

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

Appeal No. 435 of 2023 & IA No. 2066 of 2022

Dated: 15th September, 2023

**Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member**

IN THE MATTER OF:

Hubli Electricity Supply Company Limited

Through its Managing Director
A Company Registered under the provisions
of the Indian Companies Act, 1956
having its Registered Office at Navanagar,
PB Road, Huballi – 580025

...APPELLANT

Vs.

- 1. M/s Nadagouda Energies Pvt. Ltd.**
Through its Director
A Company Registered under the Provisions of
the Companies Act, 2013
Having its Office at #658/8,
2nd Floor, F, 1st 'C' Main Road, 40th Cross,
8th Block, Jayanagar, Bangalore-560082
- 2. Karnataka Power Transmission Corporation Limited**
Through its Managing Director
A Company Registered under the provisions
of the Indian Companies Act, 1956
having its Registered Office at
Kaveri Bhavan, K.G. Road,
Bengaluru – 560009
- 3. Karnataka Renewable Energy Limited**
Represented by its Managing Director

Having its Registered Office at
No. 39, Shanti Gruha
Bharat Scouts and Guides Building
Palace Road, Gandhinagar
Bangalore – 560001

4. The Deputy Commissioner

Bijapur District
DC Gaganmahal Road
Bijapur, Karnataka – 586101

5. Karnataka Electricity Regulatory Commission

Through its Secretary
Tank Bed Area, 16C-1, Millers Road
Vasanthnagar, Bengaluru
Karnataka 560052

....RESPONDENTS

Counsel for the Appellant(s) : Mr. Shahbaaz Hussain
Mr. Fahad Khan
Ms. Stephania Pinto
Mr. V. M. Kannan
Mr. Lalit Rajpur
Mr. Harimohana N.
Mr. Yeshawanth M. Comer
Ms. Ilma Subhan

Counsel for the Respondent(s) : Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Ms. Surbhi Gupta
Mr. Utkarsh Singh for R-1

Mr. Samarth Kashyap
Mr. Tushar Kanti for R-3

JUDGEMENT

PER HON'BLE MR. SANDESH KUMAR SHARMA, TECHNICAL MEMBER

1. The present Appeal is filed by M/s. Hubli Electricity Supply Company Ltd. (in short "Appellant" or "HESCOM") challenging the Order dated 18.03.2022 (in

short “Impugned Order”) passed by the Karnataka Electricity Regulatory Commission (in short “KERC” or “State Commission”) disposing of OP No. 155/2017, the Appellant also filed IA No. 2066 of 2022 for seeking interim stay of the Impugned Order.

2. After hearing the IA, it was decided to dispose of the main Appeal itself as the issue to be considered for stay, shall be same as to be deliberated for the disposal of the Appeal.

3. The Appellant, HESCOM is a distribution licensee in the State of Karnataka and is a Government of Karnataka undertaking incorporated under the provisions of the Companies Act, 1956.

4. The Respondent No. 1, M/s. Nadagouda Energies Pvt. Ltd. (in short “NEPL”) is a generating company within the meaning of Section 2(28) of the Act and has set up a 3MW solar power plant at Jalageri Village, Bijapur Taluk, Bijapur District, Karnataka.

5. The Respondent No. 2, Karnataka Power Transmission Corporation Limited (KPTCL) is a transmission licensee within the meaning of Section 2(73) of the Act and is a Government of Karnataka undertaking incorporated under the provisions of the Companies Act, 1956, the Respondent No. 3, M/s. Karnataka Renewable Energy Development Limited (hereinafter referred to as “KREDL”) is responsible for promotion of Renewable Energy in the State of Karnataka *inter-alia* has introduced the land-owning Farmers scheme, the Respondent No. 4 is the Deputy Commissioner of Bijapur District, Karnataka and the Respondent No.

5, Karnataka Electricity Regulatory Commission is the State Commission and has passed the Impugned Order.

6. The factual matrix of the case is noted in brief.

7. Mr. Rajashekar Nadagouda, a land-owning farmer, applied for allotment of a solar power project of 3 MW capacity under the scheme notified by KREDL, consequently, the project was allotted vide KREDL's allotment letter dated 16.03.2015 and accordingly, the PPA was signed by Mr. Nadagouda and the Appellant on 24.06.2015.

8. Thereafter, Mr. Rajashekar Nadagouda incorporated a Special Purpose Vehicle (in short "SPV") in the name of M/s. Nadagouda Energies Private Limited, the Respondent No. 1 and a supplemental agreement to that effect was signed by the Respondent No. 1 and the Appellant on 10.06.2016.

9. The Effective Date has been defined as the date of signing of the PPA by the Respondent No. 1 and the Appellant and the Scheduled Commercial Operation Date (SCOD) for the commissioning of the project is 18 months from the effective date as per Article 4.1. (c) of the PPA, accordingly, the effective date of the PPA is on 24.06.2015 i.e. the date on which the PPA was signed and the SCOD of the project is 23.12.2016. i.e. 18 months from the effective date, however, as submitted by the Appellant the project was commissioned on 31.03.2017 as per the Commissioning Certificate with a delay of 3 months from the SCOD.

10. The Respondent No. 1, vide letter dated 08.12.2016, citing various reasons requested the Appellant for an extension of 6 months from the SCOD to commission the project.

11. Similar requests were made by other Solar Developers across Karnataka who had signed PPAs with the distribution companies under the Farmers scheme, consequently, the Government of Karnataka issued an Order on 24.11.2016 directing the distribution companies to form a 3-member committee to consider such extension of time.

12. The Appellant submitted that in compliance with the directions of the Government, a committee was constituted by the Appellant and on the recommendation of the committee, an extension of 6 months was granted to the Respondent No.1, vide letter dated 04.02.2017, stating that all other terms and conditions of the PPA remain unaltered, further, submitted that the Respondent No.1 in its letter has claimed Force Majeure events including delay by KPTCL in granting power evacuation approval, delay by the government authority in conversion of land and the impact of demonetization resulted in further impediment in commissioning the project, thus, meaning that under Clause 5.1 of the PPA, the tariff payable to the Respondent would be applicable generic tariff determined by the State Commission on account of commissioning of the Project beyond the SCOD.

13. The Appellant informed that several other solar developers were able to commission the project under the farmers scheme within the SCOD on account of due diligence and timely approvals that were placed before government

authorities, however, submitted that the Appellant while granting the extension to the Respondent No. 1 considered the statements and documents that were placed by the Respondent No. 1, wherein, the Respondent No. 1 failed to highlight its own delays and misrepresented certain facts before the committee, the Appellant by oversight overlooked the delays of the Respondent No. 1 while approaching the Government authorities and granted extension to commission the project.

14. The Appellant submitted that the State Commission vide letter dated 16.03.2017 had directed the Appellant to not allow any extension of time beyond the SCOD without obtaining its opinion, accordingly, the Appellant vide letter dated 13.04.2017 informed the Respondent No.1 to file a Petition before the State Commission, consequently, the Respondent No. 1 filed a Petition seeking extension of time in OP 155/2017 which was dismissed on 25.09.2018 *inter-alia* granting a tariff of Rs. 4.36 per unit to the Respondent No. 1 on account of delayed commissioning of the project.

15. The Respondent No. 1 challenged the Order dated 25.09.2018 before the High Court of Karnataka through Writ Petition in W.P. No. 7782 of 2020 *inter-alia* praying for quashing of the Order dated 25.09.2018, the High Court of Karnataka allowed the Petition and vide Order dated 20.09.2021 quashed the Order dated 25.09.2018 and remitted the matter back to the KERC for appropriate orders.

16. In compliance to remand, the State Commission passed the impugned Order, the Appellant is aggrieved by the decision of the State Commission in

granting tariff of Rs. 8.40/unit to the project of the Respondent No. 1, accordingly the captioned Appeal.

17. The Appellant submitted that the SPV was formed after more than a year after effective date of the PPA and therefore the financial investments including procurement of equipment was made a few months short of the SCOD in 2016 or 2017 when the cost of equipment was at an all-time low and the Respondent No. 1 has not provided any proof to indicate that it did not incur lower capital cost, also, the basis on which the PPA was entered into was the Generic Tariff Order dated 10.10.2013, which was revised by the Respondent No. 2 on 30.07.2015 in view of which revision, the manufacturing cost of solar panels and allied equipment's, had deflated owing to improvement in technology, further, stated that the directions passed by the State Commission overlooking several delays of the Respondent No. 1 that have led to delayed commissioning.

18. On the contrary, the Respondent No.1 submitted that the State Commission passed the Impugned Order relying upon various Judgments of this Hon'ble Tribunal, wherein the issue has been settled identical to the issue as raised in the present Appeal by observing that the tariff cannot be reduced or altered once the extension for Scheduled Commercial Operation Date has been approved by the distribution companies.

19. The Respondent No. 1 referred the Judgment dated 28.02.2020 in Appeal No. 340 of 2016 in ***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, the question of reduced tariff does not arise”, which was also relied upon by the State Commission, observing as under:

“26) In view of the discussions made above and also in Page 37 (Para 14 in Table-2), which disclose the time taken for each event of delay for approval and other delays, the prayer of the Petitioner falls within the parameters as discussed under Force Majeure events and in the present case on hand, though the Petitioner has suffered delay in issuing evacuation approval, Demonetization induced delay and delay in conversion of land has commissioned the project on 31.03.2017 i.e. within the extended period as approved on 23.06.2017 accorded by the 1st Respondent as per Annexure-L (filed along with Original Petition). As per observations made herein above, the judgements relied by the Counsel for the Petitioner and the grounds urged by the Petitioner in the Petition, these events fall under the Clause of Force Majeure as described in the PPA. The delay of 97 days is condoned and SCOD is extended by 97 days under Force Majeure. Hence, Issue No. 1 is answered in affirmative.

27) Issue No. 2: For what relief the Petitioner is entitled to?

28) As per discussions made herein above paragraphs, and also answering issue No. 1 in affirmative by holding that the Petitioner is entitled for extension of time of 97 days from 23.12.2016 to 31.03.2017 (i.e. 84 days earlier) and the Petitioner is entitled for the tariff as agreed in PPA and also as per the findings given by the Hon’ble APTEL in its judgement dated 28.02.2020 in Appeal No. 340/2016 between Azure Sunrise Private Limited Vs

Chamundeshwari Electricity Supply Corporation Limited, wherein the tribunal has held that “once extension of Scheduled Commissioning Date is approved by the concerned DISCOM, the question of reduced tariff does not arise”. Hence, the Petitioner is entitled for Rs. 8.40/kWh tariff.

29) As stated above, once the SCOD is extended by the Respondent the revised SCOD is to be reckoned for determining the Tariff as well as liquidated damages. Since the time extended upto 31.03.2017, the Petitioner is not liable to pay liquidated damages. Hence, this Issue No. 2 is answered accordingly.

30) Issue No. 3: What Order?

31) In view of the foregoing reasons, we pass the following:-

ORDER

A) The Petition is allowed.

B) The delay is condoned upto 31.03.2017 in commissioning of Solar Power Project in Hunshyala Village, Vijayapura Taluk, Vijayapura District and the Petitioner is entitled tariff at Rs. 8.40/- as per PPA.

C) The 1st Respondent is directed not to levy liquidated damages and if already levied the same shall be refunded to the Petitioner within two months.”

20. The Respondent No. 1, further, submitted that the issues raised in the present Appeal have also been settled by this Tribunal in case of **Chennamangathihalli Solar Power Project LL.P & Anr. v. Bangalore**

Electricity Supply Company Ltd. & Anr. in Appeal No. 351 of 2018, wherein the Hon'ble Tribunal has held as under:

“8.15 In view of the above, we are of the considered opinion that considering facts and circumstances of the matter, the first Respondent was justified in extending COD up to six months as per the relevant provision (clause 2.5) of the PPA. Besides, it is also crystal clear that the approvals / clearances from various Govt. instrumentalities were accorded after considerable delays (of 7-8 months) which in turn attributed to delay in commissioning of the solar projects. As these approvals were beyond the control of the Appellants, the State Govt. and first Respondent have rightly considered them as an event of force majeure and accordingly granted approval for COD extension. In fact, the Commission failed to analyse all the issues in just and proper manner. The impugned order as such cannot sustain in eyes of settled principle of law as being perverse and arbitrary. For the forgoing reasons, we hold that the Appellants are entitled for the agreed tariff as per the PPA (Rs. 8.40 per unit) without being subjected to LD.

9. Summary of Findings:-

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 crystallized the rights of the parties.

9.2 The findings of the State Commission in the impugned order clearly reflect that it has ignored the vital material placed before it such as statement of objections filed by first Respondent, recommendations of State Govt. dated 23.06.2017 and communication of MNRE, Govt. of India dated 28.07.2017 regarding grant of COD extension to the solar power developers. Further, it is mandate upon the State Commission to promote co-generation and generation of power from renewable sources of energy, however, in the present case, the State Commission has suo motto interfered for the ultimate loss to RE developers who are land owning farmers and had participated in the programme of the Govt. for solar power development. In fact, the entire solar project is structured on the basis of assured tariff as per Article 5.1 of the PPA being an incentivised tariff and financial institutions have advanced loans on the basis of the assured tariff as per PPA.

9.3 In the light of above, we hold that the impugned order dated 04.09.2018 passed by the State Commission is not justified in the eyes of law and hence liable to be set aside.”

21. The above Judgement has been upheld by the Hon'ble Supreme Court in its Order dated 18.12.2022 passed in Civil Appeal No. 3958 of 2020, the Respondent No. 1 submitted the factual details of this case with the case under dispute, details are as under

COMPARITIVE TABLE

S.No.	Facts in <i>Chennamangathihalli (supra)</i>	Facts in Present Appeal
1.	Respondent No.3- Karnataka Renewable Energy Development invited applications online on 09.10.2014 in term with Government of Karnataka Guidelines dated 26.08.2014 for awarding 1-3 MW capacity Solar Photo Voltaic Power MW scale plants with ESCOMs to individual agricultural land-owning farmers.	Respondent No.3- Karnataka Renewable Energy Development invited applications online on 09.10.2014 in term with Government of Karnataka Guidelines dated 26.08.2014 for awarding 1-3 MW capacity Solar Photo Voltaic Power MW scale plants with ESCOMs to individual agricultural land owning farmers.
2.	PPA dated 03.07.2015 was executed at the tariff of INR.8.40 per unit. The PPA was approved vide Order dated 01.09.2015.	PPA dated 24.06.2015 was executed at the tariff of INR 8.40 per unit. The PPA was approved vide Order dated 01.09.2015.
3.	6 months extension granted by the Discoms on 03.02.2017	6 months extension granted by the Appellant vide letter dated 04.02.2017.
First Tariff Order		
4.	Vide Order dated 04.09.2018 in OP No.68/2017, KERC reduced the tariff to INR. 4.36 per unit.	Vide Order dated 25.09.2018 in OP No. 155/2017, KERC reduced the tariff to INR 4.36 per unit.

First Tariff Order Challenged before the Hon'ble Tribunal	First Tariff Order Challenged before the Hon'ble High Court
<p>Vide Order dated 04.09.2018, this Hon'ble Appellate Tribunal while condoning the delay in SCOD on account of force majeure held that the generator is entitled for the agreed tariff as per the PPA (Rs. 8.40 per unit) without being subjected to LD.</p> <p>Before the Hon'ble Supreme Court **The above decision in Chennamangathihalli (supra) was upheld by the Hon'ble Supreme Court by its Order dated 18.12.2020 in Civil Appeal No. 3958 of 2020.</p>	<p>The aforesaid Order dated 25.09.2018 was challenged before the Hon'ble High Court of Karnataka, wherein the Hon'ble Court quashed the impugned order and remanded the matter back to State Commission for rehearing the issues.</p> <p>Remand Stage: During the remand state, Vide Impugned Order dated 18.03.2022, the State Commission took note of the previous Judgments passed by this Hon'ble Tribunal including Chennamangathihalli, wherein it condoned the delay in SCOD on account of force majeure and held that the Answering Respondent is entitled to the tariff of INR 8.40/kWh.</p>

22. In view of the above, it can be seen that the present matter is identical to the issues decided earlier by various judgments of this Tribunal and thus the issues raised by the Appellant in the captioned Appeal are squarely covered, there is no reason to interfere with the Impugned Order passed by State Commission in the light of the various judgments rendered by this Tribunal, as also quoted above, and therefore, the Impugned Order stays.

23. Further, since this Hon'ble Tribunal has decided this issue in several Judgments (*as mentioned above*) and the Appeals against which have been

dismissed by the Hon'ble Supreme Court, the issues raised by the Appellant evidently is in the teeth of the said Judgments, therefore, there is no purpose in admitting and keeping the present Appeal pending as it deserves to be dismissed in view of the above facts and observations, including the issue settled by the earlier Judgments.

ORDER

For the foregoing reasons as stated above, we are of the considered view that the present Appeal filed by the Appellant (HESCOM) is devoid of merit and stands dismissed.

All IAs also stand disposed accordingly.

PRONOUNCED IN THE OPEN COURT ON THIS 15th DAY OF SEPTEMBER, 2023.

**(Sandesh Kumar Sharma)
Technical Member**

**(Justice Ramesh Ranganathan)
Chairperson**

pr/mkj