

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No. 208 of 2017

Dated : 03.09.2024

Present: Hon'ble Mr. Sandesh Kumar Sharma, Technical Member
Hon'ble Mr. Virender Bhat, Judicial Member

In the matter of:

- 1. VIRENDER RAWAL**
VPO Kabri, Panipat,
Haryana – 132103
- 2. KARAN SINGH**
VPO Pasina Kalan,
Teh. Bhopali,
Panipat, Haryana – 132108
- 3. ANITA SINGH**
VPO Didwara, Teh. Safidon,
Distt. Jind, Haryana – 126112
- 4. GEETA RANI**
H. No. 1245, Sector-31,
Gurgaon, Haryana – 122001
- 5. DEEPAK GOYAL**
1/7468, Gali No. 15,
East Gorakh Park,
Shahdara, Delhi – 110032
- 6. JILE SINGH**
H. No. 153, Hewo Apartment,
Sector – 15, Gurgaon,
Haryana – 122001

... Appellants

Versus

- 1. HARYANA ELECTRICITY REGULATORY COMMISSION**
Through Secretary
Bays No. 33-26, Sector-4
Panchkula - 134109

2. HARYANA POWER PURCHASE CENTRE

Through Chief Engineer

Shakti Bhawan, Sector – 6,
Panchkula - 134108

... Respondents

Counsel on record for the Appellant(s) : Neha Garg for App. 1 to 6

Counsel on record for the Respondent(s) : Justine George for Res. 1

Aditya Singh for Res. 2

J U D G M E N T

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. The appellants are aggrieved by the order dated 19.09.2016 / 04.10.2016 passed by the 1st respondent Haryana Electricity Regulatory Commission (hereinafter referred to as “the Commission”) in petition No. HERC/PRO-9 of 2016 wherein the Chairman of the Commission has, in exercise of casting vote, held that the competitive bidding process initiated by the 2nd respondent Haryana Power Purchase Centre (in short “HPPC”) for procurement of 150MW of solar power on long term basis in the year 2015, is not in line with the competitive bidding guidelines for renewable energy generators under Section 63 of the Electricity Act, 2003 and also that the deviations were not approved by the Commission, and therefore, declined to approve the Power Purchase Agreements (PPAs) of the appellants.

2. The appellants are the individuals who had participated in the bidding process for sale of solar power in pursuance to the Notice Inviting Tender (in short “NIT”) dated 26.05.2016 issued by 2nd respondent for procurement of 150MW of solar power.

3. The 1st respondent is the Electricity Regulatory Commission constituted and functioning as the regulator of tariff for the State of Haryana and exercising powers as well as discharging functions under the relevant provisions of Electricity Act, 2003. The 2nd respondent HPPC is the power procurement agency established for the purpose of procuring electricity from various sources for the purpose of onward supply to the distribution licensees and ultimately to the consumers at large in the State of Haryana.

4. The facts and circumstances, in brief, giving rise to the present appeal are noted hereinbelow: -

5. The 2nd respondent issued a NIT on 26.05.2015 for procurement of 150Mw of solar power on long-term basis from grid connected solar PV power projects through a tariff based competitive bidding process. The bidders were required to submit their bids by 28.09.2015. As per clause 2.11.1 of the NIT, each bidder was required to submit the bid along with a bid bond for an amount of Rs.10 lakh/MW of the offered capacity. The bid bond was required to be kept alive for a period of six months from the techno-commercial bid opening date.

6. Along with other solar power developers, the appellants also submitted their bids on 28.09.2015 along with valid bid bonds in-terms of the said NIT.

7. After deliberations with various project developers during the pre-bid conferences held on 10.06.2015 and 25.06.2015, the NIT dated 26.05.2015 was revised in August, 2015. In the revised NIT, the revisions were for increasing the participation in the bidding process and for the benefit of consumers at large.

8. After finalising the revised NIT incorporating the deviations, the 2nd respondent intimated the Commission about the same and forwarded the documents to the Commission vide letter dated 18.09.2015 which, *inter alia*, reads as under: -

“It is intimated that this office has issued NIT No.54/CE/HPPC/LTP DATED 26.5.2015 for purchase of 150 MW of Solar Power to meet Solar RPO through competitive bidding whose revised version was uploaded on 28.8.2015 on www.uhbn.gov.in. A copy of the same is enclosed herewith for your reference please.

It is further informed that the NIT document has been got approved from Steering Committee of Power Planning (SCPP) held on 24.8.2015.

The Last date of submission & opening of tenders is 28.9.2015.

The same is for your kind information please.”

9. Thereafter, the appellants were declared as successful bidders for supply of 11MW of solar power at fixed tariff of Rs.5.00/kWh. Subsequently, the 2nd respondent issued Letters of Intent (LoI) dated 08.01.2016 to each of the appellants for supply of the said quantum of solar power at the said tariff for a period of 25 years. The relevant extract of the LoI dated 08.01.2016 reads as under: -

“In this regard, HPPC is pleased to issue Letter of Intent to purchase 2 MW of solar power @ Rs.5.00 /Kwh (fixed

tariff) for a period of 25 years. You are therefore, requested to append remarks “Accepted Unconditionally” on copy of LOI in terms of Clause no.3.1.4(VI) of NIT and provide Contract Performance Guarantee @ Rs.30 lac / MW in terms of Clause no.2.13 of NIT within 30 days of this letter. You are further requested to incorporate Project Company if required within above referred period time in terms of clause no.2.9 of NIT.”

10. In pursuance to the Lol, the appellants furnished their unconditional acceptance as well as the Performance Bank Guarantees within the stipulated period. The 2nd respondent informed them that issuance of Lol is subject to adoption of tariff and approval of draft PPA by the Commission, and therefore, asked them to keep on extending the Bank Guarantees from time to time.

11. As required under the Lols, the appellants incorporated the Project Companies and also procured land on lease for setting up of the solar power projects. They entered into Memorandums of Understanding (MoUs) for acquiring the land from land owners.

12. The 2nd respondent had been enquiring from the appellants about the progress of their respective projects vide letters dated 06.10.2015 and 21.10.2016. The letters were duly replied by the appellants stating, *inter alia*, as under: -

“We are eligible developer, as our tariff is already below CERC tariff defined for the year 2016-17. Therefore, we are agreeing for the PPA and also find herewith an update about the project status as on the LOI issued to us.

1. We have finalized land for the project and a substantial amount has been invested.

2. Project financing has been agreed with the banker as well as with the private funding agencies. Consultant has been appointed & an advance has been given to him.

3. We have finalized the technology part for this project.

4. We have finalized DPR for the project.

5. We have already finalized EPC Company for installation & commission of the project.

6. We are willing to set up the plant after the PPA.”

13. Thereafter, the 2nd respondent filed the petition bearing No. HERC/PRO-9 of 2016 before the Commission for approval of PPAs executed by it with the appellants for procurement of 165MW (150MW± 10%) of solar power in pursuance to the competitive bidding process. The said petition has been disposed off by the Commission vide impugned orders dated 19.09.2016 / 04.10.2016.

14. It appears that the Chairman of the Commission penned his order on the petition on 19.09.2016 thereby rejecting the petition on the ground that the process under which the bidders have been selected fails the test of transparency as per the standard bidding guidelines issued by the Government of India which are to be followed by the

Commission under Section 63 of the Electricity Act, 2003. The relevant portion of the order passed by the Chairman of the Commission is reproduced hereinbelow: -

“In the present case, the NIT in question incorporated quite a few clauses which impinged upon the very objectives of inviting competitive bidding for procurement of Solar Power on a long term basis. Further, the statutory requirement of recommendations of the ‘Evaluation Committee’ on the reasonableness of the tariff so discovered was never fulfilled. The significance of the recommendations of the evaluation committee ought not to be diluted. As given the limited number of private players in the market, the tariff discovered through competitive bidding may not always be aligned to the market. Thus, the Commission, in the present case, did not have the benefit of the report of the evaluation committee. Moreover, the tariff discovered for Solar Power by competitive bidding undertaken in other States, were significantly below the tariff of Rs. 5 per unit discovered in the present case.

In view of the above, the Commission rejects the petition filed by HPPC for adoption of Tariff under section 63 of the Electricity Act, 2003 and for approval of PPA. The Commission holds that the process under which the bidders have been selected by the Petitioner fails the test of transparent process undertaken as per standard bidding guidelines of the Government of India following which the

Commission is to adopt the discovered tariff under section 63 of the Electricity Act, 2003.”

15. However, the lone Member of the Commission did not agree to the order passed by the Chairman and accordingly wrote his own separate dissenting order dated 04.10.2016 thereby allowing the petition and approving the draft PPAs submitted along with the petition. The learned Member of the Commission observed that since no guidelines have been notified by the Central Government / Ministry of New and Renewable Energy, the validity of tendering process cannot be questioned on the basis of deviation from non-existing guidelines as well as standard bid document. The relevant portion of the order passed by the learned Member is quoted hereinbelow: -

“Admittedly, there are no guidelines notified by the Central Government / MNRE. Hence, the validity of the tendering process cannot be questioned on the basis of deviations from a non-existing guidelines and SBD and Commission’s approval thereto. Hence, in my considered view absence of ‘Guidelines’ as provided in Section 63 of the Act shall negate any proceedings under the said section of the Act. Therefore, even if this Commission is required to proceed u/s 63 of the Act the same, in the absence of ‘Guidelines’ shall be ultra-virus. This is probably the reason that a few other States either invited reverse bids considering the tariff determined by the SERC u/s 62 of the Act or opted for Feed in Tariff (FIT). Similarly, the Petitioner also followed reverse bidding process as per the directions of the Commission in its Order dated 7.05.2015.

In view of the above discussions considering the present petition under Section 63 of the Act, which was also not prayed for, and then rejecting the same because the conditions stipulated therein has not been fulfilled, woefully fall short of merit. Hence, the issue-1 framed by me is answered in negative i.e. the present petition for approval of the PPSs cannot be tested on the anvil of Section 63 of the Electricity Act, 2003.”

16. The learned Member also held that the tariff @ Rs.5.00/kWh is competitive and aligned to the market rate prevailing at the relevant point of time.

17. In view of the dissenting opinion / order given by the learned Member, the learned Chairman of the Commission exercised his second / casting vote vested in him under Section 92(3) of the Electricity Act, 2003 and held that his order shall be the order of the Commission.

18. Hence, the appellants have approached this Tribunal by way of the instant appeal.

19. We have heard the learned counsel for the appellants, learned counsel for the 2nd respondent and have perused the impugned order. We have also gone through the written submission filed on behalf of the appellant and 2nd respondent.

20. Learned counsel for the appellants submitted that this case is covered by the previous judgment of this Tribunal dated 09.03.2018 passed in appeal No.278 of 2016 titled JBM Solar Power Pvt. Ltd. v. Haryana Electricity Regulatory Commission and Anr in which similar

issue was involved and was dealt with and adjudicated upon by this Tribunal. According to the learned counsel, the only difference between the appeals is that the appeal No.278 of 2016 related to procurement of solar power in the year 2014, whereas this appeal relates to procurement of solar power in the subsequent year i.e. 2015. The learned counsel took us through the relevant portion of the said previous judgment dated 09.03.2018 of this Tribunal and urged that this appeal may also be decided accordingly in terms of the principles laid down in that judgment.

21. Learned counsel for the 2nd respondent vociferously defended the impugned order of the Commission stating that it does not call for any interference from this Tribunal. He would submit that the judgment of this Tribunal in appeal No.278 of 2016 is not applicable to the facts of the present case for the reason that the said judgment was rendered in respect of the solar power generators who had already achieved financial closure and attained reasonable level of progress whereas no such progress has been achieved by the appellants in the instant appeal.

22. In view of the above noted rival submissions made by the learned counsels, we have minutely gone through the judgment of this Tribunal in appeal No.278 of 2016. We find that the said judgment has been rendered by this Tribunal in absolutely identical facts and circumstances as appearing in the instant case except the fact that the said appeal related to competitive bidding process initiated by the 2nd respondent in the year 2014 whereas this appeal relates to the competitive bidding process initiated by the 2nd respondent in the year 2015. It also needs note that in that case also dissenting opinion had been given by the learned Member of the Commission and accordingly the learned

Chairman of the Commission had exercised his casting vote thereby holding that his order would be the order of the Commission. In that case also the learned Member, in his dissenting order, had held that there were no guidelines/standard bidding document notified by the Government of India for procurement of power by Discoms from renewable energy sources and therefore, there arose no question of adoption of tariff under Section 63 of the Electricity Act, 2003 by the State Commission. Accordingly, he proceeded to approve the draft PPAs submitted by the 2nd respondent which had been executed by it with the solar power developers selected through competitive bidding. On the other hand, the learned Chairman in his order (which was held to be the order of the Commission) observed that in terms of Section 63 of the Electricity Act, 2003, the tariff based bidding guidelines have not been followed by the 2nd respondent and also the deviations with respect to standard bidding document have not been duly approved by the Commission. Accordingly, the PPAs were not approved and the petition was dismissed.

23. In these facts and circumstances, this Tribunal considered all the aspects of the case and held as under: -

“ ...

(iv) After going through the various aspects of the case we find that both the State Commission and the Respondent No. 2 had made mistake. The Respondent No. 2 making its bid process on non-existent guidelines/SBD and the State Commission passing the Impugned Order on premise of Section 63 as if guidelines/ SBD existed. The issue is between the State Commission and the Respondent No. 2. The sufferers are the Appellants who have already installed the solar

power plants based on Lol issued and PPAs signed with them for no fault of them.

(v) This Tribunal vide order dated 13.12.2016 in IA No. 637 of 2016 in Appeal No. 307 of 2016 and vide order dated 29.3.2017 in IA No. 226 of 2017 in Appeal No. 278 of 2016 has made some observations. The relevant extract from order dated 13.12.2016 is reproduced below:

“8. The primary objective for any power plant is to ensure the plant continuously and reliably operates, thereby generating the maximum economic and energy performance returns. Solar Photovoltaic (PV) power plants are no exception.

9. Solar PV stations are conceived with the premise that they need to operate and generate electricity whenever some minimum sunlight is available. In Renewable Energy Regulations (RER), they are envisaged as “must run” stations. Tariff for such Solar PV plants is designed, formulated and arrived upon considering their “must run” status.

10. Compared to many other power generating stations, PV plants have minimal maintenance and service requirements. The operation and maintenance (O&M) of Solar PV plants is based on integrated management system that is implemented throughout the lifecycle. An integrated approach to

planning, execution and monitoring of the activities leads to an optimal performance of the plant.

11. A prolonged outage may disrupt the normal operation & maintenance of Solar PV plant as generation is reduced to zero due to no schedule and as such, all auxiliaries and systems of solar PV stations are switched off. As a result, large number of technical challenges crop in such as:

- (i) Moisture ingress in transformers may cause failure of transformer. Moreover, such failure may further increase down time if such faults are detected at the time of revival from long shut down.*
- (ii) Failure of UPS batteries due to lack of charging hence loss of control, protection and communication system.*
- (iii) Theft of un-energized solar panels may additionally leads to down time from theft etc.*

12. In the Impugned Order, the State Commission has held that while the generators are not entitled to the tariff of Rs.6.44 per Kwh being the tariff discovered in the competitive bidding process, the generators should be entitled to supply electricity at a tariff which would not exceed the tariff determined by the Central Commission for the year 2016-2017 which works out to Rs.5.68 per Kwh. During the course of arguments, the Appellants undertook to

abide by this tariff, subject to the outcome of the Appeal.

13. *It is fact that the solar panels cannot be allowed to be left idle, as it would result in technical degradation which would result in irreparable loss to the generators who have invested in the project.*

14. *Under the circumstances as discussed above, we direct that as an interim measure, the Appellants' generators shall supply electricity to the Respondent No.2 at the tariff of Rs.5.68 per Kwh, being the tariff determined by the Central Commission for the year 2016-2017. This interim arrangement shall be without prejudice to the rights and obligations of the parties and subject to the outcome of this Appeal. We make it clear that we have not expressed any opinion on the merits of the case."*

This Tribunal based on the technicalities involved due to idling of the solar power projects and based on the decision of the State Commission that the generators would be entitled to supply electricity at a tariff determined by CERC for the year FY 2016- 17 which works out to Rs.5.68 per kWh (without accelerated depreciation) allowed the Appellants to supply power to the Respondent No. 2 as an interim measure.

(vi) In view of the foregoing discussions, we observe that the whole exercise of the bidding was premised and

based on the wrong notion that competitive bidding guidelines/ SBD do exist which was not true. Solar Power purchase was initiated by the Respondent No. 2 based on repeated directions from/observations of the State Commission in various ARR orders as well as in the letter dated 8.8.2014. It is also observed that the Respondent No. 2 has followed the bidding documents which it had submitted to the State Commission and the State Commission too has given go ahead with the bidding process. Negotiations too were carried out by the Respondent No. 2 in accordance with the bidding documents. PPAs too were signed after completion of the bidding process and the Appellants have already set up the solar power plants. The State Commission in the Impugned Order has also allowed the Respondent No. 2 to procure power from these plants based on the tariff determined by CERC for FY 2016-17, the year in which these plants were commissioned. This Tribunal as an interim allowed the said CERC tariff of FY 2016-17 to the Appellants.

(vii) The basic issue which merits consideration is that there was a competitive bid process initiated by the Respondent No. 2 for selection of solar power developers to supply solar power to the Respondent No. 2. Irrespective of whether such competitive bid process was undertaken under Section 63 of the Act based on the guidelines issued by Gol or not, the fact that such a competitive bid process was initiated, solar power developers were invited to participate and give their bids

and the PPA was finalised between the Respondent No. 2 and the selected bidders cannot be denied. Further, the State Commission was also informed of the bidding process being undertaken by the Respondent No. 2 and the State Commission did not stop the process at the relevant time by stating that Respondent No. 2 should wait until the guidelines are issued under Section 63 of the Act or on the ground that there exists guidelines of Gol which need to be followed. The entire process was allowed to be implemented without the State Commission exercising its regulatory powers to either stop or otherwise provide the course of action to be adopted for Respondent No. 2 to complete the bidding process. It is not for the State Commission to have raised all these issues at a later stage when the approval of PPAs with tariff discovered and negotiated downwards was placed. The Appellants have referred to the procurement of power in another case (M/s Siwana Solar Power Projects) wherein the State Commission has approved the PPA with a tariff of Rs. 6.44/kWh. However, there is no allegation in regard to the issue of guidelines being followed or not in the said decision.

(viii) Further, the PPA executed by the Respondent No. 2 with M/s Siwana Solar Power Projects on 21.2.2014 was prior in point of time as compared to the PPAs with the Appellants and the approval was granted vide order dated 20.1.2016. The PPAs in the present case were executed on a subsequent date during June 2015 and the approval to the PPAs was sought from the State

Commission on 16.7.2015. The price of the solar panels are falling progressively as indicated by various bidding process cannot be ignored. At the same time the absence of finalised guidelines by Gol cannot be considered as a ground for not approving the PPAs, particularly in the context of Section 63 of the Act which states that the bidding has to be “in accordance with the guidelines” in case of Energy Watchdog v. CERC decided by the Hon’ble Supreme Court on 11.4.2017 in Civil Appeal Nos. 5399-5400 of 2016. The relevant extract from the said judgement is reproduced below:

“19. It is important to note that the regulatory powers of the Central Commission, so far as tariff is concerned, are specifically mentioned in Section 79(1). This regulatory power is a general one, and it is very difficult to state that when the Commission adopts tariff under Section 63, it functions de hors its general regulatory power under Section 79(1)(b). For one thing, such regulation takes place under the Central Government’s guidelines. For another, in a situation where there are no guidelines or in a situation which is not covered by the guidelines, can it be said that the Commission’s power to “regulate” tariff is completely done away with? According to us, this is not a correct way of reading the aforesaid statutory provisions. The first rule of statutory interpretation is that the statute must be read as a whole. As a concomitant of that rule, it is also clear

that all the discordant notes struck by the various Sections must be harmonized. Considering the fact that the non-obstante clause advisedly restricts itself to Section 62, we see no good reason to put Section 79 out of the way altogether. The reason why Section 62 alone has been put out of the way is that determination of tariff can take place in one of two ways – either under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act, (after laying down the terms and conditions for determination of tariff mentioned in Section 61) or under Section 63 where the Commission adopts tariff that is already determined by a transparent process of bidding. In either case, the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with “determination” of tariff which is part of “regulating” tariff. Whereas “determining” tariff for inter-State transmission of electricity is dealt with by Section 79(1)(d), Section 79(1)(b) is a wider source of power to “regulate” tariff. It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under

Section 79(1)(b), only in accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79(1)(b) can then be used."

From the above it is clear that in case where there are no guidelines, regulatory powers under Section 79 (1) (b) and under Section 86 (1) (b) of the Act empowers the CERC and the State Commission respectively to provide for necessary approval for bidding process and approve the PPA including the price at which the electricity should be procured by or on behalf of the distribution licensees.

(ix) Considering the circumstances of the case equitably and the fact that the Solar Power Projects have been established by the Appellants and in terms of Section 86 (1) (e) of the Act, the power generation from renewable sources of energy need to be promoted, it would be appropriate to approve the PPAs between the Appellants and the Respondent No. 2 for procurement of solar power at the tariff of Rs. 5.68/kWh (without accelerated depreciation) as allowed in the interim Orders dated 13.12.2016 and 29.3.2017 of this Tribunal.

(x) In view of the facts and circumstances of the case, we are of the considered opinion that the PPAs signed

between the Appellants and Respondent No. 2 be allowed by the State Commission at the tariff of Rs. 5.68/kWh (without accelerate depreciation) determined by CERC for FY 2016-17.”

(Emphasis supplied)

24. Considering the absolute similarity of the facts and circumstances involved in the present case and in the afore stated appeal No.278 of 2016 we do not find any reason for not applying the decision of this Tribunal in that case to the present case and for making any departure from there.

25. The submission of the learned counsel for 2nd respondent that since the appellants had not achieved any progress towards setting up of the solar power projects in the instant case, the judgment in appeal No.278 of 2016, cannot be applied, is found to be without any force. We have already noted hereinabove that the 2nd respondent had been enquiring from the appellant about progress in their respective projects vide letters dated 06.10.2016 and 21.10.2016. In replies to these letters, the appellants had given the requisite information and had also furnished documentary evidence showing that they had obtained the land on lease for setting up of the power projects and project financing had also been arranged from the bankers as well as private funding agencies. The 2nd respondent has nowhere disputed that the appellants had invested the huge amount in complying with the conditions of Lols and the NIT. In view of the same it does not lie in the mouth of the 2nd respondent to contend that the appellants had not made any significant or substantial progress towards setting up of the solar power projects.

26. Hence, we find the impugned order of the Commission absolutely erroneous which cannot be sustained. The same is hereby set aside. The appeal stands allowed. The case is remanded back to the Commission with the direction to issue a fresh order thereby approving the PPAs signed between the appellant and the 2nd respondent.

Pronounced in the open court on this the 03rd day of September, 2024.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member (Electricity)

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