

APPEAL No. 147 of 2020

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

ACME Chittorgarh Solar Energy Private Limited
Plot No. 152, Sector 44, Gurgaon,
Haryana – 122002.

... Appellant

Versus

1. Maharashtra Electricity Regulatory Commission
Through: The Secretary
World Trade Centre, Centre No.1,
13th Floor, Cuffe Parade,
Colaba, Mumbai-400005.

2. Maharashtra State Electricity Distribution Company Limited
Through: Chairman/Managing Director
“Prakashgad”, Plot G-9,
Anant Kanekar Marg,
Bandra (East), Mumbai – 400 051. ...Res

...Respondent(s)

Counsel for the Appellant(s) : Ms. Mannat Waraich
Ms. Ananya Goswami
Mr. Mridul Gupta
Ms. Ashabari Basu Thakur

Counsel for the Respondent(s) : Mr. Basava P. Patil, Sr. Adocate
Mr. Shashwat Kumar
Mr. Rahul Chauhan
Mr. Harshit Gupta
Mr. Mukut Choudhary for R-2

JUDGEMENT

PER HON'BLE MR. SANDESH KUMAR SHARMA, TECHNICAL MEMBER

1. The Appeal is filed by M/s. ACME Chittorgarh Solar Energy Private (“ACME”/ “Appellant”) under sub-sections (1) and (2) of Section 111 of the Electricity Act, 2003. The scope of the present Appeal is to challenge the erroneous and impermissible findings and observations of the Maharashtra Electricity Regulatory Commission (“MERC”/ “Respondent Commission”) passed in its order dated 15.06.2020 in Case No. 7 of 2020 (“Impugned Order”).

Description of the Parties

2. The Appellant, i.e., ACME Chittorgarh Solar Energy Private Limited, is a Company incorporated under the Companies Act, 2013. It is a wholly owned subsidiary of M/s ACME Solar Holdings Limited, which is engaged in the business of development, building, owning, operating, and maintaining utility-scale grid-connected solar power projects, and is engaged in the business of generating power. The Appellant is a generating company within the meaning of Section 2 (28) of the Electricity Act, 2003.

3. The Respondent Commission is the Maharashtra Electricity Regulatory Commission, which was established under the provisions of the Electricity Regulatory Commissions Act, 1998, and continues to exercise jurisdiction as the State Regulatory Commission under Section 82 of the Electricity Act, 2003.

4. The Respondent No. 2, Maharashtra State Electricity Distribution Company Limited (“MSEDCL”/ “Respondent No. 2”), is a public sector undertaking of the Government of Maharashtra, and has been created with the principal object of

engaging in the business of distribution of supply of electricity in the State of Maharashtra. The Respondent is a distribution licensee within the meaning of Section 2(17) of the Electricity Act, 2003.

Factual Matrix of the Case

5. The Appellant, ACME Chittorgarh Solar Energy Private Limited, is a Special Purpose Vehicle incorporated by ACME Solar Holdings Limited for setting up a 250 MW Solar Power Project at Badisid Village, Bap Tehsil, Jodhpur District, Rajasthan pursuant to the competitive bidding process initiated by Respondent No. 2, MSEDCL.

6. On 09.04.2018, MSEDCL issued a Request for Selection (RfS) for the procurement of 1000 MW solar power under Section 63 of the Electricity Act, 2003. ACME Solar Holdings Limited was declared successful, and a Letter of Award dated 05.06.2018 was issued in its favour for 250 MW capacity. In terms of the RfS, the Appellant was incorporated and executed a Power Purchase Agreement (PPA) with MSEDCL on 27.07.2018.

7. On 30.07.2018, the Ministry of Finance, Government of India, issued Notification No. 01/2018-Customs (SG) imposing safeguard duty on import of solar cells and modules from specified countries, including China and Malaysia, at rates of 25%, 20% and 15% for successive periods between 30.07.2018 and 29.07.2020.

8. The Appellant imported modules for the Project after 30.07.2018, thereby attracting safeguard duty and incurring additional capital expenditure. The Appellant contends that such imposition of safeguard duty constitutes a “Change in Law” under Article 9 of the PPA as it was introduced after the bid submission

date (08.05.2018) and directly affected project cost. A Change in Law notice was accordingly issued to MSEDCL on 13.09.2018.

9. Earlier, by order dated 15.02.2019 in Case No. 340 of 2018, the Maharashtra Electricity Regulatory Commission (MERC) had held that the safeguard duty notification qualifies as a Change in Law event under the PPA.

10. Thereafter, the Appellant filed Petition No. 7 of 2020 before MERC seeking compensation towards additional capital cost, together with carrying cost, proposing alternative mechanisms of restitution, including lump sum payment with carrying cost, equated monthly instalments, or incremental tariff.

11. MSEDCL, in its reply, did not dispute the applicability of Change in Law but opposed the carrying cost sought at the weighted average rate of 14.25% as per MERC RE Tariff Regulations, contending that the rate applied in the earlier Azure Power case, i.e., late payment surcharge under the PPA, should be adopted as a proxy.

12. By the Impugned Order, MERC held that the Appellant is entitled to compensation on account of the imposition of safeguard duty as a Change in Law event. However, it adopted the principle in the Azure Case and allowed carrying cost only at the rate of 1-year SBI MCLR plus 1.25%, instead of the weighted average rate claimed by the Appellant.

13. Aggrieved by the findings on carrying cost, which, according to the Appellant, do not reconstitute it to the same financial position as mandated under Article 9 of the PPA, the Appellant has preferred the present Appeal.

Our Observations and Analysis

14. The Present Appeal assails the Order of the Maharashtra Electricity Regulatory Commission dated 15.06.2020 in Case No. 07 of 2020.

15. The Appellant, ACME Chittorgarh Solar Energy Private Limited, is aggrieved by the erroneous assumption taken by the MERC while arriving at the rate of carrying cost to be paid to the Developers herein (Appellant) by MSEDCL, Respondent No. 2, the Distribution Licensee operating in the State of Maharashtra.

16. After hearing the contesting parties, the Appellant submitted that the issue is fully covered by the Judgement dated 16.11.2021 passed by this Tribunal in ***Appeal No. 163 of 2020 (Nisagra Renewable Energy Private Limited Vs. MERC & Anr.)***.

17. After detailed consideration, we observed that the decision taken in the aforesaid Judgement applies to the present case also.

18. Accordingly, we decide to pass a similar Judgement in the present case regarding the quantum of carrying cost. Additional observations were made by the contesting parties regarding the quantum of carrying cost, which we decided to leave open to the State Commission to decide under the Remand Proceedings as held in the aforesaid Judgement dated 16.11.2021.

19. The fundamental principle under Change in Law provisions is to restore the affected party to the same economic position as if the Change in Law event had not occurred, which includes the recovery of carrying costs in respect of the additional capital committed. This principle is rooted in the doctrine of restitution and is designed to ensure no undue loss or gain arises from the change in legal or regulatory circumstances.

20. The Judgement dated 16.11.2021 passed in **Appeal No. 163 of 2020 (Nisagra Renewable Energy Private Limited Vs. MERC & Anr.)** is as follows:

“44. It needs to be borne in mind that carrying cost is the value for money denied at the appropriate time and is different from LPS which is payable on non-payment or default in payment of invoices by the Due Date. Payment of carrying cost is a part of the Change in Law clause which is an in-built restitution clause [see Uttar Haryana Bijli Vitran Nigam Ltd. Vs. Adani Power Ltd. (2019) 5 SCC 325]. We are satisfied that carrying costs on the CIL amount should have been on actuals and not the Late Payment Surcharge (“LPS”) rate specified in the PPAs i.e., 1.25% in excess of 1- year MCLR of SBI for the period of 25 years.

...

50. For the foregoing reasons, the impugned order dated 23.07.2020 passed by Maharashtra Electricity Regulatory Commission in case nos. 61 of 2020 and 62 of 2020 to the extent thereby the claims of the appellants for compensation on account of imposition of Safeguard Duty were restricted for a limited capacity of solar modules/panels as against the total installed Direct Current (DC) capacity and the carrying cost was awarded at rate of late payment surcharge under the power purchase agreements is set aside. The denial of full compensation of additional expenditure and other consequential impact suffered consequent upon aforementioned change in law event on actual basis in terms of earlier order dated 18.07.2019 being arbitrary, unjust and bad in law, the State Commission shall be obliged to pass a fresh consequent order on the subject bearing in mind the observations recorded and

conclusions reached above. The Commission shall hear the parties afresh on the subject of carrying cost and decide on the appropriate rate for full recompense on that account after considering the above-noted alternative pleas of the appellants.

51. The issue having persisted for long, we would expect the State Commission to pass the fresh order in terms of above directions expeditiously, not later than six weeks from the date of this judgment. The Commission shall also ensure that the order it passes pursuant to our directions is scrupulously complied with expeditiously and in a time-bound manner and for this purpose shall have recourse to all enabling powers available to it under the law.”

21. The Nisagra Judgment recognizes the difference between carrying cost and late payment surcharge. In that Judgment, we have expressly held that carrying costs should not be restricted to the LPS rate. It underscored that the LPS rate is penal and merely compensates for delay in payment, whereas carrying cost relates to the genuine financing cost borne by the affected party.

22. We are of the view that the Impugned Order, which restricted carrying cost to the LPS rate, fails to appropriately apply the principle of restitution as mandated by the PPA and established precedent. Although the PPA is a contract arising from Section 63 bidding, it does not explicitly prescribe carrying cost at LPS. The Commission’s discretion must be exercised guided by equitable principles as clarified in Nisagra based on prudence.

23. Therefore, the denial to the Appellant of carrying cost at actual financing cost, calculated based on the weighted average cost of capital or annuity rate supported by credible evidence of debt and equity costs, is inequitable and

unwarranted. The matter should be remanded to the State Commission for reconsideration and determination of carrying cost, adhering to this principle.

24. Whence, the issue of carrying cost for the additional capital cost due to the imposition of Safeguard Duty is decided in favor of the Appellant. The State Commission is directed to pass a consequential order under these Remand Proceedings after hearing and giving opportunity to the contesting parties herein. It is also directed to consider the issue on identical grounds as remanded in the ***Nisagra judgment***.

ORDER

For the foregoing reasons as stated above, we are of the considered view that the captioned Appeal No. 147 of 2020 has merit and is allowed to the extent indicated above.

The State Commission is directed to pass a consequential order under these Remand Proceedings after hearing and giving opportunity to the contesting parties herein.

The Captioned Appeal and pending IAs, if any, are disposed of in the above terms.

PRONOUNCED IN THE OPEN COURT ON THIS 15th DAY OF SEPTEMBER, 2025.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member

REPORTABLE / NON-REPORTABLE

pr/mkj/kks