IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No. 127 of 2016

Dated : 3rd October, 2024

Present: Hon'ble Mr. Sandesh Kumar Sharma, Technical Member
Hon'ble Mr. Virender Bhat, Judicial Member

In the matter of:

M/s. Trishul Power Private Limited
Incorporated under Companies Act 1956
Having its Registered Office
111, Krishnappa Layout,
Lalbagh Road,
Bangalore – 560027
Represented by its Director
Shri. SharathBachegowda …Appellant

Versus

1. **Karnataka Power Transmission Corporation Limited**
Incorporated under Companies Act, 1956
Having its Registered Office at
Kaveri Bhavan, Bangalore – 560 001

2. **Bangalore Electricity Supply Company Limited**
(wholly owned Government of Karnataka undertaking)
A Company incorporated
Under the Companies Act, 1956,
having Corporate Office at K R Circle
Bangalore – 560 001
Represented by its Managing Director

3. **Mangalore Electricity Supply Company Limited**

(Government of Karnataka undertaking)
A Company incorporated
under the Companies Act, 1956,
having Corporate Office
At Paradigm Plaza, 3rd Floor,
A.B. Shetty Circle, Pandeshwara,
Mangalore – 575 001
Represented by its Managing Director

4. Chamundeshwari Electricity Supply Company Limited
(Government of Karnataka undertaking)
A Company incorporated
under the Companies Act, 1956,
having its Corporate Office
at 927, L J Avenue,
New KantharajUrs Road,
Saraswathipuram, Mysore – 575 005
Represented by its Managing Director

5. Hubli Electricity Supply Company Limited
(Governmemt of Karnataka undertaking)
A Company incorporated
under the Companies Act, 1956,
having its Corporate Office at P B Road
Navanagar, Hubli – 580 029
Represented by its Managing Director

6. Gulbarga Electricity Supply Company Limited
(Government of Karnataka undertaking)
having its Corporate Office
At Gulbarga Main road
Gulbarga, Karnataka – 585101
Represented by its Managing Director

7. Karnataka Electricity Regulatory Commission
6th & 7th Floor, Mahalaxmi Chambers
No. 9/2, M.G. Raod
Bangalore – 560001
Karnataka …Respondents

Counsel for the Appellant(s)	:	Buddy Ranganadhan Shubhranshu Padhi Prerna Priyadarshini Kush Chaturvedi Syed Faraz Alam Atharva Gaur Aayushman Aggarwal D. Girish Kumar for App. 1
Counsel for the Respondent(s)	:	Anand K. Ganesan Swapna Seshadri for Res. 1 Anand K. Ganesan Swapna Seshadri for Res. 4 Anand K. Ganesan Swapna Seshadri for Res. 5

JUDGMENT

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. In this appeal, the Appellant has assailed the order dated 18th February, 2016 of 7th Respondent, Karnataka Electricity Regulatory Commission (hereinafter referred to as "Commission") whereby the Commission has refused to re-determine the tariff for the Mini Hydel Power Project of the Appellant.

2. The Appellant Company has established a Mini Hydel Power Plant of 4 MW capacity at Hemagiri Anicut near Bandihole village, K.R. Pet Taluka in Mandya District in Karnataka. Initially, the Government of

Karnataka vide its order dated 1st April, 2000 accorded sanction to the proposal of the Appellant for installation of Mini Hydel Power Plant of 1 MW capacity and later on, at the request of the Appellant, vide order dated 17th December, 2003, the Government enhanced the allotted capacity from 1 MW to 4 MW.

3. Thereafter, the 1st Respondent – Karnataka Power Transmission Corporation Limited (hereinafter "KPTCL") entered into a Power Purchase Agreement (PPA) dated 5th November, 2004 with the Appellant for purchase of entire power generated in the said power plant of the Appellant. The two units of 1.75 MW each of the power plant were commissioned on 6th June, 2005 and were synchronized with the State Grid on 24th June, 2005.

4. The tenure of Power Purchase Agreement is 20 years from the scheduled date of operation of the power plant. As per Article 5.1 of the PPA, the tariff was fixed for the first 10 years @Rs.2.90 per unit of energy supplied by Appellant to KPTCL at metering point with annual escalation of 2% per annum over the said base every year.

5. Clause 5.2 of the PPA provided that from 11th Year onwards, the tariff would be negotiated between the parties with the approval of the Commission. Accordingly, the tariff applicable to the power plant of the

Appellant for the 10th year after its commercial operation is Rs.3.422 per unit as per these provisions of the PPA.

6. In the year 2014, it being the 10th Year after the commercial operation of the Appellant's power plant, Appellant approached the Commission by way of O.P. No. 37 of 2014 seeking determination of tariff @Rs.4.90 per unit with annual escalation of 5% w.e.f. 11th year onwards on the ground that existing tariff of Rs.3.422 has become commercially unviable for the Appellant in view of its existing bank loan liabilities as well as the losses suffered by it during first 10 years of the operation of the power plant. The petition has come to be dismissed by the Commission vide the impugned order dated 18th February, 2016.

7. We have heard the Learned Counsel for the Appellant as well as Learned Counsel for Respondent Nos. 1, 4 & 5. None of the other Respondents is contesting the Appeal. We have also gone through written submissions filed by these two Learned Counsels.

8. At the outset, we may note that Mini Hydel Power Plant in question was initially sanctioned in favour of M/s Aparimitha Power Ventures Pvt. Ltd. but the management of the said company changed over in the year 2014 and it was taken over by the Appellant Company as per the MOU dated 25th June, 2014.

9. Clauses 5.1, 5.2 & 9.1 of the PPA are material for the disposal of this appeal and the same are extracted herein below :-

> *" 5.1 Monthly Energy Charges: Corporation shall for the Delivered Energy pay, for the first 10 years from the Commercial Operation date, to the Company every month during the period commencing from the Commercial Operation date at the rate of Rs.2.90 [Rupees Two and ninety paise only] per Kilowatt-hour ["the base tariff] for energy delivered to the Corporation at the Metering Point with an escalation at a rate of 2% per annum over "the base tariff" every year. This shall mean that the annual escalation will be at the rate of Rs.0.058 per Kwhr.*
>
> *5.2a) From the 11th year onwards, from the date of Commercial Operation date, till the validity of PPA the rate would be renegotiated between the Corporation and Company considering various factors, with due approval of the Commission.*
>
> *b) In case the Corporation refuses or fails to purchase the power after the 11th year the company could be permitted to sell energy to third parties and enter into a Wheeling and Banking Agreement with Corporation to sell power through the Corporation grid for which it shall pay wheeling charges to corporation at the rates applicable from time to time in addition to banking charges at the rates applicable from time to time and as approved by the Commission.*
>
> *9.1 Term of the Agreement: This Agreement shall become effective upon the execution and delivery thereof by the Parties hereto and unless terminated pursuant to other provisions of the Agreement, shall continue to be in force for such time until the completion of a period of twenty (20) years from the Scheduled date of Completion and may be renewed for such further period of ten (10) years and on such terms and conditions as may be mutually agreed upon between the Parties, ninety (90) days prior to the expiry of the said period of twenty (20) years."*

10. The grounds upon which the Appellant has sought enhanced tariff for its power plant in question are as under:-

(i) It has availed term loan facility in the amount of Rs. 14 crores from the Union Bank of India for setting up the plant, which was to be repaid within a period of 11 years but the outstanding loan amount given at the end of 10 years remains substantial and had to be restructured @Rs.10.4 crores in September, 2009. Subsequently, in October, 2014, the said loan was shifted to SBI and restructured again @Rs. 8 crores which requires annual payment of Rs. 1.26 crores. The gross revenue of the plant was about 1.4 crores only per annum and after servicing, the operation and maintenance cost of Rs.30 lakhs, the Appellant was left with only Rs.1.10 crores approximately which is not sufficient for the repayment of the loan.

(ii) The Appellant has failed to generate to its full capacity of 4 MW from the power plant since its commissioning and the plant has actually realized potential of 2.5 MW only. An important contributing factor in reduction of the generation from the plant is significant reduction in the outflow to the river crest on account of development of the command area of Hemawati river. While the desired annual generation as per the DFR was 15.5 MUs, the maximum actual generation was only 8.64 MUs in the year 2011.

(iii) The Appellant had requested for approval for raising the crest level of Hemagiri Anicut river by 500 milliliters based on the DPR project to reach the proposed capacity of 4MW before commissioning of the project in the year 2005 but the said approval was granted only after two years i.e. in the year 2007 with stringent conditions which required additional expenditure of about Rs. 5 crores. The Appellant was unable to increase the crest level due to financial conditions and hence it has been loosing installed capacity of generation during peak water flow.

(iv) Losses suffered by the Appellant in its power project on account of short circuit in the month of October, 2012, an incident of fire in the month of July, 2013, canal breach, floods in the year 2013 in Mandiya District, wearing out of critical parts of the plant thereby needing refurbishment and change in evacuation of plan.

11. These very grounds have been urged before us also by the Appellant. It is argued that the Commission has erred in not considering the outstanding amount in the loan of the Appellant, reduction in generation and the losses suffered by it in the 10 years of operation which are relevant factors in determining the tariff for its project from the 11th year onwards.

12. We have already noted herein above that the power purchase agreement dated 5th November, 2004 was duly executed between the

Appellant and the 1st Respondent under which the Appellant has been supplying power to the 1st Respondent from its mini hydel power plant in question. The tariff, at which the power was to be supplied by the Appellant to the 1st Respondent for the first 10 years after commercial operation of the project is fixed under PPA. The relevant clauses of the PPA have already been quoted herein above. We may note here that PPA executed between the power generator and a Distribution Licensee is a sacrosanct document, the terms of condition of which are binding upon the parties. The tariff at which the power is to be sold/purchased is an essential term of the PPA. The terms and conditions of the PPA re binding upon both the parties. As the PPA is creation of both the parties, their rights/obligations flow from the terms and conditions contained therein. The sanctity of the PPA cannot be permitted to be breached even by the decision of the State Commission in order to escalate the tariff provided under it to the advantage of generating company and to the dis-advantage of Distribution Licensee as well as the consumers. The interests of the consumers is paramount and Section 61(d) of the Electricity Act, 2003 refers the Commission to safeguard such interests while specifying the terms and conditions for determination of tariff. (see

Gujarat Urja Vikas Nigam Limited Vs. Solar Semi Conductors Power Company Private Ltd. 017 16 SCC 498).

13. In the instant case, it is manifest from the perusal of clauses 5.1 & 5.2 of the PPA that the tariff for the Appellant's power plant from the 11th Year onwards was to be fixed by mutual agreement of the parties i.e. Appellant and the 1st Respondent with due approval of the Commission. What it implies is that the parties have to first sit together and come to an agreement regarding the tariff to be applicable for the power plant from 11th year onwards and then submit it to the Commission for approval. That has not happened in this case. Instead of calling upon the 1st Respondent to have a meeting in order to come to an agreement with regards to the tariff for the power plant applicable from 11th year onwards, the Appellant has straight away approached the Commission with the petition seeking determination of tariff, which was not permissible under the provisions of the PPA. None of the provisions of the PPA empowered or authorised the Appellant to seek unilateral enhancement of tariff.

14. Even otherwise also, we do not find any error in the impugned order of the Commission and agree with the findings of the Commission that the non-payment of the entire loan amount by the Appellant and the

losses suffered by it were only due to its imprudent financial decisions as well as mis-management.

15. As already noted herein above, initially the sanction was accorded to the Appellant's power project for the capacity of 1 MW only in the year 2000 and later on, at the request of the Appellant, the capacity of the plant was enhanced to 4 MW in the year 2003. In paragraph no. 3 of the Government order dated 17th December, 2003, vide which allotted capacity was enhanced from 1 MW to 4 MW, it is specifically mentioned that the Government is not responsible for any loss of generation of power due to less availability of water. It has also been specified that sufficient water has to be allowed for irrigation and only excess water has to be used for power generation. Therefore, even it there was any reduction in the generation of power in Appellant's power plant on account of decrease in flow of water, that cannot be projected as a ground for enhancement of tariff. It is manifest that the poor performance of the project has been only due to mis-management and lack of prudent financial discipline which has resulted in accrual of the loans. Admittedly, the tariff fixed in the PPA for the first 10 years after the commercial operation of the project was higher than the tariff determined by the Commission during the relevant period, and, therefore, the Appellant

cannot claim that it was unable to service the debts within the said 10 years period on account of lower tariff as per the PPA. In this regard, we find it pertinent to reproduce the following few paragraphs of the impugned order:-

(c) (i) In the DPR of November, 2003 (Annexure - AB), prepared on the basis of daily flow data at Akkihebbal (downstream of Hemagiri Anicut) from the year 1995-96 to 2001-02, it is stated that the estimated power potentialexceeds 10 MW for 15 days in a year, 4 MW for 51 days and 2 MW for150 days. It is stated that the cost of generation would be Rs.2.03 perunit and that the loan could be repaid within 11 years from the date ofcommissioning of the Project. The average annual generation for 4 MWwas taken as 15.53 MUs. Therefore, from the DPR of the Project of November, 2003, it can be said that the estimated potential was less than 2 MW for most part of the year, but the Petitioner went ahead to setup a Plant of 4 MW capacity.

(ii) In the DPR prepared in 2014, produced at Annexure - AC, it is stated that the average generation of power for 9 years from 2005 to 2014 was 6.5 MUs annually. It is also mentioned that the discrepancy in generation as projected in the earlier DPR and the actual generation is due to thefactors like inadequate maintenance, disruptions in transmission lines,silting of tail race canal and loss of head in the power canal.

(d) Looking at the generation pattern right from the inception, we feel thatthe Petitioner took a hasty decision in enhancing the capacity of the Project and incurred losses due to such wrong business decision, which was compounded by other factors as well, some of which were totallyunder its control. There is no allegation by the Petitioner, at any point oftime, that it was misled by any act or omissions on the part of the Respondents or that

the Respondents were responsible for the incorrectestimation of the PLF in the DPR. The DPR of November 2003 was prepared for the Petitioner by a Consultant chosen by itself."

16. These findings of the Commission have nowhere been disputed or assailed before us on behalf of the Appellant. Thus, it is evident that the decision on the part of the Appellant to enhance the capacity of the power plant from 1 MW to 4 MW was not only imprudent but a hasty one and in total dis-regard to the actual generation pattern from the project for the preceding years.

17. It is relevant to note here that the present Appellant has taken over the power project from its erstwhile owner M/s Aparimitha Power Ventures Pvt. Ltd. in the year 2014 i.e. the 10th year after the commercial operation of the project. Therefore, the present Appellant should have, before deciding to take over the project, exercised due diligence and made an analysis of the present status of the power project particularly its financial liabilities, adequacy/inadequacy of power generation for any reason whatsoever, improper maintenance of the project by the previous management and reduction in water flow. We concur with the Commission in saying that the purchaser i.e. the Appellant cannot claim revision of tariff on the ground that the debts were not serviced within the period of 10 years from the commercial operation of the project at the rates prevailing as per the PPA. The consumers cannot be made to

bear the cost of inaccurate assessment and imprudent decisions made by the Appellant at the time of taking over the power project.

18. So far as the contention of the Appellant that losses have been suffered due to short-circuit in the year 2012, fire in the power plant in the year 2013, canal breach in the year 2011 and floods in Mandiya District in the year 2013, are concerned, we note that all these incidents are stated to have taken place during the first 10 years of the commercial operation of the project and do not relate to the period from 11th year onwards for which the tariff is sought to be re-determined by the Appellant. Therefore, the Appellant cannot seek enhancement of tariff from 11th year onwards on the basis of these incidents. Moreover, admittedly, the Appellant or its predecessor in interest did not issue any Force Majeure notice to the respondents with regard to these incidents and did not claim relief under the Force Majeure clause contained in the PPA. It has also been admitted that the Appellant has received compensation in respect of these losses from the insurance company under the insurance policies taken for the power project. Hence, we do not find any fault with the findings of the Commission to the effect that the Appellant cannot claim revision of tariff on the basis of these losses.

19. It has also been urged on behalf of the Appellant that it was unable to increase the crest level of Hemagiri Anicut river, even though approved

belatedly, due to stringent conditions which require additional expenditure of about Rs.5 crores. We find that no contention in this regard was raised by the Appellant before the Commission, and therefore, there is no discussion on it in the impugned order. Thus, the Appellant cannot agitate this ground before this Tribunal in this appeal, when it was not agitated before the Commission.

20. The Appellant has also sought revision of tariff on the ground that it has incurred additional cost on account of change in the evacuation system after commissioning of the project. We note that as per the DPR of 2003, the petitioner was required to draw evacuation line from the project to the sub-station of KPTCL i.e. for 10 kilometers but instead of drawing the evacuation line, Appellant started using the evacuation line of M/s ICL Sugar Limited. Subsequently, the Appellant requested for change in the evacuation arrangement for which it claims to have incurred expenditure of Rs.51,38,094.50. Thus, it is evident that change in the evacuation system was not forced upon the Appellant and the Appellant did so on its own as per its commercial wisdom. Essentially, the Appellant had to incur this expenditure on the construction of evacuation line at the initial stage of the project itself which it did not do at that stage and opted for evacuation line of M/s ICL Sugar Limited. Therefore, subsequent change of evacuation line at the request of the Appellant, cannot be made a ground for enhancement of tariff, as claimed by the Appellant.

21. The Appellant has also claimed that an amount of Rs.270.56 lakhs needs to be spent towards refurbishing the plant. On this aspect, the Commission has noted that in the DPR of 2014, the Appellant has blamed the previous management of the project for lack of maintenance of the plant. Hence, we are in agreement with the Commission in holding that any cost to be incurred to refurbish the plant cannot be made a ground for revision of tariff from the 11th year onwards in these circumstances.

22. Thus, we do not find any ground to interfere with the impugned order of the Commission. The appeal is devoid of any merit and is hereby dismissed.

Pronounced in the open court on this 3rd day of October, 2024.

(Virender Bhat)	(Sandesh Kumar Sharma)
Judicial Member	Technical Member (Electricity)

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