

COURT-I

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

**IA NO. 717 OF 2017
IN
APPEAL NO. 278 OF 2017**

Dated: 11th September, 2017

**Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. I.J. Kapoor, Technical Member**

In the matter of:

**Rattan India Power Ltd.
World Mark Tower-B, 5th Floor,
Aerocity, Indira Gandhi International Airport,
New Delhi – 110037**

Vs.

.... Appellant(s)

**1. Maharashtra Electricity Regulatory Commission
World Trade Center, Center No.1,
13th Floor, Cuffe Parade,
Mumbai – 400005**

**2. Maharashtra State Electricity Distribution
Company td.
Head Office – Prakashgad,
Bandra (East), Mumbai – 400051**

**3. Maharashtra State Power Generation Company Ltd.
3rd Floor, Prakashgad, Plot No. G-9,
Anant Kanekar Marg,
Bandra (East), Mumbai 400051**

.... Respondent(s)

**Counsel for the Appellant(s) : Mr. Harin Raval, Sr. Adv.
Mr. Amit Kapur
Mr. Vishrov Mukherjee
Mr. Janmali Manikala
Mr. Sameer Darji a/w**

Mr. Rahul Chouhan (Reps.)

Counsel for the Respondent(s) : Mr. Buddy A. Ranganadhan for R-1

Mr. Anand K. Ganesan

Mr. Kiran Gandhi

Ms. Ramani Taneja for R-2

Ms. Ranjitha Ramachandran

Mr. Shubham Arya for R-3

ORDER

PER HON'BLE MR. I. J. KAPOOR, TECHNICAL MEMBER

1. M/s. Rattan India Power Limited formerly known as Indiabulls Power Limited (**“Appellant”**) has filed the present Appeal challenging the Order dated 06.09.2017 (**“Impugned Order”**) passed by the Maharashtra Electricity Regulatory Commission (**“State Commission”**) while disposing of the Case No. 124 of 2017 whereby the State Commission has not accorded its consent to the Appellant to participate in the bidding process being conducted by the Maharashtra State Power Generation Co. Limited (**“MSPGCL”**) for procuring 400 MW power for eight months from 01.11.2017 to 30.06.2018.
2. In this application, the Appellant has prayed that the Appellant may be permitted to participate in the bidding process subject to the outcome of the appeal.

3. The Appellant and Maharashtra State Electricity Distribution Co. Limited (**“MSEDCL”**) have executed two Power Purchase Agreements (**“PPAs”**) pursuant to Case-1 competitive bidding process initiated by MSEDCL for supply of 1200 MW aggregated power to MSEDCL at levelized tariff of Rs. 3.260/kWh, for a period of 25 years in terms of:-
 - (a) Power Purchase Agreement dated 22.04.2010 for supply of 450 MW of power (**“PPA dated 22.04.2010”**); and
 - (b) Power Purchase Agreement dated 05.06.2010 for supply of 750 MW of power (**“PPA dated 05.06.2010”**).
4. The State Commission vide its order dated 28.12.2010 adopted the levelized tariff of Rs. 3.260/kWh under the above mentioned PPAs.
5. MSPGCL issued a Request for Proposal (**“RFP”**) inviting bids from IPPs for supply of upto 400 MW on short term basis, for a period of 8 months i.e. from 01.11.2017 to 30.06.2018 and the bidders were asked to bid minimum capacity to the tune of 100 MW with additional capacity being multiple of 1 MW and the last date and time for submissions of response to RFP was 8st September, 2017; 4.00 p.m.

6. After hearing the Appellant briefly on 08.09.2017, this Tribunal passed the Interim Order stating as follows:-

“Issue notice to the Respondents returnable on 11.09.2017. Mr. Buddy A. Ranganadhan takes notice on behalf of Respondent No.1. Dasti, in addition, is permitted.

We are informed that the time and date for bid submission is 4.00 p.m. today i.e., 08.09.2017. Therefore, without prejudice to the rights and contentions of the Respondents, let the bid of the Appellant be accepted in a sealed cover.

We have been informed by Mr. Amit Kapur, learned counsel for the Appellant that the bids will be opened on Monday i.e., on 11.09.2017. Let the bids be opened on 11.09.2017 at 4.00 p.m., subject to the outcome of the order that will be passed in this matter on 11.09.2017. We make it clear that we have not considered the merits of the matter and all the contentions of both the parties are kept open.”

7. We have heard learned counsel for the parties on IA No. 717 of 2017. The submissions made by the rival parties are briefly discussed hereinafter.

a) The Appellant alleged that the State Commission has failed to consider that the decision of MSEDCL to withhold consent is arbitrary, *mala fide* and without any legal and factual basis and as such the Impugned Order suffers from legal infirmity. To substantiate this arguments, the learned counsel for the Appellant has made the following submissions;

- i) that the State Commission failed to appreciate that the policy of Ministry of Power (“**MoP**”) is not aimed at capacity addition but at reduction of cost of supply of power to State Discoms and better utilization of allocated coal by more efficient generating stations.
- ii) that the State Commission has proceeded on an erroneous assumption regarding the demand forecast of MSEDCL.
- iii) that the State Commission has erred in proceeding on the basis that the interests of MSEDCL are being affected since third party interests are being created in relation to capacity already contracted to MSEDCL.
- iv) that the actions of MSEDCL in refusing consent for sale of unscheduled capacity/un-availed power is not only causing grave, irreparable loss to the Appellant but also to the consumers of Maharashtra State.

- v) that the MSEDCL's right to the contracted aggregate capacity is subject to other provisions of the PPA's whereby the Appellant is expressly permitted to supply un-availed power to third parties as per Article 4.5 of PPA. In the instant case the Appellant has only requested No Objection Certificate ("**NOC**") from MSEDCL for participating in the tender process only upto 250 MW.
 - vi) that in the instant case, the Appellant is supplying power to MSEDCL from the same station having Long Term PPA for 1200 MW valid for 25 years with MSEDCL and as such no third party interests are being affected.
 - vii) that the grant of consent to the Appellant is in the interest of MSEDCL and its consumers whereby MSEDCL will not only receive cheaper power but also mitigate the liability of capacity charges.
8. The learned counsel for the Respondents have made the following submissions:-
- a) that in the recent past when the Appellant was asked to supply the entire contracted capacity due to increased demand forecast in the State, it could not adhere to schedules given by the State, and even

did not make any attempt or any remedial recourse by arranging alternate supplies from other sources at its disposal etc.

- b) that in Para 3.3 of the PPA, the ceiling tariff shall be the variable cost of generation of the State generating station whose power is to be replaced by generation from IPP.
- c) that from the details regarding its capacity of generating units submitted by the Appellant in the PPA, there is no scope left with the Appellant to sell its power to the third party after meeting the obligated contracted capacity to MSEDCL.
- d) that the PPA clearly mentions that notwithstanding any schedule outage or unscheduled outage of the generating unit and/or of the transmission system, the Appellant shall offer for sale the contracted capacity to the procurer.
- e) that Clause 9.1.2 of the RFP mentions it clearly that MSEDCL shall be liable to pay to MSPGCL and MSPGCL shall be liable to pay the Seller, the payment for supply of power limited to the actual Energy made available by the Supplier at Single Part Tariff as submitted in

the bid for supply of electricity, as the case may be, in accordance with the provisions of this Agreement (the "Tariff").

- f) that Clause 5.5.1 of the RFP mentions it clearly that the entire Aggregate Contracted Capacity shall be for the exclusive benefit of MSEDCL and MSEDCL shall have the exclusive right to purchase the entire Aggregate Contracted Capacity from the Seller. The Seller shall not grant to any third party or allow any third party to obtain any entitlement to the Contracted Capacity and/or Scheduled Energy.
- g) As per Clause 5.5.5, upon MSEDCL intimating to the Seller of its intention and willingness to avail of the part or whole of the Available Capacity corresponding to the Contracted Capacity not availed of and therefore sold to the third party, the Seller shall, notwithstanding anything contained in the arrangement between the Seller and any third party, commence supply of such capacity to MSEDCL from the later of two (2) hours from receipt of notice in this regard from MSEDCL or the time for commencement of supply specified in such notice subject to the provisions regarding scheduling as per IEGC.
- h) In the circumstances, no case is made out for grant of interim relief.

9. After having heard the parties, we observe as follows:-

- (a) The Appellant has executed PPAs under Case-1 competitive bidding with MSEDCL aggregating to supply of 1200 MW power at levelized tariff of Rs. 3.260/kWh for a period of 25 years.
- (b) Though in past few months there has been lesser schedules of power than that contracted thereby making some room for the Appellant to supply the surplus power to the third party but we observe that under the PPA obligation, the Appellant is required to supply 1200 MW of power under long term arrangement to MSEDCL and therefore, there is hardly any scope for the Appellant to sell its power to the third party which might be the same party with which the Appellant has executed long term PPAs and even for the sake of categorization, it would be termed as a third party which in this case is MSEDCL. Therefore it becomes essential for the Appellant to seek No Objection Certificate (“**NOC**”) from the party (in the present case, it is the same party i.e. MSEDCL) with which it executed long term PPAs which was denied by MSEDCL and when the matter was taken up with the State Commission by the Appellant, it was declined.

- (c) After careful perusal of the Impugned Order, the State Commission having taken a note of the PPA conditions at Para 4.5 and scheduling and dispatch stipulated in Para 5.4.2, opined that it would be imprudent and injudicious for the State Commission to direct MSEDCL to provide its consent in the form of NOC to the Appellant.
- (d) As regards the issue of undertaking given to MSEDCL by the Appellant that it shall recall the power in the event that MSEDCL requires unutilized capacity of 250 MW proposed to be offered to MSPGCL, the State Commission has stated that the draft Tripartite Agreement is silent on the issue of recall of such power.
- (e) We find substance in the apprehensions of MSEDCL regarding expected increase in demand and shortfall in the coal supply and stocks which inter alia may affect its ability to supply power to its consumers and may also increase its power procurement cost outweighing the possibility of tariff benefits, as alleged by the Appellant. Since MSEDCL is obliged under the PPAs to pay its capacity charges which the Appellant had itself quoted in the competitive bidding process leading to the execution of PPAs for

the entire contracted capacity. These charges are payable even if MSEDCL does not schedule some or all of that contracted capacity from the Appellant.

- (f) There is no doubt in our minds that if the Appellant is allowed to schedule the entire available capacity, it would make marginal gains arising out of efficient operation. But in the instant case, it is the procurer which is MSEDCL to ascertain whether any power out of the contracted capacity can be left to the disposal of the Appellant for sale to the third parties. It would also enable MSEDCL to save some of its costs arising out of the obligated capacity but by denying No Objection Certificate to the Appellant, MSEDCL has, in its wisdom, considered prudent to keep the entire obligated capacity of the Appellant at its disposal especially in view of the expected increase in the power demand and the fuel supply uncertainties.
10. Mr. Raval learned senior counsel appearing for the Appellant has cited the judgement of Supreme Court in **Bakshi Security and Personnel Services Private Ltd. v. Devkishan Computed Private**

Limited and Ors.¹ We may reproduce paragraphs on which reliance is placed:

“19. It is also well to remember the admonition given by this Court in Michigan Rubber (India) Ltd. v. State of Karnataka in cases like the present, as under: (SCC p.228, para 21)

‘21. In Jagdish Mandal v. State of Orissa, the following conclusion is relevant: (SCC p .531, para 22)

‘22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made “lawfully” and not to check whether choice or decision is “sound”. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration of error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical /procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour

¹ (2016) 8 SCC 446

to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

Counsel submitted that the Appellant's case is completely covered by the above observations of the Supreme Court at (i) and (ii) above inasmuch as process adopted in this case is *mala fide* and the decision made is arbitrary and irrational. Having heard learned counsel and having perused the material to which our attention is drawn we are unable to agree with the learned counsel. We do not find any arbitrariness in the decision taken by the State Commission

nor do we find any mala fides in the process adopted. Reliance placed on the above judgment is misplaced.

11. In our opinion, the Appellant has not made out any *prima facie* case in its favour for us to grant interim relief and interfere with the bidding process. It is not possible to come to a conclusion that balance of convenience is in favour of the Appellant. In the circumstances, the interim application is rejected. Needless to say that interim order dated 08.09.2017 passed by us stands vacated. The bid of the Appellant submitted in a sealed cover need not be opened and may be returned to the Appellant.
12. Before parting we make it clear that all observations made by us are *prima facie* observations made for the disposal of this application.
13. Pronounced in the Open Court on this **11th day of September, 2017.**

(I. J. Kapoor)
Technical Member

(Justice Ranjana P. Desai)
Chairperson

ts/tpd