Appellate Tribunal for Electricity

(Appellate Jurisdiction)

Appeal No.28 of 2011

Dated 31st May, 2012

Coram : Hon'ble Mr. Rakesh Nath, Technical Member

Hon'ble Mr. Justice P.S. Datta, Judicial Member

In the matter of

Tarini Infrastructure Limited
Through its Managing Director,
Mr. V. Chandrashekharm
D-2, 1st Floor, Amar Coloy,
Lajpat Nagar,
New Delhi-110024.

…. Appellant(s)

Vs.

Gujarat Electricity Transmission Corporation Ltd.
Vidyut Bhavan,
Race Course, Vadora, Gujarat 390007.

Gujarat Urja Vikas Nigam Ltd.
Though its Chairman and Managing Director,
Sardar Patel Vidyut Bhavan,
Race Course, Vadora, Gujarat 390007.

Gujarat Electricity Regulatory Commission,
First Floor, Neptune Tower, Opposite Nehru Bridge,
Ashram Road, Ahmedabad – 380 009,
Gujarat – India

….Respondent(s)

Counsel for the Appellant(s)	:	Mr. Sanjay Sen Ms. Shikha Ohri Ms. Surbhi Sharma
Counsel for the Respondent(s)	:	Mr. Anand K.Ganesan for R-1 Ms Sneha Vekataramani Ms Ranjitha Ramachandran for R-2

JUDGEMENT

HON'BLE MR. JUSTICE P.S. DATTA, JUDICIAL MEMBER

1. This appeal is directed against the order dated 7.9.2010 passed by the Gujarat State Regulatory Commission, the Respondent No.-3 herein whereby it held that the transmission line laid by the appellant, M/s Tarini Infrastructure Ltd. which was involved in the development of small and medium hydro electric projects in India from the switch yard at Madhuban Dam to Mota Pandha to be the line belonging to the Gujarat Electricity Transmission Corporation Ltd., the Respondent No.1 herein. The facts are these.

2. The Govt. of Gujarat issued a policy for promoting the development of hydel projects in the State. In terms of the policy, the Narmada Water Resources, a statutory body of the Govt. of Gujarat called for the bids from private parties for building small hydro generation projects in River Daman Ganga at Madhuban reservoir which is about 35 kms. from Bapi

in the district of Valsad. The Daman Ganga dam is a major irrigation project across the river Daman Ganga in the state of Gujarat. The Appellant participated in the bid process for taking up the development of small hydro power project on the river Daman Ganga and was declared as a successful bidder. It was awarded the Concession for building two small hydro power projects of 3 MW (2 X 1500 KW) and 2.6 MW (1 X 2600 KW) at Daman Ganga / Madhuban reservoir by the Narmada Water Resources. The power plants are at a distance of 1 km. of each other and were to be connected to the nearest sub-station of the Gujarat Electricity Board which is the predecessor and interest of Gujarat Urja Vikas Nigam Ltd., the respondent no.2 herein. In terms of the tender document, the said nearest sub-station was less than 4 kms. from the dam. Accordingly, the Concession Agreement was entered into by the Narmada Water Resources with the appellant on 27.8.2007. A Detailed Project Report (DPR) was submitted any terms thereof the projects were to be completed within 24 months from the date of the start of the project. The power can be stepped up to 11/33 KV level at the switch yard of the Generating Station for further evacuation of the same to the nearest 66 KV sub-station at Rakholi. In terms of the Concession Agreement, the Narmada Water Resources by way of long term lease provided the project site, use of water to generate power and exclusive right to develop and construct the projects and maintain the

same. In terms of the Concession Agreement, the projects were to be transferred to the Narmada Water Resources at the end of 35 years. The appellant was required to pay the Narmada Water Resources a license fee of 0.23 paisa per unit of the electricity produced and transmitted to the inter-connection point. According to the appellant, in the DPR for the two projects, the total cost was estimated at Rs.1692 lakh and Rs.1443 lakh excluding the Interest During Construction(IDC). In terms of the Concession Agreement, the Appellant can use the power generated for captive consumption or can sell the same to the Gujarat Electricity Board or its successors. Accordingly, the appellant entered into a Power Purchase Agreement with the Respondent No.2 on 29.1.2008 and it agreed to sell the contacted capacity i.e. 3MW and 2.6 MW for a period of 35 years and the Respondent No.2 had agreed to purchase the power generated by the appellant at Rs.3.29 KWH for the year 2007-08 as the base rate which is subject to escalation of 3% @ till the commercial operation date and the tariff at the time of commercial operation date would be applicable for the entire project life. In the bid document as well as the Concession Agreement, the inter-connection point was at a distance of 4 Km. from the Generating Station and the DPR was also prepared on the basis of it. The Maintenance of the inter-connection facility was at the cost of the appellant and in terms of the tender document, the power was to be evacuated from the nearest

erstwhile GEB 11 /66 KV sub-station at Rakholi in Dadar & Nagar Haveli. The sub-station at Rakholi was 4 kms. away from the switch yard of the appellant and the transmission line from the delivery point in the plant switch yard to the sub-station of GETCO was to be constructed at the cost of the appellant. The construction work commenced on 24.11.2007 and subsequently GETCO after conducting a system study for evacuation of the power informed the Appellant that power could no longer be evacuated from Rakholi as the distribution in the union territory was not under the erstwhile Gujarat Electricity Board. Accordingly, the appellant was directed to lay down a 66 KV (double circuit) transmission line for 23 kms. instead of 4 kms. passing through the union territory of Dadar & Nagar Haveli and the connecting to sub-station at Mota Ponda in Gujarat. The cost of construction of this line was estimated at 8.5 crore and it was borne by the appellant. The actual cost of construction came to Rs. 10 crore. In order to enable the commissioning of the project and evacuation of the power, the Appellant agreed to laid down the transmission line for 23 kms. and the Appellant had before it three options. The first option was that if GETCO would carry out the work, the cost would be Rs.644.64 lakh, if the Appellant would carry out the work, except the GETCO's end work; the cost would be Rs.168.20 lakh and if the Appellant would carry out the work, the cost would be Rs.97.76 lakh. The appellant exercised the third option in order to

economise the work and it communicated to the GETCO by a letter dated 17.11.2008. In terms of the third option, given by GETCO to the Appellant, the works of laying down the transmission line and sub-station was carried out by the appellant under the supervision of GETCO for which the appellant was to pay the supervision charges of Rs.97,76,000/-. The Appellant requested the GETCO that it should be allowed to make the payment of supervision charges in four or five instalments as making payment at one go would cause hardship upon the Appellant. After receiving the consent of the GETCO, the Appellant submitted its drawings for approval. The appellant also signed an undertaking on 15.11.2008. By a letter dated 8.12.2008 the GETCO after deliberations allowed the appellant to make payments in four instalments. However, the appellant was belatedly informed by a letter dated 2.1.2009 that the appellant had to get purchase of the materials from the registered vendors of GETCO and get the works executed through M/S Cobra Instalaciones Y Services (India) Private Ltd. In terms of the payment schedule provided to the appellant the appellant made payment of Rs 30 lakh on 6.1.2009 and the GETCO approve d the designs submitted by the appellant . On receiving the consent of the GETCO to the designs the appellant commenced the laying the transmission lines. Though the GETCO initially objected to the engagement of M/S Cobra Instalaciones it was subsequently granted

registration as D class contractor by the GETCO on 13.5.2009.After tests the Independent Engineer issued the Completion Certificate in terms of the Concession agreement on 24.2.2010.

3. According to the appellant there has been a steep escalation in the cost of projects from Rs.35 crore to Rs 62 crores. There is added liability of Rs 27 crores since the submission of the DPR. A substantial portion of cost is due to the laying of the transmission line for 23 kms instead of 4 kms. The cost of power that has been agreed to by the parties in the Power Purchase Agreement at Rs. 3.29 per kWh for the year 2007-08 subject to escalation of 3% per annum till the Commercial Operation Date , does not take into account the increase d cost of the projects. There has been an escalation of about 78% in the estimate cost given in the DPR and the total costs as it stood on the date. Due to the increased cost of construction of the projects the appellant was not able to arrange for the funds to pay the supervision charges to GETCO on time. The appellant at various stages was asked to stop work as the supervision charges were not paid on time. The appellant communicated its reasons for not making payments on time. However, upon making the payment of second instalment the work commenced. Thereafter again the appellant was not able to make payments on time it started receiving reminders from the GETCO. The appellant was again facing threats of

stoppage. The correspondences were exchanged between the parties. However, the appellant could be able to make payment of Rs.60 lakh out of Rs. 97,76,000/-. The appellant carried out the work for laying down the transmission facility for evacuating power from the generating station to the Grid at the cost of Rs 10 crores. The land was acquired by the appellant at its own costs for erecting towers and stringing the transmission lines for 23 kms through Dadar and Nagar Haveli to Mota Pondha sub-station in Gujarat. According to the appellant, it incurred total costs of Rs 2700 lakh for SHP-1 and Rs. 3400 lakh for SHP-2. During the construction, there has been an escalation in the estimated cost of the projects and according to the Appellant, the total cost of the projects as on the date of making the Appeal was Rs.62 crore which is much higher than what was estimated in the DPR. The Appellant has received a letter dated 28.4.2010 from GETCO informing it that the GETCO shall charge an interest on the remaining amount of the supervision charges. The Appellant, however, requested for waiver of liquidated charges due to non-existence of transmission facility and further requested the GUVNL that tariff in the provisional Power Purchase Agreement should be revised to Rs.4.70 taking into consideration the increased cost of the projects. The GUVNL, however, rejected the proposal. The suggestion of the GUVNL to adjust the supervision charges in the bills of the GUVNL were turned down by the

Appellant by a letter dated 5.5.2010. The Appellant aggrieved by the action of the GETCO in not allowing the Appellant to connect to its sub-station at Mota Ponda, it filed a petition being No.1025 of 2010 before the Commission and the Commission made an order on 29.6.2010 to the effect that the Appellant should be allowed by the GETCO to connect its transmission line at GETCO sub-station at Mota Ponda and the Appellant shall confirm in writing its agreement for deduction of balance supervision charges from the energy bills for power to be supplied to the GUVNL. The Commission further ordered that so far as the interest on supervision charges and ownership on transmission line are concerned, they would be subject to final decision of the Commission. Meanwhile, being agreed by the GUVNL's refusal to increase the tariff to Rs.4.40 per unit, the Appellant filed a petition before the Commission being No.1024 of 2010 but the Commission had rejected the petition which has been appealed against. So far as the petition No.1025 of 2010 is concerned, the Commission passed the Impugned Order on 7.9.2010 holding that the GETCO is the owner of the 23 km. transmission line and further rejected the claim of the Appellant for the cost of transmission line and held that it was not entitled to recover the cost as the cost of transmission line was part of the tariff decided by the Commission. Hence, the Appeal.

4. The GETCO, the Respondent No.1 herein filed a counter-affidavit containing as follows:-

a) The issue of ownership of the line is misconceived and is contrary to the undertaking dated 15.11.2008 given by the appellant on stamp paper clearly stating that the lines shall be the property of the GETCO. This undertaking was given by the GETCO voluntarily and was never in issue till the filing of the petition before the Commission in the year 2010.

b) All permissions and authorizations for laying down the line including the permission under Section 68 of the Act was obtained by the GETCO and such permission was granted for the line on the basis of the GETCO being the owner of the line. The GETCO has been designated as a Telegraph Authority under Section 164 of the Electricity Act, 2003 for the purpose of exercising power under the Indian Telegraph Act for laying down the lines.

c) Ownership and control of the line by the GETCO shall ensure optimum and economical utilization of the line as compared to ownership by the appellant. In case of ownership by the appellant, the line cannot be used by any other person which is against the objective of the Electricity Act, 2003.

d) The appellant entered into Power Purchase Agreement with the Respondent No.2 for sale of electricity from the project in pursuance of an order dated 14.6.2007 passed by the Commission determining the tariff of Rs.3.29 per unit for the base year. The said order dated 14.6.2007 clearly provided that the project developer was required to create a transmission line from the Generating Station to the sub-station of the GETCO and the cost of transmission line was considered as part of the tariff.

e) The Concession Agreement dated 27.9.2007 between the appellant and the Narmada Water Resources and the Power Purchase Agreement dated 29.1.2008 between the appellant and the Respondent No.2 provided that the appellant was to construct the inter-connection facilities at its own cost.

f) The undertaking dated 15.11.2008 given by the appellant did not provide any refund for the cost incurred by the appellant for construction of the transmission line.

g) The Concession Agreement specifically provided for non-liability for the tender data issued in connection with the project facilities, therefore, reliance by the Appellant on the tender documents and representation thereof with regard to the inter-connection facilities and the nearest sub-station is incorrect.

h) The claim of the Appellant that the transmission line is a dedicated transmission line is totally wrong.

i) It is wrong to suggest that the Appellant is entitled to receive refund of the cost of construction for transmission line. The appellant had agreed that the cost of construction for transmission line was on account of the appellant in the Concession Agreement and the Power Purchase Agreement. It is not open to the appellant to claim a refund simply because the end cost might have been more than estimated.

5. The Respondent No.2 did not file any counter-affidavit although its learned counsel made oral submission in support of the contention of the GETCO. The Commission did not file any counter-affidavit nor did it file any written submission.

6. The points for consideration are as follows:-

(i) Whether the Commission is correct in holding that the transmission line of 23 Kms. build at the cost of Rs.10 crores by the appellant is the property of the Respondent No.2?

(ii) Whether the Commission is correct in holding that the Appellant is not entitled to recover the cost of the transmission line?

7. The two issues are inter-connected with one another and the basic issue is who shall be the owner of the transmission line. The learned Advocate for the appellant submitted that by a departmental procedure, GETCO insisted on taking over the ownership of the line so that it could use the same for supplying power to villages en-route. Although the line was constructed entirely at the cost of small hydro developer which cost is not recovered through tariff, the GETCO has now taken ownership of the line without paying for the same on the basis of an undertaking given by the appellant and this is a clear abuse of the dominant position of the State Transmission Utility. The evacuation system was set up entirely by the appellant at its cost and had to be handed over to the GETCO free of cost in terms of the undertaking. Under the Act, it is the function and duty of the Transmission Licensee to provide well coordinated and economical systems of lines from the Generating Station to Load Despatch Centres. There is no provision in the Act allowing a Transmission Licensee to direct a generator to draw transmission line at its cost and subsequently take over the line without paying. The cost of transmission line drawn for 24 km. has not been allowed as part of the

capital cost of the project. The Commission has admittedly not gone into Capital Cost of the projects. In the year 2005, when the proceedings for determination of transmission tariff were initiated, there were no small hydro projects and the jurisdictional facts required for exercise of tariff determination jurisdiction were non-existent. There was no scope for the Commission to have come to any determination of tariff in terms of the provisions of the Act. The undertaking obtained by GETCO from the appellant is a misuse of monopolistic position held by the GETCO and there is alternative for the Appellant to decline the request. The Learned Advocate for the Appellant has referred to decision in Central Inland Water Transport Corporation Ltd. V.s Brojo Nath Ganguly and Anr (1986) 3SCC 156 in this connection and also LIC of India and Anr Vs. Consumer Education and Research Centre and Ors (1995) 5SCC 482. It is submitted that transmission line is a dedicated transmission line since it was constructed by the appellant.

8. The submission of the learned Advocate for the GETCO and the submission of the learned Advocate for the GUVNL are exactly in the line which we find in the counter-affidavit of the GETCO and it is of no use in reproducing the same all over again. Two issues are different. What should exactly be the tariff payable to the appellant is one issue

which we have addressed to in Appeal No.29 of 2011 that arose out of the Commission's order dated 3.9.2010 passed in Petition No.1024 of 2010 whereby the Commission declined to re-open the Power Purchase Agreement on the ground that it was a concluded contract. The second issue which we are now confronted with is whether the appellant can be legally recognised to be the owner of the transmission line on the ground that it is a dedicated transmission line and that the entire cost of the line was incurred by the appellant and it was denied in the tariff as a component thereof in the Capital Cost for the project. It is not difficult to understand that the appellant is heavily aggrieved by the Commission's refusal to reopen the Power Purchase Agreement because, according to it, after execution of the Power Purchase Agreement and DPR, the appellant was informed by the GETCO that the appellant was required to lay a line of 24 km. instead of 4 km. and that cost of construction escalated. It is not necessary for us to consider the issues in the Appeal No.29 of 2011 and it is only proper that we have observed and held a) the concept of generic tariff not based on the principles laid down in the Act, 2003 but based on some guidelines does not find any place in the Act and the generic tariff order was issued even before the appellant participated in the bid and was declared as a successful bidder and was granted Concession; b) Power Purchase Agreement has to be subordinated to the law; c) tariff to be agreed upon by the parties in the

Power Purchase Agreement has to conform to the provision of section 61 of the Act; d) in terms of the Act, it is a statutory obligation on the part of the Commission to examine the Power Purchase Agreement and ensure that the Power Purchase Agreement has taken into consideration all the components of tariff and it does duly take note of the provisions of section 61 and the National Tariff Policy; e) the MNRE guidelines have no force of law; f) admittedly the component of Capital Cost was not considered; g) the consequence of stretching a line of 23 kms instead of 4 kms. was not reflected in the Power Purchase Agreement nor was it considered by the Commission; h) it has been the consistent position that the non-conventional energy projects have to be encouraged and incentivized; and i) that Power Purchase Agreement can be reopened, re-examined, reviewed to ensure justice. Therefore, these issues are for the purpose of the present Appeal need not be revitalized and these issues cannot be taken as premises in support of the reasoning that the ownership of the transmission line should belong to the appellant. This is a different issue altogether. What is called dedicated transmission line has been defined in Section 2 (16) of Electricity Act, 2003 as under:-

> *"dedicated transmission lines" means any electric supply-line for point to point transmission which are required for the purpose of connecting electric lines or electric plants of a captive generating plant referred to in Section 9 or generating station referred to in section 10 to any transmission lines or sub-stations or generating stations, or the load centre, as the case may be.*

In case the line forms part of the transmission system in the state, it is open to the GETCO to use the said line for transmission of electricity for others thereby, having optimum utilization of the existing resources which is, of course, an objective of the Act, while in case it is considered to be a dedicated transmission line, it is the line owned by the Generation Company dedicated to the Generating Station. The Concession Agreement has no liability for the project site risk clauses which we quote below:-

> "*Save as expressly provided in this Agreement, the Concessionaire shall not seek to recover from Grantor any losses or damages which may arise from the use of application, by or on behalf of Concessionaire, in the design and construction of the Project Facilities, of the data issued to it or its representatives in connection with the Project and/or Project Facilities by or on behalf of Grantor before or during the tender stages for the Project*".

This clause we quote in the context of ownership of the line not in a different context. It is not disputed that all necessary permission was obtained by the GETCO for construction of the line in compliance with Section 68 of the Act and it is very obvious that such permission was not accorded to the Appellant. Creation of overhead transmission lines would require statutory clearance which GETCO obtained from the Government. Though this is not the sole relevant fact, the other relevant fact is Annexure-R-1 which is undertaking dated 15.11.2008

executed by the appellant. This undertaking has 12 clauses with some sub-clauses, clause-4 is as under:-

> "*Notwithstanding that full or portion of the cost has been paid by the applicant for the entire infrastructure up-to isolator at receiving end shall remain the property of the GETCO by whom it is to be maintained and hence the GETCO reserves the right to tap this line for giving power supply to any other consumer."*

It is difficult to accept that the undertaking given by the GETCO is a misuse of monopolistic position as is contended by the appellant. In terms of the undertaking the maintenance of the line rests with the GETCO. Thus, there was clear understanding that the line would belong to the GETCO and the fact of the matter is that the length of the line which definitely was not earlier contemplated or conceived of has compounded the issue. In the undertaking it has not been mentioned that because of the GETCO tapping the line the cost of the line would have to be borne by the GETCO. Of course, the question would not have arisen if the length of the line would have been what it was in the bid document. The decision in Central Inland Water Transport Corporation Ltd. case was in the context of Article 14 of the Constitution. This was a case of pushing a weak to the wall by the strong. The second case referred to by the learned Advocate for the appellant is of course, to some extent, relevant in the sense that it deals with the bargaining power of contracting parties. If this undertaking was totally unlawful then it could have been said that the line in question

must belong to the appellant. In the case of distribution licensee, though the capital assets remain in the ownership of the licensee, the servicing of the Capital Cost is not recognised in the tariff. The analogy that the Power Purchase Agreement has to be subordinated to law cannot be made applicable to the present situation. Power Purchase Agreement was executed by the Appellant with the GUVNL and the cost of transmission line was to be considered as part of the tariff. Of course, the appellant is entitled to the tariff on cost plus basis and the cost of transmission line must get reflected in the tariff which we have discussed in the other Appeal. The GETCO's using the transmission line for supply of electricity to the villages en-route does not affect the appellant. If the servicing of the Capital Cost by way of return on equity and interest on loan would have been made available to the GETCO in its Annual Revenue Requirement then the position might have been questionable. Thus, the consequence of GETCO not incurring the Capital Expenditure of the line is that the servicing of the Capital Cost of the line would not be available to it. In this scenario the question of ownership comes to be relegated to the secondary importance It is not impossible that a Transmission Licensee may not get servicing of the Capital Cost. As per the Concession Agreement, the appellant was to construct the inter-connection facilities at its cost. Since cost incurred for laying down the transmission line from the Generating Station to the sub-station at Mota

Ponda has to be reflected in the tariff payable to the Appellant by the licensee concerned the question of the refund of the cost to the Appellant by the GETCO does not arise. The question may arise when the developer is denied the tariff demanded of the law. In fact, reading between the lines of the memorandum of appeal the principal grouse of the appellant seems to be that he incurred financial loss by not getting appropriate tariff. The GETCO's using the line, though constructed by the appellant, which was in terms of the undertaking does not appear to be unlawful. We make it clear that GETCO's using the transmission line shall be subject to maintenance by the GETCO itself and further that tapping the line by GETCO shall not disturb and interfere with the output of the plant.

9. Subject to the observation as above, the Appeal is dismissed without cost.

(P.S. Datta)
Judicial Member

(Rakesh Nath)
Technical Member

Reportable/Not-reportable

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