

No.N/38/2019

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,

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

Dated: 25.02.2020

Present:

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

RP No. 2/2019

BETWEEN:

Messrs Walwhan Renewable Energy Limited
(previously known as Welspun Renewable
Energy Private Limited)

Having its Office at

C/O The Tata Power Company Limited,
Cor, Centre B, 34 Sant Tukaram Road, Carnac Bunder,
Mumbai-400 009.

(Represented through its Authorized Signatory

Sri. Anantha Padmanabha Rao R) **Petitioner/Review Applicant**

[Represented by Sri P.N. Rajeshwara, Advocate]

AND

1. Bangalore Electricity Supply Company Limited,
K.R.Circle,
Bangalore-560001.
(Through its Managing Director)

2. Karnataka Renewable Energy Development Limited,
Having its Registered Office at
#39, "Shantigruha"
Bharath Scouts & Guides Building,
Palace Road,
Bengaluru-560 001.
(Through its Managing Director,)
3. Karnataka Power Transmission Corporation Limited,
28, Race Course Road,
Bangalore- 560 009.
(Through its Managing Director) **Respondents**
(Respondent No.1 and 3 by Advocate M/s JUST LAW)

(Respondent No.2 by Advocate Sri Murugesh v Charati)

ORDERS

1. Under Section 94 of the Electricity Act, 2003 R/W Rule 8 of the Karnataka Electricity Regulation Commission (General and Conduct of Proceedings) Regulations, 2000 this petition is filed against the impugned order dated 09.11.2018.
2. In this Review Petition the petitioner prays for following reliefs:
 - (a) That this Hon'ble Tribunal may be pleased to allow the present Review Application and review order dated 09.11.2018 in terms of the grounds raised in Para 3 above;
 - (b) Grant the reliefs as prayed for in O.P. 140/2017 filed before this Hon'ble Commission;
 - (c) Pass such other orders as this Hon'ble Tribunal may consider just and appropriate in the facts and circumstances of the present case as also in the interest of justice.

3. The petitioner has made the following grounds at para 3 of this review petition contending that this Commission has rejected all his pleas regarding his 34 MW project by committing error on the face of the records, on various following points, without appreciating them.

Para 3. GROUNDS. Regarding: Effective Date

- 3.1 Difference between Approved PPA and Initialed draft of PPA at para 13 (b) of the impugned order.
- 3.2 The date of execution and approval of PPA at page 7.
- 3.3 Draft PPA initialed on 14.01.2015 is not enforceable and PPA becomes legally enforceable only after approved by the KERC.
- 3.4 Committed gross perversity, gross and patent error by not seeking to consider-the intent and purpose of KREDL/GOK in considering the date of Approval 04.05.2015 as "Zero date".
- 3.5 Interpreted the word "execution", without discussing the ratification needed to become concluded contract as per law dictionaries and as referred in (2007) SC of M.V. Shankar Bhat & Another Vs. Clande Pinto case.

Regarding Delays and obstructions in achieving SCOD.

- 3.6 Acknowledgement given by Respondent-1 to the Petitioner on account force Majeure events in its Board of Directors Meeting dated 11.05.2017.

- 3.7 With utter disregard to the acknowledgement of Respondent-1, without any basis whatsoever, wrongly observed that there was no delay in granting of evacuation approval by respondent-3.
- 3.8 The Commission has given a complete miss and goby to the series of communications addressed by the petitioner as against the Resolution dated 11.05.2017 of the Respondent-1.
- 3.9 Admitted delay in granting interconnection Approval noted by the meeting held on 11.05.2017 of the Respondent-1 is not discussed.
- 3.10 The “U” turn taken by the Respondent-1 for the minutes of 82nd Board of Resolution dated 11.05.2017 in the 83rd Meeting of Board of Directors dated 07.09.2017 is erroneous and unsustainable and it was not considered by the Commission.
- 3.11 The Commission with utter disregard to the records of the case and inter-alia without factual basis observed that the petitioner “has not revealed its action plan and demonstrated its earnestness in implementing” the project.
- 3.12 The Commission without factual basis observed in vague and baselessly that the petitioner has not achieved the “Conditions Precedent within the specified time of the PPA”.

- 3.13 The referred citations of Gujarat Urja Vikas Nigam Limited Vs. ACME Solar Technologies (Gujarat) Private Limited, (2014) SC was not made applicable to this case on wrong notion.
- 3.14 The challenges/constraints followed by delays faced by the petitioner in each stage of the 34 MW project implementation.
- 3.15 The Commission has shown grave perversity in observing that 34 MW was not commissioned on 14.07.2016 as against the express term of "Commissioning Certificate" dated 14.07.2016.
- 3.16 The Commission has not discussed the obstruction caused by the villagers in cutting of trees and also the process of removal of obstruction and payment of compensation to the concerned.
- 3.17 The Commission has not discussed the law and order problem arose while obstruction caused by the villagers in cutting of trees.
- 3.18 The Commission has not discussed the repeated process of energized and power flow started from 27.08.2016 causing delay.
- 3.19 Second circuit of transmission line which is a standby to the first line found not charged to avoid electrical hazards to the local villagers who were resisting the trimming of trees.

- 3.20 The said standby line of 66 kV is permissible to 28MW by the KPTCL but was made available to meet the requirement of PPA.
- 3.21 The COD clause Article 5.6 in PPA not referred to Voltage level or circuits through which the power should be evacuated, is not appreciated.
- 3.22 The Commission ignored to note the minutes of the 82nd and 83rd Board meetings of the Directors, to note the force majeure events attributable for delay.
- 3.23 The intent, wider import and widest meaning of Force Majeure was not appreciated.
- 3.24 The Commission ignored to note the unprecedented rains and cyclone, which affected the entire south India.
- 3.25 The Commission ignored to appreciate the Articles 12.2, 4.1, 4.2(d) (e) of PPA.
- 3.26 The Commission not appreciated the own conduct of admitting Force Majeure events and waiving the same as evident from the transactions dated 16.03.2017 and 27.03.2017, and the Minutes of the two Board meetings.

- 3.27 Similarly placed generator case before Hon'ble Supreme Court of India in M.P. Power Management Company Limited Vs. Renew Clean Energy Private Limited was not considered.

Regarding reduction in tariff.

- 3.28 The revising tariff of Rs.6.51 as per 12.1 is against the Section 63 of the Act and it is not discussed.
- 3.29 Tariff adopted by the Commission was wrongly revised under Section 62 of the Act and it is not discussed.
- 3.30 In the absence of provision under PPA to revise the tariff for a delay in the COD, the revision made is unjust and illegal, ultra vires the PPA and it is not discussed by the Commission.
- 3.31 The Commission has erroneously applied its tariff orders dated 30.07.2015 and 10.10.2013.
- 3.32 The marginal delay in achieving the COD of the project were erroneously interpreted which too is inapplicable.
- 3.33 The marginal delay pardonable and condonable should not have been considered for levying liquidated damages.
4. The Respondents No.1 & 2 filed their objection statements separately, contending commonly that this petition is not maintainable, misconceived and deserves to be rejected, as the impugned order is well

reasoned order which does not require interference. The petitioner has failed to make out the 3 (three) grounds mentioned in review provisions. Namely; on discovery of new and important matter or evidence which, after the exercise of due diligence was not within the petitioner's knowledge or could not be produced at the time when the original order was passed, or on account of some mistake or error apparent on the face of the records or for any other sufficient reason. The petitioner has reiterated the facts and the legal positions which were addressed by the petitioner in the main petition and has been trying to re-agitate his case and the same is impermissible in law. There is no error apparent on the face of the records in the order passed by the Commission. The petitioner has not come to the court with clean hands in as much as, has been trying to seek the amendment of the PPA by virtue of the present review petition. The contention of the petitioner to treat the date of the approval by the commission as the effective date instead of the date of the execution of agreement is bad in law. The scope of the review proceeding before this Commission is no more Res-integra. The petition is liable to be dismissed.

5. The petitioner has relied on 6 reported decisions for this review petition and already considered Annexure of the Main petition, mainly arguing on his letter dated 24.04.2017 Annexure P-13 and additional Agenda marked as Annexure P-14 in the main petition. The Respondents No.1 and 3 also

have relied on already considered Annexure in the main petition. Arguments of the counsels of both the sides were heard. Perused the impugned order and contents of the produced and relied on Annexure of the main petition of both the sides.

6. The points that arise for our consideration in this Review Petition are:

1) Whether the petitioner has made out the ground of alleged error apparent on the face of records while passing the order dated 09.11.2018 in OP No.140/2017 by this Commission?

2) To what order the petitioner is entitled to?

7. Our answers are as hereunder for the following:

REASONS

8. Point No.1: Whether the petitioner has made out the ground of alleged error apparent on the face of records while passing the order dated 09.11.2018 in OP No.140/2017 by this Commission?

9. The petitioner had filed the OP No.140/2017 which was decided on 09.11.2018 by this Commission praying for declarations of his alleged right of getting the tariff of Rs.7.01 per unit from the "Effective Date" mentioned in PPA, without becoming liable to pay liquidated damages to the

Respondent No.1 from 04.05.2015. He had also prayed for order to execute two separate PPAs for the project split in two locations and to approve SPPA dated 15.07.2016 with ALTERNATIVE prayers.

10.This Commission passed orders on 09.11.2018 in the main petition as stated below.

- (a) The petitioner shall produce the relevant documents, to establish the transformer of the 50 MW capacity Solar Power Project from M/s Welspun Solar Kannada Private Limited, to it for obtaining the approval of this Commission for SPPA dated 15.07.2015 (Annexure-P3 to the petition), within 4 (four) weeks from the date of this Order.
- (b) The petitioner is entitled, for the energy supplied from its respective Units of the Solar Power Project, the tariff at the rate of:
- (i) Rs.7.01 (Rupees Seven and Paise One only) per unit, for its 16MW capacity Unit of the solar Power project;
 - (ii) Rs.6.51 (Rupees six and Paise Fifty One only) per unit, for its 34 MW capacity Unit of the solar Power project for a period of 25 (twenty five)years from the respective Commercial Operation Dates;

(c) The petitioner is liable to pay liquidated Damages for the delay in commencement of the supply of power to the 1st Respondent/(BESCOM) from its, 34 MW capacity Unit of the Solar Project, as per Article 5.8 of the PPA.

(d) The 1st Respondent (BESCOM) shall pay to the petitioner, the differential amount of the tariff, for the energy supplied from the 16 MW capacity Unit of the solar Power Project, within 6 (six) weeks from the date of this Order, in default, the 1st Respondent (BESCOM) shall pay interest at the rate of 9 (nine) percent per annum on the differential amount due, from the date of default till the date of its realization; and

(e) The petitioner is not entitled to any other relief, sought for, in the petition.

11. The Petitioner has contended that this is a clear case of an error apparent on the face of record and non-consideration of relevant documents as per the decision [(2005) 13 SCC 289] relied on by him. He has also relied on (2004) 4 SCC 122 which relates to lost sight over the placed materials.

12. The Respondents contended commonly that this petition is misconceived and deserves to be rejected as not maintainable, as the impugned order

is well reasoned order which does not require interference. That the petitioner has failed to make out the 3 (three) grounds mentioned in Order 47 Rule 1 CPC namely the review provisions.

13. The powers of this Commission under Section 94(1) (f) of the Electricity Act, 2003, for reviewing its decision, directions and orders is equivalent to that of the civil court, as its proceedings shall be deemed to be judicial proceedings as stated under Section 95. The court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by language used in on 3 grounds only. The power of review is a creature of the statute and no court or quasi-judicial body or administrative authority can review its judgment or order or decision unless it is legally empowered to do so, as observed in the case (2012) SCC 200-208. A court or tribunal has no inherent power of review. It must be conferred by law either specifically or by implication as stated in AIR 1970 SC 1273. The court is required to exercise high degree of diligence on the part of the petitioner in seeking review, since the object is to secure finality of litigation of some stage one or the other in the long process (AIR 1960 Mys 214).

14. The Hon'ble Supreme Court as, in the case of Kamlesh Verma Vs Mayavati (2013 SC 3301) held as follows:

“16. Thus in view of the above, the following grounds of review are maintainable as stipulate by the stature:

- (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 fact of the record;
 - (iii) Any other sufficient reason;

The words 'any other sufficient reason has been interpreted in Chaajju 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 proceeding 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 negatived.

15. Among the said 3 grounds the petitioner has alleged the ground of the error apparent on the face of the record. It must be such an error which must strike one, on mere looking at the record and would not require any

long drawn process of reasoning on points where there may conceivably two options as observed in the citation AIR 1995 SC 455, and it is not the case in this review petition. The petitioner has relied on most of all his annexure contending that they were not properly but erroneously appreciated by this Commission thereon.

16.The petitioner contends that the Commission has committed error apparent on the face of the record and in support of the same, has narrated the multiple reasons in para 3 of his petition under different heads.

17. The contentions of the petitioner in all the raised points are that the commission has not appreciated the alleged facts, contents of annexure, has shown grave perversity, has shown utter disregard to the documents or not accepted the arguments of the parties, and they clearly establish that they are not coming under the requirement of order 47 rule 1 of CPC and he has been trying to re-agitate the case instead of preferring appeal. The appreciation of evidence on records is fully within the domain of the appellate court, it cannot be permitted to advance in the review petition, as observed in the above stated Kamalesh Verma case.

18.The petitioner contends that the Commission has committed gross and patent error in not appreciating the contents of PPA in finding out the

Effective Date, keeping in mind role of the KREDL/GOK which were more fully described at above paras 3.1 to 3.5 of this Review Petition, the referred case (2003)4 SCC 86. (M.V. Shankar Bhat & Another Vs. Clande Pinto) of the petitioner side cannot be made applicable to the disputed PPA as there is no such requirement of the ratification clause therein to be acted upon by the parties involved. The Commission has mentioned in para 13 of issue no. 2 at page 23 of the impugned order that it has noted that, there is no such procedure, in the state of Karnataka, as stated by the petitioner for approval of a PPA. He has also relied on (2004) 4 SCC 122 which relates to lost sight over the placed materials and it also cannot be made applicable because of the observance on the relevant point. The petitioner has failed to establish the error apparent on the face of the record and hence it cannot be considered as liable to be reviewed. This review petition is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error as observed in the decision AIR 2003 Kar. 444 (449).

19. The petitioner further contends that the Commission has shown utter disregard to the records of the case, relating to the "Force Majeure" events acknowledged and once accepted by the Respondent-1 on 11.05.2017 but taking "U" turn in next 83rd meeting of the Board of Directors on 07.09,2017, despite the series of communications as mentioned in the reasons at Paras, 3.6 to 3.10, 3.21 to 3.27 of this Review

Petition. The arguments advanced on document/Annexure P-14 Agenda for 82nd meeting Board of Directors of the Respondent No.1, was considered in the impugned order of the pleadings portion at page No.8 and also at discussion portion at pages 27-28. Further arguments advanced, relating to the letter dated 24.04.2017 written by the petitioner marked as Annexure-P12 of the main petition was also involved as inconsequential while upholding the exclusive jurisdiction of this Commission to extend the SCOD. In the said letter the petitioner had sought permission from the Energy Department, GoK, to direct the BESCOM to consider his case for extension of time and to execute two SPPA for 34 MW and 50 MW solar PV plants. The Commission has considered and discussed about the minutes of 82nd Meeting of the Board of directors and at the end, relying on the decision, All India Power Engineers Federation Ltd. Vs. Susan Power Ltd (2017) 15 SCC 487 held about the exclusive jurisdiction of the Commission to consider the validity of Extension time, for commissioning of a project when it affects the tariff payable to a generating company, ultimately passed on to the consumers. The scope of review, is for consideration of "Error Apparent" only and not to review of judgment or order even if the parties are in a position to satisfy the court that impugned order is an erroneous order AIR 2003 Guj. 157 (159) DB. There is real distinction between a merely erroneous decision which can be characterized as initiated by error

apparent and Review is not an appeal in disguise as stated in AIR 2000 SC 3737.

20.The petitioner contends that the Commission showed grave perversity by not discussing the referred citations, the occasions of obstructions in the said process because of Force Majeure events also, as stated in the paras 3.11 to 3.20 of this Review Petition. The discussion of the referred Supreme Court Judgments to the facts of the case at paras (j) (n) (p) of Issue No. 2 of the impugned order falsified the said contentions. The contentions raised and decided in main proceedings cannot be reopened for re-agitation under the guise of review petition (2003 AIHC 1751-1756 AP).

21.The petitioner contends that the applicability of Section 62 and 63 of the Electricity Act, 2003 and applicability of its two orders were wrongly and erroneously interpreted by the commission in considering the reduction in tariff as stated in paras 3.28 to 3.33 of this Review Petition. The Commission has discussed on issue No.2 in the main petition elaborately by interpreting the concerned Articles of PPA by referring and by applying the Supreme Court Judgments. Revision of a tariff must be distinguished from a Review of a tariff order and extensive power that can be exercised by the Commission in the proceedings before it cannot be made applicable here [AIR 2009 SC (suppl) 1931-at 1938].

22.The review petition shows the voluminous grounds made out by the petitioner by reiterating the facts. They were all addressed in the order of the main petition. Re-agitation of his case again on different reasons by the same forum/Commission is impermissible in law. It appears that the petitioner has not come to the court with clean hands, in as much as has been trying to seek the amendment of the PPA by virtue of the present review petition. Such review powers cannot be exercised for the following reasons also.

a) Wrong appreciation of evidence is not a matter of review.
AIR 1999 Ori 106 (110).

b) The Object is not to write a 2nd judgment because the 1st one wrong.

23.This Commission cannot act as Appellate court to correct its erroneous order to substitute the views even if it is made out. The grounds urged in this petition do not come under the purview of error apparent.

24.The contention of the petitioner to treat the date of the approval of PPA by the commission as the effective date instead of the date of the execution of PPAs becomes untenable in view of the reasons and findings given on issue No1. Of the main petition. In the result the petitioner has failed to make out the grounds of alleged error apparent on the face of

the record, but it is clear that he has tried to get the reopening of the case on untenable grounds which cannot be permitted to review the same under the facts and circumstances above discussed. Hence, we answer this Point No.1 in the Negative.

25.Point No. 2: To what order the petitioner is entitled to?

26. Being guided by the principles of natural justice, this Commission has perused the impugned judgment in the light of the above alleged grounds and found that it is not a fit case to review the same, because it is the case which comes under the head "not maintainable" as referred in Kamallesh Verma case. The petitioner has prayed for granting of the reliefs as prayed for in O.P. No.140/2017 filed before this Commission. In the review petition the petitioner can seek the order for reconsideration of the impugned order if he succeeds to establish the ground made out under Order 47 rule 1 of CPC, by getting the main petition re-opened, but cannot expect, through the order in this petition only. The suit or appeal revives, only when review application is admitted and allowed [A1979 A 274 (FB)(Sakal V Debi)].

27. The petitioner who prepared large number of grounds in this petition has failed to make out the alleged error apparent on the face of the record and has relied on other citations. (2000) 6 SCC 359 relates doctrine of

merger. (2017) 1 SCC 487 is related to the case, consisting of contradictions in the observations at different portions of the same judgment. (2018) 6 SCC 157 relates to the case where penalty can be imposed instead terminating PPA. All these citations cannot be made applicable as they are either related for considering case on merit of the main petition or irrelevant to the facts of this case.

28. The petitioner it appears has been trying to re-agitate the case instead of preferring appeal. Hence he is not entitled to get the order for restoration of the OP. No.140/2017 or for any other relief. Hence, we pass the following:

ORDER

The review petition No.2/2019 seeking review of order dated 09.11.2018 in O.P. No.140/2017 is dismissed. No order as to costs.

Sd/-
(SHAMBHU DAYAL MEENA)
Chairman

Sd/-
(H.M. MANJUNATHA)
Member

Sd/-
(M.D. RAVI)
Member