

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO.141 OF 2021

Dated: **10.02.2022**

Present: **Hon'ble Mr. Justice R.K. Gauba, Officiating Chairperson**
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member

In the matter of:

INDIAN RENEWABLE ENERGY DEVELOPMENT AGENCY

India Habitat Centre,
East Court,
Core-4A, First Floor, Lodhi Road,
New Delhi

... Appellant(s)

VERSUS

1. **KERALA STATE ELECTRICITY BOARD LIMITED**
Vydyuthi Bhawanam, Pettorm,
Tiruvananthapuram,
Kerala-695004
2. **RENEWABLE POWER CORPORATION OF KERALA LIMITED**
Kanhagad South, Kanhagad,
Kasargod,
Kerala- 671531
3. **SOLAR ENERGY CORPORATION OF INDIA LIMITED**
D-3, First Floor, Wing 'A',
Relegare Building, District Centre,
Saket,
New Delhi-110017
4. **KERALA STATE ELECTRICITY REGULATORY COMMISSION**
K.P.F.C. Bhavanam,
C.V. Raman Pillai Road,
Vellayambalam,
Thiruvananthapuram 695010 ... Respondent(s)

Counsel for the Appellant(s) : Ms. Shikha Ohri

Counsel for the Respondent (s) : Mr. P.V. Dinesh
Mr. Bineesh K. for R-1

Ms. Suparna Srivastava for R-2
Mr. Shashwat Singh for R-4

JUDGMENT (*Oral*)

PER HON'BLE MR. JUSTICE R.K. GAUBA, OFFICIATING CHAIRPERSON

1. This matter has been taken up by video conference mode on account of pandemic conditions, it being not advisable to hold physical hearing.
2. The appeal has been brought by *Indian Renewable Energy Development Agency* ('IREDA', for short) which has established a 50 MW Solar PV project at Kasergod Solar Park, the entire power generated therefrom being tied up with first respondent i.e. *Kerala State Electricity Board Ltd* ('KSEBL', for short) under *Power Sale Agreement* dated 31.03.2017 (PSA). The array of parties in the matter at hand includes not only the *Kerala State Electricity Regulatory Commission* ('Commission') impleaded as fourth respondent, its Order dated 06.02.2019 being under challenge, but also *Renewable Power Corporation of Kerala Ltd* ('RPCKL') and *Solar Energy Corporation of India Ltd* ('SECI'). The former, RPCKL, is described as subsidiary of KSEBL, it being responsible for the management of the Solar Park in question in coordination with various departments of the Government. The other respondent, SECI, on the other hand, is a Government of India undertaking set up under the aegis of *Ministry of New and Renewable Energy* ('MNRE'), it acting as a nodal agency of the Government of India for development of solar power projects.

3. The pleadings make reference, *inter alia*, to the background facts arising out of four contracts, the first in chronology being a Memorandum of Understanding dated 18.02.2015 (MoU) for development of solar park and

supply of solar park in the State of Kerala, it being a document entered upon by SECI and KSEBL. The next in line would be the tripartite arrangement dated 31.03.2015 between the appellant, SECI and KSEBL setting out the broad terms of development of the project and sale of power for 50 MW solar power project at Kasergod, Kerala to KSEBL. In the wake of the above understanding and contract, SECI, for and on behalf of the appellant, had entered into a contract described as supply agreement, irrigation works contract and civil & allied works contract on 23.03.2016 with an EPC contractor named M/s Jakson Engineers Ltd (hereinafter referred to as 'EPC Contract'). Later, the appellant and KSEBL signed the PSA on 31.03.2017 setting out the terms on which the supply of electricity generated was to be made to the procurer (KSEBL).

4. The project was statedly commissioned with the total project cost of Rs. 310.88 crores. The appellant sought a tariff of Rs. 4.95/kwh on the basis of the said capital cost and as per the norms and parameters which are stated to be laid down in the appropriate Regulations framed by Central Electricity Regulatory Commission ('CERC'). The Commission, by its order dated 06.02.2019, determined the tariff at Rs. 3.83/unit. It is the said order, some disallowances wherein are under challenge by the present appeal.

5. The appellant is aggrieved because of denial of partial expenditure of Rs. 25.38 crores which it claims to have paid to RPCKL in two tranches, one of Rs. 17.25 crores on 12.07.2017 and the other of Rs. 8.13 crores paid on

25.10.2018. It appears the said expenditure was incurred as power evacuation cost. The relevant part of the impugned order reads thus:

"Power Evacuation cost

37. In the petition, the petitioner claimed the total cost of evacuation as Rs 25.38 crore. The petitioner further clarified that, IREDA had remitted Rs 17.25 crore to Renewable Power Corporation of Kerala Limited (RPCKL) for constructing evacuation facilities. Further, RPCKL has claimed an additional demand of Rs 8.13 crore, which was later withdrawn by the RPCKL.

On the contrary, KSEB Ltd vide its letter dated 28.06.2018 has submitted that, the total expenditure for the development of the evacuation facilities from solar park is Rs 31.81 crore. The substation and the connected infrastructure were created entirely for evacuation of power from the park. The evacuation infrastructure was created to cater to solar park of capacity of 130 MW. KSEB Ltd is working out a proposal for utilization of the substation by sharing the infrastructure and KSEB Ltd will share the cost of the substation to the tune of Rs 10.4723 crore, and only the balance amount of Rs 21.34 crore will be charged from RPCKL.

The Commission examined the claim of the petitioner as well the submission of KSEB Ltd. As per the details submitted by KSEB Ltd, the power evacuation facilities was created at the cost of Rs 31.86 crore to cater the solar park capacity of 130 MW. Hence there is no rationale for loading the entire cost to the 50 MW plant developed by the petitioner. Hence, the Commission has adopted the proportional cost of power evacuation for 50 MW out the total cost of Rs 31.86 crore incurred for creating the power evacuation infrastructure for 130 MW. Accordingly, the cost of power evacuation considered for tariff determination is Rs 12.25 crore."

6. The grievance raised by the appellant in above regard primarily has been that the above expenditure was incurred by the appellant towards project cost which should have been allowed as pass-through in entirety. After some hearing, however, having taken instructions, learned counsel submitted that since the amount in question, which has been denied, was paid to RPCKL under a different contractual arrangement/understanding,

the appellant does not press any relief in this regard at this stage for purposes of the tariff determination exercise and instead seeks liberty to pursue the matter of recovery of the amount paid in excess to RPCKL by taking out appropriate proceedings before the appropriate forum. We grant such liberty and thus treat the issue as not pressed in this appeal.

7. The other issue agitated by the appeal at hand relates to the liquidated damages that could have been secured on account of the delay in the completion of the project by EPC contractor. It appears that in the EPC contract dated 23.03.2016, there is a provision for liquidated damages to be payable by the EPC contractor in case of any inordinate or unexplained delay. The Commission has dealt with this subject by the impugned order as under:

“34. Liquidated damages

34.1 The project is scheduled to be commissioned within the period specified in SCC from the date of issue of LOI.

34.2 In case the contractor fails to achieve successful commissioning of the plant by the due date indicated in Timeline, the Employer shall levy Liquidated Damages on the Contractor at the rate of 0.10% of the total contract value per day of delay for the remaining work, subjected to a maximum of 5% (five percent) of the total contract value.

34.3 The project can be scheduled to be commissioned within the stipulated time period mentioned at SCC plus additional 1.5 months from the date of LOI. In case of delay for more than the maximum period allowed (including LD), the Employer may get the project completed by other suitable agency at risk and cost of Contractor. For calculation of liquidated damages, the month shall be considered consisting of 30 days and the date of LOI as reference date.”

...

34. ...

The petitioner also submitted that, they are in the process of assessing the quantum of liquidated damages that can be claimed against the EPC contractor. Any liquidated damages

recovered by the petitioners from the EPC contractor will be adjusted towards capital cost, as per the established practice in the electricity sector.

35. The Commission has examined the matter in detail. It is noted that, the total delay in commissioning of the project was about 249 days for the first 30 MW and the delay in commissioning for the total capacity was about 409 days. However, the clause 34 of the GCC limits the maximum liquidated damages of 5%, at the rate of 0.10 % of the total contract value per day. It means that, the GCC provides the liquidated damages @0.1% of the contract value per day upto a maximum of 50 days only. Hence the Commission decide to impose the maximum liquidated damage @5% of the contract value of the EPC cost of Rs 269.29 crore, i.e., a total liquidated damage of Rs 13.46 crore on the total EPC cost.

36. Thus, the Commission had considered the EPC cost excluding the liquidated damages only for determining the tariff for electricity generated from the project. The details are given below:

Sl. NO.	Particulars	Amount (Rs. Cr)
1	EPC cost	269.29
2	Liquidated damages @5% of the EPC cost	13.46
3	Net EPC cost adopted for tariff determination	255.83

8. It is the contention of the appellant that the Commission has fallen into error by assuming the maximum liquidated damages which may possibly be recovered by the appellant from EPC contractor so as to deduct such amount from the project cost. Though the learned counsel for the Commission sought to join issue on such contention, we find that the appellant had not taken out any proceedings before any forum for adjudication of the claim for liquidated damages by the time of the tariff determination exercise. In these circumstances, the decision taken by the Commission will have to be treated as an exercise done on assumptions.

9. The learned counsel for the appellant submitted that steps have since been taken to recover the liquidated damages under the EPC contract and she may be given liberty to approach the Commission for review of the order of tariff determination after decision has been rendered in the proceedings for recovery of liquidated damages which are to be taken out before the appropriate forum in accordance with law. We find no reason why such request for liberty to approach the Commission for consideration of plea for adjustment in tariff after decision on claim for award of liquidated damages ought to be declined and, therefore, grant the same.

10. The appeal is disposed of in above terms.

(Sandesh Kumar Sharma)
Technical Member

vt/mkj

(Justice R.K. Gauba)
Officiating Chairperson