Banglore Electricity Supply Company ... vs Hirehalli Solar Power Project L.L.P on 27 August, 2024

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Bench: Pankaj Mithal, Pamidighantam Sri Narasimha

2024 INSC 631

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 7595 of 2021

BANGALORE ELECTRICITY SUPPLY
COMPANY LIMITED

VERSUS

HIREHALLI SOLAR POWER PROJECT LLP
& OTHERS

WITH

CIVIL APPEAL NO. 7608 OF 2021

WITH

CIVIL APPEAL NO. 6386 OF 2021

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JUDGMENT

PAMIDIGHANTAM SRI NARASIMHA, J.

1. The short issue arising from these appeals is whether the extension of the Scheduled Commissioning Date1 was occasioned under the force majeure clause of the Power Purchase Agreement2, and consequently, whether the reduction in tariff payable to the respondents is justified. While upholding the decision of the Appellate Tribunal for Electricity 3 we have examined the scope and ambit of our appellate jurisdiction under Section 125 of the Electricity Act, 2003 4. We have held that the restrictive scope of appellate jurisdiction is a product not only of the statutory preconditions, but also a necessary measure to enable freedom to statutory regulator and Tribunal to develop sectorial laws through a principled and consistent approach.

2. Facts: Since the facts and the PPAs are similar in all three appeals, we will deal with the facts in the lead Civil Appeal No. 7595/2021, where the most relevant facts are as follows:

2.1 State of Karnataka introduced a policy dated 26.08.2014 to identify and promote solar energy projects by land-owning farmers.

Hereinafter “SCD”.

Hereinafter “PPA”.

Hereinafter “APTEL”.

Hereinafter “the Act”.

These solar power plants of 1-3 MW capacity would generate and sell power to the State Electricity (Distribution) Supply Companies5 at the tariff determined by the Karnataka Electricity Regulatory Commission6.

2.2 Respondent no. 2 is one of the many farmers who applied under the policy and is recognised as a solar power developer 7 under the policy. Respondent No.1 is a special purpose vehicle to undertake the solar power project in Chitradurga district in Karnataka.

2.3 Pursuant to a Letter of Award dated 28.08.2015, the appellant entered into a PPA with respondent no. 2 on 29.08.2015. This PPA was approved by the KERC on 07.09.2015. The relevant clauses of the PPA will be discussed later, but an important aspect to note at this juncture is that the SPV must achieve commercial operation within 18 months from the effective date as per Article 1.1(xxviii) read with Article 4.1(c) of the PPA. Effective date is defined under Article 1.1(xii) as the date of signing the PPA. Hence, the SCD for the project was 28.02.2017 as per these clauses.

Hereinafter “DISCOMs”.

Hereinafter “KERC”.

Hereinafter “SPD”.

2.4 The SPV (respondent no. 1) was incorporated on 05.02.2016. The respondents then submitted an application for land conversion on 16.02.2016. On 10.03.2016, they paid the evacuation approval processing fee. On 27.12.2016, they paid the land conversion processing fee, and the approval for conversion was granted on 07.01.2017. The evacuation scheme was provisionally approved on 13.05.2016, and the final approval was on 22.08.2016.

2.5 Several farmers, including the respondent, raised concerns regarding delay in the execution of the project on account of delay in getting land use conversion, delay in getting evacuation approvals, demonetisation, and other reasons. Hence, the Government of Karnataka by a letter dated 24.11.2016 directed all DISCOMs to set up 3-member committees to examine each request for extension.

2.6 The present respondents requested a 6-month extension under Article 2.5 of the PPA on 03.12.2016. This was approved by the appellant through a letter dated 02.03.2017. 2.7 However, by a letter dated 05.04.2017, KERC directed the DISCOMs that all requests for extensions must be filed before it. Pursuant to this letter, the respondents filed a petition before the KERC seeking extension of time for the commercial operation of the project and invoked the force majeure clause in the PPA (Article 8.3).

2.8 During the pendency of the petition, the respondents’ solar power project was commissioned on 24.08.2017, within the extended period of 24 months.

3. KERC’s order: In its order dated 18.09.2018, the KERC rejected the various causes of delay put forth by the respondents and held that the force majeure clause must be strictly interpreted. First, delay in approval of the PPA by KERC was held to have no bearing on the initial obligations of the SPD in applying for approvals, loans, etc as the respondents had not proved the same. Second, it found that the respondent had applied for conversion of land only on 18.02.2016, over five months after signing the PPA and paid the charges only on 27.12.2016, after which it was allowed on 07.01.2017. Hence, the delay in conversion of land use was attributed to the respondent. Third, the delay in disbursement of loan also did not delay the implementation as the respondent had commenced implementation from its own funds. Fourth, the respondent applied for the evacuation approval only on 25.02.2016, and the regular approval was finally granted on 22.08.2016. Hence, the respondent delayed the application and cannot attribute the same to the authorities. Similarly, the KERC also rejected delay on other grounds such as time taken for delivery of the breaker, and inspection of the project and grant of safety approval.

3.1 It also found that the respondents had not submitted a notice as contemplated under Article 8.3(b)(i) and hence, they are not entitled to invoke force majeure and claim an extension of time

under Article 2.5. Since the KERC found that the delay in securing approvals and the consequent delay in commissioning was attributable to the respondents, it imposed liquidated damages under Articles 2.2 and 2.5.7 of the PPA.

3.2 Lastly, the KERC reduced the tariff payable to the respondent to Rs. 4.36 per unit for the term of the PPA by relying on Article 5.1 of the PPA.

4. APTEL's impugned order: The respondent's appeal against the order of the KERC was allowed by the APTEL by the order impugned before us. The APTEL dealt with each ground of delay raised by the respondents. First, it took note that the respondent's application for land conversion was on 16.02.2016, after which it had to procure several documents, including a PTCL certificate, as provided under Rule 106A of the Karnataka Land Revenue Act. Further, these documents must be secured from various government departments, which is a laborious process. The PTCL certificate was issued by the government only on 04.10.2016, although the respondent had applied for it even before signing the PPA. Hence, it found that the respondent could not be blamed for the delay in getting approval for land use conversion. 4.1 Further, the APTEL also took note of the State Government's opinion to grant deemed conversion in such projects due to the number of SPDs facing similar issues. However, the APTEL observed, the guidelines to revenue authorities were unclear and hence the SPDs could not benefit from the same. The delay in the issuance of these guidelines and the confusion among authorities regarding deemed conversion had also resulted in a delay in obtaining land use conversion, which the respondents cannot be faulted for.

4.2 Second, the APTEL found that although the application for grid connectivity and evacuation approval were submitted on 25.02.2016, the final approval was only given on 22.08.2016, after a lapse of 5 months. Until this approval is given, the authorities will not prepare the bay SLD and layout drawings with estimation of bay erection. The bay intimation notice was received by the respondents only a few days before the original SCD, and it was 170 days after the grant of final evacuation approval. Hence, there was a delay in the construction of the bay that was not caused by the respondents.

4.3 Relying on other decisions by the APTEL, it held that the date of signing the PPA will not be the effective date, as provided in Article 1.1(xxviii). Rather, the PPA becomes effective only when it is approved by the KERC, which in this case was on 07.09.2015. Hence, 18 months must be calculated from this date. 4.4 The APTEL observed that the appellant had itself approved the extension of time by 6 months after a Technical Committee constituted by it had scrutinised all relevant documents. Hence, the appellant could not take the stance that the respondents were not diligent. Even before the KERC, the appellant had not objected to the grounds raised by the respondents, and hence they could not take a contrary stance at this stage.

4.5 Considering the delay in obtaining the PTCL certificate and approval for land conversion, the approval for evacuation, and construction of the bay, the APTEL found that the respondents had taken all necessary care and caution and acted with due diligence. Hence, it held that the respondents could not be blamed for the delay as the time taken by government authorities to provide approvals was not within their control and they had taken all the measures that they could.

Consequently, the APTEL found that the respondents are entitled to the benefit of the force majeure clause and an extension of time, as was already approved by the appellant. The respondents were able to commission the project on 24.08.2017, which falls within the extended period of 24 months from 07.09.2015.

4.6 With regard to the reduction in tariff by the KERC, APTEL considered that the government scheme, under which these PPAs were signed, was intended to create opportunity and benefit for farmers by establishing solar power plants. The farmers had invested huge amounts, sometimes through loans, in these projects and a reduction in tariff from Rs. 8.40 to Rs. 4.36 per unit would adversely affect them. Hence, it directed the appellant to pay the difference in per unit tariff along with the late payment surcharge as provided under Article 6.4 of the PPA. 4.7 Lastly, it also set aside the imposition of liquidated damages under the PPA as it found that there was no delay in securing approvals and commissioning the project.

5. Submissions: We have heard Mr. K.M. Nataraj, ASG and Mr. Yasobant Das, senior advocate appearing for the appellants, and Mr. Basava Prabhu Patil, senior advocate for the respondents. The learned counsels have, through the course of their submissions, emphasised on whether or not the delay in the present matter would be covered under the force majeure clause of the PPA. 5.1 Learned ASG argued that a force majeure clause must be strictly interpreted. There must be a specific pleading by the party claiming force majeure and the burden is on him to prove the same. In this regard, he made two primary submissions: first, there was no force majeure event that warrants an extension of time under Article 2.5 of the PPA; and second, the respondents have not complied with the requirement of submitting a written notice invoking force majeure as required under Article 8.3(b)(i). Further, he has also argued that the APTEL was not justified in granting late payment surcharge to the respondent as the same was not pleaded before the KERC or in appeal.

5.2 In regard the argument on force majeure, Mr. Nataraj has taken us through the various dates concerning approval for change in land use and the evacuation approval. He has submitted that the delay in securing these approvals is attributable to the respondents, who were required to obtain these permissions within the contractually stipulated period of 365 days under Article 2.1 of the PPA, and to finally commission the project within a period of 18 months. Despite being aware of these timelines, he submits that the respondents delayed the applications and payment of requisite fees. The government departments provided the approvals within a few days from the time when the respondents fulfilled all requirements. He therefore submits that the delay is attributable to the respondents and hence, as per Article 8.3(b)(iv), they cannot claim benefit of force majeure. Consequently, the tariff must be reduced as per Article 5.1 as a higher tariff increases the burden on consumers and hence, affects public interest.

5.3 Mr. Das supplemented these submissions by arguing that in Civil Appeal No. 6386 of 2021, the respondents therein had also raised the ground of demonetisation as a reason for delay in commissioning. He submits that Article 8.3 of the PPA does not cover such a ground as a force majeure event.

6. Mr. Patil, appearing for the respondents, has submitted that there are three primary factors, among several others, that caused the delay – (i) time taken for converting the land; (ii) time taken for the KERC to approve the PPA; and (iii) time taken for the evacuation approval. He submits that these concerns have been raised by not only the respondents in the present case but in several other cases. Due to the extent to which SPDs were facing these issues, the government directed DISCOMs to set up committees to look into the same and consider the facts of each case individually. It is pursuant to this direction that the respondents' case was considered by the appellant, who granted a 6-month extension on 02.03.2017 by exercising its power under Article 2.5 read with Article 8.3 of the PPA. He submits that it was incorrect for the KERC to then require the respondents to file a separate petition to seek extension as the same is not as per the terms of the PPA. He further submits that the KERC had perversely appreciated the evidence regarding delay and that it should not have rejected the petition when the appellant had already granted the extension. Further, he submitted that the respondents were able to complete the project within the extended time period. 6.1 Mr. Patil also took us through several orders of this Court8 that dismiss appeals arising out of similar orders by the APTEL. He has specifically referred to the APTEL's decision in In Civil Appeal No. 3958/2020; Civil Appeal No. 897/2022; Civil Appeal No. 5134/2021; Civil Appeal Diary Nos. 32980/2022, 33053/2022 and 33572/2022.

Chennamangathihalli Solar Power Project LLP v. BESCOM 9 and has submitted that this decision has been relied on by the APTEL in several subsequent decisions arising out of similar facts, including the present impugned order. This Court has dismissed the appeal arising out of Chennamangathihalli (supra)10 and appeals from other APTEL orders relying on it. Mr. Nataraj, in his written submissions, has sought to differentiate these cases from the present matter on facts.

7. Scope of Supreme Court's appellate jurisdiction under Section 125 of the Act: Before we deal with the submissions of the learned counsels, we must take note of the scope of our appellate jurisdiction under Section 125, which reads:

> "Section 125. (Appeal to Supreme Court):
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> Any person aggrieved by any decision or order of the Appellate Tribunal, may, file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal, to him, on any one or more of the grounds specified in section 100 of the Code of Civil Procedure,1908…" 7.1 Section 100 of the CPC restricts the High Court's jurisdiction in second appeals to cases that involve 'substantial questions of law'. There are two components to this requirement –
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> (i) there must be a 'question of law'; and (ii) such question of law must be 'substantial'.

2020 SCC OnLine APTEL 75.

In Civil Appeal No. 3958/2020.

7.2 In SEBI v. Mega Corporation Limited 11, this Court analysed the meaning of 'question of law' to determine the scope of its appellate jurisdiction under Section 15Z of the SEBI Act, 1992 12. It held that this phrase is open textured and must be interpreted by looking at the words in their context13. The relevant portions are extracted:

> "17. The jurisdiction of the Supreme Court under Section 15Z to consider any question of law arising from the orders of the Tribunal should therefore be seen in the 'context' of the powers and jurisdiction of the Tribunal under Sections 15K, 15L, 15M, 15T, 15U and 15Y of the Act. It is in the functioning of the Tribunal to re-examine all questions of fact at the appellate stage while exercising jurisdiction under Section 15T of the Act. In Clariant and National Securities Depository, this Court had an occasion to examine the jurisdiction of the Tribunal and explain that the Tribunal has wide powers. Being a permanent body, apart from acting as an appellate Tribunal on fact, the Tribunal routinely interprets the Act, Rules and Regulations made thereunder and evolves a legal regime, systematically developed over a period of time. The advantage and benefit of this process is consistency and structural evolution of the sectorial laws.
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> 18. It is in the above-referred context that the Supreme Court while exercising appellate jurisdiction under Section 15Z of the Act would be measured in its approach while entertaining any appeal from the decision of the Tribunal. This freedom to evolve and interpret laws must belong to the Tribunals to subserve the regulatory regime for clarity and consistency and it is with this perspective that the Supreme Court will consider appeals against judgment of the Tribunals on questions of law arising from its orders.
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> 19. It is in this very context that the UK Supreme Court in the case of Jones v. First Tier Tribunal, formulated certain principles for appellate courts to interfere against the orders of Tribunals on the ground of existence of questions of law. The Court held as under:
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> "16 ... It is primarily for the tribunals, not the appellate courts, to develop a consistent approach to these issues [of 2022 SCC OnLine SC 361.
>
> Section 15Z of the SEBI Act, 1992 reads:
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> "15Z. Appeal to Supreme Court.-- Any person aggrieved by any decision or order of the Securities Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Securities Appellate Tribunal to him on any question of law arising out of such order..." (emphasis supplied) ibid, para 16.
>
> law and fact], bearing in mind that they are peculiarly well fitted to determine them. A pragmatic approach should be taken to the dividing line between law and fact, so

> that the expertise of tribunals at the first tier and that of the Upper Tribunal can be used to best effect. An appeal court should not venture too readily into this area by classifying issues as issues of law which are really best left for determination by the specialist appellate tribunals."
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> 20. The scope of appeal under Section 15Z may be formulated as under:
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> 20.1 The Supreme Court will exercise jurisdiction only when there is a question of law arising for consideration from the decision of the Tribunal. A question of law may arise when there is an erroneous construction of the legal provisions of the statute or the general principles of law. In such cases, the Supreme Court in exercise of its jurisdiction of Section 15Z may substitute its decision on any question of law that it considers appropriate.
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> 20.2 However, not every interpretation of the law would amount to a question of law warranting exercise of jurisdiction under Section 15Z.

The Tribunal while exercising jurisdiction under Section 15T, apart from acting as an appellate authority on fact, also interprets the Act, Rules and Regulations made thereunder and systematically evolves a legal regime. These very principles are applied consistently for structural evolution of the sectorial laws. This freedom to evolve and interpret laws must belong to the Tribunal to subserve the Regulatory regime for clarity and consistency. These are policy and functional considerations which the Supreme Court will keep in mind while exercising its jurisdiction under Section 15Z." 7.3 The above understanding of 'question of law' as a precondition to this Court's exercise of appellate jurisdiction under regulatory statutes is extremely pertinent to the present matter. The Act envisages the establishment of State Electricity Regulatory Commissions and the Central Electricity Regulatory Commission as expert and specialised bodies that discharge advisory, regulatory, and adjudicatory functions.14 It has established the The functions of the Central Commission are enlisted in Section 79 of the Act. Similarly, Section 86 provides the functions of the State Commissions.

APTEL as an appellate body to hear appeals against orders of the adjudicating officers or the Appropriate Commission. 15 Hence, while delineating the contours of this Court's interference in appeal under Section 125, we must be mindful and measured so as to enable a systematic and coherent development of electricity law by the Commissions and the APTEL.

7.4 Having examined the scope of this Court's exercise of appellate jurisdiction when there is a 'question of law' under Section 15Z of the SEBI Act, the position that emerges in this case, it is a little more restrictive as the requirement under Section 125 is not merely a 'question of a law' but a 'substantial question of law'.16

8. Analysis on merits: The above discussion provides the context in which we decide the present appeals. We take note of several orders of this Court that have dismissed appeals arising out of similar orders and similar facts 17. We find it necessary to state our reasons for dismissing the

present appeals, to finally settle this issue. We will therefore analyse the submissions of the learned Section 110 establishes the APTEL. Section 111 provides the scope of appellate jurisdiction of the APTEL and Section 120 sets out the procedure to be followed by the APTEL and the powers of the APTEL. The requirement of 'substantial question of law' for this Court to exercise appellate jurisdiction under Section 125 has also been recognised in BSES Rajdhani Power Limited v. Delhi Electricity Regulatory Commission, (2023) 4 SCC 788.

In Civil Appeal No. 3958/2020; Civil Appeal No. 897/2022; Civil Appeal No. 5134/2021; Civil Appeal Diary Nos. 32980/2022, 33053/2022 and 33572/2022.

counsels in light of the scope of our jurisdiction and the reasoning and findings of the impugned order.

8.1 At the outset, it is necessary to state that the learned ASG and learned senior counsel for the appellant have not proposed a substantial question of law for this Court to consider. Rather, they have argued on facts as to whether or not the delay is attributable to the respondents, and consequently whether force majeure is applicable. We will analyse the impugned order, as well as the KERC's order, to determine whether there is any substantial question of law that calls for our interference.

9. Clauses of the Power Purchase Agreement (PPA): Before discussing the orders of the KERC and the APTEL, it is necessary to identify the relevant clauses of the PPA. Article 2.1 of the PPA imposes the obligation on the SPD to secure necessary approvals, clearances, and permits within 365 days. Liquidated damages can be imposed on the SPD under Article 2.2 in case of delay, provided that the delay is not attributable to the appellant or due to a force majeure event.

9.1 Article 2.5.1 permits the extension of the SCD in case the SPD is unable to fulfil its contractual obligations due to the appellant's default or there are force majeure events that affect either the appellant or the SPD. The list of force majeure events is set out in Article 8.3(a), and sub-clause (vi) is the most relevant for us. A party can invoke the force majeure clause subject to the conditions set out in Article 8.3(b).

9.2 Article 2.5.7 provides that subject to the other provisions of the PPA, the SPD is liable to pay liquidated damages if it is unable to supply power to the appellant by the SCD. Therefore, the payment of damages under this clause is subject to an extension of time under Article 2.5.1. Article 5.1 provides for the tariff rate payable to the SPD as Rs. 8.40 per unit. However, in cases of delay, subject to extension of time under Article 2.5, it provides that the lower of Rs. 8.40 per unit and the varied tariff applicable as on the date of commercial operation will apply. A plain reading of Article 5.1 makes it clear that the lower tariff will not apply if there is an extension of time under Article 2.5.

9.3 The relevant clauses of the PPA are reproduced for ready reference:

> "Article 2.1: Conditions Precedent The obligations of BESCOM and the SPD under this Agreement are conditional upon the occurrence of the following in full within

365 days from the effective date.

2.1.1

(i)The SPD shall obtain all permits, clearances and approvals (whether Statutory or otherwise) as required to execute and operate the Protect hereinafter referred to as "Approvals"):

(ii) The Conditions Precedent required to be satisfied by the SPD shall be deemed to have been fulfilled when the SPD shall submit:

a. The DPR to BESCOM and achieve financial closure and provide a certificate to BESCOM from the lead banker to this effect;

b. All Consents, Clearances and Permits required for supply of power to BESCOM as per the terms of this Agreement; and c. Power evacuation approval from Karnataka Power Transmission Company Limited or BESCOM, as the case maybe.

2.1.2 SPD shall make all reasonable endeavors to satisfy the Conditions Precedent within the time stipulated and BESCOM shall provide to the SPD all the reasonable cooperation as may be required to the SPD for satisfying the Conditions Precedent. 2.1.3 The SPD shall notify BESCOM in writing at least once a month on the progress made in satisfying the Conditions Precedent. The date, on which the SPD fulfills any of the Conditions Precedent pursuant to Clause 2.1.1, it shall promptly notify BESCOM of the same." "Article 2.2: Damages for delay by the SPD:

"2.2.1 In the event that the SPD does not fulfill any or all of the Conditions Precedent set forth in Clause 2.1 within the period of 365 days and the delay has not occurred for any reasons attributable to BESCOM or due to Force Majeure, the SPD shall pay to BESCOM damages in an amount calculated at the rate of 0.2% (zero point two per cent) of the Performance Security for each day's delay until the fulfillment of such Conditions Precedent, subject to a maximum period of 60 (Sixty) days. On expiry of the said 60 (Sixty) days, BESCOM at its discretion may terminate this Agreement." Article 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.

... 2.5.6. As a result of such extension, the Scheduled Commissioning Date and the Expiry Date newly determined date shall be deemed to be the Scheduled Commissioning Date and the Expiry Date for the purposes of this Agreement.

2.5.7. Liquidated damages for delay in commencement of supply of power to BESCOMs.

Subject to the other provisions of this agreement, if the SPD is unable to commence supply of power to BESCOM by the scheduled commissioning date, the SPD shall pay to BESCOM, liquidated damages for the delay in such commencement of supply of power as follows:

(a) For the delay up to one month-amount equivalent to 20% of the performance security.

(b) For the delay of more than one month up to three months-amount equivalent to 40% of the performance security.

(c) For the delay of more than three months up to six months-amount equivalent to 100% of the performance security.

For avoidance of doubt, in the event of failure to pay the above mentioned damages by the SPD, the BESCOM entitled to encash the performance Security." Article 5: Rates and Charges:

"5.1 Tariff payable: The SPD shall be entitled to receive the Tariff of Rs. 8.40 per kwh based on the KERC tariff order S/03/1 dated

10.10.2013 in respect of SPD's Solar PV projects in terms of this agreement for the period between COD and the Expiry Date. However, subject to Clause 2.5, if there is a delay in commissioning of the Project beyond the Scheduled Commissioning Date and during such period such period there is a variation in the KERC Tariff, then the applicable Tariff for the projects shall be the lower of the following:

(i) Rs.8.40 per kwh

(ii) varied tariff applicable as on the date of Commercial Operation..." Article 8: Force Majeure "8.3 Force Majeure Events:

a) Neither Party shall be responsible or liable for or deemed in breach hereof because of any delay or failure in the performance of its obligations hereunder (except for obligations to pay money due prior to occurrence of Force Majeure events under this

Agreement) or failure to meet milestone dates due to any event or circumstance (a "Force Majeure Event") beyond the reasonable control of the Party affected by such delay or failure, including the occurrence of any of the following:

i. Acts of God;

ii. Typhoons, floods, lightning, cyclone, hurricane, drought, famine, epidemic, plague or other natural calamities; iii. Strikes, work stoppages, work slowdowns or other labor dispute which affects a Party's ability to perform under this Agreement;

iv. Acts of war (whether declared or undeclared), invasion or civil unrest;

v. Any requirement, action or omission to act pursuant to any judgment or order of any court or judicial authority in India (provided such requirement, action or omission to act is not due to the breach by the SPD or BESCOM, of any Law or any of their respective obligations under this Agreement);

vi. Inability despite complying with all legal requirements to obtain, renew or maintain required licenses or Legal Approvals; vii. Fire, Earthquakes, explosions, accidents, landslides; viii. Expropriation and/or compulsory acquisition of the Project in whole or in part;

ix. Chemical or radioactive contamination or ionizing radiation; or x. Damage to or breakdown of transmission facilities of either Party;

b) The availability of the above item (a) to excuse a Party's obligations under this Agreement due to a Force Majeure Event shall be subject to the following limitations and restrictions:

(i) The non-performing Party gives the other Party written notice describing the particulars of the Force Majeure Event as soon as practicable after its occurrence;

(ii) The suspension of performance is of no greater scope and of no longer duration than is required by the Force Majeure Event.

(iii) The non-performing Party is able to resume performance of its obligations under this Agreement, it shall give the other Party written notice to that effect;

(iv) The Force Majeure Event was not caused by the non performing Party's negligent or intentional acts, errors or omissions, or by its negligence/failure to comply with any material Law, or by any material breach or default under this Agreement;

(v) In no event shall a Force Majeure Event excuse the obligations of a Party that are required to be completely performed prior to the occurrence of a Force Majeure

> Event."
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> 10. Re: Applicability of the force majeure clause: The primary issue for our consideration is whether the delay in this case is due to a force majeure event as defined under Article 8.3, and consequently whether the respondents were entitled to an extension of time under Article 2.5. If the answer to these questions is affirmative, the tariff cannot be lowered under Article 5.1 and liquidated damages cannot be imposed under Articles 2.2 and 2.5.7.

10.1 The law on force majeure, specifically in the context of PPAs, has been comprehensively dealt with by this Court in Energy Watchdog v. Central Electricity Regulatory Commission 18. The Court delved into contractual jurisprudence on force majeure clauses and frustration of contracts. It held that Sections 32 and 56 of the Indian Contract Act, 1872 19 govern the law on force majeure. When the contract contains an express or implied force majeure clause, it is governed under Chapter III of the Contract Act, specifically Section 32. In such cases, the 'doctrine of frustration' in Section 56 does not apply and the court must interpret the force majeure clause contained in the contract 20. It held that a force majeure clause must be narrowly construed 21.

(2017) 14 SCC 80.

Section 32 reads:

> "32. Enforcement of contracts contingent on an event happening.—Contingent contracts to do or not to do anything if an uncertain future event happens, cannot be enforced by law unless and until that event has happened.
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> If the event becomes impossible, such contracts become void." Section 56 reads:
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> "56. Agreement to do impossible act.—An agreement to do an act impossible in itself is void. Contract to do act afterwards becoming impossible or unlawful.—A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful. Compensation for loss through non-performance of act known to be impossible or unlawful.— Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise." Energy Watchdog (supra), para 47.
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> ibid, para 45.
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> 10.2 The present case is clearly one where the PPA contains an explicit force majeure clause in Article 8.3, which has already been extracted above. The question is whether

the delay in commissioning falls within the ambit of this clause.

Article 8.3(a)(vi) is the most relevant force majeure event that would apply to the facts here. It reads:

> "vi. Inability despite complying with all legal requirements to obtain, renew or maintain required licenses or Legal Approvals" Article 8.3(b)(iv) disentitles a party from claiming force majeure when the event was caused by its own negligence, intentional act, or omission. It reads:
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> "b) The availability of the above item (a) to excuse a Party's obligations under this Agreement due to a Force Majeure Event shall be subject to the following limitations and restrictions: ...
>
> (iv) The Force Majeure Event was not caused by the non performing Party's negligent or intentional acts, errors or omissions, or by its negligence/failure to comply with any material Law, or by any material breach or default under this Agreement..." 10.3 When these clauses are read together, it is clear that the SPD would be entitled to the benefit of Article 8.3(a)(vi) when it is unable to secure the necessary approvals and licenses required under the PPA, provided that there is no negligence or intentional act or omission on its part that caused this situation.

10.4 The entire dispute before the KERC and the APTEL revolves on a question of fact – whether the respondents were negligent or not diligent in securing approvals and hence, is the delay in commissioning attributable to them. The KERC's appreciation of the evidence has led it to the conclusion that the delay in commissioning was due to the respondents' delay in making the applications, despite the approval of the PPA. However, the APTEL has taken note of certain additional factors affecting the time taken to secure the approvals that were not considered by the KERC. These include the time taken by the government to provide the PTCL that is required for approval of land conversion, and the delay caused by the authority in evacuation approval. Considering these additional factors, the APTEL has reappreciated the evidence to find that the delay was not attributable to the respondents but to the government bodies and relevant authorities. We find that there is no error in the APTEL's approach, and it is reasonable in its reappreciation of evidence.

10.5 Further, the APTEL also correctly took note of the fact that a large number of SPDs have raised similar issues, and the government has responded to the same by requiring DISCOMs to set-up committees to look into these cases. The large number of cases that raise similar grounds and the government's response show that the delay was not faced by the respondents alone, and hence cannot be entirely blamed on them. The government has itself acknowledged that the land use conversion process is a long and arduous one, which led it to deem conversion for solar power projects under the present scheme. However, due to lapses in the implementation of the deemed conversion, the SPDs were unable to avail the same. The APTEL has rightly appreciated these facts to hold that the respondents acted diligently and with care and caution to secure approvals, and

hence their claims cannot be rejected through recourse to Article 8.3(b)(iv).

11. Finally, we have also considered the letter by the appellant dated 02.03.2017 that granted a 6-month extension to the respondents after considering its individual facts and circumstances. This grant of extension must be seen in light of the government's direction to DISCOMs dated 24.11.2016 to set up 3- member committees to consider each request for extension. This shows that the appellant, after considering the specific case of the respondents, has itself accepted that they are entitled to the benefit of Article 2.5 read with Article 8.3 of the PPA. Even before the KERC, the appellant did not challenge the respondents' contentions. Therefore, at the appellate stage before the APTEL and this Court, they cannot be permitted to take a contrary stance and raise the plea that the delay was attributable to the respondents and not covered by the force majeure clause or that there was non-compliance with the notice requirement under Article 8.3(b)(i). We therefore reject the contentions of the appellant that force majeure does not apply in this case.

12. In light of the above findings of fact by the APTEL that the delay is not attributable to the respondents and that the force majeure clause is applicable, it rightly held that the extension of time under Article 2.5 is warranted and the commissioning of the project on 24.08.2017 is within the extended period of 24 months. Consequently, the APTEL also rightly held that there is no occasion for the imposition of liquidated damages under Articles 2.2 and 2.5.7 or for the reduction of tariff under Article 5.1 of the PPA.

13. Conclusion: After considering the learned counsels' submissions in light of the above findings of the APTEL, we find that no substantial question of law arises in the present case. The APTEL has primarily decided a question of fact as to the attributability of the delay, and from the above, it is clear that the APTEL's findings are neither illegal nor unreasonable. Hence, we find no reason to interfere with the same.

14. Lastly, we also reject the appellant's contention that the APTEL's direction to pay late payment surcharge to the respondents is unjustified since the same was not pleaded. As we have already held, the APTEL rightly restored the tariff of Rs. 8.4 per unit and directed the appellant to pay the difference amount. The direction to pay the late payment surcharge on this amount is explicitly rooted in the PPA, and hence, is in furtherance of the intention of the parties. There is no reason to set aside the same.

15. With the above reasons, we dismiss the present appeals.

16. No order as to costs.

.....J. [PAMIDIGHANTAM SRI NARASIMHA] .....J. [PANKAJ MITHAL] NEW DELHI;

August 27, 2024