

**THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI**

(APPELLATE JURISDICTION)

**APPEAL NO. 160 OF 2020 &
IA No. 1019 OF 2020**

Dated: 2nd August, 2021

**Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. Ravindra Kumar Verma, Technical Member**

In the matter of:-

Clearsky Solar Private Limited

Through its Authorised Signatory

Having its Corporate Office at

8-2-268/2/B/3, Road No.2,

Banjara Hills, Hyderabad - 500 034

... **Appellant**

Versus

1. Karnataka Electricity Regulatory Commission

Through its Secretary

No. 16, Millers Tank Bed Area,

Vasanth Nagar, Bengaluru – 560 052

2. Gulbarga Electricity Supply Company Limited

Through its Managing Director

Station Road, Kalburagi – 585 012

3. Karnataka Renewable Energy Development Limited

Through its Managing Director

No. 39, "Shanthi Gruha"

Bharat Scouts & Guides Building

Palace Road, Bengaluru – 560 001

4. Karnataka Power Transmission Corporation Limited

Through its Managing Director
Corporate Office, Kaveri Bhavan
K.G. Road
Bengaluru– 560 009

5. State of Karnataka

Through its Additional Chief Secretary
Department of Energy
Room No. 236, 2nd Floor, Vikas Soudha
Bengaluru–560 001

... **Respondents**

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Ms. Vaishnavi Rao
Ms. Swati Mittal
Mr. Kshitij Parashar **for R-2 & 4**

Mr. Nithin Saravanan

Ms. Ridhima Malhotra **for R-3**

JUDGMENT

(PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON)

1. The present Appeal has been filed by M/s Clearsky Solar Private Limited ("**CSPL**"), challenging the Order dated 29.05.2020 ("**Impugned Order**") passed by the Karnataka Electricity Regulatory Commission ("**KERC**"/"**Commission**") in O.P. No. 219 of 2017. KERC, by way of the Impugned Order, disallowed the petition which was filed by CSPL seeking approval of the extension of Scheduled Commercial Operation Date granted by Gulbarga Electricity Supply Company Limited ("**GESCOM**") along with continuation of tariff incorporated under the Power Purchase Agreement dated 29.08.2015 ("**PPA**") executed between CSPL and GESCOM.

The facts of the case, in brief are as under:

2. On 10.10.2013, KERC passed a generic tariff order determining the tariff for grid interactive solar power plants in respect of small solar Photo Voltaic power plants ("**KERC Tariff Order 2013**"). In terms of the said order,

the tariff of Rs. 8.40/kWh determined by the KERC was to be applicable for PPAs executed on or after 01.04.2013 till 31.03.2018.

3. On 22.05.2014, Government of Karnataka (**“GoK”**) notified the Karnataka Solar Policy 2014-2021 (**“Karnataka Solar Policy”**). In terms of Category 1 of Segment 1 of the said policy, the GoK endeavoured to promote solar power generation by land owning farmers throughout the State with capacity of 1 MW to 3 MW (**“Farmers Scheme”**). Further, as per Paragraph 18 of the said policy, GoK contemplated to facilitate deemed conversion of land (i.e. from agricultural to industrial) by amending the Karnataka Land Reforms Act.

4. On 26.08.2014, GoK issued Government Order No. EN 62 VSC 2014 (**“GoK Order 2014”**) specifying the guidelines governing the process of inviting applications and allotting Category 1, Segment 1 Solar Projects under the Karnataka Solar Policy by the Karnataka Electricity Supply Companies (**“ESCOs”/ “DISCOMs”**) and Karnataka Renewable Energy Development Limited (**“KREDL”**).

5. On 09.10.2014, KREDL in pursuance of the GoK Order 2014, invited applications online for allotment of projects under Category 1, Segment 1 of the Karnataka Solar Policy. After evaluating the applications, KREDL

accepted the proposal of one Mr. Bhaskar Rao (“**SPD**”) and issued a Letter of Award (“**LoA**”) dated 25.08.2015 in his favour.

6. On 30.07.2015, KERC issued an order modifying the KERC Tariff Order 2013 (“**KERC Tariff Order 2015**”). KERC, by way of the said order, curtailed the control period of the KERC Tariff Order 2013 by observing that a mid-course revision was occasioned as there was improvement in technology, reduction in manufacturing costs of solar panels, associated infrastructure, etc. However, it also observed that such exercise should not cause hardship to those who have already invested. Thus, the KERC Tariff order 2015 laid down 2 dispensations-

(i). Tariff of Rs. 6.51/kWh – Applicable where PPAs are executed after 01.09.2015, where, projects are commissioned between 01.09.2015 and 31.03.2018.

(ii). Tariff as provided under PPA remains unaltered - Applicable where PPA executed and submitted for approval prior to 01.09.2015 and projects commissioned between 01.09.2015 to 31.03.2018.

7. In the present case, PPA was executed on 29.08.2015, submitted for approval on 29.08.2015 itself and achieved COD on 27.05.2017. Therefore, the tariff under the present PPA was not affected by this order.

8. On 13.08.2015, in accordance with the Solar Policy, the Karnataka Land Revenue (Amendment) Act, 2015 was notified and Section 95 of the Karnataka Land Revenue Act, 1964 was amended to facilitate deemed land conversion. Pertinently, at this stage, an enabling framework was put in place. However, the fees payable for conversion was not specified.

9. On 29.08.2015, Power Purchase Agreement was executed between the SPD and GESCOM ("**PPA**"). As per the PPA, the SPD was required to set-up the Solar Project and supply electricity generated to GESCOM at a tariff of Rs. 8.40/kWh. The Effective Date of the PPA was defined as the signing date i.e. 29.08.2015. As per Article 2 of the PPA, subject to delay occasioned due to *Force Majeure*, certain conditions precedent were to be fulfilled within one year from the effective date i.e. by 28.08.2016 and the Scheduled Commercial Operation date was defined to be 18 months from the effective date, i.e. 28.02.2017 ("**Original SCOD**"). The PPA was submitted for KERC's approval on the same date i.e. 29.08.2015.

10. On 07.09.2015, The PPA was approved by KERC in a letter issued to GESCOM. However, a copy of the said letter was not marked to the SPD. Further, since KERC did not return the original of the PPA, upon the request of the SPD and similarly placed developers, a letter dated 19.10.2015 was issued by GESCOM requesting KERC to return the original approved PPAs.

11. On 04.11.2015, the SPD approached the office of the Assistant Commissioner, Bidar for clarity on the way forward and fee payable for deemed land conversion route but the government officers were clueless about the same. As such various SPDs (including the SPD, Shri Bhaskara Rao) reported the same to the nodal agency KREDL and sought intervention. On this date, KREDL organized a meeting to assess the implementation of the 1-3 MW solar projects under the Farmers Scheme. The Energy Minister, State of Karnataka attended the same and directed that *“Even though deemed conversion is amended for the establishment of solar unit, proper information about this, is not reached to the offices and to avoid the obstacles, the minister suggested the Chief Secretary and Revenue Department are to give guidelines.”*

12. On 17.11.2015, as per the provision under Article 12.11 of the PPA, a SPV by the name of Clearsky Solar Private Limited was incorporated.

13. On 01.12.2015, GoK issued guidelines for deemed land conversion ("**Deemed Land Conversion Guidelines**"). In terms of the said guidelines, a solar power plant developer would be eligible for deemed land conversion upon payment of fee and submission of the following documents-

i) Allotment letter for generation of solar power from Government/KREDL.

(ii) RTC in the name of the applicant.

(iii) NoC stating that land is not attracted by PTCL Act and not subject to land acquisition proceedings.

(iv) NoC stating that land sanction/ allocation conditions have not been violated from concerned authority (Tehsildar).

Further, upon submission of the above documents, the concerned Deputy Commissioner was to treat the agricultural land non-agricultural land and complete the process of deemed land conversion within 15 days of payment of fee.

14. On 08.12.2015, KERC issued clarification to Discoms in respect of formation of SPVs under Article 12.11 of the PPA. In this letter, KERC further clarified that consent of GESCOM was not necessary for creation of Special Purpose Vehicle (“**SPV**”) by the SPDs. They also clarified that the SPD could create a SPV at any time with intimation to GESCOM along with execution of a Supplementary PPA which would be approved by the KERC. Notably, this clarification by the KERC was issued after a lapse of more than 3 months from the date of execution of the PPA.

15. On 15.12.2015, in response to the request letter dated 19.10.2015 from GESCOM, KERC finally returned the original approved PPAs to GESCOM so that the same could be handed over to the SPDs. Notably, the time taken in returning the original approved PPAs was more than 3 months from the execution of the PPA.

16. On 21.12.2015, KPTCL’s Corporate Office, with a view to expedite grant of evacuation/interconnection approvals, issued guidelines specifying a detailed procedure for grant of evacuation approvals for solar projects being developed under the Farmers Scheme.

17. On 09.01.2016, The SPD issued a letter to GESCOM intimating that an SPV by the name of M/s Clearsky Solar Private Limited was incorporated

by it on 17.11.2015 in terms of Article 12.11 of the PPA and requested GESCOM for an acknowledgment of assignment of rights of SPD under the PPA to the SPV to enable the SPV to approach/continue negotiations with various lenders, contractors, EPC and other vendors. Further, the SPD sought GESCOM's advise on whether the SPD or the SPV needs to execute any documentation in this regard.

18. On 29.01.2016, as per the direction of the office of the Assistant Commissioner, Bidar, CSPL addressed a letter to the Assistant Commissioner, Bidar annexing the Deemed Land Conversion Guidelines issued by GoK. The Asst. Commissioner informed that it was not aware of any such Deemed Land Conversion Guidelines. Hence, CSPL submitted a copy of the Deemed Land Conversion Guidelines with a request for clarity on way forward.

19. On 08.02.2016, Supplementary Power Purchase Agreement was executed between CSPL and GESCOM recording the incorporation of the SPV and assignment of rights in its favour.

20. On 24.02.2016, CSPL again annexed the Deemed Land Conversion guidelines dated 01.12.2015 issued by GoK along with KREDL sanction letter, PPA and its approval by the KERC.

21. On 24.02.2016, Application for grant of evacuation/ interconnection facilities was made by CSPL with KPTCL.

22. On 21.03.2016, KERC after a lapse of almost 5 months from the formation of SPV by the SPD and after a lapse of almost 7 months from the PPA date, issued a direction to the ESCOMS of the State of Karnataka that the MOA, AOA and Supplementary PPA for formation of SPV under the Famers Scheme were to be executed in particular format prescribed by it.

23. On 02.04.2016, GESCOM addressed an email to the SPD enclosing the formats of AOA, MOA, Supplementary PPA as issued by KERC for formation of the SPV. Appellant submits that these formats were never communicated to CSPL prior to this date.

24. On 07.04.2016, KPTCL addressed a letter to CSPL directing it to pay Rs. 57,250/- towards processing fee for grant of evacuation/interconnection facilities and to submit Detailed Project Report ("**DPR**"), Toposheet and RTC pertaining to the Solar Project. Further, the processing fee payable was communicated to CSPL.

25. On 12.04.2016, payment towards processing fee of application for evacuation facilities was made by CSPL by way of DD. Further, on 20.04.2016, the DPR, Toposheet and RTC were furnished to KPTCL.

26. On 06.05.2016, a letter was issued by EE, KPTCL (Humnabad) to SE, KPTCL (Kalaburgi) furnishing the feasibility report for evacuation from proposed Solar Project. Along with it, detailed station layout sketch and single line diagram were attached.

27. On 20.05.2016, KPTCL granted tentative evacuation approval for CSPL's Solar Project. In terms of the said approval, CSPL was required to construct 6.0 kms of 33kV overhead line from its Solar Project to 110/33-11kV Santhpur Sub-Station along with terminal bay, matching control systems at both ends, extension of control room and allied civil works. Further, it was also intimated that CSPL would be required to acquire certain land adjacent to the switchyard of the Santhpur S/s for construction of the terminal bays.

28. On 21.05.2016, CSPL requested for sparing of suitable land at the Santhpur S/s for construction of terminal bays.

29. On 25.05.2016, a Memorandum of Understanding was executed between the SPD and CSPL for assignment of rights in the Solar Project. Notably, while the SPV was formed on 17.11.2015 itself, the requirement for this MoU arose at this stage as KERC had issued instructions in respect of SPV formation only on 21.03.2016. On 25.05.2016, also CSPL addressed a letter to GESCOM submitting the revised MOA, AOA, CSPL's certificate of incorporation, Shareholding details and MoU.

30. On 28.05.2016, CE, KPTCL (Kalaburgi) addressed a letter to EE, KPTCL (Humnabad) with directions to furnish Single Line Diagram of the Santhpur S/s duly marking the land to be spared for CSPL's terminal bay.

31. On 30.05.2016, EE, KPTCL (Humnabad) addressed a letter to CE, KPTCL (Kalaburgi) confirming that there is sufficient space for construction of 33kV terminal bay and further recommended that this land can be spared to CSPL. Further, the Single Line Diagram and layout drawing of Santhpur S/s clearly marking out space which is available to be spared to CSPL for construction of terminal bays was also furnished.

32. On 01.06.2016, on the basis of the recommendation received from EE, KPTCL (Humnabad), CE, KPTCL (Kalaburgi) addressed a letter to CE, KPTCL (Bengaluru) requesting to convey approval to CSPL for sparing of

land at the Santhpur S/s to CSPL for construction of 33kV terminal bay. On the same day, a Supplementary PPA was executed between CSPL and GESCOM (as per the revised format which was provided by KERC) to record that CSPL had become the assignee of the SPD and that all rights, responsibilities, obligations and liabilities under the PPA were binding on CSPL with all other terms remaining unaltered.

33. On 04.06.2016, GESCOM applied to the KERC for approval of the Supplementary PPA dated 01.06.2016.

34. On 28.06.2016, KERC approved the Supplementary PPA dated 01.06.2016. KERC asked GESCOM to provide its written consent for the assignment in terms of Article 12.11(1) of the PPA for record purposes.

35. On 04.07.2016, CSPL addressed a letter to GESCOM requesting it to hand over the approved SPPA.

36. On 08.07.2016, KPTCL in its 67th Committee meeting deliberated upon and accepted CSPL's request for sparing of land at 110kV Santhpur Sub-station for construction of terminal bays. However, such decision was not conveyed to CSPL at this stage.

37. On 28.07.2016, KREDL issued a notice inviting all SPDs to attend a meeting to address the issues being faced by Solar Projects under the Farmers Scheme. CSPL and various stakeholders attended this meeting.

38. On 01.08.2016, owing to the delay in approval of SPPA, CSPL addressed a letter to KREDL seeking extension of timelines and for realigning the Scheduled Date of Commissioning considering the date of approval of the SPPA.

39. Since the SCOD under the PPA was 28.02.2017 which was still far and the office of the Asst. Commissioner, Bidar was insisting upon submission of application for land conversion under the regular route, CSPL was constrained to adopt this approach and started collating the 13 prescribed documents (which were in the nature of certificates to be obtained from various statutory authorities). The details of the 13 documents are set out below-

- **21.05.2016** ROR/Pahani 2001-2016- Land details with crop details was received.
- **21.05.2016** Land Khata
- **21.05.2016** Mutation Certificate
- **23.05.2016** ROR/Tenancy And Crop (RTC)

- **23.05.2016** ROR/Pahani (RTC) Various years
- **26.05.2016** Affidavit by Shri. Bhaskara Rao about his land holding as agriculturist
- **26.05.2016** EC 13 years up to date (from sub registrar Office)
- **31.05.2016** Tontan Tippen from Tahsildar Office
- **03.06.2016** No due certificate of Land Revenue etc from Tahsildar Office
- **05.06.2016** No P.T.C.L. Certificate from Tahsildar (Protected Tenant)
- **09.06.2016** Income certificate of agriculture
- **22.07.2016** Land Sketch Map – Fee Receipt No. 0579771444591

40. On 03.08.2016, as soon as CSPL could manage to collate all the 13 documents from the different statutory authorities, it applied for land conversion under the regular route. Notably, the acknowledgement or receipt given to CSPL against the application submitted by it, categorically states that the land conversion would be granted within 120 days which was well within the Original SCOD.

41. On 08.08.2016, KREDL issued a letter to CSPL and asked it to approach GESCOM for extension. A copy of this letter was also marked to GESCOM. Pertinently, this letter was issued by KREDL in response to

CSPL's letter dated 01.08.2016 requesting for extension of timelines under the PPA given that there were several difficulties being faced in the implementation of the Project.

42. On 12.08.2016, CSPL issued a letter to GESCOM seeking extension of timelines under the PPA. Extension was sought on the following counts-

- (i). Delay in PPA approval.
- (ii). Delay on account of SPV formation occasioned due to confusion created by KERC.
- (iii). Delay in approval of the Supplementary PPA dated 01.06.2016 and hand over of the same as financing for the Solar Project was not feasible in its absence.
- (iv). Delay in evacuation approval.
- (v). Cascading effect of delay in approval of Supplementary PPA dated 01.06.2016.

43. On 24.08.2016, CSPL intimated GESCOM that it has fulfilled the conditions precedent as per clause 2.1 of the PPA and requested GESCOM to advise if they needed to do anything else.

44. On 06.09.2016, even though CSPL was assured on 03.08.2016 that its application for land conversion will be processed within 120 days, there was no progress as the land inspection had not been carried out. Therefore, CSPL addressed a letter to Asst. Commissioner, Bidar requesting for land conversion clearance. It was also specifically intimated that though the application was made on 03.08.2016, the only progress made was that the Tahsildar, Aurad was directed to inspect the land which inspection has not been done.

45. On 12.09.2016, the Asst. Commissioner directed the Tahsildar, Aurad to inspect CSPL's site and submit its opinion.

46. On 26.09.2016, KPTCL through its Corporate Office, Bengaluru issued a clarification to its earlier evacuation guidelines dated 21.12.2015. It was observed in the said clarification that despite clear guidelines, an inordinate delay was persistent in grant of evacuation approvals. It was also directed that there should not be any delays on superfluous grounds.

47. According to Appellant, at this stage, CSPL's request for sparing of land dated 21.05.2016 was inordinately delayed by KPTCL despite the fact that its internal communications dated 30.05.2016 already confirmed the

availability of such land and that by way of communication dated 01.06.2016, CE, KPTCL (Kalaburgi) addressed a letter to CE, KPTCL (Bengaluru) requesting to convey approval to CSPL for sparing of land at the Santhpur S/s to CSPL for construction of 33kV terminal bay.

48. On 19.10.2016, Tahsildar, Aurad, in respect of land conversion, submitted its report for its inspection dated 03.10.2016 of CSPL's Solar Project to the Assistant Commissioner, Bidar.

49. On 18.11.2016, GoK recognizing that there had been substantial delay in land conversion directed the Karnataka ESCOMs to form committees to consider and approve time extensions for Solar Projects under the Farmers Scheme.

50. On 24.11.2016, GoK issued a formal order vide EN 75 VSC 2016 directing the Karnataka ESCOMs to constitute Committees at the company level for discussion and consideration of requests for time extension.

51. On 06.12.2016, CSPL issued a notice to Chief Engineer, GESCOM requesting for extension in Original SCOD by 2 months on account of demonetization.

52. On 12.12.2016, KPTCL granted regular evacuation approval for CSPL's Solar Project. Under this approval, it was reiterated that land adjacent to the Santhpur S/s has to be acquired for construction of terminal bays. Further, it was also reiterated that a request for sparing of land could be made with KPTCL.

53. On 16.12.2016, CSPL sent a follow up letter to CE, KPTCL (Kalaburgi) and requested for sparing of land at the Santhpur S/s.

54. On 21.12.2016, SE, KPTCL, SCADA (Bengaluru) addressed a letter to CE, KPTCL (Kalaburgi) intimating that CSPL was required to pay Rs. 84,845 plus tax for using KPTCL SCADA infrastructure. Further, it was also stated that CSPL would be required to co-ordinate to integrate bay meter.

55. On 24.12.2016, CSPL issued another letter to GESCOM reiterating its request for extension of SCOD due to the ongoing difficulties in implementation being faced by its Project.

56. On 03.01.2017, GESCOM for extension and CSPL's report updating status of fulfilment of Conditions Precedent, issued a letter to CSPL raising for the first time an issue regarding non-fulfilment of Conditions Precedent and directing CSPL to pay a sum of Rs. 3,60,000/- for the same.

57. On 10.01.2017, CSPL issued a detailed letter to CE, GESCOM confirming that it had already fulfilled the Conditions precedent under the PPA and requesting GESCOM to withdraw its claim of Rs. 3,60,000/-.

58. On 11.01.2017, CSPL issued a letter to the Assistant Commissioner, Bidar requesting for a site visit as it was verbally informed that a site inspection by the Assistant Commissioner in addition to the earlier site visit by Tahsildar, Aurad was required.

59. On 24.01.2017, GESCOM addressed a letter to CSPL asking it to attend a joint meeting on 27.01.2017 to discuss extension of SCOD. Further, on the very same date a separate letter was issued by the GESCOM (Bidar) office intimating that the evacuation line construction was taken up un-authorizedly. This objection of GESCOM was subsequently clarified on 18.03.2017 by KPTCL. Meanwhile, the Transmission Line was constructed.

60. On 27.01.2017, GESCOM held a meeting with various SPDs (including CSPL) for considering the extension applications under the Farmers Scheme. In this meeting, CSPL reiterated to GESCOM the various *Force Majeure* events which had affected CSPL's Solar Project such as delay in approval of PPA, delay in approval of SPPA due to the confusion

created by KERC, delay in grant of Land Conversion and delay on account of demonetisation.

61. On 30.01.2017, CSPL issued a letter to CE, KPTCL (Kalaburgi) seeking approval of Single Line Diagram and layout diagram for creation of 33kV terminal bay at Santhpur S/s.

62. On 01.02.2017, CSPL issued a letter to CE, KPTCL (Kalaburgi) intimating that Rs. 97,572/- towards charges for utilizing SCADA infrastructure had been paid.

63. On 03.02.2017, CE, KPTCL (Kalaburgi) issued a letter to SE, KPTCL (Kalaburgi) directing it to collect Rs. 4,23,331/- towards sparing of land at the Santhpur S/s for CSPL to construct its terminal bay. Further, this date is also 25 days prior to the Original SCOD.

64. On 04.02.2017, EE, KPTCL (Kalaburgi) addressed a letter to SE, KPTCL (Kalaburgi) submitting an estimate for construction of terminal bay for CSPL at Santhpur S/s. An amount of Rs. 51,42,524.64/- was quoted. Further, it was noted that the land sparing charges were already paid on 04.02.2016.

65. On 06.02.2017, CSPL addressed a letter to CE, KPTCL (Kalaburgi) enclosing a copy of DD dated 04.02.2016 for sparing of land. CSPL also sought for issuance of work permit for construction of the terminal bay. KPTCL confirmed receipt of Rs. 4,23,331/- towards sparing of land at the Santhpur S/s.

66. On 09.02.2017, After an inspection of the land, which was spared by KPTCL, CSPL discovered that construction of terminal bays on the said land would entail criss-crossing of lines and would not be technically feasible. The same was promptly brought to the knowledge of KPTCL and request for connection to existing bays was made which was accepted by KPTCL.

67. On 14.02.2017, CSPL wrote to CE, KPTCL (Kalaburgi) seeking approval of CT and PT meter drawings of its proposed 33kV terminal bay.

68. On 15.02.2017, CSPL wrote to Chief Electrical Inspector, GoK for approval of drawings in respect of its Solar Project, Evacuation Line and metering bay extension of 33kV at Santhpur S/s.

69. On 17.02.2017, CE, KPTCL (Bengaluru) issued a letter to CSPL directing it to pay an amount of Rs. 17,250/- towards inspection charges of 33kV metering CT's, PT's and Protection CT'.

70. On 18.02.2017, the Asst. Commissioner, Bidar, submitted its opinion on land conversion to Deputy Commissioner, Bidar after inspection of CSPL's Solar Project site. CSPL issued a letter to Manager (I&M), KPTCL submitting DD for inspection charges of of 33kV metering CT's, PT's and Protection CT'.

71. On 21.02.2017, KPTCL accorded approval of single line diagram and layout plan of terminal bay at Santhpur S/s and the Chief Electrical Inspector, GoK approved the drawings of CSPL.

72. On 22.02.2017, CSPL issued a letter to the Chief Electrical Inspector, GoK informing that the Solar Project, Evacuation line and terminal bay with metering arrangement have been constructed. A request was made for inspection. The construction was completed 6 days prior to SCOD.

73. On 23.02.2017, Chief Electrical Inspector, GoK issued a letter for the Electricity Safety approval for electrical installation pertaining to CSPL's Project under Regulation 32 and 43 of the CEA (Measures relating to Safety

and Electric Supply) Regulations, 2010. This approval/certificate confirms that the complete works related to (a) plant, (b) evacuation line, and (iii) metering bay at Santhpur Sub-station, have been completed. Immediately after receipt of this CEIG certificate, CSPL approached KPTCL for inspection of site and interconnection.

74. On 25.02.2017, CE, KPTCL (Bengaluru) directed CSPL to pay inspection charges of Rs. 17,250/-. The said amount was paid by CSPL on 27.02.2017. At this stage, CSPL was orally informed by GESCOM that though the Project was ready, it will have to wait for the formal order of land conversion for commissioning of the Project.

75. On 27.02.2017, Asst. Director, Town & Country Planning visited CSPL's project site and matter of land conversion was referred to the Directorate, Town & Planning for technical opinion. This was one day prior to the SCOD.

76. On 15.03.2017, GESCOM passed an order confirming extension of SCOD for CSPL till 27.05.2017.

77. On 16.03.2017, Supplementary PPA was executed between CSPL and GESCOM recording that Original SCOD stood revised to 27.05.2017 (**“Revised SCOD”**).

78. On 18.03.2017, KPTCL clarified that CSPL was authorized to construct the Transmission Lines. The Asst. Director, Town & Country planning Bidar, for the purposes of land conversion, asked for a NOC from JD, DIC, Bidar.

79. On 20.03.2017, in connection with the land conversion issue, CSPL issued a letter to the Assistant Director, Town & Country planning, Bidar attaching the NOC from JD. GESCOM approached the KERC for approval of the Supplementary PPA dated 16.03.2017. KERC directed GESCOM to issue a letter to CSPL for seeking approval of any time extension.

80. On 11.04.2017, CSPL issued a letter to CE, KPTCL (Kalaburgi) seeking the interconnection approval once again.

81. On 12.04.2017, KERC issued another tariff order whereby the control period of the KERC Solar Tariff Order 2013 was further curtailed (**“KERC Solar Tariff Order 2017”**). The tariff was fixed at Rs. 4.36/kWh and was applicable for all projects, whereby, PPA had been executed before

01.04.2017 but the COD specified under the PPA had not been achieved and instead, such Solar Projects would now be achieving COD during 01.04.2017 to 31.03.2018.

82. On 28.04.2017, GESCOM issued a letter to CSPL in pursuance of KERC's directions and asked it to approach KERC for extension of SCOD.

83. On 08.05.2017, the land conversion was allowed by the Deputy Commissioner, Bidar and CSPL was directed to pay the stipulated fee for conversion.

84. On 11.05.2017, CSPL issued a letter to the Deputy Commissioner, Bidar informing that the land conversion charges of Rs. 10,60,175/- had been paid by it. The payment challans were enclosed as proof.

85. On 22.05.2017, CSPL addressed a letter to GESCOM informing it that the Conditions Precedent under the PPA stood satisfied as the land conversion charges were paid by it.

86. On 24.05.2017, The Deputy Commissioner, Bidar issued the land conversion order.

87. On 27.05.2017, CSPL issued a letter to GESCOM seeking synchronization approval. GESCOM granted its synchronization approval

for CSPL's Solar Project and on the same date CSPL's Solar Project achieved COD.

88. On 29.05.2017, KPTCL issued a Commissioning Certificate which reflects that CSPL had achieved COD on 27.05.2017 which was within the Revised SCOD.

89. On 17.11.2017, CSPL filed a petition before the KERC seeking approval of the extension of SCOD along with continuation of tariff at Rs. 8.40/- as stipulated under the PPA. The Petition came to be numbered as O.P. No. 219/2017.

90. On 15.03.2018, CSPL filed an Interim Application seeking direction for tariff payments as GESCOM had not been making any tariff payments.

91. On 05.04.2018, KERC passed an interim order directing payment of tariff at Rs. 4.36/kWh.

92. On 12.07.2018, another IA was preferred by CSPL as GESCOM was threatening to levy a further amount of liquidated damages. KERC issued an Interim Order directing GESCOM not to deduct any liquidated damages.

93. On 29.05.2020, the Impugned Order was passed by KERC in O.P. No. 219 of 2017, whereby, KERC has disallowed O.P. No. 219 of 2017

which was filed by CSPL and retrospectively set aside the extension of SCOD which was granted by GESCOM on account of *Force Majeure* event.

94. Appellant contends that KERC, by way of the Impugned Order, has erroneously set aside the extension of timelines, for achieving Scheduled Commercial Operation Date, which was granted by GESCOM in terms of the PPA dated 29.08.2015. The extension of timelines was a subject matter of the Supplementary Power Purchase Agreement dated 16.03.2017 executed between CSPL and GESCOM which the KERC has unreasonably refused to approve. Instead, in utter disregard of the merits of the case, the Supplementary PPA dated 16.03.2017 was also set side and the tariff incorporated under the PPA at Rs. 8.40/kWh was unreasonably reduced to Rs. 4.36/kWh in addition to liquidated damages of Rs. 3,60,000. The Impugned Order is wholly arbitrary and has been passed to the complete detriment of CSPL in utter violation of the settled principles of law.

95. Appellant further contends that in arriving at the conclusions under the Impugned Order, the KERC has completely brushed aside the fact that the construction of the entire Project (along with the associated infrastructure) was completed well within the Original SCOD contemplated under the PPA.

This is so evidenced by the statutory certificate issued by the Chief Electricity Inspector, Government of Karnataka under Regulation 32 and 43 of the CEA (Measures relating to Safety and Electric Supply) Regulations, 2010 which certified that CSPL's Solar Project (along with all associated infrastructure) was ready on 23.02.2017 itself. However, the Solar Project could not be put to commercial operation due to want of a formal order for land conversion (i.e. from agricultural to non-agricultural) which was to be granted by government authorities. Although, CSPL had diligently pursued such land conversion order could not be granted in a timely manner for reasons beyond its control.

96. According to Appellant, under the Impugned Order, KERC itself arrived at a conclusion that there was a delay in grant of land conversion. However, it completely failed to take the same to its logical sequitur and erroneously disallowed CSPL's petition. Further, the above contention is also buttressed by the fact that once the land conversion order was granted on 24.05.2017, CSPL was able to achieve COD within 3 days on 27.05.2017 which was also the Revised Scheduled Operation Date as per the Supplementary PPA dated 16.03.2017 executed between GESCOM and CSPL.

97. Appellant further contends that in addition to the above, under the Impugned Order, the KERC also failed to recognize that the progress of the Project was hindered all along the way due to factors such as-

- Delay in handing over the original Power Purchase Agreement;
- Delay in prescription of formats of AOA, MOA and the Supplementary PPA which, in turn, led to delay in assignment of rights from the SPD to the SPV;
- Delay due to inexplicable time taken by KPTCL in grant of connectivity approvals and sparing of land for construction of the terminal bay; and
- Delay due to demonetization.

98. Further, according to Appellant, the delay on account of these factors was not attributable to CSPL. The KERC failed to recognize that despite facing multiple difficulties, CSPL showed earnest efforts and was able to complete the construction of the Project well within the Original SCOD contemplated under the PPA.

99. Appellant also contends that KERC failed to recognize that these delays cannot be attributed to CSPL as they are for reasons completely

beyond its control. Further, KERC failed to appreciate that recognizing the genuine difficulties faced by CSPL and after an in-depth analysis of the situation, GoK and GESCOM had revised the SCOD for the Project. This decision was based on mutual consent and was in conformity with the provisions of the PPA i.e., the force majeure clause which unequivocally provides day-for-day extension of timelines (and particularly when statutory approvals are delayed). The said extension has been set-aside by the KERC in an erroneous and arbitrary manner and in contravention of the express provisions of the PPA.

100. Aggrieved by the impugned order dated 29.05.2020, the Appellant has filed the present appeal seeking the following Relief:

“A. Allow the present Appeal and set-aside the Impugned Order dated 29.05.2020 in Petition No. 219 of 2017.

B. Declare and hold that CSPL is entitled to a tariff of Rs. 8.40/kWh from the date of COD of its Project and direct GESCOM to make payments accordingly.

C. Declare and hold that the timeline for achieving Scheduled Commercial Operation Date under the PPA stands revised to 27.05.2017 and approve the Supplementary PPA dated 16.03.2017.

D. Declare and hold that CSPL has fulfilled the Conditions Precedent and achieved COD of its Project well within the prescribed timelines as provided under the PPA read with the Supplementary PPA dated 16.03.2017.

E. Declare and hold that GESCOM has wrongfully realised Rs. 3,60,000 from CSPL as liquidated damages on account of non-fulfilment of Conditions Precedent and direct GESCOM to forthwith refund such amount.”

101. *Per contra*, 2nd Respondent - Gulbarga Electricity Supply Company Limited (“GESCOM”) filed reply. The 4th Respondent - Karnataka Power Transmission Corporation Limited (“KPTCL”) has also filed reply more or less same as that of the 2nd Respondent.

102. Gist of the reply filed by the 2nd Respondent GESCOM is as under:

103. According to GESCOM, the Impugned Order is passed on the correct principles of the law. The Appellant has failed to make out a case against the GESCOM. GESCOM did grant all approvals and sanctions in a timely manner depending upon the compliance of the Appellant. It was due to delays of the Appellant in obtaining the necessary conversion of the land that there was an inordinate delay in commissioning of the project. The Appellant has only filed the present Appeal only to harass and extort monies from the 2nd Respondent/GESCOM herein.

104. According to GESCOM, the Appeal is frivolous, vexatious and no grounds have been made out by the Appellant to set aside the Impugned Order and none of the reliefs could be granted. The Appellant has failed to make out sufficient grounds in support of its allegations and have not produced proper documentation for the same.

105. GESCOM further contends that any delay in commissioning of the project is solely attributable to the Appellant and no grounds have been set forth by the Appellant establishing that the delay has been caused by the 2nd Respondent. Further, the Appellant has been in violation/breach of the PPA that was entered into between the parties

and it is due to the said breach, delays were caused, and the Appellant cannot now ask for reliefs from this Tribunal to rectify its own wrongs.

106. According to GESCOM, it is an admitted fact that the Appellant requested the 2nd Respondent, vide its communication dated 06.12.2016 and sought for an extension of time of SCOD. On 24.12.2016, again the Appellant requested for extension of time for SCOD from 28.02.2017 to 27.05.2017. It is pertinent to note that the extension sought was sought on delays solely attributable to the Appellant.

107. According to GESCOM, it is alleged by the Appellant that due to delays in handing over the original Power Purchase Agreement, prescription formats of the MoA, AoA and the Supplementary Agreement, grant of connectivity approvals for construction of the terminal bay and approval of land conversion, the Appellant could not commence commercial operation of the project. It is submitted that the delay as alleged in commissioning of the project is wholly attributable to the Appellant. The Respondents have promptly granted the necessary statutory approvals to the Appellant and have performed the conditions of the PPA in a timely manner and in accordance with the law in force. It is an admitted fact that the delay has occurred due to the Appellants'

inability to make payment towards the wages of the labourers and procure the necessary raw materials on time. This is evident from the letter addressed by the Appellant to the 2nd Respondent on 24.12.20 seeking extension of SCOD. In that light, it is submitted that it is oxymoronic of the Appellant to state that the delay in the project was on account of delay in communication by the Respondents and lack of approvals for land by the relevant government authorities and then request that the Tribunal grant the reliefs prayed for on the grounds that the project had come to a grinding halt due to force majeure events. The Appellant cannot use the grounds of force majeure to cover up its own inactions and thereby seek any relief.

108. GESCOM further contends that the Appellant prior to filing O.P. No. 219 of 2017 had never raised the alleged grounds for delay as a reason for extension of the SCOD. The Appellant had in fact acknowledged that there were delays pertaining to various issues on account of its own inactions.

109. GESCOM further contends that after addressing the letter requesting extension of SCOD, the Appellant has, without any protest, made the payment of the penalty levied due to non-completion of the

conditions precedent as per Clause 2.1 of the PPA within the stipulated period of 365 days which establishes laches on the part of the Appellant. Therefore, it is submitted that the allegations against the Respondents are merely an afterthought and hence no equity can be shown towards the Appellant.

110. According to GESCOM, it is admitted that Clause 5.1 of the PPA has strictly provided for a revision in the applicable tariff when there is a delay in commissioning the project. It is clearly stated by the 2nd Respondent at the time of conditional approval of the PPA that the rate of tariff is subject to change by the KERC, if the date of commercial operation of the project has suffered any delay. The tariff on the date of the commencement of the operation of the project will be considered as the tariff payable by the Government. The KERC in light of the delay of the commissioning of the project has determined that the applicable tariff is either the varied tariff as on date of the commercial operation or Rs. 8.40/k.Wh, whichever was lower. Thus, the Appellant is only entitled to the lower tariff rate that is Rs. 4.36/kWh.

111. They further contend that the Hon'ble Supreme Court of India in ***All India Power Engineer Federation v. Sasan Power Limited***, as

reported in (2017) 1 SCC 487, has held that the moment electricity tariff gets affected, consumer interest comes in and public interest gets affected. Therefore, power has been provided to the Tribunal and State Commissions to determine the rate of tariff.

112. According to GESCOM, the Impugned Order has been passed by the KERC after taking into consideration the agreements entered into the parties, the relevant regulations and applicable tariffs. It is clear that the balance of convenience lies in favour of the 2nd Respondent herein and the Appellant is not entitled to the reliefs prayed for in the said Appeal. On these grounds, said Appeal is liable to be dismissed.

113. Appellant filed rejoinder and the gist is as under:

114. It had completed the Project in all respects and obtained the CEIG certificate within the Original SCOD contemplated under the PPA. The said CEIG certificate unequivocally confirms that the complete works related to (i) plant, (ii) evacuation line, and (iii) metering bay at Santhpur Sub-station, have been completed by the Appellant well within the Original SCOD contemplated under the PPA. For this purpose, project investments were completed by the Appellant much in advance of the SCOD. Despite the above, the said Project could not be granted the

formal commissioning certificate due to delay in approval of land conversion from Government of Karnataka. Therefore, for reasons beyond the control of the Appellant, the commissioning certificate for the Project has got delayed.

115. Appellant further contends that realizing the genuine difficulties faced by the Appellant and the delays caused in according government approvals, Government of Karnataka and GESCOM granted an extension of SCOD for the Project up to 27.05.2017 and a Supplementary Agreement was signed on 16.03.2017 between the parties to document this understanding, which is totally ignored by KERC.

116. The present appeal is squarely covered by an earlier judgment dated 14.09.2020 issued by this Tribunal in Appeal No. 351 of 2018 titled **Chennamangathihalli Solar Power Project LLP & Anr. v. BESCOM & Ors.** It may be pertinent to highlight that the Chennamangathihalli project was also developed under the Farmers' Scheme of Government of Karnataka. Notably, the Appellant's Project is better placed in terms of facts than the Chennamangathihalli project. In Chennamangathihalli's case, even the CEIG approval was delayed and

was issued beyond the Original SCOD contemplated under Chennamangathihalli PPA. However, in the case of the Appellant, the CEIG certificate has been issued well within the Original SCOD contemplated under the present PPA.

117. After due consideration of the facts and circumstances by a Committee headed by its Director (Technical), GESCOM had itself approved the extension of SCOD for the Project and thereafter signed the Supplementary PPA dated 16.03.2017 accepting the force majeure. On 20.03.2017, GESCOM itself forwarded the Supplementary PPA to the KERC for its approval. Having concurred at all stages that the Project has been affected by force majeure, GESCOM cannot be allowed to approbate and reprobate.

118. In fact, the assertions under the Statement of Objections are nothing but evasive replies. It is a settled principle of law that written statement must deal specifically with each allegation of fact in the plaint and when a defendant denies any such fact, he must not do so evasively and answer the points of substance. If his denial of fact is not specific but general/evasive, the said fact shall be taken to be admitted. In this regard, reliance is placed on the judgments issued by the Hon'ble

Supreme Court in the case of ***Badat and Co. v. East India Trading Co.***, AIR 1964 SC 538 (**Para 11**), and ***Gian Chand and Bros. v. Rattan Lal***, (2013) 2 SCC 606 (**Paras 23 to 25**).

119. Appellant further contends that after signing the PPA on 29.08.2015, the Appellant had as early as November 2015 diligently followed up regarding the deemed route of land conversion and the Appellant was always under the impression the Deemed Conversion would happen since it was an issue under the active consideration of GoK and GESCOM, failing which, by way of abundant caution it had applied for the land conversion under the regular route. The Appellant is merely claiming its legitimate dues in consonance with the provisions of the PPA and is not trying to harass or extort monies as alleged by the 2nd Respondent. In fact, it is GESCOM who is trying to wriggle out of its obligations under the PPA by unnecessarily denying the tariff under the PPA to the Appellant.

120. It is submitted that on 03.01.2017, GESCOM after a lapse of almost 4 months from the Appellant updating status of fulfilment of Conditions Precedent, issued a letter to the Appellant raising for the first

time and as an afterthought, an issue regarding non-fulfillment of conditions Precedent and directing the Appellant to pay a sum of Rs. 3,60,000/- for the same. On 10.01.2017, the Appellant issued a detailed letter to CE, GESCOM confirming that it had already fulfilled the Conditions Precedent under the PPA and requesting GESCOM to withdraw its claim of Rs. 3,60,000/-. On 15.03.2017, the Appellant made his payment under protest.

121. It is clarified that breach under the PPA has a specific connotation and specific remedies. It is pertinent to note that knowing fully well that no occasion has arisen in this regard, GESCOM has never issued a notice alleging breach to the Appellant herein and such allegations are being levied for the first time before this Tribunal.

122. Appellant further contends that while it had sought extensions on account of the various impediments faced by the Project, the Appellant was successful in overcoming those impediments and has completed the total construction of the Project including, the transmission lines and terminal bay by 22.02.2017 i.e., well within the Original SCOD of 27.02.2017. This fact has never been denied by GESCOM.

123. Appellant further contends that the Project had faced various impediments in its implementation stage, such as, delay in handing over the original PPA, delay in prescription of formats of AoA, MoA and the Supplementary PPA for assignment of rights from SPD to SPV, delay by KPTCL in grant of connectivity approvals and sparing of land for construction of terminal bay and demonetization. However, the Appellant showed earnest efforts and was able to complete the construction of the Project well within the Original SCOD contemplated under the PPA. It is pertinent to highlight that the reason for delay in commissioning of the Project beyond the Original SCOD of 27.02.2017, is the delay in issuance of formal approval for land conversion by the Government of Karnataka i.e., solely for reasons beyond the control of the Appellant. The Project suffered due to delay in government approval for conversion of land. The Appellant's case is squarely covered under Article 8.3 of the PPA and has been admitted by GESCOM as it has itself entered into the Supplementary PPA dated 16.03.2017. The Appellant has placed on record all documents which clearly establish its claim, but GESCOM has made bald allegations under its Statement of Objections with a view to obfuscate the real issues involved and has not produced any documents to substantiate its allegations.

124. Appellant further contends that it is incorrect for GESCOM to claim that prior to filing O.P. No. 219 of 2017 before the KERC, the Appellant had never raised the grounds for delay as reasons for extension of SCOD. If this be the case and GESCOM firmly believes that the Appellant's Project is not affected by force majeure, then, GESCOM should explain its own conduct of entering into the Supplementary PPA dated 16.03.2017. GESCOM had constituted a committee for considering the impact of force majeure on Projects on a case-to-case basis and after duly having considered the documents and deliberated in this regard, GESCOM has accepted the Appellant's claim for force majeure under Article 2.5.1(c) and, as a corollary, entered into the Supplementary PPA dated 16.03.2017. It is further pertinent to note that the land conversion approval was granted on 24.05.2017 and, immediately thereafter on 27.05.2017, the Project was commissioned.

125. A conjoint reading of Article 5.1 and Article 2.5 reveals that variation in tariff, if any, can take place only if the Project is delayed for reasons solely attributable to the SPD. The Project being affected by Force Majeure is clearly carved out as an exception to Article 5.1. Therefore, the contentions of GESCOM are contrary to the PPA and the applicable law.

126. According to Appellant, Section 61(d) of the Electricity Act envisages balancing of interest of all stakeholders. Being the sectoral regulator, the KERC had to balance the interest of consumer with the financial viability of the developers. As held by this Tribunal in the case of **GUVNL v. Green Infra Corporate Wind Power Ltd. & Ors.**, [2015 ELR (APTEL) 1316], consumer interest will not always override all other considerations or interest of other stakeholders. The consumer interest has to be safeguarded in a reasonable manner duly protecting the interests of other stakeholders as well and ensuring recovery of tariff in a reasonable manner. The Appellant is entitled to carrying costs over and above the tariff of Rs. 8.40/kWh which amount is increasing owing to the deliberate attempt on the part of GESCOM to delay the recovery of legitimate payments of the Appellant.

127. The appellant filed written submissions also. 2nd and 4th Respondents too filed written submissions. We have gone through the same apart from hearing the counsel.

128. In view of the above pleadings and arguments, the point that would arise for our consideration is as under:

(1) “Whether the impugned order warrants any interference?”

(2) “If so, what order?”

ANALYSIS AND CONCLUSION:

129. The relevant Clauses of PPA required for consideration to dispose of the Appeal on merits are as under:

- “(viii) **Commercial Operation Date**” with respect to the Project shall mean the date on which the Project is available for commercial operation as certified by GESCOM/KPTCL as the case may be:
- (xxxi) **“Scheduled Commissioning Date”** shall mean 18 (Eighteen) months from the Effective Date.

CONDITIONS PRECEDENT

2.1 Conditions Precedent:

The obligations of GESCOM and the SPD under this Agreement are conditional upon the occurrence of the following in full within 365 days from the effective date.

2.1.1

- (i) *The SPD shall obtain all permits, clearances and approvals (whether statutory or otherwise) as required to execute and operate the Project (hereinafter referred to as “Approvals”):*
- (ii) *The Conditions Precedent required to be satisfied by the SPD shall be deemed to have been fulfilled when the SPD shall submit:*
- (a) *The DPR to GESCOM and achieve financial closure and provide a certificate to GESCOM from the lead banker to this effect;*
- (b) *All Consents, Clearances and Permits required for supply of power to GESCOM as per the terms of this Agreement; and*

(c) Power evacuation approval from Karnataka Power Transmission Company Limited or GESCOM, as the case may be.

2.1.2 SPD shall make all reasonable endeavors to satisfy the Conditions Precedent within the time stipulated and GESCOM shall provide to the SPD all the reasonable cooperation as may be required to the SPD for satisfying the Conditions Precedent.

2.1.3 The SPD shall notify GESCOM in writing at least once a month on the progress made in satisfying the Conditions Precedent. The date, on which the SPD fulfills any of the Conditions Precedent pursuant to Clause 2.1.1, it shall promptly notify GESCOM of the same.

2.2 Damages for delay by the SPD

2.2.1 In the event that the SPD does not fulfill any or all of the Conditions Precedent set forth in Clause 2.1 within the period of 365 days and the delay has not occurred for any reasons attributable to GESCOM or due to Force Majeure, the SPD shall pay to GESCOM damages in an amount calculated at the rate of 0.2% (zero point two per cent) of the Performance Security for each day's delay until the fulfillment of such Conditions Precedent, subject to a maximum period of 60 (Sixty) days. On expiry of the said 60 (Sixty) days, GESCOM at its discretion may terminate this Agreement.

2.3 Performance Security

2.3.1 For due and punctual performance of its obligations relating to the Project Under this Agreement, the SPD has delivered to GESCOM, simultaneously with the execution of this Agreement, on irrevocable and revolving bank guarantee from a scheduled bank acceptance to GESCOM for an amount of Rs. 10,00,000/- per MW (Rupees Ten Lakhs per Mega Watt only)("Performance Security"). The Performance Security is furnished to GESCOM in the form of bank guarantees in favour Managing Director of the GESCOM as per the format provided

in Schedule 2 and having validity up to 24 months from the date of signing of this agreement. The details of the bank guarantee furnished towards the Performance Security is given below:

Bank Guarantee No. PBG 2015/4 dated 19.06.2015 for an amount of Rs. 30,00,000/- (Rupees Thirty Lakhs only).

2.3.2 Appropriation of Performance Security

Upon occurrence of delay in commencement of supply of power to GESCOM as provided in clause 2.5.7, or failure to meet the Conditions Precedent by the SPD, GESCOM shall, without prejudice to its other rights and remedies hereunder or in law, be entitled to encash and appropriate the relevant amounts from the Performance Security as Damages. Upon such encashment and appropriation from the Performance Security, the SPD shall, within 30 (thirty) days thereof, replenish, in case of partial appropriation, to its original level the Performance Security, and in case of appropriation of the entire Performance Security provide a fresh Performance Security, as the case may be, and the SPD shall, within the time so granted, replenish or furnish fresh Performance Security as aforesaid failing which GESCOM shall be entitled to terminate this Agreement in accordance with Article 9.”

2.4 Release of Performance Security

2.4.1 Subject to other provisions of this Agreement, GESCOM shall release the Performance Security, if any after scheduled commissioning of the project;

2.4.2 The release of the Performance Security shall be without prejudice to other rights of GESCOM under this Agreement.

“2.5 Extensions of Time

- 2.5.1 *In the event that the SPD is prevented from performing its obligations under Clause 4.1 by the Scheduled Commissioning Date due to:*
- (a) *Any GESCOM Event of Default; or*
 - (b) *Force Majeure Events affecting HESOM; or*
 - (c) *Force Majeure Events affecting the SPD.*
- 2.5.2 *The Scheduled Commissioning Date and the Expiry Date shall be deferred, subject to the reasons and limits prescribed in Clause 2.5.1 and Clause 2.5.3 for a reasonable period but not less than 'day for day' basis, to permit the SPD or GESCOM through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the SPD or GESCOM, or till such time such Event of Default is rectified by GESCOM.*
- 2.5.3 *In case of extension occurring due to reasons specified in clause 2.5.1(a), any of the dates specified therein can be extended, subject to the condition that the Scheduled Commissioning Date would not be extended by more than 6 (six) months.*
- 2.5.4 *In case of extension due to reasons specified in Article 2.5 (b) and (c), and if such Force Majeure Event continues even after a maximum period of 3 (three) months, any of the Parties may choose to terminate the Agreement as per the provisions of Article 9.*
- 2.5.5 *If the Parties have not agreed. Within 30 (thirty) days after the affected Party's performance has ceased to be affected by the relevant circumstance, on the time period by which the Scheduled Commissioning Date or the Expiry Date should be deferred by, any Party may raise the Dispute to be resolved in accordance with Article 10.*
- 2.5.6 *As a result of such extension, the Scheduled Commissioning Date and the Expiry Date newly determined date shall be deemed to be the*

Scheduled Commissioning Date and the Expiry Date for the purposes of this Agreement.”

2.5.7 Liquidated damages for delay in commencement of supply of power to GESCOMs.

Subject to the other provisions of this agreement, if the SPD is unable to commence supply of power to GESCOM by the scheduled commissioning date, the SPD shall pay to GESCOM, liquidated damages for the delay in such commencement of supply of power as follows:

- (a) For the delay up to one month- amount equivalent to 20 % of the performance security.*
- (b) For the delay of more than one month up to three months - amount equivalent to 40 % of the performance security.*
- (c) For the delay of more than three months up to six months - amount equivalent to 100 % of the performance security.*

For avoidance of doubt, in the event of failure to pay the above mentioned damages by the SPD, the GESCOM entitled to encash the performance security.”

4.1 Obligations of the SPD:

- (a) The SPD shall construct the Project including the pooling station, the interconnection facilities and metering arrangements at the point of delivery of power as approved by STU /GESCOM.*
- (b) The SPD shall undertake by itself or by any other person acting on its behalf, at its own cost, construction/up-gradation of (a) the interconnection Facilities, (b) the transmission lines; and (c) metering arrangements with protective gear as per the specifications and requirements of STU/GESCOM, as notified to the SPD.*

- (c) *The SPD shall achieve scheduled date of completion and the commercial operation within 18 months from the effective date.*
- (d) *The SPD shall by itself or by any other person acting on its behalf undertake at its own cost maintenance of the interconnection facilities and the metering arrangements, including the dedicated transmission line up to the delivery point as per the specifications and requirements of STU/GESCOM, as notified to the SPD, in accordance with Prudent Utility Practices. The transmission / distribution line so constructed shall remain as dedicated transmission / distribution line without provision for any tapping.*
- (e) *The SPD shall operate and maintain the Project in accordance with Prudent Utility Practices, for the entire term of this agreement.*
- (f) *The SPD shall be responsible for all payments on account of any taxes, cesses, duties or levies imposed by the GoK or its competent statutory authority on the land, equipment, material or works of the Project or on the Electricity generated or consumed by the Project or by itself or on the income or assets owned by it.*
- (g) *The benefits accruing on account of carbon credit shall be shared between the SPD and the GESCOM as per Clause 5.2.*

4.2 Obligations of GESCOM:

GESCOM agrees:

- (a) *To allow SPD to the extent possible to operate the Project as a must run generating station subject to system constraints.*
- (b) *Subject to system constraints to off-take and purchase the Electricity generated by the SPD at the Delivery Point as per Clause 3.4 and Clause 3.5 of this agreement.*
- (c) *To make tariff payments to the SPD as set out in Clause 5.1.*

- (d) *GESCOM agrees to provide support to the SPD and undertakes to observe, comply with and perform, subject to and in accordance with the provisions of this Agreement and the Applicable Laws, the following:*
 - (i) *support, cooperate with and facilitate the SPD in the implementation and operation of the Project in accordance with the provisions of this Agreement;*
 - (ii) *not do or omit to do any act, deed or thing which may in any manner be volatile of any of the provisions of this Agreement;*
 - (iii) *act reasonably, while exercising its discretionary power under this Agreement;*

6.4 Late Payment Surcharge

In the event of payment of the monthly bill being made by GESCOM after the due date, a late payment surcharge shall be payable to the SPD at the rate of 1.0% per month on the bill amount (being "Late Payment Surcharge"), computed on a pro rata basis on the number of days of the delay in payment. The Late Payment Surcharge shall be claimed by the SPD through the Supplementary Bill.

8.1 Definitions:

In this Article, the following terms shall have the following meanings:

8.2 Affected Party:

An Affected Party means GESCOM or the SPD whose performance has been affected by an event of Force Majeure.

8.3 Force Majeure Events:

- (a) *Neither Party shall be responsible or liable for or deemed in breach hereof because of any delay or failure in the performance of its*

obligations hereunder (except for obligations to pay money due prior to occurrence of Force Majeure events under this Agreement) or failure to meet milestone dates due to any event or circumstance (a "Force Majeure Event") beyond the reasonable control of the Party affected by such delay or failure, including the occurrence of any of the following:

- (i) Acts of God;*
- (ii) Typhoons, floods, lightning, cyclone, hurricane, drought, famine, epidemic, plague or other natural calamities;*
- (iii) Strikes, work stoppages, work slowdowns or other labour dispute which affects a Party's ability to perform under this Agreement;*
- (iv) Acts of war (whether declared or undeclared), invasion or civil unrest;*
- (v) Any requirement, action or omission to act pursuant to any judgment or order of any court or judicial authority in India (provided such requirement, action or omission to act is not due to the breach by the SPD or GESCOM of any Law or any of their respective obligations under this Agreement);*
- (vi) Inability despite complying with all legal requirements to obtain, renew or maintain required licenses or Legal Approvals;*
- (vii) Fire, Earthquakes, explosions, accidents, landslides;*
- (viii) Expropriation and/or compulsory acquisition of the Project in whole or in part;*

- (ix) *Chemical or radioactive contamination or ionizing radiation; or*
 - (x) *Damage to or breakdown of transmission facilities of either Party;*
- (b) *The availability of the above item (a) to excuse a Party's obligations under this Agreement due to a Force Majeure Event shall be subject to the following limitations and restrictions:*
 - (i) *The non-performing Party gives the other Party written notice describing the particulars of the Force Majeure Event as soon as practicable after its occurrence;*
 - (ii) *The suspension of performance is of no greater scope and of no longer duration than is required by the Force Majeure Event.*
 - (iii) *The non-performing Party is able to resume performance of its obligations under this Agreement, it shall give the other Party written notice to that effect;*
 - (iv) *The Force Majeure Event was not caused by the non-performing Party's negligent or intentional acts, errors or omissions, or by its negligence/failure to comply with any material Law, or by any material breach or default under this Agreement;*
 - (v) *In no event shall a Force Majeure Event excuse the obligations of a Party that are required to be completely performed prior to the occurrence of a Force Majeure Event."*

130. According to the Appellant, for no fault of the Appellant due to various circumstances beyond the control of the Appellant, the solar plant could not be commissioned within the time limits. They further contend that the solar plant in question was ready to be commissioned much prior to the original SCOD, but for want of formal land conversion certificate/order they could not commission the plant, therefore, there was no justification for the Respondent Commission to opine that the Appellant was responsible for the delay in commissioning the project.

131. They also contend that in terms of PPA, the question of paying any damages much less liquidated damages would arise only if the Appellant was responsible for the delay in commissioning of the project. Since the Appellant was not responsible, the Respondent Commission was not justified in opining that damages need to be imposed.

132. The Appellant also contends that they are entitled for carrying cost since there was no delay on the part of the Appellant in commissioning the power plant, therefore from the date of short payment of the amounts towards tariff, the Appellants is entitled for late payment surcharge/carrying cost. They contend that the power came to be supplied from 27.05.2017,

but no payment was made to the Appellant for the electricity supplied by it. Therefore, the Appellant had to file an interim application before the Commission seeking a direction for tariff payments. After hearing the parties, the Commission by an interim order directed payment of Rs.4.36/kWh. In pursuance of this order, the Appellant started receiving the payment. Though the payments were made, but no carrying cost was paid, therefore the Appellant is entitled for carrying cost on the difference of tariff amount i.e., the difference between the agreed tariff of 8.40/kWh and awarded tariff of 4.36/kWh. They rely upon Article 6.4 of the PPA for this claim.

133. As against this, the Respondents contend as under:

134. According to Respondent Nos. 2 and 4, the Appellant is not made out a case against both of them. According to them, Respondent No.2 has granted all approvals and sanctions in timely manner depending upon the compliance by the Appellant. If any delay has occurred for obtaining necessary land conversion, Respondent No.2 is not responsible. According to Respondent No.4, since the contract is between Respondent No.2 and the Appellant, there was no need to make Respondent No.4-KPTCL as a party to the proceedings.

135. According to Respondent No.2, the State Commission, after examining all facts and material placed before it by the parties, has passed a reasoned order, therefore, there is no need to interfere with the impugned order.

136. They further contend that Supplementary Power Purchase Agreement declare that the Appellant had fulfilled condition precedent as per PPA and SPPA. But the same was based on the fact that the Appellant was directed to pay liquidated damages for non-fulfilment of condition precedent. Whatever delay has occurred, it was entirely due to negligence of the Appellant and Respondent No.2 was no way responsible for the said delay.

137. According to Respondents, whatever statutory approvals that need to be granted by the Respondents were promptly issued, therefore, none of the Respondents are responsible for any delay that has occurred. They further contend that the inability to make payments to the labourers must have delayed the project, therefore, the Respondents cannot be blamed for the same. The Appellant themselves has sought for extension of SCOD on 24.12.2016, wherein they have mentioned that on account of lack of

approval for land conversion by relevant officers, the delay has occurred. This was only a ground to cover up its own inaction within time.

138. Respondent No.2 further contends that in terms of Clause 5.1 of the PPA, revision of tariff is applicable only when there is no delay in commissioning the project. Since the Appellant was responsible for the delay in declaring commercial operation of the Project, they are entitled only for reduced tariff, which was applicable at the time of commissioning of the project, therefore, the impugned order properly awarded Rs. 4.36/kWh as tariff.

139. According to Respondent No.4, the Appellant sought for provision of suitable land at Santhpur for construction of terminal bay on 24.05.2016. On 01.06.2016, Respondent No.4 granted approval to the Appellant for construction of terminal bay of Santhpur Substation and requested the Appellant to deposit **one time non-refundable deposit.** Therefore, Respondent No.4 was not responsible for the delay. The fact that the extension of time sought by the Appellant goes to show that it was the Appellant, who was responsible for the delay in commissioning the plant. They further contend that if the Appellant has acted with due care and diligence, the delay would not have occurred, therefore, the impugned order

deserves to be sustained. With these contentions, they sought for dismissal of the appeal.

140. It's not in dispute that in response to the Policy of the Government of Karnataka to promote and develop solar energy in the State of Karnataka, KREDL was established as nodal agency. Policy intended to benefit farmers under the Scheme-Land Owning Farmers (Farmer Scheme) with capacity of 1 MW to 3 MWs. Online applications were invited on 09.10.2014. Again on 30.07.2015, KERC tariff order of 2013 was modified on the ground that on account of improvement in technology resulting in reduction of the cost of investment in solar projects there was necessity for mid-course revision. This Policy further made it clear that it would not cause hardship to those who have already invested in terms of earlier Policy. The Solar Policy dated 22.05.2014, at Para 18 of the Policy specifically contemplated smooth process of conversion of agricultural land to industrial category i.e., deemed conversion. In other words, it expressed that prospective solar developers need not wait for formal approval of land conversion. However, it is noticed from the facts narrated above that when the Applicants approached the officers of the Revenue Department with a request to facilitate deemed land conversion, it emerged out that though a

frame work was in place, but the fee payable for conversion was not specified. Therefore, the so called deemed land conversion process was not implemented properly by the concerned authorities. Since concerned officers expressed that they were not sure of deemed conversion route. This was brought to the notice of KREDL by the Applicant and sought assistance. Several Solar Power Developers represented to the State Government that deemed conversion of land as promised in the Solar Policy of the State was one of the important and vital consideration, which prompted the farmers to enter into Power Purchase Agreements in the first place. In this context, on 04.11.2015 KREDL organised a meeting, which was presided over by the Minister of Energy, Karnataka and several stakeholders took part in the meeting apart from officers of KERDL and GESCOM. Since proper information of deemed land conversion had not reached the Revenue Officers, the Energy Minister directed the Chief Secretary and Revenue Department to give proper guidelines in this regard.

141. It is pertinent to mention that by that time i.e., on 29.08.2015, Power Purchase Agreement was entered into between the SPD and GESCOM. In terms of Clause 2 of PPA, certain conditions precedent have to be complied with, within one year from the effective date i.e., 28.08.2016, the date of

SCOD. In terms of PPA, SCOD date defined would be 18 months from effective day (the day on which PPA was signed i.e, 29.08.2015,) i.e., the SCOD would be 28.02.2017. However, this SCOD could be extended if there was delay in COD, on the ground of force majeure event.

142. Now it is well settled legal position that the effective date cannot be the date on which parties signed PPA, but the date on which the PPA was approved by the State Commission or the Appropriate Commission, as the case may be. We opined so in the various judgments of this Tribunal, to name some, “**Azure Sunrise Private Limited vs. CESCO & Ors**” (Appeal No 340 of 2016 dated 28.02.2020); “**SEI Aditi Power Private Limited vs. Karnataka Electricity Regulatory Commission & Ors.**” (Appeal No. 360 of 2019 dated 14.07.2021) and “**SEI Diamond Private Limited vs. Karnataka Electricity Regulatory Commission**” (Appeal No. 374 of 2019 dated 14.07.2021).

143. Since the PPA was approved on 07.09.2015, the SCOD has to be 18 months from 07.09.2015.

144. In terms of Article 12.11 of the PPA, the SPD has an irrevocable right to form a SPV at any time to implement the Solar Project. At this juncture, the Appellant-Clearsky Solar Pvt Limited came into existence as SPV. The

date of incorporation of SPV is 17.11.2015. This special provision was allowed in the PPA, since the farmers entering into PPA for development of solar projects did not have any expertise to implement a solar project.

145. On 01.12.2015, Government of Karnataka issued guidelines for deemed land conversion, which stated that Solar Plant Developer was eligible for deemed land conversion subject to payment of fees and submission of certain documents.

- i. Allotment letter for generation of solar power from Government/KREDL.
- ii. RTC in the name of the applicant.
- iii. NoC stating that land is not attracted by PTCL Act and not subject to land acquisition proceedings
- iv. NoC stating that land sanction/ allocation conditions have not been violated from concerned authority (Tehsildar).

146. Apparently, within 15 days of payment of fees with the above documents, the process of deemed land conversion had to complete. Unfortunately, no particular fee schedule was specified, since it said that the

same has to be ascertained upon inspection of the land by the Deputy Commissioner concerned.

147. There was an application to GESCOM seeking consent for creation of SPV. On 08.12.2015, KERC clarified that SPD could create a SPV at any time with intimation to GESCOM along with execution of a Supplementary PPA, which would be approved by KERC. This Notification came three months after execution of initial PPA, as stated above. However, though this information came to the knowledge ESCOMS, but none of the developers were informed about this.

148. After approval of the original PPA, the original PPA was with the Commission itself. Since the bank and other authorities were insisting for original of the approved PPA for sanctioning the loan, the developer had to approach GESCOM requesting for return of the PPA. In the letter addressed by GESCOM on 19.10.2015, it notes that banks were insisting upon the copies of the original approved PPA for sanctioning the loan. Only on 15.12.2015, original approved PPAs were returned to GESCOM, in turn handed over to developers. This process took about three months.

Guidelines were issued by KPTCL on 21.12.2015 for grant of procedure indicating for grant of evacuation approval under the 'Farmer Scheme'.

149. The Appellant was in constant touch with the revenue officials i.e., office of the Assistant Commissioner trying to secure land conversion so also clarity on the fees payable. Unfortunately, the application of the Appellant was refused, on the ground that the office of the Assistant Commissioner was not aware of the issuance of any guidelines, but directed the Appellant to submit a copy of the guidelines to their office. On 29.01.2016, a letter was addressed to Assistant Commissioner's office along with guidelines for deemed conversion process.

150. On 08.02.2016, Supplementary PPA came into existence between the Appellant and GESCOM recording the incorporation of SPV and assignment of rights of SPD in favour of SPV. On 24.02.2016, again they approached Assistant Commissioner, Bidar, for deemed conversion certificate along with the concerned sanctions and so also approved PPA. In spite of the fact that they were not the necessary documents, but Appellant submitted the same. Meanwhile, the Appellant approached KPTCL for evacuation facility.

151. It is noticed that on 21.03.2016, after lapse of five months from formation of SPV and lapse of seven months from the date of PPA, KERC issued direction to all ESCOMS of the State of Karnataka that MOA, AOA, and Supplementary PPA for formation of SPV under the 'Farmers Scheme' had to be in a particular format prescribed by KERC. Only on 02.04.2016, GESCOM addressed an email to the SPD enclosing the formats mentioned above. At no point of time, these formats were communicated to the Appellant. This led to delay, since AOA, MOA and other documents had to be made in the formats as per the directions of KERC.

152. With lot of persuasion and after complying with payment of fees etc., KPTCL granted tentative evacuation approval on 20.05.2016. In this letter, KPTCL informed the Appellant that they were required to acquire certain land adjacent to the switchyard of Santhpur Sub-Station for construction of the terminal bays. Option was given to them to request KPTCL to part with some of its land on lease basis. Only on 25.05.2016, in pursuance of KERC directions, Memorandum of Understanding (MoU) came to be executed between the SPD and the Appellant for assignment of rights in the solar project, though SPV was established in November 2015. As noted above in the pleadings of the parties, there was immense communication

even between the KPTCL Kalaburgiand KPTCL Humnabad so far as furnishing single line diagram of Santhpur Substation for sparing the land for Appellant's terminal bay. The Supplementary PPA was submitted for approval on 04.06.2016 and the same was approved on 28.06.2016. Again, after several letters, the original supplementary PPA was handed over to Appellants. Even in the month of July 2016, there was no positive response from KPTCL about sparing of its land for terminal bay for the Appellant. On 28.07.2016, KREDL asked all the developers to attend the meeting to resolve the obstacles faced by Solar Projects under 'Farmers Scheme'.

153. Since the above formalities though initiated within reasonable time by the developer was getting delayed not because of the laches on the part of the developer but on account of lethargic approach of the several state Governmental instrumentalities, the Appellant on 01.08.2016 addressed a letter to KREDL seeking extension of time on account of several delays caused including the delay in approval of supplementary PPA, so that SCOD could be realigned.

154. The SCOD in terms of PPA was 28.02.2017, but on account of Assistant Commissioner's office was insisting for submission of application for land conversion under regular route, the Appellant was constrained to

approach for normal land conversion process. For this purpose, it had to submit 13 different documents, which are already narrated in the above paragraphs, while narrating the case of the Appellant. It could apply for land conversion only on 03.08.2016, and in terms of the Karnataka Land Revenue Act, the conversion process has to be completed within 120 days, which was well within the original SCOD.

155. Meanwhile, KREDL asked Appellant to approach GESCOM for extension of SCOD. On 12.08.2016, Appellant sought extension of SCOD on the following counts-

- (i). Delay in PPA approval.
- (ii). Delay on account of SPV formation occasioned due to confusion created by KERC.
- (iii). Delay in approval of the Supplementary PPA dated 01.06.2016 and hand over of the same as financing for the Solar Project was not feasible in its absence.
- (iv). Delay in evacuation approval.
- (v). Cascading effect of delay in approval of Supplementary PPA dated 01.06.2016.

156. Only on 12.09.2016, the Assistant Commissioner directed Tahsildar to visit the site of the Appellant and submit its report. On 26.09.2016, the corporate office of the KPTCL Bengaluru, issued a clarification stating in the said letter it observed that in spite of clear guidelines, there was inordinate delay in grant of evacuation approvals and further cautioned that on superfluous grounds delay should not be caused by the officers of KPTCL.

157. Meanwhile, on 18.11.2016, Government of Karnataka after recognising that substantial delay was caused on account of land conversion and other process, directed all the ESCOMS to form Committees to consider approval of extension of SCOD for solar projects under the 'Farmers Scheme'.

158. On 24.11.2016, a formal order was also issued in this regard. At this juncture, on 06.12.2016, the Appellant addressed a letter to Chief Engineer JESCOM seeking extension of original SCOD by two months because of demonetisation. Only on 12.12.2016, regular evacuation approval was issued.

159. The Appellant by several letters requested extension of SCOD on account of various problems and delays as stated above. On 03.01.2017,

GESCOM addressed a letter to the Appellant pertaining to non-fulfilment of condition precedent i.e., payment of Rs. 3,60,000/-. Appellant informed that it had already fulfilled the condition precedent envisaged under the PPA, but GESCOM had not withdrawn the said money. The Appellant requested the Assistant Commissioner to make a site visit, though Tahsildar had visited the site on 03.10.2016. After discussion in a joint meeting regarding the extension of SCOD, GESCOM raised an objection with regard to unauthorised evacuation line being constructed. However, KPTCL clarified the said objection in the month of March 2017. In the meeting again held between all the stakeholders which was attended by various SPDs, various force majeure events, which affected commissioning of the projects including the plant of the Appellant were brought to the notice of GESCOM. On 09.02.2017, after persistent approach of the Appellant, it was found that the land spared by KPTCL for construction of bays would result in crisscrossing of lines, which would not be technically advisable and feasible. Therefore, they sought for connection to the existing Bays. With persistent persuasion by the Appellant with KPTCL Bengaluru etc., on 21.02.2017, KPTCL accorded approval of single line diagram and so also lay out plan of terminal bay at Santhpur. Only on 18.02.2017, the Assistant Commissioner,

Bidar submitted its opinion to the Deputy Commissioner Bidar on land conversion.

160. Meanwhile, on 22.02.2017, Appellant addressed a letter to CEIG stating that all the necessary evacuation line on terminal bay with metering arrangement has been constructed for its solar project and requested for inspection. On 23.02.2017, CEIG issued a letter confirming safety approval for electrical installation pertaining to Appellant's project.

161. According to Appellant, this letter of CEIG confirms the completion of works pertaining to Solar Project evacuation line, metering bay. Immediately with this Certificate of CEIG, when Appellant approached KPTCL for inspection of the site and inter connection on 25.02.2017, they directed to pay inspection charges, which came to be paid on 27.02.2017. At this stage, the Appellant was orally informed that though the project was ready, inter connection cannot be given for commissioning the project for want of formal order of land conversion.

162. It is discussed in the above paragraphs that there was no certainty with regard to process for deemed land conversion. In spite of bringing to the notice of the office of Assistant Commissioner, Bidar, they insisted for

regular route for land conversion, which compelled the Appellant for filing of an application for conversion. In spite of filing the application for conversion well within the time, there was delay in inspecting the land. Even after inspection of the land, no conversion order came to be handed over to the Appellant.

163. It is noticed that CEIG report confirms the fact that solar plant of the Appellant was all ready by 23.02.2017 itself when the certificate was issued, but for no fault of the Appellant, the solar plant could not have inter connection for want of land conversion.

164. The discussion made above establishes the fact that the Appellant was running from pillar to post and made all humanly possible efforts to comply with not only condition precedent but also to get all required approvals in order to declare COD of the solar plant. It is seen that the GESCOM had extended SCOD by six months i.e, up to August 2017, but the solar plant of the Appellant was ready well before the original SCOD of 28.02.2017. If the effective date of the PPA is the date on which PPA was approved is taken into consideration, this SCOD would go to March 2017. Though the solar plant of the Appellant was ready well within original SCOD, the formal land conversion certificate would not be received for the reasons

beyond the control of the Appellant. The Commission finds fault with the Appellant for not commissioning the project within the time contemplated in the original PPA. It is noticed in the impugned order that there was an observation by the KERC that there was delay in grant of land conversion. But, unfortunately, having opined so it concludes the same against the Appellant though the Appellant was not to be blamed. Sub-Clause (iv) of Paragraph 19 read as under:

“19. Regarding: Delay in Land Conversion under Deemed Conversion Scheme:

...
(iv) **We observe that there was delay in issuing land conversion order by the Deputy Commissioner’s Office, but it could be attributed to administrative reasons** as Land Conversion proposal requires examination of various provisions of the Karnataka Land Reforms Act, 1961, the Karnataka Land Revenue Act, 1964, Karnataka Land Grant Rules, 1969 and the Karnataka Scheduled Castes and Scheduled Tribes (Prohibition of Transfer of Certain Lands) Act, 1978 and getting filed reports and consultation with concerned Departments before issuing the land conversion order.”
(Emphasis Supplied)

165. It is seen that the land conversion was granted only on 08.05.2017. Between the date of CEIG report and the date of land conversion i.e., between 23.02.2017 to 08.05.2017, it is noticed that on 27.02.2017, the Assistant Director, Town and Country Planning visited the site and gave technical opinion. On 15.03.2017, GESCOM passed an order confirming

extension of SCOD up to 27.05.2017. A supplementary PPA came to be executed on 16.03.2017 incorporating SCOD as 27.05.2017. It is noticed that after a total lapse of 10 months' time, land conversion was granted from the date of formal application insisted to be filed by the Appellant. We already discussed that in view of deemed land conversion process applicable to 'Farmers Scheme' as per the guidelines of Government of Karnataka, there was no occasion for the Appellant to apply for land conversion in the normal course. It is also noticed that the solar plant of the Appellant was very much ready for inter connection by 23.02.2017. It could not be commenced on account of formal land conversion approval. This definitely was not within the control of the Appellant. The Appellant had herculean task in getting various approvals.

166. It is noticed from the submissions of the Appellant that CEIG Certificate dated 23.02.2017 was issued and a copy of this Certificate was addressed to Executive Engineer, O&M Division of GESCOM (Kalaburgi). Therefore, we note that the GESCOM was aware of the completion of the solar plant of the Appellant in all respects much prior to the SCOD, but the same could not be commissioned for want of formal land conversion order. In the earlier judgment of this tribunal in Appeal No. 67 of 2021 pertaining to

M/s Solitaire BTN Solar Private Limited vs. Tamil Nadu Electricity Regulatory Commission & Ors., we observed that the Project is deemed to be commissioned on the date it received CEIG certificate. The relevant paragraphs are 101, 104 and 208, which read as under:

“101. Without prejudice to the aforesaid contention, therefore, in any event at a bare minimum, the Appellant is entitled to an extension of SCD without any LDs or other penalty till 34 months i.e., till 27.07.2020 as specified in the PPA, and thereafter, it is entitled to another 5 months under the blanket extension under the MNRE OM dated 13.08.2020. With these bare minimum extensions, the SCOD gets extended up to 27.12.2020. The entire capacity of 100 MW achieved readiness on 29.10.2020 and received CEIG Certificate for the same on 19.11.2020. Thus, the same would be deemed to have been commissioned on 29.10.2020/19.11.2020 though it could not be synchronised with the Grid due to arbitrary actions and/or administrative delays on part of the Respondents.

104. With the aforesaid extensions, including the blanket extension of 5 months granted by way of MNRE OM dated 13.08.2020 is applied in the facts and circumstances of the present case, the project timelines within which the entire 100 MW was to be commissioned as per the PPA stand extended till 27.12.2020. Admittedly, the Appellant has received Chief Electrical Inspector of Government (‘CEIG’) for 25 MW (16 MW + 09 MW) on 18.08.2020 and the final 25 MW capacity on 19.11.2020. Therefore, the direction of the Ld. TNERC directing termination of the PPA qua remaining 50 MW plant capacity is

erroneous, arbitrary and illegal. The Appellant is not liable to pay any liquidated damages for the delay in commissioning insofar as the delay occurred for reasons beyond the control of the Appellant i.e. non-availability of requisite evacuation infrastructure to ensure evacuation of entire contracted capacity of 100 MW amounting to a Force Majeure Event as per Clause 16 of the PPA read along with law laid down by this Tribunal vide its judgment dated 14.09.2020, passed in the case of Chenamangathihalli Solar Power Projects LLP & Anr. vs BESCO & Anr., Appeal No. 351 of 2018.

208 We also note that the entire capacity of 100 MW achieved readiness on 29.10.2020 and received CEIG certificate for the same on 19.11.2020 but was not synchronised with the grid for reasons beyond the control of the Appellant. The fact that the balance capacity of 50 MW was declared ready for commissioning on 29.10.2020/19.11.2020, we are of the opinion that as per PPA, the Appellant made available the entire capacity of 100 MW of the solar PV plant by the extended Scheduled Commissioning Date of 27.12.2020. In view of this the Respondent TANGEDCO cannot encash the Performance Bank Guarantee or ask the Appellant for payment of Liquidated Damages.”

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.**

172. All the pending IAs, if any, shall stand disposed of. There shall be no order as to costs.

Pronounced in the Virtual Court through video conferencing on this
the **2nd day of August, 2021.**

(Ravindra Kumar Verma)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / NON-REPORTABLE

tpd/ts