

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No. 79 OF 2021

Dated: 19.12.2024

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

In the matter of:

VIYYAT POWER PRIVATE LIMITED

Viyyat Kausthubham
Kariyavattom, Trivandrum – 695 581
viyyatpower@yahoo.com

... Appellant

Versus

1. KERALA STATE ELECTRICITY REGULATORY COMMISSION

Through its Secretary,
K.P.F.C. Bhavanam,
C.V. Raman Pillai Road,
Vellayambalam, Thiruvananthapuram – 695 010
kserc@erckerala.org

2. KERALA STATE ELECTRICITY BOARD LIMITED

Through its Chairman & Managing Director
Vydyuthi Bhavanam, Pattom,
Thiruvananthapuram – 695004, Kerala
trac@kseb.in

3. GOVERNMENT OF KERALA

Through the Power Secretary,
Power Department,
Government Secretariat,

Thiruvananthapuram – 695001
powerbdepartment@gmail.com

4. THE DIRECTOR, ENERGY MANAGEMENT CENTRE

Through its Chairman & Managing Director

Srikrishna Nagar, Sreekaryam PO,
Thiruvananthapuram – 695017, Kerala
emck@keralaenergy.gov.in

... Respondent(s)

Counsel on record for the Appellant(s) : Anand K. Ganesan
Swapna Seshadri
Amal Nair

Counsel on record for the Respondent(s) : M.T. George for Res. 1
Subhash Chandran K.R
Krishna L.R for Res. 2

J U D G M E N T

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. The appellant, a small hydro project in the state of Kerala, is aggrieved by the order dated 24.04.2020 passed by 1st respondent Kerala State Electricity Regulatory Commission (hereinafter referred to as the Commission) whereby appellant's prayer for compensatory tariff for its power project has been declined.

2. The facts of the case, stated briefly, are that the Government of Kerala (3rd respondent) allotted 13 small hydro power projects in 2004 by way of public tender floated in the year 2002-02 i.e. before the enactment of Indian Electricity

Act, 2003, on the basis of competitive tariff bidding. The appellant is the allottee of two small hydro projects at Iruttukkanam, District Udupi, Kerala. Accordingly, it established the two small hydro projects i.e. 2x1.50 MW stage I and 1x1.5MW stage II which are at the at the same location using the same weir and water conductor system but having separate power houses. It may be noted here that the hydro projects had been allotted to the appellant on build, own, operate and transfer (BOOT) basis at the tariff as quoted by it in its bid.

3. An implementation agreement dated 10.12.2004 was signed between the appellant and the 3rd respondent Government of Kerala in which the scheduled date of commissioning was stated as 10.09.2010. With the approval of the Commission, a Power Purchase Agreement (PPA) dated 07.06.2007 was executed between the appellant and 2nd respondent Kerala State Electricity Board Limited (in short "the Board") for supply of energy generated in the hydro project to the Board at the tariff quoted by the appellant in the bid.

4. The three MW stage I project was commissioned on 04.11.2010 and the 1.5 MW stage II was commissioned on 10.04.2012. We may note here that the PPA dated 07.06.2007 is only with regards to the stage I project. No PPA has till date been executed between the parties with regards to the stage II

project for the reason that the appellant has been demanding revised generic tariff @ Rs.4.88/unit applicable for the projects commissioned on or after 01.01.2013 even though this SHP of the appellant achieved commercial operation on 10.04.2012 and the dispute is stated to be still pending before Hon'ble Supreme Court.

5. A landslide disaster is stated to have occurred in the month of August, 2018 triggering huge flood in the area where the power projects are situated which heavily damaged the stage I and stage II projects of the appellant including the office room, control room, switch gear room, battery room etc. The equipments were thrown over the turbine as well as the generator and the generator hall were covered with mud, rock and debris up to the height of 28-30 ft. Admittedly, the appellant has replaced all the three generators with new generators. According to the appellant, following additional expenses were incurred by it on account of the said disaster: -

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<i>Sl No.</i>	<i>Particulars Amount</i>	<i>Amount (Rs. Cr)</i>
1.	<i>Making good the damage to the power house building and other civil works</i>	2.55

2.	<i>Cost of dismantling / repair / replacement of mechanical equipment</i>	0.22
3.	<i>Cost of replacement of electro mechanical equipment including erection and commissioning</i>	9.15
4.	<i>Total</i>	11.91

6. Following additional expenses are also stated to have been incurred by the appellant on account of the damage to the machinery of the project due to the unprecedented floods: -

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<i>Sl No.</i>	<i>Particulars Amount</i>	<i>Amount (Rs. Cr)</i>
1.	<i>Cost of Civil Structure & protection work of power house against future</i>	0.56
2.	<i>Loss of generation revenue during rehabilitation period from 09.8.2018 to 01.07.2019</i>	4.94
3.	<i>Additional cost incurred for SCADA equipment in power house</i>	0.28

	<i>Total</i>	<i>5.78</i>
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7. Thus, according to the appellant, it incurred a total additional liability of Rs.17.69 crores on replacement of the generators, electro-mechanical equipment and repairs which had got extensively damaged due to the flood. Even though the appellant had taken five insurance policies in relation to the power projects which were active at the time of disaster but only one of them i.e. "Standard Fire and Special Insurance Policy" triggered. The total insured amount under this policy was Rs.23.12 crores but the payable amount by insurance company was worked out by the insurance surveyor as Rs.8.00 cores only. The appellant completed the repair and rehabilitation work and synchronized units with the grid on the below mentioned dates: -

<i>"Stage I</i>	<i>Unit 1</i>	<i>27.06.2019</i>
<i>Stage I</i>	<i>Unit 2</i>	<i>28.06.2019</i>
<i>Stage II</i>	<i>Unit 3</i>	<i>08.07.2019"</i>

8. In terms of clause 13.5 of the PPA read with article 6.5 and the implementation agreement executed between the parties, the appellant chose not to abandon the project and approached the State Government as well as

the Board for extension of BOOT period. It also approached the Commission by way of petition bearing OA No.30/2019 seeking additional compensatory tariff for stage I and stage II of its hydro power projects in view of the additional investment of Rs.9.69 crores and considering the force majeure event that had triggered the losses. The said petition has been disposed off by the Commission vide the impugned order dated 24.04.2020 thereby declining the request of the appellant for grant of additional compensatory tariff. At the same time, the Commission gave liberty to the appellant to approach the State Government for extension of BOOT period, if it so desires.

9. The appellant had sought review of the said order dated 24.04.2020 by way of review petition No.5/2020 which also has been dismissed by the Commission vide order dated 15.10.2020.

10. We have heard learned counsel for the appellant and learned counsels appearing for 1st respondent as well as 2nd respondent. We have also gone through the written submissions filed by the learned counsels.

11. There is no dispute on behalf of the respondents to the fact that there had been heavy and unprecedented floods in the month of August, 2018 which were triggered by a landslide disaster and which caused severe and extensive

damage to the entire power project of the appellant. It is also not disputed that the said incident qualifies as non-political force majeure event contemplated under article 13 of the PPA. It is also not disputed that the appellant instead of abandoning the project, which was one of the options available to it as per clause 6.5 of the Implementation Agreement, proceeded to replace and repair the damaged machinery etc. upon which it incurred Rs.17.69 crores out of which it has received Rs.8.00 crores as compensation from the insurer as per the insurance policy.

12. The issue which arises for our determination is whether any provision in the Implementation Agreement and the PPA entitles appellant to seek additional compensatory tariff to recover the additional expenditure of Rs.9.69 crores incurred by it on replacement / repair of the machinery which had got damaged due to above noted natural calamity.

13. In this regard, we find Articles 13.5 and 13.6 of the PPA relevant which are quoted hereunder: -

“13.5 If a Force Majeure event which is a non political event continues or is in the reasonable judgement of the parties likely to continue beyond a period of 120 days, the following shall apply:

- (a) *If the Board is the aggrieved party, it shall approach the Government*
- (b) *If the Company is aggrieved party, article 6.5 of Implementation Agreement shall apply.*

13.6 Liability for other losses, damages etc.

Save and except as expressly provided in this Article 13, no Party hereto shall be liable in any manner whatsoever to the other Party in respect of any loss, damage, cost, expense, claims, demands and proceedings relating to or arising out of occurrence or existence of any Force Majeure Event.”

14. Thus, as per Article 13.5 of the PPA, in case non-political force majeure event continues or is likely to continue beyond period of 120 days, it was for the appellant to proceed as per article 6.5 of the Implementation Agreement. It would be pertinent to refer here to clause 6.5 of the Implementation Agreement which is extracted hereinbelow: -

“6.5 Termination due to Force Majeure Event

(a) Termination

If a Force Majeure Event which is a Non-Political Event continues or is in the reasonable judgement of the Parties likely to continue beyond a period of 120 days, the Parties may mutually decide to terminate this Agreement or continue this Agreement on mutually agreed terms. If the Parties are unable to reach an agreement in this regard, the Affected Party shall after the expiry of the said period of 120 days, be entitled to approach Government to terminate this Agreement.

If a Force Majeure Event is a Political Event and the same subsists for a period exceeding 365 days the Company shall be entitled to approach Government to terminate this Agreement.

Provided that the Government may at its sole discretion have the option to terminate this Agreement any time after the occurrence of the Political Event.”

15. In terms of the said clause of the Implementation Agreement, there were only two options for the appellant in the aftermath of the natural disaster in question i.e. either to (a) terminate the agreement or (b) continue it further on mutually agreed terms. The clause envisages that in case the parties do not decide mutually to terminate the agreement, they may proceed with it further on the terms agreeable to both. Therefore, continuation of the agreement could have been a bilateral decision of the parties and not a unilateral decision of any of them. "Mutually agreed terms" indicates that the terms upon which the agreement is to be continued in the aftermath of a non-political force majeure event ought to be discussed by the parties and agreed to by both of them before proceeding further with the agreement. In other words, the parties should be ad-idem on the terms upon which the agreement is to be continued.

16. Learned counsel for the appellant vehemently submitted that the appellant had kept respondents informed about the damage caused to the power projects and the steps taken by it. He pointed out that the appellant had made several representations to the Board as well as to the Power Secretary and Chief Secretary, Government of Kerala in this regard. He argued that the appellant had very efficiently and expeditiously completed the repair / rehabilitation of the project and the details of expenses incurred by it on the same were duly communicated to the respondents who did not raise any

dispute at all with regards to the same. It is the submission of the learned counsel that in these facts and circumstances of the case the Commission has erred in rejecting the prayer of the appellant for additional compensatory tariff. However, the learned counsel has miserably failed to point out any correspondence / communication from the respondent Board to the appellant whereby the Board had given its consent to the appellant to proceed with the repair/ rehabilitation work of the power projects. On this aspect we may refer to the following correspondence exchanged between the appellant and the respondents subsequent to the happening of force majeure event noted hereinabove: -

(a) In August 2018, the appellant informed the State Government and the Board about the disaster vide letters dated 11.08.2018 and 23.08.2018.

(b) The appellant in its letter dated 07.09.2018 addressed to the Chief Secretary as well as Power Secretary of the Government of Kerala and CMD of the Board stated that it has already commenced the rehabilitation work with advance compensatory installment of Rs.1.00 crore received from the insurance company M/s SBI General Insurance on 18.08.2018. The appellant also mentioned that the SBI has offered Rs.7.00 crores as loan for the rehabilitation work.

(c) With regards to the request of the appellant for extension of BOOT period and tariff revision, the Board in its letter dated 15.11.2018 informed the appellant as under: -

“BOOT period of the project is defined in Article 2.1 of the Implementation Agreement executed between the GoK and the Company. Tariff of Phase-II of the project is a matter still to be decided by the Hon’ble Supreme Court. Hence KSEB Ltd requested the petitioner to take up the matter with the State Government since the Implementation Agreement is an integral part of the PPA.

As per the provisions of the PPA, flood and landslide are to be covered through insurance coverage under Article 10.1 of the PPA. Clause 10.1 & 10.2 of the PPA and Article 5.6(b)(v) of the IA specifies that ‘The Company shall at its cost and expense, purchase and maintain by reinstatement or otherwise, during the Operations period insurance against loss, damage or destruction of the Project facilities, at replacement value and provide Government / Board copies of all insurance policies obtained by the Company.

No such documents has been submitted by the Company till date. Hence KSEB Ltd requested the petitioner to provide the same'."

(d)The appellant, vide letters dated 11.01.2019, 25.01.2019, 13.02.2019 and 19.09.2019 addressed to the Chief Minister Kerala, Minister for Power, Govt. of Kerala, Chief Secretary, Govt. of Kerala and Power Secretary, Govt. of Kerala, informed them that the total cost of rehabilitation of the project including the generation loss for one year is estimated at Rs.20.55 crores out of which insurance company may share Rs.8.04 crores and the balance Rs.12.51 crores has to be borne by the appellant. Accordingly, the appellant requested for extension of the BOOT period by another 15 years to recover the said additional expenditure of Rs.12.51 crores. It was specifically mentioned by the appellant in these letters as under: -

"We have not asked for any 'Durithaswasam' from the Government, although Rs.16.00 Crore losses were reported to the Government by the District Collectorate earlier. We hereby confirm that we will not ask for any

'Durithaswasam' from the Government, as we will consider this 15 years BOOT period extension itself as the equitable 'Durithaswasam' given to us."

(e) With regards to the requests of the appellant for compensatory tariff, the Board vide its letter dated 13.02.2019 informed the petitioner as follows:-

"Tariff of the Iruttukkanam Stage-I project was determined through tariff based bidding and that for Stage-II was fixed by KSERC. However, tariff of Phase-II of the project has been challenged before the Hon'ble Supreme Court. After the enactment of Electricity Act, 2003, tariff fixation as well as re-fixation is within the purview of KSERC and KSEB Ltd does not have authority to decided on it.

Since the request for re-fixation arises due to additional investment and losses incurred due to the flood, prior approval of the Hon'ble Commission would be required for the projected additional expenditure. It is understood that insurance coverage was availed at replacement value for the project facilities as stipulated in the Implementation

Agreement and PPA. Hence replacing the plant and machinery and other facilities would be covered under insurance. Please note that recovery of any investment made over and above the insurance coverage will be subject to approval of the Hon'ble Commission."

17. Thus, in none of the communications addressed by the respondents including the Board, to the appellant, consent was given to the appellant to continue the agreement. The respondents had also not given any commitment to the appellant that the additional expenditure incurred by it over and above the compensation received from the insurance company shall be allowed to be recovered through compensatory tariff.

18. Therefore, it is evident that the appellant unilaterally decided to proceed further with the agreement subsequent to the force majeure event in which its power project got damaged and embarked upon the steps to repair / replace the damaged machinery in the absence of any consent / commitment from the respondent Board. No further terms had been mutually fixed or agreed to by the appellant and the respondent Board on which the agreement was to continue further.

19. We also do not find any provision either in the Implementation Agreement or in the PPA executed between the parties entitling the appellant to seek additional compensatory tariff for mitigation of the losses suffered on account of the natural disaster. This could have been possible for the appellant only in case the respondent Board had agreed to, in terms of Article 13.5 of the PPA read with Clause 6.5 of the Implementation Agreement. As already noted hereinabove, no such consent was given by the respondent Board.

20. In view thereof, we are unable to find any fault in refusal by the Commission of appellant's prayer for grant of additional compensatory tariff.

21. A subsequent event that has taken place during the pendency of this appeal before this Tribunal also needs to be noted. Vide order dated 22.05.2024, the Government of Kerala has extended the BOOT period of the appellant's power projects by the period the plants were not operating due to natural calamity and subject to the condition that the appellant withdraws all the cases filed by it in this regard before various forums. However, it is submitted on behalf of the appellant that this order is not acceptable to the appellant for the reason that the extension of BOOT period is only for 330 days as against 15 years requested by the appellant.

22. Considering the above discussion, we are unable to find any error or infirmity in the impugned order of the Commission. The appeal is devoid of any merit and is hereby dismissed.

Pronounced in open court on this the 19th day of December, 2024

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member (Electricity)

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