

APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)

APPEAL NO. 42 of 2017

Dated : 29th October, 2018

PRESENT: HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER

IN THE MATTER OF :

M.P. Power Management Company Limited
Shakti Bhawan, Rampur, Jabalpur - 482008

.... **APPELLANT**

Versus

1. **M/s Jaiprakash Power Ventures Limited**
Sector-128, Noida-201304
Distt. : Gautam Buddh Nagar (U.P.)

2. **M.P. Poorv Kshetra Vidyut Vitaran Co. Ltd.**
Block No. 7, Shakti Bhawan, Rampur
Jabalpur (M.P.) – 482008

3. **M.P. Madhya Kshetra Vidyut Vitaran Co. Ltd.**
Nishtha Parisar, Bijlee Nagar, Govindpura
Bhopal (M.P.) – 462023

4. **M.P. Paschim Kshetra Vidyut Vitaran Co. Ltd.**
GPH Compound, Polo Ground
Indore (M.P.) - 452015

5. **M.P. Electricity Regulatory Commission**
5th Floor, Metro Plaza, Arera Colony
Bittan Market, Bhopal (M.P.) - 462016

.... **RESPONDENTS**

Counsel for the Appellant(s) : Mr. Purushaindra Kaurav, Sr. Adv.
Mr. Ravin Dubey
Ms. Anuradha Mishra
Mr. Varun Mohan
Mr. Nitin Gaur

Counsel for the Respondent(s) : Mr. Shri Venkatesh
Mr. Vikas Maini
Mr. Sandeep Rajpurohit
Ms. Nishtha Kumar
Mr. Pratyush Singh
Mr. N. Bhattacharya
Mr. Somesh Srivastav for R-1

Ms. Mandakini Ghosh
Mr. Parinay Deep Shah
Ms. Aradhna Tandon
Ms. Ritika Singhal
Mr. Gajendra Tiwari for R-5

J U D G M E N T

PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON

1. The present appeal is filed challenging the impugned order dated 21-9-2016 passed by the fifth Respondent Commission making the following observations:

“6. *Having heard Counsel of the petitioner and on examination of the contents in the subject petition, the Commission has observed the following:*

(i) *The petitioner has filed the subject petition under Section 86(1)(f) of the Electricity Act, 2003 for adjudication of dispute between the petitioner and M/s. Jaiprakash Power Ventures Pvt. Ltd. whereas,*

there is no issue regarding difference in interpretation of provisions between the parties in respect of “Due Date” in the PPA.

- (ii) The petitioner is willing to amend the Article 1.1 of the PPA with regard to the definition of “Due Date”*
- (iii) The petition is also seeking relief to execute amendment in the PPA in respect of “Due Date”.*
- (iv) As submitted by the petitioner and also evident from Annexure P/7 enclosed with the petition, M/s. Jaiprakash Power Ventures Ltd. (Respondent No.) has declined to give its consent for the aforesaid amendment in the PPA.*
- (v) As stated by the petitioner itself, the provisions regarding Late Payment Surcharge are existing in MPERC (Terms and Conditions for determination of Tariff) Regulations prior to execution of the said PPA i.e. 05.01.2011.*
- (vi) Regarding amendment in the PPA, Article 16.2 of the PPA provides the following :*

“This Agreement may only be amended or supplemented by a written agreement between the Parties and after duly obtaining the approval of the Appropriate Commission, where necessary”

- 7. In view of the above-mentioned facts and above-mentioned provision under the Power Purchase Agreement, the subject petition is not maintainable at this stage. Hence, the subject petition is disposed of.”*

2. The facts that led to the filing of the present appeal in brief are as under:
- 2.1 The Appellant, **MPPMCL** is a company wholly owned by Government of Madhya Pradesh. It is a Trading Licensee under Electricity Act 2003. It is also a Holding Company of three Discoms in Madhya Pradesh. The first Respondent, **JPVL** is an Independent Power Producer operating its 2x250 MW (Phase-I) Coal based Thermal Power Generation Plant at Village: Sirchopi, Tahsil: Bina, District: Sagar in the State of Madhya Pradesh. The second Respondent is a successor company of MPSEB, a Distribution Licensee in the eastern part of Madhya Pradesh. The third Respondent is a successor company of MPSEB and a Distribution Licensee in the central part of Madhya Pradesh. The fourth Respondent is a successor company of MPSEB and a Distribution Licensee in the western part of Madhya Pradesh. The fifth Respondent is the Madhya Pradesh Electricity Regulatory Commission (**MPERC**).
- 2.2 Tariff Regulations of 2009 notified by MPERC provided Late Payment Surcharge at Regulation 30 and 30.1 followed by Tariff Regulations of 12-12-2012, 1-1-2016, and Tariff Regulations of 2015. Subsequently, Tariff Regulations of 2012 and 2015 were made and notified which contain similar provisions of payment period and Late Payment Surcharge. It is not in dispute that on 5-1-2011 Power Purchase Agreement (PPA) came to be

executed between Appellant and Respondent No.1 with three Discoms owned by the Appellant. In terms of the said PPA, 65% of power from 2x250 MW installed capacity of first Respondent had to supply for a period of 25 years. Article 1.1 of PPA provides definition of due date which read as under:

“Article 1.1

...

“Due Date” shall mean the twenty first (21st) day after a Monthly Bill or a Supplementary Bill is delivered to and receipt is acknowledged by the procurer (or, if such day is not a Business Day, the immediately succeeding Business Day) by which date such Monthly Bill or Supplementary Bill is payable by the Procurer.”

Article 10.4.2 of PPA defines meaning of Late Payment Surcharge which reads as under:

“10.4.2 Late Payment Surcharge

In case payment of any Bill for charges payable under this Agreement is delayed by the Procurer beyond the Due Date thereof, a Late Payment Surcharge shall be payable by the Procurer to the Company at the rate of 1.25% per Month on the amount of outstanding payment, calculated on a day to day basis for each day of delay, compounded on monthly rests. Late Payment

*Surcharge shall be claimed by the Company or
Procurer through Supplementary Bills.”*

Apparently on 30-8-2013, an Audit Report came to be prepared by Accountant General (Economic and Revenue Sector Audit), Madhya Pradesh, Bhopal and the same came to be submitted to Government of Madhya Pradesh. In this Audit Report, it was pointed out that due to reduction of payment period from 30 days (which was provided in model PPA) to 21 days in executed PPA, Late Payment Surcharge was to the tune of Rs.39.19 Lakhs between the period from August 2012 and May 2013. They further opined that the said Late Payment Surcharge could have been avoided. After receiving the said Audit Report, the Appellant analysed the word ‘avoidable’ and realized that since Tariff Regulations provide 60 days’ payment period, double the 30 days’ payment period provided in the model PPA, there is a need to amend provisions of PPA. In compliant with the Tariff Regulations especially in the light of law laid down by the Hon’ble apex court in ***PTC India Ltd. Vs. Central Electricity Regulation Commission, through Secretary***¹, after realizing the anomaly, the Appellant wrote several letters to first Respondent to give consent for amending the “due date” in the PPA from 21 days to 60 days. However the Respondent categorically declined the said proposal by sending replies.

¹ [(2010) 4 SCC 603]

Hence, according to the Appellant, dispute arose between the Appellant and first Respondent; therefore, Appellant approached MPERC by filing petition 44 of 2016 under Section 86(1)(f) of Electricity Act 2003 wherein the Commission made the above-mentioned order.

3. *Per Contra*, the first Respondent, JPVL contends as follows in the appeal:-
 - 3.1 Since terms and conditions of PPA dated 5-1-2011 were approved by the State Commission only after mutual negotiations and acceptance between the parties, therefore, approval of PPA not being challenged till date, Appellant cannot seek for amendment as sought. Since Petition No. 11 of 2012 wherein PPA has been approved by the Commission is concluded, now parties cannot go beyond the concluded position in Petition No. 11 of 2012.
 - 3.2 Regulations 2009 did exist as on the date of signing of PPA and now after the PPA being approved by the Commission, that too after its implementation for over six years, Appellant cannot revoke the said agreement seeking reopening the terms of the agreement. In the Petition before the State Commission, Appellant has not disclosed crucial facts pertaining to the PPA between the parties. According to the Respondent, the State Commission during the proceedings in Petition No. 11 of 2012 sought comments from the very present Appellant as to why the terms and

conditions of Billing and Payment are distinct from the terms and conditions as provided under the model PPA. By filing Affidavits dated 19-7-2012 and 16-8-2012, Appellant specifically submitted that the case of the answering Respondent is unique as Bina Project was a revival project and hence certain terms and conditions including billing and payment are distinct due to the said reason. Only after considering the said submissions of the Appellant, a detailed order approving the present PPA came to be made by the Commission. These facts were pleaded neither before the Commission nor before the Tribunal by the Appellant.

3.3 After a lapse of almost seven years, Appellant cannot seek amendment, seeking reopening of terms and conditions of PPA. They also rely upon *Shyam Telelink Limited vs. Union of India*² to contend that the case of the Appellant is hit by doctrine of Estoppel. The Appellant who has enjoyed the benefit of power plant which was established in the State of Madhya Pradesh is now estopped from going back from the said agreement.

3.4 Then coming to the other issue, the Respondent contends that Regulation 33 of the Tariff Regulation 2012 provides for a rebate of 2% if payment is made by the distribution licensee within a period of one month of presentation of bill. However, PPA provides for such rebate at 2.25% on

² (2010) 10 SCC 165

Provisional Bill which is 0.25% higher than what is provided under the Regulation. Therefore, even Article 10.4.1 of the PPA is at variant with Regulation 33. Now the Appellant has picked up the issue of due date though such anomaly exists even with regard to rebate clause. However, Appellant is not choosing to agitate the same since it is beneficial to the Appellant.

3.5 They rely upon Judgment of this Tribunal dated 20-10-2011 in OP No. 02 of 2011 to enlighten the consequences of concealment of material facts. They also rely upon the cases of *S.P. Chengalvaraya Naidu Vs. Jagnath and Others*³ and *Amar Singh Vs. Union of India & Ors.*⁴ to contend that a person who tries to deceive and mislead the Court is not entitled to be heard on merits of the case. The Appellant having agreed to the due date of 21 days of PPA which is being approved by the Commission, cannot at a later state go back to get benefit of the Regulation. The due date of 60 days exists even prior to execution of PPA; therefore, Appellant cannot be allowed to retract from the commitment made by it under PPA.

3.6 They rely upon *JSW Energy Ltd. Vs. MSEDCL & Anr.*⁵ to contend that sanctity of PPA and the representation and warranties made by the parties

³ (1994) 1 SCC 1

⁴ (2011) 7 SCC 69

⁵ (2013 ELR (APTEL) 343

in entering into such agreement have to be given due consideration. Appellant in its wisdom agreed to a more stringent norm of 21 days when the terms of the Regulations was 60 days. Therefore, Appellant cannot restrict from the said position since PPA is a statutory contract.

3.7 Regulations 30 of 2009 and 32 of 2012 is only a part of chapter-II of the Regulation which contain general guiding principles and methodologies for determination of tariff and the same does not relate to the commercial arrangement between the generator and procurer. Therefore, due date as spelt in the agreement alone should prevail. Only the principles for computation of capacity charges, energy charges and norms of operation envisaged under PPA alone fall under the regime of regulatory sector. Therefore, these should be in consonance with the terms of Regulations notified by the State Commission. Therefore, parties are free to agree any commercial arrangements under the PPA.

Therefore, they contend that even the number of days provided in the Regulations is bare minimum and it does not restrict or bar the parties to agree to better and more aggressive norms. Therefore, due date of 21 days as agreed in PPA is an improved version would definitely prevail over due date mentioned in the Regulations. For this proposition, they rely upon Judgement dated 15-5-2015 by this Tribunal in *Power Company of*

Karnataka Ltd. Vs. Central Electricity Regulatory Commission, Appeal No. 108 of 2014.

3.8 So far as impugned order, the State Commission was justified in holding that appeal is not maintainable and this was after due deliberation and in terms of provisions of PPA and the law. Article 16.2 of PPA specifically provides that PPA can be amended only after a written agreement between the parties after obtaining the approval of the State Commission, and this can be supplemented only by written agreement between the parties. Respondent has declined the proposal of the Appellant to amend the due date of 21 days in the PPA. Therefore, there was no consensus or written agreement between the parties for the above-said amendment to the PPA. Since such written agreement was not there, State Commission rightly dismissed the petition. They further contend that since there is no elaborate decision by the Commission, it cannot be a ground of interference with the said opinion and a reason to challenge the impugned order.

3.9 They also contend that just because the impugned order is brief and not elaborate, it cannot be described as a non-speaking order. If the order shows application of mind by the authority, however brief the order is, cannot be termed as non-speaking order. Even otherwise at Para-6 of the impugned order, Commission has deliberated upon the issue and has

recorded its observations and reasoning. According to the Respondent, the impugned order is valid and proper and cannot be interfered with.

4. Respondent Commission also filed its submissions.

4.1 According to the Respondent Commission, Appellant was erroneous in filing the petition in question seeking unilateral amendment of PPA despite express refusal of the first Respondent to agree with the said proposal. The contention of the Appellant that there is a dispute with regard to number of days vis-à-vis due date is not correct. According to Respondent Commission, there is no difference between the Appellant and Respondent No. 1 regarding interpretation of provision of due date. There is no confusion over the meaning of the term 'Due Date'. Both the parties have agreed that as per the provisions of PPA, due date shall mean the 21 days after a bill is delivered and receipt is acknowledged by the procurer. Since Appellant is desirous of amending the definition of due date from 21 days to 60 days, Respondent has refused to do the same. This is nothing but failure to reach a consensus in making changes to a provision of the contract. Therefore, it cannot be termed as differences over interpretation of provisions.

4.2 State Commission was justified in giving primacy to Article 16.2 of the PPA over the statutory requirement as laid down by the Hon'ble Supreme

Court in *PTC India Ltd. Vs. Central Electricity Regulatory Commission*⁶.

In the said Commission, the controversy arose for decision before the apex court was whether Tribunal has jurisdiction under Section 111 of Electricity Act 2003 to examine the validity of Regulations framed by CERC under Section 178 of the Electricity Act. While discussing the validity of CERC Order in fixing of Trading Margin, the Hon'ble Supreme Court held that Regulations made under Section 178 have the effect of interfering and overriding the existing contractual relationship between the parties. The Hon'ble Supreme Court held that Trading Margin Regulations has general application and will also override existing and future PPAs.

- 4.3 With respect to due date and Late Payment Surcharge in the present case, Tariff Regulations did have a provision for the same much prior to the execution of PPA. Similarly, after execution of PPA, in 2012 and 2015, such provision of 60 days was made. Therefore, Late Payment Surcharge has always been the same prior to and after execution of PPA. Appellant had opportunity to incorporate 60 days at the time of signing the PPA and even after that it did not consider incorporating provision of late payment surcharge in line with the Regulations till PPA was approved on 7-9-2012.

⁶ (2010) 4 SCC 603

4.4 Unilaterally on behest of the Appellant, the time limit prescribed for levy of surcharge cannot be approved when the contesting Respondent has not agreed for the amendment since no written agreement came to be entered between the parties for change of period of due date, the Commission was justified in rejecting the same.

5. With these submissions on behalf of the parties, we proceed to consider the merits of the appeal as follows:-

5.1 Questions of Law raised in the appeal are:

- A. Whether Ld. MP Commission was right in disposing the Petition No 44 of 2016 filed by the Appellant (Petitioner) holding it “not maintainable”?
- B. Whether Ld. MP Commission was right in holding that there is no issue regarding difference in interpretation of provisions between the parties in respect of “Due Date” in the PPA?
- C. Whether the Ld. MP Commission was right in giving primacy to Article 16.2 of the PPA over the statutory requirement laid down by Hon’ble Supreme Court of India in *PTC India Ltd. (Supra)* obligating parties to the agreement to align the provisions of the existing and future PPAs with Regulations?

5.2 Though the Commission has filed a lengthy written submission but in the impugned order dated 21-9-2016 in last seven paragraphs as stated above, the matter came to be disposed of. In the impugned order, Commission never referred to several points submitted by the Appellant/Petitioner except pointing out that Appellant/Petitioner seeking amendment to the PPA with regard to number of days with reference to due date and the same being resisted by first Respondent herein. The order does not spell out the reasons why it cannot be allowed. It further proceeds to say that there has to be a written agreement between the parties in order to seek amendment to the terms of PPA that is prior to approaching the appropriate Commission, totally ignoring the fact that dispute has arisen between parties with regard to number of days so far as 'due date'. After referring to contentions raised in the petition and submissions made by the petitioner without even calling upon the Respondents to respond to the petition, has proceeded to pass the impugned order as stated above. We are of the opinion that the impugned order is non-speaking order; in other words, in order to arrive at the conclusion, there is no discussion what so ever with regard to all the points raised by the petitioner in the petition except stating that there is no difference in interpretation of provisions between the parties.

- 5.3 In the impugned order, Commission has not directed its mind to consider why and how the 21 days have to be the due date and beyond that a surcharge should be levied which is in contradiction of model PPA as well as MPERC Tariff Regulations of 2009. It is also not stated why the existing terms in the PPA with regard to due date should not be brought in anomaly with subsequent Regulations of 2012 and 2015. At Article 16.2, it clearly says parties can seek amendment or supplement to the PPA by written agreement between the parties. If dispute has arisen between the parties with regard to due date to be brought in line with the existing Regulations, it was incumbent upon the State Commission to give reasons and say why such term in the agreement in consonance with the Regulations should not be incorporated between the parties. Dismissing the petition before even hearing the Respondents therein, Commission ought not to have disposed of the matter opining that it was not maintainable, whether Respondents have appeared or not or filed objections or not, nothing is reflected in the order. In fact Commission has filed detailed objections in the appeal which is much elaborated than the impugned order. Since the impugned order is without any reasoning, we set aside the same.
- 5.4 We make it clear that we have not expressed any opinion on merits of the controversy. All contentions are kept open.

5.5 The matter is remitted back to the State Commission to dispose of the petition on merits by reasoned order after hearing all the parties.

5.6 Parties to bear their own costs.

5.7 Pronounced in the open court on 29th October 2018.

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

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REPORTABLE / NON-REPORTABLE

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