

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No. 277 OF 2019

Dated: 30.05.2024

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

In the matter of:

M/S MAHUR WAREHOUSE

A Proprietorship Concern,

having its office at:

889/12A, L.B. Shastrinagar,

Jewargi Road,

Kalaburagi-585 104

Represented by its

General Power of Attorney holder:

Mr. Malleshappa Mahur

... Appellant

Versus

1. Gulbarga Electricity Supply Company Limited

A company registered under the Provisions of the
Companies Act, 1956,

having its registered office at:

Station Road, Kalaburagi-585 102

Represented by its Managing Director

2. Karnataka Electricity Regulatory Commission

No. 16, C-1, Millers Tank Bed Area, Vasanth Nagar,
Bengaluru, 560 052,

Karnataka, India

Represented by its Chairperson

... Respondent(s)

Counsel for the Appellant(s) : Sudhanshu

Counsel for the Respondent(s) : Shahbaaz Husain
V.M. Kannan
Fahad Khan for Res.1

Anand Sanjay M Nuli for Res.2

J U D G M E N T

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. The appellant is a proprietorship concern which has installed a 495 kWp Solar Roof Top Photo Voltaic (SRTPV) power plant on its rooftop measuring 5000 sq. meter on the premises bearing No.889/12A L.B. Shantinagar, Jewargi Road, Kalaburagi, Karnataka. The concern is aggrieved by the order dated 28.05.2019 of the 2nd respondent Commission whereby its claim for tariff @Rs.9.56 per unit as per the Commission's tariff order dated 10.10.2013 has been rejected and it has been held entitled to revised tariff @ Rs.5.67 per unit as per the subsequent tariff order dated 02.05.2016 of the Commission.

2. The 2nd respondent Commission had issued order dated 10.10.2013 thereby determining tariff for grid interactive solar power plants including rooftop and small solar photo voltaic power plants. Vide this order, the Commission, approved tariff @Rs.9.56 per unit in case of rooftop and small solar PV plants entering into PPA on or after 01.04.2013 and up to 31.03.2018 other than those where the tariff is discovered through bidding process. The control period adopted vide the order was 5 years beginning from 01.04.2013 and ending on 31.03.2018.

3. In pursuance to the said order issued by the Commission, the appellant submitted an application on 13.11.2015 requesting for installation of 495 kWp Solar Roof Top Photo Voltaic Power Plant on its rooftop on net metering basis and also entered into a Power Purchase Agreement (PPA) with the 1st respondent Gulbarga Electricity Supply Company Limited (for short "GESCOM") on 17.12.2015 at a tariff of Rs.9.56 per unit.

4. Vide letter dated 18.03.2016, GESCOM requested the appellant to select a reputed system installer and to furnish the technical details of all the equipments proposed to be used in the SRTPV system. Vide another letter dated 19.03.2016, GESCOM accorded approval for the project with the condition that the SRTPV system shall be commissioned within a period of 180 days from the date of the letter failing which the approval shall be treated as cancelled. Thus, the appellant was required to commission the project on or before 18.09.2016.

5. After obtaining the requisite approvals for the plant, the appellant submitted the work completion report in Format-7 on 14.09.2016 and requested the GESCOM to inspect the premises and to commission the project. The Executive Engineer, O&M Rural Division-I of GESCOM addressed a letter dated 15.09.2016 to the Chief Engineer, GESCOM stating that the work in the appellant's project has been completed in all respects upon taking all the necessary approvals for its commissioning and requested to accord approval for the commissioning of the project.

6. The appellant wrote a letter dated 22.12.2016 to the Additional Chief Secretary, Energy Department, Government of Karnataka, Bangalore, with the request to recommend to the GESCOM to approve synchronization of

the appellant's project as per the tariff agreed in the PPA. It appears from the contents of the said letter that the GESCO was not prepared to buy power from the appellant's project @ Rs.9.56 per unit as stated in the PPA and had offered new tariff of Rs.5.65 per unit to the appellant. It would not be out of place to mention here that the offer of GESCO to buy power from the appellant's project at a reduced tariff of Rs.5.65 per unit was on the basis of a new tariff order dated 02.05.2016 issued by the 2nd respondent Commission determining reduced tariff of Rs.5.67 per unit which was also made applicable to the power plants for which PPAs had been entered into prior to 01.05.2016 but are not commissioned within the stipulated time period fixed by the ESCOM or the Commission. The order further provided that there shall be no extension in time period for commissioning such plants after the effective date of the said order.

7. On 12.06.2017, the GESCO directed the appellant to convert the installation from LT to HT. The needful was done by the appellant and the same was indicated to GESCO on 02.08.2017. Thereafter, the appellant vide letter dated 22.11.2017 requested the respondent GESCO to commission the project.

8. While granting provisional interconnection approval to the appellant vide letter dated 04.12.2017, the GESCO further informed it that revised tariff of Rs.5.67 per unit was applicable to the project as per the Commission's tariff order dated 02.05.2016 and requested the appellant to enter into a Supplementary Power Purchase Agreement in this regard.

9. It is in these circumstances that the appellant approached the Commission by way of a petition under Section 86(1)(f) of the Electricity Act, 2003 bearing O.P. No.236/2017 seeking setting aside of the letter dated

04.12.2016 of the GESCO with further direction to synchronize the appellant's project to the grid and to pay the tariff @ Rs.9.56 per unit as agreed in the PPA.

10. The Commission, in the impugned order dated 28.05.2019 observed that the appellant failed to commission its power project within the time stipulated by the GESCO, even though the PPA had been executed between the parties prior to 01.05.2016, and therefore, the appellant cannot claim to be eligible for the tariff as per the Commission's tariff order dated 10.10.2013 and is entitled to revised reduced tariff as per Commission's order dated 02.05.2016. Accordingly, the appellant's petition was dismissed.

11. It was vehemently argued before us on behalf of the appellant that the delay in synchronization cannot be attributed to the appellant for the reason that the appellant had completed the installation work and the plant was ready for commissioning within the period of 180 days specified in the approval letter dated 19.03.2016. It is further submitted that an arbitrary condition was imposed by the GESCO belatedly vide communication dated 12.06.2017 for converting the existing installation from LT line to HT line whereas there was no such condition in the PPA or in the SRTPV scheme. It is argued, that the appellant could only complete the installation work and call for synchronization / commissioning of the project and the delay in non-commissioning / non-synchronization was beyond its control for which only the GESCO is responsible. It is pointed out that in spite of the fact that the power plant was ready, the appellant had to do continuous follow up with the GESCO and it was after a delay of about 09 months that approval for synchronization was granted. It is, further, argued that the tariff order dated 02.05.2016 is not applicable to the appellants power project for the reason

that the PPA had been executed with the GESCO much prior to the date 01.05.2016 specified in the said tariff order.

12. *Per contra*, it is argued on behalf of the 1st respondent GESCO that the clauses 1.2 and 1.3 of the PPA clearly specify that the plant must be connected to GESCO's HT distribution system but the appellant had installed the power plant on the LT line and therefore, it cannot be said the power plant of the appellant was complete in all respects and ready for commissioning within the stipulated period of 180 days mentioned in the approval letter dated 19.03.2016. It is pointed out that the appellant completed the HT installation on 02.08.2017 and therefore, the delay in commissioning of the project is clearly attributable to the appellant. On these submissions, it is claimed on behalf of the GESCO that the appellant is not entitled to higher tariff as per the tariff order dated 10.10.2013.

13. We have considered the rival submissions made on behalf of parties by the learned counsels and have perused the entire record including the written submissions filed on behalf of the appellant as well as the 1st respondent GESCO.

14. It is evident that the controversy between the parties has arisen post issuance of the tariff order dated 02.05.2016 by the 2nd respondent Commission whereby the tariff applicable to solar rooftop and small photo voltaic power plants was reduced from Rs.9.56 per unit (determined as per the previous tariff order dated 10.10.2013) to Rs.5.67 per unit. Clause 5 of the said tariff order dated 02.05.2016 relates to its applicability and is reproduced hereunder: -

“5. Applicability of the Order:

The Commission, in supersession of its Order dated 10th October, 2013, decides that the norms and tariff determined in this Order shall be applicable to all new grid connected solar rooftop and small solar photovoltaic power plants, entering into Power Purchase Agreement (PPA) and commissioned on or after 2nd May, 2016 and upto 31st March, 2018.

In respect of plants for which PPAs that have been entered into prior to 1st May, 2016 and are commissioned within the period of time as stipulated by the ESCOMs concerned or the Commission prior to the date of issue of this Order, the tariff as per the Commission's Order dated 10th October, 2013 shall be applicable. Such plants shall be eligible for the revised tariff as per this Order if they are not commissioned within the stipulated time period and there shall be no extension in time period for commissioning them after the effective date of this Order."

15. The said tariff order, though, generally is applicable to the solar power plants in respect of which the PPAs have been entered into and which have been commissioned between 02.05.2016 and 31.03.2018 yet it has also been made applicable to the power projects regarding which the PPAs have been entered into before 01.05.2016, but are not commissioned within the period of time stipulated by the concerned ESCOMS or the Commission prior to the issuance date of the order.

16. It appears that while issuing the revised tariff order dated 02.05.2016, the Commission was cognizant of the fact that its previous tariff order dated 10.10.2013 was for the control period of 5 years commencing from 01.04.2013 and ending on 31.03.2018 and accordingly it explained the need for midcourse revision of tariff in clause 4 which is quoted hereunder below:-

“4. Need for midcourse revision of tariff:

As per the Commission’s Order dated 10th October, 2013, the tariff determined therein shall be applicable to all solar rooftop and small solar plants entering into Power Purchase Agreements (PPAs) on or after 1st April, 2013 and upto 31st March, 2018 i.e for the control period of five years commencing from 1st of April 2013. While the five-year control period was envisaged to ensure to the prospective investors Regulatory certainty through assured returns and adequate time to plan, design and commission the projects more efficiently and effectively, it was also to facilitate the ESCOMs concerned to procure adequate solar energy at the promotional Tariff so as to meet the Renewable Purchase Obligation (RPO) as specified by the Commission from time to time. It was assumed that the capital cost reckoned for determination of tariff would not vary substantially during the control period.

However, during FY14 & FY15, the Commission has noticed substantial decline in the prices of solar panels and allied

equipment resulting in considerable reduction in cost of solar power generation leading to investors / developers offering to supply power from solar plants at rapidly declining rates. The growth of investments in renewable energy generation particularly in the solar generation has shown encouraging upward trend necessitating moderation of the promotional tariff offered earlier to attract investments. As a result of rapid solar capacity addition, most of the ESCOMs have been able to achieve the present RPO targets.

In view of these developments, the Commission, in order to protect the interest of the consumers and also to ensure financial stability of ESCOMs considers it necessary to take up mid-course revision of the tariff determined in 2013 in respect of solar rooftop and small Photovoltaic power plants.

The Commission also considers it necessary to ensure that only those diligent investors who take expeditious effective steps to commission projects benefit from fixed generic tariff regime during the control period and not those who merely express their intention to do so without taking any effective steps for commissioning projects.

Under Clause 9 of the KERC (Procurement of Energy from Renewable Sources) Regulations, 2011, this Commission has been conferred with the power to modify the tariff anytime either suo-moto or on application filed by any of the generator or distribution licensee.

Therefore, as proposed in the discussion paper, the Commission deems it necessary to curtail the control period of the generic tariff determined for solar rooftop and small solar projects in the Order dated 10th October, 2013 and redetermine the tariff prospectively. While doing so, the Commission has also considered it necessary to ensure that, such an exercise does not cause undue hardship to those who have already committed to invest in solar projects based on the tariff determined in the Order dated 10th October, 2013, with projects being in advanced stage of implementation.

Now, in exercise of powers conferred under Section 62(1)(a) read with Section 64 and Section 86(1)(e), Clause 9 of the KERC (Procurement of Energy from Renewable Sources) Regulations, 2011 and other enabling provisions of the Electricity Act 2003, after duly considering the comments/suggestions of stakeholders, the Commission hereby passes the following Order.”

(Emphasis supplied)

17. In the instant case, even though there was no stipulation as regards the time period within which the appellant was supposed to complete installation of the solar power plant in the PPA yet a period of 180 days was specified for the same by the GESCOM in letter dated 19.03.2016 vide which it accorded approval to the appellant for installing the SRTPV system on his

rooftop. Concededly, the appellant did not object at that time to such stipulation and proceeded to commence the installation work.

18. It is also not in dispute that the appellant had completed the entire installation work of the project on 14.09.2016 (i.e. well within the stipulated period of 180 days as specified in the approval letter dated 19.03.2016) when he submitted the work completion report in Format-7 to the respondent GESCOM and the office of the Assistant Executive Engineer (Elec), GESCOM, Kalaburagi, issued a letter to the Executive Engineer, GESCOM, saying, *inter alia*, that the work has been completed satisfactorily in the appellant's power project. However, it appears that the appellant had installed the system on LT basis instead of HT basis which was pointed out by the GESCOM to him vide letter dated 12.06.2017. The appellant executed the conversion from LT to HT and intimated the same to the officers of GESCOM vide letter dated 02.08.2017. Ultimately, the power project was granted provisional interconnection approval for synchronization on 04.12.2017.

19. The issue which now arises for consideration is whether the appellant can be said to have completed the installation work of the power plant on 14.09.2016 (i.e. within 180 days as specified in the approval letter dated 19.03.2016) even though it was connected on the LT line instead of HT line.

20. On this aspect, we find it appropriate to refer to the need felt by the Commission in undertaking midcourse revision of tariff vide tariff order dated 02.05.2016. The relevant Clause 4 of the said tariff order has already been quoted herein above. The primary ground which persuaded the Commission to revise the tariff before completion of the control period of previous tariff

order dated 10.10.2013 appears to be substantial decline in the price of solar panel and allied equipment resulting in considerable reduction in cost of solar power generation leading to investors / developers offering to supply power from solar plants at rapidly declining rates. The Commission also felt that only those diligent investors who take expeditious steps to commission projects must benefit from fixed generic tariff regime during the control period and not those who merely expressed their intention to do so without taking any effective steps for commissioning the projects. The Commission also felt it necessary to ensure that such exercise of midterm reduction in tariff does not cause undue hardship to those who have already invested in the solar projects based on the tariff order dated 10.10.2013 and whose projects are in advanced stage of implementation.

21. In the case of the appellant, we notice that he did not loose any time after GESCOM accorded approval to his project vide letter dated 19.03.2016 and not only commenced the installation work immediately but also completed the same by 14.09.2016 i.e. well within the period of 180 days stipulated in the said letter. Thus, the appellant acted as expeditiously as possible in taking effective steps towards completion as well as commissioning of the project. Manifestly, the appellant had made the entire investment in the project before 14.09.2016 and the project was at the stage of implementation. However, the same could not be commissioned for the reason that the officials of GESCOM found it connected on LT side instead of HT side which fact was communicated to the appellant very belatedly i.e. on 12.06.2017.

22. In these circumstances, to deprive the appellant of the generic tariff determined vide order dated 10.10.2013 merely for the reason that the power plant, even though complete in all other respects and ready for

commissioning, was found connected on the LT side instead of HT side, would cause immense hardship to him which the Commission was committed to avoid while issuing the subsequent tariff order dated 02.05.2016.

23. We also notice that even though the GESCOM, vide letter dated 18.03.2016, had fixed a time period of 180 days for the appellant to commissioning the project yet the company was not serious about the said time period and it never intended the time to be essence of contract. This is evident from the fact that the Executive Engineer, O&M Rural Division-I of GESCOM had inspected the appellant's project on 15.09.2016 and found the same complete in all respects for the purposes of commissioning. He did not point out any defect in the power project. Thereafter, the GESCOM maintained stoic silence over the project for about 09 months and directed the appellant vide letter dated 12.06.2017 to convert the installation from LT to HT. Even after the appellant intimated the GESCOM vide letter dated 02.08.2017 about conversion from LT to HT, the Discom took four more months to accord approval for synchronization which was done on 04.12.2017. Therefore, what can be easily discerned from the conduct of GESCOM is that by specifying the time period of 180 days in approval letter dated 18.03.2016, it only wanted the appellant to act expeditiously to complete the project, which the appellant did. It never intended to commission the project immediately as and when it was completed by the appellant.

24. We are of the considered view that the Commission has fallen in an error in holding that the appellant had delayed the commissioning of the

power project and in depriving it from the generic tariff as per tariff order dated 10.10.2013. Since the appellant had taken expeditious steps to install as well as commission the project within the timeframe stipulated in the letter dated 18.03.2016 of GESCO and had even completed the installation work well within the stipulated time about which he informed the GESCO vide letter dated 14.09.2016, he has become entitled to the benefit of generic tariff as per the tariff order dated 10.10.2013 and cannot be brought under the purview of subsequent tariff order dated 02.05.2016.

25. It was also argued on behalf of the respondent GESCO that after the filing of the petition before the Commission, the appellant had executed a Supplementary PPA with GESCO at the reduced tariff of Rs.5.67 per unit as per tariff order dated 02.05.2016, and therefore, he cannot now claim the higher tariff as per the generic tariff order dated 10.10.2013. The argument has been noted only to be rejected. Evidently, the appellant had no other option but to execute the Supplementary PPA with GESCO or otherwise his power project would not have been synchronized / commissioned and would have remained idle despite huge investment made by him. It has been specifically stated by the appellant in the letter dated 30.12.2017 addressed to Executive Engineer, O&M Division-I, GESCO, that he is accepting the offered rate of Rs.5.67 per unit under protest as he has no other option left. He has also stated in the letter that he is executing a Supplementary PPA under protest. Therefore, in these circumstances, it cannot be said that the appellant had willingly and consciously agreed to the reduced tariff of Rs.5.67 per unit.

26. In view of the above discussion, the impugned order of the Commission cannot be sustained as the same is found to be erroneous. The same is hereby set aside. The appeal stands allowed. The appellant is held entitled to generic tariff of Rs.9.56 per unit as determined by the Commission in the order dated 10.10.2013 as per the PPA dated 17.12.2015 executed between him and the 1st respondent GESCOM.

Pronounced in the open court on this the 30th day of May, 2024.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member (Electricity)

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