

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

**APPEAL NO. 351 of 2018 & IA No.505 of 2020,
&
IA No.1703 of 2018 & IA No.249 of 2019**

Dated: 14th September, 2020

**Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. S.D. Dubey, Technical Member**

In the matter of:

Chennamangathihalli Solar Power Project LL.P,
Through its Designated Partner
Sri SidramKaluti
BC 109, Davidson Road,
Camp: Belagavi. 590 001
Karnataka

Sri. G Mahesha,
No.83/A, 5th Main,
1st Cross, Pramod Layout,
Pantharapalya, Bengaluru,
Dist: Bengaluru, Karnataka

.....APPELLANTS

Versus

1. Bangalore Electricity Supply Company Limited
Through its Managing Director,
K R Circle,
Bengaluru-560001

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. Shubhranshu Padhi
Mr. Ashish Yadav

Counsel for the Respondent(s) : Mr. S.S. Naganand, Sr.Adv.
Mr. Sriranga Subanna
Mr. Balaji Srinivasan
Mr. Siddhant Kohli
Ms. Garima Jain
Mr. Pallavi Sengupta for R-1

J U D G M E N T

PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER

1. The Appeal No. 351 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.68/2017 passed by the Karnataka Electricity Regulatory Commission .
- 1.1 The said original petition was filed by the Appellants herein challenging the direction and communication issued by the Respondent vide order dated 13/04/2017 and seeking extension of time for the commercial operation of the Solar Power project. The Commission under the impugned order has held that the Appellants are not entitled to extension of time for commissioning of the solar

power project in terms of Article 2.5 (Extension of Time) read with Article 8 (Force Majeure) of the Power Purchase Agreement dated 03.07.2015 read with Supplementary PPA dated 02.12.2016.

1.2 The Appellants are aggrieved by the aforesaid Impugned Orders and have preferred the present appeal.

2. Brief Facts of the Case(s):-

2.1 The Appellant No.1, Chennamangathihalli Solar Power Project (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. The Appellant No.1 was formed as a Special Purpose Vehicle (**SPV**) to undertake the Solar Power project, a Non-Conventional Power project at Chennamangathihalli Village, Belgaum District, State of Karnataka.

2.2 The Appellant No.2, Sri. G Mahesha is a farmer owning land on which solar project has been constructed in Chennamangathihalli Kaval village, Challakere Taluka, Chitradurga District. The Appellant No.2 is the Solar Power Developer (**SPD**) in the present matter.

2.3 The Respondent No.1, Bangalore Electricity Supply Company Limited(**BESCOM**), 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 K R Circle Bangalore, Karnataka – 560001.

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

3. Questions of law :-

The Appellants have raised following questions of law in the Appeal:-

3.1 Whether the discretionary power exercised for granting extension of time within the four corners of the PPA amenable to judicial review?

3.2 Whether the State Commission has committed a serious error in holding that Commission has got jurisdiction to scrutinize the validity of the extension of time granted by BESCOM on the ground that the event affects the quantum of tariff applicable for supply of energy?

- 3.3** Whether the State Commission has committed a serious error in not appreciating that Clause 4.2. (d) provides that BESCO is required to act reasonably while exercising its discretionary power under the agreement?
- 3.4** Whether the State Commission has committed a serious error in not appreciating that the occurrences provided in clause 8.3 are inclusive and therefore they are not the only ones and the Force Majeure Event under clause 8.3 covers the situation where the delay or failure in performance has occurred due to any event or circumstance beyond the reasonable control of the party affected by such delay or failure?
- 3.5** Whether in the facts and circumstances of the case, the State Commission is right in law to hold that the Appellants cannot be said to have been affected by Force Majeure within the scope and application of Article 8 of the PPA dated 03.07.2015 entered into between the Appellant No. 1 and Respondent No. 1?
- 3.6** Whether the State Commission can decide the issue in deviation from the provisions of the PPA particularly when the State Commission itself had approved the standard format of the PPA?
- 4. Shri Shubhranshu Padhi, learned counsel appearing for the Appellant in Appeal No.351 of 2018 has filed the written submissions for our consideration as under:-**

- 4.1** The Appellant before this Tribunal was allotted the project by Karnataka Renewable Energy Development Limited, the nodal agency to facilitate setting up of Renewable energy projects in the State, to set up a Solar Power Plant of 3MW capacity in Chennammangathihalli Kaval Village, Challakere Taluk, Chitradurga district in the State of Karnataka on 17.03.2015.
- 4.2** The Appellant No.2 entered into a Power Purchase Agreement with BESCOM, the distribution licensee, on 03.07.2015. The KERC approved the PPA(which included Extension of Time)on 26.08.2015.
- 4.3** As per the terms of the PPA, the Plant was required to be commissioned within 18 months from the Effective Date.
- 4.4** Under the PPA, the Effective Date is defined as the date of execution of the PPA. The Appellant was required to commission the plant on or before 02.01.2017. In the present case, the Appellant has commissioned the plant on 30.06.2017, within the extended period of 6 months.
- 4.5** The relevant provisions of the PPA are extracted hereunder for ready reference of this Tribunal:

“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 BESCO Event of Default; or
- (b) Force Majeure Events affecting BESCO; or
- (c) Force Majeure Events affecting the SPD.

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.

2.5.6 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.”

ARTICLE 5

Rates and Charges

5.1 *Tariff Payable.*

The SPD shall be entitled to receive the Tariff of Rs. 8.40 per Kwh based on the KERC tariff order S/03/1 dated 10.10.2013 in respect of SPD's Solar PV projects in terms of this agreement for the period between COD and the Expiry Date. However, subject to Clause 2.5, if there is a delay in commissioning of the Project beyond the Scheduled Commissioning Date and during such period such period there is a variation in the KERC Tariff, then the applicable Tariff for the projects shall be the lower of the following:

- (i) Rs. 8.40 per kwh
- (ii) Varied tariff applicable as on the date of Commercial Operation.

“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 CESCO 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; (emphasis supplied)**
- (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;*

4.6 In this background, the following questions would arise for the kind consideration of this Tribunal:

- (i) Whether the State Commission was justified, and had necessary jurisdiction to intervene in the matter when there was 'no dispute' existing between the parties?
- (ii) In the alternative, whether the State Commission was justified in holding that there was no 'Force Majeure' conditions existing for

granting extension of time and consequently reducing the tariff applicable to the Appellant?

Issue No.1

4.7 In so far as first issue is concerned, it is settled law that Commission which is created under a Statute has to necessarily function within the provisions of the Statute itself. There is no scope for either inherent or *suo motu* exercise of power. Under the Electricity Act, 2003, the State Commission has the following functions to discharge;

- (i) Adjudicatory role under S.86(f)
- (ii) Advisory role under S.86(2)
- (iii) Regulatory role under S.61, 62, 63 and 64.

4.8 In order to attract the provisions of the dispute resolution under S.86(f), there has to be necessarily assertion and denial by both the parties involved. It is a settled principle of law as laid down by the Constitution Bench of the Hon'ble Supreme Court in ***KihotoHollohan v. Zachillhu* [1992 Supp (2) SCC 651]**, that-

“99. Where there is a lis—an affirmation by one party and denial by another—and the dispute necessarily involves a decision on the rights and obligations of the parties to it and the authority is called upon to decide it, there is an exercise of judicial power. That authority is called a tribunal, if it does not have all the trappings of a court.”

Therefore, for a lis or dispute to have arisen for adjudication, there has to be necessarily an affirmation by one party and denial by another, which calls upon an adjudication by the tribunal. It is a settled proposition of law that a tribunal does not exercise any inherent jurisdiction and is bound by the powers conferred under the statute.

4.9 In the present case, it could be seen that there was no dispute between the Appellant and the Respondent No.1 in terms of S.86(f). This could be seen from the following communications between the Appellant and BESCO, the Respondent No.1:

(i) Letter dated 03.12.2016 addressed to BESCO, by the Appellant requesting for extension of time in terms of article 2.5 of the PPA for a period of 6 months due to the various force majeure events, especially the land conversion.

(ii) Letter dated 03.02.2017 from the Respondent No.1 to the Appellant granting six months time to commission the plant

Once the extension of time was granted by the Respondent No. 1, which was empowered to do so under the PPA, there was no dispute between the parties that required adjudication by the KERC.

4.10 Despite the same, the KERC has *suomotu* issued communications dated 16.3.2017 and 5.4.2017 to all the ESCOMS stating therein that ESCOMS could not allow extensions of time beyond the Scheduled Commissioning date without obtaining prior approval of the Commission and the concerned party had to file a petition before the KERC in that regard seeking the approval. It is submitted that seeking any prior approval was neither contemplated nor provided under the PPA and the directions of the KERC amounts to rewriting all the concluded PPAs in the State. There is no such exercise contemplated under the Act.

4.11 The procedure followed by the KERC is also not contemplated under the PPA. Article 10 of the PPA provides a detailed procedure for dispute resolution. Article 10.3.1 provides as under:

“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.”

Therefore before any dispute could have been raised by the KERC, the procedure under Article 10 more particularly 10.3.1 had to be followed which has not been done in the present case.

4.12 In fact, the PPA itself has an inbuilt mechanism wherein as a result of extension of time, the Scheduled Commissioning Date and the Expiry Date newly determined date is deemed to be the Scheduled Commissioning Date. Therefore, there was no occasion for the State Commission to intervene in the matter to further approve the extension of time granted by the Respondent No.1 in terms of the PPA. It was also uncalled for the State Commission to direct the parties to file petitions before the Commission seeking extension of time.

4.13 The learned Counsel appearing for the Respondent No. 1 placed reliance on the judgement passed by the Hon'ble Supreme Court in the case of ***All India Power Engineer Federation v. Sasan Power Ltd., (2017) 1 SCC 487*** to state that the Commission had inherent powers to interfere in all cases where there would be an enhancement of tariff. The said judgement has no application in the facts and circumstances of the case. The said judgement does not lay down any proposition that even in cases wherein there is no enhancement of tariff and the parties exercise power under the PPA, even then the commission had any inherent power. In fact in para 31 of the said judgement it has been held as under-

“31. 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.”(Emphasis Supplied)

Therefore only in cases where there is an increase in tariff **outside the four corners of the PPA**, the Commission would have the power to examine the same. In the present case, neither has there been any increase in the tariff nor was there any exercise of power outside the PPA. The same fortifies the case of the Appellant that the Impugned Order is not in consonance with the provisions of the Electricity Act, 2003.

4.14 It is a mandate upon the State Commission to promote co-generation and generation of power from renewable sources of energy. However, in the present case, the KERC has *suomotu* interfered in the extension of time granted by the ESCOM and altered the tariff provided in the PPA to a lesser one, thereby rendering hundreds of projects such as that of the Appellant as

unviable. It is submitted that the Impugned Order is contrary to the mandate of S. 86(1)(e).

4.15 The PPA itself had been approved by the KERC, including the clauses with respect to the Extension of Time. When the parties were exercising contractual powers under the PPA and the contract had been extended, there was no occasion or power for the KERC to *suomotu* set aside the said exercise. In these circumstances, the impugned order requires to be set aside.

Issue No.2

4.16 In the alternative, if the merits of the case regarding existence of Force majeure events requires to be examined, it is submitted that the Respondent No.1 granted extension of time to commission the plant to the Appellant in terms of clause 2.5 read with Clause 8.3 of the PPA.

4.17 The implementation of the 3 MW Solar Power Project, in terms of the PPA dated 03.07.2015 and also as per the Guidelines issued by the Government of Karnataka, required various approvals, permissions, sanctions etc. from the Government of Karnataka, the other Government Agencies and also the BESCO for connectivity

of the Solar Power Project with the Grid for evacuation of power generated at the project. The Appellants were required to fund and finance the project by substantial debt being borrowed from the Banks and Financial Institutions. The financial closure of the project with the Banks and Financial Institutions was dependent upon the Appellants duly securing the approval from various agencies for implementation of the project. These include principally, the following:

- (a) Approval for conversion of the land from agricultural purpose to be used for setting up a Solar Power Project;
- (b) Connectivity of the Solar Power Project with the Grid and power evacuation approval on the 11 KV Power System up to 66/11 KV Dyavaranhalli Substation;
- (c) Providing the Bay estimation for the connectivity at the Bay of the substation of the transmission/distribution system and to provide approval for the breaker and other equipment to be obtained by the Appellants;
- (d) Grant of approval by the Chief Electrical Inspector for charging of the line and for safety and security issues connected with the generating station and line connectivity, installation of metering arrangement, synchronization etc.

4.18 For the purpose of Commissioning the project, the Solar Power Developer, the Appellant herein, is required to procure the following:

- I. Land Conversion Order
- II. Evacuation Approval
- III. Equipment and Machinery

4.19 Following is a brief list of dates and events w.r.t to the above requirements that the Appellant had to comply with:

I. Procurement of Land Conversion Order

- Applied on 16.02.2016
- Conversion order received on 29.09.2016

II. Procurement of Evacuation Approval

- Applied for Evacuation approval on 18.01.2016 / 15.02.2016.
- Evacuation approval granted on 22.08.2016.
- Bay Estimate issued by the Karnataka Power Transmission Corporation Limited (KPTCL) on 17.12.2016.
- The plant was commissioned on 30.06.2017.

III. Procurement of Equipment

- The Agreement came to be signed after obtaining in principle approval of financial assistance from the Bankers on 29.06.2016

- An Agreement for Sale and Purchase of Solar Modules was entered into by the Appellant with the Vendor on 09.09.2016

4.20 In regard to the approval for conversion of the use of the land from agricultural purpose to the purpose of setting up a Solar Power Project, the Appellants obtained various documents/approval which are required for the Application for conversion and applied to the Deputy Commissioner, Chitradurga on 16.02.2016 vide application dated 16.02.2016 duly acknowledged. (which has been mentioned in the final Land Conversion Order dated 29.09.2016). The demand Notice for payment of the conversion charges (after the Tahsildar's recommendation to the Deputy Commissioner) was issued by the Deputy Commissioner on 08.09.2016 (i.e. after 6 months). Thereafter, the payment was made by the Appellants on 22.09.2016 within 14 days. The Order of Conversion of Land into Non-Agriculture was given by the Deputy Commissioner only on 29.09.2016. Thus, the approval for conversion of land was received after a lapse of about 8 months. Copies of the Demand Notice dated 08.09.2016 and the Order of Conversion of land into Non-Agriculture dated 29.09.2016 are filed along with main appeal.

4.21 The Karnataka Land Revenue Act, 1964 itself stipulates a period of 4 months in the case of Deemed Conversion. Relevant portion of

the S.95. of Karnataka Land Revenue Act, 1964 in this regard is extracted hereunder for ready reference of this Tribunal:

Uses of agricultural land and the procedure for use of agricultural land for other purpose.

(1) Subject to any law for the time being in force regarding erection of buildings or construction of wells or tanks, an occupant of land assessed or held for the purpose of agriculture is entitled by himself, his servants, tenants, agents, or other legal representatives, to erect farm buildings, construct wells or tanks, or make any other improvements thereon for the better cultivation of the land or its more convenient use for the purpose aforesaid.

(2) If any occupant of land assessed or held for the purpose of agriculture wishes to divert such land or any part thereof to any other purpose, he shall 1 [notwithstanding anything contained in any law for the time being in force]1 apply for permission to the Deputy Commissioner who may, subject to the provisions of this section and the rules made under this Act, refuse permission or grant it on such conditions as he may think fit.

(5) Where the Deputy Commissioner fails to inform the applicant of his decision on the application made under sub-section (2) within a period of four months, from the date of receipt of the application, the permission applied for shall be deemed to have been granted.

The aforesaid period taken in the obtaining land conversion was clearly beyond the control of the Appellant and the Appellant was entitled to the benefit for the extension of period on that account.

4.22 Similarly in the case of evacuation approval, the Appellant has clearly stated aforesaid the period taken at each stage of the approval process. On 15.02.2016, the Appellant submitted the application for Grid connectivity and power evacuation approval through 11 KV Power System with connectivity to 33KV/11 KV

Dyavaranhalli Substation. The Letter for payment of processing fees was received only on 25.02.2016 and the same was immediately complied with on 10.03.2016. The tentative approval was received only on 13.05.2016. The Appellant requested for the Final evacuation approval on 25.05.2016. The final approval for evacuation scheme was issued on 22.08.2016 by BESCO (more than 6 months after submission of the application for grid connectivity).

4.23 On 05.12.2016, the Appellant applied to the Chief Electrical Inspector with drawings pertaining to the electrical installation of the 3 MW Solar Power Project. This approval was given by the Chief Electrical Inspector only on 03.01.2017 subject to certain conditions. After the payments of the inspection fees and thereafter the submission of the compliance report on 19.05.2017, the plant safety approval for commissioning of the project was given on 28.06.2017.

4.24 In the circumstances mentioned herein above, there were delays in the implementation of the project for reasons not attributable to the Appellants but attributable to the time taken by the Government Agencies for granting necessary approvals as mentioned herein above. Considering the delay in issuing approvals, the Appellant

sought for extension of time on 03.12.2016 in terms of article 2.5 of the PPA from BESCO, the Respondent No.1.

4.25 The Respondent No.1, under communication dated 03.02.2017, granted six months time to commission the plant, therefore the new date for commissioning the plant was 02.07.2017. The extension of time came to be granted by the Respondents only after satisfying the bonafides of the Appellants and after following due process to ascertain the authenticity of the Appellant's claim.

4.26 It is significant to note that the Government of Karnataka vide its letter dated 24.11.2016 had advised all ESCOMs:

- a. To form a committee comprising of 3 members to examine the requisitions from the Farmer/SPVs for extension of time as per Article 2.5.
- b. To ascertain whether the requisitions received from the farmers/SPVs fulfilled the conditions as stated in Article 8 of the PPA.
- c. To dispose the requisitions received from the Farmers/SPVs in respect of extension of time under Article 2.5 and Article 8 within 15 days.

In accordance with the same, a committee of the officers of BESCO had been formed and the Committee had considered all the documents submitted by the Appellant. Accordingly, BESCO

had granted the extension on 03.02.2017. The Respondent No.1 has all along given just consideration to the facts & documents produced by the Solar Power Developers and granted extension by invoking clause 2.5.1 of the PPA w.r.t to extension of time. In fact the statement of objections filed by the Respondent No.1 before the State Commission bears testimony to the fact that the extension was granted after completely being satisfied about existence of Force Majeure conditions affecting the Appellant.

4.27 After the first Respondent granted extension to the Appellant, KERC addressed a communication on 16.03.2017 to all the ESCOMs not to grant extension of time to any SPD without obtaining prior approval of KERC. The KERC addressed another communication on 05.04.2017 directing the ESCOMs to advise the SPD's to file a petition seeking extension of time.

4.28 The State Government addressed a communication on 23.06.2017 to the Respondent No.2, KERC to grant approval to the extension of time granted by the ESCOMs in the state. The Ministry of New and Renewable Energy also issued a Communication on 28.07.2017 to grant extension of time to the Developers. The impugned order is passed by the State Commission without taking into consideration

any of the recommendations of both the State and the Central Government.

4.29 The Appellants had requested for extension of time on 03.12.2016 as the 18 months time originally fixed under the PPA was to end on 03.01.2017. The said extension, as mentioned in the preceding paragraphs, was sought on the ground of delays by Governmental agencies in granting approvals, thus falling under the 'Force majeure' events enumerated under the PPA. The Respondent No.1 granted approval for extension of time on 03.02.2017 for a period of 6 months from 03.01.2017 to 02.07.2017. Once the Appellants received this extension, they were in a position to accelerate the pace of the project as the approvals came to be granted within the extended time, and only after which the Appellants were required to make huge investments towards procuring and installation of equipment. It is submitted that no prudent party would ever invest such huge amounts towards the various equipments without obtaining the statutory approvals.

4.30 The State Commission issued direction to the ESCOMs to direct filing of petitions by the Solar Power Developers on 5.04.2017 after the extension was already recommended by the State Government and accepted and granted by the ESCOMs in the State. The

Appellants had thus altered their position only on confirmation of extension of time by the Respondent No.1 and the order of the State Commission subsequently cancelling the extension granted amounts to defeating the rights of the Appellants and violates the principles of legitimate expectation.

4.31 The contention of the learned counsel for the first Respondent that no notice of a force majeure was given is contrary to the facts and circumstances. Firstly, no such contention was raised before the KERC by the first Respondent. Secondly, the PPA clearly contemplates under 2.5.1 read with 8.3, that the Appellant was entitled to an extension of time on the occurrence of a force majeure event affecting the Solar Power Developer. In terms thereof, an application delineating the force majeure events was clearly sent by the Appellant on 03.12.2016 which was granted by the first Respondent on 3.2.2017. In that view of the matter, the contention raised by the counsel for the Respondents merits to be rejected outright.

4.32 The State Commission erred in holding that the Appellant No.1 shall be liable to pay the Liquidated Damages to the Respondent No.1 for the period from 03.01.2017 onwards till the commissioning of the power plant despite the extension granted by the Respondent No.1

to the Appellant No. 1. The State Commission failed to consider that there was no demand for payment of Liquidated Damages by BESCO, the only authority to decide in this regard since they alone were the Contracting Party to the PPA with the Appellant. Even in the proceedings before the Commission, the Respondent No.1 did not claim any Liquidated Damages. In fact, the State Commission had not informed either the Appellants or the Respondent No.1 at any point of time about any coercive actions contemplated against the Appellants or about levy of Liquidated Damages. Even in the communication dated 07.07.2017 addressed to the Respondent No.1 directing the Solar Power Developers to approach the Commission by filing a petition, there was no mention of cancellation of extension granted or levy of Liquidated Damages. In the said communication, the Commission acknowledged that the State Government had requested the Commission to approve extension granted by the ESCOMs as even the Government had accepted the views of the ESCOMs in granting extension of time on the ground of Force Majeure events. Therefore, looked at from any angle, the State Commission did not have any jurisdiction to either cancel the extension granted or levy Liquidated damages.

4.33 The State Commission erred in holding that the tariff applicable to the Appellant is Rs.4.36/- on the ground that the normative Capital Cost of the Solar Power Plants, when the Petitioner took effective steps to procure the capital equipment for its Project, was lower than the normative cost of the Solar Power Plants, assumed in the Generic Tariff Order dated 10.10.2013. The said finding of the Commission is erroneous and contrary to the documents on record. It could be seen that the Appellant had purchased various equipment and machinery related to the plant between 01.07.2016 and 10.11.2016 immediately after signing and getting of the PPA, within the period of 18 months of signing of the PPA and when the Appellant was assured of financial assistance which eventually came to be approved on 29.06.2016 with intention of commissioning the project before December 2016 subject to availability of all statutory approvals in time. On this ground alone the impugned order requires to be set aside.

4.34 It could be seen that the entire project is structured on the basis of the 'assured tariff'. As per Clause 5.1, the Appellant was entitled to a tariff of Rs. 8.40 per Kwh. It was because of the incentivized tariff that all the Solar Power Developers including the Appellants went ahead with the project and invested heavily. Further, the banks and

financial institutions have advanced loans on the basis of the tariff at Rs.8.40/unit. The financial viability of the project was predicated on the tariff provided in the PPA. The State Commission has now, under the impugned order, set at naught the entire basis of the whole project without any basis. The same is a retrograde step affecting not only the Appellant in particular but the entire objective of incentivizing the entrepreneurs for investment in the renewable energy sector the state. In these circumstances it is prayed that this Tribunal be pleased to direct the Respondent No.1 to pay the Appellant the differential amount (that of Rs.8.40/- entitled by the Appellant as against payment made at Rs.4.36/- by the Respondent No.1 arbitrarily) with interest at the rate of 18% from the date of Commissioning till the date of payment at the tariff of Rs.8.40/-.

4.35 This Tribunal has taken a consistent view that one of the grounds for the tariff in the PPA to be altered is to promote co-generation and renewable sources of energy and the producers, thereof. It is submitted that in similar circumstances, this Tribunal had upheld the enhancement of tariff as the project was delayed due to circumstances beyond the control of the Producer in Judgment dated 26.5.2016 passed in ***Appeal No. 87 of 2015-Gulbarga electricity v. KERC and anr.***In the said case, the Power Plant was

a hydel based power plant which was linked to and dependent on the construction of a barrage by the State Govt. However, the State Govt. failed to construct the barrage in the time contemplated due to which there was significant delay in the project. The Appellate Tribunal upheld the enhancement of tariff in favour of the Power Producer holding the same was a force majeure event. It was held therein that-

*“19)The submission of the Appellant that it was not responsible for delay and therefore tariff should not be enhanced and that Respondent No.2 should be driven to file a suit for damages against KNNL deserves to be rejected. We began by saying that the fact that **Respondent No.2 generates electricity by using renewable sources of energy must be kept in mind while dealing with this case. While parting we reiterate the same observation. There can be no dispute that the object of the said Act and the relevant Government policies is to encourage projects based on renewable sources of energy. If an acceptable and genuine case is made out such projects should be helped. If such projects close down; that will deprive the consumers of environmentally benign power. In the long run such approach will be harmful to the power sector and to the consumers. It must however be made clear that not in all cases can tariff be enhanced by reopening the PPA. The Appropriate Commission will have to examine facts and circumstances of each case to see whether the generator has made out a strong case for reopening the PPA and enhancing the tariff.** In the present case the impugned order strikes a proper balance between the interests of all stakeholders. In the circumstances no interference is necessary with the impugned order. Appeal is dismissed.”(emphasis Supplied)*

4.36 The Impugned Order is not in consonance with the provisions of the Act and the law laid down by this Tribunal. The Impugned order merits to be set aside and the Appeal of the Appellants be allowed.

Additional Written submissions

4.37 The Appellant and BESCOM had entered into a Power Purchase Agreement (PPA) on 03.07.2015 for development of 3 MW solar power plant at Chennamangathihalli village in Chitradurga district.

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

***NOTE 2:**KERC approved the PPA executed between the Appellant and BESCOM on 26.08.2015*

***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 ask 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 a request to KPTCL for setting up of 11 KV Terminal Bay on 13.05.2016, but the KPTCL had raised the demand for lease charges only on 12.12.2016, after a delay of 6 months.*

4.38 The Appellant No. 2 wrote a letter dated 03.12.2016 to BESCOM requesting for extension of time upto 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 cases on its own merits. In view of GOK's direction, the Appellant's case for extension of SCOD was considered by a three member Technical Committee under the Chairmanship of the Director (Technical), BESCOM on 23.01.2017. BESCOM by its

letter dated 03.02.2017 allowed the Appellant's request for extension and granted 6 months time 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 BESCOM' and as such Article 4.2 (d)(iii), provides for BESCOM to act reasonably, while exercising its discretionary power under the PPA.*

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. Thereafter, BESCOM by its letter dated 31.03.2017, in modification of its earlier letter dated 03.02.2017, stated that the extension of time granted to the Appellant was subject to the condition that the *"... the tariff applicable and the liquidated damages to be paid, if any, is subject to Hon'ble KERC/ GOK approval..."*. Further, KERC issued another communication dated 05.04.2017 to all ESCOMS directing them to advise the concerned SPD/SPV under Land Owners/ Farmer's Scheme to file a petition before the KERC for seeking approval for any extension of COD.

4.39 In the meanwhile, GOK issued a letter dated 23.06.2017 to the Secretary, KERC highlighting the fact that the reason for the extensions issued by ESCOMs were due to Force Majeure and the extensions were done in accordance with the PPAs approved by the KERC, without altering the KERC approved rate of unit as laid down in the PPA and 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 ESCOMs grant of extensions 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.

4.40 It was in this backdrop, the Original Petition No. 68 of 2017 was filed before the KERC by the Appellant, seeking to set aside BESCO's communication dated 31.03.2017, to confirm the extension order of BESCO dated 03.07 granting extension of 6 months to the Appellant to commission its project, to restrain BESCO to take any action against the Appellant on account of communication dated 05.04.2017 and to declare that the Appellant is entitled to claim Force Majeure conditions.

NOTE: Various Original Petitions seeking similar reliefs were filed before the KERC by other affected parties.

4.41 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.

4.42 During course of hearing before the Tribunal, the Tribunal wanted details with respect to the period during which the investments were made for various components going into the capital cost of the project more particularly the solar modules. In this regard it is humbly submitted that the Appellant has been diligent in implementing the project and has placed all the orders for solar modules, power conditioning units, mounting structures, cable and accessories etc. prior to the scheduled commissioning date (SCOD) of the project as per the PPA. Therefore, it is submitted that but for the force majeure event the Appellant's project would have been commissioned within the SCOD. Thus, considering the fact that entire investment cumulating into the capital cost of the project was made prior to SCOD, it cannot be argued that the Appellant got any financial benefit of reduced expenditure in any manner from the delay due to force majeure. The detailed statement of the Appellant with respect to the period during which the investment for capital

cost of the project was made has been exhibited before the Tribunal.

4.43 It is 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. Further, under Section 95 (10) of the KLRA, as amended on 13.08.2015, a land shall be deemed to have been converted upon payment of conversion fine or fees payable, if any. It is submitted that the intimation to pay fees was given to the Appellant only on 08.09.2016, despite the application for conversion having been made on 16.02.2016, i.e. after 216 days.

NOTE: *Along with the prescribed Form (Annexure – 1) as per Rule 106A under Section 95 of KLRA, to obtain a conversion order, the following documents are required to be submitted:*

- Record of Rights
- Akarband Certificate
- Nil Encumbrance Certificate for 14 years
- Mutation Entries
- 11E Sketch
- PTCL Certificate under the Karnataka Scheduled Castes and Scheduled Tribes (Prohibition of Certain Lands) Act, 1978

4.44 The KERC has erred in holding that the Appellants are not entitled to extension of time as granted by BESCO under the PPA and reducing the tariff from Rs. 8.40 per unit to Rs. 4.36 per unit. In view of aforementioned facts and circumstances, it is submitted that the

Appellants are entitled to a tariff of Rs. 8.40 per unit in terms of the PPA dated 03.07.2015 and even otherwise, the present Appellant herein has already spent a total cost of Rs. 23.79 Crore as on the date of commissioning of its project.

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.

5. Shri S.S. Naganand, learned senior counsel appearing for the Respondent No.1 has filed the written submissions in Appeal No.351 of 2018 for our consideration as under:-

5.1 The Appellant has filed the present appeal praying to set aside the order dated 04.09.2018 passed by the Karnataka Electricity Regulatory Commission in O.P. No. 68 of 2017; to hold that Appellants are entitled to extension granted by Respondent herein and to hold that the Appellants are entitled to tariff at the rate of Rs. 8.40/kWh as per the terms of the PPA dated 03.07.2015 read with SPPA dated 02.12.2016; and consequently that the Respondents are not entitled to levy any Liquidated Damages and pass any such order this Tribunal deems fit and proper in facts and circumstances of the case.

5.2 The promoter of the Appellant Company herein is a farmer owning land at Chennamangathihallikaval Village, Challakere Taluka,

Chitradurga. The Government of Karnataka had on 26.8.2014 issued a Government Order with regard to establishing of 1 to 3 MW solar power plants in the State of Karnataka under the land owner farmer category. In furtherance to the same, the KREDL invited tenders from farmers for establishing such plants. Sri G Mahesh, made an application in response to the same which came to be accepted by the KREDL, in furtherance to which on 17.03.2015, a letter was addressed by KREDL to Sri G Mahesh, informing him about acceptance of his application. Thereafter, on 04.07.2015, a PPA came to be executed with the Respondent herein. As per the terms of the PPA, the generator was required to commission the plant within 18 months from the date of execution of the PPA. Hence, the Appellant was supposed to commission the unit by 03.01.2017. The State Commission was pleased to approve the PPA on 26.08.2015.

5.3 On 16.02.2016, Sri G Mahesh, filed an application for conversion of land from agricultural to non-agricultural purpose. Immediately thereafter, a Deed of Assignment was executed by Sri G Mahesh, assigning the plant to the Appellant herein. Thereafter, on 29.09.2016, the DC, Chitradurga was pleased to issue orders with regard to the request for conversion of land. On 13.05.2016, Provisional Interconnection approval was granted to the Appellant

and on 22.08.2016, final evacuation approval was granted. On 02.12.2016, a Supplemental PPA came to be executed with the Respondent herein incorporating the change in name of the Appellant company in furtherance to the allotment of the project to the Appellant.

- 5.4** In the interregnum, as the Appellant was unable to execute the project in a timely manner, on 03.12.2016, a letter was addressed by the Appellant to the Respondent herein seeking for extension of time for commissioning the project and a 6 month extension was sought.
- 5.5** In the interregnum, as several requests for extension of schedule commissioning date were received from solar developers, the Government of Karnataka issued an order dated 24.11.2016 directing all the ESCOM's to constitute a 3 member committee to consider and decide such requests.
- 5.6** In furtherance to the said direction, a Committee was constituted by the Respondent herein to consider the requests for extension sought for by 1 to 3 MW solar generators under the land-owning farmer category. The said committee held a meeting on 23.01.2017 wherein the causes for the delayed achievement of scheduled commercial operation were considered in respect of 11 generators,

including the Appellant herein and decision was taken to accord extension of 6 months to achieve scheduled commissioning date.

- 5.7** On 03.02.2017, the Respondent herein addressed a letter to the Appellant informing it about the extension of time by 6 months for achieving Scheduled Commercial operation subject to other terms of the PPA remain unaltered.
- 5.8** Thereafter, on 16.03.2017, the State Commission addressed a letter to all the ESCOM'S of the State, in the matter pertaining to extension of time granted to solar generators and informed them not to allow any extension of time beyond the scheduled commissioning, without obtaining prior opinion of the Commission.
- 5.9** Therefore, the Respondent herein addressed letters dated 03.2.2017 and 31.03.2017 to the Appellant informing that extension of time granted is subject to decision of the State Commission in matters pertaining to the tariff and the levy of liquidated damages if any. Further, in these letters it was specifically communicated that the extension is granted only to facilitate commissioning of the plant and other terms of the PPA will remain unaltered.
- 5.10** Further, vide letter dated 05.04.2017, ESCOM's were directed by the State Commission to advice all land owner solar developers to approach the State Commission and seek for approval of the

extension of time. In furtherance to the same, the Appellant filed original petition No. 68/2017 to set aside the communication dated 31.03.2017 issued by the Respondent herein, for grant of extension of time as per Article 2.5 of the PPA dated 04.07.2015 and confirm the extension order issued by the Respondent herein dated 03.02.2017, to restrain the Respondent herein from taking further action against the Appellant on account of communication dated 05.04.2017, to declare that the Appellant is entitled for force majeure condition as per Article 8 and is consequently eligible to seek for extension of time as per Article 2 of the PPA, to declare that the Appellant is entitled to extension of time as per Article 2 of the PPA dated 04.07.2015 without imposing or changing any conditions as enshrined in the PPA and for a direction to be issued to the Respondent herein to condone the delay in executing the project.

5.11 It was the case of the Appellant herein that the Appellant faced numerous problems in executing the project, namely, the delay in obtaining approvals of the Government and its instrumentalities, delay in the DC issuing orders for land conversion, delay in according approval for evacuation line etc., as a result of which it was unable to achieve the deadline for commissioning on

03.01.2017. Based on the same, the Appellant has sought for approval of the extension.

5.12 The Appellant had also contended that the non-grant of extension of time will be opposed to the intent of the Solar Policy issued by the Government, which was issued to encourage solar generation in the State especially because the Appellant has already spent crores of rupees on the project. Further, according to the Appellant, the delays caused are attributable to reasons beyond its control and they fall under Article 8 of the PPA, namely the *Force majeure* conditions. In view of the same, the Appellant is entitled to extension of time. It is also contended that the Appellant cannot be penalized for delays attributable to the Government and that the tariff in the PPA cannot be unilaterally altered. Hence, according to the Appellant, the Appellant is entitled to tariff of Rs 8.40 /- only and nothing less than it.

5.13 The delay in completing the project within the time frame indicated in the PPA, can in no manner be attributed to the Respondent herein. It is humbly submitted that the Appellant herein furnished several documents to the Committee constituted by the Respondent herein, for consideration of its request for extension of time. As per the same, the following information was gathered

pertaining to the various reasons assigned for the delayed execution of the project;

a. Land Conversion

- i. Date of Submission :16.02.2016
- ii. Date of conversion:29.9 2016.
- iii. Delay in getting approval: 7 months

b. KPTCL Evacuation Approval(Regular)

- i. Date of Submission:18.01.2016
- ii. Date of approval : 22.08.2016
- iii. Delay in getting approval: 7 months.

c. Bay extension approval

- i. Date of Submission: 25.05.2016
- ii. Date of approval : 12.12.2016
- iii. Delay in getting approval: 7 months

5.14 The reasons assigned for the delayed execution of the project cannot be attributed to the Respondent herein. The onus of obtaining all necessary approvals was on the Appellant herein as per Article 2.1.1 of the PPA and in view of the delayed execution of the project, the Appellant would only be entitled to varied tariff applicable as on the date of Commercial Operation.

5.15 Further, Article 5.1 of the PPA clearly states that in the event of delay in commissioning of the project beyond the Scheduled Commissioning date and during such period if there is variation in the KERC Tariff, then the applicable tariff for the project would be

the varied tariff applicable as on the date of commercial operation. In the present case, the Appellant has achieved commercial operation on 29.6.2017. On the said date, the Generic Tariff order dated 12.4.2017 of the State Commission was in force, where under the tariff payable is Rs 4.36/-. Hence, the Appellant is entitled to a tariff of Rs 4.36/- and not Rs 8.40/- as claimed. There has been no unilateral modification of tariff as contended. Article 5.1 of the PPA clearly specifies the agreed terms, which contemplates payment of the lower of the tariffs applicable at the time of commissioning of the plant.

5.16 Insofar as the contentions with regard to non-grant of extension being opposed to the intent of the Solar Policy of the State which was implemented to encourage solar generation is concerned, it is submitted that the PPA contemplates a scenario where a generator seeks for extension of time. The PPA also provides for the mechanism when such extension of time is granted, in the form of levy of liquidated damages, revision of tariff payable etc. In the event that extension is granted upon furnishing of sufficient grounds in support of such a request, the terms of the PPA which deal with revision in tariff etc. will come into effect. Hence, the contention of

the Appellant that extension ought to be given and the tariff payable ought not to be revised from Rs 8.40/- is untenable.

5.17 The delays by Governmental agencies cannot be termed as events of *Force majeure*. Article 8.3 clearly sets out the events that constitute *Force majeure*. Non receipt of approvals from agencies does not fall under those events. Further, Article 8.3(b)(i) contemplates the non performing party giving the other party a written notice describing the particulars of the *Force majeure* event as soon as practicable after its occurrence the present case, no such written communication has been issued by the Appellant herein to the Respondent herein.

5.18 After considering the pleadings of the parties and the arguments advanced, the State Commission was pleased to formulate the following questions for consideration :-

(1) Whether the Petitioners have proved the Force Majeure Events, relied upon by them, to claim exclusion of the delayed period in commissioning of their Solar Power Project?

(2) Whether this Commission has jurisdiction to call upon the Appellants to prove the Force Majeure Events, relied upon by them, by filing a Petition, urging the relevant grounds and producing proper evidence, for the scrutiny of the Commission, inspite of the Respondent admitting or not denying the occurrence of such Force Majeure Events?

(3) What should be the tariff, for the Project, for the term of the PPA?

(4) What Order?

5.19 While answering Issue No.1, the State Commission has referred to Article 2.1, 2.2, 2.5, 4.1, and 8.3 of the PPA to answer the question pertaining to whether there was delay on the part of the Respondents. The State Commission noted that Project had to be commissioned within 18 months from the date of signing the PPA. However, the Appellants applied for conversion of land more than 14 months after the effective date of the PPA. The Commission also noted that though certain documents such as Encumbrance Certificate, mutation records, etc. were produced to justify the delay by the Appellant. However, the dates of submitting the application by the Appellants herein was not forthcoming to ascertain the reasons for delay.

5.20 While dealing with the allegation of delay in grant of evacuation approval by the KPTCL, State Commission also noted that the application for tentative evacuation approval was made on 15.02.2016. The intimation to pay the processing fee, was issued to the Petitioner on 25.02.2016 and the same was paid only on 10.03.2016. The tentative evacuation approval was granted on 13.05.2016. The Petitioner accepted the conditions in the tentative evacuation approval on 25.05.2016. The regular evacuation approval was granted on 22.08.2016. The Appellant has neither

arrayed KPTCL as a party before the State Commission nor has proved beyond doubt that no delay can be attributed to itself.

5.21 The Commission held that *Force Majeure* clause in the PPA has to be strictly interpreted. No notice, as contemplated in the PPA has been issued by the Appellant to the Respondent. None of the reasons or events, cited by the Appellants, for the delay, in commissioning of its Project, falls under the *Force Majeure* Events, mentioned in the PPA. Hence, the Commission concluded that the Appellants are not entitled to extension of time, as provided in the clauses of the PPA. Consequently, the Commission held that, for not complying with the timelines, as mentioned in the PPA, for Conditions Precedent and commissioning of the Project, the Appellant herein was required to pay damages for such delay, as per Articles 2.2 and 2.5.7 of the PPA.

5.22 The Commission while deciding Issue No.2 held that State Commission has the exclusive jurisdiction, to consider the validity of the extension of time, when it affects the tariff payable to a Generating Company, ultimately passed on to the consumers. The State Commission has noted that any extension granted would have an impact on the tariff payable by the distribution company, which in turn will be borne by the Consumers of the utility.

Therefore, being the repository of consumer interest and the regulator in the sector, it has come to the conclusion that it is very much empowered to look into the extensions given by the utility. After consideration of all aspects, the State Commission has come to the conclusion that the extension granted by the Respondent is not justified and that the Appellant would be entitled to the varied tariff applicable at the time of commissioning of the plant. In addition, the State Commission has concluded that as the Appellant has not met the timelines to fulfill conditions precedent set out in Article 2.1, the Appellant is liable to pay liquidated damages for such delay on its part.

5.23 While deciding on Issue No.3, (reference has been made to Article 5), the State Commission concluded that the Appellants could not commission the Project, for certain reasons and events, which we have held to be not falling under the *Force Majeure* clause in the PPA, that could have entitled the Appellants to seek extension of the commissioning date, agreed to, in the PPA. The State Commission also noted that purchase order copies placed by the Appellant and concluded that the normative Capital Cost of the Solar Power Plants, when the 1st Appellant took effective steps to procure the capital equipment for its Project, was lower than the

normative cost of the Solar Power Plants, assumed in the Generic Tariff Order dated 10.10.2013. Thus, the Appellant is not entitled to the tariff, as per the Generic Tariff Order dated 10.10.2013 originally agreed to in the PPA, when admittedly, the Solar Power Plant was not commissioned within the stipulated time and, therefore, it is entitled only for the revised tariff, as on the date of commissioning of the Plant, as per Article 5.1 of the PPA and therefore the Appellants' Plant is entitled to a tariff of Rs.4.36 per unit, for the term of the PPA, as per the Generic Tariff Order dated 12.04.2017.

5.24 The State Commission accordingly passed the order dated 04.09.2018 holding that the Appellants are entitled to a tariff of Rs.4.36/kWh; the Appellants are also liable to pay liquidated damages to the Respondent herein. Aggrieved by the same, the Appellants have filed the present appeal.

5.25 It is the case of the Appellant that the action of the State Commission in interfering with issues pertaining to extension of time granted under Article 2.5 of the PPA is impermissible in law as the Respondent alone could have taken a decision with regard to this issue as only Respondent is a signatory to the PPA. According

to the Appellant its obligations under Article 2.1.2 of the PPA to make reasonable endeavours to fulfil the conditions precedent within the stipulated time frame, could only have commenced from the date on which the State Commission approves the PPA that is on 26.08.2015.

5.26 It is also the case of the Appellant that under Article 2.5 of the Respondent is conferred right to grant extension of time. Based on the same it has been contended that the authority to whom the power to grant extension has been vested in has exercised such power, the State Commission could not have come in judicial review over such exercise of power. Therefore, according to the Appellant, the State Commission has committed a jurisdictional error.

5.27 It is also the case of the Appellant that the Commission has committed serious error in not appreciating the discretionary power granted under Article 2.5 of the PPA under which the Respondent had granted the extension as the parties have the right to extend the time up to six months. It is also contended by Appellant that the decision of the State Commission's letter dated 16.03.2017 as to be applied prospectively and not retrospectively and extensions granted by the Respondent must have been allowed to have effect.

- 5.28** It is also the contention of the Appellant that the established principles on *force majeure* in the case of *Satyabbartha Ghose v. Mugneerm Bangurare* are not followed and the State Commission did not appreciate that the *force majeure* facts presented by the Appellant before the Commission rendered it impossible for the Appellant to construct the solar plant.
- 5.29** It is also the contention of the Appellant that the State Commission has erroneously reduced the tariff from Rs. 8.40/kwh to Rs. 4.36/kWh and also held that the Respondent herein has a claim for Liquidated Damages from the 03.01.2017 to the date of commissioning the plant.
- 5.30** In response to the contentions urged by the Appellant herein, it is at the very outset submitted that the order of the State Commission is a well reasoned order which has taken into reckoning all the material that was placed before it. The State Commission has noted that although the Appellant urged several grounds which allegedly caused the delay, the material produced in support of the same was insufficient. Also, the State Commission has examined in detail, the provisions of the PPA which bind the parties hereto and has based on the terms of the contract between the parties, come to a

reasoned conclusion. There is no infirmity in the same and the present appeal deserves rejection.

5.31 The prayers sought for by the Appellant in the original proceedings and in the present proceedings are untenable. The Appellant executed a contract with the Respondent herein, knowing fully well the terms of the same. The contract between the parties clearly sets out the time frame for execution of the project, the circumstances in which extension of time can be sought for, the consequences of delayed completion of the project etc. The Appellant accepted the terms of the contract in toto while executing the same. Therefore, to now seek for extension of time on the basis of grounds which are not permissible under the terms of the contract is untenable.

5.32 Insofar as the contention of the Appellants with regard to the delay in commissioning of the plant being caused due to delays by governmental authorities and the Respondents is concerned, it is submitted that at every stage, it has been the Appellant herein which has acted in a belated manner. As rightly noted by the State Commission in the impugned order, although the PPA was signed on 04.07.2015, the Appellant applied for conversion of land only on 16.02.2016 i.e. after a lapse of 07 months from the effective date,

for which period, no explanation is forthcoming from the SPD. Further, although allegations of delay in grant of evacuation approval are made, it ought to be noted that the Appellant submitted its application seeking for evacuation approval to the office of KPTCL on 15.02.2016 and paid the processing fee for the same only on 10.03.2016 i.e. after approximately eight months from the date of execution of the Power Purchase Agreement. The Appellant has conveniently failed to explain these delays on its part and is instead attempting to pin the blame for alleged delays on the Respondents. It is humbly submitted that the documents on record and dates clearly indicate that there has been no delay on the part of the Respondents as alleged. *Per contra*, it is the Appellant which has acted in a belated manner time and again. Therefore, the averments with regard to alleged delays by the Respondents are denied as baseless and untenable.

5.33 With regard to the averment of the Appellant, that the Appellant is entitled to extension of time as the Committee of the Respondents which met on 23.01.2017 granted extension of six months after noting that there was delay in issuance of approval by various Government entities, it is submitted that the Committee examined the status of 10 projects at the meeting on 23.01.2017, one of

which was the Appellant. After examining the same, decision was taken to grant extension. Thereafter, the Respondent vide letter dated 03.02.2017 and 31.03.2017 has clearly communicated that said extension is subject to other terms of PPA remaining unaltered i.e revised tariff applicable as on the date of commissioning and liquidated damages to be paid, Therefore, the Appellant was informed about the fact that it would be liable to pay liquidated damages for delay. Further, the observations made with regard to governmental delays were general in nature. In the facts of the present case, the material on record clearly bears out that there has been no such governmental delay as alleged. The State Commission has examined this aspect in detail and considered the documents and dates while coming to a conclusion on facts. Therefore, the averments to the contrary are denied.

5.34 In response to the averments of the Appellant that the delay in implementing the project is a force majeure condition under Article 8.3 entitling the Appellant to extension of time as per Article 2.5 of the PPA is concerned, it is submitted the Appellant has failed to follow the procedure set out in Article 8.3(b) which requires a notice of force majeure to be issued. It is settled law that when the contract provides for a certain procedure to be followed, non-

adherence to the said procedure vitiates any claim. The Appellant has failed to follow the procedure set out in the contract. The claim of force majeure is an afterthought and therefore, for this reason also, the present appeal deserves rejection.

5.35 Several contentions have been advanced by the Appellant with regard to the jurisdiction of the State Commission and its role in granting extension of time or otherwise. It is submitted that the State Commission has been entrusted with the task of overseeing the activities of the distribution companies approving all contracts executed by its licensees and undertaking its duties as the regulator of the electricity sector within the State of Karnataka. The PPA in question has also been approved by the State Commission and the same has been executed as per the standard format. It is settled law the State Commission alone is empowered to determine the tariff within the State. In the present case as any extension of time would have an impact on the tariff payable by the distribution company, it was very much within the power of the State Commission to issue the communications dated 16.03.2017 and 05.04.2017 and relook at the extension granted by the distribution company. There is absolutely no infirmity in the action of the State

Commission and the same is within the confines of the powers vested in it by the Electricity Act.

5.36 With regard to the case contention of the Appellant that the established principles on *force majeure* in the case of *Satyabhartha Ghose v. Mugneerm Bangumot* being followed in the present case, it is submitted that the factual matrix of the case cited are different from the present case and hence no reliance must be placed on the same. The PPA dated 04.07.2015 is a contract signed between the parties herein and Article 8 of PPA extensively provides for *force majeure*. Article 8.3 (a), more specifically lists situations that can be considered as *force majeure* events. Article 8.3 (b)(iv), provides that events caused due to non performing parties negligent or intentional act cannot be considered as force majeure event. In the present case, the project was delayed because the Appellant has acted in a belated manner time and again. Therefore, Appellant herein cannot claim the benefit of force majeure clause to circumvent other obligations in the PPA.

5.37 With regard to the averment that the State Commission has erroneously reduced the tariff from 8.40/kWh to Rs. 4.36/kWh and also held that the Respondent herein has a claim for Liquidated Damages from the 30.12.2016 to the date of commissioning the

plant, it is submitted that the State Commission's Impugned Order is strictly in accordance with the PPA. It is submitted that as per the Article 5 of the PPA, in case of delay in commissioning the plant the Appellant would only be entitled to the varied tariff that is applicable as on the date of commercial operation. The State Commission also examined the purchase orders placed by the Appellant on the record and concluded that the capital costs of installing the plant had significantly reduced for the Appellant and hence in order to prevent the Appellant from unlawful enrichment at the cost of State exchequer, the State Commission rightly fixed the tariff as per the Generic Order dated 12.04.2017. Since the Appellant has not provided any cogent reasons for the delay and is not eligible for extension, the Respondent herein is entitled to the claim of Liquidated Damages.

5.38 Lastly, as there has been delay in achieving commercial operation, provisions of Article 5 of the PPA would be attracted and as per Article 5.1(ii), the Appellant would only be entitled to the varied tariff that is applicable as on the date of commercial operation. The State Commission's order is in terms of the contract between the parties therefore there is absolutely no infirmity in the same. The averments with regard to the action of the State Commission being

partial and illegal and opposed to law or wholly untenable and merits no consideration. The Appellant is not entitled to the tariff of Rs.8.40 as contended and is bound by the order of the State Commission. All the other averments to the contrary are denied.

5.39 WHEREFORE it is most respectfully prayed that this Hon'ble Tribunal may be pleased to dismiss the Appeal with exemplary costs, in the interest of justice and equity.

Additional Note of arguments:-

5.40 The present appeal has been filed assailing the order of the KERC dated 4.9.2018 in OP 68/2018, by which the KERC was pleased hold that the Appellant is not entitled to extension of time to commission the plant. This Tribunal has heard the present appeal at length and considered the Short Note of Arguments filed by the Appellant on 3.4.2019, the Synopsis of Arguments of the Respondents dated 15.4.2019 and the List of Dates filed by the Appellant on 2.1.2020.

5.41 After hearing the parties at length, this Tribunal directed the Appellant herein to place on record a computation of tariff payable to it, based on the material already on record, which indicates the cost of establishment of the plant. In furtherance to the same, the Appellant has filed an Additional Written Submission by way of a

clarification to the queries raised by this Tribunal. In response to the same, the present additional note of arguments is being filed by the Respondent herein.

5.42 The submissions made in the Statement of Objections and the Note of Arguments filed by the Respondent herein maybe read as a part and parcel of the present additional Note of Arguments, and the same is not repeated herein for the sake of brevity.

5.43 The Appellant has by way of the additional written submissions reiterated its case pertaining to its right to extension of time and its bona fides of having approached the revenue authorities in a timely manner. The same having been dealt with in the pleadings already filed by the Respondent, these contentions are not being specifically rebutted herein.

5.44 The Appellant has specifically contended that the finding of the KERC that it is entitled to tariff of Rs 4.36/- in terms of the tariff order dated 12.04.2017 is bad. In order to substantiate the said contention, it has been contended that the Appellant has placed all orders (including, solar modules, power conditioning units, mounting structures etc.) much prior to the Schedule Commissioning Date (namely, 2.1.2017) and but for the event of force majeure, the Appellant would have commissioned the plant within the stipulated time frame. In support of the said contention,

the Appellant has filed a statement purportedly indicating the breakup of investment of capital cost, for setting up the plant along with Purchase orders, to show when it incurred the cost.

5.45 In response to the same, it is at the very outset submitted that the additional submissions presently filed by the Appellant do not in any manner whatsoever, indicate that the Appellant is entitled to tariff of Rs 8.40/- , which is found in the PPA. The Appellant has filed several 'purchase orders' which merely indicate that an order for materials was placed. However, there is absolutely no material on record to show when the cost for such components were incurred. The Appellant has filed several documents which fail to throw any light on the issue at hand, namely, the proof of actual cost incurred. Although the Appellant was specifically directed to place on record details of each and every component of the project, so as to arrive at a cost per unit, the Appellant has deliberately concealed the same. It is therefore submitted that unless the Appellant places on record all invoices for each and every component that is involved in establishing the plant in question, it will not be possible to fathom the bona fides of the actual investments made.

5.46 Even otherwise, assuming without admitting for the sake of argument that the documents furnished by the Appellant are bona fide, perusal of the same would indicate that the documents filed do

not specifically pertain to the Appellants project alone. The Appellant has placed on record data for not only his plant but other plants as well. This is clearly evident from the Agreement on the Sale and Purchase of Solar Modules dated 9.9.2016. Therefore, the Appellant is now attempting to mislead this Hon'ble Tribunal by relying on the cost of various projects, which the Appellant is attempting to portray as its own. It is submitted that the Appellant has failed to place on record accurate and authentic data pertaining to the actual cost of establishing the plant and the Appellant has not approached this Hon'ble Tribunal with clean hands in view of which, it is not entitled to any relief.

5.47 It would be of relevance to note that the Ministry of Finance (MoF), Government of India has vide Circular dated 22nd December, 2018 clarified that 70% of the capital cost of the project is incurred towards the Solar Modules/Panels and 30% of the capital cost of the project towards the EPC contract. Therefore, by adopting the said logic, even in case of the Appellant herein, 70% of the capital cost incurred by the Appellant would be towards procurement of solar modules/panels.

5.48 The Appellant has admitted that it has reckoned the purchase price of Solar Modules to be USD 0.35 per Watt. The KERC has in its order dated 12.4.2017, computed the capital cost by factoring in the

very same cost of solar modules i.e. USD 0.35/watt. In addition to the same, the Land cost, Civil & General works, mounting structures, power conditioning, Evacuation Lines & Equipment's, Preliminary and preoperative expenses IDC etc. have also been taken into reckoning before deriving the tariff of Rs 4.36/-. However, in the present case, the Appellant herein is a land owning farmer and has executed the PPA in question under the 'farmer category'. Therefore, the Appellant being the owner of the land upon which the plant is to be constructed would not incur any cost for the land. By considering all components considered by the KERC, namely, the capital cost of Rs.440lakhs/MW and considering debt equity ratio of (70:30), Debt Repayment Tenure in years to be 12 years, Return of Equity to be 16%, Discount Factor to be 12.50%, O & M expenses to be Rs 7.50 lakhs per MW, O & M Escalation to be 5.72% per annum, Working Capital (2 months receivables), Depreciation for first 12 years (5.83%), Depreciation for next 13 years (1.54%) etc., the cost per unit arrived would be Rs.4.36 per unit. However, in the case in hand, as the Appellant has incurred no additional cost for the land, the tariff that the Appellant herein would be entitled to, would actually be lower (after deducting the land cost) than the tariff of Rs 4.36/- determined by the KERC. Therefore, if a project specific tariff determinations were

to be done, the Appellant would still be entitled to less than the generic tariff fixed in the order dated 12.4.2017.

5.49 Therefore, it is reiterated that the Appellant herein is not entitled to higher tariff as sought for and the present appeal deserves rejection.

6. We have heard learned counsel appearing for the Appellants and learned counsel for the Respondents at considerable length of time and have gone through carefully their written submissions/arguments and also taken note of the relevant material available on records during the proceedings. On the basis of the pleadings and submissions available, the following principal issues emerge in the instant Appeal for our consideration:-

Issue No.1: Whether in the facts and circumstances of the matter, the State Commission was justified to intervene on its own when there was no dispute between the parties?

Issue No.2: Whether the State Commission has correctly held that there was no force majeure conditions so as to grant extension of time and the Appellants are entitled for reduced tariff applicable for future control periods?

Our Consideration & Analysis:

7. ISSUE NO.1:-

7.1 Learned counsel for the Appellants submitted that pursuant to the Government of Karnataka Order dated 26.08.2014, the nodal agency, KREDL invited 'online' applications on 09.10.2014 from

eligible individual agricultural land owning farmers to become Solar Power Developers (SPDs). He vehemently submitted that the Govt.'s policy was conceived in an effort to promote solar energy projects preferably by land owning farmers and after requisite scrutiny, the nodal agency issued letters to the Appellants on 17.03.2015 for development of the solar projects with an instruction to execute the Power Purchase Agreement (PPA) with first Respondent . The PPA came to be signed between the parties on 03.07.2015 which among others envisaged a guaranteed tariff of Rs.8.40 per unit. The said PPA was approved by the Karnataka Electricity Regulatory Commission vide its approval letter dated 01.09.2015 which was handed over to the SPD in the 2nd week of September 2015. Learned counsel further submitted that as per the terms and conditions of the PPA, the solar projects were given 18 months for completion and accordingly the COD was fixed as 02.01.2017. Learned counsel for the Appellants was quick to submit that the implementation of the solar projects required a number of activities such as formation of SPV, approval for evacuation of power, approval for land conversion, approval for sparing of bay for lease, approval for line charging etc.. While the first activity i.e. formation of SPV was under the control of the Appellants, the other approvals were to be accorded by Govt.

agencies and as such were beyond the control of the Appellants. The learned counsel contended that the approvals from the Govt. instrumentalities could be received after considerable delays due to which COD of projects got delayed and the Appellants sought extension of six months time for COD. The same was duly granted by the first respondent vide their letter dated 03.02.2017, accordingly the new COD was shifted to 03.07.2017.

7.2 Learned counsel alleged that subsequent to the grant of extension of time, the first Respondent on 31.03.2017 informed that the extension of time granted for COD is subject to the condition that “the tariff applicable.... if any”, is subject to the approval of KERC/Govt. of Karnataka which was entirely contrary to the earlier extension order as well as PPA terms. He further submitted that this was not an end to the stipulation of fresh conditions for extending the COD and Appellants received another letter dated 15.04.2017 from the Respondent No.1 with an instruction to approach the KERC for seeking approval of COD extension. Learned counsel for the Appellants was quick to point out that the request for extension of COD was sought on the basis of force majeure conditions when the first respondent had recommended for the same on the same ground which was also subsequently agreed to by the Government on the basis of force majeure events, it does

not stand to reason why the KERC holds that the Appellants are not entitled to extension of COD and instead, they are liable to pay liquidated damages.

7.3 Learned counsel further contended that the adjudicatory power conferred on the Regulatory Commission is to adjudicate dispute between a Licensee and Generating Company. But in the instant case, without any dispute between the parties, the KERC has called for interference without jurisdiction to the disadvantage of the Appellants. To substantiate his submissions, learned counsel placed reliance on the judgment of the Hon'ble Supreme Court in the matter of **Gujarat Urja Vikas Nigam Limited vs. Solar Semiconductor Power Company (India) Private Limited and others** wherein the extension of control period has been specifically held to be outside the purview of the powers of the Commission. Summing up his submissions, learned counsel for the Appellants highlighted that the State Commission has acted in utter contravention of the powers conferred on it with specific reference to interfering in a matter when there was no dispute between the distribution licensee and the generating company.

7.4 *Per contra*, learned counsel for the first Respondent submitted that every contract is subject to the applicable statutes and under the

Electricity Act, KERC is to regulate electricity purchase and procurement process of the distribution licensees including the price at which electricity shall be procured from the generation companies or other sources within the state. Accordingly, the State Commission has the exclusive jurisdiction to determine the tariff payable for purchase of energy by distribution licensee and any agreement or contract can be subject to the scrutiny by the Commission to ascertain the reasonability and validity of the tariff including its terms and conditions. Learned counsel to strengthen his submissions placed reliance on the judgment of the apex court in **Gujrat Urja Vikas Nigam Limited Vs. Tarini Infrastructure Ltd. And Ors.**, reported in **AIR 2016 SC 5580** which has laid down 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 of public interest. Learned counsel contended that in the instant case, the PPA (Article 5.1) itself provides for a varied KERC tariff (if it is lower than Rs. 8.40/unit) in the event of delay in commissioning of project. Admittedly, there have been a delay of 4 - 5 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 has become applicable tariff.

7.5 Learned counsel for the first Respondent further submitted that the Appellants have erroneously relied on the judgments of Hon'ble Supreme Court in *Gujarat 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- **Gujarat 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 Appellants. Learned counsel further relied upon the judgment of the Hon'ble Supreme Court in **All India Power Engineers Federation & Ors. Vs. Sasan Power Ltd. &Ors. Etc., Civil Appeal No. 5881-82/2016, dated 08.12.2016** which held that the Regulatory Commission is the only body that can adjudicate on tariff matters to uphold public interest. Learned counsel for the first respondent invited reference to various tariff orders of the State Commission which have determined the tariff for solar projects in different control periods ranging from Rs. 8.40/- to Rs.6.51 to Rs. 4.36 to Rs. 3.05 etc.. Learned counsel emphasized that the downward trend in the solar tariff is mainly on account of advancement in technology and reduction in capital cost for solar projects. In other words, if a generator has delayed in

commissioning the project, the cost of such project is bound to substantially come down and to match with such situations, the PPA has been provided with a clause for lower varied tariff as on the date of commissioning.

7.6 Regarding no dispute between the parties, as contended by the Appellants, the learned counsel for the first Respondent submitted that vide its letter dated 31.3.2017, the first Respondent has clearly stated that the commissioning of the project is subject to the liquidated damages and article 5.1 of PPA. It is, therefore, evident that the first Respondent had merely allowed the delayed commissioning of the project and not terminated the agreement on the ground of delay, as such any extension of time allowed by the first Respondent is subject to payment of liquidated damages and a lower tariff as per Article 5.1 of the PPA. Learned counsel was quick to point out that such a scenario emerges into a dispute between the first Respondent and the Appellants and accordingly, KERC is duty bound to adjudicate the matter and issue directions in best interest of public. Regarding the reliance of the Appellants that a three-member committee of the Government of Karnataka has ruled that the Appellants are 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. Under the said Act, the Government has no jurisdiction to decide on the tariff issues and admittedly all Government policies have been subjected to the tariff determined by the State Commission from time to time.

7.7 Learned counsel, appearing for the first Respondent submitted that the first Respondent/ Govt. of Karnataka has agreed to grant six months' extension of COD but all the Escoms were directed by the State Commission to advise all land owning solar developers to approach the State Commission and seek for approval of the extension of time. Admittedly, the Appellants faced numerous problems in executing the project, namely, the delay in obtaining approvals of the Government and its instrumentalities including order for land conversion, approval for evacuation line etc.. However, such clearances/approvals are of routine in nature and are generally involved in execution of all the projects. Learned counsel further pointed out that the onus of obtaining all necessary approvals was on the Appellant as per Article 2.1.1 of the PPA and in view of the delayed execution of the project, the Appellant would only be entitled to varied tariff applicable as on the date of Commercial Operation. Learned counsel vehemently submitted that the delays by Govt. agencies cannot be termed as events of force majeure due to the fact that Article 8.3 clearly sets out the events

which constitute *Force majeure*. Learned counsel for the first Respondent further submitted that in case of a force majeure, requisite notice as contemplated in the PPA has to be issued by the Appellants to the Respondents. The State Commission has rightly interpreted the clause of force majeure and ruled that none of the reasons or events cited by the Appellants for delay in the commissioning of the projects falls under the force majeure events.

7.8 Learned counsel further contended that while referring to various dates of activities submitted by the Appellants, it is crystal clear that at every stage, it has been the Appellants who have acted in a belated manner which have been duly noted and commented by the State Commission in the impugned order. For an instance, that the PPA was signed on 03.07.2015, the Appellants applied for conversion of land only on 16.02.2016 i.e. after lapse of seven months from the effective date for which no explanation has been justified by the Appellants. Similar was the cases for evacuation & bay approvals. Regarding the contention of the Appellants that the established principles on force majeure in the case of *Satyabhartha Ghose v. Mugneerm Bangurare* has not been followed in the present case, Learned counsel pointed out that the factual matrix of the case cited are different from the present case and hence no

reliance can be placed on the same. Summing up his arguments, learned counsel reiterated that the Appeal lacks merits and deserves to be dismissed.

Our Findings:-

7.9 We have carefully analysed the contentions of the learned counsel for the Appellants as well as learned counsel for the Respondents and also taken note of the judgments relied upon by the parties. While the Appellants contend that grant of COD extension was mutually agreed by the Parties to the PPA and there was no dispute upon which the State Commission had to intervene or adjudicate and as such the State Commission has acted beyond its jurisdiction and powers conferred to it under the Act. Learned counsel for the Appellants repeatedly contended that based on the delays in granting various approvals by the Govt. and its instrumentalities, the Govt. of Karnataka / first Respondent consented for extension of COD by six months considering that such delays in approvals were beyond the control of Appellants. On the other hand, learned counsel for the Respondents submitted that the alleged delays in granting approvals by various Govt. agencies were not in the nature of force majeure as defined under the PPA and as such, any claim or counter claim for extension of COD tantamount to occurrence of dispute between the parties and such

dispute attracts intervention/adjudication by the State Commission which is mandated to regulate the electricity sector in the State.

7.10 Learned counsel for the Respondent contended that the cited delays in approvals at various levels are of general in nature which by and large have to be faced by all the power project developers including solar projects. This is why a period of 18 months from the signing of PPA has been provided for completion of solar projects whereas the actual construction time may be needed as 6-8 months only. While going through the factual matrix of the dates indicating submissions of applications for approval and activities undertaken for approving the proposals, it is amply clear that the Appellants have also acted in the belated manner resulting into occurrence of some delays in undertaking various activities. However, what thus transpires that there has been considerable delays on the part of the Respondents / Govt. agencies in processing of applications and granting the respective approvals. Thus, Respondents cannot absolve itself from the burden of such delays in execution/completion of the solar projects of the Appellants. In fact, it is pertinent to note that the Govt. as well as State/Discom considering above eventualities granted an extension of six months in COD. Contrary to this, the State Commission

rejected the extension with imposition of liquidated damages to corresponding period only on the premise that it is a matter of dispute between the Appellants and the first Respondent.

7.11 In the light of various judgments of the Apex Court as also relied by the Respondent's learned counsel, it is well within the jurisdiction of the State Commission to interfere and settle the issues for a logical conclusion in accordance with law. We do not find force in the submissions of the Appellants that the State Commission has interfered in the case on its own which is beyond its jurisdiction. Accordingly, we opine that while the State Commission has prima – facie, acted in accordance with law and statute, it has failed to appreciate all the issues judiciously. The Commission in the role of a Regulator has to act in accordance with law balancing the interests of all stakeholders including consumers interest.

8. Issue No.2:-

8.1 Learned counsel for the Appellants submitted that under the PPA dated 03.07.2015, the Appellants were required to commission the solar plant on or before 02.01.2017 but due to various force majeure conditions, the solar plants could be commissioned only on 30.06.2017 within the extended period of six months. Learned counsel further referred to the relevant provisions of the PPA

regarding extension of time to submit that under the specific circumstances, COD can be extended up to six months and as a result of such extensions, the scheduled commissioning date and the expiry date duly determined shall be deemed to be the new scheduled commissioning date and the expiry date for the purpose of this agreement. The relevant Articles of the PPA are reproduced below:-

“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 BESCO Event of Default; or*
- (b) Force Majeure Events affecting BESCO; or*
- (c) Force Majeure Events affecting the SPD.*

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.

2.5.6 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.”

ARTICLE 5

Rates and Charges

5.1 Tariff Payable.

The SPD shall be entitled to receive the Tariff of Rs. 8.40 per Kwh based on the KERC tariff order S/03/1 dated 10.10.2013 in respect of SPD's Solar PV projects in terms of this agreement for the period between COD and the Expiry Date. However, subject to Clause 2.5, if there is a delay in commissioning of the Project beyond the Scheduled Commissioning Date and during such period such period there is a variation in the KERC Tariff,

then the applicable Tariff for the projects shall be the lower of the following:

- (iii) Rs. 8.40 per kwh
- (iv) Varied tariff applicable as on the date of Commercial Operation.

“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 CESCO 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; (emphasis supplied)**
- (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;

8.2 Learned Counsel for the Appellants further submitted that considering the events responsible for delaying the project and

provisions for the time extension under the PPA, the first Respondent granted extension of six months to commission the plants. In fact, a number of approvals from various agencies were required such as approval for conversion of land, grid connectivity, approval for bay connectivity, approval of Chief Electrical Inspector for charging of line etc.. While taking note of receipt of various approvals by the Appellants, it is crystal clear that solar projects would not have been completed within the scheduled COD. For example, land conversion order was issued on 29.09.2016, evacuation approval granted on 22.08.2016, approval for bay connectivity received on 17.12.2016 and the plant was commissioned on 30.06.2017. Further, the in principal approval of financial assistance was received on 09.09.2016 and agreement for purchase of solar modules was entered into by the Appellants on 09.06.2016. Learned counsel was quick to submit that the Appellants have utilised the stipulated time with utmost care without slackness as a result of which the plant could be commissioned well within the extended period of six months. Hence, the imposition of liquidated damages by the State Commission and allowing much lower tariff than the agreed under the PPA is not at all justified.

8.3 Learned counsel stated that even the Karnataka Land Revenue Act, 1964 itself stipulates a period of four months in the case of deemed conversion. Learned counsel contended that in the circumstances mentioned herein above, there were delays in the implementation of the project due to reasons beyond the controls of the Appellants and not attributable to them and hence the Appellants cannot be penalised for none of their mistakes by imposing LD on one hand and reducing the tariff drastically on the other.

8.4 *Per contra*, learned counsel for the Respondents contended that the Commission has the exclusive jurisdiction to determine the tariff payable for purchase of energy by distribution licensee and, 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 with an objective of safeguarding the consumer interest at large. To substantiate his arguments, learned counsel placed reliance on the judgment of the Hon'ble Supreme Court in the case of **Gujarat Urja Vikas Nigam Limited Vs. Tarini Infrastructure Ltd. And Ors.**, reported in **AIR 2016 SC 5580** in which it is held that State Commission has powers to revisit the tariff of a concluded PPA in furtherance of public interest. In the instant

case, Article 5.1 of the PPA itself provides for a varied KERC tariff in the event of delay in commissioning of the project. Admittedly, there is a delay of 4-5 months in the commissioning of the project and the varied KERC tariff as on the date of commissioning of the project would be applicable which was Rs. 4.36/unit as per tariff order of the State Commission relating to that period. Learned counsel further submitted that this being the case, the State Commission in suo motto issued direction to first Respondent not to allow the extension of time under PPA, also with regard to payment of tariff applicable during that period even though the plant has been actually commissioned.

8.5 Learned counsel was quick to submit that the delay in commissioning of the project has an impact on the tariff applicable on the supply of power and accordingly the State Commission is required to examine such extension of time and payment of relevant tariff. Learned counsel emphasised that the PPA was executed on 04.07.2015 stipulating execution period of 18 months as per which COD was 03.01.2017. While looking at the different event dates, it is evident that the Appellants themselves were responsible for delays and not the Govt. authorities. Regarding the contentions of the Appellants for claiming force majeure, learned counsel invited

reference to Article 8 of the PPA which defines the force majeure events and also the conditions for their applicability.

8.6 Learned counsel for the Respondents further submitted that the appellants have grossly violated the force majeure clause and did not give any notice of such force majeure events immediately upon their occurrence and also, no notice on resumption of performance after the purported force majeure events. Learned counsel submitted that as per Article 8 of the PPA, 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. Accordingly, the delay in execution of solar projects by the Appellant does not qualify for condonation.

8.7 Regarding the submission of the Appellants that a three member committee of the Govt. of Karnataka has decided to grant the extension to COD and hence SCOD shall stand extended, learned counsel for the Respondents contended that under the Act, the Govt. has no jurisdiction to decide on the tariff issue and admittedly, State Govt. policies are subjected to the tariff to be determined by the State Commission from time to time. Regarding the contentions of the Appellants that the established principles on force majeure in the case of *Satyabhartha Ghose vs. Mugneerm Bangur* were not

followed by the State Commission, learned counsel pointed out that the *force majeure* facts presented by the Appellants before the Commission rendered it impossible for the Appellants to construct the solar plants. Summing up his arguments, learned counsel for the Respondents submitted that the order of the State Commission is a well reasoned order which has taken into reckoning of the material that was placed before it. Besides the State Commission has examined in detail the provisions of PPA which bind both the parties before passing the impugned order and there is no infirmity in the same attracting interference by this Tribunal.

Our Findings:-

8.8 We have gone through the relevant material on the issue placed before us and carefully considered the submissions of learned counsel for both the parties. It is relevant to note that under the special programme undertaken by the State Govt. for promoting the RE generation and to provide opportunities for individual agricultural land owning farmers to become solar power developers, many farmers came forward to set up solar projects in their respective land. Subsequent to completion of various scrutiny and formalities, the PPA came to be signed on 03.07.2015 which among others provided a guaranteed tariff of Rs.8.40 per unit and completion

period of 18 months. The said PPA was approved by Karnataka Commission on 26.08.2015. As per the guidelines issued by the Govt. of Karnataka, a number of approvals/clearances/sanctions were required in the process of setting of solar projects such as financial closures, approval for conversion of land from agricultural purpose to be used for setting up a solar power project, approval for grid connectivity, approval for bay extension, approval from Chief Electrical Inspector for charging of the line etc.. While going through the matrix of various dates/events, it is pertinent to notice that the approval from the Govt. instrumentalities could be received by the Appellants after lapse of considerable time which in turn became the impediments in timely implementation of the solar projects. For an instance, land conversion order could be issued by the concerned authorities only on 29.09.2016, power evacuation approval came to be granted on 22.08.2016 and bay connectivity approval on 17.12.2016. For procurement of equipment, the agreement with the supplier was entered into 09.09.2016. With these eventl dates, it became almost certain that COD of projects cannot be achieved as per schedule.

- 8.9** In view of these facts and anticipated slippage in the COD, the Appellants apprised the first Respondent of the same and requested

for extension of COD by six months as admissible under the PPA. It is not in dispute that the total completion period of 18 months from the effective date was provided considering all the activities including various approvals, procurement of equipment, installation and commissioning and final safety clearance from Chief Electrical Inspector for charging the line etc.. However, in receiving approvals from Govt. instrumentalities for land conversion, evacuation arrangement, safety clearances etc., the Appellants not only faced severe difficulties but also considerable delay of 7-8 months. The Appellants accordingly put forward the case to Govt. of Karnataka as well as first Respondent for COD extension by six months which after due diligence and prudence, the Govt./first Respondent acceded to. Before further evaluation of the rival contentions of the parties regarding the extension of time, we take note of various clauses of PPA specially Clause 2.5 which is reproduced below:-

“2.5 Extensions of Time

2.5.1 In the event that the SPD is prevented from performing obligations under Clause 4.1 by the Scheduled Commissioning Date due to:

- a) Any BESCOM Event of Default; or*
- (b) Force Majeure Events affecting BESCOM; or*
- (c) Force Majeure Events affecting the SPD.*

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.

2.5.6 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.”

It is evident from the above that due to reasons specified in Clause 2.5.1(a), Scheduled Commissioning Date could be extended up to six months and as a result of such extension, the newly determined COD and expiry date shall be deemed to be the scheduled COD and the expiry date for the purpose of this agreement.

8.10 Regarding force majeure events, Clause 8.3 of PPA, it is noted that under sub-clause (vi), it is provided that **“inability despite complying with all legal requirements to obtain, renew or maintain required licenses or legal approvals”** will also attribute to force majeure. In view of these provisions under the PPA, we are of the opinion that the delay in receiving various approvals / clearances by the Govt. and its instrumentalities which were beyond the control of the Appellants should also be treated as an event of force majeure under sub-clause (vi) of clause 8.3 which has directly and severely affected the execution of the solar projects. To be more specific, if the approval for land conversion is received on last day of September, 2016, it becomes extremely difficult to achieve COD on 03.01.2017 as envisaged under the PPA. Moreover, the

grant of extension of the Scheduled COD was accorded by Govt. of Karnataka and in turn, by first Respondent after complying with due procedures and applying its diligence and prudence under the four corners of the PPA and not beyond.

8.11 We have also taken note of various judgments of Hon'ble Supreme Court relied upon by the Appellants as well as Respondents and opine that these judgments have been passed considering the matters on case to case basis and may not be quite relevant in the facts and circumstances of case in hand. For example, in the case of **All India Power Engineers Federation vs. Sasan Power Ltd.**, the Apex Court does not lay down any proposition that even in cases wherein there is no enhancement of tariff and the parties exercise powers under the PPA, even then the Commission had any inherent power. In the present case, neither has there been any increase in the tariff nor was there any exercise of power outside the PPA and hence the said judgment relied upon by the Respondents is clearly distinguishable.

8.12 It is well settled legal principle that a little difference in facts may make a lot of difference in the precedential value of a decision. In this regard, reliance is placed on the decision of the Hon'ble Supreme Court in "Bhavnagar University vs. Patiala Sugar Mills Pvt.

Ltd. (2003 (2) SCC 111)” and “KTMJM Abdul Kayoom & Anr. Vs. Commission of Income Tax Madras (AIR 1962 SC 680)”. Therefore, one significant factual difference can change the determination of a legal principle. Further, it is also a well settled legal principle that each case has to be considered and disposed of in the factual matrix of the said case.

8.13 It is also noticed that after recommendations of the three member Committee constituted by the Govt. of Karnataka, the said extension of six months was granted by the first Respondent on 03.02.2017 whereas the State Commission addressed a communication on 16.03.2017 to all the ESCOMs not to grant extension of time to any SPD without obtaining prior approval of KERC. It was further directed by the KERC on 05.04.2017 to advise to all SPDs to file petitions before the Commission seeking approval for extension of time.

8.14 We, now consider the other issue viz. of reduced tariff as now granted by the State Commission based on Article 5 of the PPA of which sub-clause 5.1 stipulates that the SPD shall be entitled to receive the tariff of Rs.8.40 per unit based on KERC tariff order dated 10.10.2013. However, if there is a delay in scheduled

commissioning and during such period, there is a variation in the KERC tariff then the applicable tariff shall be lower of the following:-

- i) Rs.8.40 per unit;
- ii) Varied tariff applicable as on the date of commissioning tariff.

While referring the above Article of the PPA, it is significant to note that the applicability of the varied tariff is subject to the Clause 2.5 of the PPA which provides for extension up to six months in case of various events of default affecting SPD in completion of the project.

8.15 In view of the above, we are of the considered opinion that considering facts and circumstances of the matter, the first Respondent was justified in extending COD up to six months as per the relevant provision (clause 2.5) of the PPA. Besides, it is also crystal clear that the approvals / clearances from various Govt. instrumentalities were accorded after considerable delays (of 7-8 months) which in turn attributed to delay in commissioning of the solar projects. As these approvals were beyond the control of the Appellants, the State Govt. and first Respondent have rightly considered them as an event of force majeure and accordingly granted approval for COD extension. In fact, the Commission failed to analyse all the issues in just and proper manner. The impugned order as such cannot sustain in eyes of settled principle of law as

being perverse and arbitrary. For the forgoing reasons, we hold that the Appellants are entitled for the agreed tariff as per the PPA (Rs. 8.40 per unit) without being subjected to LD.

9. Summary of Findings:-

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 justice. Needless to mention that the PPA' Terms & Conditions were duly approved by the State Commission which crystallised the rights of the parties.

9.2 The findings of the State Commission in the impugned order clearly reflect that it has ignored the vital material placed before it such as statement of objections filed by first Respondent, recommendations of State Govt. dated 23.06.2017 and communication of MNRE,

Govt. of India dated 28.07.2017 regarding grant of COD extension to the solar power developers. Further, it is mandate upon the State Commission to promote co-generation and generation of power from renewable sources of energy, however, in the present case, the State Commission has suo motto interfered for the ultimate loss to RE developers who are land owning farmers and had participated in the programme of the Govt. for solar power development. In fact, the entire solar project is structured on the basis of assured tariff as per Article 5.1 of the PPA being an incentivised tariff and financial institutions have advanced loans on the basis of the assured tariff as per PPA.

- 9.3** In the light of above, we hold that the impugned order dated 04.09.2018 passed by the State Commission is not justified in the eyes of law and hence liable to be set aside.

ORDER

For the forgoing reasons, we are of the considered opinion that issues raised in the present Appeal being Appeal No.351 of 2018 have merits. Hence Appeal is allowed.

The impugned order dated 04.09.2018 in O.P. No.68 of 2017 passed by Karnataka Electricity Regulatory Commission is hereby

set aside to the extent challenged in the Appeal and our findings stated supra.

In view of the disposal of the Appeal, the relief sought in the IAs do not survive for consideration and accordingly, stand disposed of.

No order as to costs.

Pronounced in the Virtual Court on this 14th day of September, 2020.

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

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