

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

**APPEAL NO. 66 OF 2020 &
IA NO. 2058 OF 2019**

Dated: 06th January, 2022

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

In the matter of:

1. VATSALA BALLARY SOLAR PROJECTS PRIVATE LIMITED

[Represented by its Authorized Signatory]

A Company registered under the provisions
of Indian Companies Act, 1956 having its
Registered office at 1208, 12th Floor, Satra Plaza
Plot No.19, Sector 19-D,
Palm Beach Road,
Navi Mumbai
Thane 400 705

... **APPELLANT**

VERSUS

1. KARNATAKA ELECTRICITY REGULATORY COMMISSION

[Represented by its Chairperson]

Having its Office at No. 16, C-1, Millers Bed Area,
Vasant Nagar,
Bengaluru – 560 052

2. BANGALORE ELECTRICITY SUPPLY COMPANY LIMITED

A Company Registered under the Provisions of
Companies Act, 1956 having its Registered office at
K R Circle,
Bengaluru 560 001

... **RESPONDENTS**

Counsel for the Appellant (s): **Mr. Basava Prabhu Patil, Sr. Adv.**
Mr. Shridhar Prabhu,
Mr. Anantha Narayana M.G.
Mr.VC Shukla
Mr. Geet Rajan Ahuja
Mr. Tarun Gulia

Counsel for the Respondent (s): **Mr. S. Sriranga Subbanna, Sr. Adv.**
Ms. Sumana Naganand
Mr. Balaji Srinivasan
Ms. Medha M Puranik
Ms. Deepthi C R for R-2

J U D G M E N T (ORAL)

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. Though this appeal was to come up, as per earlier order on 18.01.2022, it having been included in the *list of short matters*, its turn having come up ahead of the said date, the said date (18.01.2022) stands cancelled.

3. The appellant, a Solar Power Project Developer (SPD) has come up by this appeal under section 111 of Electricity Act, 2003, challenging the order dated 10.07.2018 passed by Karnataka Electricity Regularity Commission (hereinafter referred to as the "*KERC*" or the "*Commission*"), passed on Original Petition No.153 OF 2017, which had been presented on 28.11.2017, thereby reducing the tariff to Rs.4.36 per unit from the agreed rate of Rs.8.40 per unit, imposing liquidated damages claimed by the second respondent i.e. Bangalore Electricity Supply Company Limited (hereinafter referred to as "*BESCOM*"), the procurer, in terms of the Power Purchase Agreement dated 03.07.2015 (hereinafter referred

to as “PPA”) that had been executed earlier by the parties and which had been approved by KERC by order dated 26.08.2015.

4. The Solar Power Project set up by the SPD was pursuant to a scheme floated by the State Government for land owning farmers encouraging them to establish such projects, a number of such projects having come up including the one at hand and, since reference is being made to it, another project established by an entity called *Chennamangathihalli*.

5. The Scheduled Commercial Operation Date (“SCOD”) in respect of the power project of the appellant was 02.01.2017. Concededly, the project achieved Commercial Operation Date (COD) on 02.07.2017. It has been the explanation of the appellant that the delay occurred primarily on account of the approval for conversion of the land, the matter having taken about 10 months at the level of the government agencies. It is not in dispute that such a delay is covered by Article 8 (*force majeure*) of the PPA executed by the parties. Since similar delays are stated to have occurred vis-à-vis other similarly placed projects under the government scheme, the Government of Karnataka is stated to have setup a three-member committee which went into the issues of delays. It is stated that the said committee accepted the contentions of the power project developers and agreed that the delays had occurred at the end of

the government departments including on the issue of land conversion, thereby recommending extension.

6. Article 2.5 of the PPA is relevant in above context.

“2.5 Extension 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 BESCOM Event of Default; or*
- b. Force Majeure Events affecting BESCOM;*
or
- c. Force Majeure Events affecting the SPD,*

2.5.2 The Schedule 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 BESCOM through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the SPD or BESCOM, or till such time such Event of Default is rectified by BESCOM.

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 2.5.1 (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 the Article 10.

2.5.6 As a result of such extension, the Scheduled Commissioning Date and the Expiry Date newly determined 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 month 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.”

7. Noticeably, in the above Article 2.5 (on extension of time), the subject is initially a matter of amicable resolution by the parties to the agreement. As is clear from the bare reading of article 2.5.5, a dispute is required to be raised for adjudication by the State Commission only in the event of there being no agreement, the dispute resolution process being governed thereafter by the provisions of article 10 of the PPA.

8. It is not in dispute that the appellant had approached respondent Bangalore Electricity Supply Company Limited (“BESCOM”), the procurer, the other party to PPA by a letter of request dated 06.02.2017 seeking extension. In response, the respondent BESCOM agreed to the extension by six months and communicated this to the appellant by its letter dated 02.03.2017 which may be quoted as under:

*“To,
Shri. Tulsiram. M,
S/o M. Kumaraswamy,
54/1, 4th cross,
Parvathinagar
Opp Basava Bhavan,
Bellary.*

Sir,

Sub: Power Purchase Agreement of 2 MW at Kampali village, Kampali Hobli, Hospet Taluk, Belary District, Karnataka State of Sri. Tulsiram. M – reg Extension of Scheduled Commissioning Date.

*Ref: 1. PPA executed with BESCOM on 03.07.2015.
2. Your letter dated 06.01.2017 & 06.02.2017.*

With reference to the above, regarding request for time extension for achieving Scheduled Commissioning Date, I am directed to communicate as follows:

- Extension of time for Scheduled Commissioning Date is approved for 6 months from the date of SCOD (Scheduled Commissioning Date) as per PPA clause 2.5 and article 8. The validity of all the Bank guarantees furnished to BESCOM shall be extended up to 6 months from the Scheduled Commissioning Date and extended Bank Guarantees shall be submitted to BESCOM.*
- The company shall strictly adhere to the extended time line for fulfilling Scheduled Commissioning Date, failing which necessary action as per PPA will be enforced. It may be noted that no further time extension will be entertained*

- *All other terms and conditions of the PPA shall remain unaltered.*

*Yours faithfully,
General Manager (Ele),
PP, BESCO.*"

9. It appears that subsequently, the KERC, by a general order issued on 16.03.2017 directed that no extension of such nature as above would be granted without prior approval by the State Commission. Later, on 16.05.2017, the Board of Directors of the respondent BESCO approved the extension of period by six months as had been communicated to the appellant previously on 02.03.2017, but while so approving the extension the Board added a pre-condition that it would be subject to approval by KERC.

10. In the wake of above events, BESCO declined to pay the agreed tariff insisting that without approval of the extension by KERC in terms of the general order dated 16.03.2017 the contracted rate could not be enforced. This eventually led to the petitioner filing an Original Petition before KERC seeking approval. By the impugned order dated 10.07.2018 passed in the said matter, the KERC did grant the approval though observing that there had been seven months delay on the part of the appellant in applying for conversion and on such reasoning proceeding to reduce the agreed tariff.

11. As noted earlier, the solar power project of *Chennamangathihalli* was similarly placed. It had given rise to identical fact-situation and

similar dispensation at the end of the KERC which was assailed before this tribunal by appeal no. 351 OF 2018. The said appeal was decided by this Tribunal, by judgment dated 14.09.2020, the following paragraphs from the said decision having been referred to at the hearing:

“8.10 Regarding force majeure events, Clause 8.3 of PPA, it is noted that under sub-clause (vi), it is provided that “inability despite complying with all legal requirements to obtain, renew or maintain required licenses or legal approvals” will also attribute to force majeure. In view of these provisions under the PPA, we are of the opinion that the delay in receiving various approvals/clearances by the Govt. and its instrumentalities which were beyond the control of the Appellants should also be treated as an event of force majeure under sub-clause (vi) of clause 8.3 which has directly and severely affected the execution of the solar projects. To be more specific, if the approval for land conversion is received on last day of September, 2016, it becomes extremely difficult to achieve COD on 03.01.2017 as envisaged under the PPA. Moreover, the grant of extension of the Scheduled COD was accorded by Govt. of Karnataka and in turn, by first Respondent after complying with due procedures and applying its diligence and prudence under the four corners of the PPA and not beyond.

8.11 We have also taken note of various judgments of Hon'ble Supreme Court relied upon by the Appellants as well as Respondents and opine that these judgments have been passed considering the matters on case to case basis and may not be quite relevant in the facts and circumstances of case in hand. For example, in the case of All India Power Engineers Federation vs. Sasan Power Ltd., the Apex Court does not lay down any proposition that even in cases wherein there is no enhancement of tariff and the parties exercise powers under the PPA, even then the Commission had any inherent power. In the present case, neither has there been any increase in the tariff nor was there any exercise of power outside the PPA and hence the said

judgment relied upon by the Respondents is clearly distinguishable.

...

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 justice. Needless to mention that the PPA' Terms & Conditions were duly approved by the State Commission which crystallised the rights of the parties."

12. This tribunal did not approve of the reduction of tariff in the case of *Chennamangathihalli*, the decision having been assailed by BESCO by Civil Appeal No. 3958/2020 which was dismissed by Hon'ble Supreme Court by order dated 18.12.2020.

13. In the above facts and circumstances, we agree that the case is duly covered by the ruling in the case of *Chennamangathihalli* (supra). The learned counsel for BESCO, however, submitted that the case of *Chennamangathihalli* is distinguishable because in the present case there are clear findings returned by KERC about seven months' delay on the part of the appellant in approaching the Government department for land conversion, which delay has not been explained. In our view, the broad principle followed in *Chennamangathihalli* (supra) applies.

14. The relevant clauses of PPA conferred discretion on the parties to amicably resolve such issues as of delay in achieving CoD. In case of delay, the parties were expected by the contractual terms to sit across and agree to an extension if justifiable reasons were offered and if the same were covered by the clauses such as *force majeure*. That is precisely what happened in the present case. BESCO had the discretion to agree or not to agree to the request for extension. It proceeded to agree and communicated the said consent by the letter dated 02.03.2017. Assumably, the decision communicated by letter dated 02.03.2017 would be with the approvals accorded at the level where such decision-making authority lay. The subsequent decision, promulgated by a general Order dated 16.03.2017 passed by the State Commission cannot take away the effect and import of the agreement that had already been achieved on 02.03.2017 when BESCO communicated its consent for extension by six months. At the cost of repetition, it may be added that such agreement, by the contractual clauses read as on the date of communication dated 02.03.2017, was not subject to prior approval of KERC. In this view, the condition added by the Board of Directors of BESCO on 16.05.2017 also is incorrect.

15. In the above facts and circumstances, we find merit in the appeal. The State Commission has fallen into error by embarking on an inquiry

into the reasons for delay so as to deny the benefit of extension agreed upon by the parties in accordance with contractual provisions and also the contractual rate of purchase of electricity by BESCO. The decision rendered by the Commission is neither just nor fair and, therefore, set aside. For clarity, we add that the delay stands condoned post the communication of the decision by the BESCO by letter dated 02.03.2017, and in that view, BESCO is bound to honour its obligation as to the agreed financial terms under the PPA.

16. Needless to add that as a sequitur to the above decision, it shall be the contractual obligation of respondent BESCO to make good the deficiency in payments for the period up to the date of this judgment and hereafter without any demur or delay.

17. The appeal is allowed in above terms. The pending application is rendered infructuous and disposed of accordingly.

**PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO CONFERENCING
ON THIS 06th DAY OF JANUARY, 2022.**

**(Sandesh Kumar Sharma)
Technical Member**

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