

In the Appellate Tribunal for Electricity, New Delhi
(Appellate Jurisdiction)

Appeal No. 206 of 2013

Dated: 3rd January, 2014

Present:- Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Justice Surendra Kumar, Judicial Member

IN THE MATTER OF:

Viyyat Power Private Limited
Viyyat Kausthubham , Kariyavattom P.O.
Trivandrum – 695581.

..... Appellant/Petitioner

Versus

1. Kerala State Electricity Regulatory Commission,
C.V. Raman Pillai Road, Vellayambalam,
Thiruvananthapuram-695010
 2. The Secretary,
Kerala State Electricity Board,
Vydyuthi Bhavanam, Pattom,
Trivandrum-695004
 3. Principal Secretary, Power Department,
Government of Kerela, Secretariat
Trivandrum-695001.
 4. The Director, Energy Management Centre,
Sreekrishna Nagar, Sreekariyam,
Trivandrum-695017
- Respondents

APPEAL UNDER SECTION 111 OF THE ELECTRICITY ACT, 2003

Counsel for the Appellant : Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Counsel for the Respondent(s) : Mr. M.T. George &
Ms. Kavitha for R-2

J U D G M E N T

JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

1. The instant appeal under Section 111 of the Electricity Act, 2003 has been filed by the appellant/petitioner against the impugned order dated 10th June, 2013 passed by the Kerala State Electricity Regulatory Commission (in short, 'Kerala Commission') in Diary No. 345 dated 14.02.2013 whereby the learned Kerala Commission (respondent no.1) dismissed the petition for re-determination of tariff of (1 x 1.5) MW Iruttukkanam Stage-II Small Hydel Project of the petitioner treating the same as Review Petition at the admission stage itself, citing and discussing the provisions of Section 114 and Order 47 Rule 1 of the Code of Civil Procedure observing therein that the appellant/petitioner is not entitled to higher tariff as per order no. 442/CT/2012/KSERC dated 01.01.2013 of Kerala State Electricity Regulatory Commission (in short, order dated 01.01.2013) for the additional unit of (1 x 1.5) MW Iruttukkanam Stage-II Small Hydel Power Project merely because the commissioning / synchronizing and achievement of commercial operation date of the said project was 10th April, 2012, though the scheduled date of commissioning of the project was on 7th November, 2014, and the petitioner completed and commissioned the project more than two and a half years ahead of the date of commercial operation agreed in the implementation agreement due to efficient performance of the appellant/petitioner and this was not treated as a sufficient ground/reason occurring in Order 47 Rule 1 of the CPC and further this could be the ground for extending the benefit of the higher tariff of SHPs as per order of the Commission dated 01.01.2013, which shall be applicable for the projects commissioned/synchronized on or after 01.01.2013 only and in force for the financial year 2013-14.

2. The learned Kerala Commission vide impugned order dated 10.06.2013 dismissed the aforesaid petition of the appellant/petitioner at the admission stage and found no sufficient ground to admit the petition with the following observations:

“Since KSERC (Power Procurement from Renewable Sources by Distribution Licensee) Regulations, 2013 was issued on 01.01.2013 on a subsequent date and was not available at the time when the impugned order was passed, it cannot be treated as a reason for review. Review of an order of the Commission based upon a subsequent regulation issued by the Commission will not be in order.

The existing tariff was decided based on a petition by the petitioner and the review petition on the order was also disposed of by the Commission. The practice of petitioning again and again before the Commission on a settled matter cannot be allowed.”

3. The main grievance of the learned counsel for the petitioner/appellant is that the learned Kerala Commission has wrongly treated the petition filed as seeking review of the order dated 30.09.2011 earlier passed and has dismissed the petition on the ground of maintainability.

4. According to the appellant/petitioner the said petition was filed before the learned Kerala Commission, for seeking a re-determination of the tariff applicable to the generating station of the appellant/petitioner keeping in view the said facts and circumstances of the case and not seeking the review of the earlier order dated 30.09.2011 passed by the Kerala Commission, has erroneously treated the petition as a review of the previous order dated 30.09.2011 and has dismissed the petition on the ground that there was no error apparent on the face of the record.

5. The brief facts giving rise to this appeal are as under:

(i) That the appellant is a Company incorporated under the provisions of the Companies Act, 1956 having its registered office at SP1/710, Viyyat Kausthubham, Kariyavattom P.O., Trivandrum, Kerala - 695581. The appellant is a generating company under the meaning of Section 2(28) of the Electricity Act, 2003 having established a 4.5 MW mini hydro generating station at Iruttukanam in the State of Kerala.

(ii) That the appellant was allotted the small hydro electric project by the Government of Kerala on 9.7.2004 pursuant to the policy for development of renewable energy projects in the State. The project was initially allotted as a 3 MW (2 x 1.5) MW. In total 13 projects were allotted by the Government of Kerala to different persons under the policy then existing for development of hydro generating stations, out of which the Appellant is the only person who has successfully completed and commissioned the generating station.

(iii) That pursuant to the allotment of the project, the appellant entered into an Implementation Agreement dated 10.12.2004 with the Government of Kerala for implementation of the said project.

(iv) That the appellant completed and commissioned the first unit of the generating station on 18.9.2010 and the second unit on 19.09.2010. The commercial operation date for the generating station (2 x 1.5MW) was achieved on 4.11.2010 as was confirmed by the Respondent No. 2, Kerala State Electricity Board. The above was well within the time prescribed for completion/ commissioning of the generating station under the implementation agreement entered into with the Government of Kerala.

(v) That the electricity from the above generating station of 3 MW is being supplied by the Appellant to the Respondent No. 2 at the tariff as determined by the State Commission.

(vi) That based on the technical feasibility, the Appellant was in a position to establish another 1.5 MW generating unit at the generating station at Iruttukanam in the State of Kerala. In view of the above, the Appellant by communication dated 29.11.2010 approached the Government of Kerala seeking sanction to establish the additional capacity of 1.5 MW (Stage II), for which there would be a separate tariff to be determined by the State Commission.

(vii) That the Government of Kerala, on 12.01.2011 granted approval for the preparation of the Techno Economic Feasibility Report for establishing the additional unit of 1.5 MW by the Appellant.

(viii) That pursuant to the above, the appellant undertook the techno-economic feasibility report for the additional 1.5 MW generating unit and submitted the same to the Government of Kerala on 31.01.2011. Based on the above, the Government of Kerala on 25.5.2011 granted approval for establishing the additional 1.5 MW generating station by the appellant as proposed.

(ix) That the appellant also on 21.06.2011 filed a petition before the Kerala Commission for determination of the tariff for the 1.5 MW generating unit to be established by the Appellant at Iruttukanam in the state of Kerala.

(x) That for this additional 1.5 MW generating unit, the Appellant also entered into a supplemental Implementation Agreement with the Government of Kerala on 22.09.2011.

(xi) That the State Commission determined the tariff of the 1.5 MW generating unit by order dated 30.09.2011. The appellant filed a review petition.

(xii) Then the appellant filed a petition seeking review of the order dated 30.09.2011 before the Kerala Commission which was dismissed by the learned Kerala Commission vide order dated 27.02.2012 on the ground that there was no errors apparent on the face of the record, as also the Review Petition did not satisfy the conditions of review provided under Section 114 and Order 47 Rule 1 of the Civil Procedure Code. It is evident from the order dated 27.02.2012 of the learned Kerala Commission that the request of the petitioner was that 'the year' shall be 'financial year' can be incorporated in the PPA at the time of approval by the Commission. The request was not considered as a mistake or error apparent in qualifying the petition as a Review Petition by the learned Kerala Commission.

(xiii) That in terms of the implementation agreement and in particular Article 5.4 a (iii), the appellant was entitled to the period of 36 months from the date of financial closure for achieving the commercial operation of the additional 1.5 MW generating unit. However, on account of the prudent utility practices, concerted action and execution based on the experience gained, the appellant was able to complete the additional generating unit of 1.5 MW in the record time and the same was completed by 23.03.2012. The generating unit was synchronized to the grid on 4.4.2012, which was more than 2 years prior to the date for completion of the generating unit. Based on the application made by the appellant on 12.04.2012, the certificate for provisional commercial operation for the said unit was issued by the respondent no. 2 (Secretary) on 1.8.2012. The certificate for commercial operation of the said unit having been achieved was issued by the respondent no.2 on 30.10.2012 which recognized the commercial operation date as on 10.04.2012.

(xiv) That the State Commission issued a notification on 01.01.2013, inter alia, determining the generic tariff for small hydel plants which were commissioned on or after 1.1.2013.

(xv) That the appellant/petitioner filed a petition for re-determination of tariff of (1 X 1.5 MW) Iruttukanam Stage II small hydel power project, the tariff of which had already been determined by the Kerala Commission vide order dated 30.09.2011, the re-determination was requested by the appellant/petitioner before the learned Kerala Commission in the light of the Commission's order No. 442/CT/2012/KSERC dated 01.01.2013 notifying the tariff of SHPs and wind power generators commissioned on or after 01.01.2013 on the ground that the petitioner had successfully executed and commissioned Iruttukanam Stage II phase project, whose contractual date of commissioning and COD was 07.11.2014 which got commissioned earlier than 01.01.2013 only because of performance par excellence of the appellant/petitioner.

6. It is pertinent to note here that as directed by the Government of Kerala, the supplementary implementation agreement was signed on 22.09.2011 between the Government and the petitioner, according to which, the words and expressions used in the supplementary agreement shall have the same meaning as those assigned to them in Clause 1.1 of the implementation agreement (main agreement dated 10.12.2004) between these parties to the extent they are relevant to this agreement and shall mutatis mutandis be applicable to the supplemental agreement.

7. The appellant Company was required to adhere to the prudent utility practices and achieved COD within 36 months from the date of financial close. The financial close for Stage –II project was achieved on 08.11.2011 with the State

Bank of India. Thus, the commissioning date for the project (Stage-II) as per the Implementation Agreement was 36 months from the date of financial close, namely, 36 months from 08.11.2011, namely, 07.11.2014. The Stage II Project (1 x 1.5) MW was synchronized with the grid on 04.04.2012 and commercial operation date declared w.e.f. 10.04.2012 . In the meantime tariff petition was filed on 21.06.2011 and tariff order was issued by the learned Kerala Commission vide order dated 30.09.2011.

8. It is also necessary to mention here that the Review Petition seeking review of the tariff order dated 30.09.2011 was filed by the petitioner/appellant on 23.11.2011 before the learned Kerala Commission which was dismissed by the Commission vide order dated 27.02.2012. Draft power purchase agreement was approved by the Commission vide order dated 12.07.2012, however, the PPA has not been signed till the passing of the impugned order dated 10.06.2013.

9. The appellant petitioner/power generator filed a petition (impugned) for re-determination of tariff of (1 x 1.5) MW Iruttukanam Stage –II Small Hydro Power Project of the petitioner in the light of the learned Kerala Commission's order dated 01.01.2013 averring that the petitioner's stage –II project (1 x 1.5) MW was synchronized with the grid on 04.04.2012 and commercial operation date was declared w.e.f. 10.04.2012. The petitioner commissioned the project much earlier than the scheduled commercial operation date and since the order no. 442/CT/2012/KSERC dated 01.01.2013 was issued, the levelized tariff applicable to small hydro project less than 5 MW is Rs. 4.88 per unit, the same tariff shall be applicable for the projects commissioned /synchronized on or after 01.01.2013 only. Provided also that this tariff shall be in force for the financial year 2013-14, hence the petitioner be allowed tariff as per the rate sanctioned by order dated 01.01.2013. The petitioner was given project commissioning time upto

07.11.2014 which is after Kerala Commission's order dated 01.01.2013, the petitioner by making excellent efforts got the project commissioned earlier viz on 10.04.2012, much earlier than the contractual commissioning date i.e. on 07.11.2014 and the petitioner should be appreciated and encouraged by giving awards, rewards and recognition for earlier commissioning of the project before the contractual commissioning date. If the petitioner is deprived of the benefits of higher tariff, it would be a miscarriage of justice and punishment for the excellent job done by the petitioner and also would be against the natural justice. It would be travesty of justice if the petitioner had delayed the execution of the project to the contractual commissioning date just to get higher generation tariff. Thus, the petitioner sought re-determination of tariff for its stage –II Small Hydro Power Project seeking extension of benefit of the higher tariff as was made permissible by the Kerala Commission's aforesaid order dated 01.01.2013, which was not considered a sufficient ground in view of Section 114 and provisions of Order 47 Rule 1 of the Civil Procedure Code by the impugned order.

10. While arguing the petition (impugned) seeking re-determination of tariff for the Stage –II Small Hydro Power Project on behalf of the petitioner it was stated that if the petitioner had delayed the execution of the project in question to the contractual commissioning date, he would have been benefitted by getting a higher tariff in view of the Kerala Commissions order dated 01.01.2013. After considering the contention raised on behalf of the petitioner, the learned Kerala Commission found the same as not a sufficient ground for granting the relief sought by the appellant/petitioner since the KSERC (Power Procurement from Renewable Sources by Distribution Licensees) Regulations, 2013 was issued on 01.01.2013 on a subsequent date, when the said Power Project of the petitioner had already been commissioned/completed in April, 2012 and the order dated 01.01.2013 of the Kerala Commission was not available at the relevant time. This

was not found a sufficient ground for re-determination of tariff vide impugned order. The impugned order was passed by the learned Kerala Commission on merits though inadvertently exercising the power of review. The impugned order was passed by the learned Kerala Commission on consideration of full facts and the grounds taken in the petition (impugned) seeking re-determination of tariff. While passing the impugned order, learned Kerala Commission expressed the view that review of an order dated 30.09.2011, earlier passed by the Kerala Commission based upon a subsequent Regulation will not be in order. The impugned order was also passed considering the fact that existing tariff was decided based on a petition filed by the petitioner and Review Petition of the order 30.09.2011 was also earlier disposed of by the Commission. It was clearly mentioned in the impugned order while deciding not to admit the petition that the practice of petitioning again and again before the Commission on a settled matter cannot be allowed.

11. A careful and deep scrutiny of the impugned order dated 11.06.2013 passed by the learned Kerala Commission makes it quite evident that the same was passed after consideration of the sole ground taken in the petition (impugned) seeking re-determination of tariff for the said project of the appellant/petitioner. The learned Kerala Commission unnecessarily emphasized upon the provisions of review provided under the Code of Civil Procedure while passing the impugned order though the intention and spirit of the learned Kerala Commission was, as is clear from the impugned order, to consider the ground taken in the said petition praying for re-visit or re-determination of the tariff and the impugned order was passed after due consideration of the ground taken by the petitioner before the learned Kerala Commission. The impugned order cannot be said to be faulty/defective just on the ground of mentioning the provisions of review provided under the Code of Civil Procedure. As stated in the judgment, the

only aforesaid one ground was taken in the petition while seeking re-determination of the tariff and the same was discussed by the learned Kerala Commission at length and then the impugned order was passed on merits. The learned Kerala Commission after considering the points, the grounds raised in the said petition and hearing the petitioner decided it proper not to admit the petition which was within the power of the State Commission and the same cannot be challenged just on the ground that the said petition had not been admitted and decided on merits. The impugned order has been passed on the merits of the case and sufficient ground was not found to admit the petition.

12. The next contention of the learned counsel for the appellant is that the appellant/petitioner is entitled only to approach the State Commission seeking revision/re-determination of tariff and the same is maintainable before the State Commission. This proposition of law has been settled by the Hon'ble Supreme Court in the case of *Uttar Pradesh Power Corporation Ltd. Vs. National Thermal Power Corporation Ltd., (2009) 6 SCC 235* in which the Hon'ble Supreme Court has observed that the revision of the tariff must be distinguished from review of a tariff order and the Central Commission has a plenary power and its inherent jurisdiction is saved. Having regard to the diverse nature of the jurisdiction, it may for one purpose entertain an application so as to correct its own mistake but in relation to another function its jurisdiction may be limited. The Central Commission is empowered to make additions or alterations in the tariff as making of tariff is a continuous process. It can be amended or altered by the Central Commission, if any occasion arises therefor. It is established law that every State Electricity Regulatory Commission or Central Electricity Regulatory Commission has power to review its own order as also to re-determine or re-visit the tariff if the same is deemed necessary. The learned Kerala Commission exercising the

said power passed the impugned order which has been assailed before us in this appeal.

13. After going through the matter in question carefully, we hold that the appellant/petitioner was entitled in law to approach the State Commission seeking the revision/re-determination of tariff and the same remedy has been availed by the appellant/petitioner by filing the aforesaid petition and the learned Kerala Commission after hearing the parties and going through the material on record passed the impugned order recording sufficient and cogent reasons in favour of the impugned order. No benefit of the said ground, in view of the learned Kerala Commission while passing the impugned order that the petitioner's said project was commissioned or completed earlier and Kerala Commission's order dated 01.01.2013 was issued subsequently on 01.01.2013 and the benefit of the order dated 01.01.2013 cannot be given to the petitioner and the same was not found sufficient reason for re-determination of tariff. Merely by mentioning the word 'review' in the impugned order, the impugned order cannot be said to be contrary to law or contrary to the law laid down by the Hon'ble Supreme Court in *Uttar Pradesh Power Corporation Ltd. Vs. NTPC* case. No ground which was required for re-determination or re-visit of the tariff has been mentioned in the petition seeking re-determination of the tariff, like the petitioner had to spend more sum than the agreed sum and no specific ground claiming any return on equity etc. has been taken in the said petition. The tariff cannot legally be re-determined just on the ground that new Regulation has subsequently been incorporated and enforced by the learned Kerala Commission on 01.01.2013 for projects which are commissioned on or after 01.01.2013.

14. The ground of the appellant/petitioner that he completed and synchronized

small hydro power project of Stage-II in April, 2012, 2 ½ years before the commissioning date as per the implementation agreement with the State Government cannot be said to be the sufficient ground for re-determination of the tariff. We have considered the ground that if the appellant /petitioner had commissioned the project in the year 2013 which the appellant was entitled to do till 7th November, 2014, the appellant/petitioner would automatically have been entitled to higher norms, parameters and higher tariffs as has been made applicable by the learned Kerala Commission vide order dated 01.01.2013, is also not a sufficient and cogent ground entitling the appellant/petitioner to seek re-determination of tariff. Thus, the aforesaid grounds can be said to be lucrative grounds but have no substance in legal parlance.

15. The last contention of the learned counsel for the appellant that the Appellate Court is empowered under Order 47 Rule 23 of the Code of Civil Procedure to remand the case is also not acceptable to us as this is not a fit case for remand. The impugned order contains sufficient grounds and hence it does not require any interference by this Tribunal.

16. Section 99 of Part VII of the Code of Civil Procedure, 1908 dealing with appeals provides as follows:-

“No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction- No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder or non-joinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court.”

Thus, if the provisions relating to review have been discussed in detail by the learned Kerala Commission in the impugned order that is not by itself a

sufficient ground to reverse the impugned order particularly when the impugned order contains the relevant facts, the point in dispute and the reasons of the Commission on that disputed point of re-determination of tariff, claiming benefit on the basis of incorporation or introduction of a subsequent tariff order dated 01.01.2013 issued by the learned Kerala Commission. Even if the said error has crept, that cannot be said to be a sufficient ground to set aside the impugned order and to direct the learned Kerala Commission to admit the said petition seeking re-determination of tariff and after hearing both the parties decide the same on merits. The impugned order appears to have been passed on merits which contains complete narration of the fact and discussion on the point of re-determination of tariff.

17. Our findings are as under:-

If any power generator or power developer commissions the small hydro power project of less than 5MW capacity before the commissioning date as agreed in the implementation agreement, the tariff determined for that project shall not be open to be re-visited or re-determined on the application of subsequent or new regulation which is to be applied subsequently. In the instant case, the commissioning date of the small hydro project of the petitioner as per the implementation agreement was 07.11.2014 but the petitioner succeeded to complete the project and synchronized the project for power generation in April, 2012. The State Commission vide order no. 442/CT/2012/KSERC issued on 01.01.2013 provided for enhanced tariffs for the projects which will come into operation on or after 1st January, 2013. No benefit of the extension of the new or subsequent regulation issued on 1.1.2013 was given to the appellant/petitioner considering the effect of the new or subsequent regulation vide order 01.01.2013.

18. If any power generator or power developer of small hydro power project completes the project before the commissioning date as agreed in the implementation agreement with the State Government and the tariff therefore is determined for long term supply by the State Commission as per the settled formula, the same power generator or power developer shall not be entitled to the benefit of any subsequent regulation or order issued by that State Commission in order to get higher tariff just on the ground that the power developer has commissioned the project before the scheduled commissioning date because the new regulation or subsequent regulation, as in the present case was issued by the learned Kerala Commission vide no. 442/CT/2012/KSERC on 01.01.2013, has been made applicable only to the small hydro project of less than 5 MW capacity which are commissioned or synchronized on or after 01.01.2013 and the said new tariff shall be available in force for the financial year mentioned in the new Regulation. No power generator or power developer shall be entitled to the benefit of new regulation or subsequent order which is to be enforced from the subsequent date on the ground that the said project has been commissioned ahead the scheduled commissioning date. It is not the case of the appellant that the cost of the project was high or the return on investment was inadequate or the project was commercially unviable due to change in circumstances. On the other hand, the appellant sought a higher tariff based on a subsequent regulation which was effective for a subsequent date only on the ground that the project was commissioned before the scheduled date and if the project was commissioned as per the schedule agreed in the implementation agreement, they would be entitled to tariff as per the subsequent regulations. This is not a valid reason for redetermination of tariff. In other words, the appellant wants retrospective application of the regulation notified on 01.01.2013 which is not permissible.

19. In the light of above discussions, in our view, there is no illegality or infirmity in the impugned order dated 10.06.2013, passed by learned Kerala

Commission , hence the present appeal is dismissed being devoid of merits. No order as to costs.

Pronounced in open Court on this day of 3rd day of January, 2014.

(Justice Surendra Kumar)
Judicial Member

(Rakesh Nath)
Technical Member

Reportable/Non-reportable

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