APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)

APPEAL NO. 119 OF 2021
APPEAL NO. 51 OF 2021 & IA NO. 165 & 699 2021,
APPEAL NO. 338 OF 2022 & IA NO. 1231 OF 2021
&
APPEAL NO. 339 OF 2022 & IA NO. 1235 OF 2021

Dated : 28.11.2022

Present: Hon'ble Mr. Justice R. K. Gauba, Officiating Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member

Appeal No. 119 of 2021

IN THE MATTER OF:

National Solar Energy Federation of India
702, Chiranjiv Tower, 43,
Nehru Place, New Delhi – 110019 **… Appellant**

Vs.

1. Tamil Nadu Electricity Regulatory Commission
(Through its Secretary)
3rd Phase, Thiru Vi Ka Industrial Estate,
SIDCO Industrial Estate, Guindy,
Chennai, Tamil Nadu – 600032

2. Tamil Nadu Generation and Distribution Corporation Limited (Through the Chairman)
No. 144, Anna Salai, Chennai,
Tamil Nadu – 600002

3. Chief Engineer
Non-Conventional Energy Sources,
Tamil Nadu Generation and Distribution Corporation Limited
2nd Floor, Eastern Wing, No. 144,
Anna Salai, Chennai,
Tamil Nadu – 600002 **…. Respondents**

Counsel for the Appellant(s) : Mr. Sanjay Sen, Sr. Adv.
Mr. Shri Venkatesh
Mr. Bharath Gangadharan
Mr. Nihal Bhardwaj

Mr. Kartikay Trivedi
Mr. Rakesh Shah
Mr. Ashutosh Kumar Srivastava
Mr. D. Bajaj
Ms. Raksha Agrawal
Ms. Mehak Verma
Mr. Suhael Buttan
Mr. Abhiprav Singh
Mr. Anant Singh
Mr. Abhishek Nangia
Mr. Rishab Kapur
Mr. Aditya Ajay

Counsel for the Respondent(s) : Mr. Basava Prabhu S. Patil, Sr. Adv.
Ms. Anusha Nagarajan
Mr. Rahul Ranjan for R-2 & 3

APPEAL NO. 51 OF 2021 & IA NO. 165 & 699 2021

IN THE MATTER OF:

Crescent Power Limited
No. 6, Church Lane, 1st Floor,
Kolkata – 700 001. **… Appellant**

Vs.

1. Tamil Nadu Electricity Regulatory Commission,
   Through its Secretary,
   4th Floor, SIDCO Corporate Office Building.
   Thiru Vi Ka Industrial Estate,
   Guindy, Chennai-600 032

2. Tamil Nadu Generation and Distribution Corporation Limited
   Through its Chairperson & Managing Director
   6th Floor, Eastern Wing,
   144, Anna Salai, Chennai- 600002

3. The Chief Engineer
   (Non-Conventional Energy Sources)
   2nd Floor, Eastern Wing,
   144, Anna Salai,
   Chennai- 600 002 **…. Respondents**

Counsel for the Appellant(s) : Mr. Sanjay Sen, Sr. Adv.
Mr. Sanjeev K. Kapoor
Ms. Divya Chaturvedi
Mr. Saransh Shaw
Mr. Ruth Elwin
Ms. Srishti Rai
Ms. Mandakini Ghosh
Mr. Neha Dabral
Mr. Jai Dhanani

Counsel for the Respondent(s) : Mr. Basava P. Patil, Sr. Adv.
Ms. Anusha Nagarajan
Mr. Rahul Ranjan for R-2 & 3

APPEAL NO. 338 OF 2022 & IA NO. 1231 OF 2021

IN THE MATTER OF:

M/s. B.S. Apparel
Prop B V Vijayaragavan
No.23-27, SIDCO … **Appellant**
Mudalipalayam
Tirupur – 641606.

Vs.

1. Tamil Nadu Electricity Regulatory Commission
(Through its Secretary)
4th Floor, SIDCO Corporate Office Building,
Thiru Vi Ka Industrial Estate,
Guindy, Chennai-600 032, Tamil Nadu

2. Tamil Nadu Generation and Distribution
Corporation Limited (TANGEDCO)
10th Floor, 144, Anna Salai
Chennai 600 002.

3. The Chief Engineer/Non-Conventional Energy Sources (NCES)
Tamil Nadu Generation and Distribution
Corporation Ltd (TANGEDCO)
2nd Floor, Eastern Wing, … **Respondents**
144, Anna Salai,
Chennai- 600 002

Counsel for the Appellant(s) : Mr. Kumar Mihir
Mr. Dinesh Kumar

Counsel for the Respondent(s) : Ms. Anusha Nagarajan
Mr. Rahul Ranjan for R-2&3

APPEAL NO. 339 OF 2022 & IA NO. 1235 OF 2021

IN THE MATTER OF:

M/s Ranergy Solutions Pvt Ltd
Represented by its Director,
23, Jaganathan Nagar,
II Main Road, Arumbakkam,
Chennai – 600106. **… Appellant**

Vs.

1. Tamil Nadu Electricity Regulatory Commission,
Rep. by its Secretary,
4th Floor, SIDCO Corporate Office Building,
Thiru Vi Ka Industrial Estate,
Guindy, Chennai-600 032, Tamil Nadu.

2. Tamil Nadu Generation and Distribution
Corporation Ltd (TANGEDCO)
144, Anna Salai,
Chennai — 600 002.

3. The Chief Engineer/Non-Conventional Energy Sources (NCES)
Tamil Nadu Generation and Distribution Corporation Ltd (TANGEDCO)
2nd Floor, Eastern Wing,
144, Anna Salai, Chennai- 600 002 **… Respondents**

Counsel for the Appellant(s) : Mr. Kumar Mihir
Mr. Dinesh Kumar

Counsel for the Respondent(s) : Ms. Anusha Nagarajan
Mr. Rahul Ranjan for R-2&3

J U D G M E N T

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

1. The four captioned Appeals being Appeal No.119 of 2021, Appeal no. 51 of 2021, Appeal No. 338 of 2022 and Appeal No. 339 of 2022 have been filed by Solar Power Generators (in short "SPGs") either themselves or through their Federation namely M/s. National Solar Energy Federation of India (in short "NSEFI") *inter alia*, challenging the legality, validity and enforceability of the Order dated 22.12.2020 (hereinafter referred as "Impugned Order") passed by the Tamil Nadu Electricity Regulatory Commission (hereinafter referred as "State Commission" or "TNERC").

2. The Impugned Order has been passed as common order in Petition M.P. No. 11 of 2019 filed by NSEFI, Petition DRP No. 2 of 2020 filed by Crescent Power Ltd., Appeal No. 338 of 2022 by B S Apparel Pvt Ltd. and Appeal No. 339 of 2022 by Ranergy Solutions Pvt Ltd. whereby the State Commission has rejected the submissions of the Appellants seeking issuance of direction for restraining Tamil Nadu Generation and Distribution Corporation (in short "TANGEDCO") from making deductions on account of Capacity Utilization Factor ("CUF") beyond 19%.

3. The Appellant i.e. NSEFI, is a public charitable trust of Solar Power Generators (SPGs) established in the year 2013 and works in the area of policy advocacy, addressing all issues connected with solar energy growth in India.

4. The Appellants in second, third and fourth captioned Appeals i.e. M/s. Crescent Power Limited, M/s. B. S. Apparel and M/s. Ranergy Solutions P. Ltd., are the SPGs and have set up Solar Power Generating Stations (in short "SPGS") in the State of Tamil Nadu.

5. The Respondent No. 1 in all the four captioned appeals i.e. the Tamil Nadu Electricity Regulatory Commission, is a Statutory Authority constituted under the Electricity Regulatory Commissions Act, 1998 with powers vested under Section 86 and 181 of the Electricity Act, 2003.

6. The Respondent No. 2 in all the four captioned appeals i.e. TANGEDCO, is a Government Company owned by the Government of Tamil Nadu and is vested with the functions of Generation and Distribution of Electricity in the State of Tamil Nadu.

7. The Respondent No. 3 i.e. Chief Engineer, Non-Conventional Energy Sources, TANGEDCO is the authority which has issued the Circular dated 14.06.2017 on behalf of Respondent No. 2.

8. The Petitions in which the Impugned Order has been passed, are filed by the Appellants before the State Commission being aggrieved by the issuance of Circular bearing No. CE / NCES / SE / SOLAR / EE / SCB / AEE3 /F. Policy issue – PLF/D. 540/17 dated 14.06.2017 (in brief "Circular dated 14.06.2017") issued by the TANGEDCO and consequent actions, including short-payments taken thereafter *inter alia* praying for a direction to set aside the Circular dated 14.06.2017 and the action taken consequently by TANGEDCO.

9. Further, the Appellant had sought a direction from the State Commission directing Respondent No. 2 to adhere to the terms of the Energy Purchase Agreements (in short **"**EPAs") entered into with SPGs and restraining Respondent No. 2 from making deductions on account of Capacity Utilization Factor (**"**CUF**"**) beyond 19%.

10. The TNERC, *vide* the Impugned Order, has rejected the submissions of the Appellants in the aforesaid Petitions and, *inter alia*, held as quoted hereunder: -

> *"8.29. A contract cannot cause loss to the other party. TANGEDCO's purchase of power under the preferential tariff orders of the Commission issued is to promote RE and for compliance of RPO. To incur higher costs on account of higher CUF is an additional financial burden to the DISCOM.* ***If the petitioners are to seek for payment for entire energy generated at higher CUFs for having maximized the output with optimized design of the solar power plant as put forth by the petitioners, they may have to settle for lesser tariffs for the entire energy generated with respect to the contracted capacity undergoing a re-determination of tariff as per statutory provisions.***
>
> *8.30. In view of the aforementioned facts and discussions, considering the peculiar nature where the process of adding panels to the DC side is in vogue in any solar power plant, Commission decides that*
>
> ***(i) the payments to the SPGs governed by the tariff orders No.7 of 2014 dt.12.9.2014 and No.2 of 2016 dt.28.3.2016 shall be limited to the annual generation that corresponds to the CUF of 19%.***
>
> ***(ii) at any point of time the AC capacity of the solar PV power plant set up by the developer should correspond with the***

contracted AC capacity and the scheduled power at no point of time shall be in excess of the contracted capacity.

The above direction would be fairly even to the SPGs, Distribution Licensee and the consumers."

[Emphasis Supplied]

11. From the above, it can be seen that the State Commission has rejected the submissions of the Appellants on the following counts:

a) The payments to SPGs are governed by Tariff Order No. 04 / 2014 dated 12.09.2014 (inadvertently mentioned as 07/2014) ("Tariff Order 2014") and Tariff Order No. 02 / 2016 dated 28.03.2016 ("Tariff Order 2016"). Accordingly, the payments under the said Tariff Orders shall be limited to the annual generation that corresponds to the CUF of 19%.

b) If the SPGs were to seek payment for the entire energy generated at higher CUF for having maximized the output with optimized design of the Power Plants, they may have to settle for lesser tariffs for the entire energy generated with respect to the contracted capacity. This would be done by re-determination of tariff as per statutory provisions.

c) The Alternating Current ("AC") capacity of the Solar Photo Voltaic ("PV") Power Plants ("Solar Power Plants") set up by the SPGs should correspond with the contracted AC capacity at any point of time. At no point of time shall the scheduled capacity be in excess of the contracted capacity.

12. The Appellants being aggrieved, have filed the present Appeals assailing the reasons as given by the State Commission, *inter alia*, for the reasons as under: -

(a) The Tariff Orders or the EPAs do not have any provision to restrict payment of excess generation beyond the normative CUF of 19%.
(b) Respondent No. 2 does not have jurisdiction to issue the Circular dated 14.06.2017 thus amending the EPAs unilaterally and as endorsed by the TNERC through the Impugned Order.
(c) Respondent No. 2 cannot withhold payment due to SPGs for the energy supplied *inter alia* in violation of Section 171 of the Indian Contract Act, 1872 (in short "Contract Act").
(d) The Impugned Order, has allowed Respondent No. 2 to unjustly enrich itself at the cost of the SPGs.
(e) The Impugned Order is against the principles enshrined under Section 86 (1) (e) of the Electricity Act.

13. The brief of the case is noted here in brief in the following paragraphs.

14. In pursuance to the Government of Tamil Nadu ("GoTN") Order G.O. (Ms.) No. 121 dated 19.10.2012 notifying the Tamil Nadu Solar Energy Policy, 2012 (in brief "TN Solar Policy, 2012"), the State Commission (TNERC) *vide* its Tariff Order 2014 determined the Generic Solar PV Tariff at Rs. 7.01 / kWh for FY 2015-16 adopting 19% CUF in terms of the Central Electricity Regulatory Commission (Terms and Conditions for Tariff Determination from Renewable Energy Sources) Regulations, 2012 (in short "CERC RE Regulations, 2012").

15. On 01.04.2015, TNERC vide Order No. 5 of 2015 extended control period of the Tariff Order 2014 till 31.03.2016.

16. Similarly, vide Order dated 28.03.2016, the State Commission determined the Generic Solar PV Tariff at Rs. 5.10/kWh for FY 2016-17 adopting again 19% CUF. Further, on 28.03.2017, TNERC, vide its Order bearing No. 02 of 2017 ("Tariff Order 2017") determined the Generic Solar PV Tariff at Rs. 4.50 / kWh for FY 2017-18 again adopting 19% CUF.

17. Even, the Central Electricity Regulatory Commission (in short "CERC") on 17.04.2017 issued CERC (Terms and Conditions for Tariff Determination from Renewable Energy Sources) Regulations, 2017 (in brief "CERC RE Regulations, 2017") where CERC also fixed the CUF for Solar PV Projects at 19%.

18. In accordance to the Tariff Orders, the SPGs entered into EPAs with Respondent No. 2 for the entire useful life of the Solar PV Project i.e., 25 years. The EPAs entered by the SPGs are identical and contain identical provisions, therefore, the details as provided in the first captioned Appeal i.e. the True Copy of the EPA dated 04.07.2015 executed between M/s Adani Green Energy (Tamil Nadu) Limited (member of the Appellant, NFSEFI) and Respondent No. 2, are considered for adjudicating the issues raised herein.

19. The Article 5 of the EPAs (which are identical) provides for 'Tariff and Other Charges' based on the aforesaid Tariff Orders passed by the State Commission, the relevant extract of Article 5 is reproduced herewith for ready reference: -

> *"5. Tariff and Other Charges:*
>
> ***(a) Energy Charge:***

The Solar Power Tariff for the SPG commissioned during the control period of Order No. 7 of 2014, dated 12.9.12 shall be Rs. 7.01 per unit without AD benefit.

(b) Reactive Power Charges:

The reactive power charges shall be as specified in the order on Open Access and as amended from time to time by the Commission.

(c) Start up Power Charges:

The drawl of energy by SPG from the distribution licensee shall be adjusted against the exported energy for every billing period. In case, drawl of power is in in excess over the exported power in a billing month, such excess drawl shall be billed under applicable Temporary supply tariff, as per Commission's Tariff Order and as amended from time to time."

[Emphasis Supplied]

20. Therefore, the solar tariff shall be Rs. 7.01 per unit for the solar projects commissioned within the control period specified by Tariff Order 2014 as per Article 5 of the EPA i.e. the tariff applicable for the projects as mentioned in the captioned Appeals.

21. Thereafter, on 14.06.2017, Respondent No. 3 issued the Impugned Circular dated 14.06.2017 on behalf of Respondent No. 2, inter alia directing as under: -

(a) The excess generation in terms of MW, generated if any in respect of Solar Power Plants commissioned under the preferential Tariff Scheme beyond the actual installed capacity for a particular billing month, the equivalent energy in terms of

units, for the excess MW shall be calculated and shall not be considered for payment.

(b) The excess generation in terms of units, generated if any beyond the norms of 19% of annual CUF as fixed by the TNERC in Tariff Order 2014 (inadvertently mentioned as Order No. 7 / 2014) and Tariff Order 2016, shall be calculated at the end of financial year and deducted. Pertinently, it was stated that the excess generation calculated shall not be considered for payment.

22. The relevant extract of the Circular dated 14.06.2017 is reproduced herewith for ready reference: -

"The excess generation in terms of MW, generated if any, in respect of Solar Power Plants commissioned under preferential tariff scheme, beyond the actual installed capacity for a particular billing month, the equivalent energy in terms of units, for the excess MW shall be calculated and shall not be considered! For payment. The energy units corresponding to the excess MW calculated as such shall be deducted from the particular monthly bill itself. After deducting the energy equivalent to the excess MW, the balance energy may be considered for calculating annual cumulative PLF for that particular month at the end of financial year. The excess generation in terms of units, generated if any, in respect of Solar Power Plants commissioned under preferential tariff scheme, beyond the norms of 19% of annual Capacity Utilization Factor (CUF) fixed by the Commission in Order No.. 7of 2014 dated 12.092014 and Order No.2 of 2016 dated 28.03.2016, shall be

calculated at the end of financial year and deducted. The excess energy calculated as such shall not be considered for payment on any account. The energy generated during the month and the total energy generated during the financial year upto that month may be furnished along with the bill"

23. By the aforesaid Circular, the relevant provision of the EPA stands amended to the extent that the generation beyond the CUF of 19% shall attract any payment to be made by TANGEDCO to the SPGs, however, the Appellants submitted that the above direction unilaterally modified the terms of EPA.

24. Being aggrieved, NSEFI, the Appellant in the first captioned Appeal submitted that on 17.11.2017, it has filed a Writ Petition bearing W.P. No. 30422 / 2017 before the High Court of Tamil Nadu, inter alia, challenging the action of Respondent No. 2 in not making payments for units of electricity supplied by solar power generating companies, in excess of units corresponding to 19% of CUF. However, the same was withdrawn by the Appellant as seen from the Order dated 30.11.2018 passed by the High Court.

25. Thereafter, the Appellants separately, filed the aforesaid Petitions before TNERC challenging the Circular dated 14.06.2017 *inter-alia* seeking the following relief: -

“a. Grant an order of interim stay, staying the operation of the impugned circular issued by the second respondent bearing Lr. No. CE/NCES/SE/SOLAR/EE/SCB/AEE3/F, Policy issue-PLF/D. 540/17 dated 14.06.2017 and all proceedings pursuant or consequent thereto, pending disposal of the petition;

b. and set aside the circular issued by the Respondent bearing Lr.No.CE/NCES/SOLAR/EE/SCB/AEE3/F. Policy issue- PLF/D. 40117 dated 14.06.2017 and consequent actions, including short payments, as being without jurisdiction, arbitrary and illegal and consequently direct the Respondent to adhere to the terms of the PPAs entered into with Solar Power Generation and not make deductions using Capacity Utilization Factor."

26. On 22.12.2020, the State Commission passed the Impugned Order, thereby rejecting the submissions of the Appellants and hence the captioned Appeals.

27. From the above, it is clear that the crux of the case is whether the Circular dated 14.06.2017 issued by Respondent No. 3 is a binding on the SPGs and the CUF as considered by the State Commission in determining the Generic Tariff is a ceiling tariff.

28. The Appellants submitted that neither the tariff orders nor the EPA has any provision to restrict payments for generation in excess of the normative CUF of 19%, inversely, the State Commission determined the tariff considering that:

i. To maximise the return by efficient use of equipment.
ii. A cost-plus tariff regime was deemed to be appropriate considering adequate return to the investors.
iii. The CUF has been fixed at 19% on a normative basis and is not based upon the actual parameters.
iv. EPAs were to be executed in line with the Order passed by TNERC.

29. On the contrary, TANGEDCO submitted that the generic tariff was premised upon various parameters, one of most critical factors being capacity utilisation factor (CUF), which was considered at 19% and the tariff order makes it abundantly clear that the tariff determined therein, is only applicable for solar power generators "conforming to this order", in other words, generators cannot avail the benefit of the tariff determined under the generic tariff order, unless they abide by the parameters stipulated therein, further argued that the State Commission has adopted CUF for Solar PV project as 19%, in all its generic/preferential Tariff Orders and that none of said orders have been challenged by the Appellant.

30. We decline to accept the argument put forth by TANGEDCO as it could not place before us any reasonable reply to the argument of the Appellants that none of the relevant agreements signed have any provision putting a cap on the generation beyond CUF of 19% *inter-alia* no payment shall be made for energy generated beyond 19% CUF, on the contrary the Tariff Order issued by TNERC provides for maximizing the return by efficient use of equipment and the cost-plus tariff regime was adopted as it deemed to be appropriate considering adequate return to the investors.

31. Also, the contention of the TANGEDCO that these Tariff Orders have not been challenged by the Appellants on the issue of ceiling of 19% of CUF thereby restricting the payment for energy generated up to 19% CUF, we fail to appreciate it as the Tariff Orders have neither put a cap on the CUF of 19% nor determining zero cost tariff to the energy generated beyond 19% CUF.

32. It is important to note here that the notification dated 03.08.2017 of Ministry of Power (in brief "MoP"), Govt. of India vide which it has issued guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Projects ("Bidding Guidelines") under the

provisions of section 63 of the Electricity Act, 2003, wherein, Clause 5.2.1 provides for fixation of tariff for energy generated beyond the CUF as well as imposition of a penalty in case the generating company supplies energy less than the contracted CUF, the relevant extract is reproduced herewith for ready reference: -

> *"5.2. Quantum of Power/ Energy to Be Procured: The procurement of power could either be in power (MW) terms or in energy (kWh or Million Units, i.e. MU) terms.*
>
> *5.2.1. Procurement in Power Terms (MW):*
>
> *a)* ***In case of procurement in power (MW) terms, the range of Capacity Utilisation Factor (CUF) will be indicated in the bidding documents.*** *Calculation of CUF will be on yearly basis. In case the project generates and supplies energy less than the energy corresponding to the minimum CUF, the Solar Power Generator will be liable to pay to the Procurer, penalty for the shortfall in availability below such contracted CUF level. The amount of such penalty will be in accordance with the terms of the PPA, which shall ensure that the Procurer is offset for all potential costs associated with low generation and supply of power under the PPA, subject to a minimum of 25% (twenty-five per cent) of the cost of this shortfall in energy terms, calculated at PPA tariff.*
>
> *b)* ***In case the availability is more than the maximum CUF specified, the Solar Power Generator will be free to sell it to any other entity provided first right of refusal will vest with the Procurer(s).*** *In case the Procurer purchases the excess generation, the same may be done at 75% (seventy-five per cent)*

of the PPA tariff, and provision to this effect shall be clearly indicated in the RfS document."

33. From the above, it can be seen that MoP itself provided that any energy generated and supplied beyond CUF of 19% attracts tariff equivalent to 75% of the PPA tariff (in the present case it can be EPA tariff), even considering the said Guidelines are not applicable in the instant case, however, makes it clear that the energy generated and supplied beyond CUF of 19% have to be considered for payment.

34. Separately, on 05.11.2019, Ministry of New and Renewable Energy (in short "MNRE") vide its Advisory, also issued directions that for Projects established under the aegis of MNRE if a ceiling CUF is prescribed only then the beneficiaries are not obligated to offtake power beyond CUF, such a ceiling has not been specified in these Tariff Orders.

35. It is also seen that the Impugned Order has been passed on the premise that the quantum of power against which payment is made to the SPGs is limited to CUF of 19%, and not beyond it, however, we could not find any substantive provision under the relevant Tariff Orders on the basis which restrictions on the payments for generation beyond CUF of 19% can be made, therefore, we find the arguments made by TANGEDCO and also as observed by the State Commission in rejecting the submissions of the Appellants in the aforesaid Petitions as unjust and unreasonable.

36. Further, NSEFI submitted that PPAs do not expressly provide for a 'Contracted Capacity' which is restricted to the CUF of a Project, even though the tariff orders have determined the tariff, the commercial aspect of the

transaction is to be governed by the EPA which has the following relevant provisions:

a. The reading of the EPA provides that the developer has proposed to sell solar energy generated from its power plant having 'Installed Capacity' of 216 MW and not on the basis of 'Contracted Capacity'.
b. There is no definition of 'Contracted Capacity' under the EPA. However, Article 1(h) of the EPA defines 'Installed Capacity' meaning AC output in MW of all the units of the Solar power generators or the total capacity of the Solar generating station (reckoned at the generator terminals) as declared by the generator and agreed by the distribution licensee.
c. Article 3(a), provides for maximum evacuation which is only subject to Grid Stability.
d. Article 5(a) of the EPA provides for Energy Charges i.e. Solar Power Tariff for the SPG commissioned during the control period of Tariff Order 2014 shall be Rs. 7.01 per unit without AD benefit.
e. Article 6 provides for billing and payment of energy supplied by the developer. Billing of power is based only upon the net energy sold / exported and there is no mention of CUF for the purposes of billing.
f. Article 8 stipulates the contractual understanding between the parties to abide by the provisions contained in the Act, Regulations, Rules, Codes, Notifications, Orders, etc.

37. Therefore, the EPA is a contract executed between the parties for sale of quantum of power at the rate of Rs. 7.01 per unit and there is no mention, much less a qualification, with respect to power beyond 19% CUF, further, mandates that power has to be evacuated to the maximum extent and the billing of such power has to be on the basis of net power supplied by the developer.

38. On being asked, NSEFI has not denied that the generic tariff has been worked out on the basis of a normative CUF of 19%, however, stated that the purpose of 19% CUF is only for determination of generic tariff of Rs. 7.01 / unit, and not to regulate the quantum of energy, the Solar energy, by its very nature, is intermittent and cannot be regulated precisely, thus the generic tariff vests the gains and losses in operating the project with the SPG as actual costs are not being considered.

39. Further submitted that the State Commission, in the Impugned Order, has held that the SPGs who had set up the Power Plants as per the generic tariff regime have been guaranteed a reasonable rate of return, this finding is in contrast to Tariff Order 2014 as TNERC therein had held that only in case of project specific tariff determination can a developer be guaranteed reasonable rate of return.

40. The Appellant submitted that one of the technical reasons for higher generation is the ratio between Direct Current (“DC”) and AC maintained by SPGs for which they are incurring higher costs and it is due to the losses between the solar array and the output to the grid, AC capacity of the Solar Power Plant will always be somewhat lower than the peak DC capacity, therefore, for optimum system configuration, SPGs always aim to achieve higher DC capacity and use inverters, whose total capacity are equivalent to the AC capacity as per the EPAs, the technology involves high costs and the same are necessary for maintaining efficiency of the resources.

41. Our attention was invited to the Order dated 15.05.2014 passed by CERC in the Suo-Motu Petition bearing No. SM / 353 / 2013 wherein it has held that additional cost for higher capacity of modules will be taken care of by excess generation, therefore, the excess generation beyond 19% CUF due to

increased DC capacity but maintaining the AC Installed Capacity should be paid accordingly as also noted from the Guidelines issued by MoP.

42. The Appellant reiterated its argument that Circular dated 14.06.2017 unilaterally alters the position between parties in the contract and is arbitrary, it has, in effect, amended the provisions of the EPA to bring a new restriction of 19% CUF which was never envisaged or intended by the parties at the time of entering the EPA, which is further ratified by TNERC through the Impugned Order which is contrary to the judgment rendered by Hon'ble Supreme Court in *PTC India Ltd. v. CERC, (2010) 4 SCC 603* wherein it has been held that even a Regulator (appropriate Commission) can only interfere in an existing agreement by specifying Regulations, which admittedly has not happened in the present case, even TANGEDCO under the scheme of the Act has not been vested any plenary powers to issue such circulars, it is merely a licensee and is contractually and statutorily bound to operate under the terms of the Contract, therefore, such l actions of TANGEDCO are bad in law.

43. It is noteworthy that this Hon'ble Tribunal vide its Judgment in Appeal No. 279 / 2013 titled as GUVNL v. GERC & Ors. has held that a party does not have power to amend the terms of an executed contract, unless otherwise agreed between the parties. The relevant extract of the said Judgment is reproduced herewith for ready reference: -

> **"*92.*** *In other words, the PPA executed by the parties and the conduct of the parties acting upon such Agreements over a long period bind them to the rights and obligation stated in the Agreements.*
>
> *…*
>
> ***100.*** *That apart, the Appellant did not at any stage either prior to*

PPA or after signing the PPA or before the Respondents commenced the development of the plant ever represented to the Respondents that it would seek to have a project specific tariff determined as opposed to the generic tariff determined under the Original Tariff Order on normative parameters. ***Once the Appellant executes the PPA it did not have the power or authority to alter any terms of the PPA except through mutual consent of both the parties****."*

[Emphasis Supplied]

44. The Appellant argued that the Impugned Order is essentially an amendment to the EPA executed between the parties to the extent that condition of quantum restriction to 19% CUF was not envisaged in the EPA, further, pleaded that such an amendment is beyond the scope of power with the TNERC, as this Tribunal has clearly held that amendment of concluded contract is beyond the regulatory ambit of State Commission, reliance is placed upon this Tribunal's Judgment dated 29.03.2019 in Fortune Five Hydel projects Pvt. Ltd. & Ors. v. Karnataka Electricity Regulatory Commission & Ors.. The relevant extract of the said Judgment is reproduced herewith for ready reference: -

"14.16. Having regard to the submission made by the learned counsel for the Appellants as well as learned counsel for the Respondents and various judgments of the Hon'ble Supreme Court and this Tribunal, we opine that the finding of the State Commission that promotional measures for enhancing RE generation is no longer required, based on the present day landed cost of RE generation and technological development, is not supported by the adequate analysis and also not justified in

the eyes of law. ***Besides, amendment in the terms and conditions of the executed WBAs during the currency of its validity is considered beyond the regulatory ambit of the State Commission. Once the RE generators have come forward to invest in the sector and given certain representations such as flexibility in banking and consumption pattern, the same cannot be taken away by simply passing an order which is not permissible under the settled principles of law."***
[Emphasis Supplied]

45. It is submitted that it is a settled position of law that a contract can only be amended by consensus between the parties, revision in the tariff cannot unilaterally be forced upon the SPGs especially through an administrative / executive action of a contracted party, additionally, the sanctity of concluded contracts, whereby rights and entitlements have already accrued to the parties, ought not to be disturbed. In this regard, reliance is place on the case of ITC Ltd. v. State of U.P., (2011) 7 SCC 493. The relevant extract of the said Judgment is reproduced herewith for ready reference: -

"107.2. The aforesaid exercise may seem to be cumbersome, but is absolutely necessary to protect the sanctity of contracts and transfers. If the Government or its instrumentalities are seen to be frequently resiling from duly concluded solemn transfers, the confidence of the public and international community in the functioning of the Government will be shaken. ***To save the credibility of the Government and its instrumentalities, an***

effort should always be made to save the concluded transactions/transfers wherever possible, provided (i) that it will not prejudice the public interest, or cause loss to public exchequer or lead to public mischief, and (ii) that the transferee is blameless and had no part to play in the violation of the regulation."

[Emphasis Supplied]

46. Reliance is also placed on the judgment passed by Hon'ble Supreme Court in the case of *Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131*, wherein it has been held that unilateral addition of terms or alteration of a contract, without consent of both parties, is a violation of the fundamental principle of justice. The relevant extracts of the said Judgment is reproduced herewith for ready reference: -

"We have seen how the appellant gave such undertaking only conditionally and without prejudice to its argument that the Circular does not and cannot apply. This being the case, it is clear that the majority award has created a new contract for the parties by applying the said unilateral Circular and by substituting a workable formula under the agreement by another formula dehors the agreement. ***This being the case, a fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract can never be foisted upon an unwilling party, nor can a party to the agreement be liable to perform a bargain not entered into with the other party.****"*

[Emphasis Supplied]

47. In fact, Ld. TNERC has itself directed Respondent No. 2 not to issue such circulars and has suggested that it should approach Ld. TNERC in case such clarifications are required. In this regard, reliance is placed upon Order dated 31.03.2016 in S.M.P. No. 01 / 2014 wherein Ld. TNERC observed as follows:-

> *"7.30 The Commission in the Tariff Order No. 1 of 2009 dated 20.03.09 have also come out with an illustration on methodology of adjustment of banked energy clarifying that if the consumption exceeds the generation the energy banked shall be drawn to the required extent. This would also include the energy banked during peak hour and normal generation for adjustment against lower slot consumption.* ***The Commission directs that any clarification required regarding the Commission's order, the Licensee shall request for such clarifications before issuing any contrary circulars / instructions to the field which results in unnecessary litigations and causes inconvenience to the concerned.****"*
>
> ***[Emphasis Supplied]***

48. Thus, the EPAs executed between the SPGs and Respondent No. 2 do not confer unilateral power on Respondent No. 2 to alter the terms of the EPAs, without consent of the SPGs. Such action of Respondent No. 2, by way of the Circular dated 14.06.2017, is in gross violation of the basic doctrines of justice.

49. Therefore, the Circular dated 14.06.2017 is *set aside*.

50. It was also submitted that TANGEDCO earned revenue by sale of such energy, however, after benefiting from such sale, TANGEDCO's denial to pay charges for excess energy is untenable and arbitrary, a contract can only be

amended by mutual consent between the parties, further, added that it is the settled principle that the sanctity of concluded contracts, whereby rights and entitlements have already accrued to the parties, ought not to be disturbed, any unilateral addition of terms or alteration of a contract, without consent of both parties, is a violation of the fundamental principle of justice.

51. On the contrary, TANGEDCO argued that in the absence of anything to the contrary in the EPA, the CUF specified in the generic tariff orders is the maximum quantum that the distribution licensee is obliged to purchase under the EPA, it is submitted that any other interpretation would also render the EPA void for uncertainty in the absence of any quantum being specified therein.

52. From the above submission, TANGEDCO is contending that the value of 19% of CUF is the maximum limit as specified by TNERC in the Tariff Orders and thus TANGEDCO has no obligation to make payment or purchase the energy generated beyond such value of CUF, reliance was placed on the judgment rendered by this Tribunal in *APL No. 90 of 2006 (& batch)* titled as *"Rithwick Energy Syaytem Limited vs Transmission Corporation of Andhra Pradesh & Ors."*, wherein it has been held that even in absence of Commission's direction, DISCOM has no obligation to purchase excess energy beyond the capacity of the plant, the relevant extract is quoted as under:

> *26. We agree with the learned counsel for the first respondent that the capacity of the power plant was crucial to the agreement of sale and purchase of energy between the appellant and the first respondent. In case the capacity factor was irrelevant, there would not have been reason enough for the appellant to seek approval of the NEDCAP for enhancement of capacity of the plant. Generally speaking in a contract of sale and purchase, quantities are fixed so that parties know their obligations. An element of uncertainty has to*

be avoided as otherwise the parties cannot be said to be adidem or having same understanding of the terms of the contract. A party cannot be saddled with a liability which was not even in its contemplation, when it entered into an agreement with the other party. The agreement speaks of definite capacity of the plant. In Schedule 1 to the PPA, capacity of the generator and the station has been indicated as 6 MW. Delivered energy clause in the agreement has nexus with the generating capacity of the plant and cannot be read in isolation. It was argued by the learned counsel for the appellants that the generating plant has an inbuilt ability to produce approximately 20% more energy than the declared capacity. This argument has not been supported by the learned counsel for the appellants by providing any scientific data. Accordingly, the submission of the learned counsel for the appellants that all delivered energy beyond 100% PLF on monthly basis is required to be computed for payment, cannot be accepted.

53. The above quoted judgment restricts the purchase of excess generation beyond the generation capacity with PLF of 100%, we do not find similarity in the two as in present case the Respondent is arguing on the normative CUF parameter whereas the generation capacity linked to the Installed AC Capacity is not altered or amended and remained as quoted Installed Capacity, the generation remained corresponding to such Installed AC Capacity, also the CUF is a parameter which is linked to efficiency and selection of equipment installed, as also seen from the Tariff Order 2014, the relevant extracts are quoted as under:

"Comprehensive Tariff Order on Solar Power"

1. Introduction

1.1 The importance of Solar Energy

1.1.1. Solar energy offers clean, environment-friendly, abundant and inexhaustible energy resource to mankind. Among the various renewable sources, solar energy potential is the highest in the country. It is reported that Tamil Nadu has reasonably high solar insolation of around 5.5 kW/m2 with around 300 clear sunny days in a year. It is considered important to optimally exploit the solar energy for a sustainable energy base.

1.2. Commission's initiative in promoting renewable energy

1.2.1 To promote generation from renewable energy sources, the Commission has so far issued ten Tariff Orders in respect of various renewable sources of energy in accordance with section 86(1)(e) of the Electricity Act, 2003. The Jawaharlal Nehru National Solar Mission (JNNSM) was announced on 10th January, 2009 by the Government of India through the Ministry of New and Renewable Energy (MNRE). JNNSM aims to promote the development of solar energy for grid connected and off grid power generation. In pursuance of the above, the Commission in order No. 1 and 2 dated 27/5/2010 & 8/7/2010 respectively determined the tariff for Solar PV and Solar Thermal Power under the Jawaharlal Nehru National Solar Mission (JNNSM). …..

1.3 Need for the Order

1.3.1 The Government of Tamil Nadu has launched the Tamil Nadu Solar Energy Policy 2012 to promote solar energy. It has been envisioned to add about 3000 MW by the year 2015 under the Policy. The Electricity Act, 2003, mandates the State Electricity Regulatory Commissions to promote generation of electricity from renewable sources of energy. In accordance with the provision of

the Electricity Act 2003 and the Electricity Policies issued by Government of India (GoI), the Commission issues this "Comprehensive tariff order on solar power" for purchase of solar power by distribution licensee from the solar power generators and to deal with other related issues.

2.2. Standards

2.2.1 ***Each of these technologies have different cost implications based on their efficiency, reliability, mounting, tracking, land, water and other requirements. The Commission has decided that the final selection of the technology shall be left to the Solar Power Developers****. It is difficult to determine the tariff for each such technology. The Commission has decided to determine the tariff for the technology predominantly used in our country. The minimum technical requirements would be as per the regulations/specifications issued by the Central Electricity Authority and Ministry of New and Renewable Energy and the developers shall adhere to them.*

6. Applicability of the proposed order

6.1. ***The Order shall come into force from the date of its issue. The tariff fixed in this order shall be applicable to all solar power plants commissioned during the control period of this Order.*** *The tariff is applicable for purchase of solar power by Distribution Licensee from Solar Power Generators conforming to this order. …*

8.2. Project specific or Generalized Tariff

8.2.1. ***A generalized tariff mechanism would provide incentive to the investors for use of most efficient equipment to***

maximize returns and for selecting the suitable site while a project-specific tariff would provide each investor, irrespective of the machine type, the stipulated return on equity which, in effect, would shield the investor from the uncertainties involved. This order mainly provides for power purchase by distribution licensees for their Renewable Purchase Obligation (RPO) compliance as specified in the Commission's Regulations. *The capacities of the solar plants commissioned and under construction in the State are limited to a few MWs. They have mostly adopted similar technology with minor modifications. Hence the Commission has decided to issue a generalized tariff order for solar Photovoltaic and solar Thermal projects.*

8.3. Cost-Plus Tariff Determination

8.3.1. Regulation 4(6) of "Power Procurement from New and Renewable Sources of Energy Regulations 2008" empowers the Commission to adopt "appropriate tariff methodology" to determine the tariff for solar power. ***Cost-plus tariff determination is a more practical method and it can be easily designed to provide adequate returns to the investor and a surety of returns will lead to larger investment in solar power plants.*** *Para 6.4 of the Tariff Policy specifies that procurement by the distribution companies shall be done at preferential tariff determined by the Commission till such time the non-conventional technologies compete with the conventional sources in terms of cost of electricity. At the prevailing cost, the cost of solar power is generally higher than the cost of predominant conventional power. Therefore*

Cost-Plus tariff is adopted for determination of tariff in respect of solar projects.

9.2 Capital Cost

9.2.1. The capital cost is one of the most important parameters for tariff determination of power projects. The major components of a photovoltaic power plant are PV modules, Inverters, control panels, switch yard, machineries, equipment etc., Apart from the above components, the total capital cost includes the cost of land, power evacuation lines and replacement of capital equipment if any during the life time. The Commission adopts a capital cost of Rs. 12 Crores per MW in this order.

9.3. Capacity Utilization Factor (CUF)

9.3.1. Many of the stakeholders have suggested a CUF of 17 to 18%. Some of the stakeholders have recommended to adopt a CUF of 19%. Stakeholders have also suggested deration of 0.5% to 1% during the life of the plant. The Commission has adopted the capital cost taking into account the cost of replacement of modules in respect of degradation during the life time. ***The CERC has adopted a CUF of 19% and has not considered any deration in its order.*** *Most of the SERCs have also considered a CUF of 19% in their orders.* ***The Commission decides to adopt the CUF of 19% for solar PV projects and 23% for solar thermal projects. These CUFs are considered taking into account the efficiency factors of equipment, deration etc.****,*

10. Solar Power Tariff

10.1. In the SAC meeting the CMD/TANGEDCO suggested that Accelerated Depreciation (AD) may be adopted to decide the preferential tariff for solar power. Similar views were also expressed by other stakeholders. CERC and other SERCs have also adopted the Accelerated Depreciation benefit. Therefore the Commission decided to determine the tariff taking into account the Accelerated Depreciation in this order.

10.2. ***Solar power tariff is computed with reference to the determinants supra and listed in Annexure I. The tariff works out to Rs.7.01 per unit for Solar PV projects and Rs. 11.03 per unit for Solar Thermal projects without AD benefit****. …*

11.1. Quantum of solar power purchase by the distribution licensee

11.1.1. In the SAC meeting held on 20-01-2014, the Energy Secretary, Government of Tamil Nadu (GoTN) suggested that either the Solar Purchase Obligation (SPO) shall be made within the limit of RPO or to exempt the open access consumers from the RPO/SPO since the SPO and RPO have been challenged by the open access consumers in the Madras High Court. Similar view was expressed by the CMD, TANGEDCO. The Commission's 'Order on Issues related to Tamil Nadu Solar Energy Policy 2012', issued on 7/3/2012 specifies that the SPO is inclusive of RPO for the open access and captive consumers. However, the Hon'ble APTEL has set aside the above order of the Commission and therefore this issue has no relevance. ***The distribution licensee can purchase solar power at the rate determined by the Commission in this order from SPGs for their Renewable***

Purchase Obligation (RPO) requirement on "first come first served basis". Purchasing solar power at the prevailing cost by the distribution licensee beyond certain quantum will correspondingly increase the overall retail tariff to the consumers on account of the preferential nature of tariff. Renewable energy has to be promoted but at the same time the interest of the consumers shall also be taken into account. Therefore for any procurement in excess of Solar RPO by the distribution licensee, specific approval shall be obtained from the Commission. *..*

(Emphasis given)

54. From the above Tariff Order 2014, it can be seen that no ceiling has been specified capping the CUF, further, the State Commission has decided that the technology to be implemented is left to the SPGs and the generalized tariff mechanism as proposed would provide incentive to the investors for use of most efficient equipment to maximize returns, however, as compare to a project-specific tariff it may not provide each investor, irrespective of the machine type, the stipulated return on equity thereby shielding the investor from the uncertainties involved.

55. At the same time the Tariff Order provides for power purchase by distribution licensees for their Renewable Purchase Obligation (RPO) compliance as specified in the Commission's Regulations.

56. Therefore, the Tariff Order clearly mandates for leaving the choice of selection of Technology to the SPGs so as to yield higher returns with a condition for the Distribution Licensee to purchase power to meet the RPO, we

could not find any provision which has put a cap on CUF, it may be noted here that increase in CUF due to most suitable Technology selection also adds to the increased returns to the SPGs as expected by the Tariff Order also.

57. The State Commission vide the aforesaid Tariff Order has, however, also observed that the increase in such power beyond RPO may increase the cost for the consumers and therefore, any procurement in excess of Solar RPO by the distribution licensee, specific approval has to be taken from the Commission, thus only ceiling as specified is the obligation of the TANGEDCO for RPO and not on the CUF parameter.

58. It is also submitted by TANGEDCO that it has agreed to purchase the energy, “as per terms and conditions of” the 2014 Tariff Order which cannot be considered to contend that the CUF limit can be disregarded.

59. As already concluded in the preceding paragraphs that there is no ceiling for the maximum of CUF and the extent to which procurement can be restricted is the RPO limit, however, under the provisions of the EPA read with the relevant Tariff Orders.

60. It was further, added by TANGEDCO that the principle that CUF is the quantum limit at which a certain tariff would be applicable, and that any stipulated tariff cannot be applicable beyond such CUF is consistent with the regulatory scheme and is supported by the following:

a) **03.08.2017** – Ministry of Power, GoI issued guidelines for tariff based Competitive Bidding Process for Procurement of Power from Grid Connectivity connected to Solar PV Plants. The clause 5.2.1 provides for range of CUF and provides for right of first refusal in favour of

Distribution Licensee for excess generation beyond CUF limit, at lower tariff.

b) **05.11.2019** – Ministry of New & Renewable Energy, GoI issued an advisory/clarification wherein it has been clarified that the procurer is not obligated to buy energy beyond the contracted CUF range.

c) **May 2020** – CERC published Explanatory Memorandum on Draft Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020 and explained the treatment for over-generation of energy by Solar PV Plant above CUF and states that "…….*entire costs are allowed to be recovered through tariff at normative capacity utilisation factor or plant load factor considered for tariff determination, the tariff applicable for over-generation in excess of normative capacity utilisation factor or plant load factor* ***should not be same as*** *tariff determined for full recovery at normative capacity utilisation factor or plant load factor and benefits of over-generation needs to be shared with the beneficiaries. Further, the renewable energy project should be free to sell such excess energy to any other entity and at the same time priority should be given to the concerned beneficiary for procuring the energy generated in excess of normative capacity utilisation factor or plant load factor*…..".

61. We are inclined to accept the contention of TANGEDCO with reference to aforesaid notifications made by MoP, MNRE and CERC. The MoP vide the said notification has also provided that "I*n case the Procurer purchases the excess generation, the same may be done at 75% (seventy-five per cent) of*

the PPA tariff, and provision to this effect shall be clearly indicated in the RfS document."

62. The CERC vide the said notification has observed that "*the tariff applicable for over-generation in excess of normative capacity utilisation factor or plant load factor* ***should not be same as*** *tariff determined for full recovery at normative capacity utilisation factor or plant load factor and benefits of over-generation needs to be shared with the beneficiaries",* thus, observing that the Tariff for only the excess generation beyond 19% CUF should be different from the Tariff as determined in the generic Tariff determined for full recovery at normative CUF and such benefit should be shared with the procurer as also provided by the said notification issued by MoP.

63. Further, as per MNRE notification dated 05.11.2019 quoted above, the procurer is not obligated to buy energy beyond the contracted CUF range, however, on further, examining the notification MNRE has advised that if a ceiling CUF is prescribed only then the beneficiaries are not obligated to offtake power beyond CUF, therefore, as per this advice, TANGEDCO is bound to procure power even beyond CUF of 19% as no ceiling has been specified in the EPA.

64. It was further submitted by TANGEDCO that any excess energy injected into the grid, is illegal injection as TANGEDCO has not contracted to purchase the same, and is hence not liable to pay for the same, the reliance was placed on *Indo Rama Synthetics (I) Limited v. Maharashtra Electricity Regulatory Commission & Ors., APL No. 123 of 2010 dated 16.05.2022* (ref: paras 7, 8, 11).

65. As already concluded that the power injection corresponding to the Installed AC Capacity is within the contractual provisions of the EPA and there

is no ceiling specified by the EPA, the contention of TANGEDCO cannot be agreed to and is rejected.

66. We also decline to accept the submission of TANGEDCO that it is open to the Appellant to seek project specific determination of tariff so that a suitable tariff can be adopted in case their plants have the technology that enables them to generate greater output and thus achieve higher CUF and that the Appellant cannot seek to take advantage of the generic tariff fixed, which is premised on a maximum CUF of 19% and claim the same tariff for a greater amount of energy, it is clear from the conclusions recorded in the foregoing paragraphs that the Respondents failed to place before us any relevant provision which imposes a maximum ceiling of 19% for the CUF for the projects of the Appellants and thus the option of project specific tariff.

67. It was also submitted by TANGEDCO that the tariff determined under the preferential tariff orders passed by TNERC between 2014 to 2019 considering CUF 19% as benchmark indicates that it has not determined any tariff, for generation beyond 19% CUF and consideration of CUF @ 19% has not been challenged by any of the generators.

68. We find the above argument totally unreasonable as the State Commission has neither the determined the tariff for generation beyond CUF of 19% nor below the CUF of 19%, also no range has been specified in the tariff order, therefore, it cannot be interpreted that it places a ceiling on the maximum value of CUF of 19%.

69. After careful consideration of the EPAs and Tariff Orders of TNERC, it is therefore, evident that there is no restriction on injection of power over and above the normative CUF of 19%. The contract is executed between the parties for sale of quantum of power mentioned in the EPA at the rate of Rs. 7.01 per

unit, while the tariff is evidently determined based on CUF of 19%, there is no restriction with regards to quantum of energy to be injected by the project developers in the EPA above 19% CUF, the EPA only mandates that power has to be evacuated to the maximum extent and the billing of such power has to be on the basis of net power supplied by the SPG.

70. We are conscious of the settled law that the contractual terms which are unambiguous, cannot be supplied meaning as reliance has been placed upon Hon'ble Supreme Court's Judgment in *Rajasthan State Industrial Development and Investment Corporation and Ors. v. Diamond and Gem Development Corporation Ltd. and Ors., (2013) 5 SCC 470* wherein it has been held that it is not permissible for a Court to supply new meaning to the provisions of a contract, howsoever reasonable, when the terms of the contract are clear and unambiguous, the relevant extract of the judgment is quoted as under:

> *"IV. Interpretation of terms of contract*
> *16. A party cannot claim anything more than what is covered by the terms of contract, for the reason that contract is a transaction between the two parties and has been entered into with open eyes and understanding the nature of contract. Thus, contract being a creature of an agreement between two or more parties, has to be interpreted giving literal meanings unless, there is some ambiguity therein. The contract is to be interpreted giving the actual meaning to the words contained in the contract and it is not permissible for the court to make a new contract, however is reasonable, if the parties have not made it themselves. It is to be interpreted in such a way that its terms may not be varied. The contract has to be interpreted without giving any outside aid. The terms of the contract have to be construed strictly without altering the nature of the*

contract, as it may affect the interest of either of the parties adversely.

71. It is also noted that TANGEDCO has no objection to consumption of excess generation injected by the SPGs, in fact TANGEDCO was utilising the excess energy not only for the purpose of supplying it to its consumers but also claiming RPO benefit against such energy, as was informed on being asked by us.

72. It is pertinent to note that Chief Engineer, TANGEDCO vide its circular dated 14.06.2017 did not restrict consumption of energy only upto 19% CUF. On the contrary, the circular envisages consumption of excess energy and specifically directs not to make payment for the same. It would be apt to reproduce the relevant extract of the circular

"The excess generation in terms of MW, generated if any, in respect of Solar Power Plants commissioned under preferential tariff scheme, beyond the actual installed capacity for a particular billing month, the equivalent energy in terms of units, for the excess MW shall be calculated and shall not be considered! For payment. The energy units corresponding to the excess MW calculated as such shall be deducted from the particular monthly bill itself. After deducting the energy equivalent to the excess MW, the balance energy may be considered for calculating annual cumulative PLF for that particular month at the end of financial year. <u>The excess generation in terms of units, generated if any, in respect of Solar Power Plants commissioned under preferential tariff scheme, beyond the norms of 19% of annual Capacity Utilization Factor (CUF) fixed by the Commission in Order No.. 7of 2014 dated</u>

12.092014 and Order No.2 of 2016 dated 28.03.2016, shall be calculated at the end of financial year and deducted. The excess energy calculated as such shall not be considered for payment on any account. The energy generated during the month and the total energy generated during the financial year upto that month may be furnished along with the bill"

73. We have held above that there is no restriction in the EPA as regards generation and supply of power above the normative CUF of 19%. It is also apparent that there is no clear dispensation envisaged with regards to supply of excess power generated and tariff payable. Nevertheless, Article 3(a) of the EPA stipulates that the solar power generated shall be evacuated to the maximum extent subject to Grid stability.

74. On the combined reading of the terms of EPA and circular of TANGEDCO reveals that TANGEDCO has unilaterally tried to incorporate commercial terms to the EPA for consumption of excess power generated by SPGs, while the generator is bound to inject power to the maximum extent all the time subject to grid stability as per EPA, the procurer has unilaterally decided not to make payment for any excess energy consumed.

75. Indisputably, the excess electricity injected by the SPGs was actually consumed by TANGEDCO under a contract, monetary benefit having been derived therefrom by the latter, the excess energy procured under the contract has been utilized by TANGEDCO for distribution to its consumers against financial gain, therefore, it having been resulted into unjust enrichment only on account of impugned Circular issued by TANGEDCO for its benefit at the cost of SPGs and consumers.

76. The Appellants submitted that Respondent No. 2, under the cover of the Circular, has wrongfully withheld the legitimate payment to SPGs and has simply intimated that the energy in excess of 19% CUF shall not be entitled for payment, also under the provisions of the EPAs, Respondent No. 2 does not enjoy a lien over monies payable to the SPGs and, by virtue of Section 171 of Contract Act, it was the obligation / duty of Respondent No. 2 to make payments to the SPGs as per the EPAs. The relevant extract of Section 171 of the Contract Act is reproduced herewith for ready reference:-

> *"**171. General lien of bankers, factors, wharfingers, attorneys and policy-brokers**.—Bankers, factors, wharfingers, attorneys of a High Court and policy-brokers may, in the absence of a contract to the contrary, retain as a security for a general balance of account, any goods bailed to them; but **no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect**."*
>
> ***[Emphasis Supplied]***

1.1. In this regard, reliance is placed on the Judgment of the Hon'ble Supreme Court in the case of ***Sahakari Khand Udyog Mandal Ltd. v. CCE & Customs, (2005) 3 SCC 738*** wherein it was held that retention of money or benefits which in justice, equity and good conscience, belongs to someone else, would amount to unjust enrichment. The relevant extract of the said Judgment is reproduced herewith for ready reference: -

> *"31. Stated simply, **"unjust enrichment" means retention of a benefit by a person that is unjust or inequitable. "Unjust***

enrichment" occurs when a person retains money or benefits which in justice, equity and good conscience, belong to someone else.

32. ***The doctrine of "unjust enrichment", therefore, is that no person can be allowed to enrich inequitably at the expense of another. A right of recovery under the doctrine of "unjust enrichment" arises where retention of a benefit is considered contrary to justice or against equity.***

33. The juristic basis of the obligation is not founded upon any contract or tort but upon a third category of law, namely, quasi-contract or the doctrine of restitution."

[Emphasis Supplied]

77. In fact, the circular was issued by TANGEDCO without any consultation with SPGs, hence, it is evident that the supply by the SPGs was not intended to be gratuitous nor received by TANGEDCO on the understanding that it was gratuitous, thus, TANGEDCO cannot get away with the liability to pay compensation for the excess power received from SPGs, such obligation shall be governed by the provisions of Section 70 of the Contract Act 1872, quoted as under:

*"**70. Obligation of person enjoying benefit of non-gratuitous act** – Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."*

78. By the judgment rendered by Hon'ble Supreme Court in *State of West Bengal v. BK Mondal, AIR 1962 SC 779*, in the context of Section 70 of the Indian Contract Act, 1872, it has been held as under:

> *"It is plain that three conditions must be satisfied before this section can be invoked. The first condition is that a person should lawfully do something for another person or deliver something to him. The second condition is that in doing the said thing or delivering the said thing he must not intend to act gratuitously; and the third is that the other person for whom something is done or to whom something is delivered must enjoy the benefit thereof When these conditions are satisfied S.70 imposes upon the latter person, the liability to make compensation to the former in respect of or to restore, the thing so done or delivered. In appreciating the scope and effect of the provisions of this section it would be useful to illustrate how this section it would operate. If a person delivers something to another it would be open to the latter person to refuse to accept the thing or to return it; in that case S.70 would not come in to operation. Similarly, if a person does something for another it would be open to the latter person not to accept what has been done by the former; in that case again s. 70 would not apply. In other words, the person said to be made liable under s. 70 always has the option not to accept the thing or to return it. It is only where he voluntarily accepts the thing or enjoys the work done that the liability under s. 70 arises. Taking the facts in the case before us, after the respondent constructed the warehouse, for instance, it was open to the appellant to refuse to accept the said warehouse and to have the benefit of it. It could have called upon the respondent to demolish the said warehouse and take away the materials used by it in*

constructing it; but; if the appellant accepted the said warehouse and used it and enjoyed its benefit then different considerations come into play and S.70 can be invoked"

79. In terms of the above judgment, after having consumed the excess power generated by the SPGs and enjoyed the benefit of selling the power to end consumers for financial gains, TANGEDCO is liable to make compensation to SPGs for the excess power consumed by it.

80. Consequently, we also opine that the Circular issued by TANGEDCO is bad in law and need to be set-aside.

81. We are, therefore, of the firm opinion that there is no ceiling for generation of electricity beyond CUF of 19 %, also the Circular issued by TANGEDCO cannot stand in the eyes of law, simultaneously, we cannot ignore the fact that the tariff determined by TNERC vide its Tariff Orders at different point of time is based on normative CUF of 19% i.e. the entire cost of the project along with reasonable return shall be recovered by SPGs if the CUF of 19% is achieved by the project. In this regard, TANGEDCO vide its counter affidavit dated 14.02.2022 has indicated the impact of increase in CUF over and above 19%, as considered in the impugned order. The relevant extract of TANGEDCO's submission is as under:

Increase in CUF beyond 19%	Tariff under Order No. 7 of 2014 in Rs.		Tariff under Order No. 2 of 2016 in Rs.	
	without	with	without	With
By 1%	6.66	5.96	4.84	4.33
By 2%	6.34	5.68	4.61	4.13

By 3%	5.79	5.19	4.21	3.77
By 4%	5.79	5.42	4.4	3.94
By 5%	5.55	4.97	4.04	3.61

82. Therefore, any increase in CUF over 19% would result in reduction of normative tariff determined by the Commission, equally, if TANGEDCO schedules power below CUF of 19% in a given year, it would result in loss to SPGs. Consequently, both the situation would lead to unjust enrichment of either party.

83. We are, therefore, opine that there is a need to prescribe a mechanism to share benefit of excess power generated by SPGs so that while the generators have the incentive to generate more power, a part of benefit is also passed on to the end consumers. This would be in accordance with principles of Section 61(d) of the Act and also is the essence of Clause 5.2.1 of the Ministry of Power ("MoP") guidelines dated 03.08.2017 for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Projects ("Bidding Guidelines") envisaging a provision qua fixation of tariff for energy generated beyond the CUF, quoted again for emphasis as under:

> *5.2. Quantum of Power/ Energy to Be Procured: The procurement of power could either be in power (MW) terms or in energy (kWh or Million Units, i.e. MU) terms. 5.2.1. Procurement in Power Terms (MW):*
>
> *a) In case of procurement in power (MW) terms, the range of Capacity Utilisation Factor (CUF) will be indicated in the bidding documents. Calculation of CUF will be on yearly basis. In case the*

project generates and supplies energy less than the energy corresponding to the minimum CUF, the Solar Power Generator will be liable to pay to the Procurer, penalty for the shortfall in availability below such contracted CUF level. The amount of such penalty will be in accordance with the terms of the PPA, which shall ensure that the Procurer is offset for all potential costs associated with low generation and supply of power under the PPA, subject to a minimum of 25% (twenty-five per cent) of the cost of this shortfall in energy terms, calculated at PPA tariff.

b) In case the availability is more than the maximum CUF specified, the Solar Power Generator will be free to sell it to any other entity provided first right of refusal will vest with the Procurer(s). ***In case the Procurer purchases the excess generation, the same may be done at 75% (seventy-five per cent) of the PPA tariff, and provision to this effect shall be clearly indicated in the RfS document****."*

84. We are inclined to adopt the above mechanism prescribed by MoP for the generators covered in the present Appeals. Accordingly, TANGEDCO is directed to make compensation to the SPGs at the rate of 75% of the PPA/EPA tariff for excess power consumed, i.e. over and above 19% of CUF in addition to the tariff payment as per the corresponding Tariff Order for the power procured up to 19% of CUF from the SPGs covered by these captioned Appeals.

85. The TANGEDCO is directed to make payments including the payment at the rate of the relevant Tariff Order/ EPAs for energy procured from the solar projects of the Appellants up to CUF of 19% and additional payment for the excess energy procured from or supplied by the Appellants at the rate of 75%

of the tariff as applicable under the provisions of the EPAs and in accordance with the conclusions made in the following paragraphs in a time bound manner, however, within six months of this judgment.

ORDER

For foregoing reasons as stated supra, we are of the considered view that the captioned Appeals being Appeal No. 119 of 2021, Appeal No. 51 of 2021, Appeal No. 338 of 2022 and Appeal No. 339 of 2022 filed by the Appellants have merit and are allowed.

The common Impugned Order dated 22.12.2020 passed by the Tamil Nadu Electricity Regulatory Commission in Petition M.P. No. 11 of 2019 filed by NSEFI, Petition DRP No. 2 of 2020 filed by Crescent Power Ltd., Petition No. MP 11 of 2018 filed by B S Apparel Pvt Ltd. and Petition No. 4 of 2018 filed by Ranergy Solutions Pvt Ltd. is *set aside.*

PRONOUNCED IN THE OPEN COURT ON THIS 28TH DAY OF NOVEMBER, 2022.

(Sandesh Kumar Sharma)	**(Justice R. K. Gauba)**
Technical Member	**Officiating Chairperson**

REPORTABLE / ~~NON-REPORTABLE~~

pr/mkj