

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

APPEAL NO. 85 OF 2019

Date : 28.10.2022

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

In the matter of:

JINDAL ALUMINIUM LIMITED

Jindal Nagar, Tumkur Road
Bangalore – 560 073,
Karnataka

Appellant(s)

VERSUS

1. KARNATAKA ELECTRICITY REGULATORY COMMISSION

Through Secretary
No.16, C-1, Millers Bed Area,
Vasanth Nagar, Bengaluru – 560 052

**2. BANGALORE ELECTRICITY SUPPLY
COMPANY LIMITED**

Through its Managing Director,
Corporate Office K.R. Circle,
Bengaluru – 560 001

Respondent(s)

Counsel for the Appellant(s) : Mr. Parinay Deep Shah

Counsel for the Respondent(s) : Ms. Samiksha Jain

J U D G E M E N T (Oral)

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

1. The Appellant *Solar Power Project Developer* (“SPPD”) which had set up a 10 MW solar photo voltaic project at Kalamarahalli Village, Challakere Taluk, Chitradurga District in the State of Karnataka using poly crystalline solar panels, had entered a *Power Purchase Agreement* (“PPA”) with the second Respondent procurer *Bangalore Electricity Supply Company Limited* (“BESCOM”) on 25.07.2012, the capacity contracted for supply being 18.396 Million kWh for a period of 20 years, the project having been commissioned on 05.06.2013. Its claim, by petition (OP No. 138 of 2017), for direction to BESCOM to pay for the additional energy to the extent 4,13,568 units injected into the Grid during the *Financial Year* (“FY”) 2015-16 and FY 2016-17 was rejected by the first Respondent, *Karnataka Electricity Regulatory Commission* (“the State Commission”) by order dated 29.11.2018, the view taken wherein is challenged by appeal at hand.

2. The Commission has recorded its observations vis-à-vis the claim as under:

“(a) It is the case of the Petitioner that, as solar power generation is dependent on nature and is not in its control, there cannot be any floor / ceiling with regard to minimum and/or maximum energy to be supplied by the solar plant and hence, Article 5.6.1 of the PPA in so far as it relates to production of minimum and maximum quantity of energy and also payment of compensation is arbitrary and unreasonable. It is also

pleaded that the Respondent cannot deny payment for the additional energy supplied by the Petitioner, as there is no prohibition in the PPA for upward revision of the capacity utilisation factor (CUF), if the technology used by the Petitioner generates more power by virtue of its efficiency.

- (b) On the other hand, it is contended by the Respondent that the PPA specifically imposes a cap on the contracted capacity and hence, the Respondent cannot be directed to purchase any additional energy generated by the plant, when the same is not required by the Respondent.*
- (c) The Petitioner has relied on the Order of the Commission in OP No.78/2016 in support of its claim for payment for the additional energy supplied. The Respondent has argued that the said case does not apply as the Respondent had offered to purchase the additional energy in that case at APPC rate, but in this case, it does not want the additional energy. We accept the contention of the Respondent. Although the terms of the PPA in both cases provide for a ceiling limit of energy to be purchased by the ESCOM, the marked difference is that the Respondent had, in OP No.78/2016, offered to purchase the additional energy, whereas, in this case, it has specifically stated that the additional energy is not required. It was based on the offer of the Respondent that the Commission fixed a tariff in OP No.78/2016 for the additional energy.*
- (d) Articles 5.5 and 5.6 of the PPA are relevant to deal with the dispute in this case. Article 5.5 provides that the BESCO has to purchase all the power supplied at the delivery point corresponding to the Contracted Capacity. Article 5.6 of the PPA provides that, the ESCOM during the contract year shall not be obliged to purchase any additional energy from the developer beyond 18.396 Mus. There is no provision in the PPA for purchase of all the power generated by the plant if panels of superior technology are used. The definition of CUF in the PPA, stipulates that it shall be, as per the CERC Regulations. The CERC Regulations of 2012 provide for CUF of 19%. It is the submission of the Respondent that, whereas CUF at 19% is considered in this case while arriving at the maximum contracted capacity, an additional energy of 1.756*

MU is provided. Having entered into a PPA with certain specific terms, the Petitioner cannot now contend that the terms are arbitrary or unreasonable.

- (e) In this case, as against in OP No.78/2016, we note that the Respondent is unwilling to purchase the additional energy. When a certain upper limit is specified in the PPA, the Commission cannot direct or compel the Respondent to procure more than such limit. It is only if the parties agree, that the Commission can fix a rate / tariff for any power supplied beyond the specified limit. The Petitioner could have anticipated in advance, during the respective years that it would be generating more than the limit fixed and could have sought permission for sale of the additional power to third parties. The Petitioner had not even sought prior consent of the Respondent for injection of additional energy. The terms of the PPA do not cast any duty on the Respondent to specifically intimate the Petitioner not to inject any power beyond the contracted quantum.*
- (f) Therefore, we consider that, such injection of additional energy cannot be permitted, let alone compensated.*
- (g) For the above reasons, we answer Issue No.(1), in the negative.”*

3. The Appellant contends that the view taken is erroneous since the State Commission has failed to bear in mind that in relation to *Solar Power Plant (SPP)* it is impossible to control the amount of energy generated, the BESCO having availed of the additional energy for commercial gain and, thus, it being improper to allow it to indulge in unjust enrichment, the observations of the State Commission that it cannot compel the BESCO to pay for the additional energy being improper.

4. Concededly the PPA contains the following clauses:

“5.5 Purchase and sale of Contracted Capacity

Subject to the terms and conditions of this Agreement, the Developer undertakes to sell to BESCO and BESCO subject to Clause 5.6 below, undertakes to purchase all the powers supplied at the Delivery Point corresponding to the Contracted Capacity.

5.6 Right to Contracted Capacity & Energy

5.6.1 BESCO, at any time during a Contract Year, shall not be obliged to purchase any additional energy from the Developer beyond 18.396 Million kWh (MU). If for any Contract Year, it is found that the Developer has not been able to generate minimum energy of 10.512 Million kWh (MU), on account of reasons solely attributable to the Developer, the noncompliance by Developer shall make Developer liable to pay the compensation provided in the Agreement as payable to BESCO. This compensation shall be applied to the amount of shortfall in generation during the Contract Year. The amount of compensation shall be computed at the rate equal to the compensation payable by the BESCO towards non-meeting of RPOs, subject to a minimum of 25% of the applicable tariff.”

5. It is not the case of the Appellant that the BESCO is not inclined to pay or has made defaults in paying to the extent of contracted capacity in terms of Article 5.6.1 of the PPA. The claim is for the additional energy generated by the SPP. If the systems put in position by the Appellant had the potential of generation of electricity over and above the contracted capacity, it was for the SPPD to take care of its

interest by formulating the contractual clauses accordingly. PPA is a commercial contract which was signed by both parties with open eyes and full understanding of the terms thereby settled. The claim for the additional energy that seems to have been generated and injected into the Grid is beyond the scope of Article 5.6.1. Allowing the claim of such nature would amount to re-writing the contract which is not permissible.

6. For the foregoing reasons, on the given facts, and in the circumstances, we find no error in view taken by the State Commission. The appeal is dismissed.

**PRONOUNCED IN THE OPEN COURT ON THIS 28th DAY OF
OCTOBER, 2022**

**(Sandesh Kumar Sharma)
Technical Member**

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

tp/mk