

Court-1

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO.78 OF 2023

Dated: 26.10.2026

Present: Hon'ble Ms. Seema Gupta, Officiating Chairperson
Hon'ble Mr. Virender Bhat, Judicial Member

In the matter of:

Jayamal Energy LLP

Represented by Authorized Signatory / Partner

Mr. Swapnil R. Bora,

No. 47, Ground Floor, N S Iyengar Street,

Opp. Deepak Cable (India) Ltd.,

Seshadripuram, Bengaluru – 560 020

Email: jayamal@jayamalexports.com

... Appellant

Versus

1. Bangalore Electricity Supply Company Limited

Through its Managing Director

K R Circle, Bangalore – 560001

Email: md@bescom.co.in

2. Karnataka Electricity Regulatory Commission

Through its Secretary

No. 16, C-1, Millers Tank Bed Area,

Vasant Nagar, Bengaluru – 560 052

Email: kerc-ka@nic.in

... Respondent (s)

Counsel for the Appellant(s)

:

Basava Prabhu Patil, Sr. Adv.

Bharat Deep Singh

Karthiga M for App. 1

Counsel for the Respondent(s) : Shahbaaz Husain
V.M. Kannan
Harimohana N
Stephania Pinto
Yeshwanth M Comar
Lalit Rajput
Aanshika Bhushan for Res. 1

J U D G M E N T

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. The appellant, having been formed as a Special Purpose Vehicle to undertake a solar power project in District Tumkur, State of Karnataka, had submitted an application for participation in the development of renewable energy in the State and its proposal to set up a solar power project with capacity of 2MW at village Shyasamaru, District Tumkur was approved by the Karnataka Renewable Energy Development Limited (in short "KREDL"). A Letter of Award (LOA) was duly issued to the appellant for the said power project. Subsequently, a Power Purchase Agreement (PPA) was executed between the appellant and the 1st respondent Bangalore Electricity Supply Company Limited (in short "BESCOM") on 02.07.2015. As per the provisions of the PPA, the Scheduled Commercial Operation Date (SCOD) of the project had to be achieved within 18 (eighteen) months of the effective date i.e. by 01.01.2017. However, due to certain purported *force majeure* events,

as agitated by the appellant, the power project could not be commissioned on or before SCOD. Considering the *force majeure* events and other circumstances faced by the appellant, the 1st respondent approved extension of time of the power project vide Office Memorandum dated 16.06.2017 upto 01.07.2017 and thereafter, the power project came to be ultimately commissioned by the appellant on 31.08.2017. A commissioning certificate dated 19.10.2017 has been duly issued by the Karnataka Power Transmission Company Limited.

2. In these circumstances, the appellant had approached the Commission with the petition bearing OP No.230/2017 praying as under: -

- “(a) Approve the extension of time, granted by the Respondent, to the new scheduled commissioning date, viz., 01.10.2017, for its Solar Power Project. vide Official Memorandum dated 30.08.2017;*
- (b) Direct the Respondent to make payment for the delivered energy under the Power Purchase Agreement (PPA) dated 02.07.2015 at Rs.8.40 per unit, from the commercial operation date of the Petitioner’s Project, for the entire term of the PPA; and,*
- (c) Pass such other and incidental Orders, including an Order as to costs, as may be deemed appropriate under the facts and circumstances of the case.”*

3. The petition has been rejected by the Commission vide order dated 29.11.2018 holding the appellant not entitled to any relief. The appellant has also been held entitled to tariff of Rs.4.36/unit i.e. the varied tariff as applicable on the date of commissioning of the appellant's power plant as determined by the Commission in the order dated 12.04.2017. The appellant has also been held liable to pay damages as provided under Article 2.2 and 2.5.7 to the PPA.

4. The appellant has, accordingly, approached this Tribunal by way of instant appeal against the said order dated 29.11.2018 of the Commission.

5. We have heard Mr. Basava Prabhu Patil, learned senior counsel appearing on behalf of the appellant and Mr. Shahbaaz Hussain, learned counsel for the 1st respondent. The 2nd respondent i.e. the Commission has not contested the appeal. We have also perused the impugned order as well as the written submissions filed by the learned counsels.

6. The Commission in the impugned order has framed following issues for its consideration: -

“(1) Whether this Commission has jurisdiction, to call upon the Petitioner to prove the Force Majeure Events, relied upon by him 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?

(2) Whether the Petitioner has made out a case for deferment or extension of the Scheduled Commissioning Date of its Plant?

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

7. In answering Issue No.(1) in affirmative, the Commission has relied upon its previous order dated 07.08.2018 passed in OP No.65/2017 whereby the Commission had held that it has the exclusive jurisdiction to consider the validity of extension of time granted by the discom to a power generator, when it affects the tariff payable to a generating company which has ultimately to be passed on to the consumers.

8. The Issue No.(2) has been answered in negative by the Commission on the ground that no *force majeure* notice as contemplated under the PPA has been issued by the appellant to the 1st respondent and the reasons for delay in commissioning of the power plant given by the appellant did not constitute *force majeure* events as contemplated under the PPA. Thus, the

appellant was held not entitled to extension of time in commissioning of the power project.

9. On Issue No.(3), the Commission has observed that since the power project was commissioned on 31.08.2017 when the generic tariff order dated 12.04.2017 was applicable, the appellant's power project is entitled to tariff of Rs.4.36/unit as determined in the said order. Further, while relying upon the judgment of the Supreme Court dated 05.04.2018 in Civil Appeal No.3600/2018 MP Power Management Company v. Renew Clean Energy Pvt. Ltd. and Anr., the Commission has held the appellant liable to pay damages to the 1st respondent BESCOM as per Articles 2.2 and 2.57 of the PPA for delay in achieving the conditions precedents as well as the SCOD.

10. It is not in dispute that the rights and liabilities of the appellant and 1st respondent BESCOM inter-se are governed by the PPA dated 02.07.2015 executed between them. Article 1.1(xiii) of the PPA provides that "effective date" shall mean date of signing of the agreement by the parties. As per Article 2.1 of the PPA, the appellant was required to fulfil all the conditions precedent within 365 days from the effective date. These included all the permits, clearances and approvals (whether statutory or otherwise) as required to execute and operate the project. Article 1.1(xxix) provides that

the Scheduled Commissioning Date shall mean 18 months from the effective date.

11. Thus, as per these provisions of the PPA, the appellant was required to fulfil the conditions precedent before 01.07.2016 and to commission the power project by 01.01.2017.

12. It is argued on behalf of the appellant that the “effective date” indicated in a PPA has to be the date on which the PPA is approved by the Commission, which, in the present case happened on 25.08.2015, and therefore, the SCOD of the project shall have to be taken as 25.02.2017 (18 months from 25.08.2015). It is submitted that upon doing so, the effective delay in commissioning of the project comes to 06 months and 06 days only. On this aspect, reliance is placed upon the judgment of this Tribunal dated 12.08.2021 in Sirwar Renewable Energy Pvt. Ltd. v KERC and Ors. appeal no.245/2019 wherein it has been held as under: -

“80. It is well settled now in the light of the opinion expressed by this Tribunal in the Judgments of Azure Sunrise Private Limited in Appeal No. 340 of 2016 dated 28.02.2020, SEI Aditi Power Private Limited in Appeal No. 360 of 2019 dated 14.07.2021, SEI Diamond Private Limited in Appeal No. 374 of 2019 dated 14.07.2021, and

so also Chennamangathihalli Solar Power Projects LLP. Vs. Bangalore Electricity Supply Company Limited in Appeal No. 351 of 2018 dated 14.09.2020 that it is the date of approval of the PPA which becomes effective date and not the date on which parties put their signatures to the PPA. The PPA becomes implementable only when it is approved by the appropriate Commission. Even the Appellants for that matter any generator cannot approach any authority for sanction, approval, permissions, grants, loans without the PPA being approved by the concerned Commission. Therefore, date of the approval of the PPA becomes a relevant fact.”

(Emphasis supplied)

13. We concur with the legal position expounded by this Tribunal in the above noted judgment. The parties to a PPA cannot be expected to discharge their respective obligations under the same unless it is approved by the appropriate Commission. Section 86(1)(b) of the Electricity Act, 2003 makes it mandatory for a distribution company to seek approval of the Commission for any purchase of power. Therefore, unless the PPA gets approval of the Commission, none of its clauses can be enforced or acted upon.

14. In Tata Power Company Limited vs. Reliance Energy Limited, (2009) 16 SCC 659, the Hon'ble Supreme Court has held as under :-

*“108. A generating company, if the liberalization and privatization policy is to be given effect to, must be held to be free to enter into an agreement and in particular long-term agreement with the distribution agency; terms and conditions of such an agreement, however, are not unregulated. **Such an agreement is subject to grant of approval by the Commission. The Commission has a duty to check if the allocation of power is reasonable. If the terms and conditions relating to quantity, price, mode of supply, the need of the distributing agency vis-à-vis the consumer, keeping in view its long-term need are not found to be reasonable, approval may not be granted.***

.....

*115. A PPA may be a long-term one or a short-term one. Regulations have been made by the Commission by making the MERC (Terms and Conditions of Tariff) Regulations, 2005. Short-term power procurement refers to an agreement for procurement of power for a period of less than one year. Regulation 23.1 requires the distribution licensee to prepare a five-year plan inter alia upon taking into consideration the sources for procurement thereof. **Regulation 24.1 mandates obtaining of prior approval of the Commission therefor. Approval by the Commission is granted upon examining the process of procurement having regard to the factors specified in Regulation***

24.2. *It is in the aforementioned context that grant of approval of PPA by and between TPC (G) on the one hand and BEST and TPC (D), on the other hand, necessitated. The proposal of TPC (G) that Rinfra should enter with it into a long-term agreement assumes significance.”*

(Emphasis supplied)

15. This Tribunal as in the case of Rithwik Energy Generation Pvt. Limited vs. Karnataka Power Transmission Corp. Limited and others, 2011 ELR (APTEL) 1651 held as under: -

“10. Let us take up the first issue regarding the validity of the PPA.

10.1 According to the learned counsel for the appellant, the PPA is not enforceable by law as the respondents no. 2 had already exceeded the permissible limit of power purchase from the renewable sources of energy as per the State Commission’s Regulations and for this reason the PPA was returned by the State Commission on 6.6.2007. The approval of the State Commission was mandatory under Section 25 (3) of the Karnataka Electricity Reform Act, 1999. The PPA became void on account of the approval not having been given by the State Commission.

.....

10.3. Let us first examine the Section 25(3)(4) of the Karnataka Reform Act referred to by the appellant. The relevant extracts are reproduced below:

“25 (3) A holder of a supply or transmission licence may, unless expressly prohibited by the terms of its licence, enter into arrangements for the purchase of electricity from,-

The holder of a supply licence which permits the holder of such licence to supply energy to other licensees for distribution by them; and

Any person or generating company with the consent of the Commission”.

“25(4) Any agreement relating to any transaction of the nature described in sub-sections (1), (2), or (3) unless made with, or subject to, such consent as aforesaid, shall be void”.

Section 185(3) of the 2003 Act specifically stipulates that the provisions of the enactments specified in the schedule, which includes the Karnataka Reform Act, not inconsistent with the provisions of the 2003 Act, shall apply to the States in which such enactments are applicable.”

10.4. According to Section 86 (b) of the 2003 Act, the State Commission is empowered to regulate electricity purchase and procurement process of the distribution licensees including the price at which electricity is

procured from the generating companies through agreement for purchase of power.

10.5. In view of above, the distribution licensee has to obtain the consent of the State Commission for procurement of power against the PPA. Unless the State Commission gives its consent to the PPA, the distribution licensee cannot procure power under the PPA. Thus, the PPA will come into effect only after obtaining the consent of the State Commission. If the consent is denied by the State Commission, the PPA shall become void as per Section 25(3) of the Karnataka Reform Act and Section 86(b) of the 2003 Act.

Accordingly, the second respondent had submitted the PPA dated 3.5.2007 signed with the appellant before the State Commission on 25.5.2007 for its consent.

(Emphasis supplied)

16. Again, this Tribunal in Appeal No. 41 of 2018 - Hinduja National Power Corporation Limited vs. Andhra Pradesh Electricity Regulatory Commission and others decided on 7th January, 2020 held as under: -

“75. If the State Commission fails in discharging its duties by deciding the matter without proper reasoning and justification, it is nothing but failure of its duty. Since proceedings before the State Commission are not in the nature of a lis as in the case of a Civil Suit, it has to take

within its fold the interest of various stakeholders concerned.
Therefore, utmost duty of the State Commission while discharging its functions must be public interest and decide the matter on merits so far as adoption of capital cost and Continuation Agreement. The functions provided under Section 86(1)(b) of the Act is not merely a formality to approve the Power Purchase Agreement.
In other words, it does not mean one of the parties to the petition can interdict the implementation of Power Purchase Agreement at its whims and fancies totally ignoring the fact that **the Commission's duty is to regulate electricity purchase and procurement process of a distribution licensee including the price at which electricity shall be procured from generating companies through agreements.**

.....

80.As stated above, so far as the procurement of power is concerned, it must be in the interest of the consumer. Between April 2017 to January 2018 as against the declared capacity, 3273.83 million units were delivered to the Respondent DISCOMs from the Appellant's project. Since it was conducive for AP DISCOMs to schedule and take delivery of electricity for maintaining the retail supply to its consumers the above number of units was taken by the DISCOMs. **To decide the matter pertaining to capital cost or approval of Continuation Agreement, one has to see whether it is in the interest of the consumers at**

large. The State Commission is the ultimate authority to decide procurement of power including the price, but unfortunately the Commission declined to decide the matter on merits. In this process what Commission ought to have done in OP No. 21 of 2015 is to determine whether the capital cost and resultant tariff would be conducive to the interest of the consumers at large, since it is incumbent to do so as a regulatory authority. Therefore it was possible to first decide O.P. No. 21 of 2015 on merits, and based on its decision it should have proceeded to consider Continuation Agreement instead of passing the impugned order

.....

99. The Respondents contend that approval of Continuation Agreement so that PPA of 1998 could get revived is based on the principle enunciated in contingent contracts. According to Respondents, the right if any to Appellant gets created only on approval of Continuation Agreement dated 28.04.2016. They contend that happening of approval is happening of some future event, therefore question of neither of parties making any offer and acceptance would arise. In a contingent contract happening of something marks the moment at which a right is created, so that the contract becomes enforceable. As against this, Appellant contends that no doubt status of agreement dated 28.04.2016 can be treated as a contingent contract. **The contract comes in to effect once approval is given by the Commission.** It is also not the case of Appellant that

approval of the state Commission is unnecessary. It is seen that agreement for the purchase of energy was duly finalised and agreed between the parties, which came in the form of a document pertaining to confirmation of terms agreed. By virtue of this agreement parties agreed to continue the amended and restated PPA dated 15.04.1998 with modifications which are clearly mentioned in the agreement. Parties also had consensus that tariff will be as determined by the State Commission in Petition No. 21 of 2015 filed by the Appellant. **The Continuation Agreement in a way becomes concluded terms and conditions subject to approval by the State Commission.** It was not an inchoate or incomplete contract as contended by AP DISCOMs.”

(Emphasis supplied)

17. In Eswari Green Energy LLP Vs. Karnataka Electricity Regulatory Commission and Ors., Appeal No. 180 of 2018 and batch decided on 13th November, 20202, it was held by this Tribunal

“42.We do not agree with the broad argument of the appellants that there is no need for separate approval of the State Commission in respect of initialed PPAs simply because the general format of the PPA had been approved by the Commission on 22.7.2015. It cannot be overlooked that the Commission regulates the purchase and procurement process of each distribution licensee by virtue of the power conferred on it under Section 86(1)(b) of the

Electricity Act, 2003. The statute saves the operation of the Karnataka Electricity Reforms Act, 1999 by virtue of Section 185(3). The provision contained in Section 17(1) of the Karnataka Electricity Reforms Act, 1999 reads as under:

.....

44.A perusal of the statutory provisions and Rules formulated thereunder shows that the distribution licensee can procure power only in the manner approved and it is required to place a proposed Power Purchase Agreement for approval of the State Commission. The Regulation also prescribes a timeframe for approval of the PPA. It also requires final version of the PPA to be provided to the State Commission

.....

47.In above context, reference may be made to following observations of the Supreme Court in Tata Power Company Limited vs Reliance Energy reported in (2009) 16 SCC 659, while construing the functions of the Regulatory Commission under Electricity Act, 2003:

.....

48.The documents produced show that all concerned have throughout been of unanimous view that the power purchase agreements which had been initialed required the approval of the State Commission. Having sought such approval though HESCOM, it is not permissible for the appellants to now contend that no approval was required. **There is no doubt that approval of the State**

Commission in respect of individual PPA is a condition precedent without which the PPA cannot come into existence though, the respondent HESCOM concedes, with post-facto approval the PPA becomes operational retrospectively from the date of the PPA.

49. The respondents are also right in submission that there is no vested right to get approval of the PPA from the Commission which is duty-bound to consider it in light of statutory provisions and within regulatory framework.”

(Emphasis supplied)

18. In view of the clear law laid down by this Tribunal and the Hon'ble Supreme Court in the above noted judgements, there is no escape from well-founded conclusion that a PPA becomes effective only upon getting approval from the State Commission and till then the parties are precluded from enforcing any rights or obligations under the same.

19. Hence, in the instant case, the effective date under the PPA has to be taken as 25.08.2015 i.e. the date on which the PPA was accorded approval by the Commission. The SCOD of the power project would, therefore, be 25.02.2017 as rightly contended by the appellant.

20. It is not in dispute that as per the request of the appellant vide letters dated 03.01.2017, 09.01.2017 and 06.03.2017 seeking extension of commissioning date of the power project in terms of Article 2.5 of the PPA, the 1st respondent BESCOM vide its communication dated 16.06.2017 extended the date of commissioning of the project till 01.07.2017 subject to the condition that tariff applicable and the Liquidated Damages to be paid by the appellant, if any, would be subject to the approval of the Commission/Govt. of Karnataka. Vide communication dated 24.08.2017, the appellant again sought further extension of the commissioning date of the power project by another 03(three) months which was acceded to by the 1st respondent BESCOM in its communication dated 30.08.2017 and accordingly, the commissioning date of the project was extended till 01.10.2017 subject to the condition that (i) tariff applicable is as per Article 5.1(ii) of PPA; (ii) Liquidated Damages as per clauses 2.2.1 and 2.5.7 of the PPA are applicable; and (iii) contract performance guarantees to be extended up to 31.12.2017.

21. It is on account of all these extensions in the SCOD of power project of the appellant granted by 1st respondent BESCOM that Issue No.(1) as noted in Paragraph No.6 hereinabove was framed by the Commission for its consideration. Relying upon its previous decision dated 07.08.2018 in OP

No.65/2017, the Commission has held that it has the exclusive jurisdiction to consider the validity of extension of time granted by the discom and accordingly ruled that the appellant has not made out any case for deferment of extension of SCOD of the power project.

22. Learned counsel for the appellant vehemently argued that the decision of the Commission in OP No.65/2017 has been reversed by this Tribunal in judgment dated 12.08.2021 in Appeal no.322/2018 titled Madamageri Solar Power Projects LLP v. HESCOM and Ors. in which it has been held that the Commission was not justified in examining the validity of the extension of SCOD granted by HESCOM under the PPA, the terms of which had been approved by the Commission itself. Paragraphs 126 and 127 of the said judgment are material and are extracted hereinbelow: -

“126. The 1st Respondent based on the various problems faced by the solar developers granted extension of COD by six months. Within the said six months’ extended period, the grid connectivity was obtained after safety approval certificate issued by CEIG. The Petition came to be filed by the Appellant only on account of direction of the Commission to approach the Commission seeking approval of extension of time. Having approved the clause in the PPA that HESCOM could extend COD by six months period, in the facts and

circumstances discussed above, we are of the opinion that the Respondent Commission was not justified in opining that extension of six months' time for COD was not on account of force majeure event as pleaded by the Appellant.

127. It is relevant to point out the conduct of the HESCOM. During the entire process of securing these approvals by the Appellant, the Solar Developer has brought to the notice of the HESCOM the obstacles faced and at no point of time, there was any note of caution or objection finding fault with the pace at which the Solar Developer was pursuing the execution of the solar plant. In fact, after accepting the reasons for the delay being force majeure event in terms of PPA, the HESCOM did extend time for commissioning of the plant by six months. Subsequently, the conduct of the HESCOM is very surprising. It started finding fault with the Appellant contesting the matter seriously questioning the reasons for delay as force majeure event. We are of the opinion that the Respondent HESCOM cannot approbate and reprobate."

(Emphasis supplied)

23. In view of the said clear ruling of the Tribunal, the Commission was precluded from examining the validity of the extension of SCOD of the

appellant's power project granted by the BESCOM from time to time. Once, the 1st respondent BESCOM acknowledged that the commissioning of the power project of the appellant has got delayed on account of *force majeure* events claimed by the appellant and extended the commissioning date of the project till 01.10.2017, the Commission was not justified in reopening the issue of such extension granted by 1st respondent and observing that the appellant has not made out any case for deferment or extension of the SCOD of the power project.

24. This settled legal position has not been countered by the learned counsel for the 1st respondent either in his oral arguments at the time of hearing of the appeal or in the written submissions filed by it.

25. What is contended on this aspect on behalf of the 1st respondent BESCOM is that the extensions of commissioning date granted to the appellant was not unconditional and it was subject to payment of Liquidated Damages and applicability of the lower tariff i.e. the generic tariff determined by the Commission for the tariff year in which the power project gets commissioned. We do not find any infirmity in these submissions made on behalf of the 1st respondent. The extension of the SCOD granted to the appellant would be governed by the conditions put forth in the communications by which the extension was accorded. We have already

noted hereinabove that the extension of SCOD was approved by the 1st respondent BESCOM subject to the condition that Liquidated Damages as per Article 2.2 and 2.5.7 of the PPA would be payable and the tariff as per the prevalent tariff order of the Commission would be payable.

26. On this aspect, we may also note that the extension of time in achieving SCOD is governed by Article 2.5 of the PPA executed between the parties. Articles 2.5.1, 2.5.2, 2.5.3, and 2.5.4 are relevant and are extracted hereinbelow: -

“2.5 Extension 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 BESCOM Event of Default; or*
- b. Force Majeure Events affecting BESCOM; or*
- c. Force Majeure Events affecting the SPD,*

2.5.2 The Scheduled Commissioning Date and the Expiry Date shall be deferred, subject to the reasons and limits prescribed in Clause 2.5.1 and Clause 2.5.3 for a reasonable period but not less than ‘day for day’ basis, to permit the SPD or BESCOM through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the SPD or

BESCOM, or till such time such Event of Default is rectified by BESCOM.

2.5.3 In case of extension occurring due to reasons specified in clause 2.5.1 (a), any of the dates specified therein can be extended, subject to the condition that the Scheduled Commissioning Date would not be extended by more than 6 (six) months.

2.5.4 In case of extension due to reasons specified in Article 2.5.1 (b) and (c), and if such Force Majeure Event continues even after a maximum period of 3(three) months, any of the Parties may choose to terminate the Agreement as per the provisions of Article 9.”

(Emphasis supplied)

27. Upon perusal of these provisions of the PPA, it is manifest that the SCOD of the power project could be extended for a maximum period of 06 (six) months in case the default is on account of reasons specified in clause 2.5.1(a) i.e. any event of default on the part of BESCOM and for maximum period of 03 (three) months in case of reasons specified in Article 2.5.1(b) and (c) i.e. *force majeure* events affecting BESCOM or the appellant. In the instant case, undisputedly, the appellant had sought extension of SCOD of its power project on account of *force majeure* events affecting the progress

of the power project and not because of any default on account of BESCO. Therefore, the extensions granted by 1st respondent BESCO were under Article 2.5.4 and the maximum period of extension could have been only 03 (three) months. However, the extension granted to the appellant's power project by BESCO is 09 (nine) months, which is patently contrary to the above noted clause of the PPA and thus, cannot be accepted. We make it clear here that we are not disputing the competence of the BESCO in granting extension of time to the appellant for commissioning of its power project but have only said that in doing so, the Commission cannot ignore the upper limits of such extension of time specified in the PPA. Any time extension beyond the limit set in the PPA would be invalid and thus, cannot be countenanced.

28. Considering the SCOD of the project to be 25.02.2017 i.e. 18 (eighteen) months reckoned from the date of approval of the PPA and the extension of 03 (three) months which could have been granted by the 1st respondent BESCO in accordance with the relevant clauses of the PPA, the SCOD of the power project stood extended till 25.05.2017. Any extension by BESCO beyond the said date, being violative of the provisions of the PPA, cannot be considered.

29. The project was commissioned by the appellant on 31.08.2017 with a delay of 03 (three) months and 06 (six) days.

30. Therefore, the prayer of the appellant to consider and approve the extension of SCOD of the power project till 01.10.2017 as approved by the 1st respondent BESCO vide Office Memorandum dated 30.08.2017 has no merit and deserved to be rejected.

31. Article 5.1 of the PPA assumes relevance in this situation, which is extracted hereinbelow: -

“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 Commercial Operation Date 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.”*

32. Perusal of the said clause of the PPA reveals that in case, the commissioning of the power project is delayed beyond the extension granted under Article 2.5 of the PPA and there has been variation in the tariff determined by the Commission during that period, the applicable tariff for such power project would be lower of (i) Rs.8.40/kWh as stated in the PPA and (ii) varied tariff applicable as on date of commercial operation of the project.

33. In the instant case, as explained hereinabove, there has been delay of three months and six days on the part of appellant to commission its power project beyond the extension granted by the BESCOM as permissible under the Article 2.5 of the PPA. The project has been commissioned on 31.08.2018 whereas the SCOD, as discussed in foregoing paragraphs, was 25.02.2017. It is to be noted that prior to the commissioning of the project by the appellant on 31.08.2017, the Commission had issued tariff order dated 12.04.2017 applicable for grid connected solar power project in which the tariff has been fixed for the project at Rs.4.36/unit. Considering these factual aspects and placing reliance upon the previous judgment of this Tribunal in Appeal no.221/2016 Savitha Oil Technologies Ltd v. KERC& Anr decided on 07.05.2018, the Commission has held the appellant entitled to lower tariff of

Rs.4.36/unit as per the generic tariff order dated 12.04.2017 prevalent on the date of commissioning of the power project.

34. On this aspect, we find it profitable to refer to the recent judgment of this Tribunal dated 04.12.2025 in Appeal no.418/2023 Smt. Sharada Doddi v. Gulbarga Electricity Supply Company Limited & Anr., the facts of which were absolutely identical to the facts of the instant case. In that case, LOA dated 16.03.2015 had been issued to the appellant for establishment of 01MW solar power project and a PPA dated 01.07.2015 had been executed between the appellant and the 1st respondent i.e. the Karnataka discom. All the clauses of the said PPA including Article 5.1 are identical to the clauses of the PPA dated 02.07.2015 executed in this case between the appellant and the 1st respondent. The SCOD of the power project of the appellant in that case was 01.01.2017, however, on account of certain events, the power project was not commissioned by the said SCOD and upon consideration of appellant's representations under Articles 2.5 and 8 of PPA, the respondent GESCOM had granted extension of 06 months for commissioning of the project. The commissioning of the project occurred within the extended period but approximately four months after the original SCOD. The Project had been commissioned on 29.04.2017 i.e. subsequent to the issuance of generic tariff order dated 12.04.2017 by the Commission. The petition filed

by the power generator for confirmation of the extension granted by the respondent discom was dismissed by the Commission vide order dated 21.02.2019 while holding it liable to pay damages and entitled to reduced tariff of Rs.4.36/unit being the tariff applicable as per the Commission's generic tariff order dated 12.04.2017 on the actual commissioning date of the project.

35. One of the grounds raised in the appeal in that case before this Tribunal was that the Commission was not justified in reducing the tariff from Rs.8.40/kWh as fixed in the PPA to Rs.4.36/kWh. This Tribunal observed that capital cost is the single most important factor affecting annual cost such as Return on Equity, Interest on Loan, Depreciation etc. and accordingly, the tariff. It was, thus, held that if the appellant had crystalized capital cost before 01.01.2017 (SCOD in that case) in anticipation of timely availability of all the permissions, the tariff of Rs.8.40/kWh needs to be protected. However, noting that the material on record does not show whether the capital cost of the project had got crystalized before the SCOD i.e. 01.01.2017, this Tribunal remanded the case to the Commission for fixation of tariff afresh on the basis of necessary documents in this regard. We quote relevant paragraphs of the said judgment hereunder: -

“93. From the above-mentioned submissions of the Appellant, it is difficult to conclude as to whether the capital cost got crystallised before SCD i.e. 01.01.2017. We therefore consider it appropriate to remand the matter to KERC to ascertain this aspect. We make it clear that the only aim of this exercise by KERC shall be to establish if capital cost got crystallised before 01.01.2017. If that turns out to be the case, the tariff shall be fixed at ₹ 8.40 per kWh, else the tariff applicable as per actual date of commissioning will be applicable. We make it clear that if in this process, actual capital cost gets discovered, it will have no bearing on tariff as this is not intended to be an exercise for tariff determination on cost plus basis in a strict sense. The KERC will be free to call for all the necessary documents and this exercise will be done uninfluenced by previous proceedings in the matter and observations, if any of this Tribunal.”

36. We see no reason to differ with the above noted observations/findings of this Tribunal in Smt. Sharada Doddi case. In case, a power generator incurs entire expenditure on the capital cost of the power project before its SCOD, an order directing payment of PPA tariff to the power generator despite delay in commissioning of the power project would be justified.

37. In the instant case, neither were any submissions made by the learned counsels on the aspect as to whether the capital cost had got crystalized before SCOD of the project of the appellant i.e. 25.02.2017 nor has anything been stated in this regard in the written submissions filed by the learned counsels. Even the material on record also does not shed any light on this fact. Therefore, we find it expedient to remit the case back to the Commission for an inquiry on this aspect and to determine the tariff payable to the appellant afresh in terms of the conclusion to be reached in the inquiry. If it turns out that the appellant had crystalized the entire capital cost before 25.02.2017, the tariff shall be fixed at Rs.8.40/kWh as stated in the PPA.

38. In so far as the claim of the appellant that the delay in commissioning of the power project was on account of the *force majeure* events, is concerned, we concur with the finding of the Commission that the appellant is precluded from claiming relief under any such *force majeure* event for the reason that no prior notice of those *force majeure* events had been served upon the 1st respondent BESCOM. On this aspect, reference can be profitably made to Article 8.3(b)(i) of the PPA which envisaged that the party claiming to be affected by any *force majeure* event shall give the other party a written notice describing the particulars of *force majeure* event as soon as practicable after the occurrence of those events. Concededly, no such notice

has been served by the appellant upon the 1st respondent BESCOM. The Hon'ble Supreme Court in a recent judgment dated 25.08.2025 passed in Civil Appeal No.6888/2018 Chamundeshwari Electricity Supply Company Limited v. Saisudhir Energy (Chitradurga) Pvt. Ltd. and Anr. has held that requirement of prior notice of *force majeure* events as envisaged under the relevant clause of the PPA is not mere directory and it is a condition precedent for invoking the *force majeure* clause. Therefore, in view of the dictum of the said judgment, since no such prior *force majeure* notice was served by the appellant upon the 1st respondent, the appellant is precluded from claiming any relief under the *force majeure* events. For the same reason, no fault can be found in the impugned order of the Commission holding the appellant liable to pay damages under Article 2.2 and 2.5.7 of the PPA.

Conclusion: -

39. In the light of the above discussion, we affirm the impugned order of the Commission in so far as it holds the appellant liable to pay damages to the 1st respondent BESCOM as provided under Articles 2.2 and 2.5.7 of the PPA. However, on the aspect of tariff payable to the appellant by the respondent BESCOM, the case is remitted to the Commission for a fresh hearing in terms of Paragraph No.37 hereinabove. The Commission shall

call for the requisite documents in this regard from the parties and conclude the inquiry within one month from the date of this judgment. In case, on the basis of the findings of the inquiry, the tariff gets fixed at Rs.8.40/kWh (as mentioned in the PPA), same shall be applicable from the date of actual commissioning of the power project and shall be payable to the appellant along with applicable carrying cost.

40. The appeal stands partly allowed in above terms. All pending IAs, if any, also stand disposed of.

Pronounced in the open court on this the 26th day of October, 2026.

(Virender Bhat)
Judicial Member

(Seema Gupta)
Officiating Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

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