

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

**APPEAL NO. 322 of 2018 &
IA No. 1549 of 2018, IA No. 245 of 2019**

Dated : 12th August, 2021

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

IN THE MATTER OF :

1. **Madamageri Solar Power Project LL.P,**
Through its Designated Partner
Mr. Sidram M. Kaluti
BC 109, Davidson Road,
Camp: Belagavi. 590 001
Karnataka

2. **Smt. Girija B. Hattiholi,**
27/B Kuvempu Nagar,
Hindalga,
Belgavi- 591 108
Karnataka

..... **Appellants**

Versus

1. **Hubli Electricity Supply Company Limited**
Through its Managing Director,
P.B. Road, Navanagar,
Hubballii- 580 025

2. **Karnataka Electricity Regulatory Commission**
Through its Secretary
No.16, C-1, Millers Tank Bed Area,
Vasant Nagar,
Bengaluru- 560 052

..... **Respondents**

Counsel for the Appellant (s) : Mr. Basava Prabhu Patil, Sr. Adv.
Mr. Prabhulinga Navadegi, Sr. Adv.
Mr. Kush Chaturvedi
Ms. Purna Priyadarshini
Ms. Priyashree Sharma
Mr. Geet Ahuja
Mr. Shubhranshu Padhi
Mr. Ashish Yadav
Ms. Gursimran Dhillon
Mr. P. Kavin Prabhu **for App-1 & 2**

Counsel for the Respondent(s) : Mr. Shahbaaz Hussain
Mr. Fahad Khan
Ms. Sumana Naganand
Ms. Stephania **for R-1**

J U D G M E N T

PER HON'BLE MRS. MANJULA CHELLUR, CHAIRPERSON

1. This Appeal No. 322 of 2018 has been filed by the Appellants under Section 111 of the Electricity Act questioning the legality, validity and correctness of the Impugned Order dated 07.08.2018 in Original Petition No. 65 of 2017 passed by the Karnataka Electricity Regulatory Commission.

Facts of the case:-

2. The Appellant No.1, Madamageri Solar Power Project LL.P (hereinafter referred to as '**Appellant No.1**') is a Limited Liability Partnership incorporated under Limited Liability Partnership Act, 2008

having its registered office at BO 109 & 109/A, Davidson Road, Camp, Belgaum, Karnataka- 590001, India.

3. The Appellant No.1 was formed as a Special Purpose Vehicle (**SPV**) to undertake the Solar Power project, a Non-Conventional Power project at Madamgeri Village, Belgaum District, State of Karnataka. The Appellant No.2, Smt. Girija B. Hattiholi is a farmer owning land in Madamageri village, Savadatti Taluka, Dist. Belagavi. The Appellant No.2 is the Solar Power Developer (**SPD**) in the present matter.

4. The Respondent No.1, Hubli Electricity Supply Company Limited (**HESCOM**), is a distribution company within the meaning of 2(17) of the Electricity Act, 2003 and a Government of Karnataka Company incorporated under the provisions of the Companies Act, 1956 with its registered office at Navanagar Hubli, Karnataka – 580025.

5. Karnataka Electricity Regulatory Commission (Respondent Commission/ State Commission) is the Electricity Regulatory Commission for the State of Karnataka exercising jurisdiction and discharging functions in terms of the Electricity Act, 2003.

6. On 01.07.2011, the Government of Karnataka introduced the first solar policy for the state of Karnataka for the period 2011-2016 in order to harness the potential of solar resources in the state.

7. On 10.10.2013, the State Commission passed the generic tariff order determining the tariff at Rs. 8.40 for the solar power generators entering into PPA on or after 01.04.2013 and up to 31.03.2018, other than those where the tariff is discovered through the competitive bidding process.

8. On 22.05.2014, the Government of Karnataka introduced the second Solar Policy for the period 2014-2021. In this Scheme, the State Government endeavoured to promote solar energy projects preferably by land owning farmers with a minimum capacity of 1 MWp and maximum capacity of 3 MWp per land owning farmer in the state for sale of power to State Electricity (Distribution) Supply companies (hereinafter referred to as the '**ESCOMs**') at the tariff determined by the State Commission from time to time.

9. On 26.08.2014, the Government of Karnataka issued Government Order being GO: EN 62 VSC 2014 providing for the guidelines to be adopted by the ESCOMs and Karnataka Renewable Energy Development Limited (hereinafter referred to as '**KREDL**') for implementation of Clause

8, Segment 1, Category 1 of the Solar Policy 2014-21. The guidelines were issued to promote distributed generation by land owning farmers (small solar power projects under land owners/farmers scheme 1-3 MW) throughout the State of Karnataka.

10. In pursuance of the above policy of the State Government, on 09.10.2014, the KREDL issued Notification inviting application from the interested parties for facilitating the development of renewable energy in the State of Karnataka. In terms of the above, the Appellant No.2 submitted an application for participation in the Solar Power development. The application of the Appellant No.2 was evaluated and the proposal to set up a Solar Power Project was approved and the Letter of Award (**LOA**) was issued in favour of the Appellant No. 2 on 16.03.2015.

11. In terms of the above, on 30.06.2015, the Appellant No.2 entered into a PPA with HESCOM which is the distribution licensee in the area where the 3 MW Solar Power Project was proposed to be set up, namely, at Madamgeri Village, Savadatti Taluk, Belgaum in the State of Karnataka. The PPA executed between the parties was in terms of the standard form of the PPA for execution by the Solar Power Developer in the State, which is in terms of the above Policy of the Government of Karnataka and the Guidelines issued for the said purpose.

12. On 20.07.2015, the State Commission approved the PPA dated 30.06.2015 executed between the Appellant No.2 and HESCOM.

13. On 30.09.2015, the Appellant No.2 filed Application for 11E sketch (Land area survey map) i.e. a pre-condition for filing of the application for conversion of land into non-agriculture, and the same was received on 30.11.2015.

14. The Appellants state that the implementation of the 3 MW Solar Power Project, in terms of the PPA dated 30.06.2015 and also the Guidelines issued by the Government of Karnataka, required various approvals, permissions, sanctions etc. from the Government of Karnataka, the other Government Agencies and also the HESCOM for connectivity of the Solar Power Project with the Grid for evacuation of power generated at the project. The Appellants were required to fund and finance the project by substantial debt being borrowed from the Banks and Financial Institutions. The financial closure of the project with the Banks and Financial Institutions was dependent upon the Appellants duly securing the approval from various agencies for implementation of the project. These include principally, the following:

- (i) Approval for conversion of the land from agricultural purpose to be used for setting up a Solar Power Project;
- (ii) Connectivity of the Solar Power Project with the Grid and power evacuation approval on the 11 KV Power System up to 33 KV Shivapur Substation;
- (iii) Providing the Bay estimation for the connectivity at the Bay of the substation of the transmission/distribution system and to provide approval for the break-up and other equipment to be obtained by the Appellants;
- (iv) Grant of approval by the Chief Electrical Inspector for charging of the line and for safety and security issues connected with the generating station and line connectivity, installation of metering arrangement, synchronization etc.

15. In regard to the approval for conversion of the use of the land, after obtaining various required documents, application for land conversion was submitted to the Deputy Commissioner, Belagavi on 10.12.2015. The demand Notice for payment of the conversion charges (after the Tahsildar's recommendation to the Deputy Commissioner) was issued by the Deputy Commissioner on 30.05.2016 (i.e. after 5 and a half months). Thereafter, the payment was made by the Appellants on 03.06.2016 within 3 days. The

Order of Conversion of Land into Non-Agriculture was given by the Deputy Commissioner only on 18.06.2016. Thus, the approval for conversion of land was received after a lapse of more than six month (**189 days**).

16. On 20.10.2015, the Appellant submitted the application for Grid connectivity and power evacuation approval through 11 KV Power System with connectivity to 33KV/11 KV Shivapaur Substation. subject to the Letter for payment of processing fees was received only on 28.01.2016 and the same was immediately complied with on 01.02.2016. The tentative approval was received only on 04.04.2016. The Appellant requested for the Final evacuation approval on 21.05.2016. The final approval for evacuation scheme was issued on 11.08.2016 by HESCOM (more than 9 months after submission of the application for grid connectivity).

17. On 07.12.2016, the Appellant applied to the Chief Electrical Inspector with drawings pertaining to the electrical installation of the 3 MW Solar Power Project. This approval was given by the Chief Electrical Inspector only on 26.12.2016. After the payments of the inspection fees and thereafter the submission of the completion report on 20.02.2017, the plant safety approval for commissioning of the project was on 28.03.2017.

18. In the circumstances mentioned herein above, there were delays in the implementation of the project for reasons not attributable to the Appellants but attributable to the time taken by the Government Agencies for granting necessary approvals as mentioned herein above.

19. In the circumstances, the Appellants approached HESCOM for extension of time by writing the letter dated 03.12.2016 whereby the appellants had requested for execution of the project beyond the Scheduled Commissioning Date, namely, 18 months from the Effective Date which was expiring on 31.12.2016. The extension of time was sought by the Appellant in terms of Article 2.5 of the PPA on account of the above circumstances which constituted Force Majeure Events affecting the Appellant's project. In the absence of these approvals, the Appellants were not in a position to achieve the financial closure and firm up the funding and financing arrangement from the Banks and Financial Institutions.

20. The Respondent No. 1, HESCOM after considering the factual aspects, vide letter dated 04.02.2017 granted extension of time for completing the 3 MW Solar Power Project for a period of six (6) months.

21. The Appellants submit that the above letter dated 04.02.2017 was issued by HESCOM in terms of Article 2.5 of the PPA which, inter-alia, provides that HESCOM is empowered to issue extension without any

stipulation as to the approval for such extension to be taken from the State Commission.

22. The Appellant became entitled to establish the Solar Power Project by or before 29.06.2017 for the purpose of the PPA dated 30.06.2015 and for tariff provided under the PPA at the rate of Rs 8.40/Kwh.

23. On 16.03.2017, the State Commission for the first time issued a communication informing HESCOM that the extension of time should not be considered as a routine exercise except under extraordinary conditions.

24. On 05.04.2017, the State Commission directed all Escoms to advise the Solar Power Developers to file a Petition before the State Commission in regard to extension of the commissioning date.

25. Thereafter, on 13.04.2017, HESCOM issued a communication to the Appellant advising the Appellants to file a petition before the State Commission for seeking approval for extension of the Scheduled Commissioning Date.

26. On 04.05.2017, the Appellant No. 1 filed a Petition being OP No. 65 of 2017 before the State Commission, inter-alia, challenging the communication dated 13.04.2017 issued by HESCOM.

27. Thereafter, on 23.06.2017, the State Government informed the State Commission that the State Government has accepted the plea of HESCOM in the matter of extension of time to achieve the Commercial Operation Date of the Solar Power Project under the farmer scheme invoking the Force Majeure conditions of the PPA and hence called upon the State Commission to approve such extension of time.

28. On 07.07.2017 the State Commission directed HESCOM to permit the Solar Power Developer to commission the project beyond the original Scheduled Commercial Operation Date subject to the State Commission examining the merits of each case with regard to Force Majeure conditions and the applicable tariff. The State Commission directed the HESCOM to advise the Developer to file a petition before the State Commission justifying their claim for extension of time under the Force Majeure conditions as provided in the PPA.

29. On 26.10.2017, the Appellant No. 2 was impleaded as the Petitioner No.2 in the Petition being OP No.65 of 2017 filed by the Appellant before the State Commission.

30. On 18.06.2018 the State Commission reserved the Orders on OP No. 65 of 2017 filed by the Appellants challenging the letter dated 13.04.2017

issued by HESCOM in pursuance to the direction of the State Commission dated 16.03.2017.

31. In the meanwhile, the Appellants had completed and commissioned the project on 31.03.2017 as certified by HESCOM as per the requirements of the PPA and the electricity generated from the project started flowing into the Grid in terms of the provisions of the PPA dated 30.06.2015 in the month of April, 2017.

32. On 07.08.2018 the State Commission passed the Impugned order and dismissed the Petition No. 65 of 2017 filed by the Appellant.

33. Aggrieved by the Order dated 07.08.2018, the Appellants are filing the present appeal before this Tribunal.

34. QUESTIONS OF LAW-

- (a)** Whether the State Commission is right in enforcing its decision made on 16.03.2017 requiring the approval to be taken from the State Commission for grant of extension of time for achieving the Commercial Operation under Article 2.5 of the PPA dated 30.06.2015 retrospectively affecting the extensions already granted before the said date when there was no requirements to get the approval of the State Commission?

- (b)** Whether in the facts and circumstances of the case, where the State Commission has approved the format and terms of the PPA to be entered into between the Appellant No. 1 and Respondent No. 1 and providing for the circumstances under which the Respondent No. 1 can grant extension of time for achieving the commercial operation, without the need for obtaining any further approval, consent etc. from the State Commission, the State Commission is right in insisting on examining the approval granted by Respondent No. 1 for extension of time and setting aside the same, particularly, in the absence of any plea of fraud or collusion for such grant of extension?
- (c)** Whether in the facts and circumstances of the case, the State Commission is right in law to hold that the Appellants cannot be said to have been affected by Force Majeure within the scope and application of Article 8 of the PPA dated 30.06.2015 entered into between the Appellant No. 1 and Respondent No. 1?
- (d)** Whether the State Commission is right in holding that the Force Majeure Events pleaded by the Appellant as affecting the

performance of the obligation on the part of the Appellant assumed under the PPA?

- (e)** Whether the decision of the Respondent No. 1 that the Appellants were affected by reason of Force Majeure Events within the scope of Article 8 of the PPA for completing the construction of the solar power project and declaring it under commercial operation by initially stipulated scheduled commissioning date and granting six months extension in terms of Article 2.5 of the PPA can be substituted by a decision of the State Commission on the non-existence of Force Majeure event to deny the extension ?
- (f)** Whether in the facts and circumstances of the case the State Commission has correctly examined the nature of the force majeure time period during which different force majeure events were in force and the need for extension of time on the basis provided in Article 2.5 of the PPA dated 30.06.2015?
- (g)** Whether in the facts and circumstances of the case, the State Commission has acted consistent with the terms of the PPA dated 30.06.2015 and whether the State Commission can decide the issue in deviation from the provisions of the PPA

particularly when the State Commission itself had approved the standard format of the PPA and the Appellants and Respondent No. 1 had entered into the PPA terms as per the standard format approved by the State Commission?

- (h) Whether in the facts and circumstances of the case, the State Commission has correctly considered all the relevant aspects, particularly, that the Appellants had acted diligently with a view to establish the project and commission the same within the period specified in the scheduled commissioning date and that there was no reason whatsoever for the Appellants to delay or defer the implementation of the project, the appellant having already made arrangements for procurement of solar panel and other equipment?
- (i) Whether the State Commission has proceeded to reject the extension of the scheduled commissioning date despite the existence of the events beyond the control of the Appellants only to reduce the tariff applicable from Rs 8.40/KwH to Rs.4.36/KwH causing financial loss to the Appellant No. 1 as well as the farmers who are participating in the development of the solar power project?

- (j) Whether in the facts and circumstances of the case the State Commission has acted consistent with the scheme and objective of the development of the solar power projects by the Appellant in the State of Karnataka, namely, to create wealth for the farmers to the extent of their contribution to the project by offering their land and even allowing mortgaging of the land with the Lenders and at the same time adopt promotional measures for development of non-conventional energy such as solar power project consistent with the policies of the Government of India and Government of Karnataka?
- (k) Whether in the facts and circumstances of the case, the State Commission is right in holding that the declaration of commercial operation of the solar project was only after April, 2017 and not on 31.03.2017 when the solar power project was synchronized with all connectivity in place and was capable of generating and injecting of power in the grid system of the State of Karnataka and, therefore, the tariff determined at Rs.4.36/KwH vide Order fated 12.04.2017 was not in any event applicable to the solar power project of the Appellant?

- (I) Whether in the facts and circumstances of the case, the State Commission is right in dealing with the Liquidated Damages as payable by the Appellant No. 1 to HESCOM when there is no claim for the Liquidated Damages by HESCOM, there has been no allegation of any loss or prejudice to HESCOM and there is no pleadings or proof in regard to the claim of Liquidated Damages by HESCOM?

35. The Appellants have filed the following Written Submissions and Additional Written Submissions for our consideration:

36. The KERC held that the Appellants are not entitled to extension of time for commission of the solar power project which was approved by HESCOM (**Respondent No. 1**) after scrutiny by a three member technical committee under the Chairmanship of the Director (Technical), HESCOM. By its letter dated 09.10.2017, HESCOM informed KERC that a technical committee after detailed discussions, scrutiny of all the documents, and field reports sought from executive engineers, O & M divisions had decided to approve extension of up to 6 months from the date of SCOD.

37. The PPA between the Appellant and HESCOM was based on the standard format PPA in respect of Solar Power Plants of 1 – 3 MW projects

for Land Owners and institutions, that had been approved by the KERC by an order dated 16.06.2015. It may be noted that in terms of clause 2.5.3 of the standard format PPA, HESCOM has the authority to approve extension.

38. KERC approved the PPA executed between the Appellant and HESCOM on 20.07.2015

39. KPTCL by its order dated 21.12.2015 issued a guideline for grant of evacuation approval to smaller wind and solar generators. It is submitted that para 5 (g) of the said guidelines allows applicants to ask for land on lease for terminal bay instead of acquiring land on their own, provided payment of lease charges are made. Pertinently, the Appellant had raised a request to KPTCL for setting up of 11 KV Terminal Bay on 20.10.2015, but the KPTCL had raised the demand for lease charges only on 28.01.2016, after a delay of 3 months, which was paid by the Appellant on 01.02.2016.

40. The Appellant No. 2 wrote a letter dated 03.12.2016 to HESCOM requesting for extension of time upto 6 months to commission its project in terms of Article 2.5 and 8 of the PPA. Further, GOK in view of various representations made by similarly placed SPPs, issued a direction to all ESCOMs to constitute a committee and to examine each cases on its own merits. In view of GOK's direction, the Appellant's case for extension of SCOD was considered by a three member Technical Committee under the

Chairmanship of the Director (Technical), HESCOM on 23.01.2017. HESCOM by its letter dated 04.02.2017 allowed the Appellant's request for extension and granted 6 months time to commission its plant in terms of Articles 2.5 and 8 of the PPA, categorically stating that the said extension was without altering any other terms and conditions of the PPA.

41. It may be noted that Article 4.2 of the PPA deals with '*Obligations of HESCOM*' and is extracted below for ready reference:

"4.2. Obligations of HESCOM:

HESCOM agrees:

(d) HESCOM agrees to provide support to the SPA and undertakes to observe, comply with and perform subject to and in accordance with the provisions of this Agreement and the Applicable Laws as following:

(i) support, cooperate with and facilitate the SPD in 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.

42. It is submitted that HESCOM under Article 4.2 (d)(iii) had acted in a reasonable manner while granting extension of time to the Appellants after scrutiny by a three member technical committee.

43. The KERC issued a general communication dated 16.03.2017 to all the ESCOMS, stating that ESCOMS could not allow extension of time

beyond the SCOD without obtaining prior approval of the Commission, and that the same could be granted under extraordinary circumstances to be proved by the project developer. Thereafter, HESCOM by its letter dated 13.04.2017, informed that the Commission has issued clarification and advised to file a petition before the Commission. Further, KERC issued another communication dated 05.04.2017 to all ESCOMS directing them to advise the concerned SPD/SPV under Land Owners/ Farmer's Scheme to file a petition before the KERC for seeking approval for any extension of COD.

44. Meanwhile, GOK issued a letter dated 23.06.2017 to the Secretary, KERC stating that the reason for the extensions issued by ESCOMs were due to Force Majeure and the extensions were done in accordance with the PPAs approved by the KERC, without altering the KERC approved tariff as agreed in the PPA. GOK hence requested the commission to consider approval of the extension of SCOD. In reply to the aforementioned communication, the KERC by its letter dated 07.07.2017 informed GOK that the commission has approved ESCOMs grant of extensions to developers to commission projects beyond original SCODs as per PPA but the tariff applicable in each case shall be examined according to its own merits.

45. It was in this backdrop, the Original Petition No. 65 of 2017 was filed before the KERC by the Appellant. Various Original Petitions seeking similar reliefs were filed before the KERC by other similarly placed and affected parties.

46. The KERC passed the Impugned order holding that the Appellant was not entitled to extension of time to commission its project and had failed to prove Force Majeure events. Accordingly, the KERC held the Appellant to be entitled to a reduced tariff of Rs. 4.36/ unit under Article 5.1 of the PPA and also liable to pay liquidated damages under Articles 2.2 and 2.5.7 of the PPA.

47. It is submitted that the Impugned Order is based on assumptions relating to the Appellant not being diligent in implementing the Project. In this regard, it is emphasized that the Appellant had been diligent in implementing the project and had placed all orders for solar modules, power conditioning units, mounting structures, cable and accessories etc. prior to the original scheduled commissioning date (SCOD) of the project as per the PPA. Therefore, it is submitted that but for the force majeure events, the Appellant's project would have been commissioned within the SCOD. Thus, considering the fact that entire investment cumulating into the capital cost of the project was made by the Appellant prior to SCOD, it may

be noted that the Appellant does not stand to get any financial benefits of reduced expenditure in any manner by delaying the COD of the project, as has been indicated by KERC in the impugned order.

48. It may be pertinent to note that the Appellant had started the process of obtaining the required documents in prescribed Form (Annexure – 1) as per Rule 106A under Section 95 of the Karnataka Land Revenue Act, 1964, **(KLRA)** for conversion of his land immediately after signing of the PPA. Further, under Section 95 (10) of the KLRA, as amended on 13.08.2015, a land shall be deemed to have been converted upon payment of conversion fine or fees payable, if any. It is submitted that the intimation to pay fees was given to the Appellant only on 30.05.2016, despite the application for conversion having been made on 10.12.2015, i.e. after 170 days.

49. Along with the prescribed Form (Annexure – 1) as per Rule 106A under Section 95 of KLRA, to obtain a conversion order, the following documents are required to be submitted:

- Record of Rights
- Akarband Certificate
- Nil Encumbrance Certificate for 14 years
- Mutation Entries
- 11E Sketch

- PTCL Certificate under the Karnataka Scheduled Castes and Scheduled Tribes (Prohibition of Certain Lands) Act, 1978.

50. It is submitted that the KERC has erred holding that the Appellants are not entitled to extension of time as granted by HESCOM under the PPA and reducing the tariff from Rs. 8.40 per unit to Rs. 4.36 per unit. In view of aforementioned facts and circumstances, it is submitted that the Appellants are entitled to the tariff of Rs. 8.40 per unit in terms of the PPA dated 30.06.2015 and even otherwise, the present Appellant herein has already spent a total cost of Rs. 18,92,75,883 as on the date of commissioning of its project, therefore the reduced tariff is not sufficient to even met its loan commitments and stay afloat.

51. The Ministry of New and Renewable Energy (**MNRE**) by its letter dated 09.04.2018 has requested GOK to request KERC to restore original tariff of Rs. 8.40 per unit for 1 – 3 MW Solar Power Plants commissioned under the Land Owned farmers Scheme of Karnataka under Section 108 of the Electricity Act, 2003.

52. It is submitted that, this Tribunal by its judgment dated 27.02.2020 in Appeal No. 368 of 2019 entitled “*Ayana Ananthapurama Solar Power Private Limited v. Andhra Pradesh Electricity Regulatory Commission &Ors.*” categorically held that the date of approval of the PPA by the KERC

would be the starting time to reach the completion of project in terms of the agreements between the SPD and ESCOM.

53. It is also submitted that, this Tribunal in “*Chamundeshwari Electricity Supply Company Ltd. v. Saisudhir Energy (Chitradurga) Pvt. Ltd.*” reported in 2018 SCC OnLine APTEL 65 had held that no formal issuance of Notice is required in cases of force majeure events.

54. Further, the issues involved in the present Appeal are covered by this Tribunal’s judgment dated 28.02.2020 in Appeal No. 340 of 2016 entitled “*Azure Sunrise Private Limited v. Chamundeshwari Electricity Supply Corporation Limited*” wherein this Tribunal has held that once extension of Scheduled Commissioning Date is approved by the concerned DISCOM, question of reduced tariff does not arise.

55. Furthermore, the present Appeal is squarely covered by this Tribunal’s Order dated 14.09.2020 in Appeal No. 351 of 2018 entitled “*Chennamangathihalli Solar Power Project LLP v. Bangalore Electricity Supply Company Limited*”, wherein this Tribunal had held as under:

“9.1. Having regard to the deliberations and our analysis, as stated supra, we are of the opinion that there was nothing wrong on the part of KERC to suo motto interfere in the matter. As being a State Regulator, it has jurisdiction to look into affairs of ESCOMS in purchase and supply of powers in the larger interest of consumers. However, as the COD extension was granted under the signed PPA between the parties and after applying, due diligence in the matter

considering all prevailing facts and matrix of events, the State Commission ought to have considered the same and approved so as to meet the ends of the justice. Needless to mention that the PPA's Terms & Conditions were duly approved by the State Commission which crystallised the rights of the parties."

56. In light of the above it is therefore requested that this Tribunal may allow the Appeal relating to a small solar power project developed under land owners farmers category under the Solar Power Policy of the State of Karnataka, given that the delay of three months in commissioning the project has been on account of procedural delay by government authority/intuitional level which were beyond the control of the Appellants.

Additional Written Submissions:-

57. The present Additional Written Submissions are being filed in addition to the Written Submissions filed by the Appellant on 17.11.2020. That these submissions are being filed only on a limited issue raised during arguments in the matter and may be read as part and parcel of the Appellant's submissions already filed in the instant matter.

58. It is submitted that HESCOM having approved the extension of time, by 6 months for commissioning of the Appellant's solar power project by its letter dated 04.02.2017, after scrutiny of relevant documents by members of the technical committee constituted by HESCOM itself, are estopped from taking a contrary stand, more so, since there has been no justifiable

reason put forth by HESCOM at any point of time for the change in its stand.

59. In *Shyam Telelink Ltd. v. Union of India*, reported in (2010) 10 SCC 165, the Hon'ble Supreme Court observed as under:

“23. The maxim qui approbat non reprobate (one who approbates cannot reprobate) is firmly embodied in English common law and often applied by courts in this country. It is akin to the doctrine of benefits and burdens which at its most basic level provides that a person taking advantage under an instrument which both grants a benefit and imposes a burden cannot take the former without complying with the latter. A person cannot approbate and reprobate or accept and reject the same instrument.”

60. Also relevant to note is the Hon'ble Supreme Court's observation in *Suzuki Parasrampuriah Suitings Private Limited v Official Liquidator of Mahendra Petrochemicals Limited (in Liquidation) and Ors*, reported in (2018) 10 SCC 707:

“12. A litigant can take different stands at different times but cannot take contradictory stands in the same case. A party cannot be permitted to approbate and reprobate on the same facts and take inconsistent shifting stands. The untenability of an inconsistent stand in the same case was considered in Amar Singh v. Union of India, observing as follows:

“50. This Court wants to make it clear that an action at law is not a game of chess. A litigant who comes to court and invokes its writ jurisdiction must come with clean hands. He cannot prevaricate and take inconsistent positions.”

13. A similar view was taken in Joint Action Committee of Air Line Pilots' Assn. of India v DGCA, observing:

“12. The doctrine of election is based on the rule of estoppel ---- the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estopples in pais (or equitable estoppel) which is a rule in equity. ... Taking inconsistent pleas by a party makes its conduct far from satisfactory. Further, the parties should not blow hot and cold by taking inconsistent stands and prolong proceedings unnecessarily.”

61. In the instant case, the impugned order dated 07.08.2018 passed by the KERC in OP No. 65 of 2017 also records as under:

‘5) Upon Notice, the Respondent appeared through its learned counsel. Though the case was adjourned on many occasions, at the request of the Respondent (HESCOM), to file its Statement of Objections, the Respondent (HESCOM) has not filed the same. The Petitioners concluded their arguments. Finally, the learned counsel for the Respondent (HESCOM) submitted that, it would not specifically object to the pleas raised by the Petitioners and that it would abide by the Orders of this Commission. Therefore, the arguments of the Respondent were taken as ‘concluded’. ...”

62. In view of the above, it is submitted that the Respondent HESCOM cannot on the one hand approve the extension of time on the grounds of force majeure events, and not object to the Appellant’s pleas before the Commission, but on the other hand, in the appellate proceedings before this Tribunal resile from their own act of granting extension by taking a diametrically opposite view. The Respondents ought not to be permitted to approbate and reprobate in this manner.

63. It is also reiterated that the present Appeal is similar on facts and is squarely covered by this Tribunal’s Order dated 14.09.2020 in Appeal No.

351 of 2018 titled “Chennamangathihalli Solar Power Project LLP v. Bangalore Electricity Supply Company Limited”, wherein this Tribunal had held as under:

“9.1. Having regard to the deliberations and our analysis, as stated supra, we are of the opinion that there was nothing wrong on the part of KERC to suo motto interfere in the matter. As being a State Regulator, it has jurisdiction to look into affairs of ESCOMS in purchase and supply of powers in the larger interest of consumers. However, as the COD extension was granted under the signed PPA between the parties and after applying, due diligence in the matter considering all prevailing facts and matrix of events, the State Commission ought to have considered the same and approved so as to meet the ends of the justice. Needless to mention that the PPA’s Terms & Conditions were duly approved by the State Commission which crystallised the rights of the parties.”

64. That the Appellant submits that the Article 6 of the PPA dated 30.06.2015 deals with the issue of billing and payment. Article 6.4 of the PPA categorically provides for Late Payment Surcharge, which is being extracted below for ready reference:

“6.4 Late Payment Surcharge: In the event of delay in payment of a monthly bill being made by HESCOM 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.”

65. It is further submitted that this Tribunal’s Judgment in *Lanco Amrkantak Power Limited v Haryana Electricity Regulatory Commission* dated 22.05.2019 in Appeal No. 308 of 2017 on payment of interest and the time value of money wherein this Tribunal had held as under:

“93. . . .

iv) Therefore, for equity and restitution payments made at a later stage, of the amount, due in the past, must be compensated by way of appropriate rate of interest so as to compensate for the loss of money value. This is a proven concept of time value of money to safeguard the interest of the receiving party.

v) The Appellant has placed reliance on several judgments passed by this Tribunal in several similar matters wherein it has been clearly brought out that the developers are entitled to interest on the differential amount due to them as a consequence of redetermination of tariff. It has been clarified in various judgments that the interest is not a penal charge if it is fixed according to commercial principles. It is only compensation for the money denied at the appropriate time.

. . . .

vii) The Respondent No. 3 have submitted that interest cannot be paid until the amount is crystallized. It is pertinent to note here that though the amount was crystallized by the State Commission vide their Impugned Order but the most important fact to be kept in mind is that the State Commission redetermined the tariff from the date of commencement of supply which clearly shows that the due date is the date of commencement of supply. In such matters the crucial point for consideration is that interest is not a penalty or punishment at all. But, it is the normal accretion on capital. Equity demands that the paying party should not only pay back the principal amount but also the interest thereon to the recipient and therefore the argument of the Respondent does not hold ground and needs to be rejected. . . .”

66. Therefore, in terms of Article 6.4 of the PPA read with the abovementioned Judgment of this Tribunal, the interest amount is intended to compensate the developer, who was paid a lower tariff than what it was entitled to, the Appellant is entitled to Late Payment Surcharge from the date of commissioning of the project, i.e. 31.03.2017 onwards as HESCOM has been paying the Appellant at the reduced tariff rate of Rs. 4.36/ kwh as against the PPA tariff rate of Rs. 8.40/kwh.

67. With these submissions, they pray for allowing the Appeal restoring the agreed PPA tariff of Rs.8.40/kwh, and also, grant the consequential relief of interest/ late payment surcharge provided in the PPA on the differential tariff that would be payable to the Appellants for the period commencing from the date of commissioning of the project till date.

68. Mr. Shahbaaz Husain, learned counsel appearing for the Respondent No. 1 has filed the following written arguments for our consideration:-

A. Jurisdiction of Karnataka Electricity Regulatory Commission (KERC) to pass the Impugned Order

69. The contention of the Appellant that the KERC is not a party to the Power Purchase Agreement (PPA) and thus, it's approval for extension of time is not mandated under law is wholly erroneous and bad in law.

70. It is a settled principle of law that every contract is subject to the applicable statutes and any provision of the contract in so far as it contradicts any law is void to that extent. In the instant case, the Electricity Act, 2003 under Section 86(1)(b) requires the KERC to regulate electricity purchase and procurement process of the distribution licenses including the price at which electricity shall be procured from the generation companies or licenses or from other sources through agreements for purchase of

power for distribution and supply within the state. The purport of Section 86(1)(b) of the said act is abundantly clear in empowering the KERC to regulate the PPA and the clauses thereof in such manner as it may deem fit.

71. The Commission has the exclusive jurisdiction to determine the tariff payable for purchase of energy by distribution license. The validity of any terms of the contract affecting the tariff rate is always subject to the scrutiny by the Commission.

72. The Hon'ble Supreme Court has held that the State Commission has powers to revisit the tariff of a concluded PPA, should the same be in furtherance of public interest. In **Gujrat Urja Vikas Nigam Limited Vs. Tarini Infrastructure Ltd. And Ors.**, reported in **AIR 2016 SC 5580**.

73. The Hon'ble Supreme Court in the above judgment has laid out the ratio that the State Commission under Section 86(1)(b) of the Electricity Act, 2003 is empowered to regulate the tariff of a concluded PPA if the same is in warrant in public interest even in the absence of any such powers being vested in the State Commission in the PPA. In the instant case, the PPA (Article 5.1) itself provides for a varied KERC (if it is lower than Rs. 8.40/unit) in the event of delay in commissioning of project. Admittedly, there is a delay of over three months in the commissioning of

the project and the varied KERC tariff as on the date of commissioning of the project was Rs. 4.36/unit, which is lower than 8.40/unit; thus, becoming applicable tariff.

74. A lower tariff is always in the best interest of public as the tariff being paid by the Respondent gets passed on to the consumers. Wherefore, in conformity with the provisions of PPA, the KERC had the lawful right to regulate the tariff in the instant case.

75. The Appellant has erroneously relied on the judgments of Hon'ble Supreme Court in Gujrath Urja Vikas Nigam Limited v EMCO Ltd and Anr (2016 (2)SCALE 75) And Bangalore Electricity Supply Company v. Konark Power Projects Ltd. 2015(5) SCALE 711 to state that a tariff arrived at in a concluded PPA cannot be revisited. The Hon'ble Supreme Court in above quoted judgement - **Gujrat Urja Vikas Nigam Limited Vs. Tarini Infrastructure Ltd. And Ors.**, reported in **AIR 2016 SC 5580**, has distinguished the said judgments relied upon by the Appellant.

76. It is a settled provision of law that a tariff under PPA can be revisited by the KERC in the larger public interest. This being the case, the next issue is whether the KERC can suo moto issue directions to the Respondent no.1 to not allow the extension of time under PPA, when it is not a party to the PPA. This issue has been positively settled by the

Hon'ble Supreme Court in the following judgement.

77. The Hon'ble Supreme Court in **All India Power Engineer Federation & Ors. Vs. Sasan Power Ltd. & Ors. Etc., Civil Appeal No. 5881-82/2016, dated 08.12.2016** held that to uphold public interest; the KERC is the only body that can adjudicate on tariff matters. The following was held:

“All this would make it clear that even if a waiver is claimed of some of the provisions of the PPA, such waiver, if it affects tariffs that are ultimately payable by the consumer, would necessarily affect public interest and would have to pass muster of the Commission under Sections 61 to 63 of the Electricity Act. This is for the reason that what is adopted by the Commission under Section 63 is only a tariff obtained by competitive bidding in conformity with guidelines issued. If at any subsequent point of time such tariff is increased, which increase is outside the four corners of the PPA, even in cases covered by Section 63, the legislative intent and the language of Sections 61 and 62 make it clear that the Commission alone can accept such amended tariff as it would impact consumer interest and therefore public interest.”

78. The extension of time for commission of the project if allowed would entitle the Appellant to higher tariff, which would not be justified or fair. The payment of higher tariff would result in higher tariff to the consumer, thereby adversely affecting public interest. The following facts will clearly

establish the public interest involved in the instant case:

- (i) The State Commission vide its order dated 10/10/2013 had fixed solar tariff at Rs. 8.40/- for projects commissioning on or after 1/04/2013. Thereafter, the same was reduced to Rs.6.51 vide its order date 30/07/2015 for projects commissioning on or after 1/09/2015. The State Commission further reduced the tariff to Rs.4.36 vide its order dated 12/04/2017 for projects commissioning on or after 1/04/2017. The State Commission has further reduced the tariff to Rs.3.05 vide its order dated 18/05/2018 for projects commissioning after 01/04/2018.
- (ii) The above tariff orders of the State Commission indicate a downward trend in the solar tariff on account of advancement in technology and reduction in capital cost for solar projects. Wherefore, if a generator has delayed in commissioning the project, the cost of such project is bound to substantially come down as the market capital rate for such projects has been declining year on year. The cost of the project, on account of delay, will be much lower than the cost that was anticipated for such projects at the time of entering into PPA. In order to cater to this trend, the PPA has a clause for lower varied tariff as on

the date of commissioning.

- (iii) Financial assistance was sought and investment was made in 2016 by the Appellant; thus, incurring much lesser capital cost than what was anticipated in the 2013 tariff order of KERC providing tariff of Rs. 8.40. Wherefore such reduction of cost shall in all fairness be passed on to the consumers by reducing the tariff under Article 5.1 of the PPA.

79. Thus, the Commission was justified in reducing the tariff.

A. No dispute between the Appellant and Respondent no.1

80. The Appellant's averment that the Respondent No.1 has agreed to extend SCOD and hence there cannot be a dispute between the Appellant and Respondent no.1, requiring adjudication of KERC is wholly erroneous and incorrect.

81. The Respondent no. 1 vide its letter dated 31.3.2017 states that the commissioning of the project is subject to the liquidated damages and article 5.1 of PPA. Wherefore, it is clear that the Respondent no.1 has merely allowed the commissioning of the project and has not exercised its right to terminate the agreement on the ground of delay: however, such allowance by the Respondent no.1 has been subjected to payment of

liquidated damages and a lower tariff under Article 5.1 of the PPA.

82. The Appellant, however, contends that the delay is not subject to article 5.1 or liquidated damages. So, clearly there is a dispute between the Respondent no.1 and the Appellant.

83. The Respondent no.1 being a licensee of the KERC is duty bound to follow the directions of KERC. Also, under Section 86(1)(b), the KERC being the regulator of the terms of PPA, is empowered to issue directions to Respondent no.1 in best interest of public.

B. Delay in Commissioning of the Project is directly attributable actions and omissions of the Appellant

84. The contention of the Appellant that the delay in commissioning of the project was caused by Government Authorities in granting land conversion order and evacuation approval is factually incorrect. On the contrary, the delay is primarily the result of negligence on the part of Appellant in implementation of the solar project.

85. The PPA was executed on 30.06.2015, which also is the effective date of PPA. The Appellant was duty bound to complete the project and commission the same within 18 months of the effective date, i.e., 31.12.2016. However, the project came to be commissioned on 31.03.2017 with a delay of more than three months. The Commission has determined

that the project was truly commission only in April as there is no proof of injection of energy on the claimed date of commissioning, i.e. 31.03.2017. The following table will explain the main reasons on account which the delay occurred.

Sl. No.	Event	PPA e date (effective date)	Date of Application	Delay	Reference
1	Application for estimate for Power transmission line	30.06.2015	01.11.2016	4 months	Para7of Appeal
2	Application for evacuation of power	30.06.2015	20.10.2015	3 and half months	Para 7 (O) Of Appeal
3	Application for conversion of land	30.06.2015	10.12.2015	5 months	Para 7 (N) of Appeal
6.	Applicationfor11Esketch	30.06.2015	30.09.2015	3 months	Para 7 (L) Of Appeal

86. Had the Appellant been diligent in not causing the above tabled delays, the project would have commissioned well within the Schedule Commercial Operation Date (SCOD), which fact also proves that the Government authorities or the Respondent has not caused undue delay in performing their duties or obligations.

87. Furthermore, the Appellant has not produced any document or detail to show that efforts were made on its part to follow up with the concerned authorities and expedite the process, hence cannot claim that delay was beyond its control or that it's covered under the force majeure clause.

88. The Appellant did not provide any such monthly intimation and only

wrote about the same on 03.12.2016. The Appellant falsely contends that the delay in achieving SCOD is on account of force majeure events and hence the same shall be condoned by extending the SCOD.

89. Article 8 of the PPA provides for the force majeure events and also the conditions for their applicability.

90. Therefore, the Appellant's delay in execution of the project cannot be condoned.

C. State Government Recommendation

91. The Appellant's submission that a three-member committee of the Government of Karnataka (GOK) has ruled that the Appellant is entitled to extension of time to commission the project and hence, the SCOD shall stand extended, is against the principles and basic structure of the Electricity Act, 2003.

92. Under the said Act, the government has no jurisdiction to decide on the tariff issues and the same falls within the exclusive jurisdiction of KERC (section 62 r/w 86(1)(b) of the Act).

93. Admittedly the State Government Policies have been subjected to the tariff determined by the State Commission from time to time. As established supra, the Commission being the custodian of public interest and the

authority to determine tariff has a right to decide on the quantum of tariff in conformity with the provisions of PPA. Moreover, the tariff determination is the exclusive domain of State Commission and the State Policies cannot have a bearing on the tariff determined by the State Commission.

94. The GOK has no role in the tariff matters and has not evaluated the situation from the Electricity Act's point of view, which provides for a low and just tariff to consumers.

95. In light of the above submissions and facts, it is most humbly prayed that this Tribunal be pleased to dismiss the above appeal in its entirety by imposing costs on the Appellant.

96. We have gone through the pleadings and written submissions filed by the parties in detail. We have also heard learned counsel on both sides at length.

ANALYSIS & DECISION

97. Based on the contentions of both the parties, the points that would arise for our consideration are:

(A) “Whether the State Commission had jurisdiction to entertain the Petition?”

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

98. 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 had jurisdiction to adjudicate the petition in question.

99. Then coming to point no. 2, the following list of dates are relevant for analyzing the contentions raised by both the parties in order to opine whether there was force majeure event which prevented the Appellants to commission the project within the prescribed timeline:

- (a) It is seen that after signing of PPA between the parties on 30.06.2015, it was approved on 20.07.2015.
- (b) The Appellant applied for 11 E sketch (land area survey) on 30.09.2015 which is necessary for filing application for conversion of land.

- (c) Grid connectivity came to be applied on 20.10.2015.
- (d) 11 E sketch came to the hands of the Appellant on 30.11.2015.
- (e) On 10.12.2015, Appellant applied for conversion of use of land for setting of power plant.
- (f) In response to the application for evacuation approval on 20.10.2015, only on 04.04.2016, tentative power evacuation approval was received. In between, the Appellant was corresponding with KPTCL for evacuation approval which is evident from various correspondences.
- (g) Though the Appellant sought for final evacuation approval on 21.05.2016, it was received on 11.08.2016 after a lapse of three months.
- (h) Meanwhile the Appellant was pursuing the application for land conversion which required inspection of the land by Tahsildar and recommendation of Tahsildar to the Deputy Commissioner. The application was filed on 10.12.2015.
- (i) The order of conversion came after seven months i.e., 18.06.2016.

- (j) On 07.12.2016, the Appellant applied for inspection of the Chief Electrical Inspector with all necessary drawings etc.
- (k) Approval of the drawing was given on 26.12.2016 and the necessary fee was paid on 18.01.2017.
- (l) The plant safety approval was issued on 28.03.2017 and commissioning certificate was granted on 31.03.2017.
- (m) The Electricity generated from the solar power project of the Appellant into the grid is from April 2017.

100. The following clauses of PPA are relevant.

(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 HESCOM/KPTCL as the case may be:*

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

CONDITIONS PRECEDENT

2.1 Conditions Precedent:

The obligations of HESCOM 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 HESCOM and achieve financial closure and provide a certificate to HESCOM from the lead banker to this effect;*
- (b) *All Consents, Clearances and Permits required for supply of power to HESCOM as per the terms of this Agreement; and*
- (c) *Power evacuation approval from Karnataka Power Transmission Company Limited or HESCOM, as the case may be.*

2.1.2 ***SPD shall make all reasonable endeavors to satisfy the Conditions Precedent within the time stipulated and HESCOM 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 HESCOM 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 HESCOM 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 HESCOM or due to Force Majeure, the SPD shall pay to HESCOM 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, HESCOM 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 HESCOM, simultaneously with the execution of this Agreement, on irrevocable and revolving bank guarantee from a scheduled bank acceptance to HESCOM 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 HESCOM in the form of bank guarantees in favour Managing Director of the HESCOM 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 HESCOM as provided in clause 2.5.7, or failure to meet the Conditions Precedent by the SPD, HESCOM 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 HESCOM 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, HESCOM 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 HESCOM 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 HESCOM 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 HESCOM through the use

of due diligence, to overcome the effects of the Force Majeure Events affecting the SPD or HESCOM, or till such time such Event of Default is rectified by HESCOM.

- 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 HESCOMs.***

Subject to the other provisions of this agreement, if the SPD is unable to commence supply of power to HESCOM by the scheduled commissioning date, the SPD shall pay to HESCOM, 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 HESCOM 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 /HESCOM.*
- (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/HESCOM, 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/HESCOM, 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 HESCOM as per Clause 5.2.*

4.2 Obligations of HESCOM:

HESCOM 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) *HESCOM 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 HESCOM 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 HESCOM 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 HESCOM 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."

101. Aggrieved by the impugned order wherein the tariff was reduced to Rs.4.36 per unit from Rs.8.40 per unit and so also direction that Appellant was liable to pay damages including liquidated damage, this Appeal came to be filed.

102. It is not in dispute that in response to the solar policy of Govt. of Karnataka to harness the potential of solar resources in the State of Karnataka, in terms of guidelines, KREDL was established as nodal agency for the purpose of receiving applications and verification of formalities.

103.In terms of guidelines, PPA came into existence between the parties, wherein the agreed tariff per unit was Rs. 8.40. The project was to be

completed within 18 months from the date of signing of the PPA by the Appellant with Respondent i.e., 30.06.2015. To set up the solar plant, the Appellant is required to secure number of approvals/sanctions from various governmental instrumentalities such as land conversion, evacuation of power, setting up of bay and lease charges and approval for line changing. Since the project was meant to encourage farmers to set up solar plants and since they were not familiar with the formalities of securing various approvals, they were permitted to form for SPV.

104. According to the Appellants, on account of delay in securing approvals from various authorities, considerable time was taken though they were not responsible. Because of 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 while passing the impugned order; therefore, it has to be set aside.

105. According to the Respondent HESCOM'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.

106. According to Appellants, there was considerable delay on the part of governmental instrumentalities to grant necessary approvals/sanctions which delayed the commissioning of the project. Therefore, in terms of Article 2.5 of the PPA, they approached 1st Respondent for extension of SCOD by six months which was duly considered by the 1st Respondent by extending the SCOD. On 24.09.2018 this Appeal is filed aggrieved by the impugned order. On 04.02.2017 such extension was granted.

107. Meanwhile on the direction of HESCOM, Appellant filed the present OP challenging the direction of the HESCOM to file a petition before the State Commission seeking approval for extension of SCOD. This move of the HESCOM was due to direction of the State Commission on 05.04.2017 directing all the ESCOMS to advice solar developers to file petition before the State Commission with regard to extension of SCOD.,

108. Apparently, on the representation of farmers/solar developers, the State Govt. on 23.06.2017 informed the Commission to accept the plea of HESCOM in the matter of extension of time to achieve COD under the farmers' scheme based on force majeure event. Similarly, Govt. of India i.e., MNRE advised that the delay in the grant of approvals by the State

Commission could be considered as one of the grounds for extension of time. After hearing the parties, the State Commission disposed of the petition opining that appellants were not entitled for extension of time in terms of Article of 2.5 read with Article 8. Therefore, in terms of PPA, the applicable tariff of Rs. 4.36 was awarded apart from imposing damages.

109. It is the contention of the Appellant that this interference of the Commission was not called for the since the extension of time for COD was granted by HESCOM based on the facts available on record, which also has the seal of the State Govt.

110. According to the Respondents, the State Commission being the regulator, in the interest of consumers has every authority to interfere, therefore, the State Commission was justified in scrutinizing the agreement or contracts to ascertain the reasonability and validity of the tariffs including terms and conditions.

111. Similar argument was raised pertaining to the authority of State Commission in **Chennamangathihalli's** case in Appeal no. 351 of 2018. By referring to the Judgment in **Tarini Infrastructure's** case [AIR 2016 SC 5580] and so also All India Power Engineer Federation in Civil Appeal No. 5881-82/2016 by the Hon'ble Apex Court, this Tribunal opined that the regulatory Commission is the only body that can adjudicate tariff matters to

uphold public interest and so also held that the State Commission to empower to regulate tariff of a concluded contract, if the same is required in public interest. Therefore, we opined in **Chennamangathihalli**'s case that Respondent Commission had an authority to act in accordance with law and statute. This opinion of the Tribunal is affirmed without any modification by the Hon'ble Supreme Court in Civil Appeal.

112. In the **Chennamangathihalli**'s case, we had an occasion to consider various problems faced by the farmers' scheme so far as development of solar energy in the state of Karnataka while securing various approvals/sanctions from governmental instrumentalities.

113. It is also not in dispute that in terms of PPA, the distribution licensee was entitled to extend time for COD up to a period of six months on force majeure clause which in fact was granted by the Respondent HESCOM. That apart, on the recommendation of three member Committee constituted by Govt. of Karnataka, the Govt. of Karnataka informed the State Commission that the State Govt. accepted the cause for extension of time to achieve Commercial Operation Date under farmers' scheme and accordingly called upon the State Commission to approve such extension.

114. Under these circumstances, one has to see whether the State Commission was justified in interfering with the agreed tariff and reducing

the same to applicable tariff as on the date of the impugned order. Was the State Commission justified in passing the impugned order? Whether the State Commission appreciated the facts judiciously keeping in mind the peculiar problems faced by farmers.

115. From the above facts and circumstances, we have to see whether the Appellants were negligent in pursuing their effort to get various approvals from governmental instrumentalities or whether they acted with utmost care in terms of diligence. We note from the above discussion that the Appellants acted with utmost care and there was no negligence on their part to apply and secure necessary approvals within reasonable time.

116. The written submissions and oral arguments are taken into consideration so far as various dates and the contentions. We note that Govt. of Karnataka under the special programme for promoting renewable energy generation intended to provide opportunities to land owning farmers to become solar power developers. In response to the policy of the State Govt., several farmers including the Appellant came forward to set up solar plants in their respective lands.

117. The PPA came into existence which guaranteed Rs. 8.40 per unit on completion of the project in 18 months from the date of signing the PPA. It is now well settled that it is not the date of signing the PPA which has to be

considered as effective date, but the date on which the PPA becomes implementable that is the approval of the PPA by the State Commission has to be the effective date.

118. In terms of guidelines issued by State Govt. to set up solar plants several sanctions/approvals/clearances had to be obtained by the farmers like land conversion, grid connection and power evacuation approvals, plant safety approval from chief electrical inspector etc. Apparently, right from the date of signing of the PPA, the Appellant was running from office to office to secure these approvals/sanctions as stated above. If time was taken for getting these approvals as stated above, we note that considerable time was lapsed. Definitely it was not on account of the Appellants' negligence or lethargic approach.

119. We are of the opinion that the time taken to obtain the above mentioned approvals would definitely become impossible for the Appellants to achieve COD of the solar plant within SCOD of the PPA.

120. In fact as stated above, the HESCOM taking into consideration all these facts and in line with the terms of PPA extended time for COD within the extended SCOD. This action of the HESCOM has support from the fact that the State Govt. also, after due diligence and prudence, accorded

extension of COD by six months. On account of such extension, the SCOD automatically get postponed by six months.

121. Apart from that, in terms of clause 10.3 of PPA, it says despite complying with all legal requirements to obtain, renew or maintain required license or legal approval will also amount to force majeure event. Therefore, we are of the opinion that if at all there was delay in receiving various clearances/approvals by the State Govt. and its instrumentalities which are beyond the control of the Appellants, the same has to be treated as event of force majeure, since the same would directly and seriously affect the implementation of the solar project.

122. It is noticed in the present Appeal that PPA was executed on 30.06.2015 and the same was approved on 20.07.2015. The PPA became implementable with effect from 20.07.2015. There was delay of 189 days between the date of application for conversion of the land use and the final conversion order.

123. Similarly Grid connectivity permission and evacuation of power approval was obtained after 9 months delay i.e., though application is submitted on 20.10.2015 for Grid connectivity and evacuation approval, provisional approval was on 04.04.2016 and final approval was on 11.08.2016.

124. Even in getting CEIG Clearance Certificate, Appellant approached the authority on 07.12.2016, the plant safety approval was issued only on 28.03.2017. On 31.03.2017 solar plant was commissioned.

125. Since extension for COD was extended by six months, the extended SCOD in this case is 20.07.2017 as the effective date is 20.07.2015. Hence, plant was commissioned within the extended COD.

126. The 1st Respondent based on the various problems faced by the solar developers granted extension of COD by six months. Within the said six months' extended period, the grid connectivity was obtained after safety approval certificate issued by CEIG. The Petition came to be filed by the Appellant only on account of direction of the Commission to approach the Commission seeking approval of extension of time. Having approved the clause in the PPA that HESCOM could extend COD by six months period, in the facts and circumstances discussed above, we are of the opinion that the Respondent Commission was not justified in opining that extension of six months' time for COD was not on account of force majeure event as pleaded by the Appellant.

127. It is relevant to point out the conduct of the HESCOM. During the entire process of securing these approvals by the Appellant, the Solar Developer has brought to the notice of the HESCOM the obstacles faced

and at no point of time, there was any note of caution or objection finding fault with the pace at which the Solar Developer was pursuing the execution of the solar plant. In fact, after accepting the reasons for the delay being force majeure event in terms of PPA, the HESCOM did extend time for commissioning of the plant by six months. Subsequently, the conduct of the HESCOM is very surprising. It started finding fault with the Appellant contesting the matter seriously questioning the reasons for delay as force majeure event. We are of the opinion that the Respondent HESCOM cannot approbate and reprobate.

128. 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.

129. 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.

130. 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.

131. We are of the opinion that there was considerable delay in securing approvals/clearances from various instrumentalities of the State Govt. which was beyond the control of the Appellants.

132. 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.

133. In light of the above discussion, we are of the opinion that the Respondent Commission failed to analyze all the facts in issue in a just and proper manner. Hence, we are of the opinion the impugned order warrants interference. Accordingly, 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 - HESCOM 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.

134. Pending IAs if any, shall stand disposed of.

135. No order as to costs.

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