

**In the Appellate Tribunal for Electricity,
New Delhi
(Appellate Jurisdiction)**

**APPEAL NO. 363 OF 2019 & IA NO. 1817 OF 2019
and
APPEAL NO. 364 OF 2019 & IA NO. 1818 OF 2019**

Dated: 29th July, 2020

**Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. Ravindra Kumar Verma, Judicial Member**

APPEAL NO. 363 OF 2019 & IA NO. 1817 OF 2019

In the matter of:

**Haryana Power Purchase Centre
Sector 6, Shakti Bhawan
Panchkula, Haryana 134109**

...Appellant(s)

Versus

**1. Haryana Electricity Regulatory Commission
Through its Secretary,
Bays No. 33-36, Sector 4
Panchkula - 134112
Haryana**

...Respondent No.1

**2. DANS Energy Private Ltd.
Through its Managing Director,
5th Floor, Building No. 8, Tower C
DLF Cyber City, Phase-II
Gurgaon (Haryana) 122002**

...Respondent No.2

**Counsel for the Appellant(s) : Ms.Ranjitha Ramachandran
Ms.PoorvaSaigal
Ms.AnushreeBardhan
Mr.Shubham Arya**

Mr.Arvind Kumar Dubey

**Counsel for the Respondent(s) : Mr.Sandeep Kumar Mahapatra
for R-1**

**Mr. Sanjay Sen, Sr. Adv.
Mr.Anand K. Ganesan
Mrs. Swapna Seshadri
Mr.AmalNairfor R-2**

APPEAL NO. 364 OF 2019 & IA NO. 1818 OF 2019

In the matter of:

**Haryana Power Purchase Centre
Sector 6, Shakti Bhawan
Panchkula, Haryana 134109**

...Appellant(s)

Versus

**1. Haryana Electricity Regulatory Commission
Through its Secretary,
Bays No. 33-36, Sector 4
Panchkula - 134112
Haryana**

...Respondent No.1

**2. Shiga Energy Private Limited
Through its Managing Director,
5th Floor, Building No. 8, Tower C
DLF Cyber City, Phase-II
Gurgaon (Haryana) 122002**

...Respondent No.2

**Counsel for the Appellant(s) : Ms.Ranjitha Ramachandran
Ms.PoorvaSaigal
Ms.AnushreeBardhan
Mr.Shubham Arya
Mr.Arvind Kumar Dubey**

Counsel for the Respondent(s) : Mr. Justine George for R-1

**Mr. Sanjay Sen, Sr. Adv.
Mr. Anand K. Ganesan
Mrs. Swapna Seshadri
Mr. Amal Nair for R-2**

JUDGMENT

PER HON'BLE MR. RAVINDRA KUMAR VERMA, TECHNICAL MEMBER

APPEAL NO. 363 OF 2019

1. Prayer of the Appellant.

- (a) Allow the appeal and set aside the Order dated 08.03.2019 passed by the State Commission in Petition No. HERC-PRO 26 of 2017 to the extent challenged in the present appeal; and
- (b) Pass such other Order(s) and this Hon'ble Tribunal may deem just and proper.

2. Questions of Law:

- (1) Whether the State Commission has the power to unilaterally reopen or amend the terms of the PPA which has been mutually agreed to by the parties and whether the State Commission can force the Appellant to implement such altered or varied terms?
- (2) Whether the State Commission erred in rejecting the provision of the PPA providing for exit option to either party in case the tariff finally determined is not acceptable?

- (3) Whether the impugned order passed by the State Commission is in violation of principles of natural justice?

3. **Brief facts of the Case**

- 3.1 The present Appeal has been filed by Haryana Power Purchase Centre (hereinafter referred to as the “**Appellant**”) under Section 111 of the Electricity Act, 2003 against the Order dated 08.03.2019 (hereinafter referred to as the “**Impugned Order**”) passed by the Haryana Electricity Regulatory Commission in Petition No. HERC/PRO-26 of 2016, whereby the State Commission has directed the amendment of the PPA, negotiated and mutually agreed to by the parties, to delete the clause related to exit option.
- 3.2 The Appellant, Haryana Power Purchase Centre has been designated as the Nodal agency for procurement of power on behalf of the distribution licensees in the State of Haryana, namely Uttar Haryana Bijli Vitaran Nigam Limited (UHBVNL) and Dakshin Haryana Bijli Vitaran Nigam Limited (DHBVNL).
- 3.3 The Respondent No. 1, Haryana Electricity Regulatory Commission (hereinafter referred to as “**State Commission**”) is the Regulatory Commission for the State of Haryana and inter alia regulates the power procurement of the distribution licensees in the State of Haryana.

- 3.4 The Respondent No. 2, DANS Energy Pvt. Ltd. (hereinafter referred to as "Respondent No. 2") is a generating company within the meaning of the Electricity Act, 2003.
- 3.5 The learned counsel appearing for the Appellant submitted that the Respondent No. 2 has established 96 MW (2X48 MW) Jorethang Loop Hydro Electric project at Jorethang, South/West District, Sikkim. The project was allocated to Respondent No. 2 through MoU route and Implementation Agreement was executed on 05.12.2005 with Government of Sikkim.
- 3.6 The Respondent No. 2 approached the Appellant for sale of hydro power from the said Jorethang Project. The Appellant approached the State Commission for approval of the power procurement by filing a Petition under Section 86(1)(b) of the Electricity Act, 2003 being Case No. HERC/PRO-26 of 2017.
- 3.7 The State Commission vide Order dated 13.11.2017 approved procurement of power from the Jorethang Project throughout the year, at a tariff to be determined by the State Commission on a separate Petition to be filed by the Respondent No. 2, with Rs.4.71/kwh being the ceiling tariff for the first 25 years of the PPA and balance 10 years would be at variable cost.
- 3.8 Having approved the purchase of power, the State Commission on perusal of the draft PPA submitted observed that the parties need to revisit the same. The State Commission observed as under:

- a) The Appellant has to ensure that the negotiated price is reasonable and there is no other source of cheaper power:

“.....However, in order to address the issue raised by the intervener, HPPC may ensure that the negotiated price is reasonable and that they would not be able to source power at a rate lower than that of the projects selected by them.”

- b) The draft PPA does not incorporate a number of details and therefore the PPA may be recast and initialled draft PPA by both the parties may be submitted for approval within one month.

3.9 Appellant and Respondent No. 2 further negotiated the terms of the PPA and finalized the draft PPA and submitted the initialled version for approval of the State Commission for procurement of power from JorethangProject on 08.05.2018.

3.10 In the draft PPA, the parties also agreed to an “Exit option” to either party to terminate the PPA in case the tariff determined by the State Commission is not acceptable (Article 3.3.2).

Subsequently Steering Committee of Power Planning (SCPP), Government of Haryana on 15.05.2018, decided to incorporate a time period of 30 days in the exit clause in Article 9.1.3(ii)(b) for the option of termination of the PPA after the tariff determination by the State Commission. The above decision was informed to the State Commission vide Letter dated 04.06.2018.

3.11 There are similar hydro power developers as the Respondent No. 2, who had accepted the same terms of the PPA and for whose PPA approval, the Appellant had filed Petitions before the State Commission. The State Commission on 19.12.2018 Vide Memo 4041/HERC/Tariff directed to submit the acceptance of all the hydro power developers to amend the Article 9.1.3(ii)(b).

Thereafter the issue was considered and it was decided that instead of amending the Article 9.1.3(ii)(b), it would be appropriate to amend the Article 3.3.2 providing for exit option to incorporate the time period of 30 days.

3.12 The definition of wheeling charges was also modified to be aligned with Electricity Act, 2003. Accordingly, the Appellant filed submissions dated 18.02.2019 providing for such amendment along with consent of the Respondent No. 2 dated 15.03.2019.

3.13 The relevant clauses of the amended PPA as agreed to between the parties are as under:

“Wheeling Charges: means the wheeling charges to be paid by the Generator/ Purchaser to STU / CTU as the case may be for transmission of power from Delivery Point to the Purchaser’s State periphery, and to be paid/reimbursed by Purchaser for the capacity of the plant after adjusting the normative auxiliary consumption, transformation loss & free power to the State.”

.....

Clause 3.3.2

The Purchaser/ Company will have the right to terminate this Agreement within 30 days of the order regarding initial

determination of tariff by HERC pursuant to the First Tariff Petition filed by the Company under HERC Tariff Regulations in compliance of condition precedent at clause 3.1.1(ii) of the tariff so determined by the Commission is not acceptable.

.....

9.1 General

9.1.1 the Purchaser shall pay to Company, the payment comprising:

- i. Tariff Payment as mentioned under clause 9.1.2 and*
- ii. Transmission charges (subject to provision of Clause 9.2.5)/ transmission charges paid by Company to STU/CTU, RLDC/SLDC charges or other applicable charges that may be payable by the Company for use of transmission system from delivery point to drawl point of the Purchaser (i.e. CTU substation at Purchaser state periphery) for each month of every tariff Year, determined in accordance with this Clause-9. The actual payment shall be made against the Purchaser Monthly Bills issued by the Company for each Month.*

9.1.2 Tariff:

- i. The Purchaser shall pay to the Company for the energy supplied at the delivery point at a tariff as determined by the Commission from time to time as per the provisions of HERC Tariff Regulations subject to the ceiling tariff approved by the HERC in its Order dated 13.11.2017 in Petition no HERC/PRO-26 of 2017 i.e. Rs. 4.71 / kWh for the entire term of this Agreement. The petition for determination of tariff shall be filed by*

the Company before the Commission as and when required as per HERC Tariff Regulations.

- ii. The tariff at any point of time during the tenure of this Agreement shall not exceed the ceiling tariff of Rs. 4.71 / kWh even as a consequence of any order / intervention of any statutory authority including HERC, CERC APTEL or Court of Law, except for any statutory levies / taxes that may subsequently imposed by the Government which would be reimbursed to the company. Any other increase beyond the ceiling tariff due to any reason including as a consequence of any order/ intervention of any statutory authority including HERC, CERC, APTEL or Court of Law shall be absorbed by the Company.*

.....

9.2.5 No wheeling Charges is applicable for STU of Project State for entire duration of this Agreement as project is directly connected to CTU through dedicated line of the project.”

3.14 On 20.02.2019, the matter was heard by the State Commission. During the hearing no issue was raised by the State Commission or any other person on the terms related to exit option. The State Commission vide Order dated 08.03.2019 did not accept the term related to exit option, held the same to be unprecedented and directed to remove the same.

3.15 The Appellant filed a Review Petition being HERC/RA-6 of 2019 before the State Commission. The State Commission vide Order dated 01.05.2019 dismissed the Review Petition without considering any of the specific issues raised by the Appellant.

3.16 Aggrieved by the Order dated 08.03.2019 passed in Petition No. HERC/PRO-26 of 2017, the Appellant has presented the instant appeal.

4. Submissions of the Appellant

4.1 Appellant has submitted that though there is a reference in Para 13 of the Order dated 13.11.2017 to the PPA entered into between the Appellant and Teesta III Power Project, the same was merely a suggestion for consideration as a template as submitted by the Counsel for the State Commission during the hearing in the present Appeal on 03.12.2019. It cannot be binding on the parties to agree to same terms and conditions, particularly when the PPA of Teesta was entered into much prior in time in 2006. Further in case of Teesta Power, the PPA was entered into prior to the construction of the project and therefore the terms of the PPA need not be the same.

4.2 On the advice of State Commission, the Appellant and Respondent No. 2 negotiated the terms of the agreement and the parties arrived at mutually agreed terms, finalized the draft of agreement and submitted the initialled version for approval of the State Commission for procurement of power. The initialled agreement cannot be said to be a binding contract between the parties.

4.3 One of the terms negotiated and agreed to by both parties was that either party (the Appellant or the Respondent No. 2) would have the right to terminate the agreement in case the tariff as determined by the State Commission is not acceptable. Thus, the

parties agreed to an exit option to be exercised on determination of tariff by the State Commission.

- 4.4 The exit clause was included in order to address the issues of reasonableness of power procurement cost and ensure that the Appellant gets the most economical tariff in the interest of the consumers. The intention was that, on the one hand, the Appellant could terminate the power procurement in case the tariff determined by the State Commission is higher as compared to other power projects which may be available at the relevant time after determination of final tariff by the State Commission and similarly, on the other hand, an option was available to the Generator to terminate the PPA if the tariff so discovered by the State Commission is not acceptable.
- 4.5 The above clause, amongst other things, was included so as to avoid litigation in the matter or any claims of unviability of the project etc. Such an opportunity being granted to both parties is fair and reasonable so that the parties can take an informed decision as to continuation under the PPA.
- 4.6 Such contracts may be considered similar in nature to contingent contracts wherein on the basis of tariff determined by the State Commission, the parties can take an informed decision as to whether the contract is to be continued or not at the said tariff.
- 4.7 The intention of the parties was for such decision to be taken immediately on determination of tariff. However, it was felt that there may be ambiguity since the initial agreement did not

specifically provide for any timeline within which the exit option had to be exercised by either party. The Steering Committee of Power Planning (SCPP) in its 45th meeting held under the Chairmanship of ACS/Power, Government of Haryana on 15.05.2018, decided to incorporate a time period of 30 days for the option of termination of the PPA after the tariff determination by the State Commission so that such option may not in the future be interpreted to be open ended.

4.8 Initially it was proposed that Clause 9.3.1(ii) may be amended to add a requirement of concurrence of both parties to be submitted within 30 days of determination of tariff. However subsequently it was felt that it may be appropriate to provide for an option to either party to terminate instead of a positive requirement of submission of consent. Therefore, if neither party takes any steps to terminate within 30 days of determination of tariff, the PPA would continue.

4.9 Thus, the final Clause 3.3.2 providing for exit option as agreed between the parties read as under:

Clause 3.3.2

The Purchaser/ Company will have the right to terminate this Agreement within 30 days of the order regarding initial determination of tariff by HERC pursuant to the First Tariff Petition filed by the Company under HERC Tariff Regulations in compliance of condition precedent at clause 3.1.1(ii) of the tariff so determined by the Commission is not acceptable.

4.10 In addition, Clause 9.3.1(ii) was to be continued as initially agreed which was as under:

“(b)If the initial tariff determined by the State Commission is not acceptable to the Purchaser/Company and this Agreement is terminated under Clause 3.3.2, no differential shall be paid (i.e. Tariff determined/approved by the Commission over and above the Average Power Purchase Cost) for the power supplied”

4.11 There were also other amendments and the initial agreed terms were thus modified with agreement of the parties. It is submitted that both parties had agreed to the above. There was no issue or objection raised by either party. There is no dispute on the terms of the PPA. The Appellant had first proposed the amendment to Clause 9.3.1(ii)(b) to provide for the positive concurrence of both parties within 30 days of tariff determination and this was put before the State Commission vide Letter dated 04.06.2018.

The State Commission on 19.12.2018 noting the same, had specifically directed for consent of the generators to be placed on record for the amendment by way of introduction of specific timeline of 30 days. Thereafter on consideration, it was felt that the amendment may be made to Clause 3.3.2 to provide that either party may exit within 30 days of tariff determination. The Appellant took the consent of the Generators who agreed to the same. The Appellant, vide Submissions dated 18.02.2019, had enclosed the consent dated 15.02.2019 provided by the Respondent No. 2 consenting to the amended Clause 3.3.2.

4.12 In light of the above factual background, Appellant has submitted that when two parties are agreeable to the terms of the contract, the Court cannot modify the terms and compel the parties to

accept a different contract than what they have agreed to. The parties have the freedom to enter into the contract and cannot be forced to execute a PPA with terms that are not acceptable to them. In this regard, reference may be made to the following:

Gujarat Urja Vikas Nigam Limited v. EMCO Limited and Another
(2016) 11 SCC 182

“29. But the availability of such an option to the power producer for the purpose of the assessment of income under the IT Act does not relieve the power producer of the contractual obligations incurred under the PPA. No doubt that the 1st respondent as a power producer has the freedom of contract either to accept the price offered by the appellant or not before the PPA was entered into. But such freedom is extinguished after the PPA is entered into.”

Pollock and Mulla, The Indian Contract Act & Specific Relief Acts,
Volume 1, Edition 16, Page 248

“[s 10.2] Freedom of Contract

A Contract is a consensual act and the parties are free to settle any terms as they please. This Freedom has been evident in the reluctance of the courts to strike down contracts only on the ground of inequality of bargaining power, in the refusal to imply a term into a contract because it would be reasonable to do so, or in the rules of construction for giving effect to the express terms provided by the parties. This freedom lies in choosing the party with whom to contract, in the freedom to fix the terms of the contract, in excluding or limiting the liability for damages or limiting the remedies available for the breach. The concept of freedom of contract has two meanings. The first is the freedom of a party to enter into a contract on whatever terms it may consider advantageous to its interests, or to choose not to. But it also refers to the idea that as a general rule there should

be no liability without consent embodies in a valid contract.”

Gujarat Urja Vikas Nigam Limited v. Solar Semi Conductor Power Co. (India) P. Ltd (2017) 16 SCC 498 (concurring judgment)

“64. As pointed out earlier, the State Commission has determined tariff for solar power producers vide order dated 29.01.2010 and tariff for next control period vide order dated 27.01.2012. The order dated 29.01.2010 is applicable for projects commissioned from 29.01.2010 to 28.01.2012 and the order dated 27.01.2012 is applicable for projects commissioned from 29.01.2012 to 31.03.2015. As pointed out earlier, the tariff is determined by the State Commission under Section 62. The choice of entering into contract/PPA based on such tariff is with the Power Producer and the Distribution Licensee. As rightly contended by the learned Senior Counsel for the appellant, the State Commission in exercise of its power under Section 62 of the Act, may conceivably re-determine the tariff, it cannot force either the generating company or the licensee to enter into a contract based on such tariff nor can it vary the terms of the contract invoking inherent jurisdiction.”

4.13 The State Commission, as in the present case, could not have unilaterally reopened or amended the Agreement when the parties have mutually agreed to the terms and conditions. The State Commission cannot force the Appellant or Respondent No. 2 to implement such altered or varied terms. The parties had both mutually agreed and the Respondent No. 2 had initialled the PPA and further provided its consent on the direction of the State Commission.

4.14 The State Commission itself had in the Order dated 13.11.2017 directed the parties to negotiate and agree to terms and present initialled PPA to the State Commission. Having directed the parties to negotiate, the State Commission cannot then strike down or alter the terms agreed to by the parties.

4.15 The State Commission has in the Impugned Order directed for deletion of such exit option as under:

“5. The Commission has considered the additional submissions made by HPPC vis-à-vis the signed draft PPA and Order of the Commission dated 13.11.2017, as under: -

a) Clause 3.3.2 & Clause 9.1.3 (ii)(b): The Commission considered the exit clause of 30 days sought in clause 3.3.2 of the PPA. The Commission also observed that the ceiling tariff has already been decided by the Commission in its Order dated 13.11.2017. The generator is already giving power supply at average power purchase cost (APPC) to be adjusted against the final tariff determined by the Commission. Thus, both HPPC and generators have the fair idea of the range within which the tariff determined by the Commission exceeds the ceiling tariff agreed upon, the applicable tariff is to be capped at the ceiling tariff. Thus, retaining unprecedented exit clause is likely to put at risk both the parties i.e. the HPPC regarding quantum of power from the much-needed Hydro sources as well as the generator for their such exit.

In view of the above, the Commission is of the considered view that the exit provision sought in clause 3.3.2 of the PPA is unprecedented. Accordingly, clause 3.3.2 and 9.1.3 (ii) (b) contained in the draft PPA shall be removed. Needless to point out that in case of any difficulty to either party arising from the tariff or for that matter any other dispute, mechanism for seeking relief is available under the relevant clause of the Electricity Act, 2003.”

- 4.16 The State Commission in the Impugned Order has rejected the term on the basis that it is unprecedented. The above cannot be a reason for rejection of a term in the agreement, particularly when the State Commission itself had directed the parties to negotiate the terms vide Order dated 13.11.2017 and 30.11.2017. The State Commission cannot then reject the term on the basis that such term has been introduced for the first time.
- 4.17 The parties may negotiate terms depending on the facts of each case and further there may be new terms introduced with passage of time, in keeping with the practical realities faced by the parties etc. If such conclusion of State Commission is accepted, then there can never be any new term in any agreement and such a conclusion is neither practical nor reasonable.
- 4.18 Even otherwise, the term may or may not be unprecedented. However, the question that the State Commission ought to have answered was as to how the inclusion of such an exit clause was bad in law.
- 4.19 In the impugned order of the State Commission, there is no finding in the Impugned Order that the term is contrary to any law or public policy. It is submitted that the exit clause/terms are not contrary to Electricity Act, 2003 or any other law or Rules or Regulations or even any Order of the State Commission. There is no public policy or otherwise anything unconscionable in the terms of the PPA and this is not the finding of the State

Commission either. Thus, draft PPA would not fall under Section 23 of the Contract Act, 1872 to be considered unlawful.

4.20 It is submitted that the above exit clause does not in any manner affect the exercise of powers of the State Commission in regard to the tariff determination. The Tariff is to be determined by the State Commission (with a ceiling agreed between the parties and approved by the State Commission). However, though the tariff determination is by the State Commission, the parties are at liberty to decide whether to enter into an agreement on the basis of such tariff or not. Neither party can be forced to enter into a contract based on such tariff. This has been specifically held by the Hon'ble Supreme Court in the case of Gujarat Urja Vikas Nigam Limited v. EMCO Limited and Another (2016) 11 SCC 182 and Gujarat Urja Vikas Nigam Limited v. Solar Semi Conductor Power Co. (India) P. Ltd (2017) 16 SCC 498 (as quoted hereinabove).

4.21 Further it is submitted that the exit options in a contract are neither unprecedented nor unreasonable. Reference in this regard may be made to the following:

Central Bank of India v. Hartford Fire Insurance Co. Ltd AIR 1965 SC 1288

"12. We are besides of opinion that there is nothing capricious or unreasonable in Clause 10. The insurer was free at the beginning to decide whether he would agree to indemnify the assured against the risk or not, and if he decided to indemnify, for how long he would indemnify. If the assured cannot compel an insurer to take up a risk, he cannot complain of unreasonableness,

caprice or even abuse of power if the insurer is prepared to take it up only on a condition that he would be free at any time to change his mind as to the future. Furthermore, Clause 10 gives the assured the same liberty to terminate the policy. Besides a term in the form contained in Clause 10 is a common term in policies and must, therefore, have been accepted as reasonable: see MacGillivray on Insurance Law, 5th edition, volume 2, page 963. The Privy Council in Sun Fire Office v. Hart, (1889) 14 App. Cas. 98. held of a clause similar to Clause 10 in the present case that it gave an insurer the right to terminate the contract at will and that there was nothing absurd in such a term. Learned counsel for the appellant sought to distinguish this case from the present on the ground that their previous fires had occurred and anonymous letters had been written threatening continuance of the incendiarism and this made it reasonable for the insurer to terminate the policy. This attempted distinction however is wholly beside the point. The question before the Judicial Committee was not whether a particular termination of a policy was reasonable but of the interpretation of a clause in it. For that question only we have referred to that decision and on it we find that the view taken by us receives full support from the decision of the Judicial Committee. In that respect the two cases are indistinguishable.

.....

17. *The next argument was that Clause 10 was bad as it gave more option to the insurer than to the assured. We express no opinion as to whether the clause would be bad if it did so, for we are clear in our minds that it did not. The argument that it did was based on the use of the word "request" in the case of a termination by the assured and "option" in the case of a termination by the insurer. It was said that the word "request" implied that the request had to be accepted by the insurer before there was a termination whereas the word "option"*

indicated that the termination would be by an act of the insurer alone. We are unable to agree that such is the meaning of the word "request". In our view, the clause means that the intimation by the assured to terminate the policy would bring it to an end without more, for the clause does not say that the termination shall take effect only when the assured's request has been accepted by the insurer."

(Emphasis Supplied)

Her Highness Maharani Shantidevi P Gaikwad v. SavjibaiHaribai Patel and Ors (2001) 5 SCC 101

Relying on the above decision in Central Bank, the Hon'ble Supreme Court held as under:

"56. From the aforesaid, it is clear that this court did not accept the contention that the clause in the insurance policy which gave absolute right to the insurance company was void and had to be ignored. The termination as per the term in the insurance policy was upheld. Under general law of contracts any clause giving absolute power to one party to cancel the contract does not amount to interfering with the integrity of the contract. The acceptance of the argument regarding invalidity of contract on the ground that it gives absolute power to the parties to terminate the agreement would also amount to interfering with the rights of the parties to freely enter into the contracts. A contract cannot be held to be void only on this ground. Such a broad proposition of law that a term in a contract giving absolute right to the parties to cancel the contract is itself enough to void it cannot be accepted."

4.22 The State Commission did not appreciate that it is logical and reasonable that the Appellant has the opportunity to terminate the

PPA in case the tariff determined is higher compared to any other source of power available. This is particularly when the Generator has no objection to such exit option to the Appellant and has agreed to such exit option.

4.23 The State Commission did not consider that the exit option is not left open ended. The option has to be exercised by either party within a specific time line. The implications of such restricted time line of 30 days being provided alleviates the concern of the State Commission as to the risks to either Appellant-distribution licensee and its consumers or the generators. It is not possible for either party to unceremoniously exit the contract at any time during period of contract (32 years 4 months). The exit option is to be exercised within a specific time limit of the tariff determination.

4.24 The intention of the exit clause is not to create uncertainty for the term of the PPA and therefore the time line of 30 days in which option has to be exercised is significant.

4.25 Further the State Commission has erroneously stated that there is a range of tariff. The reliance even on ceiling tariff of Rs. 4.71 per unit is not correct. Merely because the parties had agreed to the ceiling tariff does not mean that the Appellant should be denied the opportunity to terminate the PPA if the tariff is higher. As discovered during earlier rounds, there are hydro power projects which may be more economical than some of the generators. Though the Generator had agreed to ceiling tariff, it is possible that there may be more economical power available than the said tariff. In such cases, it is essential that the Appellant has the

opportunity to decide on whether to procure power from the Generator or not based on the actual tariff determined. This would be in the interests of consumers as the endeavour of the Appellant is to be procure most economical power.

4.26 In fact, even the State Commission had accepted this principle when it had, despite the ceiling, directed the Appellants to ensure that there are no other cheaper power available in Order dated 13.11.2017. Thus, the State Commission had acknowledged that there could be more economical power as compared to the Generators and it is the duty of the Appellant to procure the cheapest power for its consumers.

4.27 The power procurement is regulated by the State Commission to protect the consumer interest which requires procurement of power at the most economical rates. The distribution licensees cannot be compelled to procure higher cost power when cheaper options are available. Therefore, the option given to distribution licensee to decide on procurement from a generator once the tariff to be paid is known, is reasonable and efficient. When the Generator itself had agreed to a specific term in the PPA to ensure reasonable tariff and thereby induce the Appellant to enter into a PPA with it, there is no reason for the State Commission not to accept such term on the basis of any risk to the Generator. The Generator as a business entity has taken a commercial decision to agree to certain terms and conditions and therefore the Generator has to be bound by it.

- 4.28 Similarly, the Generator has the option to terminate the PPA if the tariff determined is not considered to be viable. Again, this option is to be exercised within 30 days of tariff determination. Once this period is over, the Generator is bound by the PPA and cannot then terminate unless as per the specific provisions of the PPA (which provide for termination for certain defaults etc). Therefore, the consumer interest is protected as it is not possible for the Generator to subsequently terminate the PPA at any time on its own whims and fancies.
- 4.29 It is thus submitted that the exit option to be exercised within 30 days of final tariff determination is reasonable and fair to the Appellant and the Generators. At the same time, it does not create uncertainties in the long-term power procurement plan since the option has to be exercised within 30 days of tariff determination and cannot be exercised thereafter. On the other hand, such time bound exit option is a beneficial clause which would save the parties from litigation in case the tariff is not acceptable.
- 4.30 Without prejudice to the above contention that there is no basis to reject the exit option in the PPA, it is submitted that even if State Commission does not approve the terms of the contract or seeks to alter the terms of the contract, the State Commission can only disapprove the terms negotiated by the parties but cannot compel either the Appellant or the Generator to enter into a different contract. Therefore, the direction to the parties to sign the PPA with amended terms is not correct. In this regard, the Hon'ble

Supreme Court in Gujarat UrjaVikas Nigam Limited v. Solar Semi Conductor Power Co. (India) P. Ltd (2017) 16 SCC 498 as under:

“38. Regulation 85 provides for extension of time. It may be seen that the same is available only in two specified situations – (i) for extension of time prescribed by the Regulations and (ii) extension of time prescribed by the Commission in its order for doing any act. The control period is not something prescribed by the Commission under the Conduct of Business Regulations. The control period is also not an order by the Commission for doing any act. Commissioning of a project is the act to be performed in terms of the obligation under the PPA and that is between the producer and the purchaser, viz., the respondent no.1 and appellant. Hence, the Commission cannot extend the time stipulated under the PPA for doing any act contemplated under the agreement in exercise of its powers under Regulation 85. Therefore, there cannot be a extension of the control period under the inherent powers of the Commission”

Concurring Judgment

“60. In the case at hand, rights and obligations of the parties flow from the terms and conditions of the Power Purchase Agreement (PPA). PPA is a contract entered between the GUVNL and the first respondent with clear understanding of the terms of the contract. A contract, being a creation of both the parties, is to be interpreted by having due regard to the actual terms settled between the parties. As per the terms and conditions of the PPA, to have the benefit of the tariff rate at Rs.15/- per unit for twelve years, the first respondent should commission the Solar PV Power project before 31.12.2011. It is a complex fiscal decision consciously taken by the parties. In the contract involving rights of GUVNL and ultimately the rights of the consumers to whom the electricity is supplied, Commission cannot

invoke its inherent jurisdiction to substantially alter the terms of the contract between the parties so as to prejudice the interest of GUVNL and ultimately the consumers.

64. As pointed out earlier, the State Commission has determined tariff for solar power producers vide order dated 29.01.2010 and tariff for next control period vide order dated 27.01.2012. The order dated 29.01.2010 is applicable for projects commissioned from 29.01.2010 to 28.01.2012 and the order dated 27.01.2012 is applicable for projects commissioned from 29.01.2012 to 31.03.2015. As pointed out earlier, the tariff is determined by the State Commission under Section 62. The choice of entering into contract/PPA based on such tariff is with the Power Producer and the Distribution Licensee. As rightly contended by the learned Senior Counsel for the appellant, the State Commission in exercise of its power under Section 62 of the Act, may conceivably re-determine the tariff, it cannot force either the generating company or the licensee to enter into a contract based on such tariff nor can it vary the terms of the contract invoking inherent jurisdiction.

.....

65. It is contended that Section 86(1)(b) of the Act empowers the State Commission to regulate the price of sale and purchase of electricity between the generating companies and distribution licensees and the terms and conditions of the PPA cannot be set to be inviolable. Merely because in PPA, tariff rate as per Tariff Order (2010) is incorporated that does not empower the Commission to vary the terms of the contract to the disadvantage of the consumers whose interest the Commission is bound to safeguard. Sanctity of PPA entered into between the parties by mutual consent cannot be allowed to be breached by a decision of the State Commission to extend the earlier control period beyond its expiry date, to the advantage of the generating company-respondent No. 1 and

disadvantage of the appellant. Terms of PPA are binding on both the parties equally.

.....

68. In exercise of its statutory power, under Section 62 of the Electricity Act, the Commission has fixed the tariff rate. The word 'tariff' has not been defined in the Act. Tariff means a schedule of standard/prices or charges provided to the category or categories for procurement by licensee from generating company, wholesale or bulk or retail/various categories of consumers. After taking into consideration the factors in Section 61(1)(a) to (i), the State Commission determined the tariff rate for various categories including Solar Power PV project and the same is applied uniformly throughout the State. When the said tariff rate as determined by the Tariff Order (2010) is incorporated in the PPA between the parties, it is a matter of contract between the parties. In my view, respondent No.1 is bound by the terms and conditions of PPA entered into between respondent No.1 and the appellant by mutual consent and that the State Commission was not right in exercising its inherent jurisdiction by extending the first control period beyond its due date and thereby substituting its view in the PPA, which is essentially a matter of contract between the parties.”

4.31 The learned counsel appearing for the Appellant submitted that in view of the above, the Appeal may be allowed and the Impugned Orders may be set aside to the extent challenged.

5. Submissions of Respondent No.2.

5.1 Respondent No. 2 has submitted that the parties have agreed on the exit option in Clause 3.3.2 of the PPA, which option is to be exercised within 30 days of the initial tariff determination by the State Commission and if the tariff is not found to be acceptable to the parties.

- 5.2 The only finding of the State Commission in the impugned order is that this clause is unprecedented.
- 5.3 The State Commission has also observed that there is a range for the tariff already provided for, namely the ceiling tariff of Rs. 4.71/- per unit and the tariff presently being paid at APPC, and therefore there is no requirement of any such clause in the PPA.
- 5.4 It is submitted that the above reasoning of the State Commission may not be correct. Firstly, there is no range of tariff that has been provided for. Only the ceiling tariff is provided of Rs. 4.71/- per unit, which has been found acceptable by the Appellant. There is no minimum tariff provided for. The APPC is only an interim tariff provided, which is subject to adjustment upon the final tariff being determined. The final tariff can be higher or lower than the APPC.

By the provision in the Clause 3.3.2, in case the tariff is low and not viable, it gives an option to the answering Respondent to terminate the PPA. Further, in the present case the parties have consciously agreed to revise the open-ended Clause 3.3.2, which provided for termination at any stage without an outer time limit. The present amended Clause 3.3.2 provides that the option to exit shall be exercised within 30 days of the initial tariff determination by the State Commission. Upon the expiry of such 30 days, the option to exit is not available to the parties. In any event, in case either of the parties wrongly exercised the clause or the PPA is exited for extraneous reasons, it is open to the other party to exercise such legal remedies as to be available.

- 5.5 It is submitted that there are no set formats for PPAs to be executed. A particular clause cannot be rejected merely because other precedents are not available for such clauses. Further there is no ideal PPA and it is based on the commercial arrangements agreed to between the parties. Therefore, the decision to approve the PPA with the Clause 3.3.2 may not be treated as a precedent for all cases or applicable to parties who do not agree to such terms.
- 5.6 It is submitted that in the present case, the Clause 3.3.2 was agreed between the parties. While the answering Respondent was and is fine with the PPA either with or without the said clause (as was also the position of the answering respondent before the State Commission), since the Appellant is insisting on the clause to be included in the PPA, there is no difficulty in the PPA being approved and executed by the parties with the Clause 3.3.2.
- 5.7 It is submitted that grave prejudice is being caused to the answering Respondent due to the non-execution of the PPA as agreed to between the parties. In this regard the following are relevant:
- (a) The answering Respondent has already obtained long-term open access from POWERGRID for supply of power. However, pending the formal execution of the PPA by the parties after the approval, the long-term open access is not being permitted to be used for supply of power, even though

the Appellant is paying the long-term access charges as demanded by POWERGRID.

- (b) The tariff petition of the Appellant filed before the State Commission is pending and the State Commission is not proceeding with the said tariff petition till the formal PPA is executed by the parties.
- (c) The answering Respondent has been supplying electricity to the Appellant since May 2018 at the APPC as interim tariff. However, the Appellant has stopped taking supply since 10/10/2019 on the ground that the supply was only provisional, and the firm supply shall begin only after the formal execution of the PPA by the parties.

5.8 The non-execution of the formal PPA and the non-restoration of the power supply at the earliest date may result in the answering Respondent being subjected to insolvency proceedings by its lenders, as the project is presently lying stranded.

5.9 The learned counsel appearing for the Respondent No.2 submitted that in the above circumstances, it is prayed that this Tribunal may approve the PPA with the Clause 3.3.2 as sought for by the Appellant pursuant to which the parties shall forthwith execute the PPA and a power supply shall also forthwith be restored.

6. Submissions for Respondent No.1/the State Commission

RE: POWERS AND FUNCTIONS OF THE HERC

6.1 It is submitted the learned counsel for the State Commission that the answering respondent is a statutory body functioning within the four corners of the provisions of the Electricity Act, 2003. In the present matter the relevant statute occupying the field is reproduced below: -

“ 86. Functions of State Commission

The State Commission shall discharge the following functions,namely: -

(a)XXXXXXXXXXXXXXXXXXXXXXXXXXXX

(b) regulate electricity purchase and procurement process of distribution licensee including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreement for purchase of power for distribution and supply within the State;”

A plain reading of the ibid provision of the Electricity Act, 2003 makes is crystal clear that a statutory duty has been cast upon the answering respondent to regulate the entire gamut of electricity purchase and procurement process. There by a wide power has been bestowed upon the State Regulators with the legislative intention to balance the equity amongst all the stakeholders so that an un-interrupted and reliable power at a reasonable rate is made available to the electricity consumers.

6.2 The Commission, in exercise of powers conferred on it by Section 14 of the Act, grants Distribution and Retail Supply Licence to two Distribution Companies in Haryana i.e. Uttar Haryana Bijli Vitran Nigam (UHBVN) and Dakshin Haryana Bijli Vitran Nigam. The relevant terms of the License are presented below: -

“5. Acts Requiring Prior Consent

5.1 The Licensee shall not do the following activities without the prior approval of the Commission: -

a) purchase or import or otherwise acquire electricity under this License from any Person other than from a Bulk Supplier or generator under the terms of the License/ consent issued by the Commission to the Bulk Supplier or in terms of the power purchase agreement with the generator approved by the Commission and at the tariff approved by the appropriate Commission for such Bulk Supplier or generator”.

It is evident from the above that the power purchase agreement including tariff requires approval of the State Commission.

6.3 Reference to the decision taken in the 45th meeting of the Steering Committee of Power Planning under the Chairmanship of the Addl. Chief Secretary Power, Government of Haryana is irrelevant. It needs to be noted that Independent Regulatory body for power sector was created in India with the primary objective to distance the Government from decision making in the power sector related matters. Hence, as far as the Commission is concerned the Appellant represents the power distribution companies in Haryana i.e. UHBVN and DHBVN who are functioning under the Distribution License(s) issued by the State

Commission and are bound by the Order(s) / Directions of the State Commission within the rules / regulations framed under the Electricity Act, 2003 and Case Laws occupying the field irrespective of the fact that such regulated entities may be hundred percent owned by the Government.

RE: EXIT CLAUSE OPTION

- 6.4 The justification provided for the 'exit option' is un-acceptable as well as un-precedented in the Power Purchase Agreements. As far as the respondent Commission is concerned it has not accorded approval to any such hydro project or for that matter any project with 'exit option' of the nature under dispute.
- 6.5 The powers of the Commission under Section 86 of the Electricity Act ought not to be compromised or usurped by any party albeit with mutual consent as this clause clearly built – in uncertainty regarding the supply of power once the tariff is determined by the State Commission. The capped (ceiling) tariff agreed upon i.e. Rs. 4.71 / kWh is known to the Appellant as well as the power generating company herein. Hence, even if the tariff determined by the Commission under Section 62 of the Electricity Act happens to exceed the ceiling agreed upon by the parties and given approval by the Commission, the tariff payable shall remain Rs. 4.71/kWh i.e. the ceiling tariff. As a corollary, the Appellant herein ought not to pre-judge and insist upon an 'exit clause' as the Commission determines tariff as per its Tariff Regulations and therefore in the process of tariff determination regulatory certainty exists. As far as the generator herein is concerned and in case the tariff determined by the Commission happens to be lower than

the ceiling tariff, the 'exit clause' will only provide them an escape route to discontinue supply.

- 6.6 The source approval for the present Hydro Power was accorded by the Commission as the Commission, on submission of the Appellant herein, was convinced that such power is required to serve the electricity consumers of the State especially during the deficit months when electricity demand exceeds availability/supply tied up on a long-term basis. Hence, retaining an unprecedented 'exit option' will only add to un-certainty in the energy balance of the State.
- 6.7 Further, the Electricity Act, 2003, which a comprehensive Act, has the enabling clause to the aggrieved party to prefer a review petition in the Commission or an appeal in the APTEL in case the party (Appellant / Generator herein) are aggrieved by the Order/tariff determined by the Commission).
- 6.8 Additionally, Section 62 (Tariff Determination) at sub section (6) of the Act provides as under: -
"If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this Section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee".
- 6.9 The law occupying the field is crystal clear that the tariff determined by the Commission shall prevail subject to any Order

passed by the Court / Appellate Tribunal of competent jurisdiction. In order to deal with any differences / dispute that may arise between the Licensee herein (the Appellant) and the Generating Company herein, Section 86 (f) explicitly provides that the Commission has the powers to adjudicate upon the disputed between the licensees and the generating companies and to refer any dispute for arbitration.

6.10 In view of the above, it is respectfully submitted that the law laid down for the purpose ought to take its own course and the contention and the concern of the Appellant that the 'exit clause' will avoid litigation or any claims of unviability is unfounded and needs to be outrightly rejected as for any such (as of now imaginary) eventuality the Electricity Act, 2003 provides remedy.

RE: AMENDMENT TO ARTICLE 9.1.3 (ii)(b)

6.11 It is again a paradox that tantamount to flouting the Order of the Commission i.e. the directive was to amend Article 9.1.3 (ii)(b) instead of complying with the same the Licensee/ Appellant herein, in its own wisdom, considered it appropriate to amend Article 3.3.2 and also obtained the consent of the Generator herein. Hence, taking a unilateral decision as evident from the letter dated 18.02.2019 referred to by the Appellant and the letter reads as under: -

"In this context, it is to submit (sic) that the matter has been deliberated in detail and it has been seen that the clause 3.3.2 needs to be amended for exit clause option without touching the clause 9.1.3 (ii)(b). The same is required to be modified as under:

-"

It needs to be noted that in the ibid letter no approval/ concurrence of the respondent Commission was sought.

6.12 In view of the wide powers and statutory duties cast upon the Commission by the Section 86 of the Electricity Act and all other enabling provision, the Applicant herein has to necessarily obtain approval of the Commission for the proposed source at the regulated tariff. Further, the Commission has to balance the interest of all the stakeholders including the electricity consumers of the State. In case the answering Commission has no powers to amend an agreement signed with mutual consent it would tantamount to reducing the Commission to a “rubber stamp”. Hence, all PPAs submitted to the Commission is scrutinised so that equity is balanced for all stakeholders and accorded approval subject to alteration / amendment / addition / deletion considered appropriate by the Commission. Thus, without the approval of the Commission the PPAs do not attain finality.

6.13 Any clause/ terms of the PPA submitted for approval of the Commission upfront seen as prejudicial to any stakeholder is amended/ modified while according approval to the same. In the present case, the same benchmark was applied as the said dispensation did not balance the risks for all stakeholders including the electricity consumers. Moreover, removing the exit option adds no financial burden to any stakeholder due to the existing ceiling tariff. To the contrary, due to the said clause disruption of energy balance will be at risk the stipulation of 30 days may be too short a period to make alternative long term arrangements for meeting the peak demand.

6.14 The case law as relied upon by the appellant in the present appeal [*Gujarat Urja Vikas Nigam Limited V. Solar Semi Conductor Power Co. (India) P. Ltd*, (2017) 16 SCC 498] is clearly distinguishable on facts and circumstances. In the instant case the respondent Commission is not forcing the Appellant or the generator to enter into a contract. To the contrary, the Appellant herein filed a petition in the Commission under Section 86 (b) of the Act, seeking approval of the source and at this stage conveniently side tracked the said section which clearly uses the term “regulate” which has a very wide connotation and cannot be given a restrictive interpretation. The indulgence of the regulatory authority is required so that the contract of this nature is reasonable and equitable and is necessary to give business efficacy to the contract.

6.15 The present case is not that of adoption of tariff under Section 63 of the Electricity Act i.e. the appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government. Hence, in order to make the proposal workable and competitive, the Commission directed the Applicant to negotiate the ceiling tariff as the project was already commissioned and had suffered time and cost overrun prior to making the offer to the Applicant and hence making the same economical vis-à-vis other sources of such power that may be available. Hence, not according approval to the exit option does, in no way, materially changes the contract as such but only mitigates the risk for all parties in terms of availability of the needed power.

- 6.16 Regulatory regime is a dynamic process and at any stage the parties can approach the Commission during the life of the project in case any new term needs to be added/ deleted or modified or for the matter any dispute arises between the licensee and the Generator. Hence, the inference drawn by the Applicant that “there can never be any new term in any agreement” is absurd and needs to be outrightly rejected. In fact, the Regulations framed by SERC/ CERC can override the terms of concluded PPA or by Order of a Court/ Tribunal of competent jurisdiction.
- 6.17 Moreover, the Applicant is upfront aware that the tariff to be determined by the Commission is subject to the capped rate. Hence, the Commission proceeded on the premise that while submitting the proposal including the capped tariff the Applicant has done detailed due diligence regarding the competitiveness of proposed source at a ceiling tariff of Rs. 4.71 / kWh.

B. APPEAL NO. 364 OF 2019

7. The issues and facts of the case and the submissions of the Appellants in Appeal No. 364 of 2019 are similar to that of Appeal No. 363 of 2019, therefore for the sake of brevity, we shall consider the facts and issues of Appeal No. 363 of 2019 and shall render common judgment.

8. ANALYSIS AND CONCLUSION

8.1 We have heard learned counsel Ms. Rajitha Ramachandran appearing for the Appellants, the learned counsel Mr. Sandeep Kumar Mahapatra and Mr. Justine George for the State Commission and learned senior counsel Mr. Sanjay Sen for the second Respondent at considerable length of time and we have gone through the written submissions carefully and also taken into consideration the relevant material available on records in file.

8.2 The issue raised in the instant appeal is therefore:

“Whether the State Commission can issue directions to amend the PPA which have been mutually agreed to by the parties and force the parties to sign the PPA without their consent.”

8.3 In this Appeal both the parties i.e. the Respondent generator and Appellant agreed to include “Exit Option” in the PPA. As per the exit clause, either party (the Appellant or the Respondent No.2) would have the right to terminate the agreement, within 30 days of the order regarding initial determination of tariff by the State Commission, in case the tariff determined by the State Commission is not acceptable to them. Thus, the parties agreed to an exit option, to be exercised within 30 days, after the determination of tariff by the State Commission.

8.4 The Appellant submitted that the exit clause was included to address the issues of reasonableness of power procurement cost and ensure that the Appellant gets the most economical tariff

in the interests of the consumers. The intention was that, on one hand the Appellant could terminate the power procurement in case the tariff determined by the State Commission is higher as compared to other power projects, which may be available at the relevant time after determination of final tariff by the State Commission. Similarly, on the other hand, an option was available to the generator to terminate the PPA, if the tariff so determined by the State Commission, is not acceptable.

- 8.5 The Appellant and respondent have also submitted that amongst other things, the exit clause was included so as to avoid litigation in the matter for any claims of unviability of the projects etc. Exit clause gave an opportunity to both the parties which is fair and reasonable so that parties can take an appropriate decision regarding continuation of the PPA.
- 8.6 The fundamental thing in a contract/ agreement is the free will/consent of the parties. The parties who are signing the agreement/contract should do so with free will without any compulsion or under any influence of any other party. The parties enter into a contract with open mind, taking care of their commercial interest and all other aspects, as an independent commercial entity without any influence from any third party. In Power Procurement Agreement, tariff is the most important aspect, which in this case is not known initially but will be known only after the same is determined by the State Commission at a later stage. It is because of this reason that the parties have reserved their right, regarding continuation of tariff and have included the exit option to take final decision regarding

termination of PPA, within a period of 30 days after determination of tariff by the State Commission.

8.7 The State Commission was duly informed that the exit clause has been included with consent of both the parties i.e. the Appellant and the Respondent generator.

8.8 The Appellant has also placed reliance on number of judgments as under:

Gujarat Urja Vikas Nigam Limited v. EMCO Limited and Another
(2016) 11 SCC 182

“29. But the availability of such an option to the power producer for the purpose of the assessment of income under the IT Act does not relieve the power producer of the contractual obligations incurred under the PPA. No doubt that the 1st respondent as a power producer has the freedom of contract either to accept the price offered by the appellant or not before the PPA was entered into. But such freedom is extinguished after the PPA is entered into.”

Pollock and Mulla, The Indian Contract Act & Specific Relief Acts,
Volume 1, Edition 16, Page 248

“[s 10.2] Freedom of Contract

A Contract is a consensual act and the parties are free to settle any terms as they please. This Freedom has been evident in the reluctance of the courts to strike down contracts only on the ground of inequality of bargaining

power, in the refusal to imply a term into a contract because it would be reasonable to do so, or in the rules of construction for giving effect to the express terms provided by the parties. This freedom lies in choosing the party with whom to contract, in the freedom to fix the terms of the contract, in excluding or limiting the liability for damages or limiting the remedies available for the breach. The concept of freedom of contract has two meanings. The first is the freedom of a party to enter into a contract on whatever terms it may consider advantageous to its interests, or to choose not to. But it also refers to the idea that as a general rule there should be no liability without consent embodied in a valid contract.”

Gujarat Urja Vikas Nigam Limited v. Solar Semi Conductor Power Co. (India) P. Ltd. (2017) 16 SCC 498 (concurring judgment)

“64. As pointed out earlier, the State Commission has determined tariff for solar power producers vide order dated 29.01.2010 and tariff for next control period vide order dated 27.01.2012. The order dated 29.01.2010 is applicable for projects commissioned from 29.01.2010 to 28.01.2012 and the order dated 27.01.2012 is applicable for projects commissioned from 29.01.2012 to 31.03.2015. As pointed out earlier, the tariff is determined by the State Commission under Section 62. The choice of entering into contract/PPA based on such tariff is with the Power Producer and the Distribution Licensee. As rightly contended by the learned Senior Counsel for the appellant, the State Commission in exercise of its power under Section 62 of the Act, may conceivably re-determine the tariff, it cannot force either the generating company or the licensee to enter into a contract based on such tariff nor can it vary the terms of the contract invoking inherent jurisdiction.”

- 8.9 The learned counsel representing the State Commission has submitted that the Electricity Act, 2003 has conferred power on the State Commission for the determination of tariff. Further, the learned counsel submitted that the Distribution company has to take approval of the State Commission in regard to power procurement.
- 8.10 While there are no disputes about the powers of the State Commission as provided in the Electricity Act, 2003 and instant regulations on the subject, however, while exercising its powers the State Commission has to examine the PPA submitted to it from all angles of law. While examining the PPA, the State Commission has to not only ensure that the PPA is as per the Electricity Act and Regulations but also to ensure that it is by free will or consent of the parties. On the contrary, the State Commission by giving the direction to delete the 'Exit Option', mutually agreed between the parties, has conveyed that irrespective of the fact whether the parties are satisfied or not satisfied with the tariff determined by the State Commission, they will have to continue with the PPA.
- 8.11 No doubt that the tariff will be determined by the State Commission only but, the final decision regarding signing of Power Purchase Agreement on the basis of tariff determined by the State Commission lies with the parties only. It is a commercial decision and the parties will take an independent decision taking into consideration their commercial interest in the long term during the tenure of the PPA without any influence from third party. This is an utmost important aspect. As such though the

State Commission in exercise of its power under Section 62 of the Electricity Act, 2003 may determine the tariff but it cannot force either the generating company or the licensee to enter into a contract based on such tariff against their will/ consent and cannot give direction to change the terms of the contract invoking inherent jurisdiction.

8.12 The Appellant have also submitted that exist option will avoid unnecessary litigation which is likely to arise if the parties are not satisfied with the tariff determined by the State Commission as it is essential, for the continuation of the PPA, that it should be consented by both the parties of the PPA. For the sake of arguments, we may also visualise scenario, that suppose the tariff so determined by the State Commission is not acceptable to either of the party, in that event, can the State Commission force the parties to keep the PPA continuing, against the will of the parties to the contract. Such continuation of the PPA will be wrong and against the concept of the contract.

One may argue that if such 'exit' clause exists, there is no certainty so far as procurement of power. Uncertainty cannot be the problem for the simple reason that the 'exit' clause in question gives power to either of the parties to go back on the contract only within a period of 30 days that too if they are not satisfied with the tariff fixed by the concerned Commission. Therefore, we are of the opinion that the 'exit' clause in question do not affect the contract throughout the term of the contract.

8.13 We find that the State Commission while exercising its powers conferred to it under law has not examined the PPA submitted by the parties from all angles of law. In this case, the State Commission was fully aware that the parties have mutually agreed to include “Exit clause” but it has ignored this important aspect and directed to amend the PPA by deleting the “Exit clause”. Accordingly, we are of the considered opinion that the direction passed by the State Commission in the impugned order regarding the deletion of exit option is bad in law and thus is wrong.

ORDER

Having regard to the facts and circumstances of the case as stated above, the Appeal No. 363 of 2019 and Appeal No. 364 of 2019 filed by the Appellant(s) are hereby allowed.

The Impugned Orders dated 08.03.2019 passed in Petition No. HERC/PRO-26 of 2016 and Petition No. HERC/PRO-25 of 2017 by the first Respondent/the Haryana Electricity Regulatory Commission to the extent challenged in the instant appeal is hereby set aside.

The matter stands remitted back to the first Respondent/the Haryana Electricity Regulatory Commission with the direction to pass the order afresh, in the light of the observations made in the preceding paragraphs above, in accordance with law as expeditiously as possible within a period of three months after receiving the copy of this judgement.

The Appellant and the Respondents are hereby directed to appear before the 1st Respondent/the State Commission personally or through their counsel on 21.08.2020 without further notice.

Accordingly, the Appeals are disposed of. Consequently, pending IAs, if any, shall stand disposed of.

No order as to costs.

Pronounced in the Open Court on this 29th day of July, 2020.

(Ravindra Kumar Verma)
Technical Member

√

REPORTABLE/NON-REPORTABLE

(Justice Manjula Chellur)
Chairperson

mk