grant an extension as well as synchronization permission to the Appellant enabling the commission of the project at the earliest. The Appellant inter alia pointed out to the fact that MEI was not in a position to deliver MCVCB for another 2 months due to

manufacturing capacity constraints and therefore requested to extend the Scheduled Commissioning Date up to 31.01.2017.

28. Based on the then existing project status, and various representations submitted by the Appellant and the recommendation made by a committee constituted by the 2nd Respondent to look into the aspect of the time extension to be granted to the Projects, the 2nd Respondent issued a official memorandum dated 19.01.2017 directing, inter alia, as follows:

C) There. will be no change in effective date of the PPA dated 01.07.2015.

D) For the PPA dated 01.07.2015. GESCOM will follow the KERC order for application of tariff as per Art. 2.5.7 and Art. 5 for the delay in COD.

Synchronization detail report shall be submitted to Corporate office without fail.

29. Further to this, the 3rd Respondent issued a Commissioning Certificate certifying the commissioning of the Appellant's project on 21.01.2017 and also certified the commissioning of the Appellant's project by a separate commissioning certificate dated 07.02.2017. Thus the Appellant's project has achieved the commercial operation date on

21.01.2017 which is well within the scheduled commissioning date assigned by the Respondent.

30. It is pertinent to mention herein that GESCOM also wrote a Letter dated 16.05.2017 to Additional Chief Secretary, Energy Department, Government of Karnataka wherein it recorded, in brief entire factum and reasons for which the farmers were not able to commission - the project within the scheduled commissioning date as per PPA and concluded at the end that it was justified and incumbent to accord an approval of extension of scheduled commissioning date by a period of 6 (Six) months.

31. In the meantime, the Appellant received letter dated 28.04.2017 from the 3rd Respondent, requesting the Appellant to file a petition before this Commission seeking extension of time for achieving commercial operation date.

32. It is submitted that the post commissioning, the Appellant has been generating the energy and periodical invoices also have been raised on the 3rd Respondent every month. The 3rd Respondent has not released any payment so far. In fact, due to such action by the 3rd Respondent, the Appellant has been put to hardship, suffering and financial loss. The Appellant has availed huge sum as loan from the Bank and has now been turned as defaulter.

33. In compliance with the above said direction from the Respondent No. 3 vide its letter dated 28.04.2017, the Appellant approached the Commission on 28.07.2017 by way of filing the petition bearing No. OP No. 128/2017.

34. However, vide Order dated 04.09.2018, the Commission dismissed the petition and held that the Appellant was not entitled to any of the aforementioned reliefs sought by the Appellant. The Commission further held that the Appellant was entitled to a tariff of Rs. 6.51/- (Rupees Six and Paisa Fifty One Only) per unit, per varied tariff as applicable on the date of commissioning of the Appellant's plant, as fixed by the Commission in the Order dated 30.07.2015 for the term of the PPA, as per Article 5.1 of the PPA. The Commission further held that the Appellant was also liable to pay damages including liquidated damages as provided under Article 2.2 and 2.5.7 of the said PPA.

35. Mr. Basava Prabhu Patil, Learned Sr. Counsel for the Appellant has filed the following Written Submissions for our consideration:

**DELAY IN GETTING NECESSARY APPROVALS FROM
AUTHORITIES FALLS UNDER FORCE MAJEURE CLAUSE
8.3(a)(vi) OF THE PPA DATED 01.07.2015**

36. The Commission has completely failed to consider that the cause for delay in implementing the project falls under the Force Majeure Clause of the PPA i.e. under Clause 8.3(vi).

37. It is pertinent to mention herein that the Appellant, despite complying with all legal requirements to obtain, renew or maintain required licenses or Legal Approvals, was unable to execute and commission the project because there was a delay of about 3 months on part of various Government Authorities including Respondents in grant of the Spare MCVCB as the MEI was not in a position even after 3 months from receipt of the Purchase Order from the Appellant to deliver the same. Further there was a delay of more than 2 months in approving the Single Line Diagram and a delay of more than 1½ months for sparing the land in the substation. Further there was a delay of about 6 months in grant of Regular Evacuation Approval and about 2 months in conversion of land from agriculture to non-agriculture purpose as demonstrated by the Appellant in the facts above. Further there was also a delay of 9½ months on the part of the Commission in approving the supplementary PPA without which the Bankers refused to release the loan amount. It is submitted that because delay on part of various Government Authorities including the Respondent Authorities, it became impossible for the Appellant to execute and commission the project within the specified timeframe as specified under PPA. The Appellant tried

its level best to minimize the delay and therefore was able to commission and synchronise the project on 21.01.2017 i.e. only 21 days beyond the prescribed time period in the PPA.

38. As per Force Majeure, there occurred a delay of about 15-16 months (which has been explained here-in-below) on part of various government authorities in issuing necessary approvals and the same should be excluded from the total time period of 18 months for execution or commission of the project as stipulated of the Power Purchase Agreement.

39. Further, the Opposite Party to the PPA-GESCOM-Respondent No.3 has already approved the commissioning of the project on 21.01.2017 and also didn't object to the prayer made by the Appellant before the KERC as observed in Impugned Order dated 04.09.2018

40. Various Government Authorities including the Additional Chief Secretary, Energy Department have also repeatedly written to the KERC to consider approving the extension of commercial operation date, however, the KERC has failed to consider the said requests.

41. The Appellant has also obtained all permissions, sanctions and approvals under the PPA. Hence, the Appellant is entitled to the tariff as per the PPA.

42. Despite the said delay of about 15-16 months, the Appellant tried its level best to minimize the delay and therefore, was able to commission and synchronise the project on 21.01.2017 i.e. only 21 days beyond the prescribed time period in the said PPA.

43. For the aforementioned reasons, the Appellant is entitled for the extension of Scheduled Commissioning Date as per Clause 2.5.6 of the Power Purchase Agreement.

44. This Tribunal, at **Para 7.10, 8.15, 9.2 and 9.3** of the Chennamangathahalli Judgment dated 14.09.2020, has observed that the Impugned Order passed by State Commission was not justified in the eyes of law and was liable to be set aside.

45. The Government of Karnataka issued an Order dated 24.11.2016, thereby directing all the ESCOMs to constitute a 3-Member Committee to consider and dispose of the requests of farmers / solar developers. Accordingly, a committee was constituted by the Respondent No. 2, which in its meeting held on 25.03.2017, considered requests of 9 generators. The Committee, after detailed discussions and scrutiny of all the documents, opined that the approval may be accorded for extension of scheduled

commissioning date upto six months under Article 2.5 of PPA as there was delay in issue of approvals by various Government entities.

46. It is pertinent to mention herein that Respondent No.3-GESCOM itself wrote a Letter dated 16.05.2017 to Additional Chief Secretary, Energy Department, Government of Karnataka wherein it recorded, in brief, entire facts and reasons for which the farmers were not able to commission the project within the scheduled commissioning date as per PPA and concluded at the end that it was justified and incumbent to accord an approval of extension of scheduled commissioning date by a period of 6 (Six) months.

47. The Additional Chief Secretary, Energy Department had also written a letter dated 23.06.2017 to KERC wherein it was provided that the extension of time were given by ESCOMs under Force Majeure as per Clause 8.3(a)(vi) of the PPA which read as: "Inability despite complying with all legal requirements to obtain, renew, and maintain required licenses of legal approvals". It was provided under the said letter that the reasons given by and the opinion of MD's of CESC, HESCOM, GESCOM and MESCOM were acceptable to the Government and in view of the same, the KERC was requested to consider approval to the extension of COD of Solar Power Projects of capacity 1 to 3MW under land owning farmers category.

48. Ministry of New and Renewable Energy, vide its letter dated 09.04.2018, after considering the request of Association for Land Owned Farmers Solar Power Plants, Karnataka dated 08.02.2018 in relation to extension of time, wrote to KERC and MD of KREDL that the solar power developers need to be given adequate confidence to maximize development of solar power capacity in the state. It was further clarified that the stand taken by KERC would create an uncertainty for the investors and demotivate the investors from investing in solar sector and thus, Govt. Of Karnataka was requested to take up the said matter with KERC under Section 108 of the Electricity Act, 2003.

KERC TO ACT IN THE INTEREST, ENCOURAGEMENT AND PROMOTION OF THE GENERATION OF POWER FROM RENEWABLE ENERGY RESOURCES

49. The KERC has failed to consider that Constitution of India, by way of Article 48A and 51A(g), has casted a Fundamental Duty upon the State as well as the citizens of India to protect, improve and preserve the environment. A critical aspect towards such preservation of environment is to generate energy from renewable sources which has a much smaller environmental footprint than energy generated from fossil fuel and other resources.

50. Section 86(1)(e) of the Electricity Act, 2003 further provides for the functions of State Commission, specifically provides for the promotion of cogeneration and generation of electricity from renewable sources of energy. In consequence with the mandate of Constitution of India, even the Electricity Act, 2003 read with the National Electricity Policy and the Tariff Policy mandates the Commission for providing concessions and other promotional measures for promoting generation of electricity from non-conventional sources of energy. **(Reference to Para 20 and 21 of Judgment dated 26.04.2010 passed by this Tribunal in Appeal No. 57 of 2010; and Para 35 of Judgment passed by this Tribunal “Rithik Energy V. Transmission Corporation of Andhra Pradesh, 2008 (ELR) (APTEL) 237**

51. Mr. S. Sriranga Subbanna, Learned Counsel for the Respondent No. 2 & 3 has submitted the following Written Submissions for our consideration:-

IMPUGNED ORDER BY COMMISSION DATED 04.09.2018

- (i) The extension of time of six months, granted by the 2nd Respondent to the Appellant, for achieving the commercial

operation of the Solar Power Plant, can be subject to legal scrutiny by the Commission

52. It is submitted that Article 2.5 of the PPA does not specifically stipulate that any extension of time granted by the 3rd Respondent GESCOM should receive approval from the Commission. However, Article 2.5.1 of the PPA stipulates the grounds on which alone, the time could be extended for achieving commercial operation. Article 5.1 of the PPA provides for reduction of tariff, as consequence of delay in the commission of the project, beyond the Scheduled Commissioning Date, subject to certain terms and conditions stated herein.

53. It is submitted that whenever an event affects the quantum of tariff applicable. For supply of energy to the Distribution Licensees, it is apparent that the same be scrutinized and approved by the Commission. It is settled law that this Commission has the exclusive jurisdiction to determine the tariff supply of electricity by a Generating Company to a Distribution Licensee and it has to regulate the electricity purchase and the procurement process of the Distribution Licensees, including the price at which the electricity shall be procured from different agencies through PPAs.

54. It is submitted that in the absence of any specific term in the PPA, an event which is affecting or altering the tariff, already approved by the PPA,

should be approved by the Commission. It is further submitted that Respondent No.3 GESCOM has also specifically intimated to the Appellant vide Official Memorandum dated 19.01.2017 that it will follow the order of the Commission, for application of tariff, as per Articles 2.5.7 and 5, for the delay in the CoD.

55. It is further submitted that any extension of time to commission a Power Project has bearing on the tariff payable. The Tariff determination/fixation of price for electricity, is not an adversarial proceeding. It is submitted that the consumer, though not a formal party, ultimately pays for the supply of electricity and is the most affected party. The Commission is required to safeguard such consumer's interest. Additionally, the Commission is regarded to be the custodian of the consumer's interests and has to timely interfere and exercise its regulatory powers.

(ii) A case for deferment or extension of the Scheduled Commissioning Date of its Plant is not made out

56. It is submitted that Condition Precedent, as mentioned under Clause 2.1 of the PPA in relation to obligations to be fulfilled by the SPD, is not fulfilled by the Appellant.

57. It is submitted that the PPA was signed by the parties on 01.07.2015. As per Article 2.1 of the said PPA, the CPs had to be achieved within 365 days from the date of signing of the PPA the Project had to be commissioned within 18 months from the date of signing of the PPA within 31.12.2016. The achievement of the CPs would also include obtaining all the approvals by the SPD.

58. It is submitted that the Appellant SPD applied for conversion of the land on 05.05.2016 after a lapse of about 10 months from the Effective Date of the PPA. It is submitted that there are no explanations that are given by the Appellant. Subsequently, the land conversion charges were paid by the Appellant on 27.06.2016. The land conversion Order was passed by the Deputy Commissioner, Raichur on 13.07.2016, in about two months from the date of application, which is found reasonable. It is submitted that the delay was account of Appellant in applying for the conversion.

59. It is submitted that the Appellant applied for the Evacuation Approval to the 2nd Respondent KPTCL on 18.03.2016, after about 9 months, for the date of the PPA. It is submitted that there appears to be no explanation given for this delay. It is submitted that 2nd Respondent KPTCL intimated to the Appellant to pay the fee on 23.04.2016 and the same was remitted on 12.05.2016. thereafter the Tentative evacuation approval was granted on

18.06.2016 and the same was accepted by the Appellant on 06.07.2016. Thereafter the Regular Evacuation approval was granted on 06.09.2016. On 27.10.2016, the Appellant requested to spare the land in the Sub-station of the 2nd Respondent KPTCL for construction of the bay. Thereafter, the request was acceded to on 09.12.2016. Approval for single line diagram and layout for construction of the bay that was applied by the Appellant on 25.10.2016 was granted on 02.12.2016. It is submitted that under all these circumstances, by considering list of dates and events, it is submitted that delay, if any, is to be attributed to the Appellant in approaching the 2nd Respondent KPTCL to seek the necessary approvals.

60. It is submitted by the Appellant that the MEI delayed the delivery of the MCVCB. It is submitted that the Appellant in its letter dated 28.12.2016 addressed to the concerned engineer of the 2nd Respondent KPTCL has stated that there would be delay in supply of MCVCB by the MEI and requested to provide a spare MCVCV, along with feeder panel from any of its Sub-stations to enable the Appellant to commission and Synchronise the Solar Power Plant within the stipulated time. This request was acceded to on 31.12.2016 by the 2nd Respondent (KPTCL) and an Official memorandum was issued to divert a 11 Kv MEI make MCVCB feeder available at the 110 kV S/s APMC Raichur to the Plant of the Appellant, with certain conditions. On this account, it is submitted that 2nd Respondent

KPTCL has extended full cooperation to the Appellant in implementing the Project and acted immediately on receiving the request of the Appellant, to spare the MCVCB. It is submitted that the delay of the Appellant in approaching the 2nd Respondent, in the matter of getting approvals, that has delayed its procurement of the breaker.

61. It is submitted that there has been an inordinate delay by the Appellant that when a timeline of 365 days is provided in the PPA for getting all the approvals, the inordinate delay by the SPD/ Appellant, in applying for such approvals and thereafter, attributing the delay to the authorities, cannot be accepted.

62. It is submitted that for any delay in achieving the Conditions Precedent and commission the Project, the Generating Company is liable to pay damages as stipulated in the PPA as held in the case of Civil Appeal No. 3600 of 2018 (*M.P Power Management Company Ltd. v. Renew Clean Energy Pvt Ltd and Another*).

(iii) What should be the Tariff for the Project for the term of the PPA?

63. It is submitted that as per Article 5.1 of the PPA, the Appellant SPD shall be entitled to receive tariff of Rs. 8.40 per kWh based on the KERC

tariff order dated 10.10.2013 in respect of SPD's solar PV projects but on account of any delay in commissioning of the project beyond the Scheduled Commissioning Date as per Clause 2.5, then the tariff applicable shall be lower than Rs.8.40/- per kWh or varied tariff applicable as on the date of commercial operation.

64. It is submitted that any delay or failure in the commencement of power supply, within the agreed date, would disrupt the operation of the Distribution Licensees, like the 3rd Respondent GESCOM which could also result in their power procurement from alternative expensive sources leading to higher retail tariff to the consumers or short supply leading to revenue loss to them and even to imposition of penalties for not meeting the Renewable Purchase Obligation fixed by this Commission. It is submitted that the Capital Cost of the Solar Power Plants has been coming down very rapidly in the recent years, because of the advancement in the technology and production efficiency as well as economies of scale.

65. It is submitted that the generic tariff for megawatt scale Solar Power Plants which was fixed at Rs.14.50 per unit in the Commission's Order dated 13.07.2010 has been successively reduced to Rs.8.40 per Unit in the Order dated 10.10.2013, Rs. 6.51 per unit as per Order dated 30.07.2015,

Rs. 4.36 per Unit in the Order dated 12.04.2017 and Rs. 3.05 per Unit in the Order dated 18.05.2018.

66. It is submitted that the tariff payable to the Appellant SPD is not based on the Capital Cost incurred by the Appellant SPD in the Project Implementation, but the tariff as per the relevant Clauses in the PPA. Therefore, it is submitted that the Appellant is entitled to a tariff of Rs. 6.51 per Unit for the term of the PPA, as per the Generic Tariff Order dated 30.07.2015 and additionally, Appellant is liable to pay damages including Liquidated Damages, as provided under Article 2.2 and 2.5.7 of the PPA.

67. With the above submissions, they sought for dismissal of the appeal.

ANALYSIS & DECISION

68. Perused records. Heard learned counsel in detail. Further written submission filed by the parties are perused. Based on the pleadings and arguments, the points that would arise for our consideration are:

(A) “Whether the Respondent Commission was justified in directing the SPD to file Petition seeking approval of extension of time?”

(B) “Whether the Respondent Commission was justified in passing the impugned order reducing the agreed tariff between the parties?”

69. So far as point no. 1 is concerned, in all Appeals filed by various Developers pertaining to Farmers’ Scheme, the Appellants have raised this issue. We have already opined that the Respondent Commission being the authority to determine the tariff, if it adversely affects the public interest, it can interfere. Therefore, we opine that the Respondent Commission being the only adjudicatory body to determine the tariff has jurisdiction to adjudicate the petition.

70. The relevant Articles from PPA are as under:

(viii) **“Commercial Operation Date”** with respect to the Project shall mean the date on which the Project is available for commercial operation as certified by BESCO/KPTCL as the case may be:

(xxxix) **“Scheduled Commissioning Date”** shall mean 18 (Eighteen) months from the Effective Date.

CONDITIONS PRECEDENT

2.1 Conditions Precedent:

The obligations of BESCO and the SPD under this Agreement are conditional upon the occurrence of the following in full within 365 days from the effective date.

2.1.1

(i) *The SPD shall obtain all permits, clearances and approvals (whether statutory or otherwise) as required to execute and operate the Project (hereinafter referred to as “Approvals”):*

- (ii) *The Conditions Precedent required to be satisfied by the SPD shall be deemed to have been fulfilled when the SPD shall submit:*
- (a) *The DPR to BESCO and achieve financial closure and provide a certificate to BESCO from the lead banker to this effect;*
 - (b) *All Consents, Clearances and Permits required for supply of power to BESCO as per the terms of this Agreement; and*
 - (c) *Power evacuation approval from Karnataka Power Transmission Company Limited or BESCO, as the case may be.*

2.1.2 ***SPD shall make all reasonable endeavors to satisfy the Conditions Precedent within the time stipulated and BESCO shall provide to the SPD all the reasonable cooperation as may be required to the SPD for satisfying the Conditions Precedent.***

2.1.3 *The SPD shall notify BESCO in writing at least once a month on the progress made in satisfying the Conditions Precedent. The date, on which the SPD fulfills any of the Conditions Precedent pursuant to Clause 2.1.1, it shall promptly notify BESCO of the same.*

2.2 Damages for delay by the SPD

2.2.1 *In the event that the SPD does not fulfill any or all of the Conditions Precedent set forth in Clause 2.1 within the period of 365 days and the delay has not occurred for any reasons attributable to BESCO or due to Force Majeure, the SPD shall pay to BESCO damages in an amount calculated at the rate of 0.2% (zero point two per cent) of the Performance Security for each day's delay until the fulfillment of such Conditions Precedent, subject to a maximum period of 60 (Sixty) days. On expiry of the said 60 (Sixty) days, BESCO at its discretion may terminate this Agreement.*

2.3 Performance Security

2.3.1 *For due and punctual performance of its obligations relating to the Project Under this Agreement, the SPD has delivered to BESCO, simultaneously with the execution of this Agreement, on irrevocable and revolving bank guarantee from a scheduled bank acceptance to BESCO for an amount of Rs. 10,00,000/- per MW (Rupees Ten Lakhs per Mega Watt only) ("Performance Security"). The Performance Security is furnished to BESCO in the form of bank guarantees in favour Managing Director of the BESCO as per the format provided in Schedule 2 and having validity up to 24 months from the date of signing of this agreement. The details of*

the bank guarantee furnished towards the Performance Security is given below:

Bank Guarantee No. PBG 2015/4 dated 19.06.2015 for an amount of Rs. 30,00,000/- (Rupees Thirty Lakhs only).

2.3.2 Appropriation of Performance Security

Upon occurrence of delay in commencement of supply of power to BESCO as provided in clause 2.5.7, or failure to meet the Conditions Precedent by the SPD, BESCO shall, without prejudice to its other rights and remedies hereunder or in law, be entitled to encash and appropriate the relevant amounts from the Performance Security as Damages. Upon such encashment and appropriation from the Performance Security, the SPD shall, within 30 (thirty) days thereof, replenish, in case of partial appropriation, to its original level the Performance Security, and in case of appropriation of the entire Performance Security provide a fresh Performance Security, as the case may be, and the SPD shall, within the time so granted, replenish or furnish fresh Performance Security as aforesaid failing which BESCO shall be entitled to terminate this Agreement in accordance with Article 9.”

2.4 Release of Performance Security

2.4.1 *Subject to other provisions of this Agreement, BESCO shall release the Performance Security, if any after scheduled commissioning of the project;*

2.4.2 *The release of the Performance Security shall be without prejudice to other rights of BESCO under this Agreement.*

“2.5 Extensions of Time

2.5.1 *In the event that the SPD is prevented from performing its obligations under Clause 4.1 by the Scheduled Commissioning Date due to:*

- (a) Any BESCO Event of Default; or*
- (b) Force Majeure Events affecting HESOM; or*
- (c) Force Majeure Events affecting the SPD.*

2.5.2 *The Scheduled Commissioning Date and the Expiry Date shall be deferred, subject to the reasons and limits prescribed in Clause 2.5.1 and Clause 2.5.3 for a reasonable period but not less than ‘day for day’ basis, to permit the SPD or BESCO through the use of due diligence, to overcome the effects of the Force Majeure*

Events affecting the SPD or BESCO, or till such time such Event of Default is rectified by BESCO.

2.5.3 *In case of extension occurring due to reasons specified in clause 2.5.1(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.*

2.5.4 *In case of extension due to reasons specified in Article 2.5 (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 9.*

2.5.5 *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 10.*

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

2.5.7 ***Liquidated damages for delay in commencement of supply of power to BESCOs.***

Subject to the other provisions of this agreement, if the SPD is unable to commence supply of power to BESCO by the scheduled commissioning date, the SPD shall pay to BESCO, liquidated damages for the delay in such commencement of supply of power as follows:

- (a) For the delay up to one month- amount equivalent to 20 % of the performance security.*
- (b) For the delay of more than one month up to three months - amount equivalent to 40 % of the performance security.*
- (c) For the delay of more than three months up to six months - amount equivalent to 100 % of the performance security.*

For avoidance of doubt, in the event of failure to pay the above mentioned damages by the SPD, the BESCO entitled to encash the performance security."

4.1 ***Obligations of the SPD:***

- (a) *The SPD shall construct the Project including the pooling station, the interconnection facilities and metering arrangements at the point of delivery of power as approved by STU /BESCOM.*
- (b) *The SPD shall undertake by itself or by any other person acting on its behalf, at its own cost, construction/up-gradation of (a) the interconnection Facilities, (b) the transmission lines; and (c) metering arrangements with protective gear as per the specifications and requirements of STU/BESCOM, as notified to the SPD.*
- (c) *The SPD shall achieve scheduled date of completion and the commercial operation within 18 months from the effective date.*
- (d) *The SPD shall by itself or by any other person acting on its behalf undertake at its own cost maintenance of the interconnection facilities and the metering arrangements, including the dedicated transmission line up to the delivery point as per the specifications and requirements of STU/BESCOM, as notified to the SPD, in accordance with Prudent Utility Practices. The transmission / distribution line so constructed shall remain as dedicated transmission / distribution line without provision for any tapping.*
- (e) *The SPD shall operate and maintain the Project in accordance with Prudent Utility Practices, for the entire term of this agreement.*
- (f) *The SPD shall be responsible for all payments on account of any taxes, cesses, duties or levies imposed by the GoK or its competent statutory authority on the land, equipment, material or works of the Project or on the Electricity generated or consumed by the Project or by itself or on the income or assets owned by it.*
- (g) *The benefits accruing on account of carbon credit shall be shared between the SPD and the BESCOM as per Clause 5.2.*

4.2 Obligations of BESCOM:

BESCOM agrees:

- (a) *To allow SPD to the extent possible to operate the Project as a must run generating station subject to system constraints.*
- (b) *Subject to system constraints to off-take and purchase the Electricity generated by the SPD at the Delivery Point as per Clause 3.4 and Clause 3.5 of this agreement.*
- (c) *To make tariff payments to the SPD as set out in Clause 5.1.*
- (d) *BESCOM agrees to provide support to the SPD and undertakes to observe, comply with and perform, subject to and in accordance*

with the provisions of this Agreement and the Applicable Laws, the following:

- (i) support, cooperate with and facilitate the SPD in the implementation and operation of the Project in accordance with the provisions of this Agreement;
 - (ii) not do or omit to do any act, deed or thing which may in any manner be violative of any of the provisions of this Agreement;
 - (iii) act reasonably, while exercising its discretionary power under this Agreement;
-”

6.4 Late Payment surcharge:

“In the event of payment of the monthly bill being made by BESCO after the due date, a late payment surcharge shall be payable to the SPD at the rate of 1.0% per month on the bill amount (being “Late Payment Surcharge”), computed on a pro rata basis on the number of days of the delay in payment. The Late Payment Surcharge shall be claimed by the SPD through the Supplementary Bill.”

8.1 Definitions:

In this Article, the following terms shall have the following meanings:

8.2 Affected Party:

An Affected Party means BESCO or the SPD whose performance has been affected by an event of Force Majeure.

8.3 Force Majeure Events:

- (a) Neither Party shall be responsible or liable for or deemed in breach hereof because of any delay or failure in the performance of its obligations hereunder (except for obligations to pay money due prior to occurrence of Force Majeure events under this Agreement) or failure to meet milestone dates due to any event or circumstance (a "Force Majeure Event") beyond the reasonable control of the Party affected by such delay or failure, including the occurrence of any of the following:
 - (i) Acts of God;
 - (ii) Typhoons, floods, lightning, cyclone, hurricane, drought, famine, epidemic, plague or other natural calamities;

- (iii) Strikes, work stoppages, work slowdowns or other labour dispute which affects a Party's ability to perform under this Agreement;*
 - (iv) Acts of war (whether declared or undeclared), invasion or civil unrest;*
 - (v) Any requirement, action or omission to act pursuant to any judgment or order of any court or judicial authority in India (provided such requirement, action or omission to act is not due to the breach by the SPD or BESCO of any Law or any of their respective obligations under this Agreement);*
 - (vi) Inability despite complying with all legal requirements to obtain, renew or maintain required licenses or Legal Approvals;*
 - (vii) Fire, Earthquakes, explosions, accidents, landslides;*
 - (viii) Expropriation and/or compulsory acquisition of the Project in whole or in part;*
 - (ix) Chemical or radioactive contamination or ionizing radiation; or*
 - (x) Damage to or breakdown of transmission facilities of either Party;*
- (b) The availability of the above item (a) to excuse a Party's obligations under this Agreement due to a Force Majeure Event shall be subject to the following limitations and restrictions:*
- (i) The non-performing Party gives the other Party written notice describing the particulars of the Force Majeure Event as soon as practicable after its occurrence;*
 - (ii) The suspension of performance is of no greater scope and of no longer duration than is required by the Force Majeure Event.*
 - (iii) The non-performing Party is able to resume performance of its obligations under this Agreement, it shall give the other Party written notice to that effect;*
 - (iv) The Force Majeure Event was not caused by the non-performing Party's negligent or intentional acts, errors or omissions, or by its negligence/failure to comply with any material Law, or by any material breach or default under this Agreement;*

(v) *In no event shall a Force Majeure Event excuse the obligations of a Party that are required to be completely performed prior to the occurrence of a Force Majeure Event.*”

“10.3 Dispute Resolution

10.3.1 : *If any dispute is not settled amicably under clause 10.2 the same shall be referred by any of the parties to the KERC for dispute resolution in accordance with the provisions of the Electricity Act, 2003.*”

71. Then coming to point no. 2, according to Appellants, on account of securing approvals from various authorities took considerable time, though they were not responsible for the delay to secure several approvals required for commissioning the project, they had to seek for extension of time for commissioning the project on the ground of force majeure, but the Respondent Commission has not exercised its judicious mind in appreciating the facts on record by passing the impugned order; therefore, it has to be set aside.

72. According to the Respondent GESCOM's counsel, if only the Appellants were diligent in approaching various authorities to secure the required approvals/sanctions for commissioning the project, there would not have been delay to commission the project; therefore, according to the Respondent's counsel, the impugned order is sustainable.

73. According to Appellants, on account of inordinate delay without the Appellants being negligent in due compliance of terms and conditions of

PPA, they were not able to commission the solar plant within the time specified in the PPA. Therefore, they sought extension of time in terms of PPA which was granted by the Respondent GESCOM after accepting the force majeure event being the cause for delay in completing the project within the timelines. According to Appellants, this force majeure event was not only accepted by the Respondent GESCOM but even the State Government through its constituted Committee of three members recommended that the force majeure event claimed by the Appellants needs to be accepted. In this regard, a letter was addressed to Respondent Commission by the State Government. But the same was not taken in to consideration by the State Commission is the stand of Appellant.

74. It is further contended that the Respondent Commission having directed the Appellants to file a Petition, failed to consider the same in a judicious manner totally ignoring that the time taken for issuance of approvals/sanctions which was not in the hands of the Appellants, proceeded to pass the impugned order arbitrarily reducing the agreed tariff of Rs. 8.40 to Rs. 4.36. They further contend that having invested huge amounts thinking that the solar plant envisaged was for the benefit of the farmers but now has become a burden on account of the impugned order. Therefore, they have sought for setting aside the impugned order complying with the terms and conditions enunciated in the PPA.

75. As against this, the Respondent's counsel contends that if the date of applications submitted to each authority filed by the applicant is taken in to consideration, it would only go to show that the Appellants took their own sweet time to approach the authority and further they did not pursue the matter with the authorities, therefore the delay if any, has occurred only on account of laches on the part of the Appellants.

76. It is further contended that in terms of PPA, if the Appellants failed to complete the project within the timelines and if the claim of force majeure events does not apply to the facts of the case, the State Commission is justified to interfere with the tariff, since the main function of the Respondent Commission is to regulate tariff issues and has to determine the same keeping in mind the public interest at large i.e., consumers. Therefore, they contend that the reduction of tariff, since the Appellants were responsible for the delay in commissioning the project, is justified and therefore, there is no need to interfere with the impugned order.

77. Appellants in rejoinder arguments contended that the Respondent GESCOM having extended the time accepting the reasons for the delay put forth by the Appellant is now blowing hot and cold by taking different stand at different point of time. Therefore, according to them, the entire defence put forth by the Respondent GESCOM deserves to be rejected.

78. With these submissions at our hands, we proceed to analyze the facts and the law.

79. The following are the relevant dates which fall for our consideration to dispose of the Appeal on merits:

- (a) 01.07.2015 – Based on the Allotment letter, Mr. Dr. Vijay Shankar executed a Power Purchase Agreement dated 01.07.2015 with the 3rd Respondent GESCOM. This PPA was approved by the Commission vide its letter dated 31.08.2015.
- (b) 07.10.2015 – The Appellant made the request to incorporate the SPV in the name of Sirwar Renewable Energy Pvt. Ltd as early as 07.10.2015, however, there was no response from the Government Authorities.
- (c) 01.12.2015 – Department of Revenue issued a circular bearing RD69LGP 2015 notifying the list of documents to be obtained by the Deputy Commissioner from the project proponents.
- (d) 18.03.2016 – Dr. Vijay Shankar had approached KPTCL Gulbarga for grant of Evacuation Scheme Approval for its Power Project
- (e) 21.03.2016 – The guidelines for executing a Supplemental PPA were given by the Authorities.

- (f) 05.05.2016 – Appellant filed an application for conversion of Land from agriculture to non-agriculture purpose. However, the same was received only after a delay of more than 2 months i.e. 13.07.2016.
- (g) 18.06.2016 – The tentative Evacuation Scheme approval was given.
- (h) 05.07.2016 – The SPV was formed under the name 'SIRWAR RENEWABLE ENERGY PRIVATE LIMITED' the Appellant herein. Consequently, a Supplemental Agreement dated 05.07.2016 modifying the original PPA, came to be executed.
- (i) 29.08.2016 – Supplemental PPA was approved by the Commission.
- (j) 06.09.2016 – Regular Evacuation Approval was granted by KPTCL.
- (k) 26.09.2016 – KPTCL's Circular dated 26.09.2016, noted that Evacuation Approvals for applications of 1MW to 5 MW were getting inordinately delayed.
- (l) 27.09.2016 – The Appellant placed a Purchase Order on MEIL, the sole approved Vendor of KPTCL for procurement of materials.
- (m) 18.10.2016 – MEIL issued an acceptance letter agreeing to

supply the material as provided in the above Purchase Order.

- (n) 25.10.2016 – The Appellant applied to get the approval of Single Line Diagram and lay out plan.
- (o) 27.10.2016 – The Appellant submitted all relevant papers/drawings/documents to KPTCL for construction of 11KV Terminal Line from the Generation Plant to the Sirwar Substation at 110/11KV S/Sirwar.
- (p) 24.11.2016 – Order issued by Government of Karnataka directing all ESCOMs to constitute a 3-Member Committee to consider and dispose of several requests for extension of scheduled commission date.
- (q) 26.11.2016 – KPTCL only in the Minutes of Meeting dated 26.11.2016 decided to spare available land for the construction of 11KV TB along with metering arrangement at 110/11KV Sirawar sub station to the Appellant
- (r) 02.12.2016 – KPTCL accorded approval to the Single Line Diagram and layout plan.
- (s) 07.12.2016 – The Appellant made a detailed representation containing the project progress and difficulties and Force Majeure events encountered by the Appellant vide its letter dated 07.12.2016.

- (t) 9.12.2016 – The decision to spare available land for the construction of 11KV TB along with metering arrangement at 110/11KV Sirawar sub station to the Appellant was communicated and necessary approval was given.
- (u) 21.12.2016 – The Appellant requested KPTCL for TA and QC inspection, equipment drawing approval vide its letter dated 21.12.2016.
- (v) 27.12.2016 – KPTCL approved the drawings submitted by the Appellants.
- (w) 27.12.2016 – KPTCL made its internal communication dated 27.12.2016 to the Superintending Engineer (Elec), Transmission (W & M) Circle.
- (x) 28.12.2016 – Appellant itself wrote to KPTCL asking it to provide a spare MCVCB from any of its sub stations so as to enable the Appellant to commission and synchronise the project at the earliest.
- (y) 31.12.2016 – The KPTCL accorded approval for the diversion of the spare 11kv MCVCB feeder panel available at 11OKV APMC Raichur to the Appellant.
- (z) 19.01.2017 – The 3rd Respondent issued memorandum to look into the aspect of the time extension to be granted to the

Projects.

- (aa) 21.01.2017 and 07.02.2017 – 3rd Respondent issued a Commissioning Certificate certifying the commissioning of the Appellant's project on 21.01.2017 and also certified the commissioning of the Appellant's project by a separate commissioning certificate dated 07.02.2017. Thus, the Appellant's project has achieved the commercial operation date on 21.01.2017.
- (bb) 25.03.2017 – A committee was constituted by the Respondent No. 2 which, in its meeting held on 25,03.2017,. considered the requests of nine generators.
- (cc) 28.04.2017 – The Appellant received letter dated 28.04.2017 from the 3rd Respondent, requesting the Appellant to file a petition before the KERC seeking extension of time for achieving commercial operation date.
- (dd) 16.05.2017 –GESCOM also wrote a Letter dated 16.05.2017 to Additional Chief Secretary, Energy Department, Government of Karnataka wherein it recorded, in brief entire factum and reasons for which the farmers were not able to commission the project within the scheduled commissioning date as per PPA
- (ee) 14.06.2017 – The Appellant submitted a representation

requesting the respondent to release payments against the pending invoices.

- (ff) 10.07.2017 – The breaker (for which the purchase order was placed on 27.09.2016) was provided to the Appellant only on 10.07.2017 i.e. nearly after a delay of almost 9 months.
- (gg) 28.07.2017 – In compliance with the above said direction from the Respondent No. 3 vide its letter dated 28.04.2017, the Appellant approached the Commission on 28.07.2017 by way of filing the petition bearing No. OP No. 128 / 2017.
- (hh) 04.09.2018 – Impugned Order was passed.

80. It is well settled now in the light of the opinion expressed by this Tribunal in the Judgments of ***Azure Sunrise Private Limited*** in Appeal No. 340 of 2016 dated 28.02.2020, ***SEI Aditi Power Private Limited*** in Appeal No. 360 of 2019 dated 14.07.2021, ***SEI Diamond Private Limited*** in Appeal No. 374 of 2019 dated 14.07.2021, and so also ***Chennamangathihalli Solar Power Projects LLP. Vs. Bangalore Electricity Supply Company Limited*** in Appeal No. 351 of 2018 dated 14.09.2020 that it is the date of approval of the PPA which becomes effective date and not the date on which parties put their signatures to the PPA. The PPA becomes implementable only when it is approved by the appropriate Commission. Even the Appellants for that matter any generator

cannot approach any authority for sanction, approval, permissions, grants, loans without the PPA being approved by the concerned Commission. Therefore, date of the approval of the PPA becomes a relevant fact.

81. In this case, after approval of PPA on 31.08.2015, what the Appellant did becomes relevant, so also when the necessary permission/approval/sanctions came to the hands of the Appellants is also relevant.

82. The 1st Appellant is the SPV established in terms of PPA by the 2nd Appellant. The rights and liabilities of the 2nd Appellant – SPD are assigned in favour of the 1st Appellant in terms of PPA and the guidelines. Coming to the process undertaken by the Appellant for commissioning the project, we proceed to analyze the facts.

83. On 01.12.2015, after expiry of five months' period, there was clarity with regard to necessary documents which are required by the SPD to develop the project. This was issued only on 01.12.2015, after lapse of five months from the date of execution of PPA. The circular indicated that the following documents are also required for seeking permission of conversion of land apart from other documents:

- (a) Permission/Sanction Letter from the Government for establishing Electricity Generation Projects;

- (b) Permission Letter for having purchased Agricultural Land under Section 109 of Karnataka Land Reforms Act, 1961;
- (c) Confirmation from the Authorities that the Land did not fall under PTCL (Prevention of Transfer of Certain Lands) and Land Acquisition Act;
- (d) Permission Letter / Sanction from the Government / CREDL for production of Solar Energy;
- (e) RTC in the name of Appellant;
- (f) Confirmation from Authorities that there was no violation of Land Grant Rules.

84. After persistent follow up by the Appellant, it took about two months to secure these documents. The Appellant could ask for conversion of land only on 05.05.2016, but conversion order came on 13.07.2016.

85. The Appellant in terms of required documents approached KPTCL, Gulbarga on 18.03.2016 for grant of evacuation approval. Tentative evacuation scheme though granted on 18.06.2016, the regular evacuation approval could be obtained only on 06.09.2016. The problem did not stop at this level. Unless single line diagram and lay out approval plan for construction of terminal bay at the sub-station is approved, the Appellant cannot procure the equipment from MEIL, the sole approved vendor of

KPTCL. After persistent follow up, they applied on 25.10.2016 to get the approval of single line diagram and lay out plan. The approval from KPTCL for the same came on 02.12.2016 with almost a delay of 1½ months.

86. The Appellants had sought for approval for sparing land for the construction of terminal bay on lease basis, though it was applied on 27.10.2016, the Appellant got the same on 09.12.2016, again causing a delay of 1½ months.

87. So far as equipment from MEIL the sole approved vendor of KPTCL is concerned, though purchase order was placed on 27.09.2016, the acceptance letter by MEIL came on 18.10.2016. Therefore, the Appellant sought provision to spare MCVCB from any of the substation of the Respondent KPTCL. The Appellant did correspond with the KPTCL in this regard. The breaker which was required for commissioning of the project was provided to the Appellant only on 10.07.2017 in reply to the request made on 28.12.2016, nearly after a delay of nine months.

88. The Appellant approached Respondent GESCOM bringing all these facts and sought extension of time. Meanwhile Supplemental PPA was executed between the parties which was approved by the Commission on 29.08.2016. KPTCL was aware of the delay in securing equipment from

MEIL and in fact the Head office of KPTCL did issue circular that once tentative evacuation is granted, immediately thereafter regular evacuation must be granted.

89. From time to time, the Appellant was bringing to the notice of the concerned authorities, the delay in obtaining several approvals/sanctions.

90. It is noticed that the 3rd Respondent GESCOM issued a commissioning certificate that the Appellant's project is commissioned on 21.01.2017 and certificate is dated 07.02.2017. A Committee constituted by the Respondents opined that apart from the Appellants various farmers falling under the Farmers' Scheme are facing difficulties in securing the approvals/sanctions on time; therefore, on force majeure grounds, the delay can be condoned and there has to be extension of time for commissioning of the project.

91. The Appellants mainly rely upon the Judgment of ***Chennamangathihalli Solar Power Projects LLP. Vs. Bangalore Electricity Supply Company Limited*** in Appeal No. 351 of 2018 dated 14.09.2020, Para 7.10, 8.15, 9.2 and 9.3 which read as under:

"7.10 : ... However, what thus transpires that there has been considerable delays on the part of the Respondents / Govt. agencies in processing of applications and granting the respective approvals. Thus, Respondents cannot absolve itself from the

burden of such delays in execution/completion of the solar projects of the Appellant. In fact, it is pertinent to note that the Govt. as well as State/Discom considering above eventualities granted an extension of six months in COD. Contrary to this, the State Commission rejected the extension with imposition of liquidated damages to corresponding period only on the premise that it is a matter of dispute between the Appellants and the first Respondent.”

8.15 : In view of the above, we are of the considered opinion that considering facts and circumstances of the matter, the first Respondent was justified in extending COD up to six months as per the relevant provision (clause 2.5) of the PPA. Besides, it is also crystal clear that the approvals / clearances from various Govt. instrumentalities were accorded after considerable delays (of 7-8 months) which in turn attributed to delay in commissioning of the solar projects. As these approvals were beyond the control of the Appellants, the State Govt. and first Respondent have rightly considered them as an event of force majeure and accordingly granted approval for COD extension. In fact, the Commission failed to analyse all the issues in just and proper manner. The impugned order as such cannot sustain in eyes of settled principle of law as being perverse and arbitrary. For the forgoing reasons, we hold that the Appellants are entitled for the agreed tariff as per the PPA (Rs. 8.40 per unit) without being subjected to LD.”

“9. Summary of Findings:-

9.2 The findings of the State Commission in the impugned order clearly reflect that it has ignored the vital material placed before it such as statement of objections filed by first Respondent, recommendations of State Govt. dated 23.06.2017 and communication of MNRE, Govt. of India dated 28.07.2017 regarding grant of COD extension to the solar power developers. Further, it is mandate upon the State Commission to promote co-generation and generation of power from renewable sources of energy, however, in the present case, the State Commission has suo motto interfered for the ultimate loss to RE developers who are land owning farmers and had participated in the programme of the Govt. for solar power development. In fact, the entire solar project is structured on the basis of assured tariff as per Article 5.1 of the PPA being an incentivised tariff and financial institutions have advanced loans on the basis of the assured tariff as per PPA.

9.3 In the light of above, we hold that the impugned order dated 04.09.2018 passed by the State Commission is not justified in the eyes of law and hence liable to be set aside.”

92. It is noticed that the 3rd Respondent GESCOM itself wrote a letter to the Additional Chief Secretary in Agriculture Department on 16.05.2017 explaining the entire facts and reasons for which farmers were not in a position to commission the project within the scheduled commissioning date as per PPA and therefore, at the end of the letter, they stressed upon the fact that it was justified and incumbent to accord an approval of extension

by six months for commissioning the project. In this regard, there was communication between the GESCOM and Energy Department and Energy Department also wrote to KERC in June 2017 wherein they opined that in terms of Clause 8.3, there seems to be genuine grounds for delay; therefore, KERC was requested to consider the approval of extension of COD. In this regard, MNRE also wrote a letter on 09.04.2018 to KERC to consider the request of Association of farmers i.e., Solar Plant Developers between 1 MW to 3 MW that these farmers require adequate confidence to maximize development of solar power capacity in the State. Therefore, there cannot be uncertainty for the investors to invest in solar projects, otherwise it may de-motivate the investors from investing in solar sector.

93. What we note from the above dates is that the delay in obtaining evacuation approval, delay in obtaining the equipment from MEIL, the sole approved seller of the equipment by KPTCL, delay in approval of the diagrams have caused delay to commission the project. None of these delays are attributable to the negligence of the Appellant. On the other hand, the list of dates mentioned above clearly indicates that the Appellants were exercising due care and diligence to pursue various authorities to secure the approvals/sanctions in time. For no fault of the Appellants, the approvals by one authority or the other got delayed, which is beyond the control of the Appellants. The scheme which was envisaged to benefit the

farmers turned out to be a curse, since the Appellants were compelled to run from pillar to post to obtain these approvals apart from entering in to several litigations to get their rights resolved.

94. We are of the opinion that none of the delays was at the instance of Appellants and it was only on account of delay in securing these approvals from Governmental Instrumentalities. Therefore, in accordance with PPA terms and conditions, the Appellants are entitled for extension of time for commissioning of the project and since the commissioning of the project is extended, they are entitled for tariff at agreed rate i.e., Rs.8.40 per unit, so also they are not liable to pay any damages. They are not liable to pay other liquidated Damages. Over and above this, they were constrained to commission the project and receive reduced tariff. The Appellants are also entitled for late payment surcharge in terms of PPA.

95. In terms of the Articles and various Clauses especially Clause 6.4 of the PPA, if the amounts are due, not paid in time, the Solar Developer is entitled for late payment surcharge. Since the delay was not on account of the Appellants and they did commission the solar plant within the extended SCOD, we are of the opinion that they are entitled for late payment surcharge. Similarly, since there was no deficit on the part of the Appellants

in any manner, they are not liable to pay Liquidated Damages or any other damages.

96. We are aware that number of appeals are filed pertaining to solar projects in Karnataka under Farmers Scheme. We also note that in some cases, the Application for conversion of agriculture land was submitted two or three months or may be six months after approval of PPA. We take judicial notice as discussed in Appeal No 160 of 2020 (Clearsky matter) that having regard to the nature of the solar plants to be developed by the farmers between 1 MW to 3 MWs, which required land conversion orders from revenue authorities, which has elaborate process consuming lot of time, the State Government in fact opined that there would be deemed conversion for such solar projects. However, in spite of such expression, the guidelines to be followed by the revenue authorities for granting deemed conversion orders in favour of the solar plant developers were not clear and though the farmers approached revenue department, the concerned officers seem to have replied that they have not received guidelines in that regard. We also notice that even the guidelines came to be issued much later. Though this fact was not pleaded in all the appeals, but the guidelines in this regard issued by the State Government is common which was delayed and not intimated to the concerned authorities, we are of the opinion that such

confusion pertaining to deemed conversion procedure has also led to delay in either approaching the concerned revenue authority for conversion of agriculture land or even if they had approached, the conversion order was granted with much delay.

97. Apparently, the scheme was meant to benefit small land holding farmers, who could establish solar plants between 1 MW to 3 MWs. This also definitely requires business prudence apart from minimum knowledge in the field concerned. As per the policy, the establishment of solar plant was to be in the agricultural land. On account of restrictions to use agricultural land for non-agricultural purpose, conversion of agricultural land use is a must. In terms of Karnataka Revenue Act, it has laborious process to get conversion of agricultural land into non-agricultural one. To establish solar power plant, it is not just conversion of agricultural land permission, but several other approvals/consent/permissions were required.

98. Till SPV was established, it was the individual Appellant i.e., SPD who had to run from office to office to secure required approvals/consents. Having regard to laborious process to secure these permissions from various Government instrumentalities, it would have been a wise decision to have infrastructure under one roof (like single window agency) to get all these clearances which would have saved lot of time for the establishment

of these small solar power plants in question. Since either the SPD or SPV had to run from office to office situated at different places to secure approval and permission which would not have been possible to secure on any one particular day also seems to have caused hardship and delay in procuring the approvals, be it land conversion or power evacuation and grid connectivity or safety certificate from CEIG etc. To apply for conversion of land to non-agriculture purpose itself, more than 13 documents are required, which have to be secured not from single place but various departments of Government. The scheme which was expected to be a boon to the farmers seems to have become a bane.

99. In light of our above discussion and reasoning, we are of the opinion that the impugned order cannot be sustained and the Appeal deserves to be allowed. Hence, we pass the following order:

ORDER

- (a) The Appeal is allowed and the impugned order is set aside.**
- (b) The Appellant is entitled for Rs. 8.40 per unit in terms of PPA from the date of commissioning the solar power plant.**
- (c) The 1st Respondent - GESCOM to pay the difference of the tariff paid per unit from the date of commissioning of the**

plant along with late payment surcharge in terms of PPA within one month from today.

(d) The Appellants are not liable to pay any damages and so also liquidated damages.

100. Pending IAs if any, shall stand disposed of. No order as to costs.

101. Pronounced in the Virtual Court through video conferencing on this the **12th day of August, 2021.**

**(Ravindra Kumar Verma)
Technical Member**

**(Justice Manjula Chellur)
Chairperson**

REPORTABLE / ~~NON-REPORTABLE~~

pr/tpd/ts