

APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)

IA No.98 of 2018 IN APPEAL NO. 281 OF 2016

and

IA No.99 of 2018 IN APPEAL NO. 81 of 2017

Dated : 16th July, 2018

PRESENT : HON'BLE MR. JUSTICE N.K. PATIL, JUDICIAL MEMBER
HON'BLE MR. S.D. DUBEY. TECHNICAL MEMBER

IN THE MATTER OF:

NHPC Limited
N.H.P.C. Office Complex
Sector 33, Faridabad, (Haryana)-121003.

... APPELLANT

VERSUS

1. Power Grid Corporation of India Limited,
"Saudamani", Plot No.2,
Sector-29, Gurgaon -122 001.
2. NTPC Limited,
NTPC Bhawan
Core 7, Scope Complex, Institutional Area
Lodhi Road, New Delhi-110003.
3. Parbati Koldam Transmission Company Limited,
Building No. 10 B, 12th Floor,
DLF Cibre City, Shankar Chauk
Haryana – 122001.
4. Central Electricity Regulatory Commission,
(a statutory body incorporated under the Electricity Act, 2003),
3rd & 4th floors, Chanderlok Building,
36, Janpath, New Delhi

- Counsel for the Appellant(s)** : Mr. Sachin Datta, Sr. Adv.
Mr. Rajiv Shankar Dvivedi
Mr. A.K. Sarkar
- Counsel for the Respondent(s)** : Mr. M.G. Ramachandran
Ms. Ranjitha Ramachandran
Ms. Poorva Saigal
Mr. Shubham Arya for R-1
- Ms. Suparna Srivastava
Mr. Tushar Mathur for R-2
- Mr. Amit Kapur
Ms. Aparajita Upadhyay for R-3
- Mr. Sethu Ramalingam for R-4

J U D G M E N T

PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER

IA No.98 of 2018 IN APPEAL NO. 281 OF 2016

1. The instant application (IA No.98 of 2018) has been filed under Section 111(2) of the Electricity Act, 2003 for permission to file additional documents and bringing on record against the impugned Order dated 21.7.2016, passed by the Central Electricity Regulatory Commission (CERC) in Petition No. 91/TT/2012.
- 1.1 This Tribunal has heard the matter and permitted to parties to file their written submission and put the matter on 24.01.2018.

1.2 The Appellant has sought the following reliefs in the instant Application :

- (i) To allow this application take the Annexures 7 and 8 on records; and/or
- (ii) To pass such order or further order which this Hon'ble Court may deem fit and proper.

IA No.99 of 2018 IN APPEAL NO. 81 of 2017

2. The instant application (IA No.99 of 2018) has been filed under Section 111(2) of the Electricity Act, 2003 for permission to file additional documents and bringing on record against impugned order dated 07.09.2016, passed by the Central Electricity Regulatory Commission (CERC) in Review Petition No. 19/RP/2015 in Petition No. 91/TT/2012.

2.1 This Tribunal has heard the matter and permitted to parties to file their written submission and put the matter on 24.01.2018.

2.2 The Appellant has sought the following reliefs in the instant Application:

- (i) To allow this application take the Annexures 11 and 12 on records; and/or
- (ii) To pass such order or further order which this Hon'ble Court may deem fit and proper.

3. The submissions of the learned senior counsel, Mr. Sachin Datta and Mr. Rajiv Shankar Dvivedi appearing for the Appellant in IA No.98

of 2018 in Appeal No.281 of 2016 and IA No.99 of 2018 in Appeal No.81 of 2017 are given below:-

- 3.1 One of the contentions raised by the respondents was that since the communication system was to be attached to the Appellant, therefore Appellant must have a record to this fact. Although, the onus was upon the Respondent No.1 to put forth all the relevant facts and documents with regard to the transmission system as well as the communication system.
- 3.3 After a great effort, the applicant recently located and retrieved the copy of Minute of Meeting (MOM) dated 12/10/2013. The said meeting was held between M/s Power Grid Corporation of India Ltd. (Respondent 1), M/s NHPC Parbati-3, M/s SIEMENS Banala & M/s BPL Telecom at Power Grid Banala 400KV S/SD/S Line for Line Communication.
- 3.4 Ideally the said documents ought to have been filed by the PGCIL before CERC, but the PGCIL deliberately suppressed the fact and did not file the same. This document has been recovered just now and that is why the same is being filed now. The document is very crucial and clinching. It supports the letter of the applicant dated 07/10/2013 that till the date of these letters, the communication system was not in place, therefore the COD could not have been granted before this period. It further highlights that the Respondent No.1 has not come to court with clean hands and has

concealed crucial fact from the Commission, wherein it was onus upon them to bring forth all relevant facts and records.

3.5 Furthermore, the applicant submits that Hydro generating Station does not need and start up power for its commissioning rather, transmission line is required for integration, testing, commissioning and injection of infirm power before declaration of COD of generating unit. This fact is also manifest from the NRPC report on Deviation Settlement Account. Hence it is necessary to file NRPC report on Deviation Settlement Account for the period 17/02/2014 to 23/03/2014 to demonstrate that Parbati-III only injected power in grid during testing and commissioning period. This is technical fact which is known to all. Despite that repeated stress is given on this aspect by the other side, which has necessitated filing of this document.

3.6 Both the documents are very crucial and necessary to file for the proper adjudication of the instant case. Therefore, the instant application is being filed for permission to file additional documents and bringing on record.

4. **The learned counsel, Mr. M.G. Ramachandran, appearing for the Respondent No.1 - Powergrid Corporation of India Limited in IA**

No.98 of 2018 in Appeal No. 281 of 2016 and IA No.99 of 2018 in Appeal No.81 of 2017 has made following submissions:

- 4.1 The Appellant has filed the main Appeal against the Order dated 21.07.2016 passed by the Central Electricity Regulatory Commission upholding the commercial operation date of Asset I and Asset III as 01.08.2013 and that the Appellant is liable to pay the transmission charges from such date to the date of commissioning of the generating station i.e. 24.03.2014. The Appellant has alleged that the Assets II cannot be held to be commissioned on the said date amongst others allegedly because the PLCC/communication system was not ready. In this regard, the Appellant has filed a new document being Minutes of Meeting dated 12.10.2013 along with the application.
- 4.2 The Application filed by the Appellant is contrary to the well settled principles that new material/facts cannot be introduced for the first time in appeal proceedings when these facts/documents were not originally raised in the original Petition. In this regard the Answering Respondent crave leave to refer to the following decisions:
- a. State of Maharashtra Vs. Hindustan Construction Company Limited (2010 4 SCC 518).
 - b. M.P. Shreevastava Vs. Mrs. Veena (24.08.1966 – SC) : AIR 1967 SC 1193.

c. Karpagathachi and Ors. Vs. Nagarathinathachi (10.03.1965 – SC) :
AIR 1965 SC 1752.

4.3 The Application filed by the Appellant is contrary to the principles of Order XLI Rule 27 of Code of Civil Procedure, 1908. The Appellant was a signatory to the document and the document was in its possession; therefore, the Appellant cannot allege that it could not obtain the document despite due diligence. The Appellant could have produced the same before the Central Commission with a reasonable endeavour being made. There is no justification whatsoever for the non-production of the documents at the stage of the proceedings before the Central Commission. The Appellant cannot seek to blame the Respondent No.1 for its own failure to produce the documents. Similarly the Report on Deviation and Settlement Account could have been produced by the Appellant with reasonable endeavour and diligence before the Central Commission.

4.4 The Appellant is seeking to unnecessarily delay the proceedings to delay the payment of transmission charges. The Appellant has not paid the transmission charges to the Respondent No.1 despite the dismissal of the application for interim orders by the Hon'ble Tribunal vide Order dated 19.09.2017 and the present Application is merely an attempt to further delay the payment of the transmission charges.

4.5 The document annexed by the Appellant is related to Asset II i.e. the transmission line from Parbati III HEP to Parbati Pooling Station – Banala which is covered under Appeal No.81 of 2017. The said document does not refer to the transmission line covered under Asset I which is the subject matter of the present Appeal. There is no document or correspondence in this regard and the Appellant has sought to mislead the court by referring to the correspondence related to Asset II for other Assets.

4.6 The Appellant has been filing selectively some odd document out of context and without placing complete facts on record. The Appellant had on an earlier occasion relied on one Form 2 of the Tariff filing forms from a subsequent filing of Respondent No.1 before Central Commission without the forms filed in the original filing and the same has been produced by the Respondent No.1. Similarly, in the present Application, the Appellant has relied on one document to allege that the communication system was not ready without placing the complete facts on record. The facts in correct perspective is that the PLCC equipment / communication system was installed prior to the COD of the Transmission Line declared by the Respondent No.1 and it was the Appellant who had sought relocation of equipment and necessary testing was required to be conducted after the Appellant was ready. There was

no delay on part of the Respondent No.1 who had installed all equipment within time and had commissioned the line. The Appellant cannot rely on its action in seeking relocation as a reason for disputing the commissioning of the Respondent No.1's transmission asset.

4.7 The Appellant itself on 02.09.2013 after the declaration of COD by the Respondent NO.1 informed the Respondent No.1 that its generating station was likely to be commissioned soon and in this letter, the Appellant has acknowledged that various equipment such as wave trap, router, gateway etc. have already been installed.

4.8 After the above installation and declaration of COD, the Appellant sought a relocation of the wave traps. In response, the Respondent No.1 clarified that all the equipment had been installed and the information was given to the Appellant prior to commissioning and no change is possible at the Respondent No.1's end at this stage and any modification would have to be done at the Appellant No.1's end. In response to the above, the Appellant vide Letter dated 24.09.2013 informed the Respondent No.1 that the wave traps had been relocated.

4.9 The Appellant has filed the NRPC Report on Deviation and Settlement Account for the period from 17.02.2014 to 23.03.2014 to state that it has only injected the power in the grid during the testing and commissioning

period. The Appellant has sought to rely on the above document to allege that the hydro generating station does not need start up power.

4.10 Further, the requirement of the Appellant to pay transmission charges, irrespective of its requirement of transmission line, arises out of Regulation 8(6) of the Sharing Regulations 2010. Therefore even assuming but not admitting that the Appellant does not require the transmission line for pre-commissioning activities, the transmission charges is payable from the COD of the transmission assets to commissioning of the generating station. Further such requirement under Regulation 8(6) would override any agreement between the Appellant and the Respondent as per Regulation 14 of the Sharing Regulations and the judgment of the Hon'ble Supreme Court in PTC India Limited Vs. Central Electricity Regulatory Commission (2010) 4 SCC 603 as elaborated in the Written Submissions dated 17.01.2017 filed by the Respondent No.1.

4.11 It is denied that the hydro generating station do not need the transmission line for start up power. The Appellant has only annexed the reports for the period from 17.02.2014 when it was testing and injecting infirm power and not for the prior period. The Appellant in its letter dated 12.06.2013 had stated that it requires the 400 KV Line and supply of 400

KV power for various activities. Therefore the stand of the Appellant in the present Appeal is contrary to its own letter at the relevant time.

4.12 In view of the above, there is no merit in the claim of the Appellant. The Application is liable to be dismissed with exemplary cost.

5. The submissions of the learned counsel, Mr. Amit Kapur, appearing for the Respondent No.3 - Parbati Koldam Transmission Company Limited in IA No.99 of 2018 in Appeal No.81 of 2017 are given below:-

5.1 The Appellant, NHPC Ltd. (“**NHPC**”) by way of the present IA is seeking to place on record documents in NHPC’s possession dating back to October 2013 to March, 2014. These documents were never produced before the Central Commission or this Tribunal so far. By introducing these documents, NHPC hopes to reargue the matter afresh. Parbati Koldam Transmission Company Ltd. (“**PKTCL**”) role in respect of Asset-II is limited to construction of portion ‘d-e’ which was duly commissioned on 01.08.2013 (i.e. before the COD of Parbati-III) as declared in Petition no.297/TT/2013. PKTCL was not involved in the installation of communication systems which was the obligation of Power Grid Corporation of India Ltd. (“**PGCIL**”).

5.2 In terms of Order XLI Rule 27 of the Civil Procedure Code (**CPC**), parties to an appeal cannot produce additional or fresh evidence in the Appellate Court, except in 3 circumstances:-

- (a) The court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted.
- (b) The party seeking to produce additional evidence, establishes that such evidence was not within its knowledge or that it could not, in spite of exercise of due diligence, produce the same at the time when the decree appealed against was passed.
- (c) The Appellate Court requires any document to be produced to enable it to pronounce judgment, or for any other substantial cause.

To ensure that this rule is taken strictly, whenever additional evidence is allowed to be produced by an Appellate Court, the court is obliged to record reasons for its admission.

5.3 The Hon'ble Supreme Court in the case of *State of Gujarat & Anr. V. Mahendrakumar Parshottambhai Desai (Dead) by LRs.* reported as (2006)9 SCC 772 (at para 10, 11 and 12) has held that the High Court

was justified in dismissing the Appellant's application to adduce additional evidence as:-

- (a) Even without such evidence, the court was in a position to pronounce the judgment.
- (b) The appellate court is not entitled to let in fresh evidence only for the purposes of pronouncement of judgment in a particular way.
- (c) The Appellant had sufficient opportunity to bring the evidence on record before the trial court.
- (d) The documents sought to be brought on record were not documents which were discovered later or came into existence after the filing of the suit. The documents were part of the government records and they could have been pronounced in the suit.
- (e) Additional documents cannot be adduced by a party at the stage of appeal for filing in the lacunae in its case.

5.4 In view of this position of law, it is clear that:-

- (a) NHPC's case is not that:-
 - (i) NHPC had produced these documents before the Central Commission;
 - (ii) The Central Commission has refused to admit it; or

- (iii) NHPC has specifically been directed by this Tribunal to place the Belated Documents on record.
- (b) NHPC was in possession of the Belated Documents since the inception. NHPC did not exercise reasonable diligence to place the same on record before the Central Commission or this Tribunal at an appropriate stage.
- (c) In the I.A., NHPC has provided the following justification for placing the Belated Documents at such a late stage:-
- “4. *That after a great effort the applicant recently located and retrieved the copy of Minute of Meeting (MOM) dated 12/10/2013.*
5. *That ideally the said documents ought to have been filed by the PGCIL before CERC, but the PGCIL deliberately suppressed the fact and did not file the same. This document has been recovered just now and that is why the same is being filed now.*

The explanation rendered by NHPC in the present I.A., is untenable and does not attract the exceptions provided under Order XLI Rule 27 CPC.

- (d) All along it is NHPC's assertion (since the Central Commission stage) that the communication systems are not in place. Hence, the burden of proof lies upon it to substantiate its allegations and

produce documents in support thereof and cannot seek to shift the blame on PGCIL.

- (e) Even without the Belated Documents, this Hon'ble Tribunal is in a position to pronounce the judgment basis the detailed arguments rendered by the respective parties and the documents already on record.

5.5 NHPC in its Rejoinder dated 07.03.2018 has contended that as per Section 120 of the Electricity Act, 2003, this Tribunal cannot apply the provisions of CPC in the present case. In this regard it is submitted that the Hon'ble Supreme Court in a catena of judgment has held that tribunals are not bound by the procedure laid down by CPC. However, the same does not mean that the tribunals are precluded from invoking the procedure laid down by CPC. Rather, the tribunal can travel beyond CPC. Reliance is placed on:-

- (a) A.A. Haza Muniuddin v. Indian Railways (1992) 4SCC736 (Para5)
(b) ICICI Ltd. v. Grapco Industries Ltd. & Ors. (1999) 4SCC710 (Para 11 & 12).
(c) K. Ajit Babu & Ors. V. UoI & Ors. (199&) 6SCC473 (Para 4)

5.6 This Tribunal in its judgment in *New Bombay Ispat Udyog Ltd. v. MSEDCL* [2010 ELR (APTEL) 653] (Para 17-27) has relied upon the above judgments of the Hon'ble Supreme Court. In the said judgment

this Tribunal has held that the words “shall not be bound by” used in Section 120 of the Electricity Act, 2003, does not imply that this Tribunal is prevented from invoking the procedure laid down by CPC. It implies that this Tribunal can travel beyond CPC.

5.7 In light of the assertions made herein above and the law cited, it is most humbly submitted that I.A. No.99 of 2018 (filed by NHPC to place additional documents on records) be rejected as devoid of merits.

6. We have heard at length the learned counsel appearing for the Appellant and the learned counsel appearing for the Respondents at considerable length of time and we have gone through carefully their written submissions and also considered the relevant material on records. The principle issues emerging in IA No.98 of 2018 in Appeal No. 281 of 2016 & and IA No.99 of 2018 in Appeal No.81 of 2017 for our consideration are analysed as below:-

6.1 The Appellant (NHPC) has filed the instant applications IA No.98 of 2018 in Appeal No. 281 of 2016 and IA No.99 of 2018 in Appeal No.81 of 2017 seeking permission to submit additional documents which as per them, are very crucial and necessary to file for the proper adjudication of the present case. NHPC has further submitted that ideally, the said documents ought to have been filed by the Powergrid before CERC along with Tariff petition but the PGCIL had deliberately suppressed the facts and did not file the same. NHPC has also stated that these documents

have been recently located and that is why these are being filed now through the reference IAs. One document pertains to the joint minutes of meeting dated 12.10.2013 held between M/s Powergrid, M/s NHPC, M/s SIEMENS, M/S Banala and M/s BPL Telecoms for line communication. The second document relates to the NRPC report on deviation settlement account for the period 17.02.2014 to 23.03.2014. The Appellant has claimed that these documents are very specific and clinching and support the letter of the Appellant dated 07.10.2013 that till the date of these letters, the communication system was not in place and to demonstrate that Parbati-III project only injected power in the grid during testing and commissioning period and has not drawn any power from it.

6.2 *Per contra*, learned counsel appearing for the Respondent No.1, Powergrid has submitted that the application filed by the Appellant is contrary to the well-settled principles that new materials of the fact cannot be introduced for the first time in the Appeal proceedings when these documents were not originally raised in the original petition. To support their contentions, Powergrid has referred the following decisions:-

- a. State of Maharashtra Vs. Hindustan Construction Company Limited (2010 4 SCC 518).

- b. M.P. Shreevastava Vs. Mrs. Veena (24.08.1966 – SC) : AIR 1967 SC 1193.
- c. Karpagathachi and Ors. Vs. Nagarathinathachi (10.03.1965 – SC) : AIR 1965 SC 1752.

The learned counsel appearing for Respondent No.1, Powergrid has further contended that the application filed by the Appellant is contrary to the principles of Order XLI Rule 27 of Code of Civil Procedure, 1908. The Appellant was a signatory to the document and the document was in its possession; therefore, the Appellant cannot allege that it could not obtain the document despite due diligence. There is no justification whatsoever for the non-production of the documents at the stage of the proceedings before the Central Commission. The Appellant cannot seek to blame the Respondent No.1 for its own failure to produce the documents. These documents could have been produced by the Appellant with reasonable endeavour and diligence before the Central Commission.

- 6.3 The learned counsel for Respondent No.1, Powergrid has also submitted that the Appellant is seeking to unnecessary delay the proceedings to delay the payment of transmission charges. The said document does not refer to the transmission line covered under Asset I and is related to Asset-II only. Powergrid has reiterated that the facts in correct

perspective is that the PLCC equipment/communication system was installed prior to the COD of transmission lines declared by it and it was the Appellant who had sought the relocation of certain equipment. The Appellant has filed the NRPC Report on Deviation and Settlement Account for the period from 17.02.2014 to 23.03.2014 to state that it has only injected the power in the grid during the testing and commissioning period. The Appellant has sought to rely on the above document to allege that the hydro generating station does not need start up power. The stand of the Appellant is contrary to their own letter dated 12.06.2013 vide which NHPC had stated that it requires the 400 KV lines and supply to 400 KV power for various activities.

- 6.4 The learned counsel appearing for Respondent No.3, PKTCL submitted that the documents sought to be placed on record were never produced before the Central Commission or this Tribunal and by introducing these documents, NHPC hopes to re-argue the matter afresh. Further, the role of PKTCL in respect of Asset-II is limited to construction of Portion d-e which were duly commissioned on 01.08.2013 as declared in Petition No.297/TT/2013. It has further been contended by the PKTCL that in terms of Order XLI Rule 27 of Civil Procedure Code (CPC), parties to an appeal cannot produce additional or fresh evidence in the Appellate Court, except in some specific circumstances. In support of his

contentions, the learned counsel cited the judgment of Hon'ble Supreme Court in the case of "*State of Gujarat & Anr. Vs. Mahendrakumar Parsottambhai Desai (Dead) by LRs.* Reported as (2006)9 SCC 772 (at 10,11 and 12).

The learned counsel for PKTCL further contended that the explanation rendered by NHPC in the present I.A., is untenable and does not attract the exceptions provided under Order XLI Rule 27 CPC, due to:

- (i) All along it is NHPC's assertion (since the Central Commission stage) that the communication systems are not in place. Hence, the burden of proof lies upon it to substantiate its allegations and produce documents in support thereof and cannot seek to shift the blame on PGCIL.
- (ii) Even without the Belated Documents, this Hon'ble Tribunal is in a position to pronounce the judgment basis the detailed arguments referred by the respective parties and the documents already on record.

6.5 The learned counsel has further referred to the Rejoinder of NHPC dated 07.03.2018 which has emphasised that as per Section 120 of the Electricity Act, 2003, this Tribunal cannot apply the provisions of CPC in the present case. Hon'ble Supreme Court in a catena of judgment has

also held that tribunals are not bound by the procedure laid down by CPC. The learned counsel pointed out that the same does not mean that the tribunals are precluded from invoking the procedure laid down by CPC. The learned counsel for the Respondent No.3 has placed reliance on the various judgments of the Hon'ble Supreme Court and also of this Tribunal to substantiate his submissions. The learned counsel has contended that in view of his submissions, the IAs' for placing additional documents need to be rejected as devoid of merits.

The issues in both the IAs being similar in nature, we decided the same by this common order.

Our findings

6.6 The instant IAs' No. 98 of 2018 in Appeal No.281 of 2016 and 99 of 2018 in Appeal No.81 of 2017 have been filed by NHPC, the Appellant, for seeking permission to produce additional documents which as per them are very germane and necessary to assist in proper adjudication of the present appeals. The Appellant has also contended that these documents namely joint minutes of meeting dated 12.10.2013 held between Powergrid, NHPC, Siemens, Banala and BPL for completion of line communication system and NRPC report on deviation settlement account for the period 17.02.2014 to 23.03.2014 have been located recently and are being filed through reference IAs. NHPC has claimed

that these documents categorically support their averments that communication system was not commissioned on 1.8.2013/1.9.2013 as claimed by Powergrid and also, that no start up power was availed by NHPC during the pre-commissioning period of the generating units. The Appellant has accordingly prayed for allowing the reference IAs' in the interest of justice and equity. On the other hand, the learned counsel for Respondents namely Powergrid & PKTCL, have submitted that the applications filed by the Appellant is contrary to the well-settled principles that new materials of the fact cannot be introduced for the first time in the appellate proceedings when these documents were originally not raised in the original petition.

6.7 The learned counsel for the Respondents have further contended that the applications filed by the Appellant are also contrary to the principles of Order XLI Rule 27 of Code of Civil Procedure, 1908. They have argued that the Appellant was a signatory to the document and the document was in its possession, therefore, the Appellant cannot allege that it could not obtain the documents despite due diligence. To support their contentions, both the learned counsel appearing for the Respondents have cited some judgments of Hon'ble Supreme Court as well as of this Tribunal.

6.8 We have gone through carefully the submissions of the learned counsel appearing for the Appellant and the Respondents and also perused the

decisions contained in various judgments, referred to, of the Hon'ble Supreme Court and this Tribunal and find that the additional documents placed on record by NHPC through the instant IAs appear to be relevant and supportive for proper adjudication of the present case.

ORDER

Having regard to the facts and circumstances of the case, as stated supra, we permit the Appellant to produce these documents as additional evidence to adjudicate the matter between the parties as exceptional case in the interest of justice. With these observations the instant IAs being IA No. 98 of 2018 in Appeal No.281 of 2016 and IA Nos. 99 of 2018 in Appeal No.81 of 2017 stand disposed of.

No order as to costs.

Pronounced in the Open Court on this **16th day of July, 2018.**

(S.D. Dubey)
Technical Member

(Justice N.K. Patil)
Judicial Member

REPORTABLE / ~~NON-REPORTABLE~~

Pr