

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.111 of 2012

Dated: 30th April, 2013

**Present : HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM,
CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER**

In the Matter of:

1. **Gujarat Urja Vikas Nigam Limited
Sardar Patel, Vidyut Bhawan
Race Course, Vadodara-390 007**

2. **Paschim Gujarat Vij Company Ltd
Laxminagar, Nana Mava Main Road
Rajkot-360004.**

...Appellant(s)

Versus

1. **Gujarat Electricity Regulatory Commission
1st Floor, Neptune Tower, Ashram Road
Ahmedabad – 380009
Gujarat.**

2. **Rasna Marketing Services LLP,
A-103, Tirtharaj Complex,
B/h, Hasubhai Chambers,
Ellishbridge,Ahmedabad-380006**

.....Respondent(s)

Counsel for the Appellant(s) : Mr.M.G.Ramachandran
Ms. Swapna Seshadri
Mr. Anand K. Ganesan
Mr. K.K.Jangid & Mr. V.T. Patil(Rep)

Counsel for the Respondent(s):Mr. Ramji Srinivasan, Sr.Adv.
Mr. Sunil Sharma for R-1.
Ms. Shikha Ohri for R-1.
Mr.Sumesh Dhawan for R-2
Ms. Ruhi for R-2.
Ms. Vatsala for R-2
Mr. Kawaljit Singh Bhatia for R-2
Ms. Surbhi Sharma
Mr. Vivek Paul Oriel

J U D G M E N T

PER HON'BLE MR. JUSTICE M. KARPAGAVINAYAGAM, CHAIRPERSON

1. Rasna Marketing Services LLP, the Generating Company, 2nd Respondent, filed a petition before the Gujarat State Commission, praying for determination of specific tariff for the generation and sale of power.
2. However, the 1st Appellant, Gujarat Urja Vikas Nigam Limited and the 2nd Appellant, Paschim Gujarat Vij Company Limited raised the preliminary objection as to the maintainability of the petition.

3. The State Commission, after hearing the parties held in the impugned order dated 15.5.2012 that the petition filed by the Rasna Marketing Services LLP(R2) for determination of specific tariff was maintainable and proceeded with enquiry to consider the merits of the claim.
4. Aggrieved over the said preliminary order dated 15.5.2012 of the State Commission, both the Appellants have presented this Appeal.
5. Short facts are as follows:
 - i) Gujarat Urja Vikas Nigam Limited(Gujarat Urja), the 1st Appellant undertakes the purchase of electricity in bulk from the generating companies and supplies the power in bulk to the Distribution companies.
 - ii) The Paschim Gujarat Vij Company Ltd, 2nd Appellant is the Distribution licensee of the area.
 - iii) Rasna Marketing Services LLP, the Respondent 2, is a generating Company. This company was allocated 1 MW of solar power capacity by the Government of Gujarat by letter dated 14.10.2010.
 - iv) In the meantime, the State Commission, the 1st Respondent by the order dated 29.01.2010, decided generic tariff for the purchase of electricity from solar

power projects. This order provided that the projects which do not get the benefit of accelerated depreciation under the Income Tax Act are at liberty to approach the State Commission and to file a separate petition for determination of project specific tariff by producing the relevant materials.

- v) In pursuance of the allocation of solar capacity by the Government of Gujarat and the order dated 29.01.2010 passed by the State Commission, Gujarat Urja, the 1st Appellant and Rasna Marketing Services LLP(R2) entered into a Power Purchase Agreement on 08.12.2010 on the terms and conditions contained in the said Power Purchase Agreement. Through this agreement, Rasna Marketing Services, (R-2) agreed to sell for a fixed generic tariff rate determined as per the order dated 29.01.2010 as referred to in the PPA.
- vi) Since the solar power project of Rasna Market Services LLP,(R2) was less than 5 MW capacity and evacuation was planned below 66 KV as per the provisions of PPA, the Power Purchase Agreement was assigned by the 1st Appellant to Paschim Gujarat Vij Company Limited, 2nd Appellant, the Distribution Company through execution of

tripartite Supplemental Agreement dated 08.6.2011 signed by the Appellants and the 2nd Respondent.

- vii) On 31.12.2011 1 MW solar photovoltaic plant of Rasna Marketing Services LLP(R2) was commissioned and after achieving its Commercial Operation.
- viii) Rasna Marketing Services, (R2) on 20.2.2012 filed a petition before the State Commission under Section 62 and Section 64 of the Electricity Act,2003, praying for determination of the specific tariff for the generation and sale of power to the 2nd Appellant on the ground that Rasna Marketing Services LLP(R2) would not be availing accelerated depreciation benefits as permitted by the order dated 29.1.2010 passed by the State Commission. This petition was entertained in petition No.1198 of 2012 .
- ix) A notice was issued and served on the Appellants even before the admission of the said petition. On receipt of the said notice both the Appellants appeared before the State Commission and raised a preliminary objection stating that the petition filed by Rasna Marketing Services LLP(R2) was not maintainable as the liberty given to the developer in the order dated 29.1.2010 passed by the State Commission would not apply to Rasna Marketing Services LLP(R2) in as much as the developer(R2) had already

paid for the tariff with accelerated depreciation benefit by entering into the PPA dated 8.12.2010 as well as the supplemental PPA dated 8.6.2011.

- x) Since the maintainability of the petition was questioned by the Appellants as a preliminary objection, the State Commission heard the arguments of both the parties with reference to the maintainability of the Petition alone. Ultimately, by the impugned order dated 15.5.2012, the State Commission held that the petition was maintainable and accordingly admitted the petition and decided to proceed with the matter to conduct enquiry to consider the issue on the merits and to determine the project specific tariff by directing Rasna Marketing Services LLP, R-2, to furnish all the details to establish that it has not availed any accelerated depreciation benefit. Accordingly, the matter was adjourned for further enquiry.
- xi) At this stage , both the Appellants have filed this Appeal challenging the preliminary order dated 15.5.2012 admitting the petition filed by Rasna Marketing Services, LLP (R-2) for determination of project specific tariff.
- xii) The learned Counsel for the Appellants has made the following submissions in order to substantiate his plea that

the petition filed by Rasna Marketing Services LLP (R-2) was not maintainable:-

- a) Once Rasna Marketing Services LLP(R-2) had opted to accept the generic tariff determined by the State Commission in order No.2 of 2010 passed by the State Commission on 29.01.2010 and in pursuance of the same it had entered into a PPA as well as the supplemental PPA with Appellants, it is not open to Rasna Marketing Services(R-2), thereafter to file a separate petition for the determination of project specific tariff. If the projects developer wanted to apply for specific tariff by not availing benefit of accelerated depreciation, it must have approached the State Commission for such a determination prior to the signing of the PPAs and not after signing the same.
- b) Rasna Marketing Services LLP(R-2) has prayed for a project specific tariff on the basis that the accelerated depreciation benefits have not been availed. If it is so, the Rasna Marketing Services LLP(R2) should not have opted for signing of the PPAs as the solar power project developer offering sale of solar power at the generic tariffs, which are much more than the capacity required

to fulfil the Renewal Power Purchase obligations prescribed by the State Commission.

c) The PPA as well as supplemental PPA were entered into on 08.12.2010 and 8.6.2011 respectively by both the parties in pursuance of the tariff order No.2 of 2010 dated 29.01.2010. In the said order, the State Commission determined the generic tariff applicable to such PPAs. Admittedly, the PPAs in the present case are covered under tariff order No.2 of 2010 dated 29.01.2010. The State Commission, having already determined the generic tariff, does not have the power to override the contract already entered into between the parties and to determine the project specific tariff.

6. In reply to the above contentions, the learned Counsel for both the State Commission (R-1) as well as Rasna Marketing Services LLP(R-2) have made detailed submissions in justification of the impugned order. They are as follows:-

a) The State Commission, while passing order No.2 of 2010 on 29.1.2010 had clarified that in case, a project developer did not get the benefit of accelerated depreciation benefit, the said project developer would be at liberty to file a separate petition for specific separate tariff and in that event, the State Commission would consider and decide the same

after taking into account all the relevant aspects. Only on the basis of the said liberty, Rasna Marketing Services LLP(R-2) filed the petition before the State Commission.

- b) The execution of PPAs would not bar the power of the State Commission for tariff determination. The agreement itself recognises the fact that the tariff shall be as per order No.2 of 2010 in which the State Commission recognised the right of the party not getting the benefit of accelerated depreciation to approach the State Commission for the specific tariff determination. The tariff determined by the State Commission in order No.2 of 2010 dated 29.01.2010 was passed only after taking into account the accelerated depreciation. Since the project of Rasna Marketing Services LLP was commissioned during the control period of the said order and net tariff rate for the project not getting benefit of accelerated depreciation was required to be fixed by the State Commission, the State Commission correctly admitted the petition filed by the developer, R-2(Rasna Marketing Services LLP) for determination of specific tariff applicable to its project. There is no illegality in this order.
- c) Rasna Marketing Services LLP(R-2) is not mandated under any provision of law to disclose that it would be availing the benefit of accelerated depreciation before signing the PPA.

It is the discretion of Rasna Marketing Services LLP(R-2) not availing the benefit of accelerated depreciation to move the State Commission in a separate petition for determination of project specific tariff.

d) The contention of the Appellants that the State Commission does not have the power to override the contract entered into between the parties is untenable. It is settled law that the State Commission has the power to modify the tariff for a concluded PPA. Further, the State Commission, while admitting the petition filed by Rasna Marketing Services LLP, R-2, by following its own decision given in the tariff order No.2 of 2010 dated 29.1.2010 has rightfully entertained the petition for conducting enquiry for determining the specific project tariff for Rasna Marketing Services LLP(R-2).

7. In the light of the above rival contentions, the question which arises for consideration before this Tribunal is as follows:-

Whether the petition filed by Rasna Marketing Services LLP(R-2) before the State Commission seeking for the determination of project specific tariff even after having signed the valid PPA fixing the generic tariff with the Appellant is maintainable or not?

8. Thus, we are only concerned with the maintainability of petition which has been admitted by the State Commission.
9. The maintainability of this petition was objected to by the Appellants raising as a primary issue before the State Commission on the ground that Rasna Marketing Services LLP(R-2) having signed the PPAs agreeing for the generic tariff could not maintain this petition seeking for the project specific tariff on the ground that it has not availed the accelerated depreciation benefit.
10. Since the preliminary issue was raised by the Appellants before the State Commission, the arguments were heard over the maintainability of the petition from both the parties and the findings have been rendered by the State Commission holding that the petition was maintainable. Accordingly, the State Commission admitted the petition by passing an order giving reasons for holding that the petition was maintainable and proceeded with the enquiry to decide about the merits of the claim by adjourning the matter to a future date.
11. Thus, in this Appeal, we are not concerned with the merits of the claim made by Rasna Marketing Services LLP,R-2 before the State Commission. As stated earlier, We are concerned only with the question of maintainability.

12. Let us now refer to the findings rendered by the State Commission with regard to the maintainability. The relevant portion of the findings is as follows:-

“7). We have carefully considered the submissions made by the parties. The petitioner has filed the present petition praying for determination of tariff to be paid by the respondent No.1 PGVCL for procurement of energy generated from the 1 MW Solar PV project of the petitioner. It is an admitted fact that the PPA is signed by the petitioner and respondent No.1 on 8.12.2010 in which it was agreed that the petitioner would set up 1 MW solar PV project and the tariff payable shall be as decided by the Commission in Order No.2 of 2010 dated 29.1.2010. Thus, the tariff agreed between the parties is as per Order No.2 of 2010 of the Commission. Now, in the present petitioner, the petitioner has prayed for determination of tariff for his project stating that the petitioner is not availing the benefit of accelerated depreciation. Hence, the Commission has been requested to determine the tariff for the project. The said order also provides that for the project developer who is not availing the benefit of accelerated depreciation, tariff will be decided by the Commission based on the application of the individual projects keeping in view the relevant documents submitted by the project developers. Accordingly, the petitioner who is not availing the benefit of

accelerated depreciation is eligible to approach the Commission for determination of tariff. Hence, we decide that the petition is admissible for determination of tariff as prayed by the petitioner. However, the Petitioner has to establish through documentary evidence that he has not availed any accelerated benefit. He is also to submit other relevant details.

8) We also observe that the petitioner has not submitted the details for determination of tariff. Hence, we direct the petitioner to submit all the details specifying capital cost of the project, term loan, interest on working capital, depreciation, O&M charges etc. along with the documents to establish that the petitioner is not availing the benefit of accelerated depreciation. On submission of the above details, the Commission will decide the tariff in accordance with law. The petitioner is also directed to provide the copies of the submission to the respondents. The respondents are at liberty to file their reply, if any, on such submission within 15 days from the date of receipt of the details.

9) We order accordingly.

10) The next date of hearing will be intimated separately.

13. The crux of the finding referred to above is as follows:-

- i) The PPA had been signed by both the parties on 08.12.2010. It was agreed in the PPA that the tariff payable shall be as decided by the State Commission as per order dated 29.1.2010. Thus the tariff agreed to between the parties is as per order No.2 of 2010 dated 29.1.2010.
- ii) The very same order provides that the Project developer who is not availing the benefit of accelerated depreciation is at liberty to approach the State Commission for determination of the appropriate tariff. On that basis, the petition had been filed requesting the State Commission to determine the specific tariff for the project. Therefore, the State Commission decided that the petition is admissible for determination of tariff as prayed for by the petitioner.
- iii) So far, the petitioner has not submitted the details for the determination of tariff. Therefore, after admitting the Petition, it directed the petitioner to submit all the details and establish through documentary evidence to show that it has not availed any accelerated depreciation benefits so that the State Commission will decide the issue in accordance with law. With this direction, the State

Commission adjourned the matter for conducting enquiry to decide the same.

14. The impugned order would reveal that the petition was admitted by the State Commission rejecting the preliminary objection raised by the Appellants with regard to maintainability of this Petition mainly on the strength of the liberty which had already been granted by the State Commission to the project developers to approach the State Commission for determining the project specific tariff in the event that they have not availed the accelerated depreciation benefits.
15. In view of the above, it would be worthwhile to refer to the observation made by the State Commission earlier giving the liberty in the order No.2 of 2010 passed on 29.1.2010. The said observation is as follows:-

“The above tariffs take into account the benefit of accelerated depreciation under the Income Tax Act and the Rules. For a project, that does not get such benefit, the Commission, would on a petition in that respect, determine a separate tariff taking into account all the relevant facts”

16. The above observation would reveal that such a liberty was given to the project developers if they do not get the benefit of accelerated depreciation. According to the State Commission, in view of the liberty given in the order No.2 of 2010 dated

29.01.2010 to the effect that the project developer who did not get the benefit of accelerated depreciation, it could file a petition for fixing specific tariff and in that event, the State Commission would consider and decide the same after taking into account all aspects and therefore, the Petition was maintainable. While giving such a finding while admitting the petition, the State Commission has taken into account the background of the case also. Some of the relevant events which are not disputed would project actual background of the case. They are as follows:-

- i) There is no dispute in the fact that Rasna Marketing Services LLP(R-2) was assigned 1 MW of solar power by the Government of Gujarat. On that basis, It (R-2) had signed PPA with the 1st Appellant on 08.12.2010.
- ii) Similarly, it is not disputed that thereafter, tripartite supplemental agreement was also entered into between Rasna Marketing Services LLP, R-2 and both the Appellants on 8.6.2011 whereby it was agreed to transfer rights of Rasna Marketing Services LLP,R-2 to Paschim Gujarat Vij Company Ltd, 2nd Appellant. Article 5.2 of the PPA provides that the 1st Appellant shall pay the fixed tariff for the period of 25 years for the scheduled energy/energy injected in the month as per the State

Energy Accounts. The tariff agreed in the said Article of the PPA is as per the tariff determined by the State Commission for the solar power project , in its order dated 29.1.2010.

- iii) The tariff mentioned in the PPA is Rs.15 per kWh for the 1st 12 years and thereafter, Rs.5 per kWh from 13th year to 25th year. This tariff shall apply for the solar projects commissioned on or before 31st December,2011.

17. As indicated above, the State Commission had determined the tariff through order No.2 of 2010 on 29.1.2010. It can not be debated that while determining the tariff, the State Commission had considered the aspect of the benefit of accelerated depreciation also in the tariff. In that context, in the said order, the State Commission specifically observed that the project developer who is not availing the benefit of accelerated depreciation is at liberty to approach the State Commission for determination of project specific tariff. This order would apply to Rasna Marketing Services LLP(R-2) also since the project had been commissioned on 31.12.2010 i.e. well within the Control Period as fixed by the State Commission in the order dated 29.1.2010.

18. Therefore, Rasna Marketing Services LLP(R-2) is covered by order No.2 of 2010 dated 29.01.2010 of the State

Commission. In the said order, the State Commission has categorically mentioned that “for a project that does not get such benefit, the State Commission, on a separate petition, in that regard, filed by them, would determine a separate tariff taking into account all the relevant facts.”

19. So, the above specific observation made in the order no.2 of 2010 would show that liberty had been given to the project developer in future to approach the State Commission for fixing the separate tariff when the said project intends not to get such benefits.
20. Accordingly, Rasna Marketing Services LLP(R-2) filed a petition under Section 62 read with Section 64 of the Electricity Act,2003 on 20.2.2012 seeking for the determination of specific tariff for the generation and sale of power to the Appellant as permitted by the state Commission by the order dated 29.1.2010 on the ground that the Respondent had not availed the accelerated depreciation benefits.
21. The main ground of objection raised by the Appellants before the State Commission was that Rasna Marketing Services Limited,R-2 could not be permitted to file the said application after having signed the PPAs both on 08.12.2010 and 8.6.2011 with the Appellants and such a petition could be entertained by the State Commission only before the signing of the PPAs and

Rasna Marketing Services LLP,R-2 having preferred to sign the PPA as per the tariff order dated 29.1.2010 fixing the generic tariff cannot take a different stand and maintain the petition for determination of project specific tariff on the pretext of not availing the accelerated depreciation benefits.

22. This contention, in our view, is not sustainable for the following reasons:-

i) "The State Commission has categorically held while determining the tariff under its order No.2 of 2010 dated 29.1.2010 that the projects that are not availing the benefit of accelerated depreciation could separately in the form of petition approach the State Commission for determination of project specific tariff. The observation referred to above giving such a liberty in future would make it clear that the State Commission was conscious that there may be certain solar power developers who do not want to avail the benefit of accelerated depreciation. Only on the basis of that impression, the State Commission categorically gave option to such a developer to approach the State Commission separately for determination of project specific tariff.

ii) It can not be contended that the subsequent execution of PPA would in any manner put an embargo on the

jurisdiction of the State Commission for such a specific tariff determination especially when the PPA itself recognised the fact that the tariff shall be as per the order No.2 of 2010 dated 29.01.201 and particularly when the said order also recognised the right of the developers who are not willing to get the benefit of accelerated depreciation to approach the State Commission for determining the specific tariff for those projects.

iii) According to the Appellants, if Rasna Marketing Services LL(R-2) did not want to avail accelerated depreciation benefits, the same should have been intimated to the Appellants even before signing of the PPAs. This contention is not tenable because there is no such reservation either in the tariff order No.2 of 2010 or in the PPA entered into between the parties.

iv) Rasna Marketing Services LLP(R-2) is not mandated under any provision of law to disclose to the Appellants that it would not be availing the benefit of accelerated depreciation before signing the PPA. It is the discretion of the project developer not availing the benefit of accelerated depreciation to move the State Commission in a separate petition for determination of project specific tariff as permitted by the State Commission in the tariff order

No.2 of 2010 dated 29.1.2010. The said tariff order is a statutory order binding on the project developers and licensees such as the Appellants and the developers.

v) If the option of signing or not signing the PPA was contingent on the developers in exercise of option, then that option should have been specifically sought for by the Appellant and ensured that the same was incorporated in the PPA. This admittedly has not been done.

vi) As indicated above, Rasna Marketing Services LLP(R-2) had commissioned its project on 31.12.2010, well within the scheduled date of the Commercial Operation i.e. on 31.12.2011 as prescribed by the State Commission.

vii) Hence, it has to be held that Rasna Marketing Services LLP(R-2) is entitled to claim for project specific tariff to be determined by the State Commission as permitted in the order No.2 of 2010 dated 29.1.2010. That apart, it is noticed that the tariff order No.2 of 2010 was duly accepted by the Government of Gujarat through the Resolution dated 22.6.2010. The said resolution also recognised the fact that “ for a project that does not get such a benefit, the State Commission would , on a petition, in that respect, determine a separate tariff taking into consideration all relevant aspects”.

23. Thus, the State Commission is well within its rights to entertain such a petition following its own order dated 29.1.2010 as well as the resolution by the Government of Gujarat dated 22.6.2010 accepting the State Commission's view in that respect.
24. The Appellants also contended that the State Commission does not have the power to override the contract entered into between the parties when PPA itself was signed in pursuance of the order passed by the State Commission determining the tariff applicable to such PPAs. This contention is also misconceived for two reasons –(1) The petition filed by Rasna Marketing Services LLP(R-2) was entertained only on the basis of the order passed by the State Commission determining the tariff and giving liberty to the project developers to approach the State Commission in future for determining the project specific tariff, if they do not opt for getting accelerated depreciation benefits. Only on that basis, the petition was entertained and admitted. (2) It is settled law that State Commission has got powers to modify the tariff for a concluded PPA. This Tribunal in Appeal No. 35 of 2011 dated 10.2.2012 and Appeal No.70 of 2009 dated 13.1.2011 and Appeal No.179 of 2010 dated 23.4.2010 has specifically held that the State Commission has got powers to modify or vary

the tariff as well as the terms of agreement for purchase of power.

25. Such being the settled law the Rasna Marketing Services LLP (R-2) can not be estopped from approaching the State Commission to seek for determination of project specific tariff through the separate petition since it is not availing the benefit of accelerated depreciation. In other words, there is no bar either on Rasna Marketing Services LLP,R-2 to get the specific tariff determined by the State Commission after signing the PPA on account of not availing the accelerated depreciation benefits, nor there is a bar on the State Commission to determine the project specific tariff in the Petition filed by Rasna Marketing Services LLP (R-2) after signing the PPA.
26. In view of the above reasonings, we do not find any merit in the submission made by the learned Counsel for the Appellants especially when there is no infirmity in the finding rendered by the State Commission in regard to the maintainability of the Petition.
27. Consequently we hold that the present Appeal is liable to be dismissed being devoid of merits. However, we make it clear that we do not express any opinion with reference to the merits of the claim made by Rasna Marketing Services LLP(R-2). The responsibility to establish through documentary evidence

that any accelerated depreciation benefits had not been availed entirely lies on Rasna Marketing Services LLP,R-2.

28. So, it is for the petitioner which is 2nd Respondent herein has to submit all the details to establish that it is not availing the benefit of accelerated depreciation and thereafter, the State Commission will hear both the parties and decide the issue in accordance with law, after going into those details.

29. **Summary of the findings:-**

- i) **The State Commission has categorically held while determining the tariff for Solar Power Projects under its order No.2 of 2010 dated 29.1.2010 that the projects that are not availing the benefit of accelerated depreciation could separately file a Petition before the State Commission for determination of project specific tariff.**
- ii) **Rasna Marketing Services LLP had commissioned its project within the control period specified in the State Commission's order dated 29.1.2010 and therefore, it is covered under the said order.**
- iii) **Execution of PPA between Rasna Marketing Services LLP and the Appellants would not in any manner put an embargo on the jurisdiction of the**

State Commission for such specific tariff determination when the PPA already recognized the fact that the tariff should be as per the order No.2 of 2010 dated 29.1.2010 and the said order also recognised the right of the developer who is also not willing to get the benefit of accelerated depreciation to approach the State Commission to determine the said project specific tariff.

iv) Thus, there is no infirmity in the findings of the State Commission regarding maintainability of the Petition filed by Rasna Marketing Services LLP for determination of tariff. State Commission can go on with inquiry to decide the merits of the claim made by the Petitioner.

30. In view of the above findings, the Appeal is dismissed. However, there is no order as to costs.

31. Pronounced in the open court on the 30th day of April,2013.

(Rakesh Nath)

Technical Member

Dated: 30th April, 2013

(Justice M. KarpagaVinayagam)

Chairperson

√REPORTABLE/~~NON-REPORTABLE~~