

# Bangalore Electricity Supply Company Ltd. (BESCOM). Vs. E.S. Solar Power Pvt. Ltd. & Ors.

Civil Appeal No. 9273 of 2019

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## Full judgment text

Bangalore Electricity Supply Company Ltd. (BESCOM). Vs. E.S. Solar Power Pvt. Ltd. & Ors.

[Civil Appeal No. 9273 of 2019]

[Civil Appeal No. 9274 of 2019]

L. Nageswara Rao, J.

1. These appeals arise out of a judgment of the Appellate Tribunal for Electricity at Delhi by which the order passed by the Karnataka Electricity Regulatory Commission (KERC) was reversed.

2. The facts that are necessary for adjudication of the dispute in these appeals are as follows:

(a) Karnataka Renewable Energy Development Limited (KREDL) issued a Request for proposal on 20.11.2015 from bidders for undertaking development of Solar PV ground mount Power Plants in Karnataka pursuant to a decision taken by the State Government for development of 1200 MWA of Solar power to be implemented in 60 Taluks through private sector participation. Emmvee Photovoltaic Power Private Limited, the second Respondent herein, incorporated two Special Purpose Vehicles (SPV) in accordance with the terms of the Request for Proposal and submitted its bid for acceptance by the first Appellant, Bangalore Electricity Supply Company Limited.

(b) Respondent No. 1 in Civil Appeal 9273 of 2019 is a special purpose vehicle constituted by Respondent No. 2 for setting up a Solar PV ground mount Project with a capacity of 10 MWA (AC) in Bidar Rural Taluk, Bidar District, Respondent No. 1 in Civil Appeal 9274 of 2019 is a special purpose vehicle for setting up a 20 MWA (AC) capacity Solar PV ground mount Project in Bagepalli Taluk, Chikkaballapura.

(c) The Projects were awarded to the Respondents on 31.03.2016. Power Purchase Agreements (PPAs) were entered into between the parties on 23.05.2016. The Power Purchase Agreements were approved by Karnataka Electricity Regulatory Commission (KERC) on 17.10.2016. Supplementary Power Purchase Agreements were entered into between the parties on 17.12.2016 incorporating the modifications suggested by the Karnataka Electricity Regulatory Commission on 07.12.2016.

(d) In respect of the Bidar Project, a Commissioning Certificate was issued on 25.10.2017 by KPTCL on the basis of minutes of meeting that was held on 16.10.2017. The Commissioning Certificate for Bagpalli Project was also issued on 23.11.2017.

3. Original Petition (OP) No. 18 of 2018 was filed by the Respondents in Civil Appeal 9274 of 2019 aggrieved by the reduction of the tariff payable by Appellant No. 1 from Rs. 6.10/kWh to Rs. 4.36/kWh and imposition of damages of Rs. 20,00,000/- (Rupees Twenty Lakhs only) for delay in commissioning the plant.

4. Apart from others, the main ground taken in the Original Petition by the Respondents is that Commissioning of the Project took place on 16.10.2017 which is clear from the Minutes of meeting drawn by the Officials of KPTCL. The meeting was attended by officers of KPTCL, officers of GSCOM and representatives of the Respondents. It was contended by the Respondents that the Project commenced its operations within 12 months from the date of approval of the PPA by the Karnataka Electricity Regulatory Commission and the imposition of damages and reduction of tariff payable by the Appellant was contrary to the provisions of the agreement.

5. Original Petition No. 19 of 2018 was filed by the Respondents in Civil Appeal 9273 of 2019 in respect of the Solar PV ground mount Power Project in Bidar for reliefs similar to those claimed in OP 18 of 2018.

6. The Karnataka Electricity Regulatory Commission by its Order dated 23.10.2018 dismissed OP No. 18 of 2018 and OP No. 19 of 2018. The Karnataka Electricity Regulatory Commission framed four issues for consideration which are as follows:

(i) 'Whether the Scheduled Commissioning date' of the Solar Power Projects in question would fall in 16.10.2017 or 17.10.2017.

(ii) On what date the Solar Power Projects in OP No. 18 of 2018 and OP 19 of 2018 have started injection of power into the Grid.

(iii) Whether injection of power into the State Grid from a Solar Power Project is essential in order to declare that a Project is commissioned.

(iv) 'Whether Commissioning of the Project' and 'Commercial Operation of the Project' are one and the same or different concepts in a Solar Power Project.

7. Insofar as issue No. 1 is concerned the Commission was of the view that the Scheduled Commissioning date for the Solar Power Projects of the Developer is 16.10.2017 and not 17.10.2017 as contended by the Respondents. Considering issues 2, 3, and 4 together, the Commission was of the opinion that the injection of power into the Grid from a Solar Power Project is a sine qua non for declaring that the Project is commissioned. The Commission was of the view that the injection of power from the Solar Power Project into the Grid was only on 17.10.2017. In view of the above findings recorded by the Commission, the OP's were dismissed.

8. The Respondents approached the Appellate Tribunal for Electricity by filing Appeal Nos.332 and 333 of 2018. The Appellate Tribunal framed the following point for consideration: "Whether the Project of the Appellants was delayed by one day in terms of Power Purchase Agreement and whether the Commission was justified in imposing liquidated damages on the Appellant for such delay in commissioning the Project."

9. The Appellate Tribunal held that the Commissioning Date of both the Solar Plants according to KPTCL is 16.10.2017. According to the Tribunal, synchronization took place prior to the commissioning of the Plant. The Tribunal was also of the view that the Scheduled date of Commissioning was done within the time limit prescribed under the agreements even if the commencement of the Solar Plants is taken as 17.10.2017. The Appellate Tribunal for electricity allowed the Appeals filed by the Respondents and set aside the orders passed by the Karnataka Electricity Regulatory Commission. The Appellant has challenged the said judgment of the Appellate Tribunal for Electricity in these Appeals.

10. We have heard Mr. Tushar Mehta, the learned Solicitor General and Mr. Balaji Srinivasan for the Appellant and Mr. Basava Prabhu Patil, learned Senior Advocate for the Respondents. The learned Solicitor General was critical of the judgment of the Appellate Tribunal for its interference with a well-considered order of the Commission. He argued that the conclusion of the Appellate Tribunal that the SCOD is 17.10.2017 and not 16.10.2017 is contrary to the terms of the PPA.

He relied upon several clauses of the PPA to justify that the decision taken by the Appellant to impose liquidated damages and to reduce tariff to 4.36/kWh from 6.10/kWh. He emphasized that injection of power to the Grid is a pre requisite for determining the date of commissioning of a Solar Plant. He urged that the Tribunal committed an error in relying upon judgments relating to the General Clauses Act when PPA excluded the applicability of the General Clauses Act.

11. Mr. Balaji Srinivasan, took us through the documents to argue that regulatory commission correctly interpreted the agreement to include the first date and last date i.e. the date on which PPA was approved by the KERC for determining the Scheduled Commissioning Date. He took us through the material on record to show that there was minimum generation of power on 16.10.2017 which was utilized for auxiliary purposes which does not satisfy the condition of injection of power into the Grid.

He submitted that it is clear that there was no injection of power into the Grid till 17.10.2017 and the Respondents are not entitled to tariff at the rate of 6.10/kWh. Reliance was placed on a judgment of this Court reported in 2019 SCC online Supreme Court 1014 to argue that a Solar Power Plant is deemed to be commissioned only when there is injection of power into the Grid.

12. Mr. Basava Prabhu S. Patil, learned Senior Advocate responding to the submissions made on behalf of the Appellant contended that the twelve months period for deciding the Scheduled Commissioning Date starts from 17.10.2016 which was the date of approval of PPA by KERC. He referred to several covenants of the PPA to asseverate that the date of the event i.e. the date of approval of PPA has to be excluded for the purpose of computation of twelve months for deciding the Scheduled Commissioning Date (SCOD). There is no dispute regarding injection of power to the Grid on 17.10.2017.

Therefore, there is no default on the part of the Respondents and they were unnecessarily penalized. The alternative submission of the Respondents is that even if 17.10.2016 is not excluded, twelve months end on 16.10.2017 on which day the Plants were commissioned. Computation of twelve months from 16.10.2017, in that case, cannot be detrimental to the Respondents.

He emphasized that commissioning of the Plant is different from Commercial Operation date. He requested this Court not to interfere with the judgment of the Appellate Tribunal as the Respondents have entered into an agreement on the basis of the offer made by the Appellant to pay tariff at Rs. 6.10/kWh. Any reduction of tariff would sound a death knell to the Solar Plants which are going through difficult times.

13. Before we proceed further, it is necessary to have an overview of the PPA entered into between the parties on 23.05.2016. Development of 1200 MWA of Solar Power in 60 Districts through private sector participation was a decision taken by the State Government for improving the power infrastructure in the State. Karnataka Renewable Energy Development Ltd. was appointed as a Nodal agency for facilitating the development of renewable energy in the State. The offer made by the Respondents for setting up two Solar PV ground mount Projects was accepted pursuant to which an agreement was entered into. The relevant provisions of the PPA which are relevant are as under:

#### Article 1.1

The words and expressions beginning with capital letters and defined in this Agreement (including those in Article 21) shall, unless the context otherwise requires, have the meaning ascribed thereto herein, and the words and expressions defined in the Schedules and used therein shall have the meaning ascribed thereto in the Schedules

#### Article 1.2 (k)

any reference to month shall mean a reference to a calendar month as per the Gregorian calendar;

#### Article 1.2 (l) and (m)

any reference to any period commencing "from" a specified day or date and "till" or "until" a specified day or date shall include both such days or dates; provided that if the last day of any period computed under this Agreement is not a business day, then the period shall run until the end of the next business day;

#### Article 1.2.4

Any word or expression used in this Agreement shall, unless otherwise defined or construed in this Agreement, bear its ordinary English meaning and, for these purposes, the General Clauses Act 1897 shall not apply.

#### Article 3

##### 3.1. Effective Date

This Agreement shall come into effect from the date of getting concurrence from KERC on the PPA and such date shall be referred to as the Effective Date.

#### Article 5.1 Obligations of the Developer

5.1.1 Subject to and on the terms and conditions of this Agreement, the Developer shall at its own cost and expense: (c) commence supply of power up to the Contract Capacity to BESCOM no later than the Scheduled Commissioning Date and continue the supply of power throughout the term of the Agreement;

##### 5.4 Connectivity to the grid

The Developer shall be responsible for power evacuation from the Power Project to the nearest Delivery Point/ Delivery points.

#### Article 5.8 - Liquidated Damages for delay in commencement of supply of power to BESCOM

5.8.1. If the Developer is unable to commence supply of power to BESCOM by the Scheduled Commissioning Date other than for the reasons specified in Clause

5.7.1, the Developer shall pay to BESCOM, Liquidated Damages for the delay in such commencement of Supply of power and making the Contract Capacity available for dispatch by the Scheduled

Commissioning Date as per the following:

- a. For the delay up to one month an amount equivalent to 20% of the Performance Security.
- b. For the delay of more than one (1) month and upto two months an amount equivalent to 40% of the total Performance Security. In addition to the 20% deducted above.
- c. For the delay of more than two and upto three months an amount equivalent to 40% of the Performance Security in addition to the 20%+40% deducted above.

For avoidance of doubt, in the event of failure to pay the above-mentioned damages by the Developer entitles BESCO to encash the Performance Security.

5.8.2. In case the Developer delays the achievement of Commercial Operation Date beyond 3 (three) months, the Developer shall pay to BESCO, the Liquidated Damages at rate of INR 50,000/-

(Rupees Fifty Thousand only) per MW per day of delay for the delay in such commissioning. Provided that the Developer shall be required to make such payments to BESCO in advance on a week to week basis for the period of delay.

5.8.3. The maximum time period allowed for achievement of Commercial Operation Date with payment of Liquidated Damages shall be limited to 22 (twenty two) months from the Effective Date. In case, the achievement of COD is delayed beyond 22 (twenty two) months from the Effective Date, it shall be considered as an Developer's Event of Default and provisions of Article 16 shall apply and the Power Project shall be removed from the list of selected projects in the event of termination of this Agreement:

#### ARTICLE 8: Synchronization, Commissioning and Commercial Operation

8.1. The Developer shall provide at least forty (40) days advanced preliminary written notice and at least twenty (20) days advanced final written notice to BESCO of the date on which it intends to synchronize the Power Project to the Grid System.

8.2. Subject to Clause 8.1, the Power Project shall be synchronized by the Developer with the Grid System when it meets all the connection conditions prescribed in applicable Grid Code then in effect and otherwise meets all other Indian legal requirements for synchronization to the Grid System.

8.3. The synchronization equipment shall be installed by the Developer at its generation facility of the Power Project at its own cost. The Developer shall synchronize its system with the Grid System only after the approval of synchronization scheme is granted by the head of the concerned sub-station/Grid System and checking/verification is made by the concerned authorities of the grid system.

8.4. The Developer shall immediately after each synchronization/tripping of generator, inform the substation of the Grid System to which the Power Project is electrically connected in accordance with applicable Grid Code.

8.5. The Developer shall commission the Project within 12 months from the Effective Date.

#### ARTICLE 12: APPLICABLE TARIFF AND SHARING OF COM BENEFITS

12.1. The Developer shall be entitled to receive the Tariff of INR 6.10 / kWh of energy supplied by it to BESCO in accordance with the terms of this Agreement during the period between COD and the Expiry Date.

12.2. Provided further that as a consequence of delay in Commissioning of the Project beyond the Scheduled Commissioning Date, subject to Article 4, if there is change in KERC applicable tariff, the changed applicable Tariff for the Project shall be the lower of the following:

- I. Tariff as in Clause 12.1 above
- II. KERC applicable Tariff as on the Commercial Operation Date.

#### ARTICLE 21: DEFINITIONS

"COD" or "Commercial Operation Date" shall mean the actual commissioning date of respective units of the Power Project where upon the Developer starts injecting power from the Power Project to the Delivery Point.

"Effective Date" shall mean date of Approval of PPA KERC;

Month" shall mean a period of thirty, (30) days from (and excluding) the date of the event, where applicable, else a calendar month.

Scheduled Commissioning Date" shall mean 12 (twelve) months from the Effective Date.

14. The dispute in these Appeals is whether the Respondents did not commission the Solar Projects before the expiry of 12 months from 17.10.2016 which is the date of approval of PPA by KERC. The conflicting views of the parties relate to the computation of 12 months for the purpose of determining whether the Scheduled Commissioning Date is 16.10.2017 or 17.10.2017. According to the Appellants, SCOD is 17.10.2017 and on the other hand the Respondents contend that it is 16.10.2017. The other issue that falls for consideration is whether injection of power is a pre-requisite for deciding the Date of Commissioning of the Projects and whether the 'Commercial Operation Date' and 'Commissioning Date' are one and the same.

15. Before embarking on the exercise of interpretation of the agreement it is necessary to take stock of the wellsettled canons of construction of contracts. Lord Hoffmann in *Investors Compensation Scheme Limited vs. West Bromwich Building Society*<sup>1</sup> summarized the broad principles of interpretation of contract as follows:

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (See : *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 2 WLR 945.

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *The Antaios Compania Neviera SA v Salen Rederierna AB* [1985] 1 AC 191, 201:

"... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

16. The duty of the Court is not to delve deep into the intricacies of human mind to explore the undisclosed intention, but only to take the meaning of words used i.e. to say expressed intentions (*Smt. Kamala Devi vs. Seth Takhatmal & Anr*<sup>2</sup>). In seeking to construe a clause in a Contract, there is no scope for adopting either a liberal or a narrow approach, whatever that may mean.

The exercise which has to be undertaken is to determine what the words used mean. It can happen that in doing so one is driven to the conclusion that clause is ambiguous, and that it has two possible meanings. In those circumstances, the Court has to prefer one above the other in accordance with the settled principles. If one meaning is more in accord with what the Court considers to be the underlined purpose and intent of the contract, or part of it, than the other, then the court will choose former or rather than the later.

Ashville Investment v. Elmer Contractors.<sup>3</sup> The intention of the parties must be understood from the language they have used, considered in the light of the surrounding circumstances and object of the contract. Bank of India and Anr. v. K. MohanDas and Ors.<sup>4</sup> Every contract is to be considered with reference to its object and the whole of its terms and accordingly the whole context must be considered in endeavoring to collect the intention of the parties, even though the immediate object of inquiry is the meaning of an isolated clause. Bihar State Electricity Board, Patna and Ors. v. M/s. Green Rubber Industries and Ors.<sup>5</sup>

17. Liquidated damages can be imposed on the Developer under Article 5.8.1 if he is unable to commence supply of power to the Appellant by the Scheduled Commissioning Date. Article 12 deals with the applicable tariff. The developer shall be entitled to receive the tariff of Rs. 6.10/kWh of energy supplied the Appellant in accordance with the terms of the agreement. If there is delay in commissioning of the project beyond the Scheduled Commissioning Date and if there is change in KERC applicable tariff, Article 12.2 provides that the changed applicable tariff for the project shall be the lower of the Tariff as in Clause 12.1 and KERC applicable tariff as on the commercial operation day.

18. The bone of contention is whether the Scheduled Commissioning Date of the Solar Power Project is 16.10.2017 or 17.10.2017. We proceed to advert to the undisputed facts. KERC approved the PPAs on 17.10.2016. Scheduled Commissioning Date according to the agreement should be 12 months from 17.10.2016. There is also no dispute between the parties that 12 months means 365 days.

According to the Appellants if 17.10.2016 is included in computation of 365 days, the Scheduled Commissioning Date is 16.10.2017. On the other hand, the Respondents contended that 17.10.2016 should be excluded in the calculation of 365 days, in which case, 17.10.2017 would be the Scheduled Commissioning Date.

19. The Commission relied upon 1.2.1(m) of the PPA to conclude that 17.10.2016 has to be included for ciphering the period of 365 days to determine the Scheduled Commissioning Date. Whereas, the Appellate Tribunal was of the view that Article 1.2.1 (k) of the PPA is relevant. The Tribunal held that the date of the event which is the date on which the PPA was approved i.e. 17.10.2016 shall be excluded in calculating the period of 12 months.

20. Reduction of applicable tariff is permissible under Article 12.2 of the PPA only when there is delay in commissioning of the Project beyond the Scheduled Commissioning Date. As discussed above, there is no dispute that the Scheduled Commissioning date shall be 12 months from the effective date. There is no quarrel between the parties that the effective date is 17.10.2016. The interpretation clause contains three provisions which are 1.2.1 (k), 1.2.1 (l) and 1.2.1 (m).

According to 1.2.1 (k), any reference to a month shall mean a reference to a Calendar month as per the Gregorian Calendar. 1.2.1 (l) provides that references to any date or period shall mean and include such date, period as may be extended pursuant to the agreement. As per Article 1.2.1 (m), any reference to any period commencing from a specified date and until the specified day shall include both such day or dates.

The other crucial provision which has to be taken note of is the definition of the expression 'Month' in Article 21.1 of the agreement. Month has been defined to mean a period of 30 days and excluding (the date of the event) where applicable, else a Calendar month. We are not concerned with 1.2.1 (l), in this case as there is no question of any extension of any period pursuant to the agreement. 1.2.1 (k) indicates that any reference to a month shall mean reference to a Calendar month.

Reverting to the definition of 'Month', it is clear that a month shall mean either 30 days where applicable or a Calendar month. In this case, there is no dispute that 12 Calendar months have to be taken into account for determining the Scheduled Commissioning Date. The crucial expression in the definition of 'Month' is "excluding the date of the event". If the date of the event i.e. 17.10.2016 is excluded, the Scheduled Commissioning Date would be 17.10.2017.

We do not agree with the conclusion of the Commission that the definition of month is with reference only to one month and not more which is wrong a reading of the provision. The Commission applied 1.2.1 (m) which refers to a period commencing from a specified date to a specified day for the purpose of including the date of the event. In our view, the Commission has committed an error in applying 1.2.1 (m) when the provision that is applicable is 1.2.1 (k) read with the definition of month in Article 21.1. There is a specific mention of 'twelve months' in the definition of 'SCOD' and Article 1.2.1 (k) categorically provides that any

reference to a 'Month' shall be a calendar month. Applicability of Article 1.2.1 (k) excludes the operation of Article 1.2.1 (m) to the facts of this case.

21. The next contention of the Appellant is that actual injection of power into the Grid was on 17.10.2017 and as the Scheduled is 16.10.2017, the reduction of the tariff in view of the delay of 1 day in commissioning is justified. The alternate submission that is made by the Respondents that even assuming that the Scheduled Commissioning Date is 16.10.2017 and not 17.10.2017, the Respondents commissioned the Solar Plants on 16.10.2017 itself.

According to the Respondents, the Appellant committed an error in penalizing the Respondents on a wrong premise that the actual injection of power is required to show that the Solar Plants were commissioned. The Commission answered the point in favour of the Appellants by holding that actual injection of power is necessary to determine the date of commissioning of the Plant. The Appellate Tribunal reversed the findings recorded by the Commission on this aspect by relying upon the Commissioning certificate issued by the KPTCL which is to the effect that the Solar Plants were commissioned on 16.10.2017 itself.

There is no dispute that the power was injected from the solar plants on 17.10.2017. In view of the conclusion reached by us on the issue relating to the Scheduled Commissioning Date being 17.10.2017, it is not necessary to adjudicate the point relating to the requirement of actual injection of power into the Grid to decide the date of commissioning. At the request of Mr. Balaji Srinivasan, learned counsel for the Appellant, four weeks time is granted to implement the judgment of the Appellate Tribunal.

22. For the aforesaid reasons, the judgment of the Appellate Tribunal is upheld and the Appeals are dismissed.

1 1998 (1) AIR 98

2 1964 (2) SCR 152

3 1988 (2) All ER 577

4 2009 5 SCC 313

5 1990 (1) SCC 731

Source disclosure: Complete sanitized public judgment text retained for research. Official-primary replacement and later-history closure remain pending.

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