

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY  
NEW DELHI**

**(APPELLATE JURISDICTION)**

**APPEAL NO.292 OF 2021 &  
IA NO. 587 OF 2021**

**Dated:** 11<sup>th</sup> January, 2022

**Present:** Hon'ble Mr. Justice R.K. Gauba, Officiating Chairperson  
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member

**In the matter of:**

**WIND FOUR RENERGY PRIVATE LIMITED**

Inox Towers, Plot no. 17  
Sector-16A, Film City  
Noida- 201301

.... Appellant

**VERSUS**

**1. CENTRAL ELECTRICITY REGULATORY COMMISSION (CERC)**

3<sup>rd</sup>& 4<sup>th</sup> Floor, Chanderlok Building,  
36, Janpath,  
New Delhi – 110001

**2. SOLAR ENERGY CORPORATION OF INDIA LIMITED (SECI)**

1st Floor, D-3, A-Wing,  
Prius Platinum Building District Centre,  
Saket,  
New Delhi – 110017

**3. POWER TRADING COMPANY INDIA LIMITED (PTC)**

2<sup>nd</sup> Floor, NBCC Tower,  
15, Bhikaji Cama Place,  
New Delhi-110066

... Respondents

Counsel for the Appellant (s): **Mr. Gopal Jain, Sr. Adv.**  
Ms. Nikita Choukse

Counsel for the Respondent (s): **Mr. M.G. Ramachandran, Sr. Adv.**  
Ms. Poorva Saigal  
Ms. Tanya Sareen for R-2

**Mr. Ravi Kishore for R-3**

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

### **PER HON'BLE MR. JUSTICE R.K. GAUBA, OFFICIATING CHAIRPERSON**

1. This matter has been taken up by video conference mode on account of pandemic conditions, it being not advisable to hold physical hearing.

2. The respondent Central Electricity Regulatory Commission (hereinafter referred to as “CERC” or “Central Commission”), by its Order dated 08.03.2021 passed in Petition no. 226/MP/2020, which had been presented by the appellant – Wind Four Renergy Private Limited -- (“Appellant”, for short), condoned the period of delay of 132 days from 12.07.2009 – the date of communication of initiation of action as per Ministry of New and Renewable Energy (“MNRE”) Guidelines – till 21.11.2019 – the date of communication of extension of Scheduled Commercial Operation date (“SCOD”) and, accordingly, extended the commissioning deadline of the wind power project of the appellant by 132 days with the condition of pro-rata encashment of Performance Bank Guarantee (PBG) and with consequences of tariff reduction in terms of relevant clauses of the PPA and ‘Request for Selection (RfS)’. The appellant is aggrieved primarily for the reason the consequent extension of time for attaining SCOD by 132 days has not been granted from the date of the order of the Central Commission, the period allowed having

already lapsed during the pendency of the proceedings before the Central Commission.

**3.** The appeal is contested by the second respondent – Solar Energy Corporation of India Limited (SECI) – it being the implementing agency for the transactions in question, being the nodal agency of the Central Government to promote renewable energy such as solar, wind, etc. The subject matter relates to the Power Purchase Agreement (PPA) dated 21.07.2017 which had been entered into between the appellant on one hand and the third respondent – Power Trading Company India Limited (PTC, for short) – on the other, the appellant having agreed to establish a 50 MW wind power project and generate to supply renewable (wind) power to PTC at Rs. 3.46/Kwh, PTC as the intermediary trader purchasing such electricity to sell it to BSES Rajdhani Power Limited (BSES) under the Power Sale Agreement dated 21.07.2017.

**4.** It is not in dispute that the timelines applicable for the appellant to establish the wind power project were not met, there being several delays, the project in the consequence not having been established.

**5.** The events leading to the present controversy may be noted in brief.

**6.** The MNRE of Government of India (“GoI”) had floated a scheme on 14.06.2016 for setting up of 1000 MW Wind Power projects. The

Guidelines were notified on 22.10.2016 whereafter the respondent SECI had issued a document styled as 'RfS' on 28.10.2016 for setting up of 1000 MW ISTS connected Wind Power Projects. As a result of the process of competitive bidding initiated in the wake of such developments, a Letter of Award ("LoA") came to be issued on 05.04.2017 for setting up of 50 MW Power Project in Kutch (Gujarat) to M/s. Inox Wind Infrastructure Services Limited (the parent company of the appellant). The PPA was executed on its basis on 21.07.2017. The SCOD for such 50 MW Wind Power Project under the PPA was concededly 04.10.2018 which could not be met.

**7.** The subsequent developments primarily include series of requests emanating from the appellant seeking extensions, it being explained at some stage that the delay was on account of non-completion of transmission network by Power Grid Corporation of India Limited (PGCIL). Concededly, the Long-Term Access ("LTA") associated with this project became effective from 14.04.2019. The appellant thereafter on 18.04.2019 sought further extension assuring at one stage that SCOD would be achieved by 30.06.2019.

**8.** While the matter stood still as above, on 03.09.2019, the MNRE of GoI issued Office memorandum regarding constitution of a Committee to examine the causes of delay in setting up of Wind power projects under

SECI Tranche-I to V and for making suitable recommendations for extension of financial closure and commissioning deadline.

9. Against the above backdrop, the parent company of the appellant approached the Dispute Resolution Committee on 18.10.2019 seeking extension of time for its project.

10. On 22.10.2019, MNRE clarified its position on the subject of grant of extension to wind power projects under SECI as under:

*“This has reference to SECI’s letter dated 30.8.2019, 25.4.2019 and 2.1.2019 regarding extension of milestones in wind power projects under SECI bids.*

*2. In this regard, it is stated that the issue has been examined in the Ministry and following course of action may be followed while considering grant of extension for wind power projects under tranches SECI I to V;*

.....

*c. Extension in scheduled commissioning of the project for a period equal to 60 days subsequent to operationalization of LTA (allowing additional time to be provided to the developer to complete the commissioning activities once the ISTS infrastructure is ready) may be considered.*

*e. Overlapping periods due to extensions being given due to different reasons covering the same periods of time, would be counted only once and double benefit for the same should not be granted.*

*f. .... Further, delay in commissioning beyond the extended SCD will be dealt as per the provisions of RfS and PPA.*

*3. SECI may examine each representation for grant of extension accordingly and provide relief thereof.*

*4. This issues with the approval of the Hon’ble Minister.”*

[Emphasis Supplied]

11. It is pointed out by the learned counsel for SECI that subsequent to the above, several requests were received from the appellant requesting for further extension of SCOD, reference being made to letters dated 07.11.2019, 11.11.2019 and 13.01.2020. It appears that by its communication dated 21.11.2019 the SECI took following position:

*“In this regard, it is to inform that on account of delay in operationalization of Long-Term Access (LTA) by the Central Transmission Utility (CTU), the Scheduled Commercial Operation Date (SCOD) for the said Project has been revised to 13.06.2019.*

*Further, permission has been granted to commission the remaining capacity of 50 MW awarded to M/s Wind Four Renergy Pvt. Ltd. (Project ID: WPD-ISTS-T1-IWISL-P5-50GJ) within 09 months from revised SCOD i.e. 13.03.2020. However, liquidated damages shall be levied as per terms and conditions of RfS and PPA.”*

[Emphasis Supplied]

12. The appellant approached the Central Commission on 13.02.2020 seeking the following reliefs:-

*“a. Condone the period of delay caused in commissioning the project commencing from the date of communication of termination of PPA i.e., from 12.07.2019 till the date on which extension of SCD was communicated to the petitioner i.e. 21.11.2019. Accordingly revise the SCD of 50 MW awarded to the Petitioner from 13.06.2019 to 21.01.2020 adding 60 days additional time from the date of communication of such extension (i.e. 21.11.2019) condoning the intervening gap period from 12.07.2019 till 21.11.2019. And any delay beyond this period to be subject*

to imposition of Penalties for delay in commissioning as envisaged in Clause 3.17.B of the RFS.

b. Exempt the above period i.e., from 12.07.2019 till 21.11.2019 from imposition of Penalties for delay in commissioning as envisaged in Clause 3.17.B of the RFS.”

13. The issue raised by the appeal at hand lies in a narrow compass and it would be appropriate to take note of the relevant parts of the impugned decision at this stage, the same reading thus:

“61. The Commission is of the view that the delay in processing and deciding on the request of the Petitioner dated 12.07.2019 by SECI and MNRE and communicating the decision by SECI prevented the Petitioner from performing the contract (PPA between PTC and the Petitioner) during the period from 12.07.2019 till 21.11.2019. As a nodal agency, it was the responsibility of SECI to initiate appropriate action as the project of the Petitioner was eligible for extension in SCoD in terms of the PPA read with the PSA. Had SECI taken diligent and prompt action as expected of it, based on this information submitted by the Petitioner vide letter dated 18.04.2019, the extension in SCoD in terms of the PPA could have been granted in time (possibly even before the date of extended SCoD of 13.06.2019) and the resultant delay could have been avoided, thereby giving the Petitioner certainty of time to implement the project. The Petitioner cannot be held responsible for any inaction during this period when SECI, on one hand, had already intimated that it has initiated the action as per MNRE Guidelines, Clause 3.17(B) of RfS and Article 4.6.2 of PPA and, on the other hand, MNRE and SECI were processing the case for the extension of SCoD of the project. The Petitioner could not have anticipated the decision of extension of SCoD from a retrospective date, and acted in the meanwhile.

62. We have observed that during the intervening time period from 12.07.2019 (date of initiation of action by SECI under 3.17 (B) of the RfS and Article 4.6.2 of the PPA) to 21.11.2019 (date on which the extension of SCoD was communicated to the Petitioner), it was not possible for the

Petitioner to discharge its obligations under the PPA as the maximum period allowed in the PPA for achieving commercial operation of the project was over and no clarity was available whether SCoD would be extended or not. This is because SECI initiated the action in terms of MNRE Guidelines, Clause 3.17(B) of RfS and Article 4.6.2 of PPA on 12.07.2019 and not for granting extension of SCoD in terms of Article 4.5.1(c) read with Article 11.3.(d) of the PPA and Article 7.3.1(f) of the PSA on account of delay in operationalisation of LTA

65. In the light of our observations in this order that it was not possible for the Petitioner to discharge the obligations under the PPA from 12.07.2019 to 21.11.2019 on account of lack of clarity with regard to extension of SCoD even though operationalisation of LTA was delayed and the letter of SECI dated 12.07.2019 initiating action under MNRE Guidelines, Clause 3.17(B) of RfS and Article 4.6.2 of PPA, the said period shall be excluded while computing the maximum period for execution of the project in terms of the RFP and PPA from the date of revised SCoD.

66. MNRE/SECI have already granted the project the extension of SCoD till 13.06.2019 and commissioning deadline till 13.03.2020 subject to implications of LD and pro-rata tariff reduction. We have already condoned the delay of 132 days. Taking into account the condonation of delay of 132 days, the commissioning deadline of the project, with condition of pro-rata encashment of PBG and with consequences of tariff reduction (in terms of the provisions of Article 4.5.3 read with Article 4.6 of the PPA), shall be revised accordingly.

70. In view of our observations in the above paragraphs, we condone the period of delay of 132 days from 12.07.2019 (date of communication of initiation of action as per MNRE Guidelines, Clause 3.17(B) of RfS and Article 4.6.2 of PPA) till 21.11.2019 (date of communication of extension of SCoD) and accordingly extend the commissioning deadline of the project by 132 days, with condition of pro-rata encashment of PBG and with consequences of tariff reduction (in terms of the provisions of Article 4.5.3 read with Article 4.6 of the PPA and Clause 3.17.B of the RfS)”

[Emphasis Supplied]

**14.** It may be mentioned here that in the wake of the decision of the Central Commission, which is impugned by the present appeal, PTC invoked the relevant clauses of the PPA terminating the contractual arrangements citing the failure on the part of the appellant to commission the 50 MW power project within the stipulated time including the penalty period by a communication issued on 06.07.2021. The reliefs claimed in the appeal also include a prayer for the termination to be set aside.

**15.**

**16.** The learned counsel for SECI was at pains to argue that the timelines for commissioning having not been met, the PPA was rightly terminated and the Performance Bank Guarantees duly encashed, under the PPA clauses, the SECI being authorized to give extension of time only up to three months, any extension beyond that period to be regulated as per the decision of MNRE. It was argued that the ground taken to explain the delay with reference to non-operationalization of LTA by PGCIL is specious, the appellant not being in a position to commission the project even now, it having attempted to mislead throughout by various communications stating that it was ready to do so in all respects. It is the submission of SECI that under the PPA (Article-1), the SCOD without any liability to pay damages was 04.10.2018, a period of twenty-seven (27)

months being the maximum time available, in terms of Article 4.5.6 and 4.6.2, the SCOD thus calculated being 05.07.2019, the extended timeline for completion also attracting the levy of liquidated damages. It is submitted that in terms of MNRE notification dated 22.10.2019, the sixty days allowed after operationalization of LTA on 14.04.2019 by PGCIL would end on 30.06.2019, the period of nine months available thereafter in terms of MNRE decision dated 22.10.2019 rendering the SCOD as 13.03.2020. The Respondent SECI justifies the impugned decision by submitting that the SCOD works out as 23.07.2020 by addition of 132 days beyond 13.06.2019, the nine months allowed by MNRE being added thereto.

**17.** The respondent SECI relies on the Order dated 29.05.2020 of the High Court of Delhi in O.M.P. (I) (COMM) No.88/2020 *Halliburton Offshore Services Inc v. Vedanta Limited &Ors.*, as endorsed by the Hon'ble Supreme Court vide Judgment dated 08.10.2021 in *Maharashtra State Electricity Distribution Company Limited v. Maharashtra Electricity Regulatory Commission and Others*, 2021 SCC OnLine SC 913, the argument being that SCOD even in terms of the impugned order is much prior to imposition of lockdown due to Covid-19 on 25.03.2020, disruption due to pandemic being not available as an explanation.

**18.** Midway the hearing, it was pointed out to the learned counsel for SECI that the previous conduct of the appellant, seen in the light of various communications seeking extensions, has already been considered by the Central Commission in the impugned order and yet it has been concluded that the delays which occurred cannot be attributed to the causes of the appellant, adverse comments also having been made on the delay on the part of SECI to timely process the request, it being concluded that the appellant could not have anticipated the decision of extension from a retrospective date or to have acted in the meanwhile. It was also pointed out that such findings on facts have not been challenged by SECI by any appeal against the impugned order and, thus, in so far as the SECI is concerned, the order has attained finality. The learned counsel nonetheless persisted with the request for revisit to the history of events contending that the delay has not been properly explained by the appellant.

**19.** We find the above approach on the part of SECI highly unreasonable, rigid, inflexible and bordering on obduracy. Clear findings have been returned by the Central Commission holding the appellant not responsible for some of the delay, and being entitled to condonation of 132 days. The short issue which, therefore, needs to be addressed is as to whether it was proper on the part of the Central Commission to grant

this condonation of delay of 132 days only from 12.07.2019, the date of communication of initiation of action as per MNRE guidelines. We find the denial of such extension from the date of the order of the Central Commission unjust and unfair in as much as, borrowing the words used by the Central Commission in the impugned order itself, the appellant *“could not have anticipated the decision of extension of SCOD from a retrospective date, and acted in the meanwhile”*.

**20.** The issue presently is not whether the works related to setting up of the project by the appellant have been disrupted due to pandemic restrictions. The issue is as to whether the appellant could have proceeded with the remainder of the works towards such end even while the matter was pending consideration before the Central Commission.

**21.** As noted earlier, the CERC has concluded that the delay in execution of the project is for reasons not attributable to the appellant. In such view and circumstance, the delay of 132 days should have been condoned from the date of the order as only that would enable real, effective and meaningful relief, in line with the overarching objective of public policy adopted by the State for promotion of renewable energy, as indeed the RfS and PPA, it also being the view of the Commission itself that the appellant could not have anticipated the decision of extension of SCOD from a retrospective date and acted during that period. Having

regard to the period of condonation granted by the impugned decision of the Central Commission, the SCOD calculated in its terms also came to an end during pendency of the proceedings before the Central Commission rendering the findings to above effect academic and the relief to the extent granted mere lip service.

**22.** The learned counsel for the appellant referred to certain decisions in similar matters rendered by the Central Commission including in Petition no. 95/MP/2017 wherein vide Order dated 17.12.2018 such relief has been made effective from the date of decision rather than from an earlier date. Interestingly, in the said matter also the dispute between the parties (*Welspun Energy Private Limited* and *SECI*) had arisen out of threatened termination of PPA by SECI the latter having shown disinclination to allow extension of time for SCOD requested by the petitioner under *force majeure* clause. The Central Commission, by its order dated 17.12.2018, found a case made out for condonation of delay and granted the reliefs, including of extension of SCOD, directing, *inter alia*, that “(d)elay from 5.5.2017 till date of issue of this Order is also condoned since the matter was *sub-judice* before this Commission”. We find no good reason cited as to why in the matter at hand the same Commission would not extend similar relief for the period when the issue was *sub-judice* before it. Inconsistency in approach by the adjudicatory

body leaves a sense of unfair treatment eroding confidence of the stakeholders. The denial is arbitrary and capricious.

**23.** As mentioned earlier, the PPA was terminated by PTC on 06.07.2021 in the wake of the impugned order. The appeal at hand being in continuation of the proceedings before the Central Commission, we have the power and jurisdiction to set right the confusion arising out of such subsequent events as well.

**24.** For the foregoing reasons, on the given facts and in the circumstances, the appellant deserves grant of reliefs prayed for by the appeal at hand. While we are duty-bound to do so, we must record strong disapproval over the arbitrary and unreasonable denial of effective relief by the Central Commission and the attempt of SECI to reagitate the issues which have been adjudicated upon by an order which has become binding on SECI, there being no appeal brought by it thereagainst. We were inclined to impose costs on the respondents for prolonging the adjudicatory process for the appellant by above acts of omission and commission but refrain from doing so in the matter at hand in the hope that we shall not come across such unjust approach taken in future.

**25.** In the above facts and circumstances, we allow the appeal and modify the impugned Order dated 08.03.2021 passed by the Central

Commission in Petition no. 226/MP/2020 by directing that the period of 132 days, for which delay has been condoned, would commence from the date of this judgment in appeal and SCOD would stand extended accordingly, the subsequent termination of the PPA and invocation/ encashment of bank guarantee by the respondent consequently also being set aside, the respondent resultantly being obliged to refund the equivalent amount to the appellant which shall thereafter take necessary steps to furnish a fresh bank guarantee thereupon.

**26.** The appeal and the pending application stand disposed of in above terms.

**PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO CONFERENCING  
ON THIS DAY OF 11<sup>th</sup> JANUARY, 2022.**

**(Sandesh Kumar Sharma)**  
Technical Member

**(Justice R.K. Gauba)**  
Officiating Chairperson