IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No. 224 of 2016

Dated : 28th April, 2025

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

In the matter of:

M/s. K.M. Sugar Mills Ltd
Motinagar,
Faizabad, (Uttar Pradesh) 224001
Through its Director … Appellant

Versus

1. **Uttar Pradesh Electricity Regulatory Commission**
IInd Floor, Kisan Mandi Bhawan,
Gomti Nagar, Vibhutikhand,
Lucknow – 226010
Through its Secretary

2. **Uttar Pradesh Power Corp. Ltd**
Through its Managing Director
14th Floor, Shakti Bhawan,
14 Ashok Marg
Lucknow – 226001

3. **Madhyanchal Vidyut Vitran Nigam Ltd**
Prag Narayan Rd, Butler Colony,
Lucknow, Uttar Pradesh 226001
Through its Managing Director

4. **Executive Engineer**
Electricity Distribution Division

Faizabad

5 Chief Engineer (PPA)
Uttar Pradesh Power Corp. Ltd.
14th Floor, Shakti Bhawan
14 Ashok Marg
Lucknow 226001

6. Superintending Engineer
Import Export & Payment Cycle
Uttar Pradesh Power Corp. Ltd
14th Floor, Shakti Bhawan
14 Ashok Marg, Lucknow 226001 … Respondent (s)

Counsel for the Appellant(s)	:	Vishal Gupta Kumar Mihir for App. 1
Counsel for the Respondent(s)	:	C.K. Rai for Res. 1 Rajiv Srivastava for Res. 2 to 6

J U D G M E N T

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. The Appellant is aggrieved by the order dated 16th June, 2016 passed by the 1st Respondent, Uttar Pradesh Electricity Regulatory Commission (herein after referred to as "Commission") whereby the Commission rejected the petition of the Appellant seeking payment of its bills w.e.f. April, 2007.

2. The Appellant is engaged in the business of manufacture of sugar and other incidental products. Its sugar mill has sanctioned load of 2 MW. It has generating plant of the capacity of 1.5 MW + 2.5 MW + 3 MW (total 7 MW) for its captive use only. No part of electricity generated from the said 7 MW generating plant was ever being supplied to 2nd Respondent – Uttar Pradesh Power Corporation Limited (in short "UPPCL") nor has any power purchase agreement being executed with regard to the same between the Appellant and Respondent No. 2.

3. The Appellant set up a bagasse based 25 MW generating plant (1x10 MW and 1x15 MW) in its sugar mill. The two units of the said generating plant were commissioned on 18th March, 2007 and 29th April, 2007 respectively. In order to sell the 20 MW surplus electricity from the said 25 MW plant, the Appellant executed the power purchase agreement (PPA) dated 4th January, 2006 with 3rd Respondent Madhyanchal Vidhyut Vitran Nigam Limited (MVVNL) which contained the terms and conditions for supply of electricity as well as the applicable tariff.

4. In order to facilitate evacuation of power generated from the said new 25 MW generating plant in pursuance to the power purchase

agreement dated 4th January, 2006, 132 KV transmission line was constructed as per the terms of the said PPA at the Appellant's cost between the sugar mill and 132 KV sub-station at Darshan Nagar which was commissioned on 18th March, 2007. Subsequently, the supply of electricity was commenced by the Appellant to the 3rd Respondent on 18th March, 2007 and 29th April, 2007 upon commissioning of the two units of the power plant. Accordingly, first bill was raised by the Appellant on 5th April, 2007 in respect of the power supplied by it to the 3rd Respondent which was addressed to Respondent No. 4 who forwarded the same to Respondent No. 6 for payment. However, the Respondent No. 6 returned the bill with the directions that it should be revised and verified by applying weighted average rate and not the rate applicable for the power plants commissioned in the year 2006-07. The decision of Respondent No. 6 appears to have been based upon the following recital in the PPA dated 4th January, 2006;

> *"Whereas, the Mill has undertaken to implement the power generation by installing Plant and Equipment having co-generation/Renewable capacity of 20 MW at its production facility in addition to existing 18.56 M.W. plant and to complete erection, installation and commissioning of the*

said capacity and make it operational as per schedule given in Annexure -1, and

Whereas, the Mill desires to sell surplus Power generated in the Mill's facility after its own captive use, i.e. 20 M.W. and UPPCL agrees to purchase all such Power offered by the Mill for sale, under the terms and conditions set forth herein."

(Emphasis supplied)

5. It appears that Respondent No. 6 got the impression that the existing 18.56 MW generating plant was supplying power to 2nd Respondent – UPPCL prior to the signing of PPA dated 4th January, 2006 and the new 25 MW cogen plant was in addition to the said 18.56 MW plant supplying surplus power to 3rd Respondent and, therefore, the bill should be prepared as per the weighted average of tariff applicable on the generating plants commissioned prior to the year 2004.

6. In these circumstances, the Appellant had approached the Commission by way of Petition No. 1060 of 2015 claiming following relief :-

"In light of the above fact it is most humbly prayed that this Hon'ble ***Commission may be pleased to direct the Respondent No. 1 and***

all other concerned authorities to make full payment of the bills raised by the Petitioner w.e.f. April, 2007 while applying tariff provided under the Power Purchase Agreement and approved by the learned commission because weighted average tariff would not apply in the above case and the arrears along with up to date interest may be paid to the Petitioner with interest *and necessary correction/ amendment be ordered to be carried out in PPA dated 04.01.2006. It is further prayed that the weighted average of the two generating units- 1x10 MW commissioned on 18.03.2007 and 1x15 MW commissioned on 29.04.2007 may very kindly be applied in the bills already raised by the petitioner."*

7. Perusal of the said prayer clause of the petition makes it manifest that the primary relief sought by the Appellant was direction to 2nd Respondent UPPCL to make full payment of its bills as per the tariff stipulated in the PPA dated 4th January, 2006. Prayer for corrections/amendments of the PPA was only incidental in order to rectify the factual error which was stated to have occurred in the PPA.

8. However, the impugned order dated 16th June, 2016 passed by the Commission demonstrates that the Commission totally ignored the main prayer of the Appellant in the petition and only considered the incidental prayer for correction/amendments in the PPA which it rejected in the following words :-

"10. In view of above and considering that is the duty of the Commission to maintain the sanctity of the approved PPA, no

provision of the PPA can be revisited at least retrospectively under any circumstances on the request of one of signatory to PPA.

11. However, the Commission also opines that it is also its duty to protect the interest of the stakeholders. Thus, the Commission directs that petitioner and UPPCL to enter into a fresh comprehensive PPA over riding all previous PPAs within one month and put up before the Commission for approval but there shall be no retrospective provisions in the PPA. Till then PPA already signed by the UPPCL and petitioner and approved by the Commission shall remain in force."

9. Accordingly, the petition was disposed off without giving any findings as to whether the bills raised by the Appellant w.e.f. April, 2007 were correct or needed to be revised as directed by the Respondent No. 6.

10. We have heard Learned Counsel for the Appellant as well as Learned Counsel for the Respondents. We have also perused the material on record as well as the written submissions filed by the Learned Counsels.

11. It was vehemently argued by Learned Counsel for the Appellant that the Appellant does not have any power plant with the capacity of 18.56 MW in its sugar mill and the statement in this regard contained in the recital of the PPA dated 4th January, 2006 has been incorporated due to some inadvertent typographical error. He would submit that in addition to the new 25 MW co-generation power plant, there was only a 7 MW power plant installed in the Appellant's sugar mill which was

meant for only captive use and was not connected to the grid at all. In this regard, he referred to the report submitted by Executive Engineer, UPPCL submitted by him vide letter dated 23rd May, 2010 upon physical inspection of the Appellant's sugar mill wherein he stated as under :-

> *"The report asked on the main points vide the letter are as under:*
>
> *The placement of new and old unit is separate.*
>
> *Only new unit (10+15 MW) are connected with the Grid.*
>
> *In case of closure of new unit, the energy cannot be supplied to the Grid."*

12. Learned Counsel further argued that even if it is assumed that there is a power plant with capacity of 18.56 MW (which actually is only the captive power plant of capacity of 7 MW) in the Appellant's sugar mill premises, then also the same cannot be considered calculating weighted average tariff in view of Regulation 33 of Uttar Pradesh Electricity Regulatory Commission (Terms and Conditions for Supply of Power and Fixation of Tariff for sale of power from Captive Generating Plants, Co-generation, Renewable Sources of Energy and Other Non-Conventional Sources of Energy based Plants to a Distribution Licensee) Regulations, 2005 (in short "CNCE Regulations, 2005") coupled with the clarification issued by the Commission itself

vide letter dated 18th April, 2017, for the reason that the same is neither connected to the grid nor is any electricity being supplied from the said power plant.

13. On the contrary, Learned Counsels for the Respondents entirely supported the impugned order saying that it does not suffer from any legal infirmity.

Our Analysis

14. As we have already noted herein above that the Commission has completely mis-directed itself in considering the incidental prayer regarding corrections/amendments in the PPA dated 4th January, 2006 as the main prayer and rejecting the same without giving any opinion upon the correctness of the bills against by the Appellant w.e.f. April, 2007 which actually was the main prayer of the Appellant in the petition.

15. Even if the Commission was not inclined to accept the prayer of the Appellant for directing corrections/amendments in the PPA dated 4th January, 2006 still it was incumbent upon the Commission to give a finding regards the correctness or otherwise of the bills raised by the Appellant w.e.f. April, 2007. The Commission was duty bound to examine the validity of the objection raised by Respondent No. 6 in these bills in seeking revision thereof.

16. We may note that the methodology for determination of tariff for co-generation power plant is given under Regulation 30 of CNCE Regulations, 2005 which reads as under :-

> ***"30. Tariff***
> *The tariff for supply of electricity by the plant to a distribution licensee shall be as per Schedule–II of these Regulations.*
>
> *Note:*
>
> *1. The tariff for supply of electricity from the plant, having more than one unit commissioned in different years, shall be based on weighted average of the capacities of the units commissioned in different years."*

17. Vide clarification letter dated 18th April, 2007 issued by the Commission with regards to the weighted average tariffs of the units of power plant commissioned in different areas, it has been clarified as under:-

> *"(6) The sum and substance of said provisions is essentially that there must be agreements for sale of electricity between the parties from units*
> *commissioned in different years and the tariff of such whole of the generating station, with which the agreements have concern, shall be calculated on the basis of weighted average of the capacities commissioned in different years.* ***Therefore, a unit, for which there is a no agreement for sale of electricity between the parties, cannot be considered in calculation of weighted average tariff****."*

18. Thus, it is evident that only the capacity of those units shall have to be considered for determination for weighted average tariff for which there is an agreement for sale of electricity i.e. which are agreed to be supplied as surplus power by way of a power purchase agreement. Clearly, therefore, the units which are not connected to the grid and from which no power is supplied under a PPA, cannot be considered for determination of weighted average tariff.

19. Order dated 26th February, 2008 passed by the Commission itself in Petition No. 493 of 2017 M/s Mawana Sugar Mills Vs. UPPCL and others has been brought to our notice by the Appellant's Counsel wherein the Commission has interpreted the said Regulation 30 as under :-

> *"**6 (b)** Regulation 30 of CNCE Regulations deals with the determination of tariff where there exist more than one unit commissioned in different years in a co-generation plant and states that tariff for supply of electricity by the plant to a distribution licensee shall be as per Schedule – II of these Regulations and the tariff for supply of electricity from the plant, having more than one unit commissioned in different years, shall be based on weighted average of the capacities of the units commissioned in different years. This provision simply means that only that capacity (ies) of unit(s) shall be*

considered for tariff or weighted average tariff which is agreed to be supplied as surplus power in 'power purchase agreement(s)'. ***Hence, the price shall be paid only for the capacity for which the agreement(s) has been reached.****"*

20. It is no where the case of any of the respondents that the existing power plant in the Appellant's sugar mill which is mentioned in the PPA dated 4th January, 2006 as being a capacity of 18.56 MW but is only of the capacity of 7 MW according to the Appellant, is connected to the grid or power is being supplied from the same by the Appellant to any Discom or other consumer by way of a power purchase agreement. Therefore, the same cannot be considered in calculation of weighted average tariff. As a corollary the tariff for the power being supplied from the Appellant's new 25 MW power plant shall have to be calculated as per the provisions of the PPA dated 4th January, 2006 entered into between the Appellant and the 3rd Respondent.

21. It was argued on behalf of the Respondents that the cause of action for filing the petition had arisen in favour of the Appellant firstly in the year 2007 when the bill was raised and it was returned unpaid but the petition was filed in the year 2015 after a delay of 8 years and, therefore, this Tribunal may consider the aspect of delay and latches to

deny any relief sought by the Appellant. On this aspect, we note that the Appellant had been all along following the matter with the concerned authorities who were sleeping over the matter. It was in the month of May 2010 that the executive engineer conducted a physical inspection in the sugar mill premises of the Appellant as directed by the Chief Engineer vide letter dated 9th January, 2008. The inspection was, thus, conducted after a lapse of more than two years which, though, substantiated the contentions of the Appellant yet the disputes was not resolved. Thereafter also, the Appellant kept on corresponding with the officers of 2nd Respondent. Finally, the Superintending Engineer, vide letter dated 2nd July, 2015, also certified that no supply was being injected by the Appellant prior to 3rd January, 2007 at 33.11 KV. However, despite the same, all efforts of the Appellant towards amicable resolution of the dispute were in vain and it was constrained to approach the Commission by way of the petition which has been dismissed by the impugned order. It is a settled principle of law that a period of bonafide negotiations between the parties towards an amicable settlement has to be excluded for the purpose of computing the period of limitation. In this regard, we may, profitably, refer to following observations of the Hon'ble Supreme Court in Geo Miller &

Co. Pvt. Ltd. Vs. Rajasthan Vidyut Utpadan Nigam Ltd., 2019 SCC Online SC 1137 :

> *"28. In Shree Ram Mills Ltd. (supra), this Court found that the parties were continuously at loggerheads over joint development of certain land. They had entered into a Memorandum of Understanding to settle their dispute, however the respondent cancelled this Memorandum; hence the dispute was referred to arbitration under Section 11(6) of the 1996 Act.* ***This Court, upon considering the complete history of negotiation between the parties which was placed before it, on the facts of that case, concluded that the claim would not be barred by limitation as there was a continuing cause of action between the parties****.*
>
> *29. Having perused through the relevant precedents,* ***we agree that on a certain set of facts and circumstances, the period during which the parties were bona fide negotiating towards an amicable settlement may be excluded for the purpose of computing the period of limitation*** *for reference to arbitration under the 1996 Act.* ***However, in such cases the entire negotiation history between the parties must be specifically pleaded and placed on the record. The Court upon careful consideration of such history must find out what was the 'breaking point' at which any reasonable party would have abandoned efforts at arriving at a settlement and contemplated referral of the dispute for arbitration. This 'breaking point' would then be treated as the date on which the cause of action arises, for the purpose of limitation.*** *The threshold for determining when such a point arises will be lower in the case of commercial disputes, where the party's primary interest is in securing the payment due to them, than in family*

disputes where it may be said that the parties have a greater stake in settling the dispute amicably, and therefore delaying formal adjudication of the claim."

22. In the instant case, it was not disputed on behalf of the Respondent that the Appellant had all along been chasing the concerned officers of 2nd Respondent – UPPCL for an amicable resolution of the dispute. It appears that despite the Commission clarifying the ambit of Regulation 30 in the order dated 26th February, 2008 in Mawana sugar case, the officials of 2nd Respondent UPPCL remained adamant and did not accept the genuine contentions of the Appellant which were affirmed not only by the executive engineer in his report dated 23rd May, 2010 but also by the Superintendent Engineer in his letter dated 2nd July, 2015. Therefore, in the light of these facts and circumstances of the case which have remained undisputed, it cannot be said that the Appellant has committed any undue or unreasonable delay in approaching the Commission with its grievance.

Conclusion

23. Hence, in the light of above discussion, the impugned order of the Commission cannot be sustained and the same is hereby set aside. We direct payment of the bills raised by the Appellant w.e.f. April, 2007

as per the tariff provided under the power purchase agreement dated 4th January, 2006 along with carrying cost, within two months from the date of this judgement.

24. However, the following directions issued by the Commission vide impugned order are left untouched :-

> *"Thus, the Commission directs that petitioner and UPPCL to enter into a fresh comprehensive PPA over riding all previous PPAs within one month and put up before the Commission for approval but there shall be no retrospective provisions in the PPA. Till then PPA already signed by the UPPCL and petitioner and approved by the Commission shall remain in force."*

25. Appeal stands allowed albeit to the extent indicated hereinabove.

Pronounced in the open court on this 28th day of April, 2025.

(Virender Bhat)	(Sandesh Kumar Sharma)
Judicial Member	Technical Member (Electricity)

✓

REPORTABLE / ~~NON REPORTABLE~~

Js