

September 2024

## Supreme Court of India upholds the restrictive scope of its appellate jurisdiction under Section 125 of the Electricity Act, 2003

On August 27, 2024, the Hon'ble Supreme Court of India ("Supreme Court") has rendered its final Judgment in *Bangalore Electricity Supply Company Limited and Ors. vs. Hirehalli Solar Power Project LLP and Ors. & Batch*<sup>1</sup> ("Judgment"), wherein it has, *inter alia*:

1. reiterated that the scope of its jurisdiction under Section 125 of the Electricity Act, 2003 ("Electricity Act") is restricted only to deciding "*substantial questions of law*";
2. reiterated that force majeure provisions in contracts are governed by Section 32 of the Indian Contract Act, 1872 ("Contract Act")<sup>2</sup> and not Section 56 of the Contract Act<sup>3</sup>; and
3. directed that late payment surcharge ("LPS") is explicitly rooted in the Power Purchase Agreements ("PPAs"), and hence, is in furtherance of the intention of the parties. Therefore, direction for payment of LPS need not be separately pleaded.

In doing so, the Supreme Court dismissed the civil appeals<sup>4</sup> and upheld an order passed by the Appellate Tribunal for Electricity ("APTEL") granting extension of the Scheduled Commissioning Date ("SCD") of the Solar Power Project ("Project"). Consequently, the tariff payable to Solar Power Developers ("SPDs") was restored to INR 8.40 (Indian Rupees eight Paise forty) per unit.

### Brief facts

1. On August 26, 2014, the State of Karnataka introduced a policy to identify and promote solar energy projects of land-owning farmers. In terms of the policy, solar power plants would generate and sell power to state electricity distribution companies at a tariff determined by the Karnataka Electricity Regulatory Commission ("KEREC").
2. Pursuant to a Letter of Award, on August 29, 2015, the Bangalore Electricity Supply Company Limited ("BESCOM") entered into a PPA with one of the SPDs ("BESCOM PPA"). Similar PPAs were executed between other SPDs and electricity distribution companies. In terms of the BESCOM PPA, the Project ought to have been commissioned within 18 (eighteen) months from the 'effective date', hence, the SCD of the Project was February 28, 2017.

<sup>1</sup> 2024 INSC 631

<sup>2</sup> Section 32, Indian Contract Act, 1872: *Enforcement of contracts contingent on an event happening.*

<sup>3</sup> Section 56, Indian Contract Act, 1872: *Agreement to do Impossible Act.*

<sup>4</sup> C.A. Nos. 7595, 7608 and 6386 of 2021

3. Pursuant to the execution of the PPAs, SPDs raised concerns regarding delays in the execution of the Project, on account of delay in approvals for conversion of land for industrial purposes, delay in getting evacuation approvals, grid connectivity and demonetisation. Petitions<sup>5</sup> were filed by SPDs before KERC seeking an extension of six months for the commercial operation of the Project while invoking the *force majeure* clause in terms of the PPAs. During the pendency of proceedings before KERC, the Project was commissioned, within the extended period of 24 (twenty-four) months.
4. KERC *vide* Order dated September 18, 2018 (“**KERC’s Order**”), in the petitions, *inter alia*, rejected the various causes of delay put forth by SPDs, imposed liquidated damages and reduced the tariff payable in terms of the PPAs.
5. Aggrieved by KERC’s Order, SPDs appealed before APTEL, which, while overruling KERC’s Order, *inter alia*, held (a) the delay in execution of the Project was not attributable to SPDs as the time taken by government authorities to provide approvals was not within their control and they had taken all the measures that they could; (b) SPDs are entitled to the benefit of the *force majeure* provisions and an extension of time, as has also been previously approved by KERC; (c) SPDs were able to commission the Project within the extended period of 24 (twenty-four) months; (d) APTEL directed SPDs to pay the difference per unit tariff along with LPS in terms of the PPAs; and (e) set aside imposition of liquidated damages (Impugned Order).

## Issue

Civil Appeals were filed before the Supreme Court raising the question of whether extension of SCD was occasioned in terms of the *force majeure* provisions of the PPAs and consequently, whether the reduction in tariff was justified.

## Notable findings of the Supreme Court

1. Section 125 of the Electricity Act provides for an appeal to be filed before the Supreme Court on any one or more of the grounds specified in Section 100 of the Civil Procedure Code, 1908<sup>6</sup> (“**CPC**”). The Supreme Court held that Section 100 of the CPC restricts High Courts’ jurisdiction in second appeals to cases that involve a ‘*substantial question of law*’. The Supreme Court in *SEBI vs. MEGA Corporation Limited*<sup>7</sup> has analysed the term ‘*question of law*’ to hold that the said term is ‘*open textured*’ and must be interpreted by looking at the words in light of their context. The Electricity Act envisages the establishment of SERCs as specialised bodies that discharge advisory, regulatory and adjudicatory functions and APTEL to hear appeals against orders of SERCs.
2. In respect of whether the delay in commissioning the project is covered by the *force majeure* provisions of the PPAs, the Supreme Court held as follows:
  - a) there have been no ‘*substantial questions of law*’ raised before the Supreme Court;
  - b) the Supreme Court, has, in several orders dismissed appeals arising out of similar facts;
  - c) the delay in commissioning the project falls within the purview of *force majeure* provisions stipulated in Article 8 of the PPAs;
  - d) SPDs are entitled to benefit under *force majeure* provisions as they are unable to secure necessary approvals, licenses etc. (provided that there is no negligence or intentional act or omission);
  - e) the dispute before KERC and APTEL revolves around questions of fact. APTEL has rightly reappreciated evidence to find that the delay in the project was not attributable to SPDs but to government bodies and relevant authorities. SPDs have acted diligently and with care and caution to secure approvals, hence their claims cannot be rejected;

<sup>5</sup> O.P. Nos. 70, 71, 72, 73 and 96 of 2017

<sup>6</sup> Section 100, Civil Procedure Code, 1908 – Second Appeal.

<sup>7</sup> (2022) SCC OnLine SC 361

- f) APTEL has correctly noted that a large number of SPDs have raised similar issues, and the government has responded to the same by requiring electricity distribution companies to set up committees to look into these cases. The large number of cases that raise similar grounds and the government's response show that the delay was not faced by the SPDs alone, and hence cannot be entirely attributed to them;
- g) the extension provided was warranted and the commissioning of the project was within the extended period. Therefore, there is no occasion for reduction in tariff or for imposition of liquidated damages; and
- h) since the levy of LPS on the tariff amount is explicitly rooted in the PPA, it need not be separately pleaded.

## Conclusion

The Judgment reiterates that the scope of Supreme Court's jurisdiction under Section 125 of the Electricity Act is restricted only to deciding '*substantial questions of law*' and *force majeure* provisions in contracts are governed by Section 32 of the Contract Act and not Section 56 of the Contract Act. In such instances, courts ought to interpret *force majeure* events as contractually agreed amongst the parties. Further, if payment of LPS is explicitly rooted in PPAs, it need not be separately pleaded. Delays in commissioning projects which are beyond the reasonably foreseeable control of parties fall under the purview of *force majeure* events.

The Judgment recognises the importance of freedom accorded to the sectoral regulator, to subserve the regulatory regime as envisaged in terms of the Electricity Act. It is also in tandem with Supreme Court's recent judgment in *BSES Rajdhani Power Ltd. vs. Delhi Electricity Regulatory Commission*<sup>8</sup>, which laid down tests to determine whether a case involves a '*substantial question of law*'. The findings and observations of the Judgment bolster and justify that a court sitting in second appellate jurisdiction is to frame a '*substantial question of law*' and ought not to interfere in questions of fact.

Further, this Judgment recognises the supremacy of the contractual agreements between parties while interpreting contingency and penal provisions, thus bolstering the sanctity of such long-term contracts.

---

<sup>8</sup> (2023) 4 SCC 788

## Power Sector

JSA is the leading national practice in the power sector – conventional and non-conventional. JSA provides legal services at all stages of the value chain in the sector - across the spectrum of contractual, commercial, policy, regulatory and legal issues. We represent clients in all segments: generation, transmission, distribution and trading. JSA serves its clients by transaction-specific integrated teams across various locations and practice areas (Banking & Finance, Mergers & Acquisition and Private Equity, Projects and project related contracting, Dispute Resolution, Taxation, Regulatory proceedings and Policy advisory).

JSA has been regularly engaged in; (a) providing policy advice to Governments of Bangladesh and Maldives, as also the Government of India besides various Indian states. Also, JSA partners have presented expert testimony to the Parliamentary Standing Committees and the Forum of Regulators on challenges faced by the power sector and proposed legislative and policy changes, development financial institutions like the World Bank, the Asian Development Bank, DfID, USAID regulatory authorities and industry bodies; (b) advising project developers, investors, suppliers and contractors on commercial / transactional issues and all aspects of licensing, market structures, competition, performance standards and tariffs; (c) advising financial institutions and borrowers in relation to financing transactions; (d) Advising clients on sustainable development issues like clean development mechanism and environmental compliances; and (e) specialised dispute resolution.

### This Prism has been prepared by:



**Abhishek Munot**  
Partner



**Kunal Kaul**  
Partner



**Malcolm Desai**  
Principal Associate



**Purvi Shrivastava**  
Associate



Ranked Among Top 5 Law Firms in India for ESG Practice



19 Practices and 19 Ranked Lawyers



18 Practices and 25 Ranked Lawyers



Employer of Choice 2024

Energy and Resources Law Firm of the Year 2024

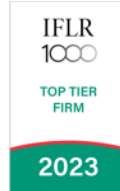
Litigation Law Firm of the Year 2024

Innovative Technologies Law Firm of the Year 2023

Banking & Financial Services Law Firm of the Year 2022



**Outstanding**  
Energy and Infrastructure



12 Practices and 42 Ranked Partners  
**IFLR1000 APAC**  
**Rankings 2023**

Banking & Finance Team of the Year

Fintech Team of the Year

Restructuring & Insolvency Team of the Year



7 Ranked Practices, 16 Ranked Lawyers

Elite – Band 1 - Corporate/ M&A Practice

3 Band 1 Practices

4 Band 1 Lawyers, 1 Eminent Practitioner



Recognised in World's 100 best competition practices of 2024



Among Top 7 Best Overall Law Firms in India and 11 Ranked Practices

11 winning Deals in IBLJ Deals of the Year

12 A List Lawyers in IBLJ Top 100 Lawyer List



14 Practices and 38 Ranked Lawyers



**Ranked #1**  
**The Vahura Best Law Firms to Work Report, 2022**

Top 10 Best Law Firms for Women in 2022



7 Practices and 3 Ranked Lawyers

For more details, please contact [km@jsalaw.com](mailto:km@jsalaw.com)

[www.jsalaw.com](http://www.jsalaw.com)



Ahmedabad | Bengaluru | Chennai | Gurugram | Hyderabad | Mumbai | New Delhi



This prism is not an advertisement or any form of solicitation and should not be construed as such. This prism has been prepared for general information purposes only. Nothing in this prism constitutes professional advice or a legal opinion. You should obtain appropriate professional advice before making any business, legal or other decisions. JSA and the authors of this prism disclaim all and any liability to any person who takes any decision based on this publication.