

COURT-II

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

APPEAL NO. 354 OF 2017

Dated: 27th March, 2019

**Present: Hon'ble Mr. Justice N. K. Patil, Judicial Member
Hon'ble Mr. Ravindra Kumar Verma, Technical Member**

In the matter of:

**M/s. JSW Energy Ltd. Appellant(s)
JSW Centre, Bandra Kurla Complex
Bandra (E), Mumbai – 400 051**

Versus

**1. Maharashtra Electricity Regulatory
Commission
World Trade Centre, Centre No.1
13th Floor, Cuff Parade, Respondent No.1
Mumbai – 400 005**

**2. Maharashtra State Electricity Distribution
Company Ltd.
G-9, Prakashgad, Anand Kanekar Marg
Bandra (E), Mumbai – 400 051 Respondent No.2**

**Counsel for the Appellant(s) : Mr. Sanjay Sen, Sr. Adv
Mr. Aman Dixit
Mr. Aman Anand
Mr. Suraj**

**Counsel for the Respondent(s) : Ms. Shruti Awasthi
Ms. Saroj Bala
Ms. Krishna Singh for R-2**

JUDGEMENT

PER HON'BLE MR. JUSTICE N.K. PATIL, JUDICIAL MEMBER

1. **The Appellant has presented the instant Appeal seeking the following reliefs:**

- a) Admit the present Appeal;
- b) Set aside the Impugned Finding in Paragraph 11.6 of the Impugned Order dated 23.08.2017 passed by the Respondent No.1 Commission;
- c) Hold and declare that the Appellant is entitled to compensation for increased costs as a consequence of changes in law for the O&M component, which compensation is to be based on the actual additional expenditure incurred by the Appellant as a result of change in law;
- d) Direct the Respondent No.2 to pay compensation for increased costs as a consequence of changes in law for the O&M component, based on the actual additional expenditure incurred by the Appellant as a result of change in law; and
- e) Pass such further orders or directions as this Tribunal may deem fit, just and proper in the circumstances of the case.

2. The Appellant has presented this Appeal for considering the following Questions of Law:

- A. Whether in view of the clear finding that change in law events have occurred which have resulted in increased operational costs to the Appellant, the State Commission could have declined to grant relief for the same in relation to O&M expenses?
- B. Whether in terms of the PPA, there is no correlation between the quoted bid tariff and computation of impact of change in law to restore the Appellant to the same economic position as if the change(s) in law have not occurred?
- C. Whether the Appellant is entitled to be restored to the same economic position, as if the change(s) in law had not occurred, in relation to O&M expenses?
- D. Whether the computation of the impact of change(s) in law in relation to O&M expenses ought to be based on the actual increase in the costs incurred by the Appellant under the O&M head, as a result of the change in law events?

Brief facts of the Case:-

- 3. In the instant Appeal, M/s. JSW Energy Ltd. (in short, the “Appellant”) is questioning the legality and validity of the Impugned Order dated 23.08.2017 passed by the Maharashtra Electricity Regulatory Commission, Mumbai in Case No. 117 of 2016 holding

that the events claimed by the Appellant as change in law events, qualify as such in terms of the PPA; and granting relief on account of the changes in law under the Fuel Handling Charges and Transportation Energy Charges heads, has declined to grant any compensation as a consequence of Change in Law in respect of O&M expenses and so far as it relates to findings recorded in paragraph 11.6 of the Impugned Order in respect of applicability to compensation for change in law to O&M expenses, the Appellant has presented this Appeal.

4. It is the case of the Appellant that the Respondent No.1/ the State Commission has passed the Impugned Order dated 23.08.2017 holding that the events claimed by the Appellant as change in law events, qualify as such in terms of the PPA; and granting relief on account of the changes in law under the Fuel Handling Charges and Transportation Energy Charges heads, but, however, has declined to grant any compensation as a consequence of Change in Law in respect of O&M expenses to the Appellant without assigning any valid nor cogent reasons in paragraph 11.6 contrary to their own reasoning recorded in paragraph 13 of the Impugned Order.
5. Therefore, it is the case of the Appellant that the Impugned order passed by the Maharashtra Electricity Regulatory Commission, Mumbai is liable to be set aside and may kindly be remanded back for reconsideration afresh for passing the appropriate order in

accordance with law after giving reasonable opportunity to the Appellant and the Respondent No.2.

6. Not being satisfied with the Impugned Order passed by the Maharashtra Electricity Regulatory Commission, Mumbai, the Appellant necessitated the present Appeal.
7. The principal submissions of the learned counsel appearing for the Appellant at the outset that, the Respondent No.1/the State Commission by assigning the valid and cogent reasons in paragraphs 13 of the Impugned Order dated 23.08.2017 has accepted the change in law event for the FY 2015-16 and FY 2016-17 and did not accept change in law event in respect of O&M charges without any justification. The finding recorded at 11.6 denying the relief sought by the Appellant towards O&M expenses cannot be sustainable in the eye of law.
8. The said finding recorded by the Respondent No.1/the State Commission is contrary to the material available on record and further he vehemently submitted and taken us through the reasoning assigned in paragraph 13 of the Impugned Order dated 23.08.2017 wherein they hold that the Appellant is entitled for change in law in respect of O&M charges. Therefore he submitted that the reasoning given in paragraph 11.6 cannot be sustainable in stretch of imagination and is liable to be set aside at threshold.

9. **Per contra**, the learned counsel appearing for the Respondent No. 2 interalia contended and substantiated that the Impugned Order dated 23.08.2017 passed by the Maharashtra Electricity Regulatory Commission, Mumbai was passed after considering material available on record as such the interference of this Tribunal does not call for.
10. We have heard the learned counsel appearing for the Appellant and the learned counsel appearing for the Respondent No.2. The Respondent No. 1, though served, is unrepresented.
11. After careful perusal of the Impugned Order passed by the Respondent No.1/the State Commission by assigning the reason for denying reliefs sought by the Appellant for applicability of the compensation for change of law to O&M expenses, the relevant finding in para 11.6 of the Impugned Order reads as follows

“11.6 Applicability of compensation for Change in Law to O&M expenses.

The Commission is not in agreement with JSWEL’s claim to the impact on the O&M expenses of the Generating Unit of the Change in Law events of levy and/or increase of Service Tax, SBC, KKC and Maharashtra VAT. The O&M cost components are subsumed in the rate offered by JSWEL and recorded in the

PPA, and only JSWEL knows their extent and weightage in the internal computations underlying its Bid. Hence, allowing this impact assuming CERC O&M norms, as suggested by JSWEL, would not be tenable.”

12. It is significant to note that the Respondent No.1/the State Commission after due consideration of oral and documentary evidence and other relevant material available on record has rightly justified by assigning valid and cogent reasons in paragraph 13 of the Impugned Order. It is worthwhile to extract the finding recorded in paragraph 13 of the Impugned Order passed by the Respondent No.1/ the State Commission as follows:-

“13. In its Petition and during these proceedings, JSWEL has presented its computations of the impacts of the Change in Law events in FY 2015-16 and FY 2016-17, which in aggregate exceed 1% of the LC in each of those Contract Years as required under the proviso to Article 13(2)(b). JSWEL may raise a Supplementary Bill on MSEDCL, as provided in Article 11.8.1(iii), for the impact of events which have been accepted by the Commission as “Change in Law”, computed from the dates from which they became effective. Along with its Supplementary Bill, JSWEL should submit proof regarding the additional

expenditure actually incurred by it on account of such “Change in Law” events and confirm that, in aggregate, it exceeds 1% of the LC amount in the relevant year.”

13. After careful consideration of the reasoning assigned in paragraph 13 of the Impugned Order dated 23.08.2017 passed by the Respondent No.1/the State Commission after going through the relevant material available on record and pleadings available on the file and reasoning assigned in paragraph 13 of the Impugned Order dated 23.08.2017, it is manifest that the Respondent No.1/the State Commission committed grave error in not allowing the adjustment in tariff due to change in law by recording reasoning in paragraph 11.6 contrary to their own finding recorded in paragraph 13 of the Impugned Order without any justification and without application of mind denying O&M charges on account of change in law to the Appellant is not at all justifiable in the eyes of law. The said reasoning assigned by the Respondent No.1/the State Commission cannot be sustainable and is liable to be vitiated at threshold for the reasons that the reasoning does not contain any discussions nor reasoning. In short, a cryptic order has been passed. It is established beyond reasonable doubt that there is no application of mind in denying the relief to the Appellant may be inadvertently or oversight paragraph 13 of the Impugned Order holding that the

Appellant entitled for O&M chares on change of law. Therefore, the reasoning given in paragraph 11.6 of the Impugned Order cannot be sustainable in the eye of law and is liable to be set aside without going into further merits and demerits of the case.

ORDER

Having regard to facts and circumstances of the case, as stated supra, the instant Appeal filed by the Appellant is allowed and the Impugned Order dated 23.03.2017 passed in Case No. 117 of 2016 so far as it relates to applicability of compensation for change in law to O&M expenses on the file of the first Respondent/Maharashtra Electricity Regulatory Commission, Mumbai is hereby set aside.

The matter stands remitted back to the Respondent No.1/the State Commission for reconsideration afresh in accordance with law after affording reasonable opportunity of hearing to the Appellant and the Respondent No.2 and in the light of the finding recorded in paragraph 13 of the Impugned Order dated 23.08.2017 and dispose of the same as expeditiously as possible at any rate within a period of six months from the date of appearance of the Appellant and the second Respondent.

The Appellant and the Respondent No.2 herein, are directed to appear before the Respondent No.1/the State Commission, Mumbai

without notice personally or through their counsel on 22.04.2019 to collect necessary date of hearing.

With these observations, the instant Appeal being Appeal No. 354 of 2017 stands disposed of.

Parties to bear their own costs.

Pronounced in the open court on this 27th day of March, 2019.

(Ravindra Kumar Verma)
Technical Member

mk/bn

(Justice N. K. Patil)
Judicial Member