

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 6399 OF 2016

GUJARAT URJA VIKAS NIGAM LIMITED

... APPELLANT (S)

VERSUS

SOLAR SEMICONDUCTOR POWER
COMPANY (INDIA) PRIVATE LIMITED
AND OTHERS

... RESPONDENT (S)

J U D G M E N T

KURIAN, J.

1. The principal question which arises in this case is whether the Gujarat Electricity Regulatory Commission (the Commission), in exercise of its inherent powers, could have extended the control period for the 1st respondent Company (Respondent no. 1). The control period is the period during which a particular tariff order operates.
2. In order to address the issue, certain provisions of the Electricity Act, 2003 (hereinafter referred to as “the Act”) are required to be noticed. Part VII of the Act deals with tariff. Sections 61, 62 and 64 of the Act are of particular relevance. :-

“61. Tariff regulations.—The Appropriate Commission shall, subject to the provisions of this

Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-

- (a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;
- (b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;
- (c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;
- (d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;
- (e) the principles rewarding efficiency in performance;
- (f) multi-year tariff principles;
- (g) that the tariff progressively reflects the cost of supply of electricity and also reduces cross-subsidies in the manner specified by the Appropriate Commission;
- (h) the promotion of co-generation and generation of electricity from renewable sources of energy;
- (i) the National Electricity Policy and tariff policy:

Provided that the terms and conditions for determination of tariff under the Electricity (Supply) Act, 1948 (54 of 1948), the Electricity Regulatory Commissions Act, 1998 (14 of 1998) and the enactments specified in the Schedule

as they stood immediately before the appointed date, shall continue to apply for a period of one year or until the terms and conditions for tariff are specified under this section, whichever is earlier.

62. Determination of tariff.-(1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for -

(a) supply of electricity by a generating company to a distribution licensee:

Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;

(b) transmission of electricity ;

(c) wheeling of electricity;

(d) retail sale of electricity:

Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.

(2) The Appropriate Commission may require a licensee or a generating company to furnish separate details, as may be specified in respect of generation, transmission and distribution for determination of tariff.

(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue

preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.

(4) No tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified.

(5) The Commission may require a licensee or a generating company to comply with such procedure as may be specified for calculating the expected revenues from the tariff and charges which he or it is permitted to recover.

(6) If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee.

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64. Procedure for tariff order.—(1) An application for determination of tariff under section 62 shall be made by a generating company or licensee in such manner and accompanied by such fee, as may be determined by regulations.

(2) Every applicant shall publish the application, in such abridged form and manner, as may be specified by the Appropriate Commission.

(3) The Appropriate Commission shall, within one hundred and twenty days from receipt of an application under sub-section (1) and after considering

all suggestions and objections received from the public,-

- (a) issue a tariff order accepting the application with such modifications or such conditions as may be specified in that order;
- (b) reject the application for reasons to be recorded in writing if such application is not in accordance with the provisions of this Act and the rules and regulations made thereunder or the provisions of any other law for the time being in force:

Provided that an applicant shall be given a reasonable opportunity of being heard before rejecting his application.

(4) The Appropriate Commission shall, within seven days of making the order, send a copy of the order to the Appropriate Government, the Authority, and the concerned licensees and to the person concerned.

(5) Notwithstanding anything contained in Part X, the tariff for any inter-State supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor.

(6) A tariff order shall, unless amended or revoked, continue to be in force for such period as may be specified in the tariff order."

(Emphasis supplied)

3. A State Commission is constituted under Section 82 of the Act. The Section to the extent relevant reads as follows:

“82. Constitution of State Commission.-(1)
Every State Government shall, within six months from the appointed date, by notification, constitute for the purposes of this Act, a Commission for the State to be known as the (name of the State) Electricity Regulatory Commission:”

4. Section 86 of the Act provides for the functions of the State Commission. To the extent relevant, the Section reads as follows:

“86. Functions of State Commission.-(1)
The State Commission shall discharge the following functions, namely:-

- (a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:
Provided that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;
- (b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;
- (c) facilitate intra-State transmission and wheeling of electricity;
- (d) issue licences to persons seeking to act as transmission licensees, distribution licensees and electricity traders with respect to their

operations within the State;

- (e) promote cogeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee;
- (f) adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration;
- (g) levy fee for the purposes of this Act;
- (h) specify State Grid Code consistent with the Grid Code specified under clause (h) of sub-section (1) of section 79;
- (i) specify or enforce standards with respect to quality, continuity and reliability of service by licensees;
- (j) fix the trading margin in the intra-State trading of electricity, if considered, necessary;
- (k) discharge such other functions as may be assigned to it under this Act.
(Emphasis Supplied)

5. Section 92 of the Act provides for the proceedings of the Appropriate Commission.

“92. Proceedings of Appropriate Commission.-

(1) The Appropriate Commission shall meet at the head office or any other place at such time as the Chairperson may direct, and shall observe such rules of procedure in regard to the transaction of business at its meetings (including the quorum at its meetings) as it may specify.”

(Emphasis Supplied)

6. Section 94 deals with the powers of the Appropriate Commission and reads as follows:

“94. Powers of Appropriate Commission.- (1)

The Appropriate Commission shall, for the purposes of any inquiry or proceedings under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) in respect of the following matters, namely:-

- (a) summoning and enforcing the attendance of any person and examining him on oath;
- (b) discovery and production of any document or other material object producible as evidence;
- (c) receiving evidence on affidavits;
- (d) requisitioning of any public record;
- (e) issuing commission for the examination of witnesses;
- (f) reviewing its decisions, directions and orders;
- (g) any other matter which may be prescribed.

(2) The Appropriate Commission shall have the powers to pass such interim order in any proceeding, hearing or matter before the Appropriate Commission, as that Commission may consider appropriate.

(3) The Appropriate Commission may authorise any person, as it deems fit, to represent the interest of the consumers in the proceedings before it.”

(Emphasis

supplied)

7. Section 95 states that the proceedings before the Appropriate Commission shall be deemed to be judicial proceedings and the Appropriate Commission shall be

deemed to be a civil court. To quote :-

“95. Proceedings before Commission.- All proceedings before the Appropriate Commission shall be deemed to be judicial proceedings within the meaning of Sections 193 and 228 of the Indian Penal Code (45 of 1860) and Appropriate Commission shall be deemed to be a civil court for the purposes of Sections 345 and 346 of the Code of Criminal Procedure, 1973 (2 of 1974).”

8. Section 181 of the Act provides for the power of the State Commission to make regulations. To the extent relevant, the Section reads as follows:

“181. Powers of State Commissions to make regulations.-(1) The State Commissions may, by notification, make regulations consistent with this Act and the rules generally to carry out the provisions of this Act.

(2) In particular and without prejudice to the generality of the power contained in subsection (1), such regulations may provide for all or any of the following matters, namely:-

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(zl) rules of procedure for transaction of business under sub-section (1) of section 92;”

(zp) any other matter which is to be, or may be, specified."

(Emphasis Supplied)

9. As per Notification No. 2 of 2004 published on 25.08.2004, the Gujarat Electricity Regulatory Commission has notified the Gujarat Electricity Regulatory Commission (Conduct of Business) Regulations. Regulations 80 to 82 provide for saving of inherent power of the Commission, which read as follows:

“80. Nothing in these Regulations shall be deemed to limit or otherwise affect the inherent power of the Commission to make such orders as may be necessary for ends of justice or to prevent the abuse of the process of the Commission.

81. Nothing in these Regulations shall bar the Commission from adopting in conformity with the provisions of the Acts, a procedure, which is at variance with any of the provisions of these Regulations, if the Commission, in view of the special circumstances of a matter or class of matters and for reasons to be recorded in writing, deems it necessary or expedient for dealing with such a matter or class of matters.

82. Nothing in these Regulations shall, expressly or impliedly, bar the Commission to deal with any matter or exercise any power under the Acts for which no Regulations have been framed, and the Commission may deal with such matters, powers and functions in a manner it thinks fit.”

(Emphasis Supplied)

10. The Regulation 85 of the Conduct of Business Regulations

reads as follows:

“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.”

(Emphasis Supplied)

11. In the context of this case, certain provisions of the Power Purchase Agreement (hereinafter referred to as “the PPA”) dated 30.4.2010 between the parties are also relevant. Article 5 of the PPA deals with “Rates and Charges”. Article 5.2 reads as follows :-

“5.2.GUVNL shall pay the fixed tariff mentioned hereunder for the period of 25 years for all the Scheduled Energy/Energy injected as certified in the monthly SEA by SLDC. The tariff is determined by Hon’ble Commission vide Tariff Order for Solar based power project dated 29.1.2010 (sic).

Tariff for Photovoltaic project: Rs.15/KWh for First 12
Years and thereafter
Rs. 5/KWh from 13th Year to 25th Years

Above tariff shall apply for solar projects commissioned on or before 31st December 2011. In case, commissioning of Solar Power Project is delayed beyond 31st December 2011, GUVNL shall pay the tariff as determined by Hon’ble GERC for Solar Projects effective on the date of commissioning of solar power project or above mentioned tariff, which ever is **lower.**”

(Emphasis Supplied)

The tariff order dated 29.01.2010 is in exercise of powers under Sections 61(h), 62(1)(a), 86(1)(e) and all other powers enabling it in this behalf.

12. Article 8 of the PPA pertains to force majeure events. It provides for events which constitute force majeure:

“ARTICLE 8 FORCE MAJEURE

8.1 Force Majeure Events

(a) Neither Party shall be responsible or liable for or deemed in breach hereof because of any delay or failure in the performance of its obligations hereunder (except for obligations to pay money due prior to occurrence of Force Majeure events under this Agreement) or failure to meet milestone dates due to any event or circumstance (a “Force Majeure Event”) beyond the reasonable control of the Party experiencing such delay or failure, including the occurrence of any the following:

(i) acts of God;

(ii) typhoons, floods, lightening, cyclone, hurricane, drought, famine, epidemic, plague or other natural calamities;

(iii) acts of war (whether declared or undeclared), invasion or civil unrest;

(iv) any requirement, actions or omission to act pursuant to any judgment or order of any court or judicial authority in India (provided such requirement, or action or omission to act is not due to the breach by the Power Producer or GUVNL of any Law or any of their respective obligations under this Agreement);

(v) inability despite complying with all legal requirements to obtain, renew or maintain required licenses or Legal Approvals;

(vi) earthquakes, explosions, accidents, landslides; fire;

(vii) expropriation and/or compulsory acquisition of the Project in whole or in part by Government

Instrumentality;
(viii) chemical or radioactive contamination or ionising radiation; or
(ix) damage to or breakdown of transmission facilities of GETCO/ DISCOMs;
(x) Exceptionally adverse weather conditions which are in excess of the statistical measure of the last hundred (100) years.

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8.2 Available Relief for a Force Majeure Event

No party shall be liable for (sic) breach of its obligations pursuant to this Agreement to the extent that the performance of its obligations was prevented, hindered or delayed due to a Force Majeure event. For avoidance of doubt, neither Party's obligation to make payments of money due and payable prior to occurrence of Force Majeure events under this Agreement shall be suspended or excused due to the occurrence of a Force Majeure Event in respect of such Party."

13. There were also certain communications between the parties which are required to be noted. On 19.04.2011 the first respondent communicated its intention to change the location. The relevant portion of the letter reads as follows :-

"..... Originally the PPA was signed with an intention to develop the 20 MW Solar PV Project at Village Ajawada, Taluka- Tharad, District Banaskantha, Gujarat. But due to some unforeseen events we were unable to procure the Project land at Ajawada village and identified THREE other Locations to procure the Land and we had informed the some to your office vide our monthly Progress Reports.

Now, we are happy to inform you that we have already acquired 60 acres of Land required for the commissioning of first two phases of 5 MW at Shivlakha Village, Tal-Bhachau, Dist.Kutch and enclosing herewith the details and copies of the

documents of the Land procurement. We have (*sic*) also made advance Payments for another 105 acres in the same Location and will be completing the Land Registration before the end of this month.

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d) We have already informed the details of Land procurement to GETCO for the necessary survey and commencement of power evacuation process. Hence we kindly request you to amend the PPA with respect to the change of Location. We hereby submit the Copies of the documents as proof of Land Procurement...”

14. A Supplemental Power Purchase Agreement (hereinafter referred to as “the SPPA”) was entered into by the parties on 10.05.2011. Clauses 2.3 and 2.4 of the SPPA read as

follows :-

“2.3. Since M/s. SSCPCIPL have changed the location of the Solar Power Project after lapse of significant time, non-availability of Transmission system shall not be considered as a ground for non-levy of Liquidated Damages. M/s. SSCPCIPL shall pay Liquidated Damages even in case of non-availability of transmission system for evacuation of power by Schedule Commercial Operation Date.

2.4. All other terms and conditions including tariff of Power Purchase Agreement dated 30th April 2010 between GUVNL and M/s. SSCPCIPL shall remain unchanged shall apply mutatis mutandis.”

(Emphasis Supplied)

15. It is also necessary to understand how this matter reached this Court. Close to the scheduled commercial operation date, Respondent No. 1 requested the Commission for an

extension of the control period. The petition to the relevant extent reads as follows.

“12. While the Petitioner is making best efforts to overcome the delays as much as possible, it would not be feasible to complete the project within the time stipulated. The Petitioner has done its due diligence and with its commitment to expedite various activities, the Petitioner is optimistic that the project is likely to be completed by the end of April 2012. The Petitioner has also issued a representation to the Department of Energy and Petrochemicals on November 30, 2011 and to GUVNL pointing out the various above mentioned reasons for delay. The Petitioner in the said letters has sought extension of time till force majeure issues are resolved...

PRAYER

13. In view of the above, it is therefore most respectfully submitted that the Hon'ble Commission may graciously be pleased to:

- (i) Extend the 'Control Period' till April 30, 2012 as defined by this Hon'ble Commission in its Order dated 29th January, 2010;
- (ii) Pass such other and further orders, as this Hon'ble Commission deems fit and proper in the facts and circumstances of the case.”

(Emphasis Supplied)

16. The Commission by order dated 27.01.2012 refused to extend the control period. To quote :-

“14.3 Article 5.2 of the PPA provides, inter alia, that “....Above tariff shall apply for power projects commissioned on or before 31 December 2011. In case, commissioning of Solar Power Projects is delayed beyond 31 December 2011, GUVNL shall pay the tariff as determined by Hon'ble GERC for Solar Projects effective on the day of commissioning of Solar Power Projects or above mentioned tariff, whichever is lower”. This means that if the project is

not commissioned within the stipulated period the existing tariff or the new tariff whichever is lower will apply. The petitioners have consciously agreed to this provision by signing the PPA. The Commission has already circulated on 1 November 2011 a discussion paper for determining tariff for Solar Projects for the second control period which is to start from 29 January 2012. The tariff suggested is lower than the current tariff. The petitioners have sought extension of the control period in order to prevent the application of a lower tariff in the event of not being able to commission the projects within the stipulated period. The reasons given by them are project specific. The situations of various projects are widely different. In some cases, the projects are at an advanced stage. In some other cases the projects are at an initial stage, and in some cases, even the order for equipment is yet to be issued. Some of them have asked for one month and some others have asked as long as six months. The petitioners have not been able to show that there has been a problem which is industry-wide and spread over the whole State or a major part of the State, necessitating an extension of the control period. On the other hand, a number of projects have been commissioned or are likely to be commissioned within the control period indicating that the issues raised by the petitioners are not industry-wide. If some developers could not complete the projects, it is not adequate justification why the tariff order should be modified for extending the control period to give relief to some project developers. This becomes more anomalous especially when a discussion paper has already been issued, and public hearing has already been completed for issue of the tariff order for the next control period. Further, the issues which have been raised can, if they so desire be addressed by the parties concerned only within the framework and the terms and conditions of Power Purchase Agreement. If they invoke Force Majeure conditions, it is for them to establish the existence of such conditions, following the procedure prescribed in the PPA. There cannot be a general order for addressing such issues which are specific to some individual project

developers, especially when several others have successfully implemented their projects.

16. In view of the above analysis, we decide that the petitioners have not succeeded in making out a case for invoking the inherent power of the Commission to extend the control period determined by the Commission in its Order No. 2 of 2010 dated 29 January 2010. Though they have put forward a number of reasons for the relief they have sought, none of the petitioners including the Association of Solar Power Developers, which has filed a separate petition, has indicated any ground whatsoever which is of universal application either in the State of Gujarat or a major part thereof by which all the projects are affected by such factors. Several projects have been or are likely to be commissioned during the control period itself. The reasons indicated by the petitioners appear to be in the manner of indirectly invoking the Force Majeure clause specified in the PPA, which cannot be addressed by a general order. Hence, all the petitions are dismissed.”

(Emphasis Supplied)

17. By its order dated 22.02.2012, the Commission, finding that the reasons put forward by Respondent No. 1 herein are similar to those dealt with by the Commission in its order dated 27.01.2012, dismissed the petition.

18. In appeal, the Appellate Tribunal for Electricity (hereinafter referred to as “the Appellate Tribunal”) in the order dated 02.01.2013 dealt with this issue at paragraphs-24 to 27.

“24. The reasoning of the Commission that extending the control period would mean amendment of the Tariff Order is not at all possible to concede to. The Commission, it will be noticed from the impugned

order, was conscious that individual petitions referred to individual project specific problems and issues and some prayed for one month extension, while some prayed for six months extension. The Commission came to the conclusion that unless there would happen a state-wide and large scale ramifications then only there could be a case for issue of a general order to extend the control period. Yet, the Commission said at the same breath that it has inherent power to extend the control period and it was made available when GETCO was at default. The basic premise that unless there is wide and large scale ramifications across the State in respect of the renewable sources of energy there cannot be extension of control period by general order is, to say the least, not a legal approach and such an approach would defeat the very spirit of the law. The GUVNL and the Govt. of Gujarat accepted the proposition that inherent power can be exercised to a genuine problem. In paragraph 10.7 of the order impugned, the Commission has observed "Even if we do not take into cognizance the above cited decisions of the TNERC, the provisions of Regulation 80 of the Commission's Regulations, Section 151 of the Civil Procedure Code and related decisions of the Hon'ble Supreme Court make it abundantly clear that the Commission has inherent power to issue any order, to meet the end of justice, if it is not inconsistent with the relevant provisions of the Regulations/Act. This power is not limited to only procedural matters." This observation makes it clear that Commission was dealing with the petitions by virtue of the power expressly given to the Commission by their own Regulations to exercise inherent power. The petitions of the two appellants were not the ones under section 86 (1) (b) of the Electricity Act, 2003. Now, it is not logical to argue that unless there is state-wide large scale ramifications inherent power cannot be exercised. The relevant Regulation of the Commission is exactly identical in language and spirit with section 151 of the CPC. This provision of inherent power does not by itself confer any power but only indicates that there is a power to make an appropriate order as may be necessary to achieve

justice and prevent the abuse of the process of law. It has been held by the Hon'ble Supreme Court in Raj Bahadur Ras Raja Vs. Seth Hiralal, AIR 1962 SC 527, that the inherent power is not a power given to the Court, it inheres in the Court itself so that by virtue of exercise of such power, justice is rendered. In Ramji Dayawala Vs. Invest Import (1981) 1 SCC 80, the Hon'ble Supreme Court held that the discretion vested in the Court is dependent on various circumstances which the Court has to consider and there is no limitation for application of the inherent power. Therefore, each case has to be decided on its own merit and simply because of the fact that some of the grounds were common to all the petitions the treatment of the alleged common grounds has to be common. While saying so, we are not oblivious of the legal proposition that inherent power cannot be exercised when prohibited or excluded by the statute itself and when there are specific provisions to address the remedy. That is to say, inherent power can be exercised only for the ends of justice. The very exercise of inherent power or non-exercise of inherent power depends upon consideration of specific facts.

25. The argument of the GUVNL and for that matter of the Commission that extension of control period would be prejudicial to the PPA is again not acceptable. Firstly, PPA is not subordinate to the Tariff Order although it is based on that. The provision in the PPA that unless projects are commissioned within the specified period tariff as per the Tariff Order dated 29.1.2010 would not be available does not conflict with exercise of inherent power. If situations having wide scale ramifications warrant exercise of inherent power for extension of control period then also a certain PPA may have some consequences. Liquidated damages are available to the GUVNL only when defaults occur on the part of the developer; but when a situation is seen where circumstances regardless of whether wide scale ramifications across the State happen or do not happen went beyond the control of a developer then exercise of the inherent power which the Commission does have in their statute may be exercised but each case has to be

decided on its own merit. The existence of force-majeure condition definitely comes within the framework of the Power Purchase Agreement but exercise of inherent power is always case-specific and it cannot be equated with force-majeure. Again extension of control period cannot by any stretch of imagination would amount to amendment of the Tariff Order. Amendment of the Tariff Order by virtue of section 62 (4) of the Electricity Act, 2003 was not prayed for. Since in every venture there is allocation of risk, it cannot be said that even if a certain developer experiences hurdles beyond his control, he has to abide by such hurdles. When fact in each case is hotly contested by a counter fact or denial, justice demands that each fact has to be separately dealt with and decided. It is the Commission which is alone competent to scrutinise the merits and demerits of each fact in each of the two Appeals. It is the Commission that has the infrastructure and capability to examine and find as to whether expenditures were made and committed ahead of the date of commissioning of the project so that no unfair advantage is claimed by any developer on the ground of prospective reduction of the capital cost. If the particulars of expenditure if already made or committed during the control period are scrutinised and the grounds are scrutinised in the perspective of each individual case then possibly it would be clear to the Commission as to whether and in which case a developer comes with clean hands or not.

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."

(Emphasis Supplied)

19. The above decision of the Appellate Tribunal dated 02.01.2013 was challenged before this Court in Civil Appeal No.2315 of 2013 with Civil Appeal No. 2542 of 2013. However, by Order dated 01.04.2013, the appeal was dismissed *in limine* but this Court made it clear that the Commission shall decide the whole issue without being influenced by the observations made by the Appellate Tribunal in accordance with law. The Order reads as follows:

“We have heard the 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.”

20. Once the matters were remanded to the Commission for rehearing on merits of each case, the Commission vide order dated 05.04.2014 allowed the petition for extension of the control period. To quote :-

“11.26. Considering the above observations, we are of the view that the delay which occurred in commissioning of the power plant was due to the

reasons beyond the control of the petitioner. Moreover, the petitioner had initiated construction activities of the Solar Power Project and completed the same which was recognized by the Chief Electrical Inspector in its letter dated 17.2.2012 and 13.03.2012 stating that the 8.64 MW Solar Power PV Project of the petitioner was ready on 1.02.2012 and 1.48 MW Solar PV Power Project of the petitioner was ready for energisation on 21.02.2012. Therefore, it is a clear case in which the petitioner was unable to commission the above capacity of the power plant due to reasons beyond its control. The prayer of the petitioner to extend the control period of order No.2 of 2010 dated 29.1.2010 upto 30th April, 2012 is valid and the same is allowed to provide the justice to the petitioner whose project was delayed.

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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.”

(Emphasis Supplied)

21. The Appellate Tribunal at paragraphs-10.11 and 10.12 of the impugned judgment held that even under Regulation 85 of the Conduct of Business Regulations, the Commission was within its power to extend time and the same can be exercised even in an individual case. To quote :

“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."

(Emphasis Supplied)

22. Thus, the Appellate Tribunal while approving the views taken by the Commission held that the Commission was legally justified in exercising its inherent power to extend the control period.

23. Now that the factual matrix of the case is laid out, we shall proceed with our analysis of the same from the legal perspective.
24. At the outset, it is important to carefully note what the Supreme Court held while dismissing Civil Appeal No. 2315 of 2013. No doubt, this Court declined to interfere with the order passed by the Appellate Tribunal. This Court dismissed the appeal *in limine*, at the admission stage without discussing any legal issues for the reason that the Appellate Tribunal had only remitted the matter to the Commission. This Court has not made any authoritative ruling on the availability and exercise of inherent powers by the Commission. Nor is there a stamp of approval of the Appellate Tribunal's order. It was for this reason that this Court clarified that the Commission should take an independent decision uninfluenced by the observations made by the Appellate Tribunal and that decision should be in accordance with law. Therefore, the decision of this Court is only on non-interference with the order of Appellate Tribunal to remit the matter to the Commission for a hearing on case-to-case basis and this Court did not

make any observations with respect to the merits of the matter. In other words, it is not an order agreeing with or upholding the views of the Appellate Tribunal. It is also crucially relevant to note that even according to the Appellate Tribunal, as stated in paragraph 27 of the order dated 02.01.2013, it had only made “observations” and in view of those observations, the appeals were allowed by remitting the matters to the Commission. This Court clearly held that the “whole issue” should be examined “without being influenced by the observations made by Appellate Tribunal for Electricity”.

25. The question before us is whether the Commission has the power to extend the control period provided under the tariff order. That question is no more *res integra*. There are two recent judgments of this Court which are relevant in this context. In **Gujarat Urja Vikas Nigam Limited v. EMCO Limited and another**¹, this Court at Paragraphs-39 and 40, has specifically held as follows:

“39. Apart from that both Respondent 2 and the Appellate Tribunal failed to notice and the first respondent conveniently ignored one crucial condition of the PPA contained in the last sentence of Para 5.2 of the PPA:

¹ (2016) 11 SCC 182

“In case, commissioning of solar power project is delayed beyond 31-12-2011, GUVNL shall pay the tariff as determined by the Hon’ble GERC for solar projects effective on the date of commissioning of solar power project or abovementioned tariff, *whichever is lower.*”

The said stipulation clearly envisaged a situation where notwithstanding the contract between the parties (the PPA), there is a possibility of the first respondent not being able to commence the generation of electricity within the “control period” stipulated in the First Tariff Order. It also visualised that for the subsequent control period, the tariffs payable to a Projects/power producers (similarly situated as the first respondent) could be different. In recognition of the said two factors, the PPA clearly stipulated that in such a situation, the first respondent would be entitled only for lower of the two tariffs. Unfortunately, the said stipulation is totally overlooked by the second respondent and the Appellate Tribunal. There is no whisper about the said stipulation in either of the orders.

40. The first respondent has created enough confusion. While on one hand the first respondent asserted a right to seek determination of a separate tariff independent of the tariff fixed under the First Tariff Order in view of the stipulation contained in the First Tariff Order that “for a project that does not get such benefit, the Commission would, on a petition in that respect, determine a separate tariff taking into account all the relevant facts” did not seek a relief before the second respondent to determine a separate tariff but claimed the benefit of the Second Tariff Order. Assuming for the sake of argument that the petition filed by the first respondent (1270/2012) is to be treated as an application for determination of separate tariff which would be identical with the tariff fixed under the Second Tariff Order, whether the first respondent would be entitled for such a relief depends, if at all he is entitled to seek such a determination, on a consideration of “all the relevant

facts” but not by virtue of the operation of the Second Tariff Order.”

(Emphasis supplied)

This decision with its pointed reference to application of “*lower of the two tariffs*” squarely applies to this case.

26. However, while addressing another grey area as to whether the Commission has the power to amend tariff despite the terms of the PPA, this Court in **Gujarat Urja Vikas Nigam Limited v. Tarini Infrastructure Limited and others**², after analyzing scheme of the Act, has answered the question in affirmative.
27. The scheme of the Act has been analyzed at paragraphs-12 and 16, which read as follows:

“12. While Section 61 of the Act lays down the principles for determination of tariff, Section 62 of the Act deals with different kinds of tariffs/charges to be fixed. Section 64 enumerates the manner in which determination of tariff is required to be made by the Commission. On the other hand, Section 86 which deals with the functions of the Commission reiterates determination of tariff to be one of the primary functions of the Commission which determination includes, as noticed above, a regulatory power with regard to purchase and procurement of electricity from generating companies by entering into PPA(s). The power of tariff determination/fixation undoubtedly is statutory and that has been the view of this Court expressed in paras 36 and 64 of *A.P. TRANSCO v. Sai Renewable Power (P) Ltd.* This, of course, is subject to determination of price of power in open access (Section 42) or in the case of open

² (2016) 8 SCC 743

bidding (Section 63). In the present case, admittedly, the tariff incorporated in PPA between the generating company and the distribution licensee is the tariff fixed by the State Regulatory Commission in exercise of its statutory powers. In such a situation it is not possible to hold that the tariff agreed by and between the parties, though finds mention in a contractual context, is the result of an act of volition of the parties which can, in no case, be altered except by mutual consent. Rather, it is a determination made in the exercise of statutory powers which got incorporated in a mutual agreement between the two parties involved.

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16. When the tariff order itself is subject to periodic review it is difficult to see how incorporation of a particular tariff prevailing on the date of commissioning of the power project can be understood to bind the power producer for the entire duration of the plant life (20 years) as has been envisaged by Clause 4.6 of PPA in the case of Junagadh. That apart, modification of the tariff on account of air-cooled condensers and denying the same on account of claimed inadequate pricing of biogas fuel is itself contradictory.”

(Emphasis supplied)

28. There is also a pointed reference to the decision of this Court in **EMCO** (supra) at paragraph-21, which reads as follows:

“21. In *Gujarat Urja Vikas Nigam Ltd. v. EMCO Ltd.* the power purchaser sought the benefit of a second tariff order made effective to projects commissioned after 29-1-2012 (the power purchaser had commissioned its project on 2-3-2012) though

under PPA it was to be governed by the first tariff order of January 2010. Under the first tariff order for such projects which were not commissioned on or before the date fixed under the said order, namely, 31-11-2011 the tariff payable was to be determined by the Gujarat Electricity Regulatory Commission. The power producer in the above case did not seek determination of a separate tariff but what was sought was a declaration that the second tariff order dated 27-1-2012 applicable to PPA(s) after 29-1-2012 would be applicable. It is in this context that this Court had taken the view that the power producer would not be relieved of its contractual obligations under PPA.”

(Emphasis supplied)

29. Having referred to the above decisions, we shall now make an independent endeavor to analyze the present case in the context of factual matrix and the relevant statutory provisions. An amendment to tariff by the Regulatory Commission is permitted under Section 62(4) read with Section 64(6) of the Act. Section 86(1)(a) clothes the Commission with the power to determine the tariff and under Section 86(1)(b), it is for the Commission to regulate the price at which electricity is to be procured from the generating companies. Section 86 (1)(e) deals with promoting co-generation and generation of electricity from renewable sources of energy . Therefore, there cannot be any quarrel with regard to the power conferred on the Commission with regard to fixation of tariff for the

electricity procured from the generating companies or amendment thereof in the given circumstances.

30. Part X of the Act from Sections 76 to 109 deals with “Regulatory Commissions” providing for their constitution, powers and functions. Section 92 read with Section 94 provides for the proceedings and power of the Commission while exercising its functions and powers. Under Section 92, the proceedings of the Commission are to be governed by what is specified in the appropriate Regulation with regard to the transaction of business at its meetings. It is that Regulation which is referred to under Section 181 (zl) *“rules of procedure for transaction of business under sub-section (1) of Section 92”*. Under Section 181(zp) other matters also can be specified. Section 2(62) defines “specified” as “specified by regulations made by the Appropriate Commission or the Authority, as the case may be, under this Act”.
31. Section 94 provides that the Appropriate Commission shall be vested with certain powers as are vested in a civil court, only in six specified areas. Under Section 94(1)(g), the Commission has the powers of a civil court in respect of “any other matter which may be prescribed”. Under

Section 2(52) “prescribed means prescribed by rules made by the Appropriate Government under this Act”.

32. Regulations 80 to 82 are instances of such powers specified by the Commission. Regulation 80 has provided for the inherent power of the Commission to the extent of making such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the Commission. It has to be borne in mind that such inherent powers are to be exercised notwithstanding only the restrictions on the Commission under the Conduct of Business Regulations, meaning thereby that there cannot be any restrictions in the Conduct of Business Regulations on exercise of inherent powers by the Commission. But the specified inherent powers are not as pervasive a power as available to a court under Section 151 of the Code of Civil Procedure, 1908:

“151. Saving of inherent powers of court.- 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.”

However, the Commission is enjoined with powers to issue appropriate orders in the interest of justice and for preventing abuse of process of the Commission, to the extent not otherwise

provided for under the Act or Rules. In other words, the inherent power of the Commission is available to it for exercise only in those areas where the Act or Rules are silent.

33. Under Regulation 81, the Commission is competent to adopt a procedure which is at variance with any of the other provisions of the Regulations in case the Commission is of the view that such an exercise is warranted in view of the special circumstances and such special circumstances are to be recorded in writing. However, it is specifically provided under Section 181 that there cannot be a Regulation which is not in conformity with the provisions of the Act or Rules.

34. Under Regulation 82, the Commission has powers to deal with any matter or exercise any power under the Act for which no Regulations are framed meaning thereby where something is expressly provided in the Act, the Commission has to deal with it only in accordance with the manner prescribed in the Act. The only leeway available to the Commission is only when the Regulations on proceedings are silent on a specific issue. In other words, in case a specific subject or exercise of power by the Commission on a specific issue is otherwise provided

under the Act or Rules, the same has to be exercised by the Commission only taking recourse to that power and in no other manner. To illustrate further, there cannot be any exercise of the inherent power for dealing with any matter which is otherwise specifically provided under the Act. The exercise of power which has the effect of amending the PPA by varying the tariff can only be done as per statutory provisions and not under the inherent power referred to in Regulations 80 to 82. In other words there cannot be any exercise of inherent power by the Commission on an issue which is otherwise dealt with or provided for in the Act or Rules.

35. This Court should be specially careful in dealing with matters of exercise of inherent powers when the interest of consumers is at stake. The interest of consumers, as an objective, can be clearly ascertained from the Act. The Preamble of the Act mentions “protecting interest of consumers” and Section 61(d) requires that the interests of the consumers are to be safeguarded when the Appropriate Commission specifies the terms and conditions for determination of tariff. Under Section 64 read with Section 62, determination of tariff is to be made

only after considering all suggestions and objections received from the public. Hence, the generic tariff once determined under the statute with notice to the public can be amended only by following the same procedure. Therefore, the approach of this Court ought to be cautious and guarded when the decision has its bearing on the consumers.

36. Regulation 85 provides for extension of time. It may be seen that the same is available only in two specified situations - (i) for extension of time prescribed by the Regulations and (ii) extension of time prescribed by the Commission in its order for doing any act. The control period is not something prescribed by the Commission under the Conduct of Business Regulations. The control period is also not an order by the Commission for doing any act. Commissioning of a project is the act to be performed in terms of the obligation under the PPA and that is between the producer and the purchaser, viz., the respondent no.1 and appellant. Hence, the Commission cannot extend the time stipulated under the PPA for doing any act contemplated under the agreement in exercise of its powers under Regulation 85. Therefore, there cannot be

a extension of the control period under the inherent powers of the Commission.

37. The Commission being a creature of statute cannot assume to itself any powers which are not otherwise conferred on it. In other words, under the guise of exercising its inherent power, as we have already noticed above, the Commission cannot take recourse to exercise of a power, procedure for which is otherwise specifically provided under the Act.
38. Extension of control period has been specifically held to be outside the purview of the power of the Commission as per **EMCO** (supra). This appeal is hence, allowed. The impugned orders are set aside. However, we make it clear that this judgment or orders of the Appellate Tribunal or Commission shall not stand in the way of the Respondent no.1 taking recourse to the liberty available to them for re-determining of tariff if otherwise permissible under law and in which case it will be open to the parties to take all available contentions before the Commission.
39. There shall be no order as to costs.

.....J.
(KURIAN JOSEPH)

.....J.
(R. BANUMATHI)

New Delhi;

October 25, 2017.

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APEPAL NO. 6399 OF 2016

GUJARAT URJA VIKAS NIGAM LIMITEDAppellant
VERSUS
SOLAR SEMICONDUCTOR POWER COMPANY
(INDIA) PRIVATE LIMITED AND OTHERS ...Respondents

J U D G M E N T

R. BANUMATHI, J.

I have gone through the judgment of His Lordship Justice Kurian Joseph. His Lordship's judgment though comprehensive, having regard to the importance of the questions raised, I prefer to give my own reasonings for my concurrence.

2. An appeal under Section 125 of the Electricity Act, 2003 would be maintainable only on the grounds specified in Section 100 of the Civil Procedure Code i.e. only on substantial question of law. In the present case, the following substantial questions of law arise for determination:-

- Whether the State Commission has inherent powers to extend the control period of Tariff Order dated 29.01.2010 beyond the control period thereby adversely affecting the sanctity of PPA which was entered into by the parties by *consensus-ad-idem*?
- Whether the State Commission can invoke Regulations 80-82 of Conduct of Business Regulations-inherent powers

of the Commission to grant substantive relief to the generating company like respondent No.1 and thereby alter the terms of the contract arrived at between the parties *consensus-ad-idem*?

3. Brief facts are that the appellant and parent company of respondent No.1 executed Power Purchase Agreement (PPA) on 30.04.2010 for sale and purchase of electricity from 20 MW Solar PV Power project to be established by the parent company of the first respondent. In the initial stage itself, there was a delay from 30.04.2010 to 27.10.2010 firstly on account of transfer of Solar Power project in the name of parent company to a Special Purpose Vehicle (SPV) i.e. respondent No.1 and an amendment of PPA in favour of the SPV. Secondly, on account of first respondent's decision to change their location of the Solar Power project from District Banaskantha to District Kutchh, there was delay from 19.04.2011 to 10.05.2011 i.e. till the date of execution of the Supplemental Agreement. The Supplemental Agreement dated 10.05.2011 itself was entered into after the Scheduled Commercial Operation Date of the first plant i.e. 10.03.2011.

4. Article 5.2 of PPA specifically provided that the tariff determined in the Tariff Order dated 29.01.2010, would be applicable only if the project is commissioned by the specific date i.e. on or before 31.12.2011 and in case, delay is occasioned in commencement of the project, the tariff mentioned in the PPA and the new tariff determined by the State

Commission, whichever is lower, shall be applicable. Article 5.2 of the PPA reads as under:-

“GUVNL shall pay the fixed tariff mentioned hereunder for the period of 25 years for all the Scheduled Energy/Energy injected as certified in the monthly SEA by SLDC. The tariff is determined by Hon’ble Commission vide Tariff Order for Solar based power project dated 29.01.2010.

Tariff for Photovoltaic project:	Rs.15/KWh for First 12 years and thereafter Rs.5/ KWh from 13 th Year to 25 th Year.
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Above tariff shall apply for solar projects commissioned on or before 31st December 2011. In case, commissioning of Solar Power Project is delayed beyond 31st December 2011, GUVNL shall pay the tariff as determined by Hon’ble GERC for Solar Projects effective on the date of commissioning of solar power project or above mentioned tariff, whichever is lower.”

Under the Supplemental Agreement dated 10.05.2011, respondent No.1 agreed to oblige all the terms and conditions of the PPA including the deadlines for completing the project. The agreement also recognized that all other terms and conditions including tariff shall remain unchanged (clause 2.4). Clause 2.3 of the Supplemental Agreement specifically provided that since respondent No.1 had changed the location after lapse of significant time, respondent No.1 shall pay the liquidated damages even in case of non-availability of transmission system for evacuation. Because of change of location, GETCO had to replan the entire transmission line to be constructed. By executing the Supplemental Agreement and also by paying liquidated damages, respondent No.1 acknowledged that GETCO would require time to establish the evacuation facilities with reference to the new location i.e. District Kutchh.

STATUTORY POWER OF THE STATE ELECTRICITY REGULATORY COMMISSION TO DETERMINE THE TARIFF

5. The State Electricity Regulatory Commission is a body corporate constituted in terms of Section 82 of the Act, vested with certain important functions and powers specified under Sections 86 and 94 of the Act respectively. The body functions to achieve the purpose of the Electricity Act, 2003 viz. *'...taking measures conducive to development of electricity industry, promoting competition therein, protecting interests of consumers and supply of electricity to all areas, rationalization of electricity tariff...'*

6. Determination of tariff is one of the important functions of the Commission, apart from other important functions specified in the Act. Under Section 61, the Appropriate Commission is obligated to specify the terms and conditions for determination of tariff, and in doing so, it shall be guided by the factors enumerated therein in clauses (a) to (i). In terms of Section 62 of the Act, the Appropriate Commission is authorized to determine the tariff for supply of electricity by generating company to a distribution licensee. However, in case of shortage of supply of electricity, the Appropriate Commission may fix only the minimum and maximum ceiling of tariff for a period not exceeding one year. The Appropriate Commission is also authorized to determine the tariff for transmission, wheeling and retail sale of electricity. While doing so, the Appropriate Commission cannot show undue preference to any

consumer of electricity. The Act also provides that the tariff or any part thereof shall not be amended ordinarily more frequently than once in any financial year.

7. Section 64 prescribes the procedure for issuing Tariff Order which includes receiving the application for determination of tariff, its publication, considering all suggestions and objections received from the public and issuing a consequent Tariff Order or rejecting the application if it is not in accordance with the provisions of the Act and the rules and regulations made there-under or the provisions of any other law for the time being force.

8. Respondent No.2, Gujarat Electricity Regulatory Commission (hereinafter referred to as 'the State Commission') determined the promotional tariff for solar power projects that may be based in the State of Gujarat during the control period of two years from the date of the order i.e. 29.01.2010 till 28.01.2012. The State Commission had adopted the capital cost of Solar Photovoltaic Power Project at Rs.16.50 crores per MW and taking note of other aspects, the Commission determined the tariff for Solar Power Project at Rs.12.54 per unit. The Commission had consciously fixed the control period for its order dated 29.01.2010 as two years, considering that the gestation period for Solar PV projects is six months and that for the Solar Thermal Projects is 18-24 months. Based on this Tariff Order dated 29.01.2010 for 1st

respondent's Solar PV Power Project, tariff rate was fixed at Rs.15 per kWh for the initial twelve years starting from the commercial operation of the project and Rs.5 per kWh from the thirteenth year to twenty fifth year.

9. The Commission had published a Discussion Paper on 01.11.2011 for public view inviting comments from stakeholders and members of the State Advisory Committee on the draft order for the next Tariff Order. All the stakeholders had sent their views on the said draft. After considering the said views of the stakeholders, in exercise of the powers conferred under Sections 61(h), 62(1)(a) and 86(1)(e) of Electricity Act, 2003 and considering National Tariff Policy and the power procurement from New and Renewable Source of Energy Regulation 2008, Tariff Order 2012 for solar power and others was issued. As per Tariff Order 2012, the rates fixed for Solar PV projects are as under:-

Period	29 Jan.'12 to 31 Mar.'13	1 Apr.'13 to 31 Mar.'14	1 Apr.'14 to 31 Mar.'15
For megawatt-scale photovoltaic projects availing accelerated depreciation			
Levelized Tariff for 25 years	Rs. 9.28 per kWh	Rs. 8.63 per kWh	Rs. 8.03 per kWh
For first 12 years	Rs. 9.98 per kWh	Rs. 9.13 per kWh	Rs. 8.35 per kWh
For subsequent 13 years	Rs. 7.00 per kWh	Rs. 7.00 per kWh	Rs. 7.00 per kWh
For kilowatt-scale photovoltaic projects availing accelerated depreciation			
Levelized Tariff for 25 years	Rs. 11.14 per kWh	Rs. 10.36 per kWh	Rs. 9.63 per kWh

The above tariffs as per Tariff Order 2012 is to be in force from 29.01.2012 to 31.03.2015. The above said tariff is fixed by the Commission, on the basis of well founded parameters, such as, capital cost of the project, income tax, return on equity etc. Be it noted, in the

present case, the first respondent obtained the Chief Electrical Inspector Certificate, which is the statutory mandate as per Section 162 of the Act only on 13.03.2012, nearly two months after the expiry of the Tariff Order (2010).

WHETHER THE STATE COMMISSION HAS INHERENT POWERS TO EXTEND THE CONTROL PERIOD OF TARIFF ORDER DATED 29.01.2010 BEYOND THE CONTROL PERIOD IN RESPECT OF ONE PPA:

10. Section 181 of the Electricity Act, 2003 empowers the State Commission to make regulations consistent with the Act and the Rules to carry out the provisions of the said Act and, *inter alia*, provide for the matters indicated thereon. In exercise of the powers conferred under Section 181 of the Electricity Act, 2003 and under Section 127 of Gujarat Electricity Industry (Re-organization and Regulation) Act, 2003 and all powers enabling it in that behalf, the Gujarat Electricity Regulatory Commission framed the Conduct of Business Regulation. Regulations 80 to 82 deal with inherent powers of the Commission, which read as under:-

“Saving of inherent power of the Commission

80. Nothing in these Regulations shall be deemed to limit or otherwise affect the inherent power of the Commission to make such orders as may be necessary for ends of justice or to prevent the abuse of the process of the Commission.
81. Nothing in these Regulations shall bar the Commission from adopting in conformity with the provisions of the Acts, a procedure, which is at variance with any of the provisions of these Regulations, if the Commission, in view of the special circumstances of a matter or class of matters and for reasons to be recorded in writing, deems it necessary or expedient for dealing with such a matter or class of matters.
82. Nothing in these Regulations shall, expressly or impliedly, bar the Commission to deal with any matter or exercise any power under the Acts for which no Regulations have been framed, and the Commission may

deal with such matters, powers and functions in a manner it thinks fit.”

The State Commission and the Appellate Tribunal held that under the Conduct of Business Regulations, 2004 and Section 86 of the Electricity Act, 2003, the State Commission has inherent jurisdiction to extend the control period of the Tariff Order 2010 and the tariff rate thereon beyond 28.01.2012. The Appellate Tribunal further held that the control period of the Tariff Order was fixed by the State Commission itself and hence, the State Commission has inherent powers to extend the control period of the Tariff Order.

11. Main contention urged by the first respondent is that the question of law arising - whether the State Commission has the inherent power or authority to extend the control period as fixed by it in its generic Tariff Order dated 29.01.2010 arose in the first round of litigation between the parties and in the earlier round of litigation, the State Commission held that the Commission had no power to extend the control period in a specific case and the power was only to extend the control period generally. It was contended that in the appeal filed by respondent No.1, the Appellate Tribunal for Electricity *vide* its judgment dated 02.01.2013 set aside the judgment of the Commission holding that the Commission has the inherent power to extend the control period in individual cases. It was, therefore, urged by the first respondent that the question of law that the Commission has inherent power to extend the control period has

thus become final between the parties and the same now cannot be reopened.

12. In the earlier round of litigation, the State Commission had rejected the request of respondent No.1 to extend the time of control period of Tariff Order (2010) beyond 28.01.2012. On appeal, the Appellate Tribunal (*vide* order dated 02.01.2013) had set aside the order of the State Commission and remanded the matter to the State Commission to decide the matter afresh. In the appeal preferred by GUVNL before the Supreme Court, this Court dismissed the appeal by an order dated 01.04.2013. However, this Court made 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.

13. Learned Senior Counsel for the appellant, Mr. V. Giri submitted that the Supreme Court specifically directed the Commission to decide the whole issue in accordance with law without being influenced by the observations made by the Tribunal. As rightly contended by GUVNL, the whole issue was, therefore, kept open before the State Commission. Further, if the law was already settled by the Appellate Tribunal, there was no requirement for this Court to direct the State Commission to consider the '*issue in accordance with law*'. In my view, there is no merit in the contention that the question of law on the Commission's inherent

jurisdiction to extend the control period has been settled inter-se the parties in the earlier round of litigation. Rival contentions of the parties on this question have to be considered now.

14. Under Regulations 80 to 82, the inherent powers of the State Commission are saved. Under Regulation 80, which is akin to Section 151 CPC, the power of the State Commission is only intended to regulate the conduct of the Commission, that is, to regulate its own procedure. That power cannot travel beyond its own procedure so as to alter the terms and conditions of the PPA entered into between the parties to grant substantive relief to the first respondent by extending the control period of Tariff Order (2010) beyond 28.01.2012.

15. By a reading of Regulation 80, it is clear that inherent powers of the State Commission are saved to make such orders as may be necessary:- (i) to secure the ends of justice; and (ii) to prevent abuse of process of the Commission. The inherent powers being very wide and incapable of definition, its limits should be carefully guarded. Inherent powers preserved under Regulation 80 (which is akin to Section 151 of the Code) are with respect to the procedure to be followed by the Commission in deciding the cause before it. The inherent powers under Section 151 CPC are procedural in nature and cannot affect the substantive right of the parties. The inherent powers are not substantive provision that confers the right upon the party to get any substantive

relief. These inherent powers are not over substantive rights which a litigant possesses.

16. The inherent power is not a provision of law to grant any substantive relief. But it is only a procedural provision to make orders to secure the ends of justice and to prevent abuse of process of the Court. It cannot be used to create or recognize substantive rights of the parties.

In ***Vinod Seth v. Devinder Bajaj and Another*** (2010) 8 SCC 1, it was held as under:-

“28. As the provisions of the Code are not exhaustive, Section 151 is intended to apply where the Code does not cover any particular procedural aspect, and interests of justice require the exercise of power to cover a particular situation. Section 151 is not a provision of law conferring power to grant any kind of substantive relief. It is a procedural provision saving the inherent power of the court to make such orders as may be necessary for the ends of justice and to prevent abuse of the process of the court. It cannot be invoked with reference to a matter which is covered by a specific provision in the Code. It cannot be exercised in conflict with the general scheme and intent of the Code. It cannot be used either to create or recognise rights, or to create liabilities and obligations not contemplated by any law.

29. Considering the scope of Section 151, in *Padam Sen v. State of U.P.* AIR 1961 SC 218 this Court observed: (AIR p. 219, paras 8-9)

“8. ... 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 those powers is not in any way in conflict with what has been expressly provided in the Code or against the intentions of the legislature.* ...

9. ... The inherent powers saved by Section 151 of the Code are with respect to the procedure to be followed by the Court in deciding the cause before it. *These powers are not powers over the substantive rights which any litigant possesses. Specific powers have to be conferred on the courts for passing such orders which would affect such rights of a party.*”

30. In *Manohar Lal Chopra v. Seth Hiralal* AIR 1962 SC 527 this Court held: (AIR p. 533, para 21)

“21. ... that the inherent powers are not in any way

controlled by the provisions of the Code as has been specifically stated in Section 151 itself. But those powers are not to be exercised when their exercise may be in conflict with what had been expressly provided in the Code or against the intentions of the legislature.”

31. In *Ram Chand and Sons Sugar Mills (P) Ltd. v. Kanhayalal Bhargava* AIR 1966 SC 1899 this Court reiterated that the inherent power of the court is in addition to and complementary to the powers expressly conferred under the Code but that power will not be exercised if its exercise is inconsistent with, or comes into conflict with any of the powers expressly or by necessary implication conferred by the other provisions of the Code. Section 151 however is not intended to create a new procedure or any new right or obligation.”

Same view was reiterated in ***Ram Prakash Agarwal and Another v. Gopi Krishan (dead through LRs.) and Others*** (2013) 11 SCC 296.

17. In the case at hand, rights and obligations of the parties flow from the terms and conditions of the Power Purchase Agreement (PPA). PPA is a contract entered between the GUVNL and the first respondent with clear understanding of the terms of the contract. A contract, being a creation of both the parties, is to be interpreted by having due regard to the actual terms settled between the parties. As per the terms and conditions of the PPA, to have the benefit of the tariff rate at Rs.15/- per unit for twelve years, the first respondent should commission the Solar PV Power project before 31.12.2011. It is a complex fiscal decision consciously taken by the parties. In the contract involving rights of GUVNL and ultimately the rights of the consumers to whom the electricity is supplied, Commission cannot invoke its inherent jurisdiction to substantially alter the terms of the contract between the parties so as to prejudice the interest of GUVNL and ultimately the consumers.

18. As pointed out earlier, the Appellate Tribunal has taken the view that the control period of the Tariff Order was fixed by the State Commission itself and hence the State Commission has inherent power to extend the control period of the Tariff Order. It may be that the tariff rate as per Tariff Order (2010) as determined by the Committee has been incorporated in clause 5.2 of the PPA. But that does not in any manner confer power upon the State Commission to exercise its inherent jurisdiction to extend the control period to the advantage of the project proponent-first respondent and to the disadvantage of GUVNL who are governed by the terms and conditions of the contract. It is not within the powers of the Commission to exercise its inherent jurisdiction to extend the control period to the advantage of any party and to the disadvantage of the other would amount to varying the terms of the contract between the parties.

19. Mr. Giri, learned Senior Counsel for the appellant submitted in terms of clause 2.4 of the Supplemental Agreement dated 10.05.2011 that all the terms and conditions including tariff fixed in PPA dated 30.04.2010 shall remain unchanged, it must be performed by respondent No.1 in the same fashion as had been acknowledged by him. Mr. Giri further submitted that in terms of clause 2.3 of the Supplemental Agreement that respondent No. 1 has agreed that no changes in respect of respondent No. 1's liability to pay liquidated

damages shall be entertained on account of delay in procuring transmission system or otherwise and respondent No. 1 actually paid an amount of Rs. 23.25 lacs to GUVNL on 14.07.2011 thereby indicating that respondent No. 1 had acceded to the terms and conditions of the PPA and that the project was not commissioned by its Scheduled Commercial Operation Date other than the reasons mentioned in clause 5.3 of the agreement. It was further argued that if the commissioning of the first respondent's project had been delayed due to the reasons beyond its control, respondent No. 1 would have invoked force majeure clause and by paying liquidated damages for the delay in commissioning, respondent No. 1 did not consider any of the events beyond its control. It was, therefore, urged that when respondent No. 1 had consciously accepted the terms of the PPA, respondent No. 1 cannot be allowed to revert back from the terms of the PPA and the Commission cannot substitute its views by invoking inherent powers of the State Commission. Since we are giving liberty to the first respondent to approach the Commission, we are not expressing our views on the above contention. The appellant is at liberty to raise all these contentions before the Commission and this contention is left open.

20. Yet another contention raised by the appellant is that the project of respondent No.1 was commissioned/ready for commissioning only after

the cut-off date and the power project was ready for commissioning only after 17.02.2012 and 13.03.2012 when the Certificate of Chief Electrical Inspector was granted. It is, therefore, contended by the appellant that the certificate of Chief Electrical Inspector is a statutory requirement and without the approval of the Chief Electrical Inspector, respondent No.1 could not have energized the electrical installations. This contention is also left open.

21. As pointed out earlier, the State Commission has determined tariff for solar power producers *vide* order dated 29.01.2010 and tariff for next control period *vide* order dated 27.01.2012. The order dated 29.01.2010 is applicable for projects commissioned from 29.01.2010 to 28.01.2012 and the order dated 27.01.2012 is applicable for projects commissioned from 29.01.2012 to 31.03.2015. As pointed out earlier, the tariff is determined by the State Commission under Section 62. The choice of entering into contract/PPA based on such tariff is with the Power Producer and the Distribution Licensee. As rightly contended by the learned Senior Counsel for the appellant, the State Commission in exercise of its power under Section 62 of the Act, may conceivably re-determine the tariff, it cannot force either the generating company or the licensee to enter into a contract based on such tariff nor can it vary the terms of the contract invoking inherent jurisdiction.

SANCTITY OF POWER PURCHASE AGREEMENT

22. It is contended that Section 86(1)(b) of the Act empowers the State Commission to regulate the price of sale and purchase of electricity between the generating companies and distribution licensees and the terms and conditions of the PPA cannot be set to be inviolable. Merely because in PPA, tariff rate as per Tariff Order (2010) is incorporated that does not empower the Commission to vary the terms of the contract to the disadvantage of the consumers whose interest the Commission is bound to safeguard. Sanctity of PPA entered into between the parties by mutual consent cannot be allowed to be breached by a decision of the State Commission to extend the earlier control period beyond its expiry date, to the advantage of the generating company-respondent No. 1 and disadvantage of the appellant. Terms of PPA are binding on both the parties equally.

23. In ***Gujarat Urja Vikas Nigam Limited v. EMCO Limited and Another*** (2016) 11 SCC 182, facts were similar and the question of law raised was whether by passing the terms and conditions of PPA, respondent can assail the sanctity of PPA. This Court held that Power Producer cannot go against the terms of the PPA and that as per the terms of the PPA, in case, the first respondent is not able to commence the generation of electricity within the 'control period' the first respondent will be entitled only for lower of the tariffs.

24. The first respondent placed reliance upon ***Gujarat Urja Vikas***

Nigam Limited v. Tarini Infrastructure Limited and Others (2016) 8 SCC 743. In the said case, this Court was faced with the substantial question of law viz. whether the tariff fixed under a PPA (Power Purchase Agreement) is sacrosanct and inviolable and beyond review and correction by the State Electricity Regulatory Commission. In that case, respondent No.1 thereon-power producer had entered into a PPA with the appellant therein-distribution licensee for sale of electricity from the generating stations to the extent of the contracted quantity for a period of 35 years at Rs. 3.29 per KWH subject to escalation of 3% per annum till date of commercial operation. However, later the power producer found that the place from where the power was to be evacuated was at a distance of 23 kms. as opposed to a distance of 4 kms, envisaged in the concession agreement entered into between the Respondent-power producer and Narmada Water Resources Department (Respondent No.2 therein). On this ground respondent had sought revision of tariff by State Electricity Commission. This Court held that Section 86(1)(b) of Act empowers State Commission to regulate price of sale and purchase of electricity between generating companies and distribution licensees through agreements for power, produced for distribution and supply and that the state commission has power to re-determine the tariff rate when the tariff rate mentioned in the PPA between generating company and distribution licensee was fixed by

State Regulatory Commission in exercise of its statutory powers. Relevant portion of the paras (17) and (18) of the judgment, read as under:-

“17. As already noticed, Section 86(1)(b) of the Act empowers the State Commission to regulate the price of sale and purchase of electricity between the generating companies and distribution licensees through agreements for power produced for distribution and supply. As held by this Court in *V.S. Rice & Oil Mills v. State of A.P.* AIR 1964 SC 1781, *K. Ramanathan v. State of T.N.* (1985) 2 SCC 116 and *D.K. Trivedi & Sons v. State of Gujarat* 1986 Supp. SCC 20 the power of regulation is indeed of wide import...

18. All the above would suggest that in view of Section 86(1)(b) the Court must lean in favour of flexibility and not read inviolability in terms of PPA insofar as the tariff stipulated therein as approved by the Commission is concerned. It would be a sound principle of interpretation to confer such a power if public interest dictated by the surrounding events and circumstances require a review of the tariff. The facts of the present case, as elaborately noted at the threshold of the present opinion, would suggest that the Court must lean in favour of such a view also having due regard to the provisions of Sections 14 and 21 of the General Clauses Act, 1898....”

In the facts and circumstances of that case and that the tariff rate of Rs.3.29/- per KWH was subject to escalation and subject to periodic review. Evacuation was changed from a distance of 4 kms. to 23 kms. from its switch yard. On account of the same, respondent No.1 therein had incurred an additional cost of about Rs.10 crores which was not envisaged in the Concession Agreement. In such facts and changed circumstances, this Court thought it apposite to take a lenient view and allow the State Commission to re-determine the tariff rate.

25. In exercise of its statutory power, under Section 62 of the Electricity Act, the Commission has fixed the tariff rate. The word ‘tariff’ has not been defined in the Act. Tariff means a schedule of

standard/prices or charges provided to the category or categories for procurement by licensee from generating company, wholesale or bulk or retail/various categories of consumers. After taking into consideration the factors in Section 61(1)(a) to (i), the State Commission determined the tariff rate for various categories including Solar Power PV project and the same is applied uniformly throughout the State. When the said tariff rate as determined by the Tariff Order (2010) is incorporated in the PPA between the parties, it is a matter of contract between the parties. In my view, respondent No.1 is bound by the terms and conditions of PPA entered into between respondent No.1 and the appellant by mutual consent and that the State Commission was not right in exercising its inherent jurisdiction by extending the first control period beyond its due date and thereby substituting its view in the PPA, which is essentially a matter of contract between the parties.

26. Section 94 of the Electricity Act deals with the powers of the Commission as far as the conduct of the proceedings. Under Section 94(1)(f), the Commission has the power to review its own decision. The power of review under Section 94 (1)(f) is akin to that under Order XLVII Rule 1 CPC. At the instance of affected parties or the generating companies or the Commission on its own motion may review its own decision only if such order was made under: (i) mistake or error of fact apparent on the face of the record; (ii) discovery of new

and important matter which was not within the applicant's knowledge at the time when the order was made; or (iii) any other sufficient reason to meet the ends of justice. Contention of the appellant is that grounds were made out by the first respondent for review of first Tariff Order which was applicable till 28.01.2012. In support of this contention, reliance was placed upon **S. Nagaraj and Others v. State of Karnataka and Another** 1993 Supp. (4) SCC 595, wherein this Court has aptly described the object of 'power to review' and the circumstances under which the court shall exercise the power of review. This contention is also left open.

27. Learned Senior Counsel Mr. Jayant Bhushan for the respondent submitted that if the tariff as per order dated 27.01.2012 is applied, respondent No.1 would be forced to shut down due to non-recovery of costs. Drawing our attention to the capital cost of Solor PV projects, the learned Senior Counsel Mr. Giri submitted that such contention is contrary to the own admission of the first respondent. Contending that India's solor power installations have grown and cost tag of solor power has been reduced remarkably, learned Senior Counsel Mr. Giri submitted that even on equity, the first respondent cannot claim tariff rate as per Tariff Order (2010). It was contended that under the Tariff Order dated 29.01.2010 the capital cost was finalized at Rs.16.50 crores per MW and tariff rate was fixed at Rs.12.54 per kWh and for power

project of 20 MW of respondent No.1, the total cost would be around Rs.330 crores. Drawing our attention to the Tariff Order dated 27.01.2012, it was submitted that as per Tariff Order (2012), the capital cost was finalized at Rs.10 crores per MW and for a 20 MW power project, this would amount to a total cost of about Rs.200 crores. It was urged that the cost of solar PV projects which was in range in 2011 between Rs.10.00 crores and Rs.11.00 crores per MW is expected to further come down in future. In the counter affidavit filed by respondent No.1 before this Court, it is stated that the first respondent has invested about Rs.200 crores in the project. The learned Senior Counsel for the appellant Mr. Giri contended that even as per the admission of respondent No.1, it has incurred total cost of Rs.200 crores i.e. Rs.10.00 crores per MW which is relatable to the Tariff Order dated 27.01.2012 and not the previous Tariff Order dated 29.01.2010 and having incurred capital expenditure of Rs.200 crores, the first respondent cannot claim higher tariff rate as per the Tariff Order 2010 based on capital cost of Rs.330 crores and if the contention of respondent No.1 is to be accepted, it would only enable respondent No.1 to make undue gains at the cost of the consumers in the State. It was urged that extension of control period of the Tariff Order (2010) *qua* the first respondent would cause huge loss to GUVNL and loss to GUVNL means that this loss is to be passed on to the consumers in the form of increased tariff and

therefore it was contended that the Commission ought to have taken note of all the stakeholders namely the appellant and the consumers and not merely the claim of respondent No. 1. Since liberty is granted to the first respondent to approach the Commission, we are not inclined to go into the merits of this contention urged by GUVNL. Liberty is granted to GUVNL to urge the above contentions before the Commission and the Commission to consider the same on its own merits.

28. **Conclusions:-** (i) When the 1st respondent commissioned its project beyond 13.03.2012, Commission cannot exercise its inherent jurisdiction and vary the terms to extend the control period of Tariff Order dated 29.01.2010 in so far as the 1st respondent of the contract-Power Purchase Agreement (PPA) between GUVNL and the first respondent; (ii) the earlier order passed by this Court in C.A. No.2315 of 2013 (dated 01.04.2013) has not conclusively decided the substantial question of law *inter-se* the parties—that is exercise of inherent jurisdiction by the Commission to vary the terms of PPA by extending the control period beyond the stipulated time. On the above reasonings, I agree with the conclusion of my esteemed brother Justice Kurian Joseph.

**New Delhi;
October 25, 2017**

.....J.
[R. BANUMATHI]

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Civil Appeal No(s). 6399/2016

GUJARAT URJA VIKAS NIGAM LTD

Appellant(s)

VERSUS

SOLAR SEMICONDUCTOR POWER COMPANY (INDIA) PVT LTD &
ORS.Respondent(s)

Date : 25-10-2017 This appeal was called on for Judgment today.

For Appellant(s) Ms. Hemantika Wahi, AOR
Ms. Puja Singh, Adv.
Ms. Jesal, Adv.
Ms. Shubham Arya, Adv.

For Respondent(s) Mr. G. Ramakrishna Prasad, AOR
Mr. Suyodhan Byrapaneni, Adv.
Mohd. Wasay Khan, Adv.
Ms. Filza Moonis, Adv.

Hon'ble Mr. Justice Kurian Joseph pronounced the reportable Judgment of the Bench comprising His Lordship and Hon'ble Mrs. Justice R. Banumathi.

While agreeing with the conclusions in the Judgment pronounced by Hon'ble Sh. Kurian Joseph, J., Hon'ble Mrs. Justice R. Banumathi also pronounced the reportable Judgment with concurrent opinion.

The concluding part of the Judgment pronounced by Hon'ble Mr. Justice Kurian Joseph is as follows :-

"Extension of control period has been specifically held to be outside the purview of the power of the Commission as per EMCO (supra). This appeal is hence, allowed. The impugned orders are set aside. However, we make it clear that this judgment or orders of the Appellate Tribunal or Commission shall not stand in the

way of the Respondent no.1 taking recourse to the liberty available to them for re-determining of tariff if otherwise permissible under law and in which case it will be open to the parties to take all available contentions before the Commission."

Pending Interlocutory Applications, if any, stand disposed of.

(JAYANT KUMAR ARORA)
COURT MASTER

(RENU DIWAN)
ASSISTANT REGISTRAR

(Two signed reportable Judgments are placed on the file)