

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.77 of 2012

Dated:18th Feb, 2013

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

In the Matter of:

**M/s. Dwarikesh Sugar Industries Ltd
Dwarikesh Puram,
PO- Afzalgarh,
Bahadarpur, Distt-Bijnor (UP)**

...Appellant

Versus

- 1. Executive Engineer Electricity Transmission Division
UP Power Transmission Corporation Ltd.,
Substation Dhampur,
District-Bijnor-246 722 (UP)**
- 2. U.P. Power Corporation Ltd
Shakti Bhawan
Ashok Marg, Lucknow-226 001**
- 3. Pachimanchal Vidyut Vitran Nigam Ltd.,
Victoria Park,
Meerut (UP)**
- 4. Chief Engineer,
Power Purchase Agreement
U.P. Power Corporation Ltd
Shakti Bhawan,
Ashok Marg, Lucknow-226 010**
- 5. Superintending Engineer,
Electricity Import Export Payment Circle,
U.P Power Corporation Ltd
Shakti Bhawan,
Ashok Marg, Lucknow-226 010**

**6. Uttar Pradesh Electricity Regulatory Commission
Kisan Mandi Bhawan,
IInd Floor, Gomti Nagar,
Lucknow-226 010**

...Respondent(s)

Counsel for the Appellant(s) : Mr. Buddy A Ranganadhan
Ms. Richa Bharadwaja

Counsel for the Respondent(s): Mr. Pradeep Misra,
Mr. Manoj Kr Sharma for R-1 to 5
Mr. Daleep Kumar Dhyani
Mr. Sanjay Singh for R-6

J U D G M E N T

**PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,
CHAIRPERSON**

1. The two questions that may arise for consideration in this Appeal are as under:

(a) Whether the State Commission had jurisdiction to decide the dispute raised by the Appellant challenging the deduction made by the UPPCL, the Respondent in the energy bills of the Appellant u/s 86 (1) (f) of the Act?

(b) Whether the deduction as proposed by the Respondent i.e. UPPCL in the energy bills raised by the Appellant was unauthorised?

2. The present Appeal is filed as against dismissal order dated 24.2.2012 in the Petition filed by the Appellant raising the

dispute in question u/s 86 (1) (f) and 94 (2) of the Electricity Act, 2003 by the Uttar Pradesh State Commission.

3. The Short facts are as under:

(a) The Appellant is a generating company. The Appellant entered into a Power Purchase Agreement with the Distribution Licensee, the Respondent on 28.4.2006 subject to the approval of the State Commission.

(b) After approval of the State Commission, the Appellant entered into a final PPA dated 15.11.2006 with the Distribution Licensee for sale of electricity generated by its co-generation unit at Dwarikesh Puram to the Distribution Company.

(c) It was agreed that UPPCL, the Respondent will undertake the construction of the Transmission Line and estimated amount was fixed as Rs.470 lacs.

(d) Accordingly, the Appellant promptly deposited the said amount as demanded by the Respondent UPPCL towards the cost of construction of transmission line as early as on 17.5.2006. However, there was a delay in construction of transmission line.

(e) Ultimately, the line was energised only on the strength of the order passed by the State Commission on 6.2.2008.

(f) Subsequently, the Appellant filed a Petition before the State Commission seeking for the compensation from the UPPCL for the delay in construction of the transmission line. The said Petition was dismissed by the State Commission by the order dated 12.11.2009.

(g) The Appellant challenged this order before this Tribunal and the said Appeal was also dismissed by this Tribunal by the judgment dated 20.10.2011. The Appellant took-up the matter with Hon'ble Supreme Court which also dismissed the said Appeal of the Appellant.

(h) While so, the UPPCL, wrote a letter dated 4.10.2007 to the Appellant claiming additional amount of Rs.127.08 lacs towards the cost of the construction of transmission line.

(i) The Appellant however deposited a sum of Rs.50 lacs as against the demand of additional amount of Rs.127.08 lacs. The balance amount was deposited by the Appellant thereafter on 6.2.2008.

(j) UPPCL once again revised the estimated cost on 17.3.2008 despite the fact that the line had already been energized. This time, the UPPCL demanded additional amount of Rs.265.58 lacs. The Appellant strongly protested the enhanced demand. Then UPPCL for the 3rd time again revised the cost of the construction of the transmission line by claiming the balance of Rs.286.19 lacs. However, the UPPCL modified the earlier demand by reducing its demand slightly and claimed additional amount of Rs.253 lacs.

(k) This time on 26.4.2011, UPPCL wrote a letter to the Appellant demanding to pay a sum of Rs.15.20 lacs towards annual maintenance charges (AMC) for the period 1.4.2011 to 31.3.2012.

(l) The Appellant objected to the annual maintenance charges demand. However, the Appellant sent a cheque for Rs.10.88 lacs to the UPPCL towards the annual maintenance charges but this cheque was returned by UPPCL demanding full amount of Rs.15.20 lacs.

(m) There were various correspondences between the parties. In the meantime, the energy bill was sent by the Appellant for November, 2011 to the Distribution Licensee. The Appellant, thereafter got information

from the Distribution Licensee that the amount towards annual maintenance charges would be deducted. The Appellant once again protested towards such proposed deduction. Even then, the Appellant received a cheque from UPPCL towards the bill for the month of November, 2011 after deducting the arrears of annual maintenance charge amount. Therefore, the Appellant filed a Petition before the State Commission on 10.1.2012 u/s 86 (1) (f) and 94(2) of the Act, 2003 to resolve the dispute in issue between the parties.

(n) After hearing the parties, the State Commission ultimately on 24.2.2012, dismissed the Petition on the ground that the same was not maintainable before the State Commission, as it had no jurisdiction, without going into the merits of the matter.

(o) Aggrieved over this order, the Appellant has presented this Appeal.

4. The learned counsel for the Appellant has made the following submissions:

(a) Section 86 (1) (f) of the Electricity Act is a substantive provision conferring upon the State Commission the powers to adjudicate a dispute between a Generator and a Distribution Licensee. The present matter is nothing but a dispute between a

Generator and the Distribution Licensee, the Respondent-3 who has chosen to unauthorisedly deduct the amount from the bills for the energy sold to the Distribution Licensee.

(b) Even under Clause 23 of the Power Purchase Agreement, any dispute between the parties under the PPA can be adjudicated upon by the State Commission on the Petition filed by either of the parties. The Petition filed by the Appellant before the State Commission was undoubtedly one such Petition which was relatable to the Clause 23 of the PPA. Hence, the Petition filed by the Appellant was maintainable and as such it is completely within the jurisdiction of the State Commission.

(c) The State Commission has committed a grave wrong in dismissing the Petition on the basis of the judgment of this Tribunal in Appeal No.19 and 20 of 2010. The dispute raised in this Petition pertains to the payment of energy bill by the Distribution Licensee which was raised on it by the Appellant for sale of energy. But, the dispute in the Appeals No.19 and 20 of 2010 disposed of by the Tribunal pertains to the delay in construction of the transmission line. Therefore, the dispute in question had nothing to do

with the construction of the transmission line by the UPPCL.

(d) The proposed deduction by the Respondent in the energy bills is completely unauthorised. Under Section 8.5 of the unamended PPA, only the annual maintenance charge for the current financial year could be adjusted from the first bill of the financial year. The proposed deduction is not towards the annual maintenance charge but towards the alleged increase in the cost of construction of line. Further, the March, 2012 bill is not the first bill for the Financial Year. Therefore, no deduction could be made from such bill. Under Clause 8.5 of the PPA, all bills have to be paid in full even during the pendency of any dispute between the parties. Therefore, deduction of the amount from the energy bills payable by the distribution company to the Appellant is completely unlawful.

5. The learned counsel for the Respondents in reply to the above submissions has strenuously contended that the impugned order passed by the State Commission is perfectly justified since the issue had already been decided by this Tribunal in the earlier Appeals and therefore, the present Petition before the State Commission was not maintainable. They further contended that there is no illegality in the proposed deduction.

6. In the light of the above contentions, the two questions which would arise for consideration as mentioned above area reiterated hereunder:
 - (a) Whether the State Commission had jurisdiction to decide the dispute raised by the Appellant challenging the deduction made by the UPPCL, the Respondent in the energy bills of the Appellant u/s 86 (1) (f) of the Act?
 - (b) Whether the deduction as proposed by the Respondent i.e. UPPCL in the energy bills raised by the Appellant was unauthorised?
7. At the outset, it shall be stated that the State Commission without going into the merits of the dispute has simply dismissed the Petition on the ground that the State Commission has no jurisdiction to decide the dispute in question and therefore, the Petition was not maintainable.
8. In the light of the findings given by the State Commission that the State Commission has no jurisdiction, we would confine ourselves with the First Question with reference to the jurisdiction.
9. If we hold that there is no jurisdiction confirming the impugned order, then there is no necessity to go into the Second Question with reference to the merits of the dispute. On the other hand, if we come to the conclusion that the

State Commission has the jurisdiction to deal with this dispute, then necessarily, we have to remand the matter to the State Commission to deal with the Second Issue.

10. Therefore, we will deal with the issue with reference to the Jurisdiction of the State Commission alone.

11. Before dealing with this question regarding jurisdiction, it would be better to refer to the relevant portion of the discussion made and findings rendered by the State Commission. They are as follows:

“4. Since the issue of admissibility was raised, it is pertinent to discuss the issue at the beginning because the issue of interim relief could be considered only when the admissibility of petition could be established. Sri D.D.Chopra, learned Council of the Petitioner, stated the details of their claims as submitted in the petition.

5. In the subject matter, the relevant provisions of Power Purchase Agreement (PPA) are as reproduced below:

“Clause 7.1: *The Generating Company shall own, install, operate, and maintain the generating plant equipments and associated dedicated transmission line described in Annexure I. The Generating Plant shall follow such operating procedures on its side of the electric interconnection with STUs system, as are consistent with applicable laws, rules and regulations, the terms and conditions of this Agreement, provisions of the UP Electricity Grid*

Code, and other related guidelines, if any, issued by UPERC, SLDC, DISCOM, STU.”

“Clause 8.2: *The cost of the dedicated transmission line from the Generating Plant to the designated grid sub-station Dhampur of STU and the cost of interfacing at both ends (the Generating Plant and grid substation) including work at the STU Substation, cost of bay, tie- line, terminal equipments and associated synchronizing equipments, shall be borne by the Generating Plant.”*

“Clause 8.3: *The construction of transmission line and other supporting works for evacuation of power shall be undertaken by the Generating Company under approval and supervision of STU on payment of 15% of the cost of the work as per Corporation’s estimate towards the supervision. The Generating Company may also opt to entrust the transmission line work to UPPCL on deposit work basis as per Corporation rule. UPPCL will construct the bay at Grid Sub Station as per Corporation’s estimate at the Generating Company’s cost.”*

“Clause 8.5: *The maintenance of 132 KV lines and terminal equipment at UPPCL Sub-Station shall be done by UPPCL. The Generating Company shall be liable to pay Annual Maintenance Charge @ 1.5% of the total cost incurred on Power Evacuation system inclusive of line to UPPCL for the first year. The Maintenance charges for subsequent years shall increase in the same proportion as the increase in the whole sale price index published by the authorized Agency of Govt. of India subject to the proviso that the increase shall not exceed 5% in*

an any year. The amount for Maintenance charges would be adjusted from the power purchase billed amount for the first month of financial year. The Maintenance of terminal equipments at Substation end will be done by UPPCL and its cost will be passing through by the Commission, while determining the wheeling and Transmission Charges.”

6. From clause nos. 7.1, 8.2, 8.3 and 8.5 of PPA cited above, it is amply evident that the responsibility of construction, operation and maintenance of the transmission system remains with the generating company even if it is entrusted to STU by the generating company. Orders dated 12.11.2009 in petition nos. 614/2009 and 615/2009 filed earlier by M/s Dwarikesh Sugar Industries Ltd., the Commission observed that,

“The CNCE Regulations, under clause 8.2 of model PPA, states that responsibility of completion of transmission line eventually lie with the Generating Company, no matter who so ever is the contractor. Making UPPTCL contractor for construction of line does not absolve the Respondent from the responsibility of completing the line within time.”

“The Commission has the opinion that the absolute responsibility of construction and completion of dedicated transmission line remain with the generating company irrespective of the fact that whether generating company itself has constructed the line or has got it done by some other agency. The generating company should ensure the progress of work on transmission line as per the schedule so that the plant as well as the transmission line could be ready on date of

commissioning. It is clarified that although the PPA allows construction of line by UPPTCL, it does not stop the generators to adopt measures to ensure its timely completion. Thus, the losses, if any, due to delay in completion of line in no way could be attributed to the Respondent.”

7. Against these orders M/s Dwarikesh Sugar Industries Ltd. had preferred appeal to Hon’ble Appellate Tribunal for Electricity (APTEL). Under appeal No. 19 & 20 of 2010 order dated 20th October, 2011, Hon’ble APTEL upholding the Commission’s above orders, has observed that “The appellant while entrusting the works related to construction of line should have entered into a separate execution agreement with second Respondent Corporation incorporating appropriate indemnifying clause safeguarding its interest in case of delay in construction of line”

8. In this case, there is no separate execution agreement between the Petitioner and the executing agency for the construction of transmission lines. The PPA does not have any such clause for indemnifying the Petitioner in case of delay in construction of the transmission line. Therefore, in view of Hon’ble APTEL’s observations, Commission’s above cited orders and provisions of agreed PPA, the issue of increase in cost of dedicated transmission line and annual maintenance charges raised by the Petitioner, does not stand admissible at the platform of this Commission”.

12. The above paragraphs would reveal that the State Commission merely came to the conclusion that it has no jurisdiction since there is no separate execution agreement between the parties for the construction of transmission lines

and the PPA did not have any such clause for indemnifying the Appellant/Petitioner in case of delay in construction of transmission line.

13. This observation made by the State Commission would show that the State Commission in fact, did not deal with the question of jurisdiction by referring to Section 86(1)(f) of the Electricity Act, 2003 which confers jurisdiction.

14. Let us refer to the said Section. The said Section 86 (1) (f) of the Electricity Act, 2003 reads as under:

“Section 86: Functions of the State Commission

(1) The State Commission shall discharge the following functions, namely:-

(a).....

(f) adjudicate upon the disputes between the licensees and Generating Companies and to refer any dispute for arbitration”.

15. The said provision clearly provides that the disputes between a Generator and a Licensee acting in their respective capacities as Generator and Licensee are completely within the power, jurisdiction and authority of the Commission to be adjudicated upon.

16. This provision is a substantive provision conferring upon the State Commission the jurisdiction to adjudicate upon a dispute between a generator and a distribution licensee.

The present matter is undisputedly a dispute wherein the Licensee, allegedly, unlawfully and unauthorisedly, seeks to deduct amounts from the bills raised by the Appellant (A Generator) for the energy sold to the Licensee and such dispute is squarely and completely between the Generator (Appellant) and the Licensee (UPPCL-being the Respondent No.3).

17. The PPA dated 15.11.2006 in question between the Appellant and UPPCL was approved by the State Commission while exercising the Powers under Section 86(1) (b). The PPA prescribed a methodology for raising bills by the Generator for the energy supplied to UPPCL and payment by the licensee. The question for the adjudication arose specifically on whether such deductions were in accordance with the stipulations of the Power Purchase Agreement which was approved by the State Commission.
18. As pointed out by the Appellant, even Clause 23 of the Power Purchase Agreement also provides that any dispute between the parties to the PPA can be adjudicated by the State Commission on a Petition being filed by either of the parties.
19. As regards the observation in the impugned order regarding the issue regarding the delay in construction of the line, it is to be pointed out that the present dispute had nothing to do

with the construction of the line or the delay for the construction.

20. In fact, the real issue has not been appreciated by the State Commission and has been wrongly considered by the State Commission by observing that either the parties should have entered into an execution agreement containing an indemnifying clause for indemnification for the delay in construction of the line.
21. The reliance by the State Commission on the earlier judgments of the Hon'ble Tribunal in Appeal No.19 and 20 of 2010 are misplaced in as much as the dispute in those matters pertained to the Appellant's claim for compensation from the UPPCL for delay in construction of the transmission line. It was in that context, this Tribunal held that in the absence of a separate contract for the construction of the line, such claim for compensation was not maintainable. The present dispute has nothing whatsoever to do with the construction of the line or the delay thereof. The present dispute is a straightforward case of alleged unauthorized deductions made by the Respondents from the energy bills raised by the Appellant for power generated by it and sold to the Respondents under a PPA approved by the State Commission. Admittedly, this is a dispute between the Generating Company and the Licensee.

22. Hence the reliance by the State Commission on the aforesaid judgments of this Tribunal is misplaced.
23. Even in a case where there was no direct contractual relationship between a Generator and a Distribution Licensee, this Tribunal was inter alia, pleased to hold that the appropriate Commission which could have jurisdiction to adjudicate any dispute between the two would be the State Commission having jurisdiction over the Distribution Licensee. This Tribunal has in the case of Lanco Power Ltd Vs. Haryana Electricity Regulatory Commission in 2011 ELR (APTEL) 1714, inter alia, held as under:

“17. This provision thus clarifies that the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity shall be the appropriate Commission. In the present case, it is not disputed that the electricity generated in the State of Chhattisgarh is intended to be transmitted through the inter State transmission system to the State of Haryana for distribution to the consumers of the State of Haryana by the distribution licensees of the Haryana. Thus, the present case squarely falls within the provision of Section 64(5) of the Act”.

24. Therefore, the dispute raised in the present matter are squarely covered by Clause 23 of the PPA as well as Section 86(1) (f) of the Act and is completely within the jurisdiction of the State Commission to decide.
25. In view of the above conclusion, we set aside the impugned order and direct the State Commission to deal with the

Second Issue with reference to the dispute raised by the Appellant on the basis of the material placed by both the parties as well as the submissions made by them and pass appropriate order in accordance with law as expeditiously as possible.

26. The Appeal is allowed. The impugned order is set-aside and the matter is remanded to the State Commission to decide the merits of the dispute.

27. However, there is not order as to costs.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated:18th Feb, 2013

✓ ~~REPORTABLE/NON-REPORTABLE~~