

APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)

APPEAL NO. 38 of 2019 & IA No. 65 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:

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

2. Shri C. Vyramudi,
No.121, Chikkadyavasandra
Dyavasandra Main Road,
K.R. Puram,
Bengaluru, Karnataka

.....**Appellants**

Versus

1. Bangalore Electricity Supply Company Limited
Through its Managing Director,
K R Circle
Bangalore- 560001

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
- Counsel for the Respondent(s) : Mr. Balaji Srinivasan
Mr. S. Sriranga
Mr. Sriranga Subbanna
Ms. Medha M. Puranik
Ms. Sumana Naganand
Mr. A. Debbarmann
Mr. Akash Chatterjee
Ms. Pallavi Sengupta
Mr. Sidhart Kohli
Mr. Mayank Kshirsagar
Ms. Lakshmi Rao
Ms. Garima Jain **for R-1& R-2**

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 18.09.2018 passed by the Karnataka Electricity Regulatory Commission (hereinafter referred to as the '**the State Commission**') in Original Petition (**OP**) No. 72 of 2017.

FACTS OF THE CASE:-

2. The Appellant No.1, Hirehalli 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 BC 109, 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 Hirehalli Village, Challakeretaluka, Chitradurga District, State of Karnataka. The Appellant No.2, Smt. Pallavi S is a farmer owning land in Hirehalli village, Challakere Taluka, Chitradurga district. The Appellant No.2 is the Solar Power Developer (**SPD**) in the present matter.

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

5. 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.

6. 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.

7. On 22.05.2014, the Government of Karnataka introduced the second Solar Policy for the period 2014-2021. 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.

8. 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.

9. 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.

10. In terms of the above, on 29.08.2015, the Appellant No.2 entered into a PPA with BESCO which is the distribution licensee in the area where the 3 MW Solar Power Project was proposed to be set up, namely, at Hirehalli Village, Challakere Taluk, Chitradurga district 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.

11. On 07.09.2015, the State Commission approved the PPA dated 29.08.2015 executed between the Appellant No.2 and BESCO.

12. On 29.03.2016 the Appellant No.2 filed Applications for PT sheet sketch (Land area map) i.e. a pre-condition for filing of the application for conversion of land into non-agriculture

13. 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:

- (a) Approval for conversion of the land from agricultural purpose to be used for setting up a Solar Power Project;
- (b) Connectivity of the Solar Power Project with the Grid and power evacuation approval on the 11 KV Power System up to 66 KV Dyavarnahalli Substation;
- (c) 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;

- (d) 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.

14. In regard to the approval for conversion of the use of the land from agricultural purpose to the purpose of setting up a Solar Power Project, the Appellants obtained various documents/approval which are required for the Application for conversion and applied to the Deputy Commissioner, Chitradurga vide application dtd.02.02.2016 submitted on 16.02.2016 duly acknowledged. The Order of Conversion of Land into Non-Agriculture was given by the Deputy Commissioner only 07.01.2017. Thus, the approval for conversion of land was received after a lapse of about 11 months.

15. On 25.02.2016, the Appellant submitted the application for Grid connectivity and power evacuation approval through 11 KV Power System with connectivity to 66KV/11 KV Dyavarnahalli Substation. The final approval for evacuation scheme was issued on 22.08.2016 by BESCO (more than 7 months after submission of the application for grid connectivity).

16. On 31.03.2017, 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 05.06.2017. After the payments of the inspection fees and thereafter the submission of the completion report on 19.07.2017, the plant safety approval for commissioning of the project was on 22.08.2017.

17. 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.

18. In the circumstances, the Appellants approached BESCO 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 28.02.2017. 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. Further, the Appellants could not have taken the steps in the absence of the conversion of land from agriculture into Non-

agriculture. The Appellants therefore, sought for extension of six months from the Scheduled Commissioning Date.

19. The Respondent No. 1, BESCO after considering the above stated aspects, vide letter dated 02.03.2017 granted extension of time for completing the 3 MW Solar Power Project for a period of six (6) months.

20. The Appellants submit that the above letter dated 02.03.2017 was issued by BESCO in terms of Article 2.5 of the PPA which, inter-alia, provides that BESCO is empowered to issue extension without any stipulation as to the approval for such extension to be taken from the State Commission. Accordingly, the Appellant became entitled to establish the Solar Power Project by or before 26.08.2017 for the purpose of the PPA dated 29.08.2015 and for tariff provided under the PPA at the rate of Rs 8.40/KwH.

21. On 16.03.2017, the State Commission for the first time issued a communication informing BESCO that the extension of time should not be considered as a routine exercise except under extraordinary conditions faced by the Project Developer within the scope of the original PPA and directed BESCO not to issue any extension of time beyond the

Scheduled Commercial Operation Date without obtaining the prior permission of the State Commission.

22. 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.

23. Thereafter, on 31.03.2017, BESCO 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.

24. On 05.05.2017, the Appellant No. 1 filed a Petition being OP No. 72 of 2017 before the State Commission, inter-alia, challenging the communication dated 31.03.2017, issued by BESCO.

25. Thereafter, on 23.06.2017, the State Government informed the State Commission that the State Government has accepted the plea of BESCO 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.

26. On 07.07.2017 the State Commission directed BESCO 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 BESCO 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.

27. On 26.10.2017, the Appellant No.2 was impleaded as the Petitioner No.2 in the Petition being OP No.72 of 2017 filed by the Appellant before the State Commission.

28. In the meanwhile, the Appellants had completed and commissioned the project on 28.08.2017 as certified by KPTCL 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 29.08.2015 in the month of August 2017.

29. On 18.09.2018 the State Commission passed the Impugned order and dismissed the Petition No. 72 of 2017 filed by the Appellant.

30 Aggrieved by the Order dated 18.09.2018, the Appellants are filing the present appeal before this Tribunal.

31. The Appellant No.1's Bankers have now issued him letter on 29.10.2018 demanding regular payments in the backdrop of the Appellant not having been able to service his loan account due to reduced tariff of Rs.4.36/unit. If the reduced tariff of Rs.4.36/per unit fixed under impugned order were to be continued to operate for the entire term of the PPA, the Appellants would not be in a position to even repay the loan, and the loan account would be declared Non Performing Asset and the proceedings for auctioning the mortgaged property (farmer's land) will be initiated. The same would cause irreparable loss and injury to the farmer.

32. Mr. Basava Prabhu Patil, learned senior counsel arguing for the Appellant has filed the following Written Submissions and Additional Written Submissions for our consideration:

33. That present Appeal has been filed by the Appellants, Hirehalli Solar Power Project LLP and Shri C Vyramudi, challenging the order dated 18.09.2018 passed by the Karnataka Electricity Regulatory Commission (**KERC**) in Original Petition No. 72 of 2017, whereby the KERC held that the Appellants are not entitled to extension of time for commission of the

solar power project which was approved by BESCOM (**Respondent No. 1**) after scrutiny by members of the technical committee under the Chairmanship of the Director (Technical), BESCOM. The Committee upon scrutiny of the relevant documents and considering the delay caused in the implementations of the Appellant's project on account of Land Conversion, KPTCL Tentative Evacuation Approval and Bay Extension Approval had decided to grant an extension of 6 months to the Appellant to achieve COD.

34. The PPA between the Appellant and BESCOM dated 29.08.2015 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.

35. KERC approved the PPA executed between the Appellant and BESCOM on 07.09.2015, 9 days after the signing of the PPA

36. KPTCL by its order dated 21.12.2015 issued a guideline for grant of evacuation approval to small 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 n.01.2016, but the KPTCL had raised the demand for land lease charges for Bay on 08.02.2016, which was paid by the Appellant on 04.03.2017

37. BESCO by its letter dated 02.03.2017 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.

38. It may be noted that Article 4.2 of the PPA deals with '*Obligations of BESCO*'.

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

40. 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. Thereafter, BESCO by its letter dated 31.03.2017, 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.

41. GOK 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.

42. 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.

43. 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.

44. 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 the PTCL certificate on 12.08.2015 immediately after getting the LOA, even before signing of the PPA. But as the PTCL certificate was not received by the Appellant even after 6 months of application for the same, the Appellant was constrained to apply for land conversion without the PTCL certificate. It is submitted that the Appellant received the PTCL certificate only on 04.10.2016, after a lapse of 418 days i.e. more than a year from the dated of Application for the same. 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 22.12.2016 despite the application for conversion having been made on 16.02.2016, i.e. after 308 days of making the application for land conversion.

45. It is further submitted that though the final evacuation approval was granted by BESCO on 22.08.2016, the bay estimate intimation was issued by KPTCL only on 08.02.2017, more than 5 months after the grant of final evacuation approval, after the original SCOD. In this case, the bay intimation notice was received just a few days prior to the original SCOD and after about 170 days from the date of grant of final evacuation approval which led to delay in further steps to be undertaken by the Appellant for construction of bay.

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

- 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.

47. It is submitted that the KERC has erred holding that the Appellants are not entitled to extension of time as granted by BESCOM 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 29.08.2015 and even otherwise, the present Appellant herein has already spent a total cost of Rs. 18,65,27,026 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.

NOTE: 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.

48. 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 as under:

“61. Over and above this, it is seen that there were Supplementary PSAs to the original PSAs with intermediary procurer extending the existing timelines up to 31.07.2019. The time is further extended by intermediary procurer. To commission the project within the timeframe when approval of procurement of power and adoption of tariff reach finality, that would be the starting time to reach the completion of project in terms of agreements i.e. PPA between the solar developer and intermediary procurer – NTPC/SECI, would come into play. Therefore, the contention of the Respondent – AP Discoms that there is delay or going to be delay to achieve SCOD is rejected.”

49. Therefore, it is submitted 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.

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

51. 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.

52. 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."

53. In light of the above 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 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 OF THE APPELLANTS

54. Additional 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.

55. It is submitted that BESCO having approved the extension of time, by 6 months for commissioning of the Appellant's solar power project by its letter dated 02.03.2017, after scrutiny of relevant documents by members of the technical committee constituted by BESCO itself, are estopped from taking a contrary stand, more so, since there has been no justifiable reason put forth by BESCO at any point of time for the change in its stand.

56. In *Shyam Tele link 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."

57. 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.”

58. In the instant case, though BESCO had filed their statement of objections dated 29.08.2017 in OP No. 72 of 2017 before the KERC, the same was later withdrawn by BESCO by filing a memo dated 14.09.2017. In addition thereto, the impugned order dated 18.09.2018 passed by the KERC in OP No. 72 of 2017 also records as under:

‘7) The Petitioners concluded their arguments. The learned counsel for the Respondent (BESCO) submitted that, it would not specifically object to the pleas raised by the Petitioners and it would abide by the Orders of this Commission. Therefore, the arguments of the Respondent (BESCO) were taken as ‘concluded’. ...’

59. In view of the above, it is submitted that the Respondent BESCO 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.

60. 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."

61. That the Appellant submits that the Article 6 of the PPA dated 29.08.2015 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 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.”

62. 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. . . .”

63. 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. 24.08.2017 onwards as BESCO 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.

64. In light of the above facts and arguments, it is prayed that this Tribunal may allow the Appeal.

65. Mr. Balaji Srinivasan, Learned Counsel for the Respondent No. 1 has filed the following Written Submissions for our consideration:-

66. On 5.11.2020, the Tribunal had directed both the parties to file a concise written submission. Pursuant to which, the Respondent is filing the present written submission.

67. The submissions made in the Statement of Objections filed by the Respondent herein may be read as a part and parcel of the present written submissions, and the same are not repeated herein for the sake of brevity.

68. On 29.8.2015, the Appellant herein and Respondent No. 1 had entered into a Power Purchase Agreement (hereinafter referred as "PPA") for development of 3MW solar power plant at AppellantNo.2's land at Hirehalli village, Challakare Taluk, Chitradurgaa District. The State

Commission approved the PPA on 7.9.2015. The Appellant commissioned its plant on 24.8.2017.

69. The PPA executed between the parties set out defined timelines for establishment of the plant. Article 1.1(xii) defined the effective date to be the date of signing of agreement i.e. 29.8.2015. Article 1.1 (xxviii) defined Scheduled Commissioning Date to be 18 months from the effective date i.e. 29.8.2015. Further, Article 5.1 of the PPA clearly states that in the event of delay in commissioning of the project beyond the scheduled commissioning date, the applicable for the project would be the varied tariff applicable as on the date of commissioning of the plant, if during such period there is variation in the tariff fixed by the State Commission.

70. In the present case, the Appellant has achieved commercial operation on 24.8.2017, after a delay of 6 months. On the said date, the Generic Tariff order dated 12.4.2017 of the State Commission was in force and the tariff payable was Rs 4.36/-. Therefore, it is submitted that Appellant is entitled to a tariff of Rs.4.36/- and not Rs 8.40/- as claimed by the Appellant. This has been affirmed by the Hon'ble Supreme Court in the matter of *Gujarat Urja Vikas Nigam Ltd v. EMCO Limited and Another* [reported in (2016) 11 SCC 182] and this Tribunal in its judgment dated in 11.1.2019 in Appeal No. 169 of 2015 *Earth Solar Pvt Ltd v. Punjab State*

Electricity Regulatory Commission and Another.

71. In the present case, the Appellant has attributed delay to the delay in grant of evacuation approval, delay in conversion of land and delay in supply of MEI breakers. It is submitted that none of these delays can be attributed to the Respondent herein as it was not the responsibility of the answering respondent i.e. distribution licensee to furnish any of the above. However, the submissions of the answering Respondent to each of the above reasons assigned by the Appellant are as under:

i. Delay in KPTCL Evacuation Approval

72. The Appellant submitted an application to the Chief Engineer, Transmission Zone, Bengaluru, KPTCL on 25.2.2016 for grid connectivity and power evacuation approval. On 25.2.2016, KPTCL requested the Appellant to pay the requisite e-processing fee. On 10.3.2016, the Appellant paid the processing fee towards grant of evacuation approval. Further, on 13.5.2016 accorded tentative evacuation scheme for the Appellants plant and the same was accepted by Appellants on 25.5.2016. Thereafter, on 22.8.2016, KPTCL approved the regular evacuation scheme of the Appellant.

73. It is clear from the above timeline that KPTCL has been prompt in

responding to the Appellant and further, Appellant has approached KPTCL only on 25.02.2016 i.e. after a delay of 6 months from the date of execution of PPA. Therefore, the delay in evacuation approval cannot be solely attributed to the governmental agencies.

74. It ought to be noted that as per Article 2.1 of the PPA pertaining to Conditions Precedent, the Appellant was required to achieve condition precedent within 12 months from date of execution of the PPA i.e. on or before 29.9.2016. Therefore, on the date on which the Appellant was to achieve conditions precedent, he had received regular evacuation approval.

75. Further, the Appellant has claimed that there was delay in receiving the MEI breakers and has received it only on 6.6.2017. It is submitted that the Appellant placed the order only on 14.11.2016 i.e., after a month and half of receiving regular evacuation approval from KPTCL. Further, the Appellant revised its order on 9.12.2016 and submitted its drawing on 15.12.2016. It is submitted that the MEI breakers are tailor-made, based on the drawing submitted, tested and certified by the TAQC and, thereafter despatched. Therefore, the Appellant itself has caused delay on its part by approaching the authorities late and changing the order thereafter. Hence, the delay was on the part of the Appellant itself.

ii. Delay in Land Conversion

76. The PPA was executed on 29.8.2015. Several months after execution of the PPA, on 18.2.2016/2.2.2016, Appellant submitted an application before DC, Ramanagara for conversion of agricultural land into non-agricultural purpose. The Appellant has paid the fee for land conversion on 27.12.2016. And on 7.1.2017, DC, Chitradurga issued official memorandum with regard to conversion of land.

77. The only documents that are on record are the application of the Appellant dated 2.2.2016 and the land conversion order 7.1.2017. The Appellant ought to have placed on record all the communications with the Revenue authorities to substantiate the same. In the absence of the entire correspondence, the contention with regard to delay is liable to be rejected.

78. The Appellant signed the PPA on 29.8.2015. The PPA was executed for establishment of 3 MW solar power plant on the Appellant's land. The Appellants application seeking conversion of land is dated 2.2.16/18.2.2016. Absolutely, no explanation is forthcoming to explain the delay of 6 months in making the application for land conversion. Failure of the Appellant in maintaining the necessary records pertaining to his own land cannot be cited as a cause for delay. It is settled law that a party ought not to be permitted to take advantage of its own wrong. It was the

Appellant's duty to have all necessary records available. On this count, the allegation of delay is wholly untenable.

79. The Appellant cannot contend that there has been delay in land conversion, when the Appellant has delayed in approaching the authorities for approvals. In any event, as per the terms of the PPA, the responsibility of obtaining all statutory approvals and permits lies with the Appellant itself. In spite of having received the requisite orders for conversion of land, the Appellant delayed the execution of the project. Hence, the contention that delay has been caused by the answering Respondent herein is untenable.

iii. Delay in CEIG approval

80. Appellants claim that they applied for approval on 31.3.2017 and have received the approval only 5.6.2017. It is submitted that Appellants have not furnished any records to indicate the date on which the application for approval of drawings was made to CEIG. Onus is on the Appellant to prove that it acted in a timely manner. In the absence of any documentation to indicate the same, it cannot be assumed that the Appellants have acted promptly.

81. It is submitted that the Appellants have not submitted the CEIG approval to substantiate its claims. The Appellant has provided no

explanation as to why it has submitted the drawings so belatedly, i.e. a month after the scheduled commissioning date. Therefore, the allegation that there is delay in CEIG approval is false and denied.

iv. State Commission's Power to review extension granted By BESCO

82. It is submitted that the State Commission is the sole authority to approve the tariff. In the realm of contract, generating companies and distribution licensees do not have complete freedom in the regulated sector. Any decision of entering into a contract, acting under it, waiver and concession affecting tariff is Amenable to the State Commission's regulatory powers as stipulated in Section 61, 62, 63, 64 and 86(1)(a) and 86(1)(b) of the Electricity Act, 2003. In this regard, reliance is placed on the decision of the Supreme Court of India in the matter of *All India Power Engineer Power Federation and Others v. Sasan Power Ltd* [reported in (2017) 1 SCC 487]. Such being the case, the contention that the State Commission over stepped its bounds is untenable.

83. It is submitted that the power to grant extension of time to commission a project directly affects the tariff payable. The State Commission has approved the tariff for solar units on the date of scheduled

commissioning date as Rs. 8.40/- per unit as per the order of State Commission order dated 10.10.2013. It is submitted that, the Appellant having commissioned the plant only on 29.6.2016, tariff of Rs. 4.36 per unit (as per order of the State Commission order dated 12.4.2017) , which was prevailing, would have been payable. The downward revision was on account of reduction in the cost of setting up of solar generation plants due to lowering of cost of plant and machinery on account of technological advancements and international pricing. The Appellant having had the benefit of lower project cost is not justified in expecting higher tariff to be applied to them. If this is permitted, private parties will earn super profit at the cost of the distribution companies and tariff paying consumers in the State of Karnataka. Even if extension of time for completion of the project had to be granted, such extension would only entitle generating companies to supply power and not to claim higher tariff.

84. It is submitted that the power of the State Commission to review decisions of the Distribution companies to grant extension of time is traceable in the Section 61, 62, 63, 64 and 86(1)(a) and 86(1)(b) of the Act.

85. The State Commission having carefully examined the request of the generating companies for extension of time, has come to the conclusion that their request is not justifiable and does not satisfy the provisions of

force majeure clauses, consequent to which extension was unjustified. It is submitted that there being no illegality nor perversity in the order of the State Commission, the same does not call for interference in the present appeal.

86. It is submitted that the order of the State Commission is just, equitable, fair and rendered in the interests of the public. The State Commission has exercised its power taking note of all factors. It is submitted that the State Commission has ensured that a generator does not take undue benefit and take advantage of their own wrong by getting higher tariff than others who are similarly placed to them. Hence, the order is equitable and just and has been issued in public interest.

87. The State Commission has approved the tariff of Rs. 8.40/-per unit for the Appellant's plant as per the KERC order dated 10.10.2013. In view of the progressive reduction in cost of equipment and the project cost, the State Commission reduced the tariff to Rs. 4.36/- per unit with effect from 1.4.2017 in its order dated 12.4.2017. The Appellants have taken benefit of reduced project cost since the equipment orders for the plant were placed by the Appellant on 9.9.2016, as disclosed in the written submission filed by the Appellant. Therefore, no prejudice will be caused to the Appellants by the order of the State Commission.

V. Issuance of *Force Majeure* notice

88. Invocation of *force majeure* clause under Article 8 of the PPA has to be done strictly in the manner stipulated. Due notice regarding occurrence of *force majeure* must be given with a reasonable time. Admittedly, the Appellant has not issued *force majeure* notice as required under the PPA. It is submitted that *force majeure* clause can be invoked only when the specific requirements under the said clause are strictly complied. In this regard reliance is placed on the Tribunal's judgment in *Himachal Sorang Power Ltd v. CERC and others* [reported in (2015 SCC On Line APTEL 148)].

89. It is submitted that the Appellant has failed to place on record accurate and authentic data pertaining to the actual cost of establishing the plant and the Appellant has not approached this Tribunal with clean hands in view of which it is not entitled to any relief.

90. Further, as per the purchase orders and invoices produced by Appellant at Annexure D, it is clear that the Appellant has placed the orders only in the month of October 2016 or later (the Agreement for purchase of solar modules was entered into only on 09.09.2016). The State Commission in the impugned order dated 18.9.2018, has made an

observation that when the Appellant took the effective steps to procure the capital equipment for its plant, the normative Capital Cost of the solar power plants was lower than the normative cost of the Solar Power Plants, assumed in the Generic Tariff Order dated 10.10.2013. And therefore, the Appellant is not entitled to the tariff, as per the Generic Tariff Order dated 10.10.2013, originally agreed to in the PPA, when admittedly, the Solar Power Plant was not commissioned, within the stipulated time and it is entitled only for the revised tariff, as on the date of commissioning of the Plant, as per Article 5.1 of the PPA.

91. It would be of relevance to note that the Ministry of Finance (MoF), Government of India has vide Circular dated 22nd December, 2018 clarified that 70% of the capital cost of the project is incurred towards the Solar Modules/Panels and 30% of the capital cost of the project towards the EPC contract. Therefore, by adopting the said logic, even in case of the Appellant herein, 70% of the capital cost incurred by the Appellant would be towards procurement of solar modules/panels.

92. It is submitted that the State Commission has in its order dated 12.04.2017, computed the capital cost by factoring in the very same cost of solar modules i.e. USD 0.35/watt. In addition to the same, the Land cost, Civil & General works, mounting structures, power conditioning, Evacuation

Lines & Equipments, Preliminary and preoperative expenses IDC etc. have also been taken into reckoning before deriving the tariff of Rs 4.36/- .However, in the present case, the Appellant herein is a land owning farmer and has executed the PPA in question under the 'farmer category'. Therefore, the Appellant being the owner of the land upon which the plant is to be constructed would not incur any cost for the land.

93. The Appellant has placed reliance on several judgments in its written submissions. In *Ayana Ananthapurama Solar Power Private Limited v. Andhra Pradesh Electricity Regulatory Commission & Ors*, the facts of the case are different from the present case and no reliance can be placed on the same. Further, in *Chamundeshwari Electricity Supply Company Ltd. v. Saisudhir Energy (Chitradurga) Pvt. Ltd* [reported in 2018 SCC On Line APTEL65] an appeal is pending against this order before the Hon'ble Supreme Court bearing Civil Appeal no. C.A. No. 006888 of 2018 and IA No. 101461 of 2018 application for stay. Therefore, in the backdrop of the appeal pending, no reliance can be placed on the same.

94. In the Tribunal's judgment dated 28.02.2020 in Appeal No. 340 of 2016 entitled *Azure Sunrise Private Limited v. Chamundeshwari Electricity Supply Corporation Limited*, the extension was sought due to the failure of the distribution licensee to provide an original duly approved PPA without

which the generating company could not have taken any steps in the execution of the project. In the present case, there is no dispute regarding the execution or approval of the PPA by the State Commission. Therefore, no reliance can be placed on the same judgment.

95. Further, this Tribunal's Order dated 14.09.2020 in Appeal No. 351 of 2018, *Chennamangathihalli Solar Power Project LLP v. Bangalore Electricity Supply Company Limited* an appeal against this order is pending before the Hon'ble Supreme Court bearing Diary No.24933 of 2020.

96. It is submitted that at every step of the way, the Appellant has failed to act diligently. The contract clearly stipulates that it is the obligation of the generator to obtain all permits and clearances. The Appellant has repeatedly contended that it was unable to furnish applications for land convergence etc. immediately after execution of the PPA as it had to obtain the requisite land related Documents such as RTC, mutation etc. In this regard, it is submitted that as per Article 2.1.1 onus of getting all necessary permissions is on the Appellant alone. Failure of the Appellant to do so, cannot be attributed to the Respondent.

97. Therefore, in the light of the above submissions, it is submitted that Appellant herein is not entitled to higher tariff as sought for and the present

appeal deserves rejection.

ANALYSIS & DECISION

98. We have heard learned senior counsel arguing for the Appellant and learned counsel for the Respondents at considerable length of time and we have gone through carefully their written submissions/arguments and also taken note of the relevant material available on records during the proceedings.

99. Based on the pleadings and arguments on both the sides, the following points arise for our consideration:

(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?”

100. 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.

101. The following relevant Articles are necessary for consideration of Appeal on merits.

- (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:
- (xxxi) ***“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 /BESCO.*
- (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.”*

102. 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) 09.10.2014 – In furtherance of the solar policy of the state government the Karnataka Renewable Energy Development Ltd., (KREDL) issued notification inviting online applications for facilitating the development of renewable energy in Karnataka.
- (b) 28.08.2015 – Pursuant to the aforesaid notification the Solar Power Developer (SPD) /Farmer submitted application and after evaluation of the application the Committee concerned accepted the proposal of SPD for allotment of solar project and KREDL issued letter of award in favour of SPD.

- (c) 16.06.2015– Pursuant to submission of format PPA by KREDL KERC approved the standard format of PPA of the solar power plants.
- (d) 29.08.2015 – The SPD and BESCO entered into a Power Purchase Agreement (PPA) for supply of power from 3 MW solar power plants at Hirehalli village, Challakere Taluk, Chitradurga.
- (e) 07.09.2015 – KERC approval of the PPA dated 29/08/2015 executed between BESCO and SPD.
- (f) 25.02.2016 – Submission of application for grid connectivity and power evacuation approval on 11 kv systems.
- (g) 16.02.2016 – Submission of land conversion application in respect of lands in Sy. No. 465, 297/9, 297/12, 331/1, 331/2 Hirehalli village, Challakere Taluka, Chitradurga District.
- (h) 10.03.2016 – Payment of evacuation approval processing fee.
- (i) 05.02.2016 – Incorporation of SPV as per the terms & conditions of the PPA.

- (j) 27.12.2016 – Payment of NA conversion processing fees towards land in Sy No.465, 297/9, 297/12, 331/1, 331/2 of Hirehalli village, Challakere Taluk, Chitradurga District.
- (k) 04.05.2016 – SPD executed Assignment deed with Petitioner for execution of 3 MW solar power project and assigning all the rights and liabilities of the PPA.
- (l) 07.01.2017 – DC Chitradurga orders the conversion of project land into NA.
- (m) 13.05.2016 – Issued provisional approval for evacuation scheme of 3 MW power on 11 kv reference to 66/11kv Dyavarnahalli Sub-station from the proposed solar power project.
- (n) 22.08.2016 – Issued final approval for the evacuation scheme of 3 MW power on 11 kv reference to 66/11kv Dyavarnahalli Sub-station for the proposed solar power project.
- (o) 30.06.2016 & 13.10.2016 – Furnishing the progress achieved report of 3 MW solar power project.

- (p) 03.12.2016 – Requested for extension of time for commissioning the solar power project by 6 months as per article 2.5 of PPA.
- (q) 02/03/2017 – Approval for time extension for completing 3 MW solar power project from BESCO.
- (r) 31.03.2017 – Communication issued by BESCO intimating the petitioner regarding the approval of extension is subject to Hon'ble KERC/GOK approval.
- (s) 05.04.2017 – Direction issued by the KERC to all ESCOs to direct all SPDs to file petition for seeking extension.

103. According to the 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.

104. According to the Respondent BESCO'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.

105. According to Appellants, though the Appellants took all care and caution to commission the project within the time limit prescribed by the contract between the parties, but on account of delay for the reasons beyond the control of the Appellants i.e., force majeure event, the commissioning of the solar projects could not be achieved in time. However, Appellants contends that the 1st Respondent BESCO considering the reasons for the delay as explained by the Appellant granted extension of time for completing the solar project of the Appellant by six months. Therefore, there was no justification for the Respondent Commission to deny approval granted by the BESCO.

106. According to Appellants, the extension of time was in terms of Article 2.5 of PPA which empowers the Respondent Commission to extend time for a maximum period of six months, however the Respondent Commission totally ignored this fact. Therefore, according to them, with the extension of time, total period for completion of the solar project would be 24 months

from effective date which would be 28.08.2017, since the Appellant commissioned the project within the extended period of COD. Hence, the impugned order deserves to be set aside and Appellants are entitled for a tariff provided under PPA at the rate of Rs.8.40.

107. *Per Contra*, Respondent BESCO contends that there is justification in the opinion of the Respondent Commission that 18 months' time from the effective date was envisaged keeping in mind the time normally consumed for obtaining various approvals from different Governmental Instrumentalities. That apart, the list of dates furnished by the Appellant itself indicates that the Appellant did not exercise due care and caution; therefore, there was delay and it was not on account of force majeure event. Therefore, each and every approval sought by the Appellant whether approval is issued within a reasonable time or not would depend upon the date of application and the effort made by the Appellants to secure such approval with due diligence.

108. On going through the records, we note that the standard format of PPA came to be approved by KERC on 16.06.2015 only. Subsequent to this date, the Appellant and BESCO entered in to PPA on 29.08.2015. This came to be approved on 07.09.2015. Thereafter, KPTCL on 21.12.2015 issued guidelines for evacuation approval to small wind and

solar generators. Admittedly, in terms of these guidelines, the Developer had the option to ask for land lease on payment of lease charges instead of acquiring land for bay etc. In terms of these guidelines, on 19.01.2016, within a short time from the date of guidelines, Appellant demanded land on lease basis for setting up 11 KV terminal bay.

109. Appellant seems to have applied for land conversion in respect of lands upon which solar plant was proposed on 16.02.2016 itself. It is noticed that in terms of Karnataka Land Revenue Act as per Rule 106A, PTCL certificate has to be furnished apart from Record of Rights, Akarband Certificate, Nil Encumbrance Certificate for 14 years, Mutation Entries and 11E Sketch etc. for approval of conversion of land. However, the PTCL certificate could be obtained only on 04.10.2016, though even prior to the signing of PPA was sought for. Without PTCL certificate, the Appellant had to apply for land conversion after waiting for about six months to secure PTCL certificate. Only after a lapse of 418 days, more than a year, PTCL certificate was obtained on 04.10.2016. Without this certificate, conversion of land could not be obtained. In spite of submitting the application in time and paying the fee, only on 22.12.2016 the Appellant could get land conversion order after a lapse of 308 days from the date of application for land conversion.

110. So far as Grid connectivity and power evacuation approval, application was submitted on 25.02.2016. Provisional approval for the same was obtained after three months i.e., 13.05.2016. The final evacuation approval was granted only on 22.08.2016 after a lapse of five months. Till final evacuation approval is granted, the major work division of ESCOM/KPTCL will not prepare bay SLD and lay out drawings with estimation of bay erection after joint visit by ESCOM and KPTCL. The bay intimation notice was received just few days prior to the original SCOD i.e., after 170 days from the date of grant of final evacuation approval which led to delay in construction of bay.

111. According to Appellants, SPV was incorporated in February 2016 itself and assignment of all rights and liabilities of SPD to SPV occurred on 04.05.2016.

112. Appellants placed on record that having regard to the dates of approvals received as stated above, the Appellant was certain that the project could not be commissioned within the original SCOD; therefore, requested for extension of time for commissioning the solar project. This extension came on 02.03.2017 from Respondent BESCO. Subsequent to this date, on direction by the State Commission, BESCO intimated the Petitioner to file application for approval of extension of time granted by

BESCOM. Therefore, the Petition had to be filed by the Appellant seeking such approval wherein the impugned order was passed.

113. 18 months' time was set for completing the projects from effective date. Not much difference exists between the date of signing of PPA and approval of PPA by KERC. On 29.08.2015, PPA was signed between the parties and 17.09.2015, KERC approved PPA. As already held by this Tribunal in various judgments that the PPA becomes implementable only when it is approved by the Commission and not the date of execution of PPA between the Developer and the BESCOM. Therefore, 18 months has to be taken from 07.09.2015. Till December 2016, the Appellant was running from place to place and office to office to get conversion of their land. Only on 07.01.2017, the conversion of the land occurred.

114. Similarly, after issuance of approval of evacuation of the power, the drawings etc. pertaining to setting up of bay terminal were not approved in time and such approval could be secured much later by the Appellant i.e., estimation difference was intimated on 08.02.2017. In this process, the Appellant was not able to commission the project within the original SCOD.

115. It is also seen that the BESCOM approved extension of time by six months after scrutiny of relevant documents by Technical Committee

constituted by BESCOM itself. In that view of the matter, it is not open to BESCOM now to contend tht there was no diligence on the part of the Appellant to commission the project on time.

116. It is noticed from the records that after extending time for commissioning the project by BESCOM, the BESCOM taking a different stand before the Tribunal which cannot be appreciated. That apart, it is noticed that on 14.09.2017, the Appellant filed a memo before the Respondent Commission which it submitted before the Commission after the conclusion of the arguments of the Petitioner that the Respondent BESCOM would not specifically object to the grounds/pleas raised by the present Appellants (Petitioners), but however, BESCOM would abide by the orders of the Commission. Noting this, the Commission concluded arguments of the Respondent. In other words, the Respondent BESCOM did not seriously challenge or contest the grounds for delay of commissioning the project raised by the Appellants.

117. Having taken that stand before the Commission, it is not open to the Respondent BESCOM to take a different stand biometrically opposite view.

118. In the case of Appeal No. 351 of 2018 dated 14.09.2020 i.e., ***Chennamangathihalli Solar Power Project LLP vs. Bangalore***

Electricity Supply Company Limited, this Tribunal at Para 9.1 of the Judgment under similar circumstances, opined 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.”

119. As noticed by this Tribunal that there was considerable delay in obtaining PTCL certificate which was a must document for land conversion approval. On account of lapse of more than one year to obtain land conversion order, the Appellant was compelled to seek for extension of time. Similarly, the approval for evacuation also, it took considerable time as stated above, which also added to the delay in completing the project. It is seen that within reasonable time, the applicant has taken all necessary care and caution and tried to pursue the matters with various departments with due diligence, still the delay occurred. However, within the extended time granted by BESCO, the Appellant was able to commission the project on 24.08.2017 i.e., within two years from the date of approval of PPA on 07.09.2015.

120. We also notice that on 24.11.2016, Government of Karnataka directed ESCOMs to constitute three member Committee to consider and decide extension of time. Based on the recommendation of three member Committee, the State Government requested KERC to consider approval of extension of COD of solar power project with a capacity of 1 to 3 MW. Though the Respondent Commission has undertaken the exercise of analyzing the facts in each and every case, it has opined that the Petitioners were not diligent and therefore, the delay has occurred. But on perusal of facts and circumstances under which the delay was caused to commission the project, we are of the opinion the Appellants cannot be blamed for the delay to obtain required approvals and sanctions as stated above. The Appellants had to approach several Governmental Instrumentalities. It was not within the control of the Appellants to secure these approvals. We note that whatever the Appellants could do, to secure these approvals, has been done by them. But in spite of all these, the approvals and sanctions could not be obtained in time for the reasons beyond the control of the Appellants, in accordance with the terms and conditions of the PPA. If force majeure event happens not on account of fault of the Appellants, the Appellants are entitled for the benefit of force majeure event. Considering the same, BESCO had extended the time,

but for the reasons best known to the Respondent BESCO, they have taken a u-turn and changed their stand completely. But the fact remains that the delay in commissioning the project was not certainly on account of Appellants' negligence.

121. The solar scheme which was evolved as Farmers' Scheme in the State of Karnataka was to create opportunity for small farmers to establish solar plants between 1 MW to 3 MW. This involves definitely huge investment which has to be in the form of raising loan. The scheme which was made to create opportunity and benefit to the farmers seems to have become otherwise. At least they should not be burdened with financial losses after spending huge investment. If the loans borrowed by them become non-performing assets, they may even lose the lands upon which the solar plant is established. The Commission has totally ignored these aspects and has reduced the agreed tariff of Rs.8.40 to Rs.4.36, the applicable tariff at the time of commissioning the project. The Commission which is supposed to discharge its duties in a judicious manner taking in to consideration all the facts and circumstances, according to us has totally ignored the factual situation under which the delay has occurred to commission the project.

122. 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.

123. 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.

124. 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.

125. 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.

126. 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 - BESCO shall 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.**

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

128. 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