

No.N/171/2019

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**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,  
No.16, C-1, Millers Tank Bed Area, Vasanth Nagar, Bengaluru-560 052.**

**Dated: 11.06.2021**

**Present**

**Shri Shambhu Dayal Meena : Chairman**  
**Shri H.M. Manjunatha : Member**  
**Shri M.D. Ravi : Member**

**R.P. No.07/2019**

**BETWEEN:**

Hubli Electricity Supply Company Limited,  
P.B. Road,  
Navanagar,  
Hubli, Karnataka.

**...PETITIONER.**

(Represented by Smt. Rithika Ravikumar  
of M/s INDUSLAW Advocates)

**AND**

- 1) M/s Chirasthayee Saurya Limited,  
Flat No.78, Electronic City,  
Hosur Road,  
Bengaluru-560 100.
- 2) The Managing Director,  
Karnataka Renewable Energy  
Development Limited (KREDL),  
39, 'Shanti Gruha',  
Bharath Scouts and Guides Building,  
Palace Road,  
Bengaluru-560 001.

**... RESPONDENTS.**

(Respondent No.1 represented by Smt. Poonam Patil,  
Advocate & Respondent No.2 represented by  
Sri Murugesh V. Charati, Advocate)

**ORDERS**

1) This Review Petition is filed by the Petitioner under Section 94 (1) (f) of the Electricity Act, 2003 read with Regulation 8 of the Karnataka Electricity Regulatory Commission (General and Conduct of Proceedings) Regulations, 2000 praying for the following reliefs to:

- a) Call for the records in OP No.160 of 2017;
- b) Stay the impugned order dated 09.07.2019 passed in OP No.160 of 2017 during the pendency of this petition before the Hon'ble Commission;
- c) Hold that the Respondent No.1 herein (Petitioner in the OP) has failed to achieve Commercial Operation of the plant within the time prescribed by the concerned PPA and the SPPA;
- d) Direct that the Respondent No.1 herein (Petitioner in the OP) is not entitled to the tariff envisaged under the PPA at Rs.6.10 as it failed to achieve Commercial Operation within the Scheduled Date of Commercial Operation;
- e) Direct the Petitioner herein (Respondent No.1 in the OP) to pay the Respondent No.1 herein (Petitioner in the OP) at the rate of Rs.4.36 as per the Generic Tariff Order applicable for the year 2017; and
- f) Pass any other orders as this Hon'ble Commission deems fit in the interest of justice.

2. The brief facts relevant for the disposal of the Review Petition may be stated as follows:

- a) The Review Petitioner (HESCOM) herein was the 1<sup>st</sup> Respondent and the 1<sup>st</sup> Respondent herein (M/s Chirasthaayee Saurya Limited), was the Petitioner in OP No.160 of 2017 filed before this Commission. The 2<sup>nd</sup> Respondent herein (KREDL), was also the 2<sup>nd</sup> Respondent in OP No.160 of 2017. The 2<sup>nd</sup> Respondent (KREDL) is/was not a necessary party either in this proceedings or in OP No.160 of 2017.
- b) For the sake of convenience in this order, we refer the Review Petitioner as HESCOM and the 1<sup>st</sup> Respondent herein as Solar Power Project Developer (Developer).
- c) The Developer filed OP No.160 of 2017 against HESCOM for extension of Scheduled Commercial Operation Date (SCOD) for a period of 225 days on the ground of Force Majeure event preventing the Developer from commissioning the Solar Power Project and other consequential reliefs. There was a PPA dated 03.06.2016 executed between the Developer and the HESCOM. The date of approval of the PPA by the Commission was treated as Effective Date for the purpose of counting the timeline for achieving SCOD and Conditions Precedent. The PPA was approved on 07.10.2016 by this Commission. Therefore, the Developer was required to achieve Conditions Precedent within eight (8) months and was required to commission the Project within twelve (12) months from the Effective Date. Therefore, the Conditions Precedent was to be achieved on or before 06.04.2017 and the commissioning of the project was to be achieved on or before 06.10.2017.

d) The Developer had filed in OP No.160 of 2017 before this Commission on 21.09.2017, a few days earlier to the SCOD. The Developer was able to commission the Project on 06.10.2017 within the stipulated time. In this regard it may be noted that HESCOM in its Statement of Objections in OP No.160 of 2017 at para 2 has stated as follows:

" At the outset it is submitted that the current petition as far as the first two prayers are concerned, has become infructuous and not maintainable as the Petitioner's prayer seeking for extension of time for COD does not arise at all, owing to the fact that the said project has been commissioned on 06.10.2017. A copy of the commissioning certificate bearing No. GESCOM/ EEE/ AEE (O)/ AE (O)/ 2017-18/5017-21 dated 09.11.2017 is produced by the Petitioners themselves. Hence, in the light of commissioning of the project, the present petition seeking for inter alia extension of the SCOD to 19.05.2018, as sought for under the prayer Clause (1) of the petition, does not arise at all."

e) After considering the material on record and hearing the parties in OP No.160 of 2017, this Commission by Order dated 09.07.2019 held that the Developer was liable to pay the damages as per Clause 4.3 of the PPA for the delay in achieving the Conditions Precedent. During the course of the Order, the Commission noted that the Developer had commissioned the Solar Power Project on 06.10.2017 as per the Commissioning Certificate produced as Annexure-P11 (Annexure-P11 was produced by the Developer on 17.01.2019 during the course of hearing in OP No.160 of 2017).

f) In the present Review Petition, the HESCOM had stated the following grounds in support of its prayers as noted above.

(i) Though the Commissioning Certificate is issued evidencing commissioning of the Solar Power Project on 06.10.2017, no electricity was injected into the grid from the Project and this fact was suppressed by the Developer in OP No.160 of 2017 with a deliberate attempt to mislead this Commission.

(ii) During the course of the Order dated 09.07.2019 in OP No.160 of 2017, this Commission observed that the Solar Power Project was commissioned as per the Commissioning Certificate but further wrongly observed that there was no delay in the commercial operation of the Solar Power Project. This is erroneous as the records namely; the B-Form and the Log Book from the Sub-station for the Solar Power Project reflect that though the Project was commissioned as on 06.10.2017, no power was injected into the grid and the generation of power was delayed and that the project was restarted in November, 2017.

(iii) In support of the averment that no power was injected into the grid, HESCOM has now produced Annexure-P2, the B-Form relating to the Solar Power Project of the Developer for the month of October, 2017. This B-Form shows that no power was injected into the grid for the month of October, 2017. HESCOM has now produced Annexure-P3, the B-Form relating to the month of November, 2017, wherein it is

shown that 1,20,750 units have been injected into the grid as per the Main Meter readings.

(iv) The Petitioner has now produced Annexure-P4 dated 22.03.2018, a letter addressed by the Developer to the Executive Engineer (Ele.), Power Trading Cell, HESCOM, Corporate Office, Hubballi, wherein the Developer has stated that though the Project was commissioned on 06.10.2017, they were not allowed to operate the Project due to the following events and stated that those events were beyond its control:

- On 07.10.2017, the local people did not allow us to operate the plant on the ground that their land claim issue is pending before SC & ST Commission and all activities are required to be stopped immediately until final disposal of the same and blocked our plant gate entry.
- Stay order was issued by ST/ST Commission on 12.10.2017, order copy attached for your reference.
- We appealed in the High Court against this stay order of SC/ST Commission which was stayed by Hon'ble Karnataka High Court and the Plant was re-started on 14.11.2017, the Court order copy and local Tahsildar letter attached.

(v) It is clear from Annexure-P2 to P4 that the Project of the Developer had not begun injecting power into the grid from the date of commissioning of the project (06.10.2017), therefore, it cannot be

held that the project had achieved commercial operation as envisaged by the term of the PPA dated 03.06.2016.

g) For the above reasons, HESCOM has prayed for allowing the Review Petition.

3. The Developer had appeared through its counsel and filed its Statement of Objections denying all the facts alleged in the Review Petition. The gist of the contentions of the Developer may be stated as follows:

a) That no ground is made out for review of the Order dated 09.07.2019 passed in OP No.160 of 2017. In this regard, the decision in Kamlesh Verma Vs. Mayavati (AIR 2013 SC 3301) is relied upon.

b) That assuming for the sake of arguments that the Developer had suppressed injection of power into the grid, nothing prevented HESCOM from urging the said ground in the original proceedings in OP No.160 of 2017.

c) As per Article 8.5 of the PPA, the Developer has commissioned the project within twelve (12) months from the Effective Date. The said Article does not adopt the term 'Commercial Operation Date'.

d) Therefore, the Developer requested for the rejection of the Review Petition.

4. We have heard the learned counsel for both the parties. The following Points arise for our consideration:

Point No.1: Whether there is 'any other sufficient reason' as stated in Order No.47 Rule 1 of the Code of Civil Procedure, 1908, to review the Order dated 09.07.2019 passed in OP No.160 of 2017?

Point No.2: What Order?

5. After considering the rival contentions and the relevant provisions of law and also on perusing the records in OP No.160 of 2017, our findings on the above Points are as follows:

6. Point No.1: Whether there is 'any other sufficient reason' as stated in Order No.47 Rule 1 of the Code of Civil Procedure, 1908, to review the Order dated 09.07.2019 passed in OP No.160 of 2017?

a) The principles stated in para 16 of the decision in Kamlesh Verma Vs. Mayavati (AIR 2013 SC 3301), as extracted in para 7 of the Statement of Objections of the Developer, is as follows:

*"16. Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:*

*(A) When the review will be maintainable:-*

*(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the Petitioner or could not be produced by him;*

*(ii) Mistake or error apparent on the face of the record;*

*(iii) Any other sufficient reason;*

*The words 'any other sufficient reason' has been interpreted in Chhajju Ram Vs. Neki, AIR 1922 SC 112 and approved by this Court in Moran Mar Basselios Catholicos*



*Vs. Most Rev. Mar Poulouse Athanasius & Others (1955) 1 SCR 520: (AIR 1954 SC 526), to mean a 'reason sufficient on grounds at least analogous to those specified in the rule.'*"

b) There could not have been any averment in OP No.160 of 2017 that there was injection of power from the Project to the grid subsequent to the commissioning of the project, as the project was not yet commissioned on the date of filing of the said petition. However, the parties were required to make that averment at any subsequent stage of the proceedings in OP No.160 of 2017. In the absence of such averment either by the Developer or by HESCOM, the Commission observing that the Project achieved commissioning and commercial operation within the timeline is not erroneous. It is presumed that whenever there is commissioning of the Solar Power Project during day time, there would be injection of power into the grid. It may also be noted that for the purpose of synchronization of the project, the flow of energy from the project to the grid is essential. The commissioning of the project cannot be said to be completed unless there is synchronization of the project with the grid. Therefore, whenever it is stated that the Solar Power Project is commissioned, the flow of energy into the grid is presumed unless the contrary is proved. The flow of energy might not be recorded in the Main Meter or the Check Meter in the event the quantum of energy injected is not sufficient to recognize the readings in the Meters. Annexure-P2 & P3 would show that Meter constant is 1,05,000 kWh. In this regard, the decision of the Hon'ble ATE in Appeal No.180 of 2018 decided on

13.11.2020 between Eswari Green Energy LLP Vs. KERC & Others, relied upon by the learned counsel for the Developer may be noted. Therefore, we hold that there is no mistake or error apparent on the face of record while the Commission observing that the Project was commissioned on 06.10.2017 and has achieved commercial operation.

- c) It is not the case of HESCOM that Annexure-P2 to P4 referred in the Review Petition, were the new and important evidence discovered which was not within its knowledge or could not be produced by it during the trail of OP No.160 of 2017. HESCOM has merely alleged in the last sentence of para 14 of the Review Petition that Annexure-P2 to P4 were not produced at the time of hearing of the OP 160 of 2017 and it is crucial to complete the record to obtain a wholesome picture of the facts and the circumstances of the case at hand. Therefore, the non-production of Annexure-P2 to P4 cannot be treated as discovery of new and important matters which could now be allowed to bring them on record.
- d) Therefore, we have to see whether the case of HESCOM falls under the head "Any other sufficient reason" to allow the review of the impugned order. As held by the Hon'ble Supreme Court in the above decision in Kamlesh Verma case, 'a reason sufficient on the ground at least analogous to those specified in the rule' can be treated as 'Any other sufficient reason'. We are of the opinion that if this yardstick is applied HESCOM has not made out any ground to bring its case for reviewing the impugned order.

- e) Assuming that non-injection of power into the grid subsequent to 06.10.2017 the date of commissioning of the project, was for the reason stated in the letter dated 22.03.2018 of the Developer (Annexure-P4), one has to hold that the non-injection of power was due to Force Majeure event. Article 5.1.1 (c) specifying the obligation of the Developer, provides that subject to and on the terms & conditions of this Agreement, the Developer shall at its own cost and expenses, commence supply of power up to the Contracted Capacity to HESCOM, no later than the Scheduled Commissioning Date and continue the supply of power throughout the term of the Agreement. Therefore, one can say that if there was delay in commencement of supply of power immediately after the commissioning of the Project, due to Force Majeure events the same is not treated as breach of obligation. We have already noted the contents of the letter dated 22.03.2018 (Annexure-P4) which make out a case of Force Majeure event.
- f) It appears that during the hearing in OP No.160 of 2017, HESCOM might have thought that there were acceptable reasons for non-injection of power into the grid as narrated in the letter dated 22.03.2018 (Annexure-P4). There is no obligation on the part of the Developer to bring these facts on record explaining the reasons for non-injection of power in the month of October, 2017. If, HESCOM intended to challenge the truth or otherwise of the contents of letter dated 22.03.2018 (Annexure-P4), it

should have brought it on record, denying the truthfulness of the contents of the said letter.

g) HESCOM contended that not bringing on record by the Developer, the non-injection of power to the grid during the hearing in OP No.160 of 2017 is a 'fraud played on the Court' and the Commission was misled to reach the conclusion in the final order. We can say that HESCOM was also equally responsible for it, as the said fact was within its knowledge. It is not the case of HESCOM that till the passing of the order in OP No.160 of 2017 it was not aware of the fact that power was not injected during October, 2017.

h) For the above reasons, we hold that HESCOM has failed to make out any ground for review of the Order passed in OP No.160 of 2017 dated 09.07.2019. Accordingly, we hold Point No.1 in negative.

7. Point No.2: What Order?

As Point No.1 is held in negative, we pass the following:

**ORDER**

The Review Petition filed by the Petitioner-HESCOM is dismissed, as not maintainable.

sd/-  
(SHAMBHU DAYAL MEENA)  
Chairman

sd/-  
(H.M. MANJUNATHA)  
Member

sd/-  
(M.D. RAVI)  
Member