

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

**DFR No. 198 of 2022 &
IA Nos. 784, 785 and 1828 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:

Gulbarga Electricity Supply Company Limited
Through its Chief Engineer (Electy), Operations,
Station Road, Kalburagi – 585 102.

...Appellant

Versus

1. M/s. Aurad Solar Pvt. Ltd.
Through its Director,
8-2-268/2/B/1, Road No. 2,
Banjara Hills,
Hyderabad – 500 034
2. Karnataka Power Transmission Corporation Limited
Through its Managing Director
KPTCL, Kaveri Bhavan,
Bangalore – 560009
3. The Karnataka Electricity Regulatory Commission
Through its Secretary,
No. 16, Millers Tank Bed Area,
Vasant Nagar, Bengaluru – 560052

... Respondents

Counsel for the Appellant(s) : Ms. Bhabna Das
Mr. Arunav Patnaik
Mr. N. Sai Kaushal
Mr. Aditya Mishra

Counsel for the Respondent(s) : Mr. Basava Prabhu Patil, Sr. Adv.
Mr. Hemant Sahai
Mr. Shreshth Sharma
Ms. Molshree Bhatnagar
Mr. Nitish Gupta
Ms. Nipun Sharma
Mr. Geet Ahuja
Ms. Parichita Chowdhury
Mr. Nishant Talwar
Mr. Nimesh Jha
Ms. Surabhi Pandey
Mr. Utkarsh Singh
Mr. Deepak Thakur
Mr. Neel Kandan Rahate
Mr. Allan Massey for R-1

JUDGEMENT

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

1. The Appellant i.e. M/s. Gulbarga Electricity Supply Company Limited has filed the IA No. 785 of 2022 in the captioned Appeal seeking ad-interim stay of the Impugned Order dated 20.01.2022 passed by the Karnataka Electricity Regulatory Commission (in short "State Commission") in Original Petition No. 16 of 2018 filed by M/s Aurad Solar Private Limited.

2. The Appellant is aggrieved by the decision of the State Commission in allowing the OP No. 16/2018 preferred by Respondent No. 1 before the State Commission inter alia directing the Appellant to pay to Respondent No. 1, tariff as per the PPA rate which is nearly double the prevailing tariff for solar power plants at the time of commissioning, though there is no delay or default on the part of the

Appellant, and also exempting the Respondent No. 1 from paying the liquidated damages despite the delays caused by the Respondent No. 1 in commissioning the Project.

3. The Appellant is the distribution company operating in the State of Karnataka, whereas, the first Respondent i.e. M/s. Aurad Solar Private Limited (in short “ASPL”) is a Special Purpose Vehicle incorporated for the purpose of executing the commissioning the Solar Power Plant in question, the second Respondent is the Karnataka Power Transmission Corporation Limited (KPTCL), the Transmission Licensee of the State of Karnataka and third Respondent is the State Commission, which has passed the Impugned Order.

4. The State Commission while passing the Impugned Order has granted the aforementioned relief to the Respondent No. 1 after observing as quoted below:

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6. After considering the submissions of the parties and their pleadings and records, the following issues arise for our consideration:

Issue No.1: *Whether the petitioner had made out the Force Majeure events relied upon by it to claim extension of time till the actual date of commissioning of the Project?*

Issue No.2: *Whether the petitioner is liable to pay, the damages for delay in achieving the Conditions Precedent and Liquidated Damages for delay in commencement of supply of power to the 1st respondent (GESCOM)?*

Issue No.3: *To which reliefs the petitioner is entitled to?*

Issue No.4: What Order?

7. *After considering the records and the submissions of the parties, our findings on the above issues are as follows:*

8. Issue No.1: *Whether the petitioner had made out-the Force Majeure events relied upon by it to claim extension of time till the actual date of commissioning of the Project?*

o) The above letter purporting to extend the time for commissioning of the Project, does not convey any meaning and it is also not in terms of provisions provided in Article 2.5 (Extension of Time) read with Article 8 (Force Majeure) of the PPA. Therefore, this Commission has rightly directed the petitioner to file a proper petition before this Commission making out the grounds for Force Majeure events for claiming extension of time, when the SPPA dated 16.03.2017 (Annexure-P45) was submitted for approval.

p) Both parties have relied upon several precedents of different Courts. We have gone through the said precedents. We are of the opinion that while giving findings on questions of fact of a particular case, based on its facts and circumstances, the precedents are not much helpful. Therefore, we deem it fit not to cite them in this Order.

q) For the above reasons, Issue No.1 is held in affirmative.

9. *Issue No.2: Whether the petitioner is liable to pay, the damages for delay in achieving the Conditions Precedent and Liquidated Damages for delay in commencement of supply of power to the 1st respondent (GESCOM)?*

e) The petitioner would have been liable for Liquidated Damages for delay in commencement of power supply to the 1st respondent (GESCOM)' as per Article 2.5.7 of the PPA, had it been unable to establish the delay in commissioning the Project was due to Force Majeure event beyond its reasonable control. As already noted on Issue No.1, the petitioner has established the Force Majeure event for claiming the extension of time for achieving commissioning of the Project. Therefore, the petitioner is not liable to pay any Liquidated Damages for delay in commencement of power supply.

f) For the above reasons, we hold issue No.2 in negative.

10. *Issue No.3: To which reliefs the petitioner is entitled to?*

a) The PPA provides for payment of tariff of Rs.8.40 per-unit for the energy supplied from Commercial Operation Date during the term of the PPA. It appears as per the interim order dated 05.06.2018 passed in this case by this Commission, the petitioner is being paid the tariff of Rs.4.36 per unit for the energy supplied from the date of commissioning of the Project. The petitioner is entitled to the differential tariff.

- b) The petitioner is not liable for payment of any damages either under Article 2.2.1 or 2.5.7 of the PPA.*
- c) The SPPA dated 16.03.2017 (Annexure-45) does not contain proper terms while enabling the term for extension of time for commissioning the Project. Therefore, the parties are to be directed to enter into a fresh SPPA in terms of the present orders.*
- d) For the above reasons, we hold Issue No.3 accordingly.*

11. *Issue No.4: What Order?*

For the foregoing reasons, we pass the following:

ORDER

- a) The petition is allowed holding that the petitioner is entitled to tariff of Rs.8.40 per unit for the energy supplied to the 1st respondent (GESCOM) from the Solar Power Project of the petitioner from the date of commissioning of the Project i.e., 27.05.2017, during the term of the PPA dated 29.08.2015 (Annexure-P4).*
- b) The 1st respondent (GESCOM) shall pay to the petitioner, the differential tariff for the energy supplied from the date of commissioning of the Project up to the immediate preceding monthly bill, within a period of three months from the date of this Order. In default, the 1st respondent (GESCOM) shall pay the amount found due with interest at 9% per annum from the date of default till the date of payment.*

- c) *The 1st respondent (GESCOM) shall pay to the petitioner, the tariff of Rs.8.40 per unit for the energy supplied subsequent to the immediate preceding monthly bill, in terms of the relevant provisions of the PPA.*
- d) *The petitioner is not liable to pay any damages either under Article 2.2.1 or Article 2.5.7 of the PPA. The damages collected if any, shall be refunded to the petitioner within 30 (thirty) days from the date of this Order.*
- e) *The petitioner and the 1st respondent (GESCOM) shall enter into a fresh SPPA substituting the date "27.05.2017" in place of the words "18 (eighteen) months from the Effective Date" appearing in clause (xxxi) of Article 1.1 defining "Scheduled Commissioning Dote" and clause (c) of Article 4.1 specifying obligations of SPD in the PPA, within 30 (thirty) days from the date of this Order."*

5. The Respondent No. 1 submitted that the matter is covered by the earlier Judgement dated 02.08.2021 passed by this Tribunal in the matter of *Clearsky Solar Pvt. Ltd. Vs. KERC & Ors*, accordingly, after hearing the Interim Application, it was considered reasonable to dispose of the Appeal itself.

6. The Respondent No. 1 relying upon the earlier Judgement of this Tribunal in *M/s. Clearsky Solar Pvt. Ltd. Vs. KERC & Ors.*, placed before us a comparative factual matrix of the instant case and that of the matter in which the said judgment was passed by this Tribunal as under:

S. No.	Particulars	Aurad Solar Case (KERC Order dated 20.01.2022 i.e. Impugned Order herein)	Clearsky Solar case (APTEL's Judgement dated 02.08.2021)
1.	Farmer's Scheme under the Karnataka Solar Policy 2014-2021	SAME Para 2(a)/ page 45 of the KERC Order	SAME Para 3 @ page 4 of the APTEL Order
2.	Date of PPA	29.08.2015 {Para 2(c)/ page 3 of the KERC Order)	29.08.2015 [Para 9 @ Page 6 of the APTEL Order]
3.	Date of approval of PPA by KERC	07.09.2015 [Para 2 (c)/ page 3 of the KERC Order]	07.09.2015 [Para 10 @ page 7 of the APTEL Order]
4.	Date of CEIG Certificate	23.02.2017 [Para 3(m)/ page 6 of the KERC Order	23.02.2017 [Para 163 @ page 71 of the APTEL Order]
5.	Scheduled Commissioning Date as per PPA	28.02.2017 [Para 2(d) / page 3-4 of the KERC Order]	28.02.2017 [Para 9 @ Page 6 of the APTEL Order]
6.	Land Conversion Order by the Government of Karnataka	23.05.2017 [Para 8(i)/ page 19 of the KERC Order)	24.05.2017 [@page 86 / page 27 of the APTEL Order]

7.	Extended SCOD (Extension given by GESCOM)	27.05.2017 [Para 2 (j) / page 5 of the KERC Order)	27.05.2017 [@ para 76 / page 25 of APTEL Order]
8.	Actual Commissioning Date (Plant commissioned within extended commissioning date)	27.05.2017 [Para 2(n)/ page 6 of the KERC Order)	27.05.2017 [@para 167 / page 75 of the APTEL Order]

7. The Respondent No.1 also submitted that as per clause 3 of Generic Tariff Order dated 30.07.2015, the Plants commissioned between 01.09.2015 and 31.03.2018 and for which PPAs have been entered into and submitted for KERC's order prior to 01.09.2015 shall be paid tariff as per PPA notably, both Aurad and Clearsky achieved commissioning on 27.05.2017 and their PPAs were signed and submitted to KERC for approval prior to 01.09.2015.

8. It may be seen from the above that except the dates corresponding to Land Conversion Order (as mentioned at Sl. No. 6 of the above Chart) are identical and even the impact of issuance of the Land Conversion Order on different dates has not impacted the commissioning of the project of the Respondent No. 1.

9. Also, as per Clause 3 of the Generic Tariff Order dated 30.07.2015 by which the two cases are covered, the Solar Power Projects which are commissioned between 01.09.2015 and 31.03.2018 and also for which PPAs have been entered into prior to 01.09.2015 shall be applicable for a tariff of Rs. 8.40 per unit.

10. This Tribunal vide its Judgement dated 02.08.2021 has held that:

“167. Apparently, the Appellant’s Project received formal COD Certificate and started supplying power from 27.05.2017, but no payment for the electricity supplied was made. It was only with the intervention of the Respondent Commission by an interim order dated 05.04.2018 payment of Rs. 4.36/kWh was granted and the same came to be paid from April 2018 onwards. The Respondent-GESCOM paid all the arrears for the period between May 2017 to April 2018 at the rate of Rs. 4.36/kWh, but without any carrying cost. The project has been operating at the reduced tariff of Rs. 4.36/kWh till date. Therefore, we are of the opinion that the Appellant is entitled for late payment surcharge/carrying cost in terms of PPA, from 27.05.2017.

168. Since we opine that there was no fault on the part of the Appellant to commission the project and they were ready in all respects, they are entitled to receive the amounts from the date of COD. Therefore, Respondents are liable to pay late payment surcharge on the differential tariff so also amounts due towards tariff for the electricity supplied by the Appellant to Respondent GESCOM from the date of COD in terms of Article 6.4 of the PPA.

169. Since Appellants were not responsible for any delay, they are entitled for tariff at Rs.8.40 per unit.

170. In the light of the above discussion and reasoning, we are of the opinion that none of the contentions raised by the Respondent-GESCOM or Respondent-KPTCL are sustainable.

171. Accordingly, the following order is made:

(i) Appeal is allowed setting aside the impugned order. The Appellant is entitled for Rs. 8.40/kWh from the date of commissioning the project.

(ii) The Appellant is entitled for differential tariff from the date of COD and the same shall be paid by the Respondent Discom to the Appellant.

(iii) The Appellant is also entitled for carrying cost/late payment surcharge on the differential amount of tariff so also dues of energy charges if any, that were not paid from COD till it is paid, in terms of Article 6.4 of the PPA.

(iv) Appellant is not liable to pay any damages so also liquidated damages.

(v) The Respondent Discom shall pay the amounts indicated above to the Appellant within four weeks from the date of receipt of this Order.”

11. The Respondent No. 1 also relied upon the various other Judgements rendered by this Tribunal:

a) Vcarve Solar LLP Vs. KERC & Ors. in Appeal No. 128 of 2018 dated 24.11.2022.

- b) Clearsky Solar Pvt. Ltd. Vs. KERC & Ors. in Appeal No. 160 of 2020 dated 02.08.2021.*
- c) Azure Photovoltaic Private Limited V. Gulbarga Electricity Supply Company Limited & Anr. In Appeal No. 89 of 2018 dated 12.08.2021.*
- d) Hukkeri Solar Power Project LLP & Anr. V. Hubli Electricity Supply Company Limited & Anr. In Appeal 342 of 2018 dated 12.08.2021.*
- e) Hunsakodilli Solar Power Project LL.P & Anr. V. Bangalore Electricity Supply Company & Anr. In Appeal No. 37 of 2019 dated 12.08.2021.*
- f) Chennamangathihalli Solar Power Project LL.P & Anr. Bangalore Electricity Supply Company Limited & Anr. In Appeal No. 351 of 2018 dated 14.09.2020.*
- g) M/s. Solitaire BTN Solar Private Limited V. Tamil Nadu Electricity Regulatory Commission & Ors. in Appeal No. 67 of 2021 dated 05.07.2021.*

12. On the contrary, the Appellant failed to bring any facts differentiating the facts of the present case from the facts of the earlier case where this Tribunal has granted similar relief to Solar Project Developer therein.

13. It was also brought to our notice that the Judgement dated 02.08.2021 passed by this Tribunal was also upheld by the Hon'ble Supreme Court of India vide Judgement dated 09.12.2022 in Civil Appeal No. 5134 of 2021.

14. We are, therefore, satisfied that the instant case is identical to the matter of M/s. Clearsky Solar Pvt. Ltd. Vs. KERC & Ors. wherein this Tribunal has passed the Judgement dated 02.08.2021 directing similar relief as ordered by the State Commission in the present case, the Impugned Order dated 20.01.2022 passed by the State Commission is just and reasonable.

ORDER

In the light of the above, the instant appeal DFR No. 198 of 2022 filed by the Gulbarga Electricity Supply Company Limited is dismissed being devoid of merit, the Impugned Order dated 20.01.2022 passed by the State Commission in Original Petition No. 16 of 2018 filed by M/s Aurad Solar Private Limited is upheld.

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