

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No. 443 OF 2019 & IA No.1302 OF 2021

Dated: 30.05.2024

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

In the matter of:

TEAM FERRO ALLOYS PVT. LTD.

Plot No. 79, 401

Universal Annex, Shivaji Nagar,

Nagpur – 440010

Maharashtra

... Appellant

Versus

**1. MAHARASHTRA STATE ELECTRICITY
DISTRIBUTION COMPANY LTD.**

Through its Chairman and Managing Director

Prakashgad, Plot No. G-9, 6th Floor,

Anant Kanekar Marg,

Bandra (East), Mumbai – 400 051

2. MAHARASHTRA ELECTRICITY REGULATORY COMMISSION

Through its Secretary

World Trade Centre,

Centre No. 1, 13th Floor,

Cuffe Parade, Colaba, Mumbai – 400005

3. MAHARASHTRA ENERGY DEVELOPMENT AGENCY

Through its Director General

MHADA Commercial Complex

II Floor, Tridal Nagar,

Yerwada Pune – 411006, Maharashtra

... Respondent(s)

Counsel on record for the Appellant(s) : Anand K. Ganesan
Swapna Seshadri
Amal Nair

Counsel on record for the Respondent(s) : Shashwat Kumar
Rahul Chouhan
Shikha Sood
Raghav Kapoor for Res.1

J U D G M E N T

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. In this appeal, assail is to the order date 09.09.2019 passed by the 2nd respondent Commission in appellant's petition bearing case No.55/2019 thereby partly allowing the said petition. We would refer to the claims of the appellant in the petition and the final order passed by the Commission at a later stage. Here, we consider it appropriate to first advert to the facts of the case.

2. Undisputed facts of the case are that the appellant company has setup 08 MW Biomass-based power plant at District Gondia, Maharashtra. In pursuance to *Energy Purchase Agreement* (in short "EPA") dated 22.12.2005 executed between the appellant and *Maharashtra State Electricity Distribution Company Limited* (in short "MSEDCL"), the entire power from the said plant was being supplied to MSEDCL. The EPA was for a duration of 13 years and accordingly expired on 30.12.2018. The appellant had written letters dated 17.07.2018 and 17.12.2018 to MSEDCL seeking renewal of the EPA in view of the directions issued by the 2nd respondent Commission vide order dated 12.07.2018 in case No.84/2015. Vide letter dated 29.12.2018, MSEDCL suggested the appellant to approach the Commission for determination of tariff post expiry of 13 years of the EPA for

the reason that conducting a competitive bidding process as directed by the Commission in the order dated 12.07.2018 passed in case sno.84/2015, was not possible for a single project.

3. Accordingly, the appellant approached the Commission by way of a petition under sections 86(1)(b) and 86(1)(f) of the Electricity Act, 2003, with the following prayers: -

“a) admit the petition and grant an early hearing;

b) give approval to the Petitioner and the Respondent to execute EPA for seven years as per the terms and conditions stated in the previous EPA and at the tariff rate determined by the Hon’ble MERC;

c) determine and clarify the eligible tariff rate for sale and purchase of power from the Petitioner’s Plant at Rs. 5.84/unit as per the Order dated 12 July 2018 in Case No. 84 of 2015 and thereafter increase in variable cost;

d) additionally, exempt the Petitioner from competitive bidding to sell its power since it is the only biomass plant as on date whose PPA has expired;

e) direct the Respondent to procure power from the Petitioner’s 8 MW Biomass Plant till the hearing and final disposal of this Petition at the last rate specified in the EPA as and by way of interim relief;”

4. After discussing the rival contentions of the parties and taking note of various orders passed by it, the 2nd respondent Commission disposed of the petition by pass the following order: -

“1. The Case No. 55 of 2019 is partly allowed.

2. The Commission can not mandate Maharashtra State Electricity Distribution Company Limited to procure power from Team Ferro Alloys Pvt. Ltd. Biomass plant.

3. Team Ferro Alloys Pvt. Ltd. can consider Rs. 0.55 per unit as fixed cost (operating cost) and variable cost as determined under the Generic tariff Order for the respective year as its base rate to sell power from its biomass plant to other Distribution Licensees in the State.”

5. Feeling aggrieved by the said order of the Commission in not directing the MSEDCL to execute a fresh EPA with the appellant for a period of 07 years at a tariff of Rs.5.84 per unit, the appellant has preferred the instant appeal.

6. We have heard the learned counsels for the parties extensively and have perused the entire record including the written submissions filed by learned counsels for appellant and the 1st respondent.

7. The issue of power to be purchased from the existing power plant after the expiry of EPAs had come up before the respondent Commission in case No.127/2014 filed by *Jawahar Shetkari Sahakari Karkhana Limited (JSSKL)* and it was held by the Commission in its order dated 11.11.2014 as under: -

“In view of the Commission’s ruling in Case No. 100 of 2014 as mentioned above and based on the submission made by MSEDCL, as the tenure of EPA is due for expiry, the commission is not inclined to direct either party to enter into the new EPA. However, the Commission is of the view that both the parties could mutually discuss and agree for terms and conditions including tariff after expiry of the existing EPA. With regards to MSEDCL’s prayer for considering the power purchased from JSSSKL’s co-generation plant for meeting RPO targets of MSEDCL, the Commission clarifies that same will be considered for meeting RPO targets of mechanism for the same capacity of its bagasse based cogenerated projects, which has been considered under EPA.”

(Emphasis supplied)

8. We may note that the 2nd respondent Commission has in its order dated 12.07.2018 passed in case No.84/2015 (upon which heavy reliance is placed on behalf of the appellant) categorically dealt with the fate of the projects whose EPAs had expired and directed MSEDCL to procure power from such projects through competitive bidding process. We find it apposite to quote the relevant portion of the said order hereunder: -

“Periodicity of conducting Bid: The eligible projects whose EPA are due for expiry shall intimate to Distribution Licensee at least 6 months in advance. Considering the intimations received from the eligible projects and based on accumulation of sufficient bid volume and also considering

the RPO requirement, MSEDCL may carry out the bidding process on an annual basis or in any frequency based on the need.

Other terms of EPA: Except for the tariff and tenure, the other existing provisions in the old EPA shall be continued.

While conducting the competitive bidding, the Distribution Licensees shall follow modalities/principles as stipulated under this Order. Further, for modalities/ principles other than that is set under this Order, the Distribution Licensee is free to follow Central Government approved guidelines for competitive bidding of wind/solar projects. The Commission shall approve the purchase price discovered as part of the transparent bidding process under Section 86 (1) (b) of the Act, 2003, following due regulatory process. Besides, it is noted that MSEDCL in its suggestions has proposed first right of refusal to be provided to them in cases of EPA expiry. Regarding this, Commission is of the view that since extension of EPA now has to be based on a competitively bid mechanism, wherein MSEDCL will have to necessarily float tenders and interested projects will have to participate in the bid process for EPA extension, any such provision of first right of refusal upon expiry of old EPA becomes infructuous.”

(Emphasis supplied)

9. We do not find anything in the said entire order dated 12.07.2018 which mandated MSEDCL to extend or renew the EPAs which had already expired.

What the Commission permitted vide said order was extension of EPAs till the useful life of a project i.e. 07 years at a tariff to be discovered through bidding process. It has been further directed that the bidding shall be conducted only for discovery of fixed cost whereas variable cost would be the same as that determined under the generic renewable energy tariff order. MSEDCL had sought review of the said order dated 12.07.2018 regarding fixing of the ceiling tariff for fixed component and the variable cost component as per the generic tariff order for competitive bidding, which came to be dismissed by the Commission vide order dated 02.11.2018.

10. MSEDCL again approached the Commission by way of case No.328/2018 seeking approval for procurement of 50MW Biomass power on long-term basis for 20 years. The petition was disposed of vide order dated 05.12.2018 in which the dispensation regarding ceiling tariff of Rs.5 per unit and the ratio of fixed cost and variable cost was provided as under:-

“11.2 Ceiling Tariff of INR 5/unit:- The Commission observes that as per RE Tariff Order 2018-19 notified under Case No. 204 of 2018 dated 18 August, 2018, the Tariff for Biomass based power projects for FY 2018-19 is INR 7.44/unit, Fixed Charges being INR 2.15/unit and Variable Charges as INR 5.29/unit. MSEDCL has proposed a Ceiling Tariff of INR 5/unit for reverse bidding. The Commission has considered the PPA period as 20 years as cited in para 11.1 of the Order on the ground of reduced prevailing Bank interest rates and that the levelised tariff for serving the debt for 20 years and recovery of the fixed cost in 20 years would

be relatively lower as compared to levelised tariff determined for 13 years of PPA tenure. Since the proposal of MSEDCL is in the interest of the consumer and is also maintaining the balance by way of reasonable return to the bidders/developers, the Commission has no objection to MSEDCL's proposal of Ceiling Tariff of INR 5/unit which the Commission presumes must have been arrived at after proper due diligence by MSEDCL.

11.3 Fixed Cost: Variable Cost as 50:50 :- MSEDCL has proposed Ratio of Fixed Cost to Variable Cost as 50:50. It has submitted that for Merit Order Despatch purpose, the tariff shall be bifurcated into Fixed charge and Variable charge in 50:50 ratio. The Commission recognizes that Biomass based power projects are subjected to Merit Order Despatch principles, and hence the variable cost of the project is required. However, from the various RE Tariff Orders, the Commission observes that the ratio of Fixed cost to Variable cost is ~30:70. This be the case, in consideration of Merit Order Despatch principles and promoting Biomass projects to be scheduled (being RE), the Commission has no objection in MSEDCL considering the ratio of Fixed Cost to Variable Cost as 50:50 after carrying out proper due diligence.”

11. It is, therefore, evident that in the above noted order, the Commission had fixed the modalities for procurement of power for the projects whose EPAs had expired.

12. Upon considering its previous orders, as noted hereinabove, the Commission refused the relief sought by the appellant on the following reasoning:-

“... However, as there is only one Biomass based project i.e. TFAPL whose EPA has expired, MSEDCL is not able to initiate competitive bidding process. MERC RPO Regulations does not stipulate separate RPO percentage for bio-mass based project, it is included in non-solar RPO target which can be met through various options such as Wind, bagasse, biomass, REC etc. Recent competitive bidding in Solar and Wind energy procurement has substantially reduced the rate of these energy sources. Therefore, now Distribution Licensees have cheaper option to fulfil its RPO. Under such circumstances, it is not appropriate to direct any Distribution Licensee to procure energy from particular project and that too at very high cost as compared to other sources.

13. *In view of the foregoing, the Commission opines that considering the cheaper non-solar power available in the market, and when MSEDCL has expressly stated that it can meet its RPO from other cheaper sources, the Commission cannot mandate MSEDCL to procure the power from*

TFAPL's biomass project at higher rate. However, TFAPL may approach other Distribution Licensees in the State to see their willingness to procure its power for meeting non-solar RPO. While doing so, TFAPL may consider Rs. 0.55 per unit as fixed cost (operating cost) as ruled by the Commission in its Order 12 July, 2018 in Case No. 84 of 2015 and variable cost as determined under the Generic tariff Order for the respective year as its base rate."

13. We are unable to find any factual error or legal lacuna in the impugned order passed by the 2nd respondent Commission.

14. Neither the Commission nor this Tribunal can direct MSEDCL or any other distribution company to procure power from any particular power project. It is for the Discoms to exercise their discretion in coming to a decision as to whether or not to purchase power from a particular power project at a particular tariff. Such a decision has to be arrived upon considering various aspects including the commercial aspect as well as the interest of the consumers to whom the power is ultimately to be supplied. The execution of Power Purchase Agreement between a generator and Discom has to be a mutual decision of both of them upon mutually agreed terms and none of them can be compelled to enter into such an agreement against its will and to its detriment. In this regard, we find it profitable to quote the following observations of the Hon'ble Supreme Court in the judgment dated 08.01.2024 passed in Civil Appeal No.6503 of 2022 titled Jaipur Vidyut Vitran Nigam Ltd. v. MB Power (Madhya Pradesh) Limited & Ors.: -

“102. It could thus be seen that this Court has held that the award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are paramount are commercial considerations. It has been held that the State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It has further been held that the State can enter into negotiations before finally deciding to accept one of the offers made to it. It has further been held that, price need not always be the sole criterion for awarding a contract. It has been held that the State may not accept the offer even though it happens to be the highest or the lowest. ...”

...

105. In any case, the High Court, by the impugned judgment and order, could not have issued a mandamus to the instrumentalities of the State to enter into a contract, which was totally harmful to the public interest. Inasmuch as, if the power/electricity is to be procured by the procurers at the rates quoted by the respondent No.1-MB Power, which is even higher than the rates quoted by the SKS Power (L-5 bidder), then the State would have been required to bear financial burden in thousands of crore rupees, which would have, in turn, passed on to the consumers. As such, we are of the considered view that the mandamus issued by the

Court is issued by failing to take into consideration the larger consumers' interest and the consequential public interest. We are, therefore, of the view that the impugned judgment and order passed by the High Court is not sustainable in law and deserves to be quashed and set aside."

15. Thus, a court or a tribunal cannot direct a procurer to enter into a contract with a power generator which is against its commercial interests as well as harmful to public interest.

16. We may also note that the function of State Electricity Regulatory Commission under Section 62 of the Electricity Act, 2003, is to determine tariff. However, Commission cannot compel either the power generator or the distribution licensee to enter into a contract based on such tariff. It is for the generating company and the distribution licensee to or not to enter into a contract with each other based on such tariff. On this aspect, we find it relevant to quote the following observations of the Hon'ble Supreme Court in judgment dated 25.10.2017 passed in Civil Appeal No.6399/2016 titled Gujarat Urja Vikas Nigam Ltd. v. /solar Semiconductor Power Company (India) Pvt. Ltd.:-

"21. ... As pointed out earlier, the tariff is determined by the State Commission under Section 62. The choice of entering into contract/PPA based on such tariff is with the Power Producer and the Distribution Licensee. As rightly contended by the learned Senior Counsel for the appellant, the State Commission in exercise of its power under Section 62 of the Act, may conceivably re-determine the tariff, it

cannot force either the generating company or the licensee to enter into a contract based on such tariff nor can it vary the terms of the contract invoking inherent jurisdiction.”

17. Thus, the Commission has very rightly held in the impugned order that it cannot mandate MSEDCL to procure power from the Biomass plant of the appellant.

18. Even otherwise also we may note that Article 5.2 of the EPA executed between the appellant and the 1st respondent MSEDCL provides that the tenure of the EPA can be extended only through mutual written agreement of the parties upon the terms and conditions mutually agreeable to the parties. Therefore, the tenure of the EPA can be extended only by mutual agreement between the parties and no such extension is possible in the absence of a consensus between the parties. Hence, once one of the parties to the EPA i.e. MSEDCL has expressed its inability to extend the EPA and to continue purchasing power from the appellant under its terms and conditions, neither the Commission nor this Tribunal can direct extension of the EPA or execution of fresh EPA between the parties.

19. Further, the reasons given by MSEDCL for not initiating the competitive bidding process and for declining to procure power from the appellant's power project cannot be termed as *malafide*. It is not disputed that the appellant is the only Biomass-based project whose EPA had expired in 2018 and had approached MSEDCL for its renewal. It is in these circumstances that MSEDCL expressed its inability to initiate competitive bidding process. It also cannot be gainsaid that the distribution licensees have now cheaper options like wind and Bagas-based power project to fulfil their Renewable

Power Purchase Obligations (in short “RPO”) and the regulations in this regard do not stipulate any separate RPO percentage for Biomass-based projects. Therefore, the decision taken by MSEDCL for meeting its RPO from other cheaper sources and not to procure power from appellant’s power project at a higher rate appears to be a commercially viable and consumer friendly decision which cannot be faulted with.

20. In view of the above discussion, we do not find any error or infirmity in the impugned order of the Commission. The appeal is devoid of any merit and is hereby dismissed. All pending applications are disposed of accordingly.

Pronounced in the open court on this the 30th day of May, 2024.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member (Electricity)

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