

**Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal No.236 of 2012

Dated: 29th October, 2013

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member**

In the matter of:

**Raj West Power Limited ... Appellant (s)
308-311 Geetanjali Towers
Ajmer Road, Jaipur-302 006**

Versus

- 1. Rajasthan Electricity Regulatory Commission ...Respondent(s)
Vidyut Viniyamak Bhawan
New State Motor Garage
Sahakar Marg, Jaipur – 302 005**
- 2. Jaipur Vidyut Vitran Nigam Limited
Vidyut Bhawan, Janpath, Jaipur – 302 005**
- 3. Ajmer Vidyut Vitran Nigam Limited
Old Power House, Hathi Bhata
Ajmer – 305 001**
- 4. Jodhpur Vidyut Vitran Nigam Limited
New Power House, Industrial Estate
Jodhpur – 342 003**

**Counsel for the Appellant(s) : Mr. M.G. Ramachandran
Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Ms. Swagatika Sahoo**

**Counsel for the Respondent(s) : Mr. R.K. Mehta
Mr. R. R. Pathak
Mr. P.N. Bhandari
Mr. Antaryami Upadhyay
Mr. David**

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

M/s. Raj West Power Limited, a generating company, has filed the present Appeal against the impugned order dated 17.10.2012 passed by the Rajasthan Electricity Regulatory Commission deciding the cap on the first year tariff of the Appellant's power plant after interpreting the provisions of Power Purchase Agreement entered into between the Appellant and the Distribution Licensees.

2. The matter in issue relates to interpretation of the provision of Power Purchase Agreement ("PPA")

entered into between the Appellant and the Distribution Licensees in the State of Rajasthan for deciding the first year tariff applicable to the power plant of the Appellant.

3. The brief facts of the case are as under:-

a) M/s. Raj West Power Ltd., hereinafter referred to as Raj West, is a generating company which has set up 8 units of 135 MW each with aggregate capacity of 1080 MW in District Barmer, Rajasthan. Four units have achieved commercial operation on lignite during the FY 2011-12 and the remaining four units during the FY 2012-13.

b) The State Commission is the first Respondent. The Distribution Licensees are the Respondent nos. 2 to 4.

c) The generating station of Raj West is based on a scheme promoted by the State Government for development of lignite mining-cum-thermal power project. The lignite mines at Kapurdi and Jalipa have been identified for development and supply of lignite for power generation at the generating station. M/s. Barmer Lignite Mining Company Ltd. has been incorporated as a Joint Venture Company of Raj West and M/s. Rajasthan State Mines and Minerals Ltd., a State owned mining company, for mining of lignite from the designated lignite mines.

d) On 29.5.2006 an Implementation Agreement was executed between the State Government and the Appellant setting out the terms and conditions for development of lignite mining-cum-thermal power project.

e) On 19.10.2006, the State commission passed an order granting in principle approval for the project.

f) On 26.10.2006, the PPA was signed between Raj West and the Distribution Licensees (R-2 to R-4) for generation and sale of electricity from the power project.

g) There was a delay in development of Kapurdi and Jalipa mines by Barmer Lignite Mining Company on account of delay on part of the State Government in making available the mines to the Mining Company. As a result, even though Unit no. I of the power project was ready for generation, the same could not be run due to non-availability of lignite. However, with the consent of the parties the power plant was operated on alternate fuel viz. imported coal, till the lignite was made available from the designated mines.

- h) On 13.11.2009, the State Commission passed an order determining the provisional tariff for the first two units of the power project to be operated on imported coal as an interim measure.
- i) The first four units achieved commercial operation on lignite during the FY 2011-12 and the remaining four units during the FY 2012-13.
- j) On 30.9.2011, the State Commission passed an order determining the provisional tariff of units 1 and 2 of the power project for generation of electricity with lignite as fuel. Thereafter, on 21.10.2011, the State Commission determined the provisional tariff for units 3 and 4 on lignite.
- k) On 2.4.2012, the State Commission determined the provisional tariff for unit nos. 1 to 4 for the FY 2012-13 on lignite. On 15.10.2012, the State

Commission determined the provisional tariff of unit nos. 1 to 4 for the period 2012-13 and provisional tariff of unit nos. 5 to 8 on lignite.

- l) On 17.10.2012, the State Commission passed the impugned order in which it decided that the cap of Rs. 2.43 per unit would apply in respect of the first year tariff of the entire project according to the terms of the PPA.
 - m) Aggrieved by the findings of the State Commission in the impugned order dated 17.10.2012, the Appellant has filed this Appeal.
4. Raj West has made following submissions:
- a) Rs. 2.43 per unit cannot be the ceiling tariff for the first year in absolute terms. Proviso to Clause 7.1 of the PPA states “provided that tariff for first year shall be

less than first year tariff (Rs. 2.43 per unit) of Giral Project (1 x 125 MW) being developed by Rajasthan Rajya Vidyut Utpadan Nigam Ltd.” There is some purpose and meaning to refer to Giral Project. The reference to the first year tariff of Giral Project cannot be ignored as done by the State Commission.

b) The reference to Giral 1x125 MW, a similar lignite project developed by the State utility besides mentioning Rs. 2.43 per unit in brackets clearly establish that the parties had intended to cap the first year tariff with reference to the tariff that is to be determined for Giral project.

c) Rs. 2.43 per unit in brackets in clause 7.1 of the PPA refers to the base year price as per the Detailed Project Report ('DPR') of Giral Project of the year 2004 and cannot be taken as final tariff to be applicable to

Raj West when the units of 8x135 MW power plant are commissioned. The base year price at the time of finalization of the DPR will not be the final tariff at the time of commercial operation. The base year price is subject to such increases and escalation allowed after prudence check by the State Commission.

d) The tariff of Giral Project had not been determined when the PPA was entered into between the parties as Giral Project was not then completed. The final tariff of Giral after commissioning could not be estimated to be Rs. 2.44 per unit and, therefore, Rs. 2.43 per unit could not be ceiling tariff for Raj West.

e) If the tariff in absolute terms had to be fixed at Rs. 2.43 per unit, then there was no need to make a reference to Giral Project in proviso to clause 7.1 of the PPA.

f) The reason for specifying Rs. 2.43 per unit in brackets as compared to the DPR tariff of Rs. 2.44 per unit for Giral Project was to emphasize that the tariff of Raj West would be one paisa less than whatever would be the first year tariff of Giral Project.

g) If the 2004 price level of Giral was subjected to escalation, increase in various costs including changes in taxes and duties, the completed capital cost etc., the tariff of Giral Project would be higher and, therefore, there was no rationale to limit the tariff of Raj West to Rs. 2.43 per unit.

h) The State Commission's finding on Rs. 2.43 per unit being the ceiling tariff is contradictory to determination of provisional tariff by the State Commission by orders dated 30.9.2011, 21.10.2011

and 15.10.2012 wherein tariff higher than Rs. 2.43 had been fixed for Raj West.

- i) The tariff of units achieving commercial operation after the first year should not be subject to ceiling. The first year applicable to PPA in the present case is the FY 2011-12. Accordingly, units 1 to 4 which came into operation in the first year would be subjected to the ceiling at the final tariff of Giral Project as determined by the State Commission.
5. We have heard Shri M.G. Ramachandran, Learned Counsel for the Appellant who argued elaborately on the above points. Shri M.G. Ramachandran in support of his arguments cited the following rulings:

“i) (2007) 10 SCC 231 in the matter of P.S. Ramakrishna Reddy v. M.K. Bhagyalakshmi.

- ii) *(1976) 4 SCC 147 in the matter of Union of India v. D.N. Revri and Co.*
- iii) *(2011) 1 SCC 529 in the matter of GovindImpex Pvt. Ltd. v. Appropriate Authority, Income Tax Department.*
- iv) *(2008) 4 SCC 451 B.K. Muniraju v. State of Karnataka*

He also referred to “Chitty on Contract” (Paragraphs 808 and 809).

6. The State Commission and the Distribution Licensees have filed replies in support of the findings in the impugned order. We have also heard Shri R.K. Mehta and Shri P.N. Bhandari, Learned Counsel for the State Commission and the Distribution Licensees (Respondent no.2 to 4) respectively. We shall be dealing with their submissions at the relevant paragraphs in this judgment.

7. In view of the rival contentions of the parties, the following questions would arise for our consideration:

i) Whether the State Commission was correct in deciding that the first year tariff of the power project of Raj West should be capped at Rs. 2.43 per unit in accordance with Schedule 7 of the PPA, independent of the first year tariff determined by the State Commission for Giral Power Project of the State owned generating company?

ii) Whether the cap on tariff as agreed to in the PPA should be for the units that are declared commercial operation on lignite in the first year of operation or the cap would be applicable on tariff determined by the State Commission for the first year of operation of each of the eight generating units?

8. Let us take up the first issue regarding the capping of first year tariff at Rs. 2.43 per unit for the project of Raj West independent of the actual tariff of Giral Project.

9. According to the Raj West, the State Commission has wrongly interpreted the provisions of PPA to cap the first year tariff at Rs. 2.43 per unit in absolute term without linking the tariff to the actual first year tariff of Giral Project as finally determined by the State Commission.

10. Shri R.K. Mehta Learned Counsel for the State Commission has submitted as under:
 - a) The figure of Rs. 2.43 per unit has emerged from the letter dated 16.11.2004 from the Appellant to then Energy Minister, Government of Rajasthan wherein supply of power from the Appellant's project at a tariff

more competitive than the first year tariff of Giral Project was offered. In the year 2004, the tariff determined by the State Commission was not available. However, the DPR of Giral Project was available. Obviously the entire negotiations and the final agreement were based on the estimated first year tariff of Rs. 2.44 per unit as per the DPR of Giral Project. The rate of Rs. 2.43 per unit also finds place in the State Government's decision dated 24.1.2006 communicated vide letter dated 28.1.2006.

b) The State Commission had determined the first year tariff of Giral Project at Rs. 2.06 per unit for FY 2006-07 vide order dated 17.7.2006. However, Giral Project encountered technical problems and could not achieve COD much later i.e. on 18.10.2011. Thus, tariff of Rs. 2.06 per unit as determined by the State Commission was available when the PPA was signed on 26.10.2006. Despite this, parties agreed to the

figure of Rs. 2.43 per unit as given in brackets in proviso to clause 7.1 of the PPA instead of it being more than Rs. 2.06 per unit.

c) If the parties intended that the first year tariff should be less than first year tariff of Giral as determined by the State Commission, the same would have been so mentioned. Any other interpretation would make words “(Rs. 2.43 per unit)” redundant.

d) The order dated 15.10.2012 was passed by the State Commission pursuant to the remand order of the Tribunal in respect of the tariff petition filed by the Appellant under Section 62 of the Electricity Act, 2003. On the other hand the impugned order dated 17.10.2012 is in respect of separate petition filed by the Appellant under Section 86(1)(f) of the Act.

11. The submissions made by Shri P.N. Bhandari, Learned Counsel for the Respondent nos. 2 to 4 are summarized as under:-

a) The rate of Rs. 2.43 in the brackets in the PPA has to be seen in the historical prospective based on the first offer given by Raj West by letter dated 16.11.2004.

b) Every word and expression in the PPA is important whether within brackets or outside brackets.

c) There is no link between the future tariff determination of Giral and the tariff indicated in brackets in PPA.

d) The ceiling of tariff is only for the first year and thereafter the annual tariff has to be determined by the

State Commission. The Appellant had voluntarily given this offer.

e) Rs. 2.43 per unit could not be an indicative tariff and was the absolute tariff to be made applicable to cap the first year tariff of the Appellant.

12. Let us first examine the PPA dated 26.10.2006.
13. In the PPA, the project was envisaged in two phases of 500 MW each, Phase 1 having 4 units of 125 MW each and Phase 2 having 4 units of 125 MW each, with generation starting from the first unit within 36 months from the date of signing of the PPA.
14. Clauses (K) and (L) of the PPA are reproduced below:-

“(K) The Seller has approached the RERC for in-principle determination of Project cost, fuel cost and tariff under Section 62 of the Electricity Act, 2003. The

RERC by its Order dated 19.10.2006 in Petition No. RERC/110/06 (“RERC Order”) has determined the “in principle” cost of generation of power from the Project, capital cost for the Project and transfer price of lignite.

(L) The tariff for the first year shall be less than the first year tariff (Rs.2.43/unit) of the Giral Project (1 x 125 MW being developed by Rajasthan Rajya Vidyut Utpadan Nigam Limited).”

15. The Clause 7.1 of Schedule 7 regarding ‘Tariff’ is reproduced below:-

“Schedule 7 : TARIFF

7.1 The tariff shall be the tariff determined by RERC under Section 62 of the Electricity Act, 2003 based on the RERC Regulations and based on the capital cost, transfer price of lignite and cost of generation of power from the Project, as determined by the RERC Order and subsequent orders of the RERC. Provided that Tariff for the first year shall be less than the first year Tariff (Rs. 2.43/unit) of the Giral Project (1 x 125 MW being developed by Rajasthan Rajya Vidyut Utpadan Nigam Limited).”

16. Thus, according to the PPA, the tariff has to be determined by the State Commission under Section 62 of the 2003 Act, as per its Regulations, capital cost and

transfer price of lignite. However, tariff for the first year shall be less than the first year tariff (Rs. 2.43/unit) of Giral Project having one unit of 125 MW capacity being developed by the State owned generating company.

17. Article 11.1 of the PPA regarding Billing and Payment is as under:-

“From the CoD of the first Unit, Procurer shall pay the Seller the Monthly Tariff Payment, on or before the Due date, as per Tariff determined/adopted by RERC in accordance with the Article 11 and Schedule 7. All Tariff Payments by Procurers shall be in Indian Rupees.”

18. The main dispute over the interpretation of the PPA is this. “Whether the figure of Rs. 2.43/unit in brackets in the proviso to clause 7.1 of Schedule 7 has to be taken as the ceiling for the first year tariff of Raj West’s power project in absolute term or the first year tariff has to be capped at less than the actual first year tariff of Giral Project as determined by the State Commission and the

figure within brackets is only an indicative figure, derived from the first year tariff of Giral Project as estimated in the Detailed Project Report (“DPR”) of Giral Project of October, 2004 by reducing the estimated first year tariff of Giral by one paisa?”

19. In order to find out as to how the figure of Rs.2.43/unit has been referred to in the PPA, we shall examine the letter of Raj West dated 16.11.2004. The relevant portion of the letter is reproduced below:

“We undertake to commission the first phase of the project within 36 months from the date of allocation/transfer of the requisite land to us and to supply the power therefrom to Rajasthan at a tariff more competitive than the first year tariff of Rs. 2.43 fixed for the Giral Project. The phases of the project will be decided at a later stage, depending upon the stages of the productivity expected from the mines.”

20. Raj West stated in the above letter that they would commission the first phase of the project within 36 months from date of allocation/transfer of requisite land

to them and supply electricity to Rajasthan at a tariff more competitive than the first year tariff of Rs. 2.43 fixed for the Giral Project.

21. Thus, Raj West in November, 2004, before the allotment of the project to them by the State Government had indicated to the State Government that the tariff of their project would be more competitive than the first year tariff of Rs. 2.43 fixed for the Giral Project, which was being developed by the State owned generating company.

22. The State Government by letter dated 28.1.2006 to the power utilities of Rajasthan directed for executing the PPA with the Appellant with certain conditions as under:-

“After the above Consent the Company shall get prepared and present before the State Electricity Regulatory commission complete project reports and

mining plan for determination of “in principle” Project Cost and Power Tariff. The Regulatory Commission will determine “in principle” Project Cost, Fuel Cost and Power Tariff based on which Messrs West Power promoted consortium’s generation company will execute Power Purchase Agreement with the State’s Power Distribution Companies. The Agreement will contain a provision that Power Distribution Companies’ will fix Final Rates for purchase of power as per Central Government’s Tariff Policy through competitive bidding process and the tariff fixed for the projects for the first year will be less than first year tariff of GIRAL PROJECT (Rs. 2.43 per unit).”

23. The above letter dated 28.1.2006 of the State Government gives a direction that the PPA between the distribution licensees and Raj West would have a provision that the tariff fixed for the project for the first year will be less than first year tariff of Giral Project (Rs.2.43 per unit).

24. Admittedly, the number Rs.2.43 per unit had been based on the estimated first year tariff of Rs. 2.44 per unit as per the DPR of Giral Project (1 x 125 MW) of

October, 2004 and is one paisa less than the first year tariff of Giral Project (1 x 125 MW) as estimated in the DPR.

25. We find that the DPR of Giral Project (1 x 125 MW) indicates first year tariff of Rs.2.44 per unit with some assumptions of capital cost, cost of lignite, etc., as estimated at the time of preparing the DPR i.e. October, 2004. Thus, the figure of Rs. 2.43/unit in brackets mentioned in the proviso of clause 7.1 is one paisa less than the first year tariff of Giral Project as estimated in the DPR of Giral Project prepared in October 2004.

26. We feel that the tariff as given in the DPR is only estimated tariff as per the prevalent costs, assumption of operational and financial parameters and the time schedule as envisaged at the time of preparing the DPR. However, the actual capital cost of the project

would vary, sometimes substantially, depending on the actual costs due to cost escalation and other factors and time taken in completion of the project. The tariff as given in the DPR is only an estimated or indicative tariff at the time of preparation of the DPR to justify commercial viability of the project and could not be taken as the tariff at which the generating station has to sell electricity after completion of the project. The tariff of the State owned generating company for supply of power to the distribution licensees as per Sections 62 and 86(1)(a) of the Electricity Act, 2003 has to be determined by the State Commission according to its Tariff Regulations.

27. In the present case, Giral Project of the State owned generating company was delayed from 2006-07 to 2011-12 and at the same time the power project of Raj West has achieved operation on the designated fuel in

FY 2011-12, much later than that envisaged at the time of signing of the PPA due to delay in handing over the lignite mines by the State Government. Thus, the tariff of Rs. 2.44 per unit envisaged in the DPR for Giral Project would not be relevant in FY 2011-12 when Giral Project has achieved commercial operation. The State Commission is mandated to determine the tariff of Giral Project under Sections 62 and 86(1)(a) of the Electricity Act taking into account the actual capital cost incurred and transfer price of lignite, subject to prudence check, and the operational and financial norms as specified in its Tariff Regulations.

28. Clearly, there is a contradiction in the proviso to clause 7.1 of the PPA between the figure of 2.43 per unit given in the brackets and the first year tariff of Giral Project. Thus, we have to interpret the clauses of the PPA in the light of the circumstances of the case as well as the

background in which the PPA was finalised and the intent of the parties at the time of offer, acceptance of offer and entering into the PPA.

29. The comprehensive reading of clauses of the PPA in the background of the Appellant's offer dated 16.11.2004, the letter dated 28.1.2006 from the Government of Rajasthan and DPR of Giral Project of October, 2004 the following conclusions are drawn.

i) Raj West by its offer dated 16.11.2004 assured the State Government that the tariff of their project would be more competitive than the tariff of Giral Project which was being set up by the State owned generating company. Since Giral Project was being developed around the same time in the same district by the State owned generating company, the first year tariff of Giral was proposed as a benchmark for the project of Raj West. This letter indicates that Raj West

wanted to assure the State Government that they would supply power from the first phase of the project at a tariff more competitive than the first year tariff of the neighbouring State owned Giral Project which as per the DPR of the Project of October 2004 was indicated as Rs. 2.44 per kWh. If the intention of the Appellant in letter dated 16.11.2004 was to offer an absolute figure of Rs. 2.43 per kWh as first year tariff, they would not have stated that their tariff would be more competitive than the first year tariff of Rs. 2.43 fixed for Giral Project. Instead they would have indicated that their first year tariff would not be more than Rs. 2.43 per kWh which was less than the estimated tariff for Giral Project.

ii) The State Government by letter dated 28.1.2006 directed the State utilities that after the in-principle tariff of Raj West's project is determined by the State

Commission, Raj West and Distribution Licensees would execute PPA which would have a provision that the tariff fixed for the project of Raj West for the first year would be less than first year tariff of Giral project (Rs. 2.43 per unit). The figure in brackets in our opinion was the indicative tariff with respect to the estimated tariff of Giral as envisaged in the DPR of Giral Project of October 2004. If the intention of State Government was to restrict or cap the first year tariff of Raj West's project to the absolute figure of Rs. 2.43 per unit, there was no need to mention that "the Tariff Fixed for the projects for the first year will be less than first year tariff of Giral Project". The State Government would have indicated that the first year tariff of Raj West's project would not be more than Rs. 2.43 per unit, if their intention was to cap the first year tariff to an absolute figure of Rs. 2.43 per unit.

iii) The main clause 7.1 of the PPA stipulates that the tariff of the Raj West's project would be determined by the State Commission under Section 62 of the 2003 Act based on: (a) Regulations (b) capital cost (c) transfer price of lignite and (d) Cost of generation of power from the project, as determined by the State Commission's order and subsequent orders. The proviso to clause 7.1 stipulates that tariff for the first year of Raj West's project shall be less than the first year tariff (Rs. 2.43 per unit) of the Giral Project. Rs. 2.43 per unit has been put within brackets in the proviso in accordance with the directions of the State Government in letter dated 28.1.2006. The proviso clearly stated that the first year tariff of the project would be less than the first year tariff of Giral Project of 1 x 125 MW capacity. However, the figure within the brackets have been given as per the directions of the State Government vide letter dated 28.1.2006 to State Distribution

Companies based on the offer of the Appellant which was in turn based on the estimated first year tariff of Giral Project as per the DPR of October, 2004 which is only an indicative figure. If the intent of the proviso was to restrict or cap the first year tariff of Raj West's project to an absolute figure of Rs. 2.43/unit, then there was no need to mention the words "less than the first year Tariff of the Giral Project (1 x 125 MW being developed by Rajasthan Rajya Vidyut Utpadan Nigam Limited)" in the proviso. If there was an understanding between the Raj West and the Respondent Distribution Licensees at the time of executing the PPA regarding the absolute figure at which the first year tariff of the Project would be capped then the Proviso to clause 7.1 of the PPA should have been formulated as "provided the tariff for the first year shall not be more than Rs. 2.43 per unit."

iv) In clause 11.1 of the PPA regarding billing and payment, it has been indicated that the Distribution Licensees would pay the monthly bills as per Tariff determined/adopted by the State Commission in accordance with Article 11 and Schedule 7. According to the Learned Counsel for the Distribution Licensees, word 'adopted' has been used for first year tariff so that there is no need for the determination of first year tariff and the Commission could adopt the tariff of Rs. 2.43 per unit bilaterally agreed between the parties. This argument has no force. The Electricity Act, 2003 refers to adoption of tariff by the Appropriate Commission only in Section 63 where the tariff is determined through transparent process of bidding in accordance with the guidelines issued by the Central Commission. In the present case, the tariff has to be determined by the State Commission under Section 62 of the Electricity Act, 2003. The adoption of tariff by the State

- Commission has been used in Clause 11.1 of the PPA in the context of the ceiling on the first year tariff of the Power Plant of Raj West in terms proviso to clause 7.1. Clause 11.1 does not in any way indicate that the first year tariff of the project would be capped at Rs. 2.43 per unit.
30. The tariff of Giral Project has to be determined by the State Commission as per the 2003 Act and the tariff as indicated in the DPR could not be legal tariff for Giral Project. Thus, the first year tariff of the Appellant's project can only be capped with respect to the first tariff of Giral project (1 x 125 MW) as determined by the State Commission according to Section 62 of the Electricity Act, 2003.
31. According to Shri R.K. Mehta, Learned Counsel for the State Commission a tariff of Rs. 2.06/unit was determined by the State Commission for 2006-07 by its

order dated 17.7.2006 as earlier the unit at Giral was expected to be commissioned on 1.12.2006. However, this did not become effective tariff as Giral Unit I could not be commissioned by 1st December 2006 as the unit encountered technical problems and could achieve COD much later i.e. on 18.10.2011. Despite the tariff determined by the State Commission being available when PPA was signed, the parties agreed on the figure of Rs. 2.43/unit in the brackets in proviso of Schedule 7.1 of PPA instead of the bracketed figure being less than Rs. 2.06/unit. Therefore, according to Shri R.K. Mehta, the cap on first year tariff as agreed by the parties was with reference to DPR tariff of Rs. 2.44/unit. If Rs. 2.43/unit in the bracketed portion of the proviso is ignored, the remaining formulation would mean that the first year tariff shall be less than the first year tariff of Giral Project. This would make the said formulation vague and would be subject to many interpretations.

- Tariff to be lower from that of Giral Project by how much? Would it be less by one paisa, two paise, twenty paise or more?
32. Thus, according to the Learned Counsel for the State Commission, the provision becomes vague in the absence of bracketed portion and the figure in brackets on the other hand removes the ambiguity by clarifying that the said lower value would be Rs. 2.43/unit and this would not be in conflict with the main clause.
33. We are unable to agree with the above contention of Shri R.K. Mehta, Learned Counsel for the State Commission. If the ceiling tariff of first year for Raj West's project was intended to be Rs. 2.43/unit i.e. one paise less than the estimated tariff of Giral Project as per the DPR of October, 2004, there was no need to mention the words "less than the first year Tariff of the

Giral Project (1 x 125 MW being developed by Rajasthan Rajya Vidyut Utpadan Nigam Ltd)” in proviso to clause 7.1 of the PPA. If the intent was to cap the tariff of the project to an absolute value of Rs. 2.43/unit, the provision would have simply read as “provided that the tariff for first year shall be not more than Rs. 2.43/unit.” Further Rs. 2.06 per unit determined by the State Commission on 17.7.2006 before the COD of the Project was not the final tariff for Giral.

34. We feel that Rs. 2.43/unit in brackets has to be seen in the light of the background and the circumstances of the case. When the Appellant gave its offer on 16.11.2004, the first year tariff had not been determined by the State Commission and the same was subsequently determined on 17.7.2006. At that time only the estimated tariff as given in the DPR of October, 2004 was available. Therefore, the Appellant in its offer

indicated that its tariff will be more competitive than the first year tariff of Giral and offered supply of power at one paisa less than the estimated tariff of Giral as per its DPR October, 2004. State Government in its letter dated 28.1.2006 had also directed the Distribution Licensees to keep the provision in PPA that “the tariff fixed for the project for the first year will be less than first year tariff of Giral Project (Rs. 2.43 per unit)” which was based on the offer of the Appellant dated 16.11.2004. The same provision as per the direction of State Government was kept in the PPA with bracketed figure of Rs. 2.43 per unit.

35. Clause 7.1 does not provide that the tariff of Raj West’s project has to be less than estimated tariff of Giral Project as per the DPR. According to the Electricity Act, 2003 the tariff of Giral Project has to be determined only by the State Commission. The estimated tariff as

per the DPR could not be the tariff at which Giral Project would sell electricity to the Distribution Licensees. Thus, the legal interpretation of proviso to Clause 7.1 would be that the first year tariff of the project shall be less than the first year tariff of Giral Project as determined by the State Commission. The figure in brackets is to be seen in the background of the case when the offer was made by the Appellant to the State Government and the acceptance of the State Government subject to the condition of capping of the first year tariff. At the time of offer by the Appellant dated 16.11.2004 and its acceptance by the State Government communicated on 28.1.2006, only the estimated first year tariff for Giral Project was the DPR tariff of Rs. 2.44/unit. The offer and the acceptance of the offer was one paisa less than the estimated tariff as available at that time. Thus, the proviso to clause 7.1

has to be interpreted in the background and circumstances of the case.

36. If the final first year tariff of Giral Project as determined by the State Commission had been less than Rs. 2.44 per unit would the first year tariff of Raj West's power station be still be capped at Rs. 2.43 per unit?

The answer is emphatic 'No'. The first year tariff of Raj West's power plant would then be capped at one paisa less than the actual tariff of Giral, as determined by the State Commission.

37. In B K Muniraju v. State of Karnataka reported as (2008) 4 SCC 451, it has been held that:

"18. The document in question which is filed as Annexure P-3, has been styled or tiled as "certificate of grant". In order to know the real nature of the document, one has to look into the recitals of the document and not the title of the document. The intention is to be gathered from the recitals in the deed, the conduct of the parties and the evidence on record. It is settled law that the question of construction of a

document is to be decided by finding out the intention of the executants, firstly, from a comprehensive reading of the terms of the document itself, and then, by looking into – to the extent permissible- the prevailing circumstances, which persuaded the author of the document to execute it. With a view to ascertain the nature of a transaction, the document has to be read as a whole. A sentence or term used may not be determinative of the real nature of transaction. Reference in this regard can be made to the following cases i.e., Vidhyadhar v. Manikrao, Subbegowda v. Thimmegowda and Bishwanath Prasad Singh v. Rajendra Prasad”

38. In Union of India vs. D.N. Revri and Co. reported as (1976) 4 SCC 147, the Hon'ble Supreme Court has held as under:

“7. It must be remembered that a contract is a commercial document between the parties and it must be interpreted in such a manner as to give efficacy to the contract rather than to invalidate it. It would not be right while interpreting a contract, entered into between two lay parties, to apply strict rules of construction which are ordinarily applicable to a conveyance and other formal documents. The meaning of such a contract must be gathered by adopting a common sense approach and it must not be allowed to be thwarted by a narrow, pendantic and legalistic interpretation.....”

39. According to Chitty on Contract:

“808 Object of construction. The object of all construction of the terms of a written agreement is to discover therefrom the intention of the parties to the agreement. The rules which govern the construction of contracts are the same at law and in equity, for simple contracts and for specialties.

809 Intention of parties. The cardinal presumption is that the parties have intended what they have in fact said, so that their words must be construed as they stand. That is to say, the meaning of the document or of a particular part of it is to be sought in the document itself. “One must consider the meaning of the words used, not what one may guess to be the intention of the parties.” However, no contract is made in a vacuum. In construing the document, the court may resolve an ambiguity by looking at its commercial purpose and the factual background against which it was made.

Further, the law does not approach the task of construction with too nice a concentration on individual words. “The common and universal principle ought to be applied: namely, that [an agreement] ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties, to be collected from the whole of the agreement, and the greater regard is to be had to the clear intention of the parties than to any particular words which they may have used in the expression of their intent. As Lord Cottenham L.C. said in Lloyd v. Lloyd: “If the provisions are clearly expressed, and

there is nothing to enable the court to put upon them a construction different from that which the words import, no doubt the words must prevail; but if the provisions and expressions be contradictory and if there be grounds, appearing on the face of the instrument, affording proof of the real intention of the parties, then that intention will prevail against the obvious and ordinary meaning of the words. If the parties have themselves furnished a key to the meaning of the words used, it is not material by what expression they convey their intention.” But a party must not only make out a possible intention favourable to his view, but must also show a reasonable certainty that the intention was such as he suggest.”

40. Thus, if the construction of the agreement is such that the provisions are clearly expressed and there is nothing to enable the court to interpret differently from that the words import, the words of the agreement would prevail. However, if the provisions and expressions are contradictory or if there is an ambiguity in the provisions of the contract, the court will in order to resolve the ambiguity look into the background against which the contract was made to find the intention of the parties.

41. In the present case there is an ambiguity in the provision of the PPA regarding cap on the first year tariff of Raj West's power plant. Therefore, we have gone into the background of the case and the circumstances under which the offer was made by the Appellant, acceptance given by the State Government subject to certain provisions to be kept in the PPA and execution of the PPA.

42. The intention of the Appellant at the time of giving the offer in November, 2004 was that its tariff would be more competitive the first year tariff of Giral Project. The indicative tariff in the offer was one paisa less than the estimated tariff of Giral as per the DPR of October, 2004. The State Government while conveying acceptance of the offer of the Appellant in its letter to the distribution licensees dated 28.1.2006 also directed

them to have a clause in PPA that the tariff fixed for the project for the first year will be less than the first year tariff of Giral Project (Rs. 2.43 per unit). The figure of Rs. 2.43/unit was kept within the brackets and the figure was in line with the offer given by the Appellant. The same was sincerely incorporated by the Distribution Licensees in the PPA entered into with the Appellant. Thus, the background of the figure of Rs. 2.43 per unit used in the PPA was the offer of the Appellant dated 16.11.2004 and its acceptance by the State Government which was based on one paisa less than the estimated first year tariff of Giral Project as per its DPR of October, 2004.

43. In the above background, clause 7.1 of the PPA has been interpreted by us.

44. According to the main clause 7.1, the tariff of the project shall be determined by the State Commission under Section 62 of the 2003 Act, based on the Tariff Regulations etc. According to the proviso of main clause 7.1, the first year tariff shall be less than the first year tariff of Giral Project. Legally the first year tariff of Giral has to be determined by the State Commission. If the first year tariff of Raj West's project as determined by the State Commission is less than the first year tariff of Giral as determined by the State Commission, the proviso regarding capping of tariff will not be applicable. However, if the first year tariff of Raj West's project as determined by the State Commission is equal to or more than the first year tariff of Giral as determined by the State Commission, then the first year tariff of Raj West's project would be capped at one paisa less than the first year tariff of Giral, as was the intention of the parties at the time of signing of the PPA. In our

view, the State Commission in the impugned order has only given effect to the bracketed portion of the proviso to clause 7.1 without taking into consideration the specific provision regarding the first year tariff of Giral Project thus diluting the clear provision of the Agreement.

45. The tariff of Raj West's power plant has to be determined by the State Commission under Section 62 of the 2003 Act guided by the principles laid down in Section 61 of the Act. The State Commission has to determine the capital cost of the project after prudence check. The transfer price of lignite and the financial and operational parameters have to be decided as per the State Commission's Regulations. Thus, the tariff of Raj West's power plant as also the final tariff of Giral Project have to be determined by following the commercial principles to allow a tariff which is fair to the

power plants as also the consumers. The figure of Rs. 2.43 per unit on the other hand is only an indicative figure derived from the DPR of Giral Project of October, 2004 which has no legal sanctity as it is based on the assumptions made by the State owned generating company at the time of preparing the DPR of the Project. It is also not the first year tariff of Giral Project at which it would supply electricity to the Distribution Licensees. Thus, figure of Rs. 2.43 per kWh given in brackets in the PPA could not be imposed as cap on the first year tariff of the Raj West's power plant.

46. Accordingly, the first issue is decided in favour of the Appellant.

47. Let us now consider the second issue whether the cap on tariff has to be on the units that are declared commercial operation in the first year of the project or

- the cap would be applicable in the first year of operation of each of the generating units (8 nos.).
48. According to Raj West, the first year referred to in the clause 7.1 of the PPA is the first year of the Project as per the terms of the PPA i.e. FY 2011-12.
49. According to Shri R.K. Mehta, Learned Counsel for the State Commission in Schedule 7 of the PPA provides that the cap on tariff will apply to the first year tariff of the entire project and not restricted only to the units coming into operation in the first year.
50. He has further submitted that the issue of ceiling tariff had first arisen when the Appellant had filed a petition in the year 2009 for determination of provisional tariff for unit no. 1 & 2 on alternate fuel (imported coal). The State Commission by its order dated 13.11.2009 had

observed that a decision on first year tariff would need to be taken after COD based on lignite fuel is achieved. The Appellant filed a petition for determination of tariff of units 1 and 2 envisaged to become operational on lignite in FY 2011-12. The Commission in its order dated 17.8.2011 decided that the ceiling on first year tariff would come into reckoning as and when the tariff was determined. However, the dispute had arisen whether the ceiling tariff was Rs. 2.43/unit or the first year tariff of Giral Project as determined by the State Commission. The Commission directed that a petition under Section 86(1)(f) would have to be filed for adjudication of dispute. The State Commission subsequently while determining the adhoc tariff for units to be operated on lignite had in its order dated 30.9.2011 mentioned that the ceiling on first year tariff would come into reckoning.

51. Let us examine the finding of the State Commission on this issue in the impugned order. The relevant paragraph 60 of the impugned order is reproduced below:

“60. The said submission indicates that the cap on first year tariff is to be applied on the units which come into commercial operation during the first year and units coming later would not be subject to ceiling on first year tariff. The agreement nowhere says so. The cap on first year tariff, as agreed by the parties, is in respect of first year tariff of the entire project covered in PPA as distinct from units coming into commercial operation in first year. The Commission has already clarified while finalizing scrutiny of PPA vide its order dated 8.6.2012 that agreement between the parties as regards first year tariff is for the entire project and is not limited to units, which get commissioned in a particular year.”

52. According to the State Commission, the agreement did not provide that the cap on first year tariff was to be applied on the units which come into operation during the first year and units coming later would not be subject to ceiling on first year tariff. The cap on first year tariff would be in respect of first year tariff of the

entire project covered in PPA as distinct from units coming into commercial operation in first year.

53. We find that the PPA envisaged development of the project in two phases. Phase 1 comprised 4 units to be commissioned within 48 months for the effective date and phase 2 comprising another 4 units to be set up in 54 months from the effective date.

54. The commercial operation date and contract year is defined as under in the PPA.

“(i) Commercial Operate Date or COD – means (i) the date on which the Unit is declared to be under Commercial operation by the Seller as per Article 6.3; or (ii) the date falling after one hundred eighty (180) days from the Commissioning Date of the Unit, whichever is earlier, commercial Operate Date in relation to the Power Plant means the Commercial Operation Date of the Last Unit.

(ii) Contract Year – means the period commencing from the commercial Operation Date and ending with the last day of the financial year immediately thereafter

and every period of one year subsequently, during the Term of this Agreement. The last Contract Year of this Agreement shall end on the last day of the term of this Agreement.”

55. Thus, according to the PPA, the first contract year commences from the COD of first unit and ends with the last day of the financial year immediately thereafter.
56. We find that according to proviso to clause 7.1 of the PPA, the tariff for first year shall be less than the first year tariff of Giral Project. The proviso does not say that the tariff of the power plant for the contract year in which the COD of the power plant is achieved would be less than the first year tariff of Giral Project.
57. We feel that the terms used in the Schedule 7 of the PPA has to be interpreted as per the terms and conditions of the PPA. The contract year defined in the PPA is commencing from the COD and ending with the last day of the financial year immediately thereafter.

Accordingly, the first contract year will commence from the COD of the first unit and end with the last day of financial year immediately thereafter.

58. Since the tariff for the first year of Appellant's Power Plant has to be capped to the first year tariff of Giral Project which was operated on only Lignite, the capping on the total tariff i.e. fixed and variable cost of Raj West's Project has to be applied after the operation of the plant on lignite.

59. We find that the first unit of Appellant's plant achieved commercial operation on lignite during FY 2011-12. The remaining three units of Phase 1 have also achieved commercial operation on lignite during the FY 2011-12. Therefore, the tariff of the power plant for the FY 2011-12 has to be reckoned as the first year tariff and the cap on tariff will be applicable for the tariff for

the FY 2011-12 for the period when the units started operating on lignite. However, in order to maintain equity and ensure that the cap is applied for the entire contract year, for the remaining period of FY 2011-12 when lignite was not available, the fixed cost per unit of the Raj West's Project would be capped at the fixed cost per unit of Giral Project for the first year as determined by the State Commission.

60. Summary of our findings:

i) There is an ambiguity in the provisions of the PPA entered into between the parties with regard to capping of the first year tariff of the Appellant's power station. Therefore, we have gone into the background and circumstances of the case to find the intention of the parties when the offer was made by the Appellant, the offer was accepted and the PPA was signed and the prevailing law to interpret

the PPA. On the comprehensive reading of the PPA in the background of Appellant's offer dated 16.11.2004, letter dated 28.1.2006 by the State Government communicating the acceptance of offer and DPR of Giral Project of October 2004, we have concluded that the tariff of Raj West's project will be determined by the State Commission under Section 62 of the Electricity Act, 2003 based on the Tariff Regulations and based on the capital cost and transfer price of lignite provided that the tariff for the first year shall be less than the final first year tariff of Giral Project (1 x 125 MW developed by Rajasthan Rajya Vidyut Utpadan Nigam Ltd.) as determined by the State Commission. In case the first year tariff of Appellant's power station as determined by the State Commission is less than the final first year tariff of Giral, the provision regarding capping of the tariff will not apply.

However, in case the first year tariff of the Appellant's power plant as determined by the State Commission is more or equal to the first year tariff of Giral, then it will be capped at one paisa less than the first year tariff of Giral.

ii) The first year tariff of the Appellant's power plant on which the provision for capping will apply will be the tariff for the FY 2011-12. For the period when the units were operated on lignite the cap will be imposed on the total tariff i.e. fixed and variable cost. For the remaining period of FY 2011-12 when lignite was not available, the cap will be only on the fixed cost per unit of the Raj West's Project with respect to the fixed cost per unit of Giral Project for the first year as determined by the State Commission.

61. In view of our above findings, the Appeal is allowed. The impugned order is set aside. No order as to costs.

62. Pronounced in the open court on this 29th day of October, 2013.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

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