

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

(APPELLATE JURISDICTION)

**APPEAL NO. 89 OF 2018 &
IA No. 843 OF 2017**

Dated: 12th August, 2021

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

In the matter of:-

Azure Photovoltaic Private Limited

3rd Floor, Asset 301-304,
Worldmark 3, Aero City,
New Delhi – 110037

... **Appellant**

Versus

1. **Gulbarga Electricity Supply Company Limited**
Corporate Office, Station Road, Gulbarga
Karnataka - 585102

2. **Karnataka Electricity Regulatory Commission**
Through its Secretary
6th& 7th Floor, Mahalakshmi Chambers,
No.9/2, M.G. Road,
Bangalore – 560001

... **Respondents**

Counsel for the Appellant(s) : Mr. Buddy A. Ranganadhan
Ms. Anuradha Mukherjee
Ms. Shikha Tandon
Ms. Akriti Gandotra
Mr. Robin Grover

Counsel for the Respondent(s) : Mr. Avimukt Dar
Mr. Mohit Chadha
Mr. Gaurav Dani
Ms. Vaishnavi Rao
Mr. Varun Khanna
Ms. Vanika Gupta
Mr. Kshitij Parashar
Ms. Ragima R.
Ms. Swati Mittal
Mr. Yugank Goel
Ms. Padmaja Kaul
Mr. Sandeep Grover
Ms. Pankhuri Bhardwaj **for R-1**

JUDGMENT

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

1. The present appeal is being filed challenging the decision of the Karnataka Electricity Regulatory Commission dated 24.08.2017 bearing reference no. KERC/S/F-31/Vol-45, 46 & 47/17-18 (hereinafter referred to as "**Impugned Order**") addressed to Gulbarga Electricity Supply Company

Limited (**"GESCOM/Respondent No. 1"**), wherein the State Commission has arbitrarily and unjustifiably set aside the extensions granted by Respondent No. 1, and directed it to enforce reduced tariff and recover liquidated damages due to delay in achieving the Commercial Operation Date (**"COD"**) by Appellant. Consequent to the Impugned Order, the Appellant has received from GESCOM, a letter dated 22.09.2017 bearing reference no. GESCOM/CEE(CP)/EE/AEE(PTC)/2017-18/30431-38 (hereinafter referred to as **"Impugned Letter"**) raising a demand of Rs. 35,04,00,000/- upon the Appellant as liquidated damages. The Appellant also challenges the said letter in this appeal.

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

3. The Appellant, Azure Photovoltaic Private Limited, (hereinafter referred to as **"Appellant"/ "Azure"**), a Special Purpose Vehicle (**"SPV"**) of M/s Azure Power India Private Limited, is a generating company.

4. Respondent No.1-GESCOM is a distribution licensee and is one of the electricity supply companies responsible for supplying electrical power in the State of Karnataka having signed the PPA with the Appellant. Respondent

No.2 is the Karnataka Electricity Regulatory Commission (hereinafter referred to as “**Commission/Respondent No.2**”)

5. Karnataka Renewable Energy Development Limited (“**KREDL**”), incorporated under the Companies Act, 1956, is the nodal agency of the Government of Karnataka for facilitating the development of renewable energy in the State of Karnataka. KREDL processes all applications received for setting up of renewable energy generating plants and based on their recommendation, the Government of Karnataka approves and grants rights to such independent power producers to set up their generation plants in the State. KREDL also monitors progress of various renewable energy projects in the State.

6. In the year 2014, KREDL resolved to undertake development (to design, own, construct, develop, finance, build, engineer, procure, commission, operate and maintain) of 500 MW of solar power energy in the State of Karnataka through private sector participation at Chitradurga District in the State of Karnataka. Accordingly, KREDL invited proposals by its Request for Proposal (“**RFP**”) dated 30.05.2014 prescribing the technical and commercial terms and conditions for the selection of Bidders for undertaking development of solar thermal power and/or solar PV power

plants in Karnataka. The bidding process was conducted as per the 'Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licenses' dated 19.01.2005 (updated as on 21.07.2010 issued by the Ministry of Power, Government of India under Section 63 of the Electricity Act, 2003) ("**Bidding Guidelines**"). The Bid Documents including the RFP and the draft PPA attached to the RFP (hereinafter together referred to as the "**Bid Documents**") issued by KREDL were based on the Standard Bidding Documents as notified by the Ministry of Power pursuant to the Bidding Guidelines. The bidders are required to bid on the basis of the Bid Documents.

7. After evaluation of the proposals received, KREDL accepted the bid of M/s Azure Power India Private Limited ("**APIPL**") for development of 40 MW capacity of Solar PV Project in the PD Kote Village, Dharampur Taluk of Chitradurga District and accordingly issued the Letter of Award ("**LOA**") dated 19.11.2014 to APIPL. The Tariff Order for Solar Power Generation dated 10.10.2013 for the period FY 14-18 prevailing at the time of award of the LOA to APIPL had determined tariff at Rs. 8.40 per unit in respect of solar PV power plants, which states that the approved tariff would be applicable to solar power generators entering into power purchase

agreements on or after April 01, 2013 and up to March 31, 2018. Further such Tariff Order will not apply where the tariff is discovered through bidding process.

8. In fact, APIPL had been awarded the LOA and the Project, as an outcome of the competitive bidding process, by quoting a price significantly lower price i.e. Rs. 6.96 per unit as compared to the tariff determined by KERC in the Tariff Order i.e. Rs. 8.40 per unit

9. In terms of Clause 2.1.16 of the RFP, APIPL incorporated the Appellant as a SPV for setting up the Plant and for supply of power on long-term basis to GESCOM and to execute the PPA. That the executed PPA was to be approved by the State Commission as per the Bid Documents.

10. The Appellant and GESCOM entered into the PPA on 23.01.2015, however, at that time the PPA was signed only by GESCOM, and the same was received by the Appellant for its signature only in the month of April, 2015.

11. As part of the Bid Security, Appellant furnished three irrevocable and unconditional bank guarantees (**PBG**) dated 08.12.2014 for a total amount

of Rs.4,00,00,000/- from Central Bank of India. The PBG were further extended to 25.03.2018 on 09.05.2017.

12. In terms of Article 4 of the PPA, the Appellant was required to fulfil certain Conditions Precedent within 365 days from the effective date i.e. 23.01.2015, unless such completion is affected by any *force majeure* event or if any of the activities is specifically waived in writing by GESCOM. The said Article 4 also provides for liquidated damages to be imposed in case of delay in fulfilling Conditions Precedent by the Developer to the maximum period of 30 days @0.2% of the Performance Security. Article 4 also provides that GESCOM should extend all cooperation to Developer for achieving Conditions Precedent.

13. Admittedly, though the date of the PPA was 23.01.2015, the Appellant received the copy of the PPA in original from the GESCOM only in April, 2015. GESCOM was well aware that for performing the Conditions Precedent and for raising the funds from financial institutions for achieving financial closure of the Project, the Appellant required an effective executable and a valid agreement, duly approved by the State Commission.

However, GESCOM failed to provide the Appellant with an effective executable and a valid PPA, until 25.05.2015.

14. The Appellant understands that in accordance with the Bid Documents and the Bidding Guidelines, GESCOM was mandated to take prior approval of the State Commission and thereafter, forward the signed PPA to the State Commission for adoption of tariffs in terms of Section 63 of the Act, which was not done by GESCOM

15. Without an effective executable agreement as approved by the State Commission, the Appellant was not in a position to initiate any activities towards fulfilling its obligations under the Conditions Precedent as defined in the PPA, more particularly activities related to land procurement, project financing, MNRE exemption for material procurement and other construction related activities. The Appellant could not be expected to perform and complete its obligations under the PPA within the remaining time period out of 365 days, especially when it was provided the effective executable PPA only in the month of May 2015 i.e. after delay of 121 days from the date of the signing of the PPA by the Appellant. This delay in effect left the Appellant with only 164 days to perform its obligations against the agreed period of 365 days.

16. The approval of the PPA by the State Commission was to be obtained by GESCOM. It was not in control of the Appellant. Since no approved PPA was made available to the Appellant to commence work and the same was beyond its control, the Appellant in order to expedite the approval took the following steps:

- (i) The Appellant sent a letter dated 12.03.2015 to GESCOM requesting it to provide the Appellant with an effective executable and a valid PPA duly approved by the State Commission at the earliest. As the GESCOM did not respond, the Appellant was constrained to approach the State Commission *vide* its letter dated 06.04.2015 requesting the State Commission to consider the date of receipt of the PPA after due approval from the State Commission as the Effective Date of the PPA instead of the date of signing of the PPA.
- (ii) The State Commission *vide* its letter dated 13.04.2015 informed that the delay in receipt of the approval from the State Commission was solely attributable to the GESCOM since it had

failed to supply certain documents required to be submitted to the State Commission.

- (iii) Only on 25.05.2015, after 4 months of signing the PPA by Appellant, GESCOM informed the Appellant that it received the approval to the PPA from the State Commission and requested the Appellant to visit its office on 30.05.2015 to sign the modified PPA. This was adhered to by the Appellant and an addendum to the PPA was executed between the parties on 03.08.2015. However, Addendum to the PPA did not extend the date of fulfilling Conditions Precedent and achieving COD. Considering these facts, the Appellant requested GESCOM through various letters to grant extensions in achieving COD and fulfilling Conditions Precedent.
- (iv) Since the Appellant did not receive any response from GESOCM, wrote to the State Commission on 31.08.2015 and 09.10.2015, requesting that the date of receiving the duly approved and signed PPA as the Effective Date under the PPA. Vide its letter dated 21.10.2015, the State Commission directed

the Appellant to approach the GESCOM to consider the case of Appellant for extension of time on the grounds provided in Article 5.7 of the PPA.

- (v) When the State Commission's specific directions were not followed, GESCOM failed to respond and/or affirm to the Appellant's request. Therefore, the Appellant filed an Original Petition No. 08/2016 before the State Commission seeking for extension of time. The State Commission took up the matter and restrained the GESCOM from taking any action against the Appellant including any action under Article 4.3 of the PPA.

- (vi) During pendency of the said Petition, GESCOM proposed that it was ready to grant extension of time to the Appellant and consider the date of completion of Conditions Precedent as 23.05.2016 and COD as 23.01.2017, provided the Appellant withdraws the matter pending before the State Commission. Accordingly, the order was passed by the GESCOM on May 05, 2016. The said Order further stated that it was subject to ratification by the Board of Directors of the GESCOM and execution of Supplemental Power Purchase Agreement duly

approved by the State Commission to give effect to the aforesaid.

(vii) On the basis of GESCOM's assurances to cooperate and grant extensions as requested by the Appellant, the Appellant withdrew the said Original Petition No. 8 of 2016.

(viii) Now as per the order of GESCOM dated 05.05.2016, the time stood extended by 121 days as follows:

a. Completion of Conditions Precedent: May 23, 2016

b. Completion of COD: January 23, 2017

17. However, the Appellant fulfilled all its obligations with respect to the Conditions Precedent as on 19.04.2016 well before the extended time of 23.05.2016, and informed the GESCOM about the same. According to the Appellant, It was an acknowledged fact that the extension of 121 days was on account of factors beyond the control of the Appellant and hence, the Appellant was entitled to an extension under Article 5.7 of the PPA. Post the withdrawal of the Original Petition No. 08 of 2016, the Appellant *vide* its letter dated 30.05.2016 sought a copy of the draft supplemental agreement to the PPA from the GESCOM to give effect to the Order dated 0505.2016.

18. Meanwhile, in a similarly situated project, being executed by the Appellant in the state of Karnataka, Chamundeswari Electricity Supply Company Limited (hereinafter "**CESCOM**") after granting extension of time on account of delay in approval of the PPA by the State Commission, unilaterally imposed a lower tariff of INR 6.51 per unit than the applicable tariff of INR 6.89 per unit. This was challenged separately by the Appellant before the State Commission *vide* Original Petition No. 19 of 2016, which is presently in appeal before this Tribunal. In its order of 14.12.2016 the State Commission had set aside the letter of December 01, 2016, which directed change of tariff.

19. The draft supplemental agreement to the PPA handed over by GESCOM to the Appellant for execution had lowered the tariff under the PPA to Rs. 6.51 per unit based on the CESCOM project and letter dated December 01, 2016, though the Appellant had entered into the PPA by bidding for a much lower price of Rs. 6.96 per unit. The arbitrary reduction of tariff as Rs.6.51 per unit was done by the GESCOM on an erroneous interpretation of Article 12.2 of the PPA, on the basis of there being a change in 'KEREC applicable tariff' and the tariff as per the Tariff Order dated

30.07.2015 being Rs. 6.51 per unit. However, Clause 3 of the Tariff Order dated 30.07.2015 clearly excludes from its scope power purchase agreements entered into and submitted to the State Commission prior to September 01, 2015, in respect of projects that are commissioned during the period from September 01, 2015 to March 31, 2018. It is submitted that the prevailing applicable KERC generic tariff is Rs.8.40 per unit under clause 12, and while considering the lower tariff from the two, it may be noticed that the PPA tariff of Rs. 6.96 per unit is much lesser than Rs. 8.40 per unit, basing of which the Appellant had submitted its bid and executed the PPA with the Respondent.

20. Further, when GESCOM *vide* its letter dated 10.08.2016 asked the Appellant to visit its office to sign the said Supplemental PPA by lowering the tariff to Rs. 6.51 per unit as a pre-condition for granting extensions under the PPA, the Appellant again approached the State Commission by filing Original Petition No. 73/2016 praying *inter alia* to set aside the direction passed by the GESCOM in the aforesaid letter dated 10.08.2016, which sought to lower the tariff to Rs.6.51 per unit.

21. Vide its order dated 18.08.2016, the State Commission directed the GESCOM to refrain from taking any adverse actions against the Appellant. Meanwhile, the progress of the project was suffered as the lenders were refusing to advance loans on account of lack of clarity on the tariff. Since the GESCOM gave assurances to the Appellant of full cooperation, on the precondition that the Original Petition No. 73/2016 should be withdrawn, the Appellant withdrew the Original Petition No. 73/2016

22. Subsequently, the Appellant and GESCOM entered into the Supplemental PPA dated 10.03.2017 by modifying the PPA dated 23.01.2015 and the Addendum to the PPA dated 03.08.2015. The said Supplemental PPA revised the COD as 23.01.2017 and it did not mention that this Supplemental PPA would reduce the tariff to Rs. 6.51 per unit. Therefore, according to the Appellant, the tariff would be at Rs. 6.96 per unit.

23. The Project was progressing based on the extended dates, until another *force majeure* event in the form of Cauvery river water based riots occurred in Karnataka, which was beyond the Appellant's control. The work came to a halt on account of this. By its letter dated 09.05.2017, the

Appellant requested GESCOM to further extend the date for achieving COD for a further period of two months, i.e. to 26.03.2017, from the revised date of COD i.e., 23.01.2017. Vide its letter dated 27.05.2017, GESCOM further extended the time for one month, i.e. up to 23.02.2017.

24. Ultimately, Appellant was able to achieve COD by 26.03.2017 and a Commissioning Certificate in this regard was given to the Appellant by Karnataka Power Transmission Corporation Limited *vide* letter dated 27.03.2017. The project became operational and electricity supply to GESCOM commenced. The Appellant has been raising invoices on an interim rate of Rs.6.51 per unit upon GESCOM from the date of achieving COD, i.e. from March 26, 2017. However, no payment has been received by the Appellant from GESCOM in that regard.

25. After achieving the COD, the Appellant received a letter from GESCOM dated 27.05.2017 condoning the delay of 30 days on account of Cauvery riots etc. and imposing penalties for further delay of 31 days in achieving COD from 23.02.2017 to 26.03.2017. For the delay of 31 days, GESCOM sought liquidated damages for an amount of Rs.2,40,00,000/- in accordance with Article 5.8.1 of the PPA. However, a perusal of Article

5.8.1 would show that for the delay up to one month period, the liquidated damages shall be only to the extent of 20% of Performance Security, which would come to Rs.80,00,000/- being 20% of Rs.4,00,00,000/-, whereas GESCOM has imposed an additional amount of liquidated damages calculated as 40% of Performance Security for the additional delay of one day which extended the total period of delay to 31 days, when such delay could have easily been condoned by GESCOM.

26. Since the Project had commenced, the Appellant vide its letter dated 07.06.2017 requested GESCOM to settle the amount of Rs.2,40,00,000/- against the amounts raised by the Appellant in its monthly invoices for March 2017, April 2017 and May 2017. Accordingly, the Appellant has already paid liquidated damages. However, GESCOM has also delayed the payment of monthly supply invoices being raised in the interim at Rs. 6.51 per unit. The outstanding as on the date of filing the Appeal is Rs.12,67,65,980.50/- after deducting INR 2,40,00,000/- towards liquidated damages.

27. The Appellant was not aware that the Supplemental PPA had been sent to the State Commission by GESCOM for approval. The Appellant

states that it performed the PPA based on the original approved PPA received from GESCOM. However, only on receiving the Impugned Letter on 22.09.2017 from GESCOM, the Appellant came to know the decision of the State Commission addressed to GESCOM vide letter dated 24.08.2017. The grievance of the Appellant is that without providing an opportunity of hearing to the Appellant, who is the main aggrieved party, the State Commission has taken a decision without proper appreciation of the relevant records. In the Impugned Order, State Commission not only refused to approve the extension granted but further directed GESCOM to impose liquidated damages and reduce tariff based on “actual Commercial Operation Date (COD)”. The Impugned Order further directed GESCOM to inform the Appellant to approach the State Commission to justify its claims for extension of time under force majeure conditions in the PPA. Having directed to impose and levy liquidated damages vide the Impugned Letter, State Commission has already arrived at a decision on the extended time granted by GESCOM.

28. Instead of informing the Appellant of the Impugned Order and providing it an opportunity to challenge the same, GESCOM sent the Impugned Letter to the Appellant raising a demand of Rs.35,04,00,000/-

upon the Appellant as liquidated damages by retrospectively reinstating to original CODs and unilaterally withdrawing the extension of 121 days and 30 days granted by it vide its letters dated 05.05.2016 and 27.05.2017. Further, the Impugned Letter has intimated the Appellant that if the liquidated damages are not paid within 15 days, GESCOM will recover the same from the supply bills.

29. The Appellant has sent a representation on 05.10.2017 requesting GESCOM to reconsider the imposition of penalty and not to deduct the same from the ongoing invoices as the same would gravely prejudice the Appellant.

30. Apprehending that it will face coercive steps from the Respondents including invocation of the PBG and deduction from its ongoing invoices, which would gravely prejudice the Appellant and put it under huge financial strain; being aggrieved by the Impugned Order of the State Commission, the Appellant has filed the present Appeal seeking for the following reliefs:

- (a) “Set aside the Impugned Order dated August 24, 2017 passed by the Karnataka Electricity Regulatory Commission bearing Reference No. KERC/S/F-31/Vol-45, 46 & 47/17-18 as against

the Appellant, and restore the extension of time granted by Respondent No. 1 during the execution of the project i.e., of 121 days and further 30 days;

- (b) Set aside the Impugned Letter dated September 22, 2017 issued by Gulbarga Electricity Supply Company Limited bearing reference no. GESCOM /CEE(CP) /EE/ AEE(PTC) / 2017-18 / 30431-38 issued by the Respondent No. 1 pursuant to direction of the Respondent No. 2 dated August 24, 2017 bearing Reference No. KERC/S/F-31/Vol-45, 46 & 47/17-18;
- (c) In the alternative, pass an order restraining Respondent No. 1 from acting on the Impugned Order dated August 24, 2017 and raising a demand of INR 35,04,00,000/- for alleged delays in achieving Conditions Precedent and Commercial Operation Date;
- (d) Pass an order restraining the Respondent No. 1 from recovering the liquidated damages of INR 35,04,00,000/-, including by way of invocation of bank guarantee dated December 08, 2014 bearing Bank Guarantee No. 0346414BG0000105; 0346414BG0000106 and 0346414BG0000108, from the monthly

supply invoices raised by the Appellant and direct the Respondent No. 1 to continue payments of the monthly supply invoices in terms of the PPA;

- (e) Pass an order restraining the Respondent No. 1 from invoking and/or encashing the bank guarantee dated December 08, 2014 bearing Bank Guarantee No. 0346414BG0000105; 0346414BG0000106 and 0346414BG0000108 totaling to Rs. 4,00,00,000/- (Rupees Four Crores only) towards recovery of the liquidated damages;
- (f) Restrain the Respondents from taking any coercive or penal action against the Appellant under the Power Purchase Agreement dated January 23, 2015, or even otherwise, including recovery of the said amount of INR 35,04,00,000/- from the monthly invoices of the Appellant or by invoking the bank guarantees;
- (g) Grant an additional extension of time of 31 days in favour of the Appellant under Article 5.7 of the Power Purchase Agreement dated January 23, 2015, in addition to the extension already granted by Respondent no. 1 during the execution of project;

- (h) Direct Respondents not to reduce the tariff at which the Appellant is required to supply energy to Respondent No. 1 and to pay the applicable Tariff of INR 6.96 per unit to the Appellant as prescribed under the Power Purchase Agreement dated January 23, 2015, being the lower of the Tariff as per Article 12.1 of the Power Purchase Agreement dated January 23, 2015 and the KERC Applicable Tariff as on the commercial operation date being INR 8.40 per unit as determined by the Tariff Order dated October 10, 2013;
- (i) Approve the Supplemental Power Purchase Agreement dated March 10, 2017 executed between the Appellant and the Respondent No. 1;
- (j) Award costs of the present Appeal to the Appellant; and
- (k) Pass any or such further orders in favour of the Appellant, and against the Respondents, as may be deemed fit and proper in the facts and circumstances of the case”

31. We have gone through the written submissions filed by both the parties.

32. The point that would arise for our consideration is –

“Whether the impugned order warrants any interference? If so, what order?”

ANALYSIS & DISCUSSION

33. From reading of the pleadings and elaborate arguments, what we gather from the arguments is that the Appellant has grievance with regard to computation of Liquidated Damages payable by the Appellant due to delay in achieving the Commercial Operation Date (COD).

34. The other argument seems to be with regard to revision of tariff. According to PPA, the bid tariff rate was Rs. 6.96 per unit which was reduced to Rs. 6.51 per unit on the ground that Clause 12.1 of the PPA applies. Since admittedly there is delay in achieving commissioning of the project, the lower of the tariff should be applicable in terms of Clause 12.1, according to Respondents. This is contested by the Appellant.

35. Relevant facts which need to be taken into consideration are as under:

36. The PPA was executed between the parties on 23.01.2015. KERC approved the PPA on 04.05.2015, however this was intimated to the Appellant only on 25.05.2015. In terms of directions of KERC, a Supplemental Power Purchase Agreement (SPPA) was executed between the Appellant and Discom on 03.08.2015.

37. In terms of PPA, the Scheduled Date of Commissioning of the project is 23.07.2016. However, the PPA was approved on 04.05.2015. It is no more *res integra* that date of approval of the PPA by the appropriate Commission i.e. KERC has to be taken as effective date, since the PPA cannot be implemented till this approval by the statutory authority i.e., KERC. Therefore, if the PPA was approved on 04.05.2015, the Scheduled Date of Commissioning would be 04.11.2016 instead of 23.07.2016. The fact remains, it was not commenced even within this scheduled date of 04.11.2016.

38. According to Appellant, the delay in approval of PPA is attributable to GESCOM since it had failed to supply certain documents/details required to be submitted to the State Commission for the purpose of completion of process of approval. Apparently, in terms of Bidding Guidelines of Bid Documents, GESCOM has to take prior approval of the State Commission

and thereafter forward the signed PPA to the State Commission for adoption of tariff which is in accordance with the terms of Section 63 of the Act. Therefore, the Appellant contends that the Appellant was not responsible for the delay so far as approval of the PPA.

39. It is seen that only on 25.05.2015, GESCOM intimated the Appellant about the approval of the PPA subject to modification, which was implemented in the form of Supplemental PPA. The contention of the Respondent GESCOM is that the Appellant did not complete conditions precedent on or before 23.01.2016, hence the commissioning of the project automatically got delayed. Since the conditions precedent according to Respondent was complied with only on 19.04.2016 and commissioning of the project was achieved on 26.03.2017, there is delay of 87 days in complying with the conditions precedent and delay of 246 days in commissioning the project.

40. Apparently, if the effective date has to be approval of the PPA by the Commission, then the effective date would be 04.11.2016 and if the commissioning of the project was on 26.03.2017, it would be delay of 143 days on the part of the Appellant in commissioning of the project.

41. So far as this 143 days delay, what is the stand of the Appellant has to be seen. It is seen that the Appellant by letters dated 30.09.2015, 16.10.2015 and 02.11.2015 requested GESCO to grant extension of six months in terms of Article 5.7 of PPA. When GESCO failed to reply to these letters, Appellant approached the State Commission seeking intervention of the Commission to treat the date of execution of the PPA as 25.05.2015, because of delay in informing the Appellant about the approval. However, the Commission replied directing the Appellant to approach GESCO for extension of time under Article 5.7 which provides extension of time without payment of any penalty or Liquidated Damages. At that point of time, Original Petition was filed in OP 08 of 2016. During pendency of the said Petition, GESCO proposed to grant extension of time without any penal consequences, provided the Appellant withdraws the OP No. 08 of 2016. Subsequent to this only, the date of commissioning of the project i.e., COD was 23.01.2017 as approved by GESCO, subject to Supplemental PPA and withdrawing of the Petition. The Appellant did not receive any communication on extension, and when the Appellant approached GESCO for execution of draft of Supplemental PPA, GESCO sought to lower the tariff to Rs. 6.51 as a pre-condition to grant

extension. At this point of time, the Appellant again approached KERC in OP No. 73 of 2016 wherein they sought for interference of KERC pertaining to alleged arbitrary reduction in PPA tariff.

42. According to Appellant, on account of GESCOM's assurance of extending the time, Appellant withdrew the Petition No. 73 of 2016 and subsequently, as mentioned above, Supplemental PPA dated 10.03.2017 which was revised on COD as 23.01.2017 and the date of fulfilling the conditions precedent as 23.05.2016 was made between the parties. This Supplemental PPA apparently, did not have any clause so far as reduction of tariff at INR 6.51. However, it stated that the extension of time was subject to Article 12 of the PPA.

43. Subsequent to this, it is seen that the Appellant again approached GESCOM for extension of time by two months from 23.01.2017 to 26.03.2017 on account of agitation which was going on in the State of Karnataka pertaining to Cauvery river dispute. This, according to Appellant, delayed the commissioning of project. Therefore, the COD could be achieved only on 26.03.2017. The revised COD was granted up to 23.02.2017 because of Cauvery river agitation. The GESCOM imposed

Liquidated Damages of Rs. 2,40,00,000/- in terms of Article 5.8.1 of the PPA considering the delay of 31 days in achieving COD.

44. Meanwhile, the Supplemental PPA was sent for approval of the Commission. During the proceedings of approval of Supplemental PPA, the impugned order dated 24.08.2017 was passed directing GESCOM to set aside the extension granted by GESCOM and to enforce reduction of tariff and recover Liquidated Damages from the actual Commercial Operation Date. At that point of time, GESCOM sent impugned letter to the Appellant raising a demand of Rs. 35,04,00,000/- as Liquidated Damages with retrospective effect whereby, according to Appellant, unilaterally withdrew the extension of the 121 days and 30 days granted by the letter dated 05.05.2016 and 27.05.2017. The impugned order, according to Appellant, did not give any opportunity of hearing to the Appellant, though the Appellant is the aggrieved party. Therefore, this Appeal came to be filed.

45. It is seen that without an interim arrangement without prejudice to the rights of the parties, the Appellant started supplying power and raised invoices of release of payment at the rate of Rs. 6.51 per unit. In spite of this, the GESCOM seems to have not honoured any payment though supply

of electricity was distributed to its consumers. At that point of time, during the proceedings before this Tribunal, by letters dated 24.05.2018 and 31.05.2018, GESCO was directed to release payments in terms of affidavit of undertaking. According to Appellant, the Respondent GESCO failed to comply with the directions of the Tribunal and did not release full payment raised in invoices.

46. Under the circumstances, the Appellant approached this Tribunal challenging the impugned letter on the ground that there was no opportunity of being heard to Appellant before levying punitive Liquidity Damages by GESCO and the basis of this action of the GESCO i.e., impugned order opining that no grounds existed for extension of time is also not justified.

47. It is seen that in accordance with the directions of KERC, the Appellant approached GESCO for extension of time in terms of Article 5.7 wherein no penalty of Liquidated Damages was envisaged. The Supplemental PPA with revised date as 23.01.2017 was signed between the parties on 10.03.2017. This did not contemplate any particular rate of tariff though it states that the extension of time was as per Article 12 of PPA. Article 12 of PPA reads as under:

ARTICLE 12: APPLICABLE TARIFF AND SHARING OF CDM BENEFITS

12.1 The Developer shall be entitled to receive the Tariff of Rs.6.96/kWh of energy applied by it to GESCO in accordance with the terms of this Agreement during the period between COD and the Expiry Date.

12.2 Provided further that as a consequence of delay in Commissioning of the Project beyond the Scheduled Commissioning Date, subject to Article 4, if there is a change in KERC applicable Tariff, the changed applicable Tariff for the Project shall be the lower of the following:

- i. Tariff at in Clause 12.1 above*
- ii. KERC applicable Tariff as on the Commercial Operation Date.*
- iii. Import billing : the company shall be permitted to use 10% of installed capacity of startup after inspection by the concerned officer of GESCO and 115% of such energy provided by GESCO for startup power shall be deducted from the energy pumped in to the grid by the company for determining the amount payable by GESCO to the company. If energy over and above the requirement is drawn from the grid, the same shall be billed under the tariff applicable to HT industries demand charges.*
- iv. Reactive energy billing. The company shall pay at the rate of 40 paise for each KVARH drawn."*

48. Article 12.1 provides, if there is delay in achieving the commissioning of the project, the lower of the tariff should be applicable. It would mean that PPA rate at Rs. 6.96 per unit or the State Commission's applicable tariff as on the date of achieving COD (whichever is lower).

49. The Supplemental PPA which was executed between the parties indicated revised COD as 23.01.2017, but the Appellant could achieve COD only on 26.03.2017. Though the Appellant asked for two months' extension on account of Cauvery river agitation, the request for extension was accorded for a month i.e., up to 23.02.2017. Even with this extension of time, still there is delay of 31 days in achieving the COD.

50. In terms of Supplemental PPA, it was not an absolute extension of time, but it said the extension is subject to Article 12 of PPA which refers to tariff applicable.

51. Then coming to Liquidated Damages, Clause 5.8 provides for the same which reads as under:

"Article 5.8.1 (c)

For the delay of more than two and up to three months an amount equivalent to 40% of the performance security."

“Article 5.8.2

In case the Developer delays the achievement of Commercial Operation Date beyond 3 (three) months, the Developer shall pay to GESCO the Liquidated Damages at the rate of Rs. 50,000/- (Rupees Fifty Thousand only) per MW per day of delay for the delay in such commissioning.”

“Article 5.8.3

Maximum time period allowed for achievement of Commercial Operation Date with payment of Liquidated Damages shall be limited to 22 (twenty two) months from the Effective Date. In case. . . ”

52. In terms of this Clause, Liquidated Damages has to be imposed per day of the delay. Up to one month, it is 20%; between one month to two months, it becomes 40%; for delay between two to three months, 40%. In terms of 5.8.2 of the PPA, for delay of three months, it has to be Rs. 50,000/- per MW per day in COD.

53. In terms of direction of the KERC, the Appellant approached GESCO for extension of time which was extended, as stated above up to 23.01.2017. Whether any force majeure event as pleaded by the Appellant prevented the Appellant from achieving COD?

54. The first delay prior to Supplemental PPA, as seen, was delay for approval of the PPA for which Appellant was not responsible, but for reasons entirely attributable to GESCOM and also other reasons beyond the control of Appellant. Since the Appellant was not in a position to take any effective steps for execution of the project without original duly approved PPA, and since the Appellant was unable to initiate any activity for fulfilling conditions precedent in terms of PPA including finance of the project, land procurement, and MNRE exemption for want of original duly approved PPA, the delay seems to have happened. By the time the approved PPA came to the hand of the Developer to comply with conditions precedent out of 365 days, only 164 days was available. Therefore, we are of the opinion that the Appellant was not responsible for the delay and up to the date of signing of Supplemental PPA, it was on account of delay beyond the control of the Appellant which is attributable to GESCOM.

55. Having agreed to extend the COD though with a condition, GESCOM now cannot take a different stand that the Appellant was not entitled for extension of COD. If there was no justification for extension of time for the initial extension of time, GESCOM instead of conditional extension, ought to

have refused extension, but however, it not only extended, but signed the Supplemental PPA where time was extended up to 23.01.2017.

56. Subsequent extension sought by the Appellant was for two months, GESCOM granted one month i.e., on account of Cauvery river agitation, whereby the extension was up to 23.02.2017. With all these, the delay was for a period of 31 days in achieving COD. **We are of the opinion that in terms of Article 5.8.1 of the PPA, the Appellant is liable to pay Liquidated Damages for 31 days.**

57. Coming to reduction of tariff from Rs.6.96 to Rs.6.51 per unit, it is seen that this rate of Rs.6.96 was arrived at in a Competitive Bidding process. According to Appellant, in the facts and circumstances, there is no scope for reduction/revision from the bid tariff either in the provisions of PPA or the Supplemental PPA. As already referred to above, tariff as per Article 12.1 i.e., Rs.6.96 per unit, and if there is delay in achieving commissioning of the project, lower of the two i.e., Rs.6.96 per unit or the State Commission's applicable tariff as on the date of COD is applicable. For this, we refer to the Tariff Orders as directed by the State Commission from time to time.

58. Admittedly, the COD was achieved on 26.03.2017. As already stated above, there was delay of 31 days. The tariff of 2013 was in existence so far as the PPA is concerned i.e., Rs.8.40 per unit. This Tariff Order is dated 10.10.2013. The October 2013 Tariff Order reads as under:

“5. Tariff for grid connected Solar PV, Solar Thermal power plants and Roof top Solar Photovoltaic plants:

On the basis of the approved parameters, the following is the approved tariff:

<i>Type of Solar Plant</i>	<i>Approved Tariff in Rs/Unit</i>
<i>Solar PV Power Plants</i>	<i>8.40</i>
<i>Solar Thermal Power Plants</i>	<i>10.92</i>
<i>Rooftop and Small Solar PV Plants</i>	<i>9.56</i>
<i>Rooftop and Small Solar PV Plants with 30% capital subsidy</i>	<i>7.20</i>

The above approved tariff is applicable to solar power generators entering into power purchase agreements (PPA) on or after 01.04.2013 and up to 31.03.2018 other than those where the tariff is discovered through bidding process.”

59. By reading the above Tariff Order, this applies to PPAs entered on or after 01.04.2013 and during the control period of five years i.e., 01.04.2013

to 31.03.2018. The applicable tariff in terms of Article 12.1 was Rs.6.96 per unit. There was no revision of tariff to Rs.6.51 per unit. The 6.51 tariff was adopted by the GESCO based on the Tariff Order dated 30.07.2015 which was at Rs. 6.51 per Unit. The Clause 3 of the Tariff Order dated 30.07.2015 clearly excludes from its application those PPAs entered into and submitted to the Commission prior to 01.09.2015 in respect of the projects that are commissioned during the period from 01.09.2015 to 31.03.2018. The applicable tariff to all the small power plants commissioned between 01.04.2013 to 01.09.2015 was Rs. 8.40 per unit. Even if both the conditions of Tariff Order of 2013 are taken into consideration, there will be no change in the applicable tariff, since the PPA approved tariff is Rs.6.96 per unit and the same is lower than Rs. 8.40 per unit as per 2013 Tariff Order of the Commission. Since the lesser tariff rate has to be considered, it would still be Rs. 6.96 per unit.

60. Then coming to 30.07.2015 Tariff Order which is relied upon by GESCO to reduce the tariff to Rs.6.51 per unit, Para 3 of this Order reads as under:

“3. ... the Commission, in modification of its Order dated 10th October, 2013, decides that the norms and tariff determined

in this Order shall be applicable to all new grid connected MW scale solar PV and solar thermal power plants, entering into Power Purchase Agreement (PPA) on or after 1st September, 2015 and getting commissioned during the period from 1st September, 2015 to 31st March, 2018 for which PPAs have not been entered into, prior to 1st September, 2015.”

61. Reading of Clause 3 of the Tariff Order of 2015 would be applicable only under the following circumstances:

- (a) The PPA must be on or after 01.09.2015 and
- (b) The Solar Power Plant must have been commissioned between 01.09.2015 to 31.03.2018.

62. Reading of the above two conditions confirms the fact that though the solar plant of the Appellant was commissioned during 01.09.2015 to 31.03.2018, as it was commissioned on 26.03.2017 during the above said control period, however, the PPA entered into between the parties was prior to 01.09.2015, since the PPA was executed between the parties on 23.01.2015, therefore, the conditions laid down in the Tariff Order of 2015 wherein the reduced tariff of Rs.6.51 per unit was determined by the

Respondent Commission does not apply. In the absence of both the conditions being applicable to the case of the Appellant on hand, we are of the opinion that the reduced tariff of Rs.6.51 per unit would not have been applied to the solar plant of the Appellant.

63. As stated above, if the PPA was entered into on or after 01.04.2013 to 31.03.2018 for solar PV power plants, the approved rate was Rs.8.40. However, the tariff in terms of PPA was adopted by the GESCOM at Rs. 6.96 per unit. If there is delay in commissioning of the project, the lower tariff would be applicable. Since the PPA approved tariff is at Rs. 6.96 per unit, this tariff would be applicable.

64. In light of the discussion pertaining to 2013 Tariff Order and 2015 Tariff Order, it is established that the case of the Appellant is not covered under these two Tariff Orders and the Appellant is entitled for Rs. 6.96 per unit. Hence, we are of the opinion that there was no justification for the Respondent Commission to apply Rs. 6.51 per unit tariff to the case of the Appellant. Accordingly, we allow the Appeal in part to the extent as discussed above. We pass the following Order:

ORDER

- (a) The Appeal is allowed partly.**
- (b) The Appellant is liable to pay damages in terms of PPA to the GESCOM for delay of 31 days in commissioning the solar plant of the Appellant**
- (c) The Appellant is entitled for Rs. 6.96 per unit for the supply of energy to the Respondent GESCOM from the date of COD.**
- (d) The GESCOM shall pay the Appellant differential tariff between Rs. 6.96 and Rs. 6.51 from the date of COD till they start paying Rs. 6.96 per unit towards the supply of energy.**
- (e) The Appellant shall pay differential Liquidated Damages if any, after calculating damages in accordance with the PPA for delay of 31 days. If the differential amount towards Liquidated Damages after calculating the same for 31 days delay still remains with the Respondent GESCOM, the same shall be adjusted towards differential tariff payable by GESCOM to Appellant.**

- (f) After the above said adjustment, the balance differential tariff amount shall be paid to the Appellant by the Respondent GESCOM within eight weeks from today.
- (g) The Respondent Commission shall approve the Supplemental PPA dated 10.03.2017 executed between the Appellant and GESCOM.

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

Pronounced in the Virtual Court through video conferencing on this the 12th day of August, 2021.

**(Ravindra Kumar Verma)
Technical Member**

**(Justice Manjula Chellur)
Chairperson**

REPORTABLE /NON-REPORTABLE

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