

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI
(APPELLATE JURISDICTION)**

APPEAL NO.208 OF 2015

IA NO.345 OF 2015, IA NO. 411 OF 2016

AND

IA NO.441 OF 2016

Dated: 23rd September, 2016.

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

IN THE MATTER OF:

Gujarat Urja Vikas Nigam Limited,)
Sardar Patel Vidyut Bhavan,)
Race Course, Vadodara-390007,)
Gujarat)Appellant(s)

Versus

1. ACB(India) Limited)
C-102, L.G.F. Surya Enclave,)
New Multan Nagar,)
New Delhi – 110057)

2. Gujarat Electricity Regulatory)
Commission,)
6th Floor GIFT ONE,)
Road 5-C Zone , GIFT CITY,)
Gandhinagar-382355)
Gujarat.)Respondent(s)

Counsel for the
Appellant(s)

... Mr. M.G. Ramachandran
Mr.Anand K. Ganesan

Mr. Swapna Seshadri
Mr. Ranjitha Ramachandrdan

Ms. Anushree Bardhan
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Counsel for the
Respondent(s)

...Mr. Sanjay Sen, Sr.Adv.
Mr. Matrugupta Mishra
Mr. Nimesh Kr. Jha
Mr. Tabrez Malawat for **R.1**

Ms. Suparna Srivastava
Mr. S.R. Pandey, Legal Advisor
for **R.2**

J U D G M E N T

PER HON'BLE (SMT.) JUSTICE RANJANA P. DESAI – CHAIRPERSON:

1. The Appellant is a company incorporated under the provisions of the Companies Act, 1956. The Appellant is a successor entity of the erstwhile Gujarat Electricity Board and is vested with the functions of bulk purchase and sale of electricity. The Appellant is a public utility and is supplying electricity to the distribution licensees for onward supply to the consumers at large in the State of Gujarat. The total cost and expenses incurred by the Appellant are passed on to the consumers at large in the State of Gujarat through the retail supply tariff charged by the Distribution Licensees.

2. Respondent No.1 is a generating company within the meaning of Section 2(28) of the Electricity Act,2003 (**“the said Act”**). Respondent No.1 has set up a 270 MW thermal generating station in the State of Chhattisgarh. Respondent No.2 is Gujarat Electricity Regulatory Commission (**“the State Commission”**). In this appeal the Appellant has challenged the order dated 01/07/2015 passed by the State Commission on Petition No.1397 of 2014 filed by the Respondent No.1 under Section 86(1)(f) of the said Act.

3. We shall first give the gist of the facts which gives rise to this appeal. In the year 2006 the Appellant had floated a bidding process for procurement of electricity. The procurement was proposed by way of a competitive bidding process under Section 63 of the said Act based on the competitive guidelines and documents notified by the Government of India under Section 63. The bidding documents included the draft of the Power Purchase Agreement (**“PPA”**) to be entered into by the Appellant with the successful bidder. Respondent No.1 had participated in the bidding process for supply of 200 MW net capacity from its proposed 270 MW coal based generating station to be established

in Chhattisgarh. Respondent No.1 submitted its bid on 01/01/2007.

4. Upon the bids being evaluated on the basis of the lowest tariff, Respondent No.1 was selected as successful bidder for supply of capacity of 200 MW at the levelised bid tariff of Rs.2.34/- per unit to the Appellant from its Thermal Power Plant set up in District Korba, Chhattisgarh. Pursuant to the above, the Appellant and Respondent No.1 entered into a PPA dated 26/02/2007 providing for the terms and conditions based on which the generating station would be established by Respondent No.1 and the supply of 200 MW would be made to the Appellant.

5. The PPA, *inter alia*, defines the term “Contracted Capacity” and “Scheduled COD”. Article 13 thereof relates to Change in Law. Article 13.1.1 defines Change in Law.

6. In terms of the PPA, the scheduled Date of Commercial Operation (“**COD**”) for the first unit was 36 months from the signing of the PPA and 42 months in the case of the second unit.

Thus, the first unit was scheduled to be commissioned on 25/02/2010 and the second unit was scheduled to be commissioned on 25/08/2010.

7. In view of certain difficulties faced by Respondent No.1, it requested for extension of the scheduled COD for both the units. Unit No.1 of the generating station was finally commissioned by Respondent No.1 on 13/12/2011 and Unit No.2 was commissioned on 26/06/2012.

8. It is Respondent No.1's case that in terms of Industrial Policy 2004-2009 of the Government of Chhattisgarh, there was an exemption granted for payment of electricity duty on the auxiliary consumption for the generating station of Respondent No.1. The Industrial Policy 2004-2009 was applicable for the period only till 30/03/2009. A fresh Industrial Policy was issued by the Government of Chhattisgarh on 10/11/2009. A limited exemption from electricity duty was granted to the projects subject to various conditions including that the commercial production of the projects should be prior to 31/10/2010 to avail of the exemption. Respondent No.1 did not qualify under the

said policy for exemption from the electricity duty because as stated above COD of Unit No.I & II of Respondent No.1 was achieved after 31/10/2010. According to Respondent No.1 in terms of the policy prevailing 7 days prior to the bid Respondent No.1 was not liable to make any payment towards electricity duty. Respondent No.1 submitted the bid taking into consideration this exemption. However, due to change in policy this exemption was withdrawn. According to Respondent No.1 this is a Change in Law in terms of Article 13.1.1 of the PPA and therefore Respondent No.1 is entitled to get tariff adjustment as per Article 13.4 of the PPA which shall restore it to the same economic position as if such Change in Law has not occurred. Respondent No.1 therefore filed a petition under Section 86(1)(e) of the said Act in the State Commission making the following prayers:

a) declare that the Petitioner is liable to pay Electricity Duty from January 2012, which payment/liability is an event covered under 'change in law' provision in terms of Article 13(2) of the PPA dated 26.2.2007;

b) approve adjustment of tariff/compensation in terms of Article 13(2)(b) read with Article 13.4.2 of the PPA dated 26.02.2007 on account of levy of Electricity Duty;

c) direct the Respondent to reimburse the Petitioner an amount of Rs.7,54,15,654.92 along with interest, being the Electricity Duty paid by the Petitioner for the period January 2012 to March 2013;

d) pass such other and further order or orders as this Hon'ble Court may deem fit and proper under the facts and circumstances of the present case and in the interest of justice.

9. By the impugned order the State Commission allowed Respondent No.1's petition and held that the imposition of electricity duty on the auxiliary consumption in the power plant of Respondent No.1 is a Change in Law in terms of Article 13 of the PPA and Respondent No.1 is entitled to be compensated by the Appellant. We may quote the relevant paragraphs of the impugned order.

“8.15. Considering the submissions made by both the parties, we arrive at the following conclusions:

(i) *As per the Article 13 of the PPA, the law prevailing on 7 days prior to bid submission date is law agreed between the parties. According to the provisions of Industrial Policy 2004-2009, the petitioner is governed by the provisions of said policy because there was no other policy or law prevailing on Bid submissions date.*

(ii) *The petitioner had legitimate expectation that the State Government who had granted certain benefits in the Industrial Policy 2004-2009, may be continued beyond 2009 by the Government in fairness because similar policy was prevailing for past 15 years in the State and it was genuine expectation and belief of the investors that the benefits assured in the previous policies shall continue for the industrial development of the new State.*

(iii) *In the absence of any specific law/policy on the Bid submission date for the period during which the project of the petitioner was likely to be commissioned, the petitioner had genuinely relied on the policies prevailing 7 days before the BID submission date. Any changes which may occur subsequently be*

qualified as Change in Law and accordingly, the petitioner is eligible for treatment as per the provisions of the PPA.

(iv) The petitioner has legitimate expectation that the benefits which were ensured in earlier policy may be continued by the Government in future because the substantial work was initiated and completed by the project developer during the period of Industrial Policy 2004-2009.

8.16. Based on the above, we decide that the liability of the petitioner to pay the Electricity Duty is covered under the Change in Law as stipulated in the PPA, and the petitioner is entitled to be compensated by the respondent on this account.”

10. During the hearing of this appeal Respondent No.1 has filed two interim applications being IA No.411 of 2016 and IA No.441 of 2016 praying that certain additional documents which are annexed to the applications may be permitted to be brought on record.

11. Through IA No.411 of 2016 following documents are sought to be brought on record:

- i) Copies of letters and orders pertaining to acquisition and allotment of land in the State Chhattisgarh.
- ii) A copy of the MoU dated 19/06/2006 executed between the Respondent No.1 and the Government of Chhattisgarh for setting up of the Project.
- iii) Copy of the excel sheets demonstrating energy duty of 270 MW on auxiliary consumption by the Respondent No.1.
- iv) A copy of the Chhattisgarh Electricity Duty (Amendment) Act, 2013.
- v) A copy of the Notification dated 03/12/2004 published by the State of Chhattisgarh along with true translated copy in English.
- vi) A copy of the Notification dated 10/11/2009 published by the State of Chhattisgarh along with true translated copy in English.

12. Through IA No.441 of 2016 following documents are sought to be brought on record:

- i) Notification dated 03/11/2005 issued by Energy Department, Government of Chhattisgarh along with true translated copy in English.
- ii) Notification dated 05/04/2006 issued by Energy Department, Government of Chhattisgarh along with true translated copy in English.
- iii) Notification dated 08/06/2012 issued by Energy Department, Government of Chhattisgarh.

13. Mr. Ganesan, learned counsel for the Appellant submitted that two submissions made by the Appellant have been reproduced by the State Commission in the impugned order but have not been dealt with by it. The following are the said submissions:

- i) The respondent stated that the contract between the petitioner and the respondent is in respect for generation and supply of the contracted capacity of 200 MW at Gujarat STU-CTU interconnection. The arrangement of the

petitioner with regard to the total installed capacity of the generating station, the auxiliary consumption etc. Assumed by the petitioner do not affect the rights and obligations of the parties under the PPA. The balance capacity is at the disposal of the Petitioner without there being any restriction on the means of such sale of electricity, the tariff, the quantum of auxiliary consumption etc. And has no correlation to the purchase of the contracted capacity of 200 MW by the respondent from the Petitioner under the PPA. The issue relating to the additional revenue to the date of commencement of supply of power to the respondent to be 25/09/2011 is of no relevance since the rights and obligations of the parties has to be in terms of PPA.

- ii) The interpretation and applicability of the Industrial Policies by the Petitioner are wrong and are denied. The alleged change made by the Government of Chhattisgarh in the Industrial Policies is not a Change in Laws in terms of Article 13 of the PPA in the facts and circumstances of the present case. The petitioner was not entitled to exemption from Electricity Duty on auxiliary consumption under the Industrial Policy, 2004-09 which has been withdrawn by

the Government of Chhattisgarh under the Industrial Policy, 2009-14. The demand that the Electricity Duty is liable to be reimbursed by the Respondent in guise of 'Change in Law' is not permissible.

These submissions are quoted at sub paragraphs 3.15 and 3.17 respectively in the impugned order.

14. We do not want to express any opinion as to whether the documents which are sought to be brought on record have any relevance or not. But having heard the learned counsel we feel that in the interest of the justice Respondent No.1 will have to be permitted to bring on record the additional documents which are annexed to the interim applications. Similarly, direction needs to be given to the State Commission to deal with the contentions of the Appellant quoted hereinabove.

15. Hence, we pass the following order:

- (i) Without going into the merits of the case the impugned order dated 01/07/2015 is set aside.

- (ii) The matter is remanded to the State Commission.
- (iii) The State Commission is directed to permit Respondent No.1 to bring on record the additional documents which are annexed to IA No.411 of 2016 and IA No.441 of 2016 and which we have mentioned hereinabove.
- (v) The State Commission shall hear the parties afresh on all issues including the two issues raised by the Appellant which we have reproduced hereinabove and deliver judgment on all the said issues independently and in accordance with law. We make it clear that we have not expressed any opinion on the merits of the case of either party. The State Commission shall conduct the entire exercise as directed by us within three months from the date of receipt of this order.

16. The appeal is disposed of in the aforesaid terms. Needless to say that all the interim applications stand disposed of.

**17. Pronounced in the Open Court on this 23rd day of
September, 2016.**

**(I.J. Kapoor)
Technical Member**

**(Justice Ranjana P. Desai)
Chairperson**

~~REPORTABLE~~ / NON-REPORTABLE