

No. N/9/18

---

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION**

**No. 16 C-1, Miller Tank Bed Area, Vasanth Nagar, Bengaluru- 560 052.**

**Dated :05.11.2019**

**Present:**

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

**RP No.01/2018**

**BETWEEN:**

Venkat Energy and Power Private Limited,  
No. 40, 14 A Main, 15 A Cross,  
Sector 4, HSR Layout,  
Bengaluru – 560 102. ..  
*(Represented by Haranahalli Law Partners, Advocates)*

**PETITIONER**

**AND:**

- 1) Bangalore Electricity Supply Company Limited,  
Corporate Office, K R circle,  
Bengaluru-560 001.
- 2) Chief Electrical Inspector to Government,  
Nirman Bhavan, 2<sup>nd</sup> Floor,  
P.B. No.5148,  
Dr Rajkumar Road, Rajajinagar,  
Bengaluru–560 010.

- 3) Karnataka Power Transmission Corporation Ltd.,  
Cauvery Bhavan, K G Road,  
Bengaluru -560009. ..

**RESPONDENTS**

*[Respondents 1 and 3 represented by Just Law,  
Advocates, Respondent 2 remained absent]*

**ORDERS**

- 1) This Review Petition is filed, seeking review of the Order dated 14.11.2017 passed by this Commission in OP No.82/2017 and consequently, to grant the reliefs claimed in OP No.82/2017.
- 2) The material facts, leading to filing of the present Review Petition, are as follows:
  - (a) The Petitioner being a land holder, had entered into a Power Purchase Agreement (PPA) dated 26.06.2015 with the 1<sup>st</sup> Respondent- BESCO, for sale of Solar energy, in terms of the PPA, pursuant to the allotment made by the Karnataka Renewable Energy Development Limited (KREDL) for establishing a 3 MW capacity Solar Power Project, under the land-owning farmers category. The Project is situated at Talavatti Village, Aimangala Hobli, Hiriyr Taluk, Chitradurga District.
  - (b) As per the terms of the PPA, the Petitioner was required to achieve the Conditions Precedent within one year from the date of execution of

the PPA and commission the Solar Power Project within 18 months from the date of execution of the PPA, i.e., within 25.12.2016.

- (c) The Petitioner had approached the 2<sup>nd</sup> Respondent on 04.11.2016 for approval of the electrical drawings for the plant pursuant to which, the 2<sup>nd</sup> respondent visited the plant, and approved the drawings on 26.12.2016. The 3<sup>rd</sup> Respondent had given the provisional interconnection approval on 26.12.2016 for synchronization of the power plant to the 11/66 kV grid. Hence, although the Petitioner was ready to commission the plant on 25.12.2016, the plant could not be commissioned as it was a Sunday and a national holiday on account of Christmas.
- (d) The Petitioner approached the officials of 2<sup>nd</sup> and 3<sup>rd</sup> Respondents for the synchronization of 11 kV line to the grid but the authorities found that the breaker was faulty and thereby the interconnection to the grid was not possible even on 26.12.2016. Hence, the petitioner sought extension of time to commission the project. The 1<sup>st</sup> Respondent issued a letter dated 21.01.2017 according tentative approval for extension of the scheduled commissioning date upto 31.01.2017. Thereafter, the plant was commissioned on 21.01.2017.

- 
- (e) The Petitioner commenced generating power from the solar plant and supplied power to the 1<sup>st</sup> Respondent during the months of January, February and March, 2017 and received payments at the agreed tariff of Rs.8.40 per unit. When the Petitioner submitted the bill for the month of April, 2017, the 1<sup>st</sup> Respondent withheld the payment and issued a letter on 09.05.2017, informing the Petitioner to approach the Commission seeking approval for extension of the date of commissioning of the project with all relevant grounds and documents.
- (f) The Petitioner filed OP No.82/2017 before the Commission. This Commission, by its Order dated 14.11.2017, disallowed the request of the Petitioner for a declaration that the Project was commissioned within the due date and held that, the Petitioner was not entitled to the tariff of Rs.8.40 per unit, but was only entitled Rs.6.51 per unit, the varied tariff applicable as on the date of commissioning of the Petitioner's Plant and also directed the Petitioner to pay the Liquidated Damages, as provided under Articles 2.2 and 2.5.7 of the PPA. Against this Order, the petitioner filed Appeal No. 388/2017 before the Hon'ble Appellate Tribunal for Electricity. The Appeal was disposed of on 2.1.2018, granting liberty to file a Review Petition, as requested by the petitioner. Hence, this Review Petition is filed.

- 3) The grounds urged by the petitioner in the pleadings (Amended petition filed on 3.6.2019), as well as during the arguments, may be stated as follows:
- (a) That, as per Section 86 (1) (b) of the Electricity Act, 2003, the Commission has to approve the PPA and the PPA without approval, has no sanctity, hence, the date of approval of the PPA by the Commission (25.8.2015) has to be treated as the 'Effective date' and the period of 18 months has to be reckoned from such date; that as the project was commissioned within 18 months from the date of approval of the PPA, there is no delay, and the petitioner is entitled to the tariff of Rs. 8.40 per unit; that due to non approval of the PPA for over two months after signing the same, the petitioner was prevented from completing the key aspects of the project as no financial institution approved the finances before approval of the PPA; that the CEIG delayed the approval of drawings by 35 days and grant of safety approval by 52 days; that the interconnection approval was also delayed by KPTCL; that the plant could not be synchronised due to fault of breaker, which is a force majeure event under Article 8 (x) of the PPA and the benefit has to be given to the petitioner, as the petitioner had completed all the works and the fault of the breaker is covered under the clause '*the delay or circumstance beyond the*

*reasonable control of the party affected by such delay or failure'*, in Article 8.3 (a) of the PPA; that as the 1<sup>st</sup> Respondent had, on 21.1.2017 granted extension of time upto 31.1.2017, to commission the plant, and the plant was commissioned on 21.1.2017 within such extended time, the tariff of Rs.8.40 per unit, cannot be altered; that the generic tariff order dated 30.7.2015 is not applicable to the petitioner as the PPA was signed earlier to the control period stipulated therein; that the finding of the Commission to the effect that Article 3.3 of the PPA providing for an event of emergency, applies to post commissioning events is improper, as Article 1.1 (xiv) does not mention any such restrictions; that the Commission failed to consider the principle in *Mohd. Ayub vs State of UP & others, reported in (2009) 17 SCC 70* that when time prescribed to perform an act ends on a holiday and it is performed on the next working day, it is treated as done within time.

- (b) Therefore, the Petitioner has prayed for allowing the Review Petition.
- 4) Upon Notice, the 1<sup>st</sup> Respondent (BESCOM) appeared through its counsel and filed its Preliminary Objections stating that the RP was not filed in time and hence, not maintainable; that the Petitioner has failed to make out any grounds for review of the Order and that the Petitioner is attempting to re-agitate the case and the same is impermissible in

law. The 1<sup>st</sup> Respondent has filed Objections to the main petition and to the I A for amendment, contending that the Petitioner was granted extension of time on 21.1.2017, however, the same was subject to the decision of the Commission and the petitioner was also informed that the tentative tariff of Rs.6.51 per unit would be paid; that there is no scope for review of the order as all the aspects urged by the petitioner were considered by the Commission in the order dated 14.11.2017; that the petitioner had not pleaded in the Original petition about the delay in approval of the PPA and the same cannot be urged in the Review proceedings, as it does not qualify as '*discovery of new material which after exercise of due diligence was not in the knowledge of the petitioner or could not be produced at the time of the original order*'; that the judgments of Hon'ble ATE relied by the petitioner are not applicable to the case, as they only provide that a distribution licensee cannot procure power without approval of the PPA by the Commission. Therefore, the 1<sup>st</sup> Respondent (BESCOM) has prayed for dismissal of the Review Petition.

- 5) We have heard the learned Counsel for the parties.
- 6) The following Points would arise for our consideration:

- (1) Whether the Order dated 14.11.2017 holding that the Petitioner has failed to make out a case for extension of time, suffers from an error apparent on the face of the record?
  - (2) Whether the petitioner has made out a case for production of additional evidence or for pleading additional grounds in the Review Proceedings?
  - (3) What Order?
- 7) After considering the rival contention and the material on record, our findings on the above Points are as follows:
- 8) **POINT No.(1):** Whether the Order dated 14.11.2017 holding that the Petitioner has failed to make out a case for extension of time, suffers from an error apparent on the face of the record?
- (a) It is contended by the Petitioner that, the impugned Order has been passed without properly examining the material on record and the findings arrived at, suffer from errors apparent on the face of record. The Respondent has contended that the ingredients of Review are not satisfied and the petition deserves to be dismissed.
  - (b) A perusal of the order dated 14.11.2017 reveals that this Commission, has considered all the grounds urged by the Petitioner, to claim extension of time for commissioning the Project. The Commission has

fixed the tariff of Rs.6.51 per unit, prevalent as on the date of commissioning of the project, as per the Article 5.1 (ii) of the PPA, after considering all the grounds urged by the petitioner. The Petitioner has now contended that the conclusions, arrived at, are not proper and the Commission has committed errors, in arriving at the findings against the Petitioner.

- (c) The grounds urged by the petitioner in the Review Petition namely, the time taken by CEIG in approving the drawings and granting safety approval, interconnection approval, fault of breaker, etc., have been considered in the Order dated 14.11.2017 and there is no basis for review.
- (d) The contention of the Petitioner that, the findings arrived at by this Commission, are erroneous, cannot be a ground for review of the impugned Order. The scope of review of an order is limited to the stipulations in Order 47 Rule 1 CPC. The Hon'ble Supreme Court has, in the case of *Kamlesh Verma –Vs- Mayavati* (**AIR 2013 SC 3301**), held 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 v. Neki*, AIR 1922 SC 112 and approved by this Court in *Moran Mar Basselios Catholicos v. Most Rev. Mar Poulouse Athanasius & Ors.*, (1955) 1 SCR 520 : (AIR 1954 SC 526), to mean 'a reason sufficient on grounds at least analogous to those specified in the rule'. The same principles have been reiterated in *Union of India v. Sandur Manganese & Iron Ores Ltd. & Ors.*, JT 2013 (8) SC 275 ; (2013) AIR SCW 2905).

(B) When the review will not be maintainable :-

- (i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.
- (ii) Minor mistakes of inconsequential import.
- (iii) Review proceedings cannot be equated with the original hearing of the case.

- 
- (iv) *Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.*
  - (v) *A review is by no means an appeal in disguise whereby an erroneous decision is re-heard and corrected but lies only for patent error.*
  - (vi) *The mere possibility of two views on the subject cannot be a ground for review.*
  - (vii) *The error apparent on the face of the record should not be an error which has to be fished out and searched.*
  - (viii) *The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.*
  - (ix) *Review is not maintainable when the same relief sought at the time of arguing the main matter had been negated."*
- (e) We feel that the Review Petition is not maintainable on any of the parameters mentioned in the above decision. The Petitioner cannot, in a review proceedings urge to re-appreciate the evidence or pray the Commission to come to a different finding.
- (f) For the above reasons, we answer Point No.(1), in the negative.

9) **POINT No.(2):** Whether the petitioner has made out a case for production of additional evidence or for pleading additional grounds in the Review Proceedings?

(a) In the IA for amendment and the Amended petition filed on 3.6.2019, the petitioner has prayed to consider three additional grounds, viz., i) the delay in approval of the PPA by the Commission has to be treated as a ground for extension of time to commission the project; ii) as per Section 86 (1) (b) of the Electricity Act, 2003, the PPA becomes effective only after approval by the Commission; iii) the finding of the Commission that the generic tariff order dated 30.7.2015 is applicable to the petitioner's project, requires reconsideration. The Respondent has contended that grounds not urged in the Original Petition cannot be added in the Review Proceedings, as the same would be beyond the stipulations in Order 47 Rule 1 CPC.

(b) In order to give a finality to the litigation, we deem it appropriate to consider the additional grounds urged by the petitioner, in these proceedings.

(c) The petitioner's case is that the time taken by the Commission for approval of the PPA, has to be considered as a ground to grant extension of scheduled commissioning date, as this event hindered/delayed the

progress of the project. The petitioner has mentioned in para 5 (a) of the Amended petition that, ' On account of non approval of PPA for over two months after the date of signing of the PPA, the petitioner was constrained from completing key aspects of the project', and in para 5 (b) that, 'no financial institution came forward to approve the finances of the project before 25.8.2015, which had a negative effect on the project in the initial days'. Except for these statements, no evidence is produced by the petitioner to establish that the execution of the project was delayed, or the progress of the project was hindered by this event. Thus, the allegation of the petitioner is not substantiated. We have held in several cases that preliminary works can be undertaken by the project developer with the signed PPA on hand. Further, the terms of the PPA provide for granting extension of time to commission the project on happening of certain force majeure events. The 2 months' time taken by the Commission for approval of the PPA, does not constitute a force majeure event, as per the terms of the PPA. It is settled law that force majeure events have to be strictly interpreted in terms of the PPA. Therefore, the contention of the petitioner that the project was delayed on account of this event cannot be accepted.

(d) The next contention of the petitioner is that the PPA is not effective till it is approved by the Commission, as per decisions of the Hon'ble ATE mentioned in para 5 (c) of the Amended petition. We note that the decisions of Hon'ble ATE relied by the petitioner relate to the requirement of approval of the PPAs under section 86 (1) (b) of the Electricity Act, 2003 for procurement of power by the ESCOMs, i.e any power procurement by the ESCOMs requires approval of the Commission. These decisions do not apply to the facts of this case. In this case, the KREDL had invited bids only for selection of land owning farmers in order to allot solar projects of 1-3 MW capacity, in pursuance of the Solar Policy of the State. The tariff was not discovered through bidding, under section 63 of the Electricity Act, 2003. The draft of the standard format of the PPA for such projects was sent by KREDL to the Commission for approval. After 'public consultation process' the standard format of the PPA sent by KREDL was approved with certain modifications, vide order dated 16.6.2015, and the same was hosted on the Commission's web site. Thus, the terms of the PPA were known to the parties before entering into the PPA. The definition of 'Effective date' in the standard format of the PPA approved in the order dated 16.6.2015 cannot be changed now, when the said order has remained unchallenged and the parties have executed the PPA in terms of the standard format. It is held by the Hon'ble Supreme Court of India

in *Bihar State Electricity Board, Patna & others vs M/s Green Rubber Industries & others* reported in **(1990) 1 SCC 731**, that the terms of a contract are binding on the parties and a person who signs a contract is bound by the terms even though he has not read them and is ignorant of the precise legal effect. Hence, the contention of the petitioner that the 'Effective date' should be the date of approval of the PPA by the Commission, is rejected.

- (e) With regard to the applicability of the generic tariff order dated 30.7.2015 to the petitioner's project, the Commission has given reasons in the Order dated 14.11.2017. It is pertinent to note that the Hon'ble Supreme Court of India, in the judgment dated 25.7.2019 in Civil Appeal Nos. 9218-19/2018 (*Madhya Pradesh Power Management Co. Ltd & another vs M/s Dhar Wind Power Projects Pvt Ltd & others*), has held that a project is stated to be commissioned on a date, if, on that date injection of power into the grid takes place and, the tariff applicable on such date will apply to the project. In this case, the PPA provides for reduction of agreed tariff, if the project is not commissioned within the time stipulated. As mentioned earlier, the standard format of the PPA containing the clause, was available to the parties before executing the same. In the order dated 14.11.2017, the Commission had held that the petitioner had not made out a case for extension of the scheduled commissioning date

and fixed the tariff for the project at Rs.6.51 per unit, which was the tariff applicable on the date of the commissioning of the project. Hence, the same does not require any reconsideration.

(f) Therefore, we answer Point No.(2), accordingly.

10) **POINT No.(3)**: *What Order?*

For the foregoing reasons, we pass the following:

**ORDER**

The Review Petition stands dismissed.

Sd/-  
(SHAMBHU DAYAL MEENA)  
CHAIRMAN

Sd/-  
(H.M. MANJUNATHA)  
MEMBER

Sd/-  
(M.D. RAVI)  
MEMBER