

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL Nos. 279 of 2022 & 425 of 2022

Dated : 19th February, 2024

Present: Hon`ble Mr. Sandesh Kumar Sharma, Technical Member
Hon`ble Mr. Virender Bhat, Judicial Member

In the matter of:

APPEAL No. 279 of 2022

WAANEEP SOLAR PRIVATE LIMITED

201 & 202, Third Floor,
Okhla Industrial Estate Phase 3 Rd,
Okhla Phase III, Okhla Industrial Area,
New Delhi, Delhi – 110020

secretarial@herofutureenergies.com

abhijeet.swaroop@theguild.co.in

... Appellant(s)

Versus

1. ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION

(Through its Secretary)

4th Floor, Singareni Bhavan,
Red Hills Hyderabad – 500004

Andhra Pradesh

Email: chmn@aperc.in

2. GOVERNMENT OF ANDHRA PRADESH

(Through its Principal Secretary)

Department of Energy,
Secretariat, Velagudi,

Amaravati-522503

Andhra Pradesh

Email: secyenergyap@gmail.com

3. **SOUTHERN POWER DISTRIBUTION COMPANY OF ANDHRA PRADESH**
(Through its Chairman & Managing Director)
Tirupathi, Andhra Pradesh
Chittoor District-517503
Andhra Pradesh
Email: cmd@southernpower.co.in

4. **SOUTHERN POWER DISTRIBUTION COMPANY OF ANDHRA PRADESH**
(Through it's the Chief General Manager (PMM & IPC))
Tirupathi, Andhra Pradesh
Chittoor District-517503
Andhra Pradesh
Email: cgm pmm@southernpowerap.co.in

5. **The Chief Engineer**
TRANSMISSION COMPANY OF ANDHRA PRADESH
A.P.P.C.C,
Vidyut Soudha
Vijayawada – 520004
Andhra Pradesh
Email: ce.trans@aptransco.gov.in

6. **TRANSMISSION COMPANY OF ANDHRA PRADESH**
(Through it's the General Manager)
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Vidyut Soudha
Vijayawada – 520004
Andhra Pradesh
Email: ce.ipc@aptransco.gov.in

7. **NEW & RENEWABLE ENERGY DEVELOPMENT CORPORATION OF ANDHRA PRADESH LIMITED (NREDCAP)**
(Through its Vice Chairman & Managing Director)
12-464/5/1, River Oaks Apartment,
CSR Kalyana Mandapam Road,
Tadepalli, Guntur District - 522501
Andhra Pradesh

Email: vc@nredcap.in

... Respondent (s)

Counsel for the Appellant(s) : Sajan Poovayya, Sr. Adv.
Basava Prabhu Patil, Sr. Adv.
Abhijeet Swaroop
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Rajeswari Mukerjee For App.1

Counsel for the Respondent(s) : Sridhar Potaraju
Mukunda Rao Angara
Aayush
Yashvir Kumar for Res. 1
Sidhant Kumar
Manyaa Chandok for Res. 3 to 6

APPEAL No. 425 OF 2022

1. SOUTHERN POWER DISTRIBUTION COMPANY OF ANDHRA PRADESH LIMITED

(Through its Chairman & Managing Director)

Tirupathi, Andhra Pradesh

Chittor District-517503

Andhra Pradesh

Email: cmd@southernpower.co.in

2. SOUTHERN POWER DISTRIBUTION COMPANY OF ANDHRA PRADESH LIMITED

(Through its Chief General Manager (PMM & IPC))

APSPDCL, Tirupathi, Andhra Pradesh

Chittor District-517503

Andhra Pradesh

Email: cmd@southernpower.co.in

3. ANDHRA PRADESH POWER COORDINATION COMMITTEE

(Through its Chief Engineer (IPC))

A.P.P.C.C., Vijayawada

Having Office at:

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Beside KAY Hotel
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4. ANDHRA PRADESH POWER COORDINATION COMMITTEE

(Through its General Manager)

A.P.P.C.C., Vijayawada

Having Office at:

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1st Floor,

Vidyut Soudha AP Transco

Beside KAY Hotel

Near Ramavappadu Ring

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Email: cgm-pp.vja@aptransco.co.in

... Appellant(s)

Versus

1. ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION

(Through its Secretary)

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2. WAANEPP SOLAR PRIVATE LIMITED

(Through its Authorised Signatory, Mr. M. Sridhar)

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3. GOVERNMENT OF ANDHRA PRADESH

(Through its Special Chief Secretary - Energy)
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**4. NEW & RENEWABLE ENERGY DEVELOPMENT CORPORATION
OF ANDHRA PRADESH LIMITED**

(Through its Vice Chairman & Managing Director)
12-464/5/1, River Oaks Apartment,
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... Respondent (s)

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Sajan Poovayya, Sr. Adv.
B.P. Patil Sr. Adv.
Abhijeet Swaroop
Tabrez Malawat
Syed Hamza
Sourajit Sarka for Res. 2

JUDGEMENT

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. Since both these appeals arise out of the order dated 9th March, 2021 passed by Andhra Pradesh Electricity Regulatory Commission in the

Petition No. 62 of 2019, we find it appropriate to dispose off both the appeals by this common order.

2. M/s. Waaneep Solar Pvt. Ltd. (Appellant) in Appeal No. 279 of 2022 and hereinafter referred as (WSPL) had filed a petition before the Andhra Pradesh Electricity Regulatory Commission (hereinafter referred as “Commission”) with the following prayers:-

- (a) *“Declare the revised SCOD of the 25 MW solar power project as 29-09-2016 due to Force Majeure Events as envisaged in the PPA.*
- (b) *Consequently, declare that the petitioner is not liable to pay any penalties as per the PPA or as demanded in Letter No.GM/APPCC/SAO(PP&S)/D.No.202/19, dated 6-8-2019 issued by respondent No.5 and to direct the respondents to refund the amounts adjusted towards penalty amounting to Rs.18,74,70,000/- (Rupees Eighteen crores seventy four thousand and seventy thousand) and adjusted bank guarantees invoked amounting to Rs.6.36 crores.”*

3. On the basis of pleadings of the parties, the Commission framed following points for determination :-

- 1.** *“Whether the grounds raised by the petitioner constituting delay in execution of the project fall within the definition of force majeure under Clause 9.1 of the PPA dated 6-12-2014, as amended from time to time?*
- 2.** *Whether the petitioner is entitled to the relief of revising the SCOD?*
- 3.** *Whether the petitioner is entitled to consider 28-07-2016 as the COD in respect of 25 MW of Gurrampkonda location ?*
- 4.** *Whether the action of respondent Nos.2 to 5 in invoking bank guarantees and imposing liquidated damages and recovering the same from the petitioner is legal, proper and valid ?*
- 5.** *Whether the levy and recovery of GST on the liquidated damages is proper, legal and valid ?”*

4. The Commission, vide the impugned order, has decided the point number 1 to 4 against WSPL whereas point number 5 has been decided in its favour. Accordingly, WSPL has assailed the findings of the Commission on above noted point numbers 1 to 4 in its Appeal No. 279 of 2022 whereas the Southern Power Distribution Company of Andhra Pradesh (Respondent Nos. 3 & 4 before the Commission) along with Andhra Pradesh Power Coordination Committee (which was a party to the petition before the Commission) have preferred the Appeal No. 425 of 2022 assailing therein the findings of the Commission on above noted point number 5.

5. The facts of the case in brief are that WSPL is a solar power generating company within the meaning of Section 2(28) of the electricity Act and has set up 50 MW solar power plants at Gurramkonda (25MW) and Somala (25MW), Chittoor District, Andhra Pradesh. The instant appeal related to the 25MW solar Power plant set up at Gurramkonda, Chittoor District, Andhra Pradesh.

6. With a view to harness solar power generation potential in the State of Andhra Pradesh, Southern Power Distribution Company (Respondent No. 3 before the Commission and hereinafter referred to as "SPDC") floated tender for purchase of 500 MW Solar Power on Build, Own and Operate basis. The New & Renewable Energy Development Corporation of Andhra Pradesh Limited (NREDCAP), Respondent No. 7 before the Commission

was designated as nodal agency for facilitating and obtaining permission as well as approvals required for setting up of these renewable energy projects in the State of Andhra Pradesh. WSPL offered to set up 50 MW capacity solar power projects at two locations i.e. 41 MW at Palamaner and 9 MW at Rompicherla both in Chittoor District. The company was one among the 23 selected bidders to supply power at the quoted tariff of Rs. 5.76 per KWH for the first year subject to escalation of 3% every year upto 10th year and the 11th year tariff to continue upto 25th year. The Company entered into a power purchase agreement with the Govt. of Andhra Pradesh (Respondent No. 2 before the Commission) on 6th December, 2014. As per the terms of PPA, the Company WSPL was required to commission the project within 12 months if it is connected at 33 KV voltage to the grid and within 15 months if its connected at 132 KV voltage to the grid. Hence, the Scheduled Commercial Operation Date (SCOD) of the power project was fixed as 5th March, 2016 i.e. 15 months after the execution of the PPA. We note here that the SCOD was later extended till 31st March, 2016. It appears that after the execution of PPA, WSPL vide letter dated 4th February, 2015 requested the Govt. of Andhra Pradesh and SPDC to permit splitting of locations of the project in two or more and vide subsequent letter dated 11th February, 2015 had requested for revision of its capacities by changing the locations of the projects i.e. 24 MW at

Gurramkonda, 16 MW at Somala (both in Chittoor District) and 10 MW at Jammalabanda in Ananthapur District. Vide another letter dated 12th February, 2015, WSPL requested for further change of locations i.e. 24 MW at Gurramkonda, 16 MW at Somala and 10 MW at Jammalabanda. The SPDC acceded to the request of WSPL for such change of locations vide its letter dated 30th March, 2015. There has been further change of locations later on with Nagiri substituting Somala. In view of these changes in the locations of the power projects, the PPAs were amended as many as three times. However, it may be noted that the instant appeals are concerned as well as confined to the solar power project at Gurramkonda location only.

7. Pursuant to the change of capacities of the power projects of WSPL as noted herein above, it furnished revised performance bank guarantees dated 28th April, 2015 and 29th April, 2015 for a sum of Rs.12.50 crores for Gurramkonda and Nagiri locations. First amendment to the PPA was made on 4th June, 2015 with regard to these revised capacities only while there being no change in the other terms and conditions. Vide letter dated 7th December, 2015, WSPL requested the officials to extend the timeline of the commissioning of the project by two months on the ground of torrential rainfall that was witnessed at the project site in the month of November, 2015. Since the WSPL did not complete and commission the

project on the date fixed in the PPA as amended from time to time, the SPDC invoked its performance bank guarantees @20% upto one month delay, 40% upto two months delay and the balance 40% upto three months delay. As according to SPDC, the total delay in commissioning of the project was 181 days, it also levied liquidated damage for the remaining 91 days @ Rs.1 lakh per MW per day in respect of 20.83 MW, which amounted to Rs.18,95,53,000/-. WSPL felt aggrieved by this action of SPDC in invoking the performance bank guarantees and levying of liquidated damage which it assailed before the Commission by way of its petition bearing O.P. No. 62 of 2019.

8. WSPL had put forth five reasons before the Commission for delay in achieving COD of its solar power project at Gurramkonda which were :-

- (i) delay due to change of locations;
- (ii) delay in acquiring the land;
- (iii) torrential rains;
- (iv) losses suffered due to reduction of tariff for Nagiri plant and
- (v) delay in inspection of the plant and network at Gurramkonda.

9. It was the case of WSPL before the Commission that the reasons for delay mentioned at Serial Number 1 to 4 hereinabove are well within the

definition of Force Majeure under clause 9.1 of PPA dated 6th December, 2014 as amended from time to time which entitled it for extension in SCOD of the project. However, the Learned Counsel for WSPL did not press these alleged force majeure events before us and confined to the scope of Appeal No. 279 of 2022 as well as his submissions only to following two issues:-

- (a) Whether the COD for the project at Gurrumkonda should be taken as 28/07/2016 or 29/09/2016; and
- (b) Whether invoking of the Bank Guarantees of WSPL by SPDC & TCA and imposing liquidated damages upon it is legal, proper and valid.

10. It is the case of WSPL that it managed to synchronize 1.35 MW out of 25 MW on 19th May, 2016, 4.17 MW on 24th May, 2016 and remaining 16.83 MW on 28th July, 2016 and thus entire project at Gurrumkonda was synchronized by 28th July, 2016. It is stated that the inspection of the project was carried out after a delay of two months on 29th September, 2016 and, therefore, the COD of the project should be considered as 28th July, 2016 and not 29th September, 2016 as declared by SPDC.

11. It was submitted by Learned Counsels for WSPL that despite noting in the impugned order that WSPL had completed the set up of entire 25MW power project at Gurrumkonda by 28th July, 2016 and the entire power injected by it into the grid was utilized by the Discoms, the Commission erred

in not passing consequential necessary relevant orders for refund of penalty amount of Rs.18,95,53,000/- to the company. He referred to the letter dated 7th May, 2016 of the Executive Engineer, Division A.P. Transco, Tirupati to Divisional Engineer, A.P. Transco, Chittoor wherein it is mentioned that the works at Gurrankonda plant are complete and a request was made for arranging statutory inspection. The Learned Counsel argued that there is no dispute on the part of the SPDC that WSPL had been injecting 25MW power to the grid from its Gurrankonda plant w.e.f. 28th July, 2016 and, therefore, the Commercial Operation Date (COD) of the project has to be taken as the said date and not 29th September, 2016 which is stated by SPDC. In this regard, the Learned Counsel also placed reliance upon the letters dated 4th September, 2016, 7th September, 2016 and 12th November, 2016 addressed by WSPL to the authorities highlighting therein the factum of injection of power into the grid from the Gurrankonda plant. It is his submission that no loss at all has been caused to the SPDC and on the contrary, the Discom has utilized and sold the power injected by the project of WSPL and therefore even if some penalty is stipulated in the PPA for delayed commissioning of the power project, the SPDC was at best entitled to a reasonable compensation only upon proof of any loss caused to it. On this aspect, the Learned Counsel placed reliance upon the judgement of the

Hon'ble Supreme Court in **Kailash Nath Associates v. Delhi Development Authority and Anr.** (2015) 4 SCC 136.

12. According to the Learned Counsel, the performance of synchronization is purely to tune the plant to grid frequency so that supply of power can be recorded for billing purposes and therefore once the supply of power and capability of grid system to record the same is established, the other technical considerations become non-consequential and immaterial. He would argue that in these circumstances when the power plant of WSPL was duly tuned to the grid frequency w.e.f. 28th July, 2016, no penalty or damages should have been imposed upon it. It was pointed out by the Learned Counsel that since SPDC did not respond to the letters dated 4th September, 2016, 7th September, 2016 and 9th November, 2016 WSPL and itself delayed inspection of the power project at Gurramkonda. Despite these letters of WSPL, it does not lie in its mouth to show that the project was not completed and commissioned on 28th July, 2016, and therefore, its action of levying penalty and damages on WSPL is totally illegal, arbitrary and baseless.

13. The submissions of the Appellant's counsel, as noted hereinabove, have been strongly refuted on behalf of the SPDC and NREDCAP. All the contentions raised on behalf of the WSPL have been denied except to the extent that it had synchronized 4.17 on 24th May, 2016. It is submitted that

there is nothing on record to show that WSPL had synchronized 16.83 on 28th July, 2016. Reliance is placed upon the letter dated 27th September, 2016 addressed by WSPL to Govt. of Andhra Pradesh stating that CEIG has yet not given safety certificate in respect of the balance capacity of 20.83 and has promised to undertake such inspection during that weekend. It is thus argued that these letters clearly indicates that the entire project of the WSPL was not ready even on the said date i.e. 27th September 2016 which totally falsify its claim that the said project was ready on 28th July, 2016.

14. Referring to the letters dated 4th September, 2016, 7th September, 2016 and 12th November, 2016 of WSPL, it is argued that in the absence of completion of the project in all respects including the statutory inspection by CEIG certifying the safety of the equipment of the project as well as its readiness, such letters do not have any sanctity in law. As regards the claim of WSPL that it has injected power from 19th May, 2016 to 30th September, 2016, it is argued that as per Regulation No. 2 of 2016, the power injected from the date of synchronization until the actual COD has to be treated as “inadvertent power” and the same cannot be accounted for. Thus, it is argued that the SCOD of the project of WSPL at Gurrankonda has been rightly declared as 29th September, 2016 and therefore, no fault can be found in encashing of the bank guarantees of the

company as well as in levying penalty as well as liquidated damages upon it due to delay in commissioning of the project.

15. We have considered the rival submissions made on behalf of the parties and impugned order of the Commission as well as the entire record.

16. It is the case of WSPL itself that it was unable to achieve the scheduled commercial operation date for the project at Gurrampkonda. At the same time, we note that there is no dispute on the part of SPDC, AP Transco and NREDCAP (Respondents in Appeal No. 279 of 2022) to the fact that WSPL was injecting 1.35 MW power from 19th May, 2016, 4.17 MW from 24th May, 2016 and 16.83 MW from 28th July, 2016. It is on the basis of injection of such entire capacity of power w.e.f. 28th July, 2016 that WSPL is claiming the said date to be the commercial operation date of the project.

17. Article 1 of the PPA defines “Commercial Operation Date” as the date on which the project is declared operational by the solar power developer provided that the solar power developer shall not declare a generating unit to be operational until such unit has met the conditions of clause 3.10. Article 6 of the PPA envisaged that the solar power developer shall be responsible, inter alia, for complying with the provision of the grid code, performance standard, protection and safety standards as required as per the Rules and Regulations in force from time to time in the State of

Andhra Pradesh for achieving COD within the timelines stipulated for SCOD as per the agreement and for seeking approval of the Andhra Pradesh Transco as well as the Discom in respect of the inter-connection facilities with the grid sub-station and synchronization of the project with the grid.

18. Clause 3.10 of the PPA provides the conditions for synchronization of a solar power project with the grid and the same is reproduced hereunder:-

3.10.1. *The Solar Power Developer shall give a written notice to the concerned SLDC and DISCOM, at least sixty (60) days in advance to the date on which it intends to synchronize the Project to the grid system.*

3.10.2. *The Project may be synchronized by the Solar Power Developer to the grid system when it meets all the connection conditions prescribed in applicable Grid Code then in effect and otherwise meets all other Indian legal requirements for synchronization to the grid system.*

3.10.3 *The synchronization equipment shall be installed by the Solar Power Developer at its generation facility of the Project at its own cost. The Solar Power Developer shall synchronize its system with the Grid System only after the approval of synchronization scheme is granted by the head of the concerned sub-station/grid system and checking/verification is made by the concerned authorities of the grid system.*

3.10.4. *The Solar Power Developer shall immediately after synchronization/tripping of generator, inform the sub-station of the grid system to watch the Project is electrically connected in accordance with applicable Grid Code.*

3.10.5. *The Solar Power Developer shall commission the Project within timelines defined for Scheduled COD as per this Agreement, and any delay of the same is subject to the penalties stated in Clause 10.5 of the Agreement.*

19. It is manifest from the perusal of above noted clause 3.10 of the PPA that a project cannot be treated as having been commissioned and having achieved commercial operation unless it is properly synchronized to the grid system. As per clause 3.10.3, the synchronization of the project with the grid system can be done only after the solar power developer gives at least 60 days advance notice in writing to the concerned SLDC and Discom of the date on which it intends to synchronize the project to the grid system and the synchronization scheme is granted by the head of the concerned sub-station/grid system and checking/verification is made by the concerned authorities of the grid system.

20. We find from the record that concerned officials of the grid system have issued a certificate certifying that the plant of WSPL was commissioned as per the A.P. Discoms/A.P. Transco's guidelines and has been synchronized to the grid on 24th May, 2016 at 15.15 hours to the extent of 4.17 MW. The same team of officials have certified that the remaining capacity of 20.83 MW was synchronized to the grid system in presence of the officials of the AP Discoms, Transco and the developer on 29th September, 2016. Record also shows that for 4.17 MW capacity, CEIG had granted approval on 2nd May, 2016 and for the balance capacity of 20.83 MW, the CEIG has accorded approval on 27th September, 2016. It is not the case of WSPL itself that it had given any advance notice to SPDC or AP

Transco of its intention to synchronize the project with the grid system, as required under clause 3.10.1 of the PPA. In fact, there is no correspondence in this regard from WSPL to SPDC or the AP Transco or the Government of Andhra Pradesh prior to 28th July, 2016 on which date it claimed to be achieved commercial operation of the project. The communications in this regard, upon which WSPL is relying, are the letters dated 4th September, 2016, 7th September, 2016 and 12th November, 2016 sent by it to SPDC, Government of Andhra Pradesh and A.P. Transco respectively. It is significant to note that these letters have been issued by WSPL much after the date 28th July, 2016 when it claims to have achieved commercial operation of the project. It is true that in all these letters, the WSPL has communicated that it has charged full capacity of 25MW of the project in question on 28th July, 2016. The details of the power injected from the project into the grid system w.e.f. 19th May, 2016 till September, 2016 have been given in the letter dated 12th November, 2016 are as under :-

- “May’ 2016 : 3,200] June’ 2016 : 293,100
- Jul’ 2016 : 1,137,700] Aug’2016 : 1,469,500
- Sep’2016 : 268,300 (substantial drop on account of damage to the transformer)”

21. It is correct that in the letter dated 7th May, 2016, the Executive Engineer, Construction Division, Andhra Pradesh Transco, Tirupati has informed the Divisional Engineer, O&M, AP Transco, Chittoor that the

works of erection of 132 KV/DC/SC line from 132 KV/SS Gurrankonda to M/s. Waaneep Solar Plant and one number 132 KV Bay at polling station from Gurrankonda feeder in Chittoor District have been completed and requested for arranging of its statutory inspection. This letter, at best, conveys that the project at Gurrankonda is physically complete. It does not absolve the WSPL from the requirement of giving advance notice of its intention to synchronize the project to the grid system as mandated under Clause 3.10.1 of the PPA.

22. As per the relevant provisions of the PPA, it was the responsibility of the solar power developer i.e. WSPL to get all the statutory inspections made and to secure required statutory clearances/ approvals for synchronization, commissioning and commercial operation of the power project at Gurrankonda which it has clearly failed to do. It cannot be heard to blame the SPDC or AP Transco for delaying commissioning and commercial operation of the project. Inspection by CEIG is a sine qua non for declaring synchronization, commissioning and commercial operation of the project. In the absence of the statutory inspection by CEIG, WSPL cannot claim to have achieved synchronization, commissioning and commercial operation of the project on 28th July, 2016. WSPL had itself mentioned in the letter dated 27th September, 2016 addressed to

Government of Andhra Pradesh that CEIG had not given safety certificate in respect of the balance capacity of 20.83 MW of the project.

23. At the same time, we note that SPDC as well as AP Transco do not deny that WSPL has been injecting 1.35 MW power w.e.f. 19th May, 2016, 4.17 MW power w.e.f. 24th May, 2016 and 16.83 MW power from 28th July, 2016 into the grid from Gurramkonda solar power project. Therefore, it is manifested that WSPL commenced injecting the entire capacity of power of the project i.e. 25MW w.e.f. 28th July, 2016. Exact amount of power injected by WSPL into the grid from the said Gurramkonda power project w.e.f. May, 2016 has already been noted in paragraph number 20 hereinabove. This is clearly indicative of the fact that the entire power project of WSPL was complete in all respects on 28th July, 2016 and was ready for synchronization as well as commissioning even though it was yet to be inspected by CEIG. SPDC and AP Transco and NREDC were aware that power is being injected from the said project of WSPL into the grid regularly and continuously. Admittedly no communication was addressed by them to WSPL intimating it that the power is being injected by it into the grid without fulfilling the requirements as stipulated under Clause 3.10 of the PPA and, therefore, the same cannot be accounted for. They have

even failed/neglected to respond to the letters dated 4th September, 2016, 17th September, 2016 and 12th November, 2016 addressed to them in this regard by WSPL. It is also not their case that the power project of WSPL was not complete in all respects and ready for commercial operation on 28th July, 2016 or that any structural/mechanical/safety defects were discovered in it during the inspection by CEIG in last week of September, 2016. It is also not disputed on their behalf that the power injected into the grid by WSPL w.e.f. 28th July, 2016 was sold by them to the consumers thereby earning revenue from such sale. Such conduct of SPDC, AP Transco and NREDC in maintaining stoic silence on the injection of so called “inadvertent power” into the grid by WSPL w.e.f. 28th July, 2016 and selling the same to the consumers, created a genuine and bonafide impression in the minds of the officials of WSPL that the synchronization/ commissioning/ commercial operation of the said project at Gurrumkonda has been accepted treating the COD of the project as 28/07/2016 and they would be getting payment for the power injected into the grid.

24. It thus appears that not only did SPDC and AP Transco chose not to object to the injection of power into the grid by WSPL w.e.f. 28th July, 2016 without formal synchronization/commissioning but also went ahead to sell the power to the consumers thereby achieving financial advantage from the same but on the other hand they have taken the COD of the

project as 29/09/2016 and have, accordingly, invoked the performance bank guarantee furnished by WSPL as well as levied liquidated damages to the tune of Rs.18,95,53,000/- upon the company.

25. It is evident that the commissioning of the project was delayed by WSPL much beyond its scheduled commercial operation date fixed in the PPA and commenced injection of entire capacity of 25 MW power with the grid w.e.f. 28/07/2016 without formal synchronization/commissioning of the project. However, SPDC & AP Transco, by virtue of their conduct in acquiescing to the injection of power by WSPL into the grid w.e.f. 28th July, 2016 without fulfilling the requirements under clause 3.10 of the PPA and utilizing the power by selling the same to their consumers, they are taken to have waived off/ forfeited the requirement of the formal synchronization/commissioning of the project. This is simply for the reason that the WSPL furnished the asset/goods i.e. power to WSPL & AP Transco by injecting the same into the grid which they accepted as well as acknowledged and even utilized the same thereby indicating that the synchronization/commissioning of the project w.e.f. 28/07/2016 has been accepted.

26. Thus, we have no hesitation in holding the COD of the project of WSPL at Gurrankonda as 28/07/2016. However, even then also, the commissioning of the project has got delayed by four months (SCOD for the

project being 31/03/2016). Therefore, WSPL is liable for penalty/damages as per clause 10.5 of the PPA which is reproduced hereunder :-

“10.5 Penalties in case of Delayed Commissioning

Under normal circumstances the Project has to be commissioned within Twelve (12) months for the projects where Delivery Voltage is 33 kV and within Fifteen (15) months for the projects where Delivery Voltage is 132 KV and 220 kV – from the Effective Date. In case of failing to achieve this milestone, DISCOM shall encash the Performance Bank Guarantee which was submitted by Solar Developer to the DISCOM before signing of the PPA, in the following manner:

Contracted Capacity commissioned but with delay:

- (a) Delay upto one (1) month – DISCOM will encash 20% of Performance Bank Guarantee (INR 5 lakh/MW) on per day basis proportionate to the Capacity not commissioned.*
- (b) Delay of more than one (1) month and upto two months – DISCOM will encash 40% of the Performance Bank Guarantee (INR 10 lakh/MW) on per day basis proportionate to the Capacity not commissioned.*
- (c) Delay of more than two and upto three months – DISCOM will encash the remaining 40% of the Performance Bank Guarantee on per day basis proportionate to the Capacity not commissioned.*
- (d) In case the commissioning of Power Project is delayed beyond three (3) months from the Scheduled Commissioning Date, the SPD shall pay to DISCOM, the Liquidated Damages at rate of Rs 1,00,000/- per day of delay for the delay in such remaining Capacity which is not commissioned. The amount of liquidated damages would be recovered from the SPD from the payments due on account of sale of solar power to DISCOM.*
- (e) The maximum time period allowed for commissioning of the full Project Capacity with encashment of Performance Bank Guarantee and payment of Liquidated Damages shall be limited to six (6) months from the Scheduled COD as per this Agreement. In case, the commissioning of the Power Project is delayed beyond six (6) months from the Scheduled COD as per this Agreement, it shall be considered as an SPD Event of Default and provisions of Article 10 shall apply and the Contracted*

Capacity shall stand reduced/amended to the Project Capacity Commissioned within six (6) months from the Scheduled COD as per this Agreement and the PPA for the balance Capacity will stand terminated.

(f) For all other cases of Solar Power Developer Event of Default, procedure as provided in Clause 10.3 shall be applicable.”

27. We feel that action of SPDC, AP Transco and NREDC is encashing the Performance Bank Guarantees of WSPL in tune with the sub-clauses (a) to (e) of clause 10.5 of PPA and same cannot be faulted with. However, imposition of liquidated damages as per clause 10.5(d) of PPA needs consideration of this Tribunal.

28. Clause 10.5(d) of PPA makes the Solar Power Developer (WSPL in this case) liable to pay liquidated damages @Rs.1,00,000/- per MW per day of delay in commissioning of the project beyond three months from the SCOD. Based on this provision in the PPA, it was argued on behalf of SPDC, AP Transco & NREDC that since the amount of liquidated damages to be levied from WSPL in case of delay in commissioning of the project beyond three months from SCOD, is specified in PPA itself, they were entitled to impose such damages upon WSPL. We are unable to countenance these submissions. This aspect of the case needs to be decided in the light of Section 74 of the Contract Act which is reproduced hereinbelow :-

“74. Compensation for breach of contract where penalty stipulated for.—

¹[When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.]

Explanation.—A stipulation for increased interest from the date of default may be a stipulation by way of penalty.]

Exception.—When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the ²[Central Government] or of any ³[State Government], gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.—A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.”

29. This legal provision lays down the law governing liquidated damages. Bare perusal of this section would reveal that parties are free to stipulate an amount in the agreement that will be paid by the party who commits breach of the terms of the agreement i.e. defaulting party to the other party in the agreement. It further provides that the amount of liquidated damages so fixed in the agreement would be the maximum amount payable by the defaulting party and the Court will not allow more than the said amount fixed in the contract but may award a smaller amount depending upon the facts & circumstances of the case. In other words, the Court would award only a reasonable amount as liquidated damages even though the same are pre-estimated and spelled out in advance in the contract.

30. The Hon'ble Supreme Court has interpreted Section 74 of the Contract Act in a catena of judgements and the latest one being Kailash Nath Associates V/s DDA & Anr. (2015) 4 SCC 136, the relevant paragraphs of which are reproduced hereunder :-

“33. Section 74 occurs in Chapter 6 of the Indian Contract Act, 1872 which reads "Of the consequences of breach of contract". It is in fact sandwiched between Sections 73 and 75 which deal with compensation for loss or damage caused by breach of contract and compensation for damage which a party may sustain through non-fulfillment of a contract after such party rightfully rescinds such contract. It is important to note that like Sections 73 and 75, compensation is payable for breach of contract under Section 74 only where damage or loss is caused by such breach.”

“43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:-

43.1 Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation.

43.2 Reasonable compensation will be fixed on well known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

43.3 Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the Section.

43.4 *The Section applies whether a person is a plaintiff or a defendant in a suit.*

43.5 *The sum spoken of may already be paid or be payable in future.*

43.6 *The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.*

43.7 *Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application."*

31. Thus, any damage or loss suffered by a party due to breach of contract on the part of another party to the contract is a sine qua non for applicability of this section i.e. for award of liquidated damages. Even if a sum of money is stipulated in the contract as liquidated amount payable by the defaulting party by way of damages, only reasonable compensation commensurate with the loss/damages suffered by the other party, can be awarded not exceeding the amount so specified in the contract.

32. In the instant case, it is nowhere the case of the SPDC and AP Transco that they have suffered any loss on account of delay in commissioning of the power project in question by WSPL. Neither are there any pleadings to this effect on their behalf nor have they filed any document

in this regard. On the contrary, it is admitted by them that they have sold the entire power injected with the grid by WSPL since May, 2016 and thereby have gained financially. The price of such power has also been denied to WSPL. In such facts and circumstances of the case, we are of the opinion that encashment of the Performance Bank Guarantee of WSPL would be sufficient penalty upon WSPL and imposing further liquidated damages would be totally unfair as unjust. The fact that WSPL had completed by the project in all respects on 28/07/2016 and has been injecting full capacity of 25 MW power since that date without getting price for the same, even though with a delay of about four months from the SCOD, also persuades us to hold that imposition of liquidated damages upon WSPL with not only be excessive penalty but also double jeopardy for it.

33. Hence, we are unable to agree to the findings of the Commission on this aspect of imposition of liquidated damages upon WSPL. WE hold the imposition of liquidated damages to the tune of Rs.18,74,70,00/- upon WSPL excessive, unjust and untenable in the fact of circumstances of the case. The Company WSPL is entitled to refund of the said amount which has already been adjusted in its bills.

34. The two issues formulated by this Tribunal and stated in paragraph number 9 hereinabove stand adjudicated accordingly.

APPEAL NO. 425 of 2022

35. The SPDC along with Andhra Pradesh Power Coordination Committee has preferred this appeal assailing therein the findings of the Commission on point number 5 stating in paragraph number 3 hereinabove, whereby the Commission has declared the recovery of GST on the liquidated damages by SPDC, AP Transco and NREDC as illegal and unauthorized.

36. Since we have held herein above that imposition of liquidated damages upon the Respondent No. 2 (WSPL) is unjust & untenable and have set aside the impugned order of the Commission on this aspect, as a necessary corollary the levy of GST on the amount of such damages from WSPL also becomes illegal & unsustainable. Hence, this appeal merits straightaway dismissed.

37. However, we may note that on a query put to SPDC, it has been brought to our notice that the Appellants have deposited the GST amount after the date of the Order passed by the State Commission, contrary to the decision of the State Commission which has declared the same as illegal and unauthorized.

38. We find such conduct of the State Distribution Company as totally unjust and unreasonable. However, at this stage we are refraining ourselves

to make any further observation against such stand taken by the State Distribution Company.

Conclusion

39. In view of the above discussion, the Appeal No. 279 of 2022 stands partly allowed. The respondents in the said appeal are hereby directed to refund the amount adjusted liquidated damages of Rs.18,74,70,000/- to WSPL forthwith.

40. Appeal No. 425 of 2022 stands dismissed.

41. Appeals are accordingly disposed off along with pending IAs.

Pronounced in the open court on this 19th day of February, 2024.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member (Electricity)

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REPORTABLE / ~~NON-REPORTABLE~~

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