IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI

APPEAL NO 268 OF 2015
IA No. 433 of 2015

Dated : 3rd May, 2018

Present: HON'BLE MR. JUSTICE N.K. PATIL, JUDICIAL MEMBER
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER

IN THE MATTER OF:

Surat Municipal Corporation
Main Office Building
Muglisara
Surata - 395003 **….Appellant**

VERSUS

1. Gujarat Electricity Regulatory Commission
   6th Floor, GIFT ONE
   Road 5C, Zone 5, GIFT CITY
   Gandhinagar - 382355

2. Torrent Power Ltd.
   Electricity House
   Lal Darwaja
   Ahmedabad – 380 001 **……Respondents**

Counsel for the Appellant(s) : Mr. I.J. Desai
Mr. Ankit Swarup
Ms. Tanya Swarup
Mr. Jinesh Patel
Mr. Monisha Handa
Mr. Mohit D. Ram

Counsel for the Respondent(s): Ms. Suparna Srivastava
Ms. Sanjana Dua for R-1

Ms. Deepa Chawan
Mr. Hardik Luthra
Mr. Sakie Jakharia
Mr. Nitin Ojha
Mr. Chetan Bundela
Mr. L. Pal
Mr. H.S. Jaggi
Mr. Neves Kumar
Mr. Alok Shankar Shukla
Mr. Naveen Kr. Raheja for R-2

J U D G M E N T

PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER

1. The present appeal has been filed by Surat Municipal Corporation (**'the Appellant'**) under Section 111(1) read with section 111(6) of the Electricity Act, 2003 against the Order dated 29/5/2015 in Petition No. 1418 of 2014 passed by the Hon'ble Gujarat Electricity Regulatory Commission (GERC, **'State Commission'**).

   The Appellant herein is a '**Corporation**' within the meaning of Section 2(10) of the Bombay Municipal Corporations Act, 1949 '(**BPMC Act' for short**).

2. Respondent No. 1, is the "Appropriate Commission" within the meaning section 2(4) of the Act. (**hereinafter "GERC" for short**).

   The Respondent No. 2, Torrent Power Ltd. (TPL), is a '**Distribution Licensee**' within the meaning of section 2(17) of the Act, and in its area of supply, within the meaning of section 2(3) of the Act, includes the area of SMC (hereinafter called '**TPL**' for short).

3. **FACTS OF THE CASE**

3.1 During Financial Year 2013-14, Appellant Surat Municipal Corporation commissioned one SPV plant of the aggregate capacity 750 KWP on 26/27-03-2014. As per Respondent No. 1's Order No. 1 dated 27.01.2012 read with amended Order dated 11.07.2014, for Solar Power procured by distribution licensees including 2nd Respondent Torrent Power Ltd, the 1st Respondent GERC has determined levelised generic flat tariff for 25 years for projects not availing depreciation like that of the Appellant at Rs. 12.18 per kWh. As per order, the applicable tariff gets fixed at the time of commissioning of the plants.

3.2 As per Clause 11 of the Notification No. 2 dated 07.08.2013 of the GERC for procurement of Solar Power, the distribution licensee (TPL) is required to enter into PPA with the supplier in accordance with the Model PPA prescribed by GERC. It specifically states that approval of the GERC shall be sought in the event of any deviation from the Model PPA.

3.3 TPL vide its letter dated 07.08.2013 conveyed its consent for buying Solar Power from SMC at the GERC levelised generic tariff prevailing at the time of commissioning of the project.

3.4 As stipulated in the said order, on 03.03.2014, 18.03.2014 and 26.03.2014, the Appellant repeatedly requested Respondent No. 2 TPL to sign PPA before commissioning of the project. However, 2nd Respondent did not send any reply to the said letters.

3.5 In the meantime by a letter dated 31.12.2013, Appellant received sanction for installation of Grid connected rooftop SPV plants of total aggregate capacity of 750 KWP under the "off Grid and Decentralized Solar Applications" Scheme of MNRE. By Such sanction, the Appellant became entitled to receive 30% Central

Financial Assistance (ÇFA' for short) from the MNRE as per the said guidelines.

3.6 Referring to the said sanction letter dated 31.12.2013, on 27.03.2014, by a letter, 2nd Respondent backtracked its commitment to purchase Solar Power at Rs. 12.18 per KWh and instead sent a draft of PPA along with the said letter which contained variation in Article 5 with regard to rates and charges from those in model PPA. The Appellant had no alternative but to sign such the PPA in duress.

3.7 Thereafter, without making any payment for the Solar Power, it started purchasing from the Appellant and without any existing cause of action, Respondent No. 2, approached 1st Respondent GERC on 29th April, 2014 with Petition No. 1418 of 2014 for determination of tariff as per the submissions made therein, namely for factoring Central Financial Assistance receivable by the Appellant under the said scheme resulting into reduction in tariff from already determined rate at Rs. 12.18 per kwh by GERC vide its Order dated 27.01.2012 No. 1 of 2012.

3.8 Respondent No. 1 allowed the said petition and decided to reduce rate at 8.526 per kwh from Rs. 12.18 per kwh in its daily order dated 13.06.2014 and Rs. 9.44 per kwh from Rs. 12.18 per kwh in its final order dated 29.05.2015. Respondent No. 2, however, in violation of GERC's Order dated 13.06.2014, paid the price at the rate of Rs. 7.574 per kwh instead of at the rate of Rs. 8.526 per kwh till 29.05.2015. As a result, the Appellant is losing Rs. 6,597/- per day and the aggregate loss will reach to Rs. 6,01,98,947/- over 25 years.

3.9 After hearing the Appellant and the Respondent, the State Commission has given the following reasons & Grounds raised of its Order dated 29/5/2015:

"9.11 Since, the Commission undertakes tariff determination within the ambit of the Regulations, we decide that the CFA granted by MNRE to SMC has to be considered by the Commission in determination of the Solar Project of the respondent".

"9.12 The project developer is assured guaranteed return of 14% RoE and also repayment of loan, interest on working capital, O & M charges etc. on normative parameters basis. The Capital Finance Assistance was utilized by the project developer to set up the plant/creating the assets. Hence, the reduction of asset/project cost is required to be factored in the tariff so that the benefit of the same is passed on to the distribution licensee and ultimately to the consumers. Hence, the claim of the petitioner to factor Capital Finance Assistance of Rs. 2.25 Crores received by the Respondent seems to be valid and the same is required to be given effect in the normative parameters of the capital cost considered by the Commission for Solar Rooftop Power Project"

3.10 Aggrieved by the said order dated 29/5/2015, the Appellant has filed the present appeal.

4. ***QUESTIONS OF LAW***

A. Whether the State Commission was right in law in entertaining the impugned petition of the Respondent claiming to be under section 86(1)(b) read with section 86(1)(e) of the Act when the provisions contained therein do not give any such power under the Act?

B. Whether the State Commission was right in law when the project specific tariff resulting from the impugned order in the case of only TPL tentamounting to redetermination of tariff, was not contemplated in the relevant regulations made by the State Commission itself relating to determination of levellised generic tariff which are applicable in respect of all such Solar Power producers like the Appellant overlooking

the ratio of the decision of this Hon'ble Tribunal in Appeal No. 279 of 2013 in respect of petition No. 1320 of 2013?

C. After having stated in Para 8 of the order No. 2 of 2010 dated 29/1/2010 read with amended order dated 31/8/2010 that "as envisaged in the Solar Mission the distribution utility will pay the tariff determined by the State Electricity Regulatory Commission for the metered electricity generated from such applications (whether consumed by the grid connected owner of the (rooftop) / ground mounted installation or fed into the grid, the State Commission was right in law to deviate from its own regulation while disposing of the impugned petition of the TPL?

D. Whether the State Commission was right in law in not appreciating the Solar Mission's purpose of the said Central Financial Assistance which is for "promoting such innovative applications of Solar energy and would structure a non-distorting framework to support entrepreneurship upscaling and innovation" and not for acquiring assets required for setting up such Solar Power project, while concluding that CFA granted by MNRE to SMC has to be considered by the Commission in determination of the Solar project of the respondent.

E. Whether the GERC is right in law when while saying in Para 9.12 of the impugned order that the project developer is assured return of 14.1 RoE, in not appreciating the disastrous and retrograde consequence of its decision that by reducing the capital cost of the project as has been done in Para 9.19 of the impugned order, the amount of RoE also shall be reduced resulting into total loss of Rs. 6,01,98,947/- (Rs. Six crores one lakh ninety eight thousand nine hundred forty seven only) over long range period of 25 years to the appellant?

F. Whether the State Commission is right in law in believing the implied contention of the TPL that it was not aware of purpose, nature and character of the subsidy (CFA) receivable by such Solar power producer under guidelines issued by MNRE under the Solar Mission and that only after it shared information about receipt of in-principle sanction *(without actual receipt)* in August, 2013 and final sanction on

31/12/2013 *(again without actual receipt)* by appellant, the TPL thought it fit to approach the State Commission with the impugned petition as if the State Commission had forgotten to include such stipulation in its order No. 1 of 2012 dated 27/1/2012 and as if the State Commission also was not aware of the said guidelines while framing the tariff vide order dated 27/1/2012?

G. When in such CFA, the purpose, nature and character is to be seen, whether State Commission is right in law in showing ignorance about the settled ratio in this regard in a decision by the Apex Court reported in AIR 1994-SC -2727?

H. In the fact and circumstances of this case when CFA was received after the commissioning of the project, whether the State Commission was right in law in overlooking and / or not appreciating the ratio of the decision of the Calcutta High Court reported (1991) 188 ITR 16 Cal.

I. Whether the State Commission is right in law in overlooking the ratio of the decision of this Hon'ble Tribunal in appeal No. 279 of 2013 in petition No. 1320 of 2013 rendered on 22/8/2014 which is preceding the date of the impugned order in the present appeal in respect of redetermination of Solar Power tariff.

5. RELIEFS SOUGHT.

In view of the facts mentioned above, the Appellant prays for the following reliefs:

This Hon'ble tribunal may be pleased to:-

(A) Allow the appeal and set aside the order dated 29/05/2015 passed by the GERC to the extent challenged in the present appeal with a direction to TPL (Respondent No. 2 herein) to make payment to the SMC at the rate of Rs. 12.18 per unit for the solar power purchased by it from 26-03-2014 to the date on which payment is made as per order of the Tribunal in the present Appeal with interest at the rate of 15% p.a. on the differential amount.

(B) Pending hearing and final disposal of the present appeal, stay the operation, execution and implementation of the impugned order passed by the GERC on 29/5/2015.

(C) Pass such other Order(s) as this Hon'ble Tribunal may deem just and proper in the interest of justice.

6. **The gist of written submissions made by Mr. Ankit Swarup, the learned counsel for the Appellant, are as under:-**

6.1 Generic tariff determined on normative parameters is not permissible to be revisited on the basis of actual cost incurred in setting up the project.

We rely on the decision dated 22nd August, 2014 of this Tribunal in Appeal No. 279 of 2013. Paras 87, 88, and 89 on page 66 of the order, Para 114 on pages 77/78 of the order and Para 177(2) and Para 177(3) (a to ii) on pages 189 to 192 are sought to be referred to.

6.2 It is not permissible to fix project specific tariff when already generic tariff has been determined and the normative tariff determined by the State Commission is binding on all Solar Power developers and also to Distribution Licensees.

We rely on the decision of this Hon'ble Tribunal in Appeal No. 75 of 2012. Para 3.5 of the order on page 52 and Para 18 (X) on page 83 are sought to be referred to.

6.3 Whether or not Central Financial Assistance (CFA) receivable could be factored in the normative formula or not, depends on the character and nature of such Assistance. Linkage of specified percentage with the Bench mark cost or actual cost whichever is lower in the scheme is for quantifying the amount of CFA. In this case, provisions of the scheme for CFA is as an incentive to encourage entrepreneurs to set up Solar Power projects in order to

augment Solar power in the electricity sector with a view to achieve target fixed by Govt. of India and not for acquiring assets required for setting up such projects.

We rely upon Apex Court decision reported in 1994 (Supp-3) SCC 535 on similar/identical facts and circumstances. Para 13 on page 6 and 7 of the said decision may be perused.

6.4 Presuming for the time being without admitting that such CFA could be factored, it could be factored only if it would have been received and utilized before completing and commissioning of the project.

We rely on Calcutta HC decision reported in (1991) 188 ITR 16 Cal. Para 4 on page 2 of the said decision may be perused.

6.5 Without prejudice to what has been stated hereinabove and presuming for the time being without admitting that Central Financial Assistance receivable under the above said programme could be factored in the formula so as to reduce the determined rate under law, even otherwise, the appeal deserves to be allowed on the following grounds:-

Cause of action which is a pre-requisite for the admissibility/maintainability is absent in this case. Not a single penny was received much less utilized on the date on which (i.e. 30/04/2014) impugned Petition No. 1418 of 2014 was filed by Respondent No. 2. We rely on Apex Court decision in case reported in (2013) 5 SCC 455. Para 9 on page 5 of the decision may be perused.

We also rely on another Apex Court decision reported in 2017 JX (SC) 341 – Para 8 on page 2 of the decision may be perused.

6.6 While passing the order, the 1st Respondent has proceeded on erroneous factual basis in as much as on the date on which impugned petition was filed not a single penny of CFA was

received. Therefore, the question of CFA being used for setting up the project did not arise at all.

We rely on Apex Court decision reported in 2010(2) SCC 114. Para 1 therein may be perused.

We also rely on Apex Court decision reported in (2001) 5 SCC 289. Para 12 therein on page 4 of the decision may be perused.

6.7 The PPA dated 29.03.2014 which contained Article 5 with deviation from the standard PPA and for which 1st Respondent – GERC gave so much credence as evident from Para 9.5 of the order is void ab-initio under section 23 of the Contract Act 1872 because provisions contained therein are not only forbidden by law but is of such a nature that if permitted, it would defeat the provisions of GERC Order No. 1 of 2012 dated 27.01.2012, GERC notification No. 3 of 2010 dated 17.04.2010 and GERC Notification No. 2 of 2013 dated 7.8.2013. Also the said PPA is void under section 10, 14, 15 & 16 of the Indian Contract Act, 1872. We rely on a decision dated 26.02.2016 of this Hon'ble Tribunal in Appeal No. 210 of 2014 – Paras 11.16, 11.17 and 11.18 therein may be perused.

6.8 Though in Para 9.11 of the Impugned Order, GERC has said that the Commission undertakes tariff determination within the ambit of the regulations, it has not only travelled beyond the ambit of its own order No. 1 of 2012 dated 27.01.2012 and other regulations relating to 'RPO' by obligated entity but also ignored the provisions contained in Sections 61(h) and 61(i) of the Electricity Act, 2003. Para 9.11 of the order on page 75 may be perused.

6.9 For determination of tariff there is only one provision i.e., Section 62 in the Electricity Act, 2003. Section 61(h) and Section 61(i) may be also perused.

We rely on paras 71, 72 and 73 of the decision of this Hon'ble Tribunal in Appeal No. 279 of 2013. Paras 71 to 73 on pages 144 and 145 therein may be perused.

6.10 In respect of subsequent solar project commissioned by the Appellant SMC on 21.03.2015, during the same control period, without any support of any provision of Electricity Act, 2003 nor of regulations made there under nor any order of GERC while becoming law unto itself, Respondent No. 2 started paying at the rate of Rs. 7.049 per kWh instead of at the rate of Rs. 11.33 per kWh mandated in GERC Order No. 1 of 2012. In respect of this project, SMC suffers loss of Rs. 7,939 per day which will reach Rs. 7,24,39,785/- over 25 years.

6.11 Tariff at Rs. 9.44 kWh has been determined, despite communication from MNRE (which had sanctioned CFA to Appellant) dated 22.05.2014. (See para 9.10 of Impugned Order)

The said communication had made it clear that CFA was not to be factored in determination of tariff. It was also made clear that CFA was a motivation by MNRE to Appellant herein. Therefore, the tariff determined on basis of CFA, is contrary to the stand of MNRE (which has provided CFA to Appellant herein).

6.12 Impugned order relies on a factually erroneous assumption that CFA was utilized by Appellant at the time of setting up of the present Solar Power Plant Project.

Whereas, the plant had commenced its operation from 26/27 March, 2014 and CFA was received by Appellant in installments in July, 2014 and March, 2017. Impugned order has determined tariff at Rs. 9.44 kWh by assuming CFA received to be Rs. 2.25 Cr. whereas, only Rs. 2.05 Cr. has been received in total.

Thus, even if the CFA is to be a factored in determination of tariff, the tariff needs to be computed with correct CFA amount.

6.13 The Respondent - Torrent Power is a Public Limited Company. Whereas, Appellant – Surat Municipal Corporation is a local civic body under Bombay Provincial Municipal Act, 1949. SMC is responsible for providing basic amenities to the residents of Surat under Section 63 of Bombay Provincial Municipal Corporations Act, 1949. CFA has been used by SMC in the interest of consumers. SMC operates with zero profit objective.

In fact, SMC has been established for the following objective:-

To make Surat a dynamic, vibrant, beautiful, self-reliant and sustainable city with all basic amenities, to provide a better quality of life.

Whereas, the Respondent – Torrent Power has not yet demonstrated as to how the reduced tariff of Rs.9.44 kWh has benefited the end consumers i.e. residents of Surat.

6.14 Since the impugned clause of PPA i.e. Article 5.2 requires a fresh determination of tariff after considering capital subsidy, by State Commission, it was a deviation from generic tariff prescribed under Order No.1 of 2012.

This Hon'ble Tribunal has held such deviations to be valid only after approval from respective appropriate commission. (Appeal No. 210 of 2014 – Indian Wind Power Association v. MERC & Anr. dated 26.02.2016)

Even Order No.1 of 2012 under clause 4.10 requires the Respondent herein to obtain approval of PPA from State Commission.

Also clause 11 of GERC Notification No. 2 of 2013 (dated 07.08.2013) requires Respondent herein to obtain approval of present PPA from State Commission.

However, the impugned tariff clause was considered but not approved by State Commission. This is admitted position between the parties.

6.15 Order No.1 of 2012 requires the tariff as obtaining on the date of commercial operation date to be applicable, under clause 2.5.3. The operation date of the present project is 26/27 March, 2014 and the tariff applicable on that date was Rs. 11.57/ kWh and which was revised vide suo moto order to Rs. 12.18/ kWh. The above is an admitted position between the parties. Whereas, PPA and Article 5.2 was executed subsequently on 29th March, 2014. On the basis of the above, vide impugned order, tariff applicable has been reduced to be Rs. 9.44 kWh for period of 25 years.

7. **The gist of written submissions made by Ms. Suparna Srivastava, the learned counsel for the Respondent No. 1, are as under:-**

7.1 The Appellant had proposed to generate electricity through rooftop solar power generation projects with installed capacity of 750 KWp within the licensed area of Respondent No.2. Accordingly, it approached Respondent No.2 for supply/purchase of the said power on long-term basis.

7.2 The Appellant's generation projects had the following two features:

(i) the Appellant had received a sanction of Rs.2.25 Crores as capital subsidy through Central Financial Assistance (CFA) from MNRE under the scheme of off-grid and decentralized solar applications;

(ii) being a Municipal Corporation, the Appellant was exempted from the applicability of income tax and as such, the accelerated depreciation benefits were not applicable to it.

7.3 The Appellant commissioned its project on 27.3.2014 and began supplying electricity to Respondent No.2 from that day. Soon thereafter, on 29.3.2014, the Appellant and Respondent No.2 executed a Power Purchase Agreement (PPA) for sale of power generated from the generation projects of the Appellant. The tariff agreed between the parties was recorded in Article 5 of the PPA.

7.4 Disputes arose between the Appellant and Respondent No.2 after signing of the PPA and commencement of supply of electricity from the solar rooftop power projects on the tariff payable by Respondent No.2. While Respondent No.2 contended that the capital finance assistance being received by the Appellant from MNRE for the project set up by it was required to be factored in the tariff determined by the Commission, the Appellant opposed the same. Further, Respondent No.2 also disputed that the Appellant was not eligible for the tariff determined by the Commission for projects which were availing the benefit of accelerated depreciation.

7.5 Based on the submission made by the parties, the Commission framed the following issues for its consideration:

(i) Whether the capital finance assistance received by the Appellant from MNRE was to be factored in the tariff determined by the Commission in Order No.1 of 2012 dated 27.01.2012?

(ii) Whether Respondent No.2 was eligible for tariff without accelerated depreciation as claimed by the Appellant?

7.6 In its Order No. 1 of 2012 dated 27.01.2012, the Commission had taken into account various items as a part of the project cost and

had derived the capital cost of the solar photovoltaic projects. The Commission had thus determined the capital cost of the KW scale solar PV projects as Rs.1.2 lakhs/ KW or Rs.12 Crore/ MW.

7.7 From the letter dated 11.8.2010 of MNRE to Gujarat Energy Development Agency enclosing the in-principle sanction letter of MNRE, it was clear that the capital finance assistance which was provided by MNRE for installation of grid connected roof-top SPV plant was sanctioned as a grant by the Government to set up the 750 KWp solar PV rooftop power projects by the Appellant under the "Off grid and decentralized Solar Applications" of MNRE.

Thus, the said sanction letter was silent about the capital financial assistance to be factored against the capital cost considered by the Commission in the project.

7.8 In a subsequent communication dated 22.5.2014, MNRE had stated that the capital financial assistance given by it was not to be considered as subsidy or incentive and was not to prevent the Appellant from availing tariff as decided by the Commission in FY 2013-14. However, tariff determination by the Commission was governed by the Act and regulations framed by the Commission. As such, the communication dated 22.5.2014 of MNRE was without backing of any statute.

7.9 Accordingly, the Commission held that,

"9.11 Since, the Commission undertakes tariff determination within the ambit of the regulations, we decide that the CFA granted by MNRE to SMC has to be considered by the Commission in determination of the Solar Project of the respondent.

9.12 The project developer is assured guaranteed return of 14% RoE and also repayment of loan, interest on working capital, O & M charges etc. on normative parameter basis. The Capital Finance Assistance was utilized by the project developer to set

up the plant/creating the assets. Hence, the reduction of asset/project cost is required to be factored in the tariff so that the benefit of the same is passed on to the distribution licensee and ultimately to the consumers. Hence, the claim of the petitioner to factor Capital Finance Assistance of Rs. 2.25 Crore received by the Respondent seems to be valid and the same is required to be given effect in the normative parameters of the capital cost considered by the Commission for Solar Rooftop Power Project."

7.10 With regard to the plea of tariff with accelerated depreciation, it was an admitted position that the Appellant was exempted from the applicability of income tax. Therefore, the benefit of accelerated depreciation was not applicable to the Appellant. This issue had also been considered and decided by the Commission in its Order dated 8.8.2013 passed in Petition No.1270/2012 (and upheld by this Hon'ble Tribunal) that when a generator was not availing the benefit of accelerated depreciation, the question of allowing the tariff with consideration of accelerated depreciation did not arise. Accordingly, the relief sought by Respondent No.2 on this issue was rejected.

7.11 Having decided the contentious issues as aforesaid, the Commission determined the tariff applicable to the rooftop solar project of the Appellant. The Commission had, through its Order No.1 of 2012 dated 27.1.2012 read with follow-up Suo-Motu Orders dated 7.7.2014 and 11.7.2014, determined the generic tariff for solar power projects (including rooftop solar PV projects) for the control period of 29.1.2012 to 31.3.2015. The Appellant's project was commissioned during the control period of the said Order and normally the generic tariff determined in the Order should have been applicable to it. However, on account of the capital subsidy available to the Appellant from the Government of India, the PPA had included Article 5 set out above.

7.12 The impugned Order having been passed after considering the contentious issues in its applicable factual and legal context, no infirmity can be said to exist in the same so as to warrant any interference from this Hon'ble Tribunal. It is prayed accordingly.

8. **The gist of written submissions made by Mr. Hardik Luthra, the learned counsel for the Respondent No. 2, are as under:-**

8.1 At the outset, it is submitted that the Respondent No. 2, Torrent Power Limited is contesting the present Appeal inter alia for and on behalf of the consumers of Surat, as the subsidy involved in the present case is not claimed by the Respondent No. 2 but sought to be factored in the Tariff determined by the Respondent No. 1 Commission for the plants put up by the Appellant, SMC. Thus, the Respondent No. 2, TPL is revenue neutral in the present case.

8.2 It is crystal clear that the MNRE Guidelines for Procurement of Solar Power under the JNNSM provided for bringing down the cost for the ultimate users. In the present case, the Respondent No. 2 is a Distribution Licensee distributing and supplying electricity to its consumers in its area of supply and the ultimate user are the consumers. The rationale was to address a tariff shock to the consumers as it was deemed necessary to move to renewable sources of energy not only in the interest of environment but also to address the prohibitive cost of Solar Energy at the relevant time to the consumers.

8.3 The Respondent No. 1 Commission has duly considered this letter and given its dispensation in respect of the contention of the Appellant with reference to the said letter dated 22.05.2014, in its impugned order dated 29.05.2015. The Respondent No. 1 Commission has rightly considered the said letter in light of the CERC Regulations, 2012. Regulation 22 thereof reads as under:

"22. Subsidy or incentive by the Central / State Government
The Commission shall take into consideration any incentive or subsidy offered by the Central or State Government, including accelerated depreciation benefit if availed by the generating company, for the renewable energy power plants while determining the tariff under these Regulations."

It is an admitted position that GERC had not framed its own Regulations for determination of tariff from Renewable Energy Sources and therefore was right in using the Regulatory Framework of CERC as Guidelines which it was bound to under Section 61 of the Electricity Act, 2003.

8.4 The subsidy in the present case has been granted under JNNSM. As such, the present Project is covered by a different set of Guidelines which has considered the price of solar power and creation of an enabling environment by specifically seeking to reduce the price for end users (General Consumers).

The Appellant cannot rely on Guidelines issued for wind Projects in support of its contention relating to Solar Power Projects.

8.5 The factual matrix as revealed from the correspondence sheds light on the fact that the Appellant, SMC had never intimated the actual sanction of the subsidy to the Respondent No. 2, TPL and approached TPL in March 2014 when the Project was nearing completion without calling upon the TPL to enter into MOU - 1 as contemplated by the Guidelines under JNNSM and had itself suggested that PPA could contemplate revision of tariff if ordered by GERC, vide its letter no. 97 dated 26.03.2014

8.6 The SMC approached TPL directly in the month of March, 2014 requesting it to enter into PPA and without disclosing the details of the subsidy including the fact that the subsidy was sanctioned under JNNSM. As both the parties deliberated and discussed the issues TPL contended that the Commission in its Tariff Order No.

1 of 12 dated 27.01.2012 had not considered and factored in any such subsidy for the benefit of the ultimate consumers as such subsidy was not generically available to all power producers. At that time, it was further revealed that SMC being a local municipal body is exempted from the applicability of the Income Tax.

8.7 It is respectfully submitted that it has been factually established in the preceding Paragraph, that the Appellant, SMC had itself suggested the arrangement to solve the impasse between the parties and entered into the PPA dated 29.03.2014 as it wanted to avail of tariff prior to the end of the Control Period. There were/are no specific Statutory Regulations prevailing in the State of Gujarat for determination of tariff from renewable sources. Therefore, for the sake of argument and assuming without admitting that the Appellant was entitled to a generic tariff, the said right has been waived by the Appellant in accordance with the Guidelines under the JNNSM and by overtly suggesting for approaching the GERC and for both the parties to accept *"the revision of tariff, if ordered by GERC"*.

8.8 The conduct of the Appellant, SMC in suppressing the sanction dated 31.12.2013 from the Respondent No. 2, TPL, not approaching TPL with complete discloser of the JNNSM, not calling upon TPL to enter into MOU – 1, approaching TPL when the Solar Power Plants were nearing completion in March 2014 – is a conduct which merits consideration while dealing with the charge of coercion.

8.9 It is respectfully submitted that in the present case neither was coercion pleaded nor advanced. Further, the Appellant itself contributed to the aspect of entering into PPA being discussed and deliberated by the parties in March, 2014. This was because the

Appellant maintained a stoic silence post receipt of the sanction of subsidy from MNRE on 31.12.2013 and approached TPL only in March 2014. The Appellant is now seeking to invalidate the PPA dated 29.03.2014 by pleading coercion.

8.10 Article 5.2 only records an Agreement between the parties to approach the Respondent No. 1 Commission for a decision on the contentious issue of whether the capital subsidy ought to be passed on to the consumers of electricity or not. The contention of the SMC essentially means that the parties or TPL needed to approach the Commission and seek its consent for the parties to approach the Commission. Not only was Article 5.2 inserted at the behest of SMC but the said execution of PPA was undertaken hurriedly at the behest and persuasion of SMC as it had a certain advantage if the PPA was executed prior to 31.03.2014. Otherwise SMC would have been entitled to a lower tariff post 31.03.2014 in view of the non-execution of PPA. Having taken due advantage of the situation, SMC as the Appellant seeks to wriggle out of the suggestions originally made by it in its letter dated 26.03.2014

8.11 The Appellant had filed the present Appeal on 13th July, 2015. This Hon'ble Tribunal in a case filed by Indian Wind Power Association against MERC and MSEDCL passed its judgment dated 26.02.2016 in Appeal No. 210 of 2014 wherein this Hon'ble Tribunal dealt with and was concerned with admitted Suo Motu insertion of three clauses without the approval / sanction of the State Commission in the PPA.

The three clauses were substantial clauses affecting the rights of the parties to the PPA unlike Article 5.2 in the present case which deals with and sets out an Agreement between the parties to approach the Commission and which has been incidentally inserted

upon suggestion of SMC vide letter dated 26.03.2014 and at their behest.

8.12 The said case dealt with the action of the MSEDCL in not renewing the EPA / PPA upon expiry, insisting on incorporation of these unapproved three clauses, insisting on Wind Energy Generators to give an undertaking that these clauses are acceptable to them, non-payment of purchase price by MSEDCL, the Wind Generators fearing that their accounts with the Bank would turn out to be non-performing assets, due to non-payment by MSEDCL for 12 months. The said Appeal No. 210 of 2014 is therefore factually and legally clearly distinguishable.

8.13 In the present case where the subsidy itself is granted under the JNNSM for end users in view of the high cost of Solar Power during the nascent stages of Solar Power Development in the Country, the question of the above judgment being applicable to the present case does not hold merit. In addition, factually, the fact that the Appellant vide letter dated 26.03.2014 after remaining silent for two months post receiving sanction of subsidy on 31.12.2013 made a suggestion to approach the Regulatory Commission as it was desirous of executing a PPA prior to 31.03.2014, belies any claim of purported coercion.

Judgment dated 22.08.2014 passed by the Hon'ble APTEL in Appeal No. 279 of 2013, GUVNL Vs. GERC &Ors.

8.14 The Appellant has relied on Paragraph 87 to 89 and 114 of this judgment. This judgment is however, not applicable to the present case. The judgment has to be read in its entirety. The said judgment notes that the tariff determined by the Commission ***"was accepted by all parties and acted upon. The PPA enter into the parties were confirmed by the State Commission. The Tariff was also***

adopted by the Gujarat Government and notified…. This cannot be sought to be taken away long after the generators have acted upon the same."

Interestingly, a clear distinguishing factor is further recorded by the Hon'ble APTEL in the said order in Paras 90, 92, 100, 177(2), 177(3).

8.15 In the present case, the Respondent No. 2 had expressed its reservations prior to entering into the PPA and at the suggestion of the Appellant, SMC in its letter no. 97 dated 26.03.2014, informed that the Respondent No. 2 was agreeable to approach the GERC and such a clause can be incorporated in the PPA vide its Reply dated 27.03.2014.

Judgment in Commr. of Income Tax, Hyderabad Vs. P. J. Chemicals Ltd. with Janak Steel Tubes Pvt. Ltd. Vs. Commr. of Income Tax – (1994) Supp. 3 SCC 535

8.16 The Appellant has relied on Paragraph 13 thereof.

It is respectfully submitted that such judgment has no application to the present case. It in fact supports the contention of the Respondent No. 2. In the said judgment the Hon'ble Apex Court referred to the decision of the Andhra Pradesh High Court wherein it was recorded that:

"Nowhere had the scheme provided as to how the subsidy should be utilized and for which assets."

In that case the Hon'ble Apex Court had directed that the term actual cost needs to be interpreted liberally. In that case, the Hon'ble Apex court was not concerned with the case wherein the scheme itself provided the reason, rationale, nature and purpose of subsidy namely, bringing down the cost for the end user.

Judgment in Bhagwati Developers Pvt. Ltd. Vs. Peerless Gen. Fin. Investment Co. Ltd. – (2013) 5 SCC 455

8.17 It is respectfully submitted that the Appellant has relied on the said judgment to contend that the Petition filed by the Respondent No. 2 before the Respondent No. 1 Commission relying on the Agreement between the Appellant and the Respondent No.2 to approach the Respondent No. 1 Commission vide article 5.2 of the PPA was itself not maintainable. The aforesaid judgment which deals with Section 397 to 399 of the Companies Act, 1956 is irrelevant for consideration of the present matter. In that case, the Hon'ble Supreme court had remanded the matter in view of the fact that the person who had filed the Suit had withdrawn the same though the Suit was filed in representative capacity and withdrawn by the Plaintiff without consulting the category of people that the Plaintiff represented.

Judgment in Madanuri Sri Rama Chandra Murthy Vs. Syed Jalal – (2017) AIJEL – SC 60106

8.18 The Appellant has relied on Paragraph 8 thereof. The Appellant contends that the Petition filed by the Respondent No. 2 ought to have been rejected at threshold under Order VII Rule 11. The facts narrated by the Appellant have been refuted on the basis of the documents and the correspondence relied upon by the Respondent No. 2. As such, the said contention of the Appellant is liable to be rejected.

8.19 ***Judgment in Dalip Singh Vs. State of U. P. – (2009) GLHEL – SC 47882***

The Appellant has relied on Paragraphs 18 to 21 thereof.

The facts of the said judgement are completely different and distinct from the present case. This judgment has been supposedly cited in support of the case of the Appellant relating to purported perjury by the Respondent no. 2. The Respondent No. 2 reiterates its submission in the preceding Part of these Written Arguments.

However, it has to be noted that the Appellant is a local body, a Municipal Corporation and a State within the terms of Article 12 of the Constitution of India. After having induced the Respondent No. 2, which the Respondent no. 2 though was fair suggestion, to approach the GERC and entered into a PPA reflecting the said Agreement in Article 5.2, the Appellant has expended public money to espouse the present Appeal. Considering the frivolous and vexatious nature of the contentions raised in the present proceedings, it is necessary in the interest of the public to dismiss the present Appeal with costs.

Judgment in Suo Motu Proceedings against Mr. R. Karuppan, Advocate Vs. Union of India – (2001) GLHEL – SC 24074

8.20 The Appellant has relied on this judgment in support of its contention of Perjury against the Respondent No. 2.

The Respondent No. 2 also relies on the Para 12 of the said judgement. In the present case, the Appellant is well aware of the contents of the JNNSM. It had agreed to approach the GERC and in fact suggested so vide letter no. 97 dated 26.03.2014.

In view of the factual rebuttal of the charge of Perjury in the preceding Paragraph by this Respondent it is submitted that the said allegation was made in a very casual manner and therefore merits an action as contemplated by the Hon'ble Supreme court in Paragraph 12 of Karuppan*(supra)*.

Judgment in Amar Singh Vs. Union of India – (2011) 7 SCC 69

8.21 The Appellant has relied on Paragraph 58 and 59 of the said judgment. The Respondent No. 2 also relies on the very same principles enunciated in the said judgment. The frivolous nature of the arguments like Perjury made by the Appellant irresponsibly, though the Appellant is a state within the terms of Article 12 of the Constitution of India merits dismissal of the Appeal with exemplary cost.

Judgment in Balmer Lawrie & Co. Ltd. Vs. Partha Sarthy Sen Roy – (2013) 8 SCC 345

8.22 The Appellant has relied on Paragraph 19 of the said judgment and also contended that insertion of Article 5.2 in the PPA was as a result of unequal bargaining power and therefore hit by Section 23 of the contract Act resulting in the PPA being *void ab initio*.

The Appellant is a ***"State"*** within the meaning of Article 12 of the Constitution of India. Despite, receipt of the sanction of subsidy on 31.12.2013, the Appellant did not approach the Respondent No. 2 for executing the MoU or apprise the latter about the sanction. It approached the Respondent No. 2 only in March, 2014 when the project was nearing completion.

The Respondent No. 2 would have failed in its duties towards the common consumers in the area of supply if it had not raised the issue of factoring in the subsidy granted by MNRE as capital subsidy to alleviate the higher cost of Solar Power to the common Consumers.

In the event, if this Hon'ble Tribunal were to accept the contention of the Appellant then inter alia the Appellant would be bound to return the subsidy to MNRE amongst other consequences.

8.23 The Respondent No. 2, humbly and respectfully states and submits that this Hon'ble Tribunal be pleased to consider the correct factual matrix as pointed out by the Respondent No. 2 relying on the documents and record including correspondence between the parties and be pleased to dismiss the present Appeal filed by the SMC which is a State within the meaning of article 12 of the Constitution of India and which has raised frivolous allegations and contentions, with exemplary cost.

It is submitted that the Appellant, SMC has sought to rely on selected portions of the judgement in Appeal No. 279 of 2013 *(supra)*. However, it is the ***ratio decidendi*** of the judgment which would operate as a precedent and is the ground of the said judicial decision.

9. **We have heard at length the learned counsel for the rival parties and considered carefully their written submissions, arguments put forth during the hearings, etc. The following principal issues arise in the present appeal for our consideration:**

Issue No. 1

A. Whether any variation in the model PPA made by the distribution licensee (TPL) without approval of the State Commission resulting into reduction of tariff from Solar Power from that determined by the State Commission vide its Order No. 1 of 2012 is permissible in law?

Issue No. 2

B. Whether the Central Finance Assistance (CFA) received by the Appellant from MNRE as capital subsidy is required to be factored in the determination of tariff by the State Commission when the generic tariff of solar power has already been fixed by GERC vide Order No. 1 of 2012?

10. **Our Findings and Analysis**

Issue No. 1:

10.1 The Appellant has submitted that the impugned clause of Power Purchase Agreement (PPA) i.e. 5.2 requires a fresh determination of tariff after considering the capital subsidy given by Government of India and is tentamount to a deviation from the generic tariff determined by the State Commission for Rooftop PV Solar Power Projects under its Order No. 1 of 2012.

10.2 The Appellant, SMC has also submitted that the Clause 4.10 of Order No. 1 of 2012 dated 27/1/2012 in the matter of determination of tariff for the procurement of power by the distribution licensee and others from solar energy requires the distribution licensees to sign PPA on long term basis and get approved by the Commission. The said clause is reproduced below :-

"4.10. *Power Purchase Agreement*. The term of the power purchase agreement that the solar Developer signs with the Distribution Licensee *will be 25 years. The Distribution Licensee will sign the PPA* ***at the earliest from the date of submission of the application with all relevant details by the solar generators and get it approved from the Commission.****"*

10.3 The Appellant has further alleged that the TPL, the distribution licensee, pressurized for inclusion of the additional clauses under Article 5 of the PPA entered into between TPL and SMC on 29/3/2014 as under :-

"5.2 The project is *entitled for* a capital subsidy from Central Government. MNRE vide its *sanction letter* No.5/2/2013-14/ST dated 31st Dec 2013 has approved a Capital subsidy equivalent to Rs 2.25 crores for the project.

The parties will approach GERC for determination of Tariff *considering capital subsidy in Project cost. Tariff determined by*

GERC will be *binding* to both the parties. The tariff decided by GERC will be applicable from COD".

"Upon determination of tariff by GERC, *SMC will raise the invoice* from COD till last day of the month of tariff determination. *No interest shall be chargeable on these arrears*. This arrears invoice will be paid by TPL within 15 days of the receipt of invoice. *Thereafter SMC will raise monthly invoice as per Article 6"***.**

10.4 The Appellant had further contended that since the impugned clause of PPA i.e. Article 5.2 requires a fresh determination of tariff after considering the Central Financial Assistance in form of capital subsidy, it was a deviation from the generic tariff order of the State Commission. In this context, this Hon'ble Tribunal vide its judgment dated 26/2/2016 in the Appeal No. 210 of 2014 – Indian Wind Power Association Vs. MERC and Others has held that such deviations are to be valid only after approval from the respective appropriate Commission. In addition, the Clause 4.10 of Order No. 1 of 2012 of GERC also stipulates similar requirement.

Per Contra:

10.5 The Respondent, TPL, has submitted that the Appellant approached in the month of March, 2014 for entering into PPA but without disclosing the details of the subsidy that was sanctioned by MNRE under JNNSM. It has further been contended by TPL that SMC itself had suggested the arrangement to solve the impasse between the two parties regarding capital subsidy and applicable tariff thereon and subsequently, entered into PPA on 29/03/2014. It is also pointed out that PPA was signed by the Appellant before 31/3/2014 with an objective of claiming higher tariff available prior to the end of the control period i.e. 2013-14.

10.6 It is further brought out by the Respondent that Article 5.2 only records the agreement between the parties to approach the State Commission for a decision on the contentions issue of whether the capital subsidy is sought to be passed on to the consumers of electricity or not. It is clear from the deliberations between the Appellant and Respondent that not only the Article 5.2 was the subject at the behest of SMC but also, the said execution of PPA was undertaken hurriedly at the behest of SMC as it had certain advantage in tariff if the PPA was executed prior to 31/3/2014.The Respondent has also pointed out that having taken due advantage of the situation i.e. signing the PPA before 31/3/2014 and getting higher tariff, SMC now seeks to wriggle out of the suggestions originally made by it in its letter dated 26/3/2014.

Our Findings

10.7 We have evaluated the facts and submissions of the rival parties as available with us and find that after commissioning its solar project on 27/3/2014, the Appellant began supplying electricity to the Respondent and was quick to persuade TPL to enter into PPA on an urgent basis. Before executing the PPA, Respondent and the Appellant deliberated the issue related to the capital subsidy granted by Government of India (by MNRE) and its impact on tariff to the distribution licensee and in turn, to consumers. Both the parties agreed for signing the PPA and also referring the matter of tariff determination to the State Commission with a specific reference to the factoring of CFA provided by MNRE to the Appellant. In view of these facts, we do not find any ambiguity or infirmity in signing of the PPA between the two parties and also, approaching the State Commission for tariff determination in consideration of grant of capital subsidy to the project from MNRE.

Issus No. 2

10.8 The Appellant has submitted that the impugned order relies on factually erroneous assumption that CFA was utilized by the Appellant at the time of setting up of the solar power plant. The Appellant has further claimed that the solar plant was commissioned on 27th March, 2014 and CFA was received by it into installments, the first in July, 2014 and the second in March, 2017. The total CFA was Rs.2.05 crores only whereas the Commission has assumed the same as Rs.2.25 crores in the impugned order.

10.9 The Appellant has further relied on the clause 4.6 of the scheme for continuation of Generation Based Incentive (GBI) for grid interactive wind power projects for 12th plan period which reads as under:-

"4.6 This incentive is over and above the tariff that may be approved by the State Electricity Regulatory Commissions in various States. In other words, this incentive that is sanctioned by the Union Government to enhance the availability of power to the grid will not be taken into account while fixing tariff by State Regulators".

Citing the above, the Appellant has claimed that though this is not directly applicable in their case but the provision stated here in above is equally applicable in principle to solar plants as well.

10.10 The Appellant has further contended that for deciding as to whether a particular Central Financial Assistance goes to reduce the capital cost of the project or not, what is to be examined is *to verify the* nature, character and purpose of the receipt and that the subsidy amount granted as percentage of the total field capital investment, which was only taken as a measure for quantifying the

subsidy as held by several High Courts and finally settled by the Apex Court on almost similar facts, in a case reported in AIR 1994 SC 2727, in Para 13. In support of their contentions that the CFA provided by MNRE should not be factored in the tariff determination, the Appellant has relied on various other judgments of several High Courts.

Per Contra

10.11 The Respondent (TPL) and the State Commission have contended that it is crystal clear that the CFA sanctioned by MNRE under JNNSM is solely for bringing down the cost of solar power projects for the ultimate benefit of consumers of electricity. It is further indicated that the rationale was to address a tariff shock to the consumers as it was deemed necessary to move to renewable sources of energy and not only in the interest of environment but also to address the prohibitive cost of solar energy as relevant time to the consumers. It is further contended by the Respondents that the State Commission has rightly considered various issues involved in the matter and factored the CFA in determination of tariff for the solar plant of the Appellant.

10.12 The State Commission has followed the principles laid down by CERC in its Regulation, 2012 which reads as under :-

"22. Subsidy or incentive by the Central / State Government
The Commission shall take into consideration any incentive or subsidy offered by the Central or State Government, including accelerated depreciation benefit if availed by the generating company, for the renewable energy power plants while determining the tariff under these Regulations."

It is an admitted position that GERC had not framed its own Regulations for determination of tariff from Renewable Energy Sources and therefore was right in using the Regulatory

Framework of CERC as Guidelines which it was bound to under Section 61 of the Electricity Act, 2003.

10.13 The learned counsel for the State Commission has rightly pointed out that being a Municipal Corporation, the Appellant is exempted from the applicability of income-tax and considering the same the accelerated depreciation benefit was not extended to it. It is further pointed out by the Respondent Commission that the Tariff Order No. 1 of 2012 dated 27/1/2012 is a generic tariff order based on normative parameters and has not considered any financial assistance or subsidy as such subsidy was not generally available to all solar power producers.

Our Findings :

10.14 Considering the submission of the learned counsel appearing for the Appellant and learned counsel appearing for the Respondent, we observe that the basic objective of granting capital subsidy in form of CFA by MNRE was to bring down the project cost and tariff for the ultimate benefit of the consumers. CFA being approximately 30% of the project cost and without any interest, is a considerable benefit in setting up of the solar projects and cannot be considered as mere incentive as being claimed by the Appellant.

10.15 Further, it cannot be equated with Generation Based Incentive provided by the Government of India for Wind Power Generators. It is also clearly stipulated in the CERC Regulations (22) that Subsidy or incentive by Central/State Government shall be taken into consideration while determining the tariff for the renewable energy power plants. It is, however, noted that the capital subsidy has been released by MNRE in two installments the first in July, 2014 and the second in March, 2017 i.e. after the completion of the solar projects. It is accordingly, contended by the Appellant

that the subsidy has not been utilized for setting up of the reference projects. Admittedly, the subsidy as sanctioned by MNRE has been released and paid to the Appellant and accordingly the same has to be factored in the tariff determination or otherwise need to be refunded by the Appellant. The Appellant is exempted from the income tax being a Municipal Corporation which itself is an incentive. Such capital subsidy, as being not available to other generators, has not been considered by the State Commission while deciding the generic tariff in its order No. 1 of 2012. As such the Appellant cannot claim multiple benefits of higher generic tariff, capital subsidy and also, exemption from income tax.

10.16 We, thus, are of the firm opinion that the capital subsidy provided by MNRE, needs to be factored in the tariff determination of the projects of the Appellant appropriately. However, instead of assuring subsidy of Rs.2.25 crores as considered in the impugned order by the State Commission, the actual subsidy received by the Appellant (Rs. 2.05 crores or so) is required to be taken into tariff determination based on the documentary evidence. Though not prayed in the Appeal specifically, taking a judicial note, we also decide that till the time the CFA has not been actually disbursed to the Appellant, it should be allowed generic tariff as per GERC Order No. 1 of 2012.

Summary of Findings:

10.17 After due consideration on the various issues involved in the Appeal as stated at supra, we are of the opinion that some of the issues raised in the instant appeal have merit. The same ought to have been considered by the State Commission taking a just and equitable approach. Accordingly, the appeal deserves to be

partly allowed to the extent of allowing the Appellant to approach the State Commission to re-determine the project specific tariff considering over findings in Para **10.16** hereinabove.

ORDER

We are of the considered opinion that some issues arising out of the instant Appeal No. 268 of 2015 have merit. For the foregoing reasons as stated supra, the instant appeal filed by the Appellant is partly allowed. The impugned order dated 29/5/2015 passed in Petition No. 1418/2014 on the file of the Gujarat Electricity Regulatory Commission is hereby set aside so far it relates to the limited extent as brought out in the above paragraphs **10.16 & 10.17** and the matter stands remitted back to the State Commission on the issues regarding re-determination of tariff considering the actual time and exact amount of the CFA disbursement.

The State Commission is further directed to pass the consequential order within a period of three months from the date of appearance of the Appellant before the State Commission.

In view of the above, IA No. 433 of 2015 is disposed of, as such.

No order as to costs.

Pronounced in the open Court on this day of **3rd May, 2018.**

(S.D. Dubey)
Technical Member

(Justice N.K. Patil)
Judicial Member

REPORTABLE / ~~NON-REPORTABLE~~