

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No. 322 of 2017

Dated : 22nd October, 2024

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

In the matter of:

Madhya Pradesh Power Management Company Limited

Shakti Bhawan, Vidyut Nagar,
Jabalpur – 482008

Represented by Dr. Navin Kohli,
Dy. General Manger

...Appellant

Versus

1. **The Registrar,**
Central Electricity Regulatory Commission
3rd & 4th Floor, Chanderlok Building,
36, Janpath, New Delhi - 110001
2. **The Authorised Signatory,**
Sasan Power Limited
C/o Reliance Power Ltd.
3rd Floor, Reliance Energy Centre,
Santa Cruz East, Mumbai – 400055
3. **The Managing Director,**
Paschimanchal Vidyut Vitran Nigam Ltd.
Victoria Park, Meerut - 250 001
4. **The Managing Director,**
Purvanchal Vidyut Vitran Nigam Ltd.
Hydel Colony, Bhikaripur, Post-DLW, Varanasi - 221 004

5. **The Managing Director,
Madhyanchal Vidyut Vitran Nigam Ltd.**
4A-Gokhale Marg, Lucknow - 226 001
6. **The Managing Director,
Dakshinanchal Vidyut Vitran Nigam Ltd.**
220kV, Vidyut Sub-Station,
Mathura Agra By-Pass Road,
Sikandra, Agra - 282 007
7. **The Chairman & Managing Director,
Ajmer Vidyut Vitran Nigam Ltd.**
400 kV GSS Building (Ground Floor),
Ajmer Road, Heerapura, Jaipur –
302005
8. **The Chairman & Managing Director,
Jaipur Vidyut Vitran Nigam Ltd.**
400 kV GSS Building (Ground Floor),
Ajmer Road, Heerapura, Jaipur -
302005
9. **The Chairman & Managing Director,
Jodhpur Vidyut Vitran Nigam Ltd.,**
400 kV GSS Building (Ground Floor),
Ajmer Road, Heerapura, Jaipur -
302005
10. **The Managing Director,
Tata Power Delhi Distribution Ltd.,**
Grid Sub-Station Building,
Hudson Lines, Kingsway camp,
New Delhi-110 009
11. **Chief Executive Officer,
BSES Rajdhani Power Ltd.,**
BSES Bhawan, Nehru Place, New Delhi-110 019

- 12. Chief Executive Officer,**
BSES Yamuna Power Ltd.,
Shakti Kiran
Building,
Karkardooma, Delhi
- 110 092
- 13. The Chief Engineer/PPM,**
Punjab State Power Corporation Ltd.,
The Mall, Patiala - 147001
- 14. The Chief Engineer/PPM,**
Haryana Power Purchase Centre,
Shakti Bhawan, Sector-6,
Panchkula (Haryana) - 134109
- 15. The Chairman & Managing Director,**
Uttarakhand Power Corporation Ltd.,
Urja Bhawan, Kanwali Road,
Dehradun – 248001

Respondents

Counsel on record for the Appellant(s) : G. Umapathy Ld. Sr. Adv.
Aditya Singh for App. 1

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

Siddharth Nigotia
Shri Venkatesh
V.M. Kannan
Jatin Ghuliani
Mohit Mansharamani
Rishabh Sehgal
Isnain Muzamil
Ashutosh Kumar
Srivastava
Bharath Gangadharan
Jayant Bajaj
Nihal Bhardwaj

Kartikay Trivedi
Shivam Kumar
Suhael Buttan
Siddharth Joshi
Abhishek Nangia
Simran Saluja
Vineet Kumar for Res. 2

Rajiv Srivastava for Res. 3

Rajiv Srivastava for Res. 4

Rajiv Srivastava for Res. 5

Rajiv Srivastava for Res. 6

K. Heema
Vasudha Sen
Ujjwal Jain
Chaitanya Mathur
Ananya Chug
Prachi Golechha
Vineet Kumar for Res. 10

JUDGMENT

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. Order dated 17th February, 2017 passed by Central Electricity Regulatory Commission (hereinafter referred to "Commission") whereby it has held the levy of Forest Transit Fee by the State of Madhya Pradesh vide notification dated 28th May, 2001 to be Change in Law as per Article

13.1.1(ii) of the PPA executed between the 2nd Respondent i.e. the power generator and the Appellant has been assailed in this appeal.

2. The Appellant is a Distribution Licensee in the State of Madhya Pradesh and is supplying electricity to the consumers in the State. The 2nd Respondent M/s Sasan Power Limited has set up a Super Critical Ultra Mega Power Project based on linked coal mine at Sasan, District Singhrauli in the State of Madhya Pradesh. It has entered into long term PPA for supply of power to the Appellant.

3. The facts of the case lie within a very narrow compass. Levy of transit fee was imposed by the State of Madhya Pradesh vide notification dated 28th May, 2001. The bid deadline for Sasan UMPP was 28th July, 2007 and cut off date for the purpose of Change in Law was 21st July, 2007. As already noted herein above, PPA was executed between Appellant and the 2nd Respondent on 7th August, 2007. The notification dated 28th May, 2001 was challenged before the Hon'ble High Court of Madhya Pradesh by way of Writ Petition No. 2309 of 2002 which was allowed vide judgement dated 14th May, 2007 thereby setting aside the said notification. The said judgement dated 14th May 2007 of the High Court was assailed before the Hon'ble Supreme Court by way of SLP(C) No. 6956 of 2008 wherein an interim order dated 7th March, 2008 was

passed thereby staying the operation of impugned judgement dated 14th May, 2007 of the High Court of Madhya Pradesh with further direction that recovery of transit fee during the interim period would be subject to the ultimate outcome of the appeals before it and in event of private parties/power generators succeeding in the appeals, the amount deposited/recovered from them shall be refunded to them with interest @9% from the date of deposit till actual refund.

4. The Civil Appeals filed by the State of Madhya Pradesh were tagged with the Civil Appeal No. 14874 of 2017 filed by State of Uttarakhand which also was directed against the same notification dated 28th May, 2001 imposing transit fee. Ultimately, all the appeals were decided by the Hon'ble Supreme Court vide judgement dated 15th September, 2017 upholding the constitutionality as well as validity of the said notification dated 28th May, 2001 imposing levy of transit fee.

5. It is after the interim order dated 7th March, 2008 was passed by the Hon'ble Supreme Court in SLP No. 6956 of 2008 thereby staying the operation of the judgement dated 14th May, 2007 of the High Court of Madhya Pradesh that the 2nd Respondent i.e. Power Generator had approached the Commission by way of Petition No. 16 of 2016 seeking following reliefs under Change in Law during the operating period :-

“(a) Levy of Forest Transit Fee by the Government of Madhya Pradesh under the Madhya Pradesh Transit (Forest Produce) Rules, 2000;

(b) Imposition of a new condition in the Environmental clearance dated 30.6.2015.

(c) Establishment of the District Mineral Foundation and National Mineral Exploration Trust in terms Section 9B and 9C of the Mines and Minerals (Contribution to District Mineral Foundation) Rules, 2015;

(d) Imposition of levy equivalent to 2% of the royalty to be paid to the National Mineral Exploration Trust in terms of Section 9C of the MMDR Act read with Rule 7 (3) of the National Mineral Exploration Trust Rules, 2015.”

6. Vide the impugned order, the Commission has allowed the claims of 2nd Respondent for the Change in Law events mentioned at Sl. Nos. (a), (c) & (d) herein above and rejected the claim regarding Change in Law event mentioned at Sl. No. (b). It is pertinent to add here that the claim regarding Change In Law event at Sl. No. (a) i.e. levying of Forest Transit Fee has been allowed subject to the final decision of the Hon’ble Supreme Court in SLP No. 6956 of 2008 which was still pending adjudication at that time.

7. The instant appeal had initially been filed with respect to the following two Change in Law events allowed by the Commission :-

(a) Levy of Forest Transit Fee imposed by the State of MP and;

(b) Imposition of levy equivalent to 30% towards District Mineral Function (DMF) and 2% National Mineral Exploration Trust (NMET).

8. However, during the course of argument, the Learned Senior Counsel appearing for the Appellant Company stated that the Appellant is not pressing the appeal with regards to Change in Law event mentioned at Sl. No. (b) herein above i.e. imposition of levy towards DMF and NMET. Thus, we are now confronted with only one issue i.e. whether the levy of Forest Transit Fee by the State of Madhya Pradesh vide notification dated 28th May, 2001 constitutes Change in Law as per the relevant clause of PPA.

9. We have heard Learned Senior Counsel for the Appellant and Learned Counsels appearing for 2nd Respondent and 10th Respondent. None of the remaining respondents has turned up to argue the appeal. We have also gone through the impugned order as well as written submission filed by the Learned Counsels.

10. "Change in Law" has been defined in Article 13 of the PPA and we find it necessary to quote the same herein above :-

"13 ARTICLE 13: CHANGE IN LAW

13.1 Definitions In this Article 13, the following terms shall have the following meanings: 13.1.1 "Change in Law" means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline: (i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law or (ii) a change in interpretation of any Law by a Competent Court of law, tribunal

or Indian Governmental Instrumentality provided such Court of law, 4 tribunal or Indian Governmental Instrumentality is final authority under law for such interpretation or (iii) change in any consents, approvals or licenses available or obtained for the Project, otherwise than for default of the Seller, which results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurers under the terms of this Agreement, or (iv) any change in the (a) Declared price of Land for the Project or (b) the cost of implementation of the resettlement and rehabilitation package of the land for the Project mentioned in the RFP or (c) the cost of implementing Environmental Management Plan for the Power Station mentioned in the RFP or (d) the cost of implementing compensatory afforestation for the Coal Mine, indicated under the RFP and the PPA; but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) change in respect of UI Charges or frequency intervals by an Appropriate Commission. Provided that if Government of India does not extend the income tax holiday for power generation projects under Section 80 IA of the Income Tax Act, upto the Scheduled Commercial Operation Date of the Power Station, such non extension shall be deemed to be a Change in Law.”

11. In terms of the definition of term “Change in Law” in Article 13 of the PPA, in order to constitute Change in Law, it has to be established that :-

- (i) The event has occurred after the cut off date (which is 21st July, 2007 in this case);

- (ii) The event has resulted in change in any cost for revenue from the business of selling electricity by the seller to the procurers under the terms of PPA;
- (iii) The event relates to any enactment bringing into effect adoption, promulgation, amendment, modification or repeal of any law;
- (iv) The event relates to any change in interpretation of any law by a Competent Court of Law, Tribunal or Indian Governmental Instrumentality provided such Court, Tribunal or Instrumentality is final authority under Law for such interpretation;
- (v) The event relates to change in any consents, approvals or licensees available or obtained for the project, otherwise than for default of the seller;
- (vi) The event relates to any change in the declared price of land for the project or cost of implementation of re-settlement and re-habilitation package or cost of implementing environmental management plant or the cost of implementing the compensatory afforestation.

12. We have already noted that the notification dated 28th May, 2001 issued by the State of Madhya Pradesh imposing levy of Forest Transit

Fee was quashed by the High Court of Madhya Pradesh vide judgement dated 14th May, 2007 in Writ Petition No. 2309 of 2002. Therefore, as on the cut off date in this case i.e. 21st July, 2007, there was no law requiring levy of Forest Transit Fee. As a logical consequence, the 2nd Respondent as well as other bidders were justified in not factoring the Forest Transit Fee in the bids submitted by them. It so happened that subsequently, the Hon'ble Supreme Court by way of judgement dated 15th September, 2017 in Civil Appeal No. 14847 of 2017 and connected appeals upheld the constitutional validity of the said notification dated 28th May, 2001, thereby reviving it. By virtue of Article 141 of the Constitution of India, a judgement of the Hon'ble Supreme Court has a binding effect through out the length and breadth of the country and, therefore, patently, the said judgement of the Hon'ble Supreme Court dated 13th September, 2017 tantamounts to change in interpretation of law constituting Change in Law as per Article 13.1.1 of the PPA.

13. It is not difficult to understand that as on cut off date there was no law imposing levy of Forest Transit Fee as the notification dated 28th May, 2001 issued in this regard in the State of Madhya Pradesh had been set aside by the High Court of Madhya Pradesh vide judgement dated 14th May, 2007. Long after the cut off date, there comes the judgement from

the Hon'ble Supreme Court setting at naught the judgement of Madhya Pradesh High Court thereby reviving the notification dated 28th May, 2001. What comes out is that the interpretation of law given by High Court of Madhya Pradesh before the cut off date, which was binding upon everybody residing or having any business concern in the State of Madhya Pradesh, was changed or reversed by the Apex Court on 15.09.2017 i.e. long after the cut-off date. Even the interim order of the Hon'ble Supreme Court staying the operation of the judgement of High Court of Madhya Pradesh is dated 7th March, 2008 i.e. after the cut off date. Therefore, the argument raised on behalf of the Appellant that the 2nd Respondent was aware on the cut off date that transit fee would be levied, is totally unconscionable and unacceptable. The Apex Court by virtue of judgement dated 15th September, 2017 has altered the scenario by rejecting the interpretation of law given by High Court of Madhya Pradesh and upholding the constitutional validity of the said notification dated 28th May, 2001 thereby reviving it. Therefore, we are unable to accept the submission made on behalf of the Appellant that the said judgement dated 15th September, 2017 of the Apex Court does not constitute Change in Law in terms of Article 13 of the PPA.

14. Even if, as contended on behalf of the Appellant, the judgement dated 14th May, 2007 of the High court of Madhya Pradesh was assailable before the Hon'ble Supreme Court that does not mean that it was not final as envisaged under Clause(ii) of Article 13.1.1 of PPA. Merely, for the reason that the judgement of the High Court is appealable before the Apex Court does not mean that the said judgement is not final. In view of the hierarchy of Courts in India, a High court is the Highest Court within a particular State over which it has jurisdiction and, therefore, every order/judgement passed by the High Court is final and binding throughout that State until the same is over-turned by the Hon'ble Supreme Court. Another argument raised on behalf the Appellant that the 2nd Respondent should have foreseen as well as expected that judgement dated 14th May, 2007 of High Court of Madhya Pradesh would be assailed before the Hon'ble Supreme Court is totally misplaced. It is not mandatory for any party in proceeding before the High Court including the State, to assail a High Court judgement before the Hon'ble Supreme Court. It always depends upon the nature of the order/judgement passed by the High Court. There was no mechanism available with the 2nd Respondent to know with certainty that State of Madhya Pradesh is going to assail the

judgement of High Court before the Hon'ble Supreme Court and ultimately the Hon'ble Supreme Court would over turn the High Court's judgement.

15. Hence, we are of the considered view that revival of the notification dated 28th May, 2001 of the State of Madhya Pradesh imposing Forest Transit Fee, by the Apex Court by way of judgement dated 15th September, 2017 squarely tantamounts to change in interpretation of the law by a Competent Court of law envisaged under Article 13.1.1(ii) of the PPA constituting Change in Law event, for which the 2nd Respondent is entitled to be compensated suitably.

16. Accordingly, we do not find any ground to interfere with the impugned order of the Commission. The appeal is devoid of any merit and is hereby dismissed.

Pronounced in the open court on this 22nd day of October, 2024.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member (Electricity)

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