

**APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI  
(APPELLATE JURISDICTION)**

**APPEAL NO. 328 of 2018 &  
IA No. 1567 of 2018, IA No. 244 of 2019**

**Dated : 12<sup>th</sup> August, 2021**

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

**IN THE MATTER OF :**

1. **Basaragi KM Solar Power Project LL.P,**  
Through its Designated Partner  
Sri. Sidram Kaluti  
BC 109, Davidson Road,  
Camp: Belagavi. 590 001  
Karnataka

2. **Sri. Channaraj Hattiholi,**  
27/B Kuvempu Nagar,  
Hindalga,  
Belgavi - 591 108  
Karnataka

.....Appellants

**Versus**

1. **Hubli Electricity Supply Company Limited**  
Through its Managing Director,  
P.B. Road, Navanagar,  
Hubballii- 580 025

2. **Karnataka Electricity Regulatory Commission**  
Through its Secretary  
No.16, C-1, Millers Tank Bed Area,  
Vasant Nagar,  
Bengaluru - 560 052

.....Respondents

Counsel for the Appellant (s) : Mr. Basava Prabhu Patil, Sr. Adv.

Mr. Prabhulinga Navadegi, Sr. Adv.  
Mr. Kush Chaturvedi  
Ms. Purna Priyadarshini  
Ms. Priyashree Sharma  
Mr. Geet Ahuja  
Mr. Shubhranshu Padhi  
Mr. Ashish Yadav  
Ms. Gursimran Dhillon  
Mr. P. Kavin Prabhu

Counsel for the Respondent(s) : Mr. Shahbaaz Hussain  
Mr. Fahad Khan  
Ms. Stephania **for R-1**

## **J U D G M E N T**

### **PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON**

1. The Appeal No. 328 of 2018 has been filed by the Appellants under Section 111 of the Electricity Act questioning the legality, validity and correctness of the Impugned Order dated 04.09.2018 in Original Petition No. 66 of 2017 passed by the Karnataka Electricity Regulatory Commission. .
2. The said original petition was filed by the Appellants herein challenging the direction and communication issued by the Respondent Commission vide order dated 13/04/2017.

### **FACTS OF THE CASE:-**

3. The Appellant No.1, Basaragi KM Solar Power Project LL.P (hereinafter referred to as '**Appellant No.1**') is a Limited Liability Partnership incorporated under Limited Liability Partnership Act, 2008 having its registered office at BC 109, Davidson Road, Camp, Belgaum, Karnataka-590001, India.

4. The Appellant No.1 was formed as a Special Purpose Vehicle (**SPV**) to undertake the Solar Power project, a Non-Conventional Power project at Basaragi KM Village, Belgaum District, State of Karnataka. The Appellant No.2, Sri. Channaraj B. Hattiholi is a farmer owning land in Basaragi KM village, Savadatti Taluka, Dist. Belagavi. The Appellant No.2 is the Solar Power Developer (**SPD**) in the present matter.

5. The Respondent No.1, Hubli Electricity Supply Company Limited(**HESCOM**), is a distribution company within the meaning of 2(17) of the Electricity Act, 2003 and a Government of Karnataka Company incorporated under the provisions of the Companies Act, 1956 with its registered office at Navanagar Hubli, Karnataka – 580025.

6. Karnataka Electricity Regulatory Commission (Respondent Commission/ State Commission) is the Electricity Regulatory Commission for the State of Karnataka exercising jurisdiction and discharging functions in terms of the Electricity Act, 2003.

**7. Mr. Basava Prabhu Patil, learned Senior Counsel arguing for the Appellants has filed the following Written Submissions and Additional Written Submissions for our consideration :**

**8.** That present Appeal has been filed by the Appellants, Basaragi KM Solar Power Project LLP and Mr. Channaraj B. Hattiholli, challenging the order dated 04.09.2018 passed by the Karnataka Electricity Regulatory Commission (**KERC**) in Original Petition No. 66 of 2017, whereby the KERC held that the Appellants are not entitled to extension of time for commission of the solar power project which was approved by HESCOM(**Respondent No. 1**)after scrutiny by a three member technical committee under the Chairmanship of the Director (Technical), HESCOM. By its letter dated 09.10.2017, HESCOM informed KERC that a technical committee after detailed discussions, scrutiny of all the documents, and field reports sought from executive engineers, O & M divisions had decided to approve extension of up to 6 months from the date of SCOD.

**9.** The Appellant and HESCOM had entered into a Power Purchase Agreement (PPA) on 30.06.2015 for development of 3 MW solar power plant at Basargi village in Belgaum district.

**NOTE:** The PPA between the Appellant and HESCOM was based on the standard format PPA in respect of Solar Power Plants of 1 – 3 MW projects for Land Owners and institutions, that had been approved by the KERC by an order dated 16.06.2015. It may be noted that in terms of clause 2.5.3 of the standard format PPA, HESCOM has the authority to approve extension.

**NOTE 2:** KERC approved the PPA executed between the Appellant and HESCOM on 20.07.2015

**NOTE 3:** KPTCL by its order dated 21.12.2015 issued a guideline for grant of evacuation approval to smaller wind and solar generators. It is submitted that para 5 (g) of the said guidelines allows applicants to request for land on lease for terminal bay instead of acquiring land on their own, provided payment of lease charges are made. Pertinently, the Appellant had raised such a request to KPTCL for setting up of 11 KV Terminal Bay on 05.08.2016, but KPTCL raised the demand for lease charges only on 12.01.2017, that is after a delay of 4 ½ months, however, this is completely disregarded by KERC in the impugned order.

**10.** The Appellant No. 2 wrote a letter dated 03.12.2016 to HESCOM requesting for extension of time up to 6 months to commission its project in

terms of Article 2.5 and 8 of the PPA. Further, GOK in view of various representations made by similarly placed SPPs, issued a direction to all ESCOMs to constitute a committee and to examine each case on its own merits. HESCOM on 04.02.2017 allowed the Appellant's request for extension and granted it an extension of 6 months to commission its plant in terms of Articles 2.5 and 8 of the PPA, categorically stating that the said extension was without altering any other terms and conditions of the PPA.

**NOTE:** It may be noted that Article 4.2 of the PPA deals with '*Obligations of HESCOM*' which would be extracted later.

11. It is submitted that HESCOM under Article 4.2 (d)(iii) had acted in a reasonable manner while granting extension of time to the Appellants after scrutiny by a three member technical committee.

12. The KERC issued a general communication dated 16.03.2017 to all the ESCOMs, stating that ESCOMs could not allow extension of time beyond the SCOD without obtaining prior approval of the Commission, and that the same could be granted under extraordinary circumstances to be proved by the project developer. Further, KERC issued another communication dated 05.04.2017 to all ESCOMs directing them to advise the concerned SPD/SPV under Landowners/Farmer's Scheme to file a petition before the KERC for

seeking approval for any extension of COD granted to them by the ESCOMs.

**13.** Meanwhile, GOK issued a letter dated 23.06.2017 to the Secretary, KERC stating that the extensions granted by ESCOMs were due to Force Majeure and the same was done in accordance with the PPAs approved by the KERC, without altering the KERC approved tariff as agreed in the PPA. GOK hence requested the Commission to consider approval of the extension of SCOD. In reply to the aforementioned communication, the KERC by its letter dated 07.07.2017 informed GOK that the Commission has approved the grant of extension of time to developers to commission projects beyond original SCODs as per PPA, but the tariff applicable in each case shall be examined according to its own merits.

**14.** It was in this backdrop, the Original Petition No. 66 of 2017 was filed before the KERC by the Appellant. Various Original Petitions seeking similar reliefs were filed before the KERC by other similarly placed and affected parties.

**15.** The KERC passed the Impugned order holding that the Appellant was not entitled to extension of time to commission its project and had failed to prove Force Majeure events. Accordingly, the KERC held the Appellant to be entitled to a reduced tariff of Rs. 4.36/ unit under Article 5.1 of the PPA and

also liable to pay liquidated damages under Articles 2.2 and 2.5.7 of the PPA.

**16.** It is submitted that the Impugned Order is based on assumptions relating to the Appellant not being diligent in implementing the Project. In this regard, it is emphasized that the Appellant had been diligent in implementing the project and had placed all orders for solar modules, power conditioning units, mounting structures, cable and accessories etc. prior to the original scheduled commissioning date (SCOD) of the project as per the PPA.

**17.** It may be pertinent to note that the Appellant had started the process of obtaining the required documents in prescribed Form (Annexure – 1) as per Rule 106A under Section 95 of the Karnataka Land Revenue Act, 1964, **(KLRA)** for conversion of his land immediately after signing of the PPA. It is submitted that the intimation to pay fees was given to the Appellant only on 16.04.2016, despite the application for conversion having been made on 11.12.2015 i.e., after 125 days.

**18.** It is submitted that the KERC has erred holding that the Appellants are not entitled to extension of time as granted by HESCOM under the PPA and reducing the tariff from Rs. 8.40 per unit to Rs. 4.36 per unit. It is submitted that the Appellants are entitled to the tariff of Rs. 8.40 per unit in terms of the PPA dated 30.06.2015 and even otherwise, the present Appellant herein has

already spent a total cost of Rs. 19,21,99,695 Crore as on the date of commissioning of its project, therefore the reduced tariff is not sufficient to even met its loan commitments and stay afloat.

**NOTE:** The Ministry of New and Renewable Energy (**MNRE**) by its letter dated 09.04.2018 has requested GOK to request KERC to restore original tariff of Rs. 8.40 per unit for 1 – 3 MW Solar Power Plants commissioned under the Land Owned farmers Scheme of Karnataka under Section 108 of the Electricity Act, 2003.

**19.** It is also submitted that, in this Tribunal in “*Chamundeshwari Electricity Supply Company Ltd. v. Saisudhir Energy (Chitradurga) Pvt. Ltd.*” reported in 2018 SCC OnLine APTEL 65 had held that no formal issuance of Notice is required in cases of force majeure events.

**20.** Further, the issues involved in the present Appeal are covered by this Tribunal’s judgment dated 28.02.2020 in Appeal No. 340 of 2016 entitled “*Azure Sunrise Private Limited v. Chamundeshwari Electricity Supply Corporation Limited*” wherein this Tribunal has held that once extension of Scheduled Commissioning Date is approved by the concerned DISCOM, question of reduced tariff does not arise.

**21.** Furthermore, the present Appeal is squarely covered by this Tribunal's Order dated 14.09.2020 in Appeal No. 351 of 2018 entitled "*Chennamangathihalli Solar Power Project LLP v. Bangalore Electricity Supply Company Limited*", wherein this Tribunal had held as under:

*"9.1. Having regard to the deliberations and our analysis, as stated supra, we are of the opinion that there was nothing wrong on the part of KERC to suo motto interfere in the matter. As being a State Regulator, it has jurisdiction to look into affairs of ESCOMS in purchase and supply of powers in the larger interest of consumers. However, as the COD extension was granted under the signed PPA between the parties and after applying, due diligence in the matter considering all prevailing facts and matrix of events, the State Commission ought to have considered the same and approved so as to meet the ends of the justice. Needless to mention that the PPA's Terms & Conditions were duly approved by the State Commission which crystallised the rights of the parties."*

**22.** In light of the above, it is requested that this Tribunal may allow the Appeal relating to a small solar power project developed under land owners farmers category under the Solar Power Policy of the State of Karnataka, given that the delay of three months in commissioning the project has been on account of procedural delay by government authority/ intuitional level which were beyond the control of the Appellants.

**23.** The Additional Written Submissions were filed in addition to the Written Submissions filed by the Appellant on 21.09.2020. That these submissions were being filed only on a limited issue raised during arguments.

**24.** It is submitted that HESCOM having approved the extension of time, by 6 months for commissioning of the Appellant's solar power project by its letter dated 04.02.2017, after scrutiny of relevant documents by members of the technical committee constituted by HESCOM itself, are estopped from taking a contrary stand, more so, since there has been no justifiable reason put forth by HESCOM at any point of time for the change in its stand.

**25.** In *Shyam Telelink Ltd. v. Union of India*, reported in (2010) 10 SCC 165, the Hon'ble Supreme Court observed as under:

*"23. The maxim qui approbat non reprobate (one who approbates cannot reprobate) is firmly embodied in English common law and often applied by courts in this country. It is akin to the doctrine of benefits and burdens which at its most basic level provides that a person taking advantage under an instrument which both grants a benefit and imposes a burden cannot take the former without complying with the latter. A person cannot approbate and reprobate or accept and reject the same instrument."*

**26.** Also relevant to note is the Hon'ble Supreme Court's observation in *Suzuki Parasrampuriah Suitings Private Limited v Official Liquidator of Mahendra Petrochemicals Limited (in Liquidation) and Ors*, reported in (2018) 10 SCC 707:

*"12. A litigant can take different stands at different times but cannot take contradictory stands in the same case. A party cannot be permitted to approbate and reprobate on the same facts and take inconsistent shifting stands. The untenability of an inconsistent stand in the same case was considered in Amar Singh v. Union of India, observing as follows:*

*“50. This Court wants to make it clear that an action at law is not a game of chess. A litigant who comes to court and invokes its writ jurisdiction must come with clean hands. He cannot prevaricate and take inconsistent positions.”*

13. A similar view was taken in *Joint Action Committee of Air Line Pilots’ Assn. of India v DGCA*, observing:

*“12. The doctrine of election is based on the rule of estoppel ---- the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estopples in pais (or equitable estoppel) which is a rule in equity. ... Taking inconsistent pleas by a party makes its conduct far from satisfactory. Further, the parties should not blow hot and cold by taking inconsistent stands and prolong proceedings unnecessarily.”*

**27.** In the instant case, the impugned order dated 04.09.2018 passed by the KERC in OP No. 66 of 2017 also records as under:

*‘5) Upon Notice, the Respondent appeared through its learned counsel. Though, the case was adjourned on many occasions at the request of the Respondent (HESCOM) to file its Statement of Objections, the Respondent (HESCOM) has not filed the same. The Petitioners concluded their arguments. Finally, the learned counsel for the Respondent (HESCOM) submitted that, it would not specifically object to the pleas raised by the Petitioners and that the Respondent (HESCOM) would abide by the Orders of this Commission. Therefore, the arguments of the Respondent were taken as ‘concluded’. ...’*

**28.** In view of the above, it is submitted that the Respondent HESCOM cannot on the one hand approve the extension of time on the grounds of force majeure events, and not object to the Appellant’s pleas before the Commission, but on the other hand, in the appellate proceedings before this Tribunal resile from their own act of granting extension by taking a

diametrically opposite view. The Respondents ought not to be permitted to approbate and reprobate in this manner.

**29.** It is also reiterated that the present Appeal is similar on facts and is squarely covered by this Tribunal's Order dated 14.09.2020 in Appeal No. 351 of 2018 titled "*Chennamangathihalli Solar Power Project LLP v. Bangalore Electricity Supply Company Limited*", wherein this Tribunal had held as under:

*"9.1. Having regard to the deliberations and our analysis, as stated supra, we are of the opinion that there was nothing wrong on the part of KERC to suo motto interfere in the matter. As being a State Regulator, it has jurisdiction to look into affairs of ESCOMS in purchase and supply of powers in the larger interest of consumers. However, as the COD extension was granted under the signed PPA between the parties and after applying, due diligence in the matter considering all prevailing facts and matrix of events, the State Commission ought to have considered the same and approved so as to meet the ends of the justice. Needless to mention that the PPA's Terms & Conditions were duly approved by the State Commission which crystallised the rights of the parties."*

**30.** That the Appellant submits that the Article 6 of the PPA dated 30.06.2015 deals with the issue of billing and payment. Article 6.4 of the PPA categorically provides for Late Payment Surcharge, which is being extracted below for ready reference:

***"6.4 Late Payment Surcharge:** In the event of delay in payment of a monthly bill being made by HESCOM 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.”*

**31.** It is further submitted that this Tribunal’s Judgment in *Lanco Amrkantak Power Limited v Haryana Electricity Regulatory Commission* dated 22.05.2019 in Appeal No. 308 of 2017 on payment of interest and the time value of money wherein this Tribunal had held as under:

“93. . . .

*iv) Therefore, for equity and restitution payments made at a later stage, of the amount, due in the past, must be compensated by way of appropriate rate of interest so as to compensate for the loss of money value. This is a proven concept of time value of money to safeguard the interest of the receiving party.*

*v) The Appellant has placed reliance on several judgments passed by this Tribunal in several similar matters wherein it has been clearly brought out that the developers are entitled to interest on the differential amount due to them as a consequence of redetermination of tariff. It has been clarified in various judgments that the interest is not a penal charge if it is fixed according to commercial principles. It is only compensation for the money denied at the appropriate time.*

. . .

*vii) The Respondent No. 3 have submitted that interest cannot be paid until the amount is crystallized. It is pertinent to note here that though the amount was crystallized by the State Commission vide their Impugned Order but the most important fact to be kept in mind is that the State Commission redetermined the tariff from the date of commencement of supply which clearly shows that the due date is the date of commencement of supply. In such matters the crucial point for consideration is that interest is not a penalty or punishment at all. But, it is the normal accretion on capital. Equity demands that the paying party should not only pay back the principal amount but also the interest thereon to the recipient and therefore the argument of the Respondent does not hold ground and needs to be rejected. . . .”*

**32.** Therefore, in terms of Article 6.4 of the PPA read with the abovementioned Judgment of this Tribunal, the interest amount is intended

to compensate the developer, who was paid a lower tariff than what it was entitled to, the Appellant is entitled to Late Payment Surcharge from the date of commissioning of the project, i.e. 31.03.2017 onwards as HESCOM has been paying the Appellant at the reduced tariff rate of Rs. 4.36/ kwh as against the PPA tariff rate of Rs. 8.40/kwh.

**33.** In light of the above facts and arguments, it is prayed that Appeal be allowed as prayed for.

**34. Mr. Shahbaaz Husain, learned counsel for the Respondent No. 1 has also brought on record written arguments for our consideration :-**

**A. Jurisdiction of Karnataka Electricity Regulatory Commission (KERC) to pass the Impugned Order**

**35.** The contention of the Appellant that the KEREC is not a party to the Power Purchase Agreement (PPA) and thus, its approval for extension of time is not mandated under law is wholly erroneous and bad in law.

**36.** In the instant case, the Electricity Act, 2003 under Section 86 (1) (b) requires the KEREC to regulate electricity purchase and procurement process of the distribution licenses including the price at which electricity shall be procured from the generation companies or licenses or from other sources through agreements for purchase of power for distribution and supply within the state. The purport of Section 86(1)(b)

of the said act is abundantly clear in empowering the KERC to regulate the PPA and the clauses there of in such manner as it may deem fit.

**37.** The Commission has the exclusive jurisdiction to determine the tariff payable for purchase of energy by distribution license. Therefore, any agreement or contract between the distribution licensees and the generator can be subject to the scrutiny by the Commission to ascertain the reasonability and validity of the tariff payable by the generators.

**38.** The Hon'ble Supreme Court has held that the State Commission has powers to revisit the tariff of a concluded PPA, should the same be in furtherance of public interest. In **Gujrat Urja Vikas Nigam Limited Vs. Tarini Infrastructure Ltd. And Ors.**, reported in **AIR 2016 SC 5580**, the Hon'ble Supreme Court has settled this issue by ruling that:

*“10.....In the Present case, admittedly, the tariff incorporated in the PPA between the generating company and the distribution licensee is the tariff fixed by the State Regulatory Commission in exercise of its statutory powers. **In such a situation it is not possible to hold that the tariff agreed by and between the parties, though finds mention in a contractual context, is the result of an act of volition of the parties, which can, in no case, be alternate except by mutual consent.** Rather, it is a determination made in the exercise of statutory powers which got incorporated in a mutual agreement between the two parties involved.*

*15. As already noticed, Section 86(1)(b) of the Act empowers the State Commission to regulate the price of sale and purchase of electricity between the generating companies and distribution licensees through agreements for power produced for distribution and supply. As held by this Court in Sri Venkata Setaramanjaneya Rice & Oil Mills and Ors.Vs. State of A.P. (supra), K. Ramanathan Vs. State of T.N. & Anr. (supra) and D.K.Trivedi & Sons Vs. State of Gujarat & Ors. (supra) **the power of regulation is indeed of wide import.***

The following extracts from the reports in the above cases would illuminate the issue.

**Sri Venkata Setaraman Janeya Rice & Oil Mills and Ors. Vs. State of A.P. (supra)**

*“20. Then it was faintly argued by Mr. Setalvad that the power to regulate conferred on the respondent by Section 3(1) cannot include the power to increase the tariff rate; it would include the power to reduce the rates. This argument is entirely misconceived. **The word “regulate” is wide enough to confer power on the respondent to regulate either by increasing the rate, or decreasing the rate, the test being what is it that is necessary or expedient to be done to maintain, increase, or secure supply of the essential articles in question and to arrange for its equitable distribution and its availability at fair prices.***

.....”

**K. Ramanathan Vs. State of T.N. & Anr.(supra)**

*“18. The word “regulation” cannot have any rigid or inflexible meaning as to exclude “prohibition”. The word “regulate” is difficult to define as having any precise meaning. It is a word of broad import, having a broad meaning, and is very comprehensive in scope. There is a diversity of opinion as to its meaning and its application to a particular state off acts, some courts giving to the term a somewhat restricted, and others giving to it a liberal, construction. The different shades of meaning are brought out in Corpus Juris Secundum, Vol. 76 at p.611:*

*“„Regulate” is variously defined as meaning to adjust; to adjust, order, or govern by rule, method, or established mode; to adjust or control by rule, method, or established mode, or governing principles or laws; to govern; to govern by rule; to govern by, or subject to, certain rules or restrictions; to govern or direct according to rule; to control, govern, or direct by rule or regulations.*

*„Regulate” is also defined as meaning to direct; to direct by rule or restriction; to direct or manage according to certain standards, laws, or rules; to rule; to conduct; to fix or establish; to restrain; to restrict.” See also: Webster’s Third New International Dictionary, Vol. II, p. 1913 and Shorter Oxford Dictionary, Vol. II, 3rd Edn., p. 1784*

**16. All the above would suggest that in view of [Section 86\(1\)\(b\)](#) the Court must lean in favour of flexibility and no tread inviolability in terms of the PPA insofar as the tariff stipulated therein as approved by the Commission is concerned. It would be a sound principle of interpretation to confer such a power if public interest dictated by the surrounding events and circumstances require are view of the tariff.”**

**39.** The Hon'ble Supreme Court in the above judgment has laid out the ratio that the State Commission under Section 86(1)(b) of the Electricity Act, 2003 is empowered to regulate the tariff of a concluded PPA if the same is in warrant in public interest even in the absence of any such powers being vested in the State Commission in the PPA. In the instant case, the PPA (Article 5.1) itself provides for a varied KERC (if its lower than Rs. 8.40/unit) in the event of delay in commissioning of project. Admittedly, there is a delay of more than three months in the commissioning of the project and the varied KERC tariff as on the date of commissioning of the project was Rs. 4.36/unit, which is lower than 8.40/unit; thus, becoming applicable tariff.

**40.** A lower tariff is always in the best interest of public as the tariff being paid by the Respondent gets passed on to the consumers. Wherefore, in conformity with the provisions of PPA, the KERC had the lawful right to regulate the tariff in the instant case.

**41.** The Appellant has erroneously relied on the judgments of Hon'ble Supreme Court in Gujrath Urja Vikas Nigam Limited v EMCO Ltd and Anr (2016 (2) SCALE 75) And Bangalore Electricity Supply Company v. Konark Power Projects Ltd. 2015 (5) SCALE 711 to state that a tariff arrived at in a concluded PPA cannot be revisited. The Hon'ble Supreme Court in above quoted judgement - **Gujrat Urja Vikas Nigam Limited Vs. Tarini**

**Infrastructure Ltd. And Ors.**, reported in **AIR 2016 SC 5580**, has distinguished the said judgments relied upon by the Appellant.

**42.** Therefore, it is a settled provision of law that a tariff under PPA can be revisited by the KERC in the larger public interest.

**43.** The Hon'ble Supreme Court in **All India Power Engineer Federation & Ors. Vs. Sasan Power Ltd. &Ors. Etc., Civil Appeal No. 5881-82/2016, dated 08.12.2016** held that to uphold public interest; the KERC is the only body that can adjudicate on tariff matters. The following was held:

*“All this would make it clear that even if a waiver is claimed of some of the provisions of the PPA, such waiver, if it affects tariffs that are ultimately payable by the consumer, would necessarily affect public interest and would have to pass muster of the Commission under Sections 61 to 63 of the Electricity Act. This is for the reason that what is adopted by the Commission under Section 63 is only a tariff obtained by competitive bidding in conformity with guidelines issued. If at any subsequent point of time such tariff is increased, which increase is outside the four corners of the PPA, even in cases covered by Section 63, the legislative intent and the language of Sections 61 and 62 make it clear that the Commission alone can accept such amended tariff as it would impact consumer interest and therefore public interest.”*

**44.** Delay in commissioning of the project has an impact on the tariff applicable on the supply of power from the power plant and the Commission has the exclusive jurisdiction to determine the tariff or supply of electricity to a distribution Licensee. The following facts will clearly establish the public interest involved in the instant case:

- (a) The State Commission vide its order dated 10/10/2013 had fixed solar tariff at Rs. 8.40/- for projects commissioning on or after 1/04/2013. Thereafter, the same was reduced to Rs.6.51 vide its order date 30/07/2015 for projects commissioning on or after 1/09/2015. The State Commission further reduced the tariff to Rs.4.36 vide its order dated 12/04/2017 for projects commissioning on or after 1/04/2017. The State Commission has further reduced the tariff to Rs.3.05 vide its order dated 18/05/2018 for projects commissioning after 01/04/2018.
- (b) The above tariff orders of the State Commission indicate a downward trend in the solar tariff on account of advancement in technology and reduction in capital cost for solar projects. Wherefore, if a generator has delayed in commissioning the project, the cost of such project is bound to substantially come down as the market capital rate for such projects has been declining year on year. The cost of the project, on account of delay, will be much lower than the cost that was anticipated for such projects at the time of entering into PPA. In order to cater to this trend, the PPA has a clause for lower varied tariff as on the date of commissioning.

(c) Financial assistance was sought and investment was made in 2016 by the Appellant; thus, incurring much lesser capital cost than what was anticipated in the 2013 tariff order of KERC providing tariff of Rs. 8.40. Wherefore, such reduction of cost shall in all fairness be passed on to the consumers by reducing the tariff under Article 5.1 of the PPA.

**45.** Thus, the Commission was justified in reducing the tariff.

**46.** The Appellant's averment that the Respondent no.1 has agreed to extend SCOD and hence there cannot be a dispute between the Appellant and Respondent no.1, requiring adjudication of KERC is wholly erroneous and incorrect.

**47.** The Respondent no.1 being a licensee of the KERC is duty bound to follow the directions of KERC. Also, under Section 86(1) (b), the KERC being the regulator of the terms of PPA, is empowered to issue directions to Respondent no.1 in best interest of public.

**C. Delay in Commissioning of the Project is directly attributable actions and omissions of the Appellant**

**48.** The contention of the Appellant that the delay in commissioning of the project was caused by Government Authorities is granting land conversion

order and evacuation approval is factually incorrect.

**49.** The PPA was executed on 30.06.2015, which also is the effective date of PPA. The Appellant was duty bound to complete the project and commission the same within 18 months of the effective date, i.e., 31.12.2016. However, the project came to be commissioned on 31.03.2017 with a delay of more than three months. The following table will explain the main reasons on account which the delay occurred.

Sl. No.	Event	PPA edate (effective date)	Date of Application	Delay	Reference
1	Application for 11 E Sketch (Land area Survey map)	30.06.2015	29.09.2015	3months	Para 7 (L) of Appeal
2	Application for Evacuation of power	30.06.2015	20.10.2015	4months	Para 7 (0) of Appeal
3	Application for conversion of land	30.06.2015	11.12.2015	5months	Annexure E
5.	Formation of SPV (appellant)	30.06.2015	04.02.2016	7 months	List of Events

**50.** Had the Appellant been diligent in not causing the above tabled delays, the project would have commissioned well within the Schedule Commercial Operation Date (SCOD), which fact also proves that the Government authorities or the Respondent has not caused undue delay in performing their duties or obligations.

**51.** Karnataka Power Transmission Corporation Limited (KPTCL) is the authority to grant evacuation approval. The Appellant has alleged delay in

granting of such approval; however, the KPTCL has not been made a party to these proceedings and thus this case is bad in law for non-joinder of parties. The State Commission is right in ruling that 5 months in granting power evacuation approval after following the due process is reasonable and cannot be termed as a delay on the part of KPTCL or this Respondent.

**52.** Respondent highlights the fact that the Appellant submitted the application for Grid connectivity and power evacuation approval on 20.10.2015, which is after nearly 4 months of execution of the PPA.

**53.** Furthermore, the Appellant has not produced any document or detail to show that efforts were made on its part to follow up with the concerned authorities and expedite the process.

**54.** Furthermore, the appellant has approached the commission with unclean hands and by suppressing material facts regarding the dates on which the application made to obtain certain documents to satisfy the conditions precedent. The State Commission has rightly noted the same at para 10 (d) of its impugned order

**55.** The Appellant has also violated Article 2.3 of the PPA which requires the Appellant to intimate the Respondent on monthly basis about the progress being made in achieving conditions precedent.

## **Force Majeure does not attract**

**56.** The Appellant falsely contends that the delay in achieving SCOD is on account of force majeure events and hence the same shall be condoned by extending the SCOD. As explained supra, the delay in achieving SCOD is directly attributable to the delays of the Appellant in applying for various permissions.

**57.** Article 8 of the PPA provides for the force majeure events and also the conditions for their applicability.

**58.** The Appellant has grossly violated the above clause for the following reasons:

- (a) The above clause reveals that the Appellant had to give notice of force majeure events immediately upon its occurrence. In the instant case, no such notice is forthcoming upon the occurrence of any of the purported/alleged Force Majeure Event.
- (b) As established supra, the delays have been caused by pure negligence on the part of the Appellant
- (c) The Appellant has not provided any notice on resumption of performance after the purported Force majeure Events.

(d) The Force Majeure clause in no way excuses the obligations of a party that are prior to the occurrence of Force Majeure Events. In the instant case, the Appellant admittedly has horribly failed in reasoning the delays in filing various applications before the Government Authorities, which delay, as provided in the above clause, cannot be excused.

**59.** Therefore, the Appellant's delay in execution of the project cannot be condoned.

**B. State Government Recommendation**

**60.** The Appellant's submission that a three-member committee of the Government of Karnataka (GOK) has ruled that the Appellant is entitled to extension of time to commission the project and hence, the SCOD shall stand extended, is against the principles and basic structure of the Electricity Act, 2003.

**61.** Under the said Act, the government has no jurisdiction to decide on the tariff issues and the same falls within the exclusive jurisdiction of KERC (section 62 r/w 86 (1) (b) of the Act).

**62.** Admittedly the State Government Policies have been subjected to the tariff determined by the State Commission from time to time. As established

supra, the Commission being the custodian of public interest and the authority to determine tariff has a right to decide on the quantum of tariff in conformity with the provisions of PPA. Moreover, the tariff determination is the exclusive domain of State Commission and the State Policies cannot have a bearing on the tariff determined by the State Commission.

**63.** The GOK has no role in the tariff matters and has not evaluated the situation from the Electricity Act's point of view, which provides for a low and just tariff to consumers

**64.** In light of the above submissions and facts, they have prayed that this Tribunal be pleased to dismiss the above appeal in its entirety by imposing costs on the Appellant.

**65.** We have heard learned counsel appearing for the Appellant and learned counsel for the Respondents at considerable length of time and we have gone through carefully their written submissions/ arguments and also taken note of the relevant material available on records during the proceedings.

**66.** Based on the pleadings, oral arguments and written submissions, following points arise for our consideration:

- (A) **“Whether the State Commission had jurisdiction to entertain the Petition?”**
- (B) **“Whether the Respondent Commission was justified in passing the impugned order reducing the agreed tariff between the parties?”**

67. So far as point no. 1 is concerned, in all Appeals filed by various Developers pertaining to Farmers’ Scheme, the Appellants have raised this issue. We have already opined that the Respondent Commission being the authority to determine the tariff, if it adversely affects the public interest, it can interfere. Therefore, we opine that the Respondent Commission being the only adjudicatory body to determine the tariff has jurisdiction to adjudicate the petition.

68. The relevant provisions in PPA necessary for consideration of the appeal are as follows:

- “(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 HESCOM/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 HESCOM 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 HESCOM and achieve financial closure and provide a certificate to HESCOM from the lead banker to this effect;*
  - (b) *All Consents, Clearances and Permits required for supply of power to HESCOM as per the terms of this Agreement; and*
  - (c) *Power evacuation approval from Karnataka Power Transmission Company Limited or HESCOM, as the case may be.*

**2.1.2** ***SPD shall make all reasonable endeavors to satisfy the Conditions Precedent within the time stipulated and HESCOM 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 HESCOM 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 HESCOM 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 HESCOM or due to Force Majeure, the SPD shall pay to HESCOM 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, HESCOM 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 HESCOM, simultaneously with the execution of this Agreement, on irrevocable and revolving bank guarantee from a scheduled bank acceptance to HESCOM 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 HESCOM in the form of bank guarantees in favour Managing Director of the HESCOM 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 2015/4dated 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 HESCOM as provided in clause 2.5.7, or failure to meet the Conditions Precedent by the SPD, HESCOM 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 HESCOM 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, HESCOM 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 HESCOM 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 HESCOM 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 HESCOM through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the SPD or HESCOM, or till such time such Event of Default is rectified by HESCOM.*
- 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 HESCOMs.***
- Subject to the other provisions of this agreement, if the SPD is unable to commence supply of power to HESCOM by the scheduled commissioning date, the SPD shall pay to HESCOM,*

*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 HESCOM 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 /HESCOM.*
- (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/HESCOM, 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/HESCOM, 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 HESCOM as per Clause 5.2.*

**4.2 Obligations of HESCOM:**

**HESCOM 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) *HESCOM 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 violative 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 HESCOM 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 HESCOM 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 HESCOM 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."*

**"10.3 Dispute Resolution**

**10.3.1** : *If any dispute is not settled amicably under clause 10.2 the same shall be referred by any of the parties to the KERC for dispute resolution in accordance with the provisions of the Electricity Act, 2003."*

69. Then coming to point no. 2, the following list of dates are relevant for analyzing the contentions raised by both the parties in order to opine whether there was force majeure event which prevented the Appellants to commission the project within the prescribed timeline:

- (a) 16.03.2015 – Solar Developer-the 2<sup>nd</sup> Respondent submitted application which was approved for allotment of solar project and a letter was issued.

- (b) 16.06.2015 – Standard format of PPA submitted by KREDL was approved by KERC.
- (c) 30.06.2015 – SPD and HESCOM entered into Power Purchase Agreement (PPA) for supply of power from 3 MWs solar plant situated at Savadatti Taluk.
- (d) 20.07.2015 – KERC approved the PPA dated 30.06.2015
- (e) 20.10.2015 – Application for Grid connectivity and evacuation of power was submitted.
- (f) 11.12.2015 – Application for land conversion was submitted to the Deputy Commissioner, Belagavi.
- (g) 26.01.2016 – Approval of power evacuation was granted.
- (h) 04.02.2016 – SPV-1<sup>st</sup> Appellant was established in terms of guidelines.
- (i) 16.04.2016 – Conversion fee payable by the Appellant was determined and the same was paid on 22.04.2016
- (j) 28.04.2016 – Assignment Deed between SPD with 1<sup>st</sup> Appellant was executed assigning all rights and liabilities of the PPA.

- (k) 10.05.2016 – Deputy Commissioner passed conversion orders converting project land in to non-agricultural land.
- (l) 31.05.2016 – Provisional approval for evacuation of the power from the proposed solar project was granted.
- (m) 06.08.2016 – Appellant executed Supplemental PPA with HESCOM.
- (n) 11.08.2016 – Final approval for evacuation from the solar plant in question was granted.
- (o) 07.10.2016 – KERC approved Supplemental PPA
- (p) 13.10.2016 & 16.11.2016 – Progress achieved in respect of the solar plant was furnished.
- (q) 03.12.2016 – Request for extension of time for commissioning the solar project for six months was submitted.
- (r) 26.12.2016 – CEIG approved drawings pertaining to the electrical installation of the solar plant.
- (s) 04.02.2017 – HESCOM approved extension of time for completing solar power project by six months.

- (t) 13.04.2017 – HESCOM directed the Appellant to file a Petition before the State Commission for approval of extension of time.

**70.** According to the Appellants, on account of delay in securing approvals from various authorities there was loss of considerable time though they were not responsible. To secure several approvals required for commissioning the project, they had to seek for extension of time for commissioning the project on the ground of force majeure, but the Respondent Commission has not exercised its judicious mind in appreciating the facts on record by passing the impugned order; therefore, it has to be set aside.

**71.** According to the Respondent HESCOM's counsel, if only the Appellants were diligent in approaching various authorities to secure the required approvals/sanctions for commissioning the project, there would not have been delay to commission the project, therefore the impugned order is sustainable.

**72.** Though according to the terms of PPA, the effective date for implementing the PPA is the date of signing of the PPA between SPD and HESCOM, this Tribunal in various Appeals has opined that the effective date has to be the date on which the PPA is approved and not when the PPA was executed between the parties, since PPA becomes implementable only

when it is approved. Therefore, since the PPA in this case was approved on 20.07.2015, the effective date would be by or before 20.01.2017.

**73.** In terms of PPA, the total timeline to commission the solar project would be 18 months from 20.07.2015 i.e., by or before 20.01.2017.

**74.** It is seen from terms and conditions of PPA i.e., Clause 2.5 that the Respondent HESCOM could extend time for completion of the project up to a maximum period of six months. This clause in the PPA was approved by the Respondent Commission. Similarly the standard format of PPA envisages such clause.

**75.** The dates referred to above indicate that evacuation of power approval was submitted on 20.10.2015. The final approval of evacuation of power from the solar plant in question was granted on 11.08.2016, almost after 10 months. Approval of Supplemental PPA was on 07.10.2016.

**76.** Appellant was informing the progress of the solar power project from time to time to the Respondent HESCOM. After realizing the delay in getting several approvals, the Appellant sought extension of time for commissioning the solar project by six months on 03.12.2016. This extension of time for COD was based on force majeure event i.e., delay in obtaining several approvals required for commissioning of the solar project. In the above case, it is seen that the design and drawings of the electrical installations

came to be approved by CEIG only on 26.12.2016. Even if we take effective date as 20.07.2015, the project had to be completed by 20.01.2017. Having realized the delay caused to obtain several approvals required for commissioning the solar project of the Appellant, extension of time was sought on force majeure event. The HESCOM only after being satisfied with the reasons explained by the Appellants, extended time by six months in terms of Article 2.5 of PPA. Once commissioning date of the project is extended, automatically SCOD gets extended by six months i.e., 20.01.2017.

**77.** It is seen that approval of drawings pertaining to electrical installations of the solar plant comes in to picture only after final approval pertaining to evacuation of power which happened on 11.08.2016.

**78.** We notice from the pleadings and written submissions that the Appellant got demand for lease charges from KPTCL only on 12.01.2017 after final approval for evacuation of power on 11.08.2016.

**79.** It is seen that the project came to be commissioned on 31.03.2017, though the SCOD would be 20.01.2017. The contention of the Appellant is that though they submitted applications for various approvals approaching different authorities, considerable time was spent waiting for these approvals. With one approval from one authority, definitely the Appellant

would not be in a position to establish the solar plant. Each approval has significant impact on the commissioning of the project. Unless land conversion approval, evacuation of power approval to get Grid connectivity and so also safety certificate by CEIG are in place, the ESCOM concerned will not consent for commissioning of the solar plant. The land upon which the solar project has to be put up must be converted from agricultural use to non-agricultural use. Only after such conversion, work on the land pertaining to the installation of the machinery and equipment can start. Unless there is approval for Grid connectivity, even if the solar plant is ready there cannot be evacuation of power. This evacuation of power is only possible after the seal of the CEIG certifying the safety of the solar plant. Only after such certificate, the Appellant can seek for Grid connectivity.

**80.** The project in question was evolved by the State Government for extending benefit to the farmers of the lands under the scheme to establish 1 to 3 MWs units. Since farmers were not aware of the procedure to obtain these approvals, SPVs are permitted to be established. Once SPV is established, again there has to be assignment of rights and liabilities. Again Supplemental PPA has to come in to existence. If all these approvals are in order, then only the financier would finance the project. We cannot expect the farmers to invest huge amounts to establish solar plant by funding themselves. Certainly they need loans from the banks.

**81.** Having regard to the fact that securing these approvals from various instrumentalities of the Government/Government offices, 18 months period was envisaged to complete the project. Having regard to the fact that there could be circumstances or events which could delay the happening of COD within the original time slot, six months' time for extension of commissioning the project at the level of concerned distribution licensee was envisaged. For events beyond that, they had to approach the Respondent Commission.

**82.** The above procedure was envisaged keeping in mind the possibility of delay happening on account of laches on the part of the offices of Governmental Instrumentalities, though Solar Developer or SPV do not contribute to such delay. Unforeseen happening could possibly delay commissioning of the project, therefore force majeure event clauses were introduced in the terms of PPA as stated above. These force majeure clauses definitely take within its fold, the delay caused by offices of the Government or Governmental Instrumentalities.

**83.** Arguments of the Respondent HESCOM that KPTCL is not a party to the PPA, therefore, the delay on their part cannot come to the aid of the Appellant cannot be accepted. KPTCL is also a public utility and instrumentality of the Government. Therefore, even if the project is delayed on account of KPTCL in not issuing approval for evacuation of power and

Grid connectivity within reasonable time, it amounts to event of force majeure.

**84.** The very scheme is framed as Farmers' Scheme. The policy was meant to create opportunities to land owning farmers. Project instead of benefitting them should not cause damage to them. We have seen that though a deemed land conversion was envisaged in the scheme, there was lot confusion so far as deemed conversion. One cannot ignore the fact that approaching these different institutions/Instrumentalities of Government with applications and obtaining approvals in time take considerable time.

**85.** The Respondent HESCOM contends that there was delay in submitting applications to various departments by the Appellant. One has to analyze the circumstances in a holistic approach is whether there was negligence on the part of the Developer to approach and obtain these approvals? It cannot be said that the considerable time lapsed in obtaining these approvals from various Instrumentalities of the Government was at the instance of the Appellants.

**86.** As stated above, the evacuation of power could be achieved only in the month of March, 2017 after obtaining safety approval certificate from CEIG. Having invested huge amounts taking loans from banks/financial

institutions, one cannot even imagine that the Developer will be negligent in pursuing his project.

**87.** Having regard to all these facts, both the State Government and MNRE recommended that so far as Farmers' Scheme, there has to be extension of time on account of force majeure event.

**88.** We are aware that number of appeals are filed pertaining to solar projects in Karnataka under Farmers Scheme. We also note that in some cases, the Application for conversion of agriculture land was submitted two or three months or may be six months after approval of PPA. We take judicial notice as discussed in Appeal No 160 of 2020 (**Clearsky** matter) that having regard to the nature of the solar plants to be developed by the farmers between 1 MW to 3 MWs, which required land conversion orders from revenue authorities, which has elaborate process consuming lot of time, the State Government in fact opined that there would be deemed conversion for such solar projects. However, in spite of such expression, the guidelines to be followed by the revenue authorities for granting deemed conversion orders in favour of the solar plant developers were not clear and though the farmers approached revenue department, the concerned officers seem to have replied that they have not received guidelines in that regard. We also notice that even the guidelines came to be issued much later. Though this

fact was not pleaded in all the appeals, but the guidelines in this regard issued by the State Government is common which was delayed and not intimated to the concerned authorities, we are of the opinion that such confusion pertaining to deemed conversion procedure has also led to delay in either approaching the concerned revenue authority for conversion of agriculture land or even if they had approached, the conversion order was granted with much delay.

**89.** Apparently, the scheme was meant to benefit small land holding farmers, who could establish solar plants between 1 MW to 3 MWs. This also definitely requires business prudence apart from minimum knowledge in the field concerned. As per the policy, the establishment of solar plant was to be in the agricultural land. On account of restrictions to use agricultural land for non-agricultural purpose, conversion of agricultural land use is a must. In terms of Karnataka Revenue Act, it has laborious process to get conversion of agricultural land into non-agricultural one. To establish solar power plant, it is not just conversion of agricultural land permission, but several other approvals/consent/permissions were required.

**90.** Till SPV was established, it was the individual Appellant i.e., SPD who had to run from office to office to secure required approvals/consents. Having regard to laborious process to secure these permissions from various

Government instrumentalities, it would have been a wise decision to have infrastructure under one roof (like single window agency) to get all these clearances which would have saved lot of time for the establishment of these small solar power plants in question. Since either the SPD or SPV had to run from office to office situated at different places to secure approval and permission which would not have been possible to secure on any one particular day also seems to have caused hardship and delay in procuring the approvals, be it land conversion or power evacuation and grid connectivity or safety certificate from CEIG etc. To apply for conversion of land to non-agriculture purpose itself, more than 13 documents are required, which have to be secured not from single place but various departments of Government. The scheme which was expected to be a boon to the farmers seems to have become a bane.

**91.** The very same set of facts so far as force majeure convinced HESCOM and three member Committee constituted by the State Government and MNRE. However, the same set of Force Majeure Events could not convince the Respondent Commission. The Respondent Commission being a neutral body is expected to discharge its functions in a judicious manner. If delay has occurred on account of reasons beyond the control of the Appellant, the Appellant cannot be punished. The intention of

the Government to assist the farmers should not become otherwise a weapon to punish them.

**92.** We notice that HESCOM at no point of time expressed its doubt with regard to genuineness of the Appellant pursuing various departments to issue the approval/sanction concerned. After accepting the reasons for the delay, they extended time for commissioning of the project. Now it is not open to HESCOM to totally take a u-turn and question the Appellants in this regard. Having extended the time for commissioning the project, it is not fair on the part of the Respondent HESCOM to take a different stand now.

**93.** In terms of the Articles and various Clauses especially Clause 6.4 of the PPA, if the amounts are due, not paid in time, the Solar Developer is entitled for late payment surcharge. Since the delay was not on account of the Appellants and they did commission the solar plant within the extended SCOD, we are of the opinion that they are entitled for late payment surcharge. Similarly, since there was no deficit on the part of the Appellants in any manner, they are not liable to pay Liquidated Damages or any other damages.

**94.** Having regard to the Clause 8.3 of the PPA, we are of the opinion that viewed from any angle, the impugned order cannot be sustained. Hence, we pass the following order:

**ORDER**

- (a) The Appeal is allowed and the impugned order is set aside.
  - (b) The Appellant is entitled for Rs.8.40 per unit in terms of PPA from the date of commissioning the solar power plant.
  - (c) The 1<sup>st</sup> Respondent - HESCOM to pay the difference of the tariff paid per unit from the date of commissioning of the plant along with late payment surcharge in terms of PPA within one month from today.
  - (d) The Appellants are not liable to pay any damages and so also liquidated damages.
95. Pending IAs if any, shall stand disposed of.
96. No order as to costs.

Pronounced in the Virtual Court through video conferencing on this the  
**12<sup>th</sup> day of August, 2021.**

**(Ravindra Kumar Verma)**  
**Technical Member**

**Justice Manjula Chellur)**  
**Chairperson**

**REPORTABLE / ~~NON-REPORTABLE~~**

*pr/tpd*