

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI**

(APPELLATE JURISDICTION)

APPEAL NO. 170 OF 2014

Dated: 11th May, 2016

**Present: HON'BLE MR. JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER
HON'BLE MR. T. MUNIKRISHNAIAH, TECHNICAL MEMBER**

IN THE MATTER OF

**Gujarat Urja Vikas Nigam Ltd,
Sardar Patel Vidhyut Bhavan,
Race Course,
Vododara-390007**

..... Appellant

VERSUS

**1. Gujarat Electricity Regulatory Commission,
1st Floor, Neptune Tower,
Opposite Nehru Bridge,
Ashram Road, Ahmedabad-380009**

..... Respondent No.1

**2. Solar Semiconductor Power Company
(India) Private Limited,
Having its Registered Office at
Plot No. 443/A-28, Road No. 86,
Jubilee Hills, Hyderabad-500033**

and subsequently amended as:

**Shivalakha Solar Energy Private Limited
3-5-821, Flat No. 104,
1st Floor, Doshi Square, Hyderguda,
Hyderabad-500029, Telangana**

**..... Respondent No.2/
Petitioner**

**3. Gujarat Energy Development Agency,
4th Floor, Block No. 114/2,
Udhyog Bhavan, Sector-11,
Gandhinagar- 382 017, Gujarat**

..... Respondent No.3

**4. Energy and Petrochemicals Departments,
Government of Gujarat,
Block No. 5, 5th Floor, New Sachivalaya,
Gandhinagar-382010 Gujarat**

..... Respondent No.4

Counsel for the Appellant	...	Mr. M.G. Ramachandran Mr. Anand K. Ganesan Ms. Ranjitha Ramachandran
Counsel for the Respondent(s)...		Ms. Suparna Srivastava for R-1 Mr. Vikas Singh, Sr. Adv. Mr. Sakya Singha Chaudhuri Mr. Avijeet Lala Mr. Saraswat Mahapatra for R-2

J U D G M E N T

PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

1. The instant Appeal under Section 111 of the Electricity Act, 2003, has been preferred by Gujarat Urja Vikas Nigam Ltd (in short, the '**Appellant**') against the Order, dated 5.4.2014 (in short, the '**Impugned Order**') passed by the Gujarat Electricity Regulatory Commission (in short, the '**State Commission**') in Petition No. 1188 of 2012 for the extension of the 'control period' as specified by the State Commission in its tariff order, dated 29.1.2010, passed in order N. 2 of 2010 of the State Commission whereby, the learned State Commission has partly allowed the petition, being Petition No. 1188 of 2012 (impugned petition) which was filed by the Respondent No.2 i.e. Solar Semiconductor Power Company (India) Private Limited under Regulation 80 of the GERC (Conduct of Business) Regulations, 2004 (in short, '**Conduct of Business Regulations, 2004**') read with section 86 of the Electricity Act, 2003 seeking extension of the control period and, while accepting the request of the Respondent No.2/petitioner, extended the control period upto 30.4.2012 for its 10.08 MW capacity solar project and, further, directed both the parties to consider the same and act accordingly.

2. The relevant part of the impugned order is quoted as under:

"11.28 We observe that the Article 8 of the PPA sets out the force majeure conditions which may restrain the project developer from completing the project in time and consequences of such delay. On the other hand, the order dated 29.01.2010 determines the generic tariff payable to the solar projects commissioned during the control period of order. In the present

case, the petitioner has not raised any dispute and only seeks extension of the control period. As such, the matter cannot be raised under Section 86(1)(f).

11.29 Moreover, the Force Majeure clause agreed in the PPA is a contractual arrangement between the parties, whereas the control period specified in the statutory generic tariff order by the Commission is a time frame in which the project is required to be commissioned to become eligible to receive the tariff determined by the Commission. While deciding the control period the Commission takes into account normative conditions which may prevail during execution of the project.

11.30 The Commission has inherent powers to pass an appropriate order to provide the justice to the affected person. In the present case, the delay occurred in commissioning of the project by the petitioner due to various reasons namely (i) Non availability of land for a longer time due to changes in Government Policy/Law, and (ii) Non availability of evacuation facility by GETCO.

The above facts reflect that the delay in commissioning of the project was partially due to change in government rules regarding land acquisition and partially due to failure of GETCO in providing transmission line within stipulated period. Both these reasons were beyond the control of the petitioner, though these may not form part of force majeure events. As such, we decide that the present petition could not be filed under Section 86 (1) (f) of the Act.

.....

11.33 From the above it is clear that it was duty of GETCO to evacuate the power from the Solar Power Project. In the present case, we note that the GETCO had assigned the work of laying transmission line to the petitioner. The petitioner had submitted that he had constructed the major part of the transmission line before 28.1.2012. The said transmission line had to cross the railway-line for which permission from railway authorities was required to be obtained by the GETCO. GETCO had applied for such permission only on 27.02.2012 to the railway authorities and the railway authorities granted the permission on 13.04.2012 to charge the cable at the location. Thus, the delay in the transmission line creation for the period upto 13.4.2012 was only due to the GETCO and the petitioner is not responsible for it. Moreover, due to such delay the petitioner cannot be penalized for the failure of GETCO to perform its duty in time.

11.34 We also observe that the acquisition of land was delayed due to reasons beyond the control of the petitioner and the actual possession could be taken by the petitioner only in October, 2011. Thereafter, the petitioner installed 8.68 MW capacity by 1.02.2012 and another 1.40 MW by 21.02.2012. These have been established through the certificates issued by the Chief Electrical Inspector. Thus, the petitioner was able to commission 10.08 MW capacity in about 4 months' time, as against a time period of 6 months considered by the Commission in its order dated 29.01.2010. Hence, there is sufficient reasons to waive off the delays of 24 days in commissioning of 10.08 MW of capacity of the project.

11.35 Further, the actual commissioning of this capacity was delayed upto 30.04.2012 due to failure of GETCO to provide the necessary evacuation facility. According to the Solar Power Policy of the Government of Gujarat and the Commission's order No.2 of 2010 dated 29.01.2010, it is duty of GETCO to provide necessary transmission system for evacuation of power from the Solar Power Projects. For any default on the part of GETCO, the petitioner cannot be penalized by depriving it from availing the tariff determined in the order dated 29.01.2010. We, therefore, decide to extend the control period of Order no. 2 of 2010 dated 29.01.2010, upto 30.04.2012 specifically for the 10.08 MW capacity of the petitioner's solar project at village Shivilakha, Taluka Bhachu, District Kutch.

12. In view of above observations, we decide that the present petition partly succeeds. The prayer of the petitioner for extension of control period specified in order No.2 of 2010 dated 29.1.2010 for its 10.08 MW capacity solar project is extended up to 30.4.2012. The petitioner and the respondents are directed to consider the same and act accordingly.”

3. The Appellant is a Government of Gujarat Undertaking and incorporated under provisions of the Companies Act, 1956 and is an unbundled utility of the erstwhile Gujarat Electricity Board and has succeeded to the functions of bulk purchase and bulk supply of electricity. The Appellant undertakes the purchase of electricity in bulk from the generating companies and others, and supplies electricity in bulk to the distribution companies in the State to enable maintenance and supply of electricity by the distribution companies to the consumers in the State.

4. The Respondent No. 1 is the State Electricity Regulator which is empowered to discharge various functions and exercises jurisdiction under the provisions of Electricity Act, 2003. The Respondent No.2 is a Solar Power Project Developer in the State of Gujarat and was allocated 20 MW Photovoltaic Solar Power Project capacity by the Government of Gujarat for setting up solar power project in the State of Gujarat under the Government of Gujarat's Solar Power Policy, 2009. The Respondent No.3 is the State Energy Development Agency and the Respondent No.4 is Energy and Petrochemicals Department of the Government of Gujarat.

5. Shorn of unnecessary details, we are narrating the relevant facts which are necessary for the purpose of deciding the instant appeal, which are as under:

- (a) that in exercise of its power under Section 61(h), 62(1) (a) and 86 (1) (e) of the Electricity Act, 2003, the State Commission passed a tariff order, being Tariff Order No. 2 of 2010, dated 29.1.2010, and determined the tariff for procurement of power by distribution licensees from Solar Power Projects in the State of Gujarat. The State Commission, vide its order, dated 29.1.2010, determined the control period where under the Project Developers were required to take necessary steps within the control period to complete the construction and commissioning of the project;
- (b) that in pursuance of the Tariff Order, dated 29.1.2010, the Appellant and the Respondent No. 2, entered in to the Power Purchase Agreement (**PPA**), dated 30.4.2010, Article 5.2 of which specifically provides that the tariff determined in the Tariff Order, dated 29.1.2010, would be applicable only if the project is commissioned by the specified date i.e. on or before 31.12.2011, and in case of delay in commissioning of the project, the tariff mentioned in the PPA or the new tariff determined by the State Commission, effective on the date of

commissioning of the project, whichever is lower, shall be applicable;

- (c) that, on 19.4.2011, the Respondent No.2, after one year of signing of the PPA and expiry of SCOD in respect of first 5 MW to the PPA, requested the Appellant to execute Supplemental Power Purchase Agreement for change of location of their project. Consequently, on 10.5.2011, the Supplemental PPA was entered in to between the parties in regard to the change in location of the power project, specifically stipulating that the change in location will not entitle the Respondent No.2 to claim any extension of time;
- (d) that the Respondent No.2/petitioner, on 20.1.2012, filed a petition, being Petition No. 1188 of 2012 (impugned petition), before the State Commission seeking extension of control period as determined by the State Commission in its Tariff Order, dated 29.1.2010. This petition was filed much after expiry of the SCOD and construction commencement date as agreed to in the PPA and also after 31.12.2011, i.e. the pleadings and the hearing in the other 39 petitions filed by the other Solar Power Developers had concluded who had all sought extension of control period beyond 28.1.2012;
- (e) that the State Commission, vide its order, dated 27.1.2012, had rejected the prayer for general extension of control period by exercise of inherent power and directed each solar power developer to come in case of individual grievances under Section 86 (1) (f) of the Electricity Act, 2003;
- (f) that the learned State Commission, vide its order, dated 22.2.2012, dismissed the impugned petition, being Petition No. 1188 of 2012 of the Respondent No.2 with the following observations:

“Having carefully considering the above, we find that the reasons put forward by the petitioner are similar to those dealt by the Commission in the Order dated 27.01.2012 in the case no. 1126 of 2011. Consequently we arrive at a similar decision. Hence petition is dismissed.”

- (g) that the Respondent No.2, being aggrieved by the State Commission’s order, dated 22.2.2012, filed an Appeal, being Appeal No. 130 of 2012 before this Appellate Tribunal and this Appellate Tribunal, vide its judgment and order, dated 2.1.2013, directed the State Commission to consider each individual case separately by exercising its inherent power. The relevant part of which is as under:

“26. In the result, it is of absolute necessity that the Commission needs to examine the case of each of the two appellants in their respective merits and decide afresh. The basic premise that extension of control period is possible only when there are wide scale ramifications is pregnant with flaws.

27. The Appeals succeed in view of the observations as above and are thus allowed. We remand the matters back to the Commission for rehearing on merit of each individual case and for decision according to law. No cost.”

- (h) that on 1.4.2013, the Appellant had filed a Civil Appeal, being Civil Appeal No. 2542 of 2013 before the Hon’ble Supreme Court under Section 125 of the Electricity Act, 2003, against the judgment & order, dated 2.1.2013, passed by this Appellate Tribunal and the Hon’ble Supreme Court while dismissing the Civil Appeal, vide its order, dated 1.4.2013, passed the following order:

“ORDER

We have heard learned counsel for the parties.

We are not inclined to interfere with the order passed by the Appellate Tribunal for Electricity. The civil appeals are, accordingly, dismissed.

We, however, make it clear that the Commission shall decide the whole issue without being influenced by the

observations made by the Appellate Tribunal for Electricity in accordance with law.”

- (i) that it was after the order of the Hon'ble Supreme Court, dated 1.4.2013, in the aforesaid Civil Appeal No. 2542 of 2013 upon rehearing of the petition no. 1188 of 2012 (impugned petition), the State Commission has passed the aforementioned impugned order, which is under challenge before us in the instant Appeal.

6. We have heard Mr. M.G. Ramachandran, learned counsel for the Appellant, Ms. Suparna Srivastava, learned counsel for the Respondent No.1 and Mr. Vikas Singh, learned senior counsel & Mr. Sakya Singha Chaudhuri, learned counsel for the Respondent No. 2/petitioner. We have deeply gone through the material available on record including the impugned order passed by the State Commission.

7. The sole issue arising for our consideration in this Appeal is ***whether the State Commission is legally justified in extending the control period for the 10.08 MW capacity Solar Power Plant of the Respondent No.2/petitioner upto 30.4.2012 on the basis of delay in the procurement of land due to change in Jantri rate/delay in getting land related approvals and delay in the evacuation facilities being made available from Gujarat Energy Transmission Company Limited (GETCO) by exercising its inherent power under Conduct of Business Regulations, 2004 ignoring the terms and conditions of the PPA entered into between the Respondent No.2 with the Appellant based on the tariff order, dated 20.1.2010, of the State Commission providing for specific circumstances such as force majeure?***

8. On this issue, the following contentions have been made by the Appellant:

- (a) that the Power Purchase Agreement, dated 30.4.2010, as amended by Supplemental Agreements, dated 10.5.2011,

executed between the parties in pursuance of the order, dated 29.1.2010, of the State Commission provides for force majeure provisions, the rights and obligations of the parties including extension of the period for commissioning the Solar Power Project need to be adjudicated as per the terms of the PPA only;

- (b) that the order, dated 29.1.2010, of the State Commission provides that the Solar Power Developers shall enter into a Power Purchase Agreement with the Distribution Licensee for a period of 25 years and The Distribution Licensee will take approval of the State Commission in respect of the PPA;
- (c) that Article 8.1 of the PPA provides for force majeure and Article 8.2 of the PPA deals with the consequences of force majeure. In terms of this PPA, the Respondent No. 2/petitioner was required to establish force majeure which the Respondent No.2 could not establish. Further, the Respondent no. 2 has also not given notices of force majeure as required in Article 8.1 of the PPA and the claim of the Respondent No.2 on the ground of Force Majeure is liable to be rejected being outside the purview of the PPA signed between the parties;
- (d) that the conduct and intention of the Respondent No.2 could be gathered from the fact that it filed the impugned petition before the State Commission only on 20.1.2012 seeking extension of the control period only after the circulation of the discussion paper on 1.11.2011 indicating the possible price of Solar PV Projects being much less than those fixed in the earlier Tariff Order, dated 29.1.2010, passed by the State Commission. Thus, the Respondent No.2 filed the impugned petition for extension of control period with the intention to avoid the lower tariff of the next control period even though, the prevailing project cost was much lower as compared to earlier. The Respondent No. 2 had taken the chance of not establishing the

project within the period allowed under the Tariff Order, dated 29.1.2010, and waited for reduction in the price of solar power project equipments. However, as soon as it came to the knowledge of the Respondent No. 2 that the second control period tariff will be lower than the tariff decided in the Tariff Order, dated 29.1.2010, it filed the petition for reduction in the tariff;

- (e) that the Respondent No. 2 voluntarily signed the Supplemental Agreement, dated 10.5.2011, specifically agreeing to the fact that Respondent No. 2 is changing location of the project belatedly and the non-availability of the transmission system shall not be pleaded by Respondent No. 2 as a ground for non-levy of liquidated damages;
- (f) that the Respondent No. 2 was not able to achieve SCOD in time and voluntarily and without any protest paid amount of Rs. 23.25 lacs as liquidated damages on 14.7.2011 to the Appellant. The Respondent No. 2 did not claim that the Respondent No. 2 was affected by any of the aspects now sought to be alleged delaying the execution of the project and that the same are beyond the control of the Respondent No. 2;
- (g) that the Respondent No.2 had achieved financial closure in the month of April 2011 and undertaken project as per the cost of the plant and machinery thereafter. The plant and machinery required for the project were available at a much reduced price as compared to the price prevalent at the time when the State Commission determined the tariff and passed the Tariff Order, dated 29.1.2010. It is, therefore, unjust and improper for the Respondent No.2 to claim tariff applicable as per the Tariff Order, dated 29.1.2010, for the projects undertaken by the Respondent No. 2 from April 2011 onwards by seeking extension of the control period;

- (h) that the procurement of land and other facilities required for the project was entirely the responsibility of the Respondent No.2. The change of the project site, etc. cannot be a ground for extension of the control period. These are exclusively within the decision to be made by the Respondent No. 2 at its cost and responsibility. There was no representation with regard to the land to be allotted to the Respondent No. 2 in the solar park or elsewhere by the State Government. The Respondent No. 2 was a part of allocation of solar capacity by Government of Gujarat under Phase-I and was not entitled to allocation of land in the solar park. Government of Gujarat had given option to solar power project developers under Phase-II keeping in view that under phase-II the solar power project developers had less time for completion of projects;
- (i) that the change in Jantri Rate cannot be ground for extension of the control period as the Respondent No 2 had signed the PPA with the Appellant on 30.4.2010 whereas, the increase in Jantri rate was on 1.4.2011. Therefore, almost one year was available with the Respondent to complete the project as against the gestation period of six months. The Respondent No 2 did not act diligently or take any effective steps to complete the project instead they waited for reduction in the solar equipment cost. Thereafter also, the revision in the Jantri Rate was effected on 1.4.2011 and registration of the transfer of land was done from 11.5.2011 pending the notification of the new Jantri rates for conversion of Agriculture land for Industrial use. There was 41 days delay in registration of land deed which could not be a ground for extension of control period;
- (j) that the State Commission has not even considered that in Phase-I and Phase- II, 25 Project Developers (for aggregate capacity of 314 MW) had raised the issue of revision in the Jantri rate in the petitions filed before the State Commission.

Of these 25 developers, 9 Project Developers (for aggregate 126.34 MW capacity) had, however, commissioned the Project/made ready for commissioning within the control period i.e. on 28.1.2012. It is, therefore, not correct on the part of the Respondent No.2 to state that the delay in the commissioning of Project was due to the change in Jantri rates etc.;

- (k) that the prayer of the Respondent No. 2 for extension of the control period till 30.4.2012 lacks bona fide and in any event, cannot be justified on grounds of Force Majeure. There is no reason that Respondent No. 2 was not able to establish the project by 28.1.2012 when various other Project Developers had duly established the power project. Respondent No. 2 has been given a tariff which is much higher than the tariff applicable to the project that are established in the subsequent control period from 29.1.2012 onwards. 59 developers completed their projects within the control period under the same circumstances;
- (l) that the delay in the commencement of the construction of the solar project was entirely attributable to Respondent no. 2 and on account of the actions of Respondent no. 2 in seeking transfer of the project from its parent company, change in location etc. and not for any reason or factor attributable to the Appellant or Gujarat Energy Transmission Company Limited (GETCO);
- (m) that as agreed in the PPA, the Respondent No. 2 was required to commission the first phase of the generating station by 31.3.2011 and the second unit by 30.6.2011. However, as late as on 10.5.2011 (i.e. after expiry of SCOD for first 5 MW capacity), the Respondent No. 2 chose to change the location of the solar power project to be set up by the Respondent No. 2 and, consequently, the transmission system to be used for

evacuation of power was required to be changed. These aspects have been totally ignored by the State Commission in the impugned order;

- (n) that the letter, dated 5.8.2011, of GETCO calling for tenders or thereafter directing the Respondent No. 2 to put the evacuation line cannot be relied on by the Respondent No. 2 to claim an extension of control period because the Respondent No. 2 chose the land belatedly and, thereafter, changed its location and, therefore, GETCO could not arrange the evacuation facilities in time;
- (o) that without prejudice to the above contentions, the power project of the Respondent No. 2 was not ready by 28.1.2012, namely, the stipulated time even in the absence of transmission line for the Respondent No. 2 to get the relief as in the cases of other developers whose power project was completely ready but the power could not be injected into the system for want of connectivity. The deemed completion was allowed only in respect of those projects which were ready in all respect except transmission line and there was a delay on the part of GETCO and such delay was not attributable in any manner to the project developers. These aspects are not available to project of developers whose project was not ready and there is a change in location belatedly and the supplemental agreement duly recognizes the consequent delay in the transmission line;
- (p) that the learned State Commission has erroneously extended the control period on account of time taken by GETCO to provide for the transmission line overlooking the fact that GETCO ought to have reasonable time from the identification of the location of solar power project (identification of the site on 10.5.2011) to undertake and complete the transmission line;

- (q) that the learned State Commission has not considered the important facts that the control period of two years was provided for in the Order, dated 29.1.2010, considering the gestation period for Solar PV Projects about six months. Since, the State Commission was dealing with the Solar Thermal Projects also where the gestation period could extend from 18 to 24 months, the State Commission decided to give two years time as the control period even for Solar PV Projects such as the project of the Respondent No. 2. Therefore, Respondent No. 2 had available two years time as against the gestation period of six months to put the project;
- (r) that the Hon'ble Supreme Court on 2.2.2016 has decided the Civil Appeal No. 1220 of 2015 entitled Gujarat Urja Vikas Nigam Limited vs EMCO Limited and Another arising out of the Order, dated 20.11.2010, passed by this Appellate Tribunal wherein the Hon'ble Supreme Court has recently held that adjudication and exercise of powers by the State Commission should be in terms of the Power Purchase Agreement (**PPA**) and the Supplemental PPA (Agreement) entered into between the parties and not de-hors of the said agreement. The learned State Commission, in the impugned order, has proceeded on the basis that it has the inherent regulatory powers to vary the control period for establishing the Solar Generating Units, notwithstanding Clause 5.2 of the PPA, dated 30.4.2010, and Supplemental PPA, dated 10.5.2011. The State Commission was considering the implications of the Tariff Order, dated 29.1.2010, (Generic Tariff Order) passed by it which provided for the control period of the tariff from 29.1.2010 to 28.1.2012 (two years);
- (s) that the State Commission has wrongly proceeded on the basis that notwithstanding the provisions of the PPA, it has inherent power to extend the control period in the case of Respondent

No. 2 on account of the events pleaded by Respondent No. 2. The plea of the Respondent No.2 seeking extension of the control period needs to be judged only in the light of Force Majeure provision contained in Article 8 of the PPA which plea has wrongly been rejected by the State Commission in the impugned order;

- (t) that the Hon'ble Supreme Court, in its judgment, dated 2.2.2016, in Civil Appeal No. 1220 of 2015, while considering the issue arising out of the same Order, dated 29.1.2010, of the State Commission specifying the tariff for the control period 29.1.2010 to 28.1.2012 provided the provision that if the project is established after the control period, the Project Developer will be entitled only to the lower tariff as provided in Clause 5.2 of the PPA.

9. **Per contra**, the following contentions have been made on behalf of the Respondent No. 2/Shivalakha Solar Energy Private Limited, a solar photovoltaic generating company project:

- (a) that the contention of the Appellant that the Hon'ble Supreme Court, vide its order, dated 1.4.2013, has set aside the judgment of this Appellate Tribunal in toto including the findings on the inherent powers of the State Commission is totally erroneous. The Hon'ble Supreme Court has dismissed the appeal, vide its order, dated 1.4.2013, filed by the Appellant against this Appellate Tribunal's judgment. The Hon'ble Supreme Court, while dismissing the Civil Appeal filed by the Appellant, has made clear that the State Commission shall decide the whole issue without being influenced by the observations made by the Appellate Tribunal for Electricity in accordance with law. It is apparent from the order of the Hon'ble Supreme Court that all the observations made by the Appellate Tribunal in the judgment were to be ignored and the State Commission was required to decide the matter afresh as

ordered by this Appellate Tribunal without getting any influence from the observations made by this Appellate Tribunal. So far as, the order of remand, passed by this Appellate Tribunal, is concerned, the same is to be decided by the State Commission without being influenced by the observations of the Appellate Tribunal;

- (b) that the State Commission has inherent power to extend the Control Period under its own tariff order since such issue already stands finalized by the judgment, dated 1.2.2013. The Hon'ble Supreme Court in many judgments has upheld the exercise of inherent powers to ensure that the ends of justice are met, so long as the exercise of the same is not in contravention with any other provision of the Code considering the same the State Commission has equated its powers under Regulation 80 of the Conduct of Business Regulations, 2004 to Section 151 of CPC. In the case of Ram Chand and Sons Sugar Mills Private Ltd, Barbanki (U.P) vs Kanhayalal Bhargava & Ors.(1966) 3 SCR 856, the Hon'ble Supreme Court while dealing with the scope of Inherent Powers held as under:

“5. Section 151 of the Code reads:

“Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

The words of the section appear to be rather wide. But the decisions of this Court, by construction, limited the scope of the said section. In Padam Sen v. State of Uttar Pradesh the question raised was whether a Munsif had inherent powers under Section 151 of the Code to appoint a Commissioner to seize account books. This Court held that he had no such power. Raghubar Dayal, J., speaking for the court, observed:

“The inherent powers of the Court are in addition to the powers specifically conferred on the Court by the Code. They are complementary to those powers and therefore it must be held that the Court is free to exercise them for the purposes mentioned in Section 151 of the Code when the

exercise of these powers is not in any way in conflict with what has been expressly provided in the Code or against the intentions of the legislature. It is also well recognised that the inherent power is not to be exercised in a manner which will be contrary to or different from the procedure expressly provided in the Code.”

- (c) that, the Hon’ble Supreme Court, further, held that inherent power of the Court cannot override the express provisions of the law. There are specific provisions of the Code dealing with a particular topic and they expressly or by necessary implication exhaust the scope of the powers of the Court or the jurisdiction that may be exercised in relation to a matter, the inherent power of the Court cannot be invoked in order to cut across the powers conferred by the Code;
- (d) that the State Commission has the power to determine tariff and fix control period and also has the power to extend the control period. There is no restriction or fetter on the powers of the State Commission, either under the Electricity Act, 2003 or under the Conduct of Business Regulations, 2004 to pass such orders as it deems appropriate in the interest of justice and in the discharge of its functions under the Electricity Act, 2003;
- (e) that in addition to the inherent power under Regulations 80, 81 & 82 of the Conduct of Business Regulations, 2004, there is Regulation 85 which provides as under:

“Extension or abridgement of time prescribed

85. Subject to the provisions of the Acts, the time prescribed by these Regulations or by order of the Commission for doing any act may be extended (whether it has already expired or not) or abridged for sufficient reason by order of the Commission.”

- (f) that, even if it is assumed that there has been a re-opening of PPA, this Appellate Tribunal, in several cases i.e. Tarini Infrastructure Limited vs. Gujarat Urja Vikas Nigam Ltd. (Appeal No. 29 of 2011 dated 31.5.2012); Rithwik Energy

Systems Ltd. vs. Transmission Corporation of Andhra Pradesh (Appeal 90 of 2006 dated 28.9.2006); Junagadh Power Projects Private Limited vs. GUVNL (Appeal 132 of 2012 dated 2.12.2013); has upheld the power of the State Commission to re-open the PPAs for the benefit of incentivizing the generation of energy through renewable sources of energy;

- (g) that the impugned petition for extension of control period was filed not as an afterthought but stating the real difficulties in commissioning of the project. Further, the State Commission has rightly, by exercising the inherent power, extended the control period for 24 days for the solar power project of the Respondent No.2;
- (h) that the present case deals with the power of the State Commission to extend the period of its own tariff order in exercise of its powers under Section 62 of the Electricity Act, 2003 read with Regulations 80 and 85 of the Conduct of Business Regulations, 2004. No such question arose in AP Transco vs Sai Renewables and in Green Infra vs Jaipur Vidyut Vitran Limited cited by the Appellant. In the reported matters, there was a specific regulation which prohibited re-opening of tariff for projects that had been entered under an erstwhile regulations but, in the present case, there is no such prohibition against re-opening of the tariff for projects. In Green Infra case related to the issue on whether a generator can resile from its own undertaking that it will avail accelerated depreciation and thereby charge a lower tariff on the ground that such undertaking was given on the basis of a draft tariff order;
- (i) that the Respondent No.2 was striving to procure land and commission its' Project within the Control Period of the Tariff Order, 2010 despite all the hurdles faced by it and for this

reason the Respondent No.2 did not raise the issue of extension of control period before the State Commission before 13.1.2012. SSPL (predecessor to Respondent No.2) signed a PPA in the control period of Tariff Order, 2010 which provides higher tariff in view of the high capital cost. However, Respondent No.2 was prevented from commissioning its Project within the Control Period solely on account of the acts and omissions on part of the utilities of the Gujarat Government and factors beyond its control and as such, cannot be penalized for the delay by way of payment of lower tariff;

- (j) that the Respondent No.2 had committed its investments and ordered most of the equipment for its project well before the discussion paper was issued in November 2011. The Appellant had already recovered an amount of Rs.8,01,75,000/- from the power supply bills of Respondent no.2 towards liquidated damages, pursuant to Article 2.3 of the supplemental PPA and the Respondent No.2 reserves the right to contest the same. The Respondent No.2 has, on the basis the Tariff Order No. 2 of 2010, already spent the capital cost for its project and made substantial investments/ expenditures in the project during the Control Period of Tariff Order, 2010. The Respondent No.2 had placed orders for capital equipments like modules etc. in May, 2011 and had, in fact, committed expenditure of Rs. 174.28 Crores, which is approximately 78% of total Project cost of Rs. 224.04 Crores during the midst of the Control Period of Tariff Order, 2010 and well before the end of the Control Period. Respondent No.2 did not get the benefit of capital cost relevant for the next Control Period i.e. from 29.1.2012 to 31.3.2015;
- (k) that the delay in procurement of land is attributable to the State and is a valid ground for extension of the control period;

- (l) that this Appellate Tribunal, in Appeal No. 257 of 2013, in the case of Power Grid Corporation of India Ltd. vs. Central Electricity Regulatory Commission, as regards the interpretation of the words ‘factors beyond the reasonable control of the party’ as used in Article 8.1 of the PPA, has held:

“11. In our opinion, the present situation of non-availability of test bed for Short Circuit Test will fall under the second Category as it has been established beyond any doubt, that there was no imprudence on the part of the generating company or its supplier in executing the project and the delay of 8 months was due to factors beyond the control of Power Grid or its supplier. It is not necessary that the factors beyond the control of the generating or transmission company are only due to force majeure like natural calamity. The example given under the second category in the judgment of the Tribunal relied by the Central Commission is not exhaustive. If it is clearly established, beyond any doubt, that the delay in execution of the project is due to factors beyond the control of the company and there is no imprudence on the part of the company in executing the project, then the delay would be covered under the second category i.e. due to factors beyond the control of the company.”

- (m) that Respondent No. 2 is aggrieved by the acts of omission and commission of State Government, Respondent No.3, GPCL and GETCO;
- (n) that 36 other developers could not complete their projects within the control period of tariff order, 2010 and approached the State Commission for extension of control period on various grounds;
- (o) that the Respondent No.2 faced numerous hurdles in the execution of its’ Project including but not limited to delay due to increase in Jantri rates, flooding at the project site, non-availability of transmission system, delay in procuring land, etc. Despite all the hurdles faced by Respondent No. 2, 8.68 MW capacity of Respondent No.2’s Project was ready for evacuation

on 1.2.2012 (only 4 days from 28.1.2012, the closing date of the control period) and an additional 1.40 MW capacity was ready for evacuation on 21.2.2012 (only 24 days from closing date of the control period);

- (p) that the non-availability of evacuation facility by GETCO was the major reason for delay in commissioning of the Project after readiness, especially the 10.08 MW capacity, this delay of 4 days is attributable to GETCO. Failure of GETCO to fulfil its obligations under the Electricity Act, 2003 and the Solar Power Policy, 2009 of Government of Gujarat, cannot be attributed to the change in project site of the Respondent No.2. GETCO was informed of the change in project site on 19.4.2011, however, GETCO, after a lapse of almost 4 months, expressed its inability to erect the transmission line on time;
- (q) that the Respondent No.2, owing to the inability of GETCO to fulfil its own responsibilities, had to undertake the work of erection of 66 KV transmission line from the Project to the proposed Chitrod Sub-Station and completed the entire transmission line within the least possible time i.e. 4 months (by 28.1.2012) after obtaining the requisite approval for supply of materials and the contractor from GETCO, except for the railway crossing (for which GETCO was required to obtain permission from Railway Authorities). Despite all the hurdles, 8.68 MW capacity of the project of the Respondent No.2 was ready for evacuation on 1.2.2012 and an additional 1.40 MW capacity of the project was ready for evacuation on 21.2.2012, only 4 days and 24 days from closing date of the control period i.e. 28.1.2012. The aforesaid capacities were commissioned on 30.4.2012, with the temporary arrangements made by GETCO without erection of substation at Chitrod as per sanctioned scheme. The commissioning certificate, dated 9.7.2012, for the 10.08 capacity was issued on 17.5.2012 by Respondent No.3

and the balance 9.92 MW capacity out of 20 MW capacity of the Project was commissioned on 26.6.2012. GETCO was able to provide regular evacuation facility only in September, 2012 i.e. six months after completion of 10.08 MW and 3 months after commissioning of balance 9.92 MW;

- (r) that Article 2.3 of the supplemental PPA, provides only about the liability of payment of liquidated damages, even if, the evacuation facility is not available and it is not at all relevant to subject the extension of control period granted by way of the Order, dated 5.4.2014, of the State Commission;
- (s) that GETCO, three months after the Supplementary PPA, refused to set up the transmission line and, further, when the Appellant unreasonable delayed in getting the clearance for crossing the railway line;
- (t) that this Appellate Tribunal, in its judgment, dated 2.1.2013, in Appeal Nos.96 & 130 of 2012, held that the State Commission has been vested with inherent powers and such powers can be exercised by the State Commission to extend the control period of a tariff order when any project developer faces problems, due to reasons beyond its control, in completing its project in the said control period in the interest of justice, after examining each case on its merits;
- (u) that the State Commission after examining the circumstances of the matter came to the conclusion in the impugned order that 10.08 MW capacity of the project could not be commissioned within the control period for the reasons beyond the control of the project developer (Respondent No.2), and the control period needs to be extended for this capacity. The State Commission extended the control period for the said capacity up to 30.4.2016, vide impugned order, dated 5.4.2014, in

exercise of its inherent power to meet the ends of justice in accordance with law.

10. **OUR CONSIDERATION AND CONCLUSION:**

- 10.1 Having described the facts of the matter, rival contentions of the parties and the relevant part of the impugned order, we, now, proceed towards our consideration and conclusion on the sole issue involved in this appeal.
- 10.2 The Respondent No.2/petitioner, a solar energy generator, filed a petition on 20.1.2012, being Petition No. 1188 of 2012 (impugned petition), before the State Commission seeking extension of control period as determined by the State Commission in its Tariff Order, dated 29.1.2010. The impugned petition was filed at the stage when other 39 petitions, filed by the other solar power developers, were pending for consideration seeking extension of control period beyond 28.1.2012, were almost at concluding stage. The State Commission, vide its order, dated 27.1.2012, had rejected the prayer in those 39 petitions for general extension of control period during the exercise of inherent powers and directed each solar power developer to come in case of individual grievances through a petition under Section 86 (1) (f) of the Electricity Act, 2003.
- 10.3 The impugned petition filed by the Respondent No.2 was also dismissed; vide State Commission's order, dated 22.2.2012, on the same grounds as mentioned in the State Commission's order, dated 27.1.2012. The Respondent No.2, a solar energy generating company, being aggrieved by the State Commission's order, dated 22.2.2012, filed an Appeal, being Appeal No. 130 of 2012 before this Appellate Tribunal and this Appellate Tribunal, vide its judgment and order, dated 2.1.2013, directed the State Commission to consider each individual case separately by exercising its inherent power.

10.4 The Appellant feeling aggrieved against the judgment, dated 2.1.2013, of this Appellate Tribunal, had filed a Civil Appeal, being Civil Appeal No. 2542 of 2013 before the Hon'ble Supreme Court under Section 125 of the Electricity Act, 2003. The Hon'ble Supreme Court, while dismissing the Appeal, vide its order, dated 1.4.2013, did not interfere with the order passed by this Appellate Tribunal and dismissed the Civil Appeal making it clear that the State Commission shall decide the whole issue without being influenced by the observations made by the Appellate Tribunal for Electricity in accordance with law. After the order of the Hon'ble Supreme Court, dated 1.4.2013, the State Commission reheard the impugned petition, being petition no. 1188 of 2012, and vide impugned order, dated 5.4.2014, extended the control period for the solar project of the Appellant up to 30.4.2012 for its 10.08 MW capacity solar project directing the parties to consider the same and act accordingly. The impugned order has been passed by the State Commission in exercise of its inherent powers as provided under Regulations 80, 81 & 82 of the Conduct of Business Regulations, 2004 in addition to Regulation 85 dealing with the extension or abridgment of time prescribed, which is analogues to Section 151 of CPC, 1908.

10.5 The Hon'ble Supreme Court, while dismissing the aforesaid Civil Appeal No. 2542 of 2013, preferred not to interfere with the judgment and order, dated 2.1.2013, of this Appellate Tribunal but, directed the State Commission to decide the whole issue ignoring the observations made by this Appellate Tribunal in its judgment and order. Thus, the Hon'ble Supreme Court directed the State Commission to ignore or bypass all the observations made by this Appellate Tribunal in its judgment, dated 2.1.2013, in Appeal No. 130 of 2012 and, at the same time, upheld the order of remand made by this Appellate Tribunal where this Appellate Tribunal remanded the matter back to the State Commission for rehearing on merits of each individual case for decision according to law.

- 10.6 We may make it clear here that the impugned petition, being Petition No. 1188 of 2012, filed by the Respondent No.2 was dismissed by the State Commission for the first time, vide its order, dated 22.2.2012, on the similar grounds, on which, the State Commission's another order, dated 27.1.2012, was passed in Case No. 1126 of 2011. Thus, the State Commission, vide its order, dated 27.1.2012, had rejected the prayer of all the petitioners in the said petitions for general extension of control period by exercising its inherent powers and directed each solar power developer to file petition for individual grievances under Section 86(1)(f) of the Electricity Act, 2003. Thus, it is evident from the record that the State Commission's order, dated 27.1.2012, had never been challenged before this Appellate Tribunal or before the Hon'ble Supreme Court. Thus, the order, dated 27.1.2012, regarding other 39 petitions, had become final which means that each petitioner was required to file separate petition for individual grievances under Section 86(1)(f) of the Electricity Act, 2003. The State Commission, vide impugned order, dated 5.4.2014, as mentioned above, has allowed the impugned petition, being Petition No. 1188 of 2012, for extension of control period as specified by the State Commission in its tariff order, dated 29.1.2010, passed in Order No. 2 of 2010. Thus, so far as the Respondent No.2 is concerned, the control period upto 30.4.2012 for 10.08 MW capacity solar project of the Appellant was extended.
- 10.7 The main contention of the learned counsel for the Appellant is that the Respondent No.2/petitioner was required to establish Force Majeure as per Article 8 of the PPA for seeking extension of the control period and the said petition seeking extension of control period was filed by the Respondent No.2 with an intention to avoid the lower tariff of the next control period, even though, the prevailing project cost was much lower. The Respondent No.2 had taken the chance of not establishing the project within the period allowed under the Tariff Order, dated 29.1.2010, and waited for

reduction in the price of solar power project equipments and, as soon as the Respondent No.2 came to know that said control period tariff will be lower than the tariff decided in the earlier tariff order, dated 29.1.2010, the impugned petition was filed by the Respondent No.2. Further contention is that since the Respondent No.2 was not able to achieve SCOD in time and voluntarily and without any protest paid liquidated damages on 14.7.2011 to the Appellant without raising the point of alleged delay in execution of the project for the reasons beyond the control of the Respondent No.2.

- 10.8 Further contention of the Appellant is that the change of project site or change in Jantri rate could not be a ground for extension of the control period as the Respondent No.2 had signed the PPA with the Appellant on 30.4.2010 whereas, the increase Jantri rate was on 1.4.2011, and after a revision in Jantri rate, registration of transfer of land was done from 11.5.2011 pending the notification of the new Jantri rates for conversion of agriculture land for industrial use. The extension of control period cannot be justified on the ground of Force Majeure because other developers have duly established the power project within the same control period.
- 10.9 Further contention of the Appellant is that the State Commission has wrongly passed the impugned order by exercising its inherent powers to vary the control period for establishing the Solar Generating Units, notwithstanding Clause 5.2 of the PPA and Supplemental PPA dealing with Force Majeure, etc. Further, the approach of the State Commission that it has inherent power to extend the control period against the provisions in the PPA is quite invalid, improper and illegal, as held by the Hon'ble Supreme Court in its judgment, dated 2.2.2016 in Civil Appeal No. 1220 of 2015, providing that if the project is established after the control period, the Project Developer will be entitled only to the lower tariff as provided in Clause 5.2 of the PPA.

10.10 After considering the merits and substances in the aforesaid contentions of the Appellant and going through the aforementioned facts and circumstances including the impugned order, we do not find any merit or substance in the contentions of the Appellant. The Hon'ble Supreme Court, while not interfering with the judgment of this Appellate Tribunal and while dismissing the Civil Appeal filed against the judgment of this Appellate Tribunal, clearly directed the State Commission to decide the matter according to law without being influenced by the observations made by this Appellate Tribunal. Thereafter, the State Commission, after going through the merit and contentions of the parties and dealing with the impugned petition, which was filed under Regulation 80 of the Conduct of Business Regulations, 2004 read with Section 86 of the Electricity Act, 2003, has passed the impugned order and extended the control period as stated above.

10.11 We have gone through the Conduct of Business Regulations, 2004 and the provisions provided under Section 86 of the Electricity Act, 2003 and find that the learned State Commission has rightly passed the impugned order under its inherent powers. We are unable to accept the contention of the Appellant that the State Commission cannot exercise inherent power for the purpose of extending the control period. We may clarify that the control period of the tariff order is fixed by the State Commission itself and, hence, the State Commission has inherent powers to extend the control period of the tariff order. There is no restriction or fetter on the powers of the State Commission in the Electricity Act, 2003 or under the Conduct of Business Regulations, 2004 to pass such order as the State Commission may deem fit and appropriate in the interest of justice and discharge its functions under the Electricity Act, 2003. The Conduct of Business Regulations, 2004 provide inherent powers to the State Commission to pass any order it deem fit and proper to meet the ends of justice or to prevent abuse of the process of the court. The State Commission has liberty to exercise its inherent

powers if the exercise of inherent power is not in any way in conflict with what has been expressly provided in the Civil Procedure Code or against the intentions of the legislature which means that the inherent power is not to be exercised in a manner which will be contrary to or different from the procedure expressly provided in the Code.

- 10.12 Regulation 85 of the Conduct of Business Regulations, 2004 dealing with Extension or abridgement of time prescribed fairly provide that subject to the provisions of the Acts, the time prescribed by these Regulations or by order of the Commission for doing any act may be extended (whether it has already expired or not) or abridged for sufficient reason by order of the Commission.
- 10.13 The facts of the matter make it abundantly clear that the impugned petition seeking extension of control period was filed by the Respondent No.2 in a good faith without any malafide and not afterthought and the real difficulties faced by the Respondent No.2 in commissioning of the project were clearly stated in the impugned petition. The State Commission, in the impugned order, has rightly by exercising the inherent power, extended the control period of 24 days for the solar power project of the Respondent No.2. We have carefully gone through the law laid down by this Appellate Tribunal in the matter of AP Transco vs. Sai Renewables and in Green Infra vs. Jaipur Vidyut Vitran Limited cited by the Appellant but the same are not applicable in the instant matter because in the reported matters, there was a specific regulation prohibiting reopening of the tariff in the project that had been entered under an erstwhile regulations but, in the present case, there is no such prohibition against reopening of the tariff.
- 10.14 We observe that the Respondent No.2/petitioner was striving to procure land and commission its' project in the Control Period provided by the Tariff Order, 2010 despite all hurdles faced by it and

for this reason the Respondent No.2 did not raise the issue of extension of control period before the State Commission before 13.1.2012. However, the Respondent No.2 was prevented from commissioning of the said project during the control period solely on account of the aforesaid reasons which are not attributable and beyond the control of the Respondent No.2 and for the same Respondent No.2 cannot be penalized for the delay by way of payment of lower tariff. We, further, find that the Respondent No.2 had committed its investments and ordered most of the equipments for its project well before the issuance of discussion paper in November, 2011. The Appellant had already recovered substantial part of the amount from the power supply bills from the Respondent No.2 towards liquidated damages prescribed in Article 2.3 of the Supplemental PPA. Further, the Respondent No.2, on the basis of the tariff order No. 2 of 2010 had already spent the capital cost for its project and made substantial investments/expenditures in the project during the control period of the Tariff Order, 2010. Apart from it, the Respondent No.2 had placed orders for capital equipments, etc. in May, 2011 and had, in fact, committed expenditure to the extent of approximately 78% of total project cost during the midst of the control period of Tariff Order, 2010 and well before the end of the control period. The Respondent No.2 also did not get the benefit of capital cost relevant for the next control period.

10.15 According to the Respondent No.2, 36 other developers could not complete their projects within the control period of the Tariff Order, 2010 and also approached the State Commission for extension of control period on various grounds. We find that despite all the hurdles faced by the Respondent No.2, 8.68 MW capacity of the Respondent No.2's project was ready for evacuation on 1.2.2012 only after 4 days from the closing date of the control period i.e. 28.1.2012 and an additional 1.40 MW capacity was ready for evacuation on 21.2.2012 only after 24 days from closing of the control period. Thus, the learned State Commission, in the

impugned order, only extended the period of 24 days in the control period considering the grounds for the said delay in their proper perspective after adopting a correct and legal approach.

10.16 We may observe here that the non-availability of evacuation facility by GETCO was the major reason for delay of 24 days in commissioning of the project after readiness, especially the 10.08 MW capacity which is attributable to GETCO. Failure of GETCO to fulfil its obligations under the Electricity Act, 2003 and Solar Power Policy, 2009 of the Government of Gujarat cannot be attributed to the change in project site of the Respondent No.2. GETCO was informed of the change in project site on 19.4.2011, however, GETCO, after a lapse of almost 4 months, expressed its inability to erect the transmission line on time. At that stage, the Respondent No.2 had to undertake the work of erection of 66 KV transmission line from the project to the proposed Chitrod Sub-Station and completed the entire transmission line within the least possible time i.e. 4 months by 28.1.2012 after obtaining the requisite approval for supply of materials and the contractor from GETCO, except for the railway crossing for which GETCO was required to obtain permission from Railway Authorities. We may further mention here that the aforesaid capacities were commission on 30.4.2012, with the temporary arrangements made by GETCO without erection of substation at Chitrod as per sanctioned scheme. GETCO was able to provide regular evacuation facility only in September, 2012 i.e. six months after completion of 10.08 MW and 3 months after commissioning of balance 9.92 MW.

10.17 This Appellate Tribunal, in its judgment, dated 2.1.2013, in Appeal Nos. 96 & 130 of 2012, held that the State Commission has been vested with inherent powers to meet the end of justice and to prevent abuse of the Code and such powers can be exercised by the State Commission to extend the control period of a tariff order when any project developer, like the Respondent No.2 herein, faces

problem, due to reasons beyond its control, in completing its project in the said control period in the interest of justice after examining each case on its merits.

10.18 **In view of the above discussions, while approving the views taken by the State Commission in the impugned order, this issue is decided against the Appellant.** We clearly hold and observe that the State Commission is legally justified in extending the control period by exercising its inherent powers and the present Appeal merits dismissal.

ORDER

11. The instant Appeal, being Appeal No. 170 of 2014, is hereby dismissed as being without merits and the impugned order, dated 5.4.2014, passed by the Gujarat Electricity Regulatory Commission, in Petition No. 1188 of 2012, is hereby affirmed. There shall be no order as to costs.

PRONOUNCED IN THE OPEN COURT ON THIS 11TH DAY OF MAY, 2016.

**(T. Munikrishnaiah)
Technical Member**

**(Justice Surendra Kumar)
Judicial Member**

√ REPORTABLE/NON-REPORTABLE

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