

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

COURT-II

**APPEAL NO. 251 OF 2021 &
IA NO. 1223 OF 2021**

Dated: **12.10.2021**

Present: **Hon'ble Mr. Justice R.K. Gauba, Judicial Member**

Hon'ble Mr. Sandesh Kumar Sharma, Technical Member

In the matter of:

GREEN INFRA RENEWABLE ENERGY LIMITED

5th Floor, Tower-C, Building No. 8

DLF Cyber City,

Gurugram Haryana-122002

pankaj.kapoor@sembcorp.com

.... Appellant(s)

VERSUS

1. RAJASTHAN ELECTRICITY REGULATORY COMMISSION

[Through its Secretary]

Vidhyut Viniyamak Bhawan

Sahakar Marg, Near State Motor Garage

Jaipur, Rajasthan 302001

recjpr@yahoo.co.in

2. RAJASTHAN URJA VIKAS NIGAM LIMITED

[Through its Chief Engineer]

Vidyut Bhawan

Jan Path, Jyothi Nagar, Lalkothi

Jaipur, Rajasthan 302005

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3. SOLAR ENERGY CORPORATION OF INDIA LIMITED

[Through its General Manager (C & P)]

6th Floor, Plate-B

NBCC Office Block Tower-2

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sanjaysharma@seci.co.in

4. ALJOMAIH ENERGY AND WATER INDIA PRIVATE LIMITED

[Through its Authorized Representative]

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5. **NTPC LIMITED**
[Through its Authorized Representative]
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7, Institutional Area, Lodhi Road
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..... Respondents

Counsel for the Appellant (s) : Mr. Sajan Poovayya, Sr. Adv.
Mr. Vishrov Mukerjee
Mr. Rohit Venkat

Counsel for the Respondent (s) : Mr. Anand K. Ganesan
Mr. Ashwin Ramanathan for R-2
Mr. M.G. Ramachandran, Sr. Adv.
Ms. Poorva Saigal
Ms. Tanya Sareen
Mr. Ravi Nayar
Ms. Srishti Khindaria for R-3
Ms. Mannat Wariah
Ms. Pratiksha Chaturvedi for R-4

J U D G M E N T

PER HON'BLE MR. JUSTICE R.K. GAUBA, JUDICIAL MEMBER (ORAL)

1. This matter has been taken up by video conference mode on account of pandemic conditions, it being not advisable to hold physical hearing.

2. The appeal at hand challenges the Order dated 23.07.2021 of the respondent, Rajasthan Electricity Regulatory Commission (in short, "RERC" or "State Commission") in Petition No. 1905/MP/2021 whereby while adopting tariff for Grid-Connected Solar PV Power Projects in Rajasthan (Tranche-III) it declined to entertain the prayer of the appellant for declaration as to the right to be compensated on account of

Force Majeure and *Change in Law* events that had statedly occurred after the bid deadline i.e. 28.10.2021 observing, in that context, that the parties are at liberty to file a fresh petition to raise such issues “*at appropriate time*”, for the reason, the Commission had deemed it appropriate “*to not look into the merits of the issues*” in the present proceedings.

3. With the consent of the parties, we have taken this appeal for final hearing at this stage, the pleadings having been completed.

4. The background facts need to be noted only briefly for present discussion and in the light of the decision that we proceed to take in this appeal.

5. On 16.07.2020, Solar Energy Corporation of India (SECI) had issued RFS No. SECI/C&P/SPD/RfS/RJ-III/002020 (RFS) for selection of Solar Power Developers for setting up of 1070 MW Grid Connected Solar PV Power Projects in Rajasthan (Tranche-III) under Tariff based Competitive Bidding. On 28.12.2020, the appellant was declared by SECI as the successful bidder and Letter of Award (LOA) for 400 MW for the development of solar power project, generation, and sale of solar power under the RFS was issued in its favour. The appellant addressed

certain communications in February/March 2021 to Rajasthan Renewable Energy Corporation Ltd (RREC), *inter-alia*, stating that the project had been granted Registration No S/2019/0074 by it, and it was to be constructed under certain rigid timelines, the request being to recommend its case to Rajasthan Rajya Vidyut Prasaran Nigam Limited (RVPNL) for conveying approval for power evacuation for the project at 220KV level to RVPNL 400/220KV Jaisalmer II Substation.

6. On 04.03.2021, the respondent SECI and the appellant executed the Power Purchase Agreement (PPA) pursuant to the RFS and LOA issued by SECI for a period of 25 years from the Scheduled Commissioning Date (SCOD), the effective date having been indicated in the PPA as 27.01.2021.

7. The Rajasthan Urja Vikas Nigam Limited (RUVNL), the beneficiary/procurer under the PPA, moved the RERC by Petition No. RERC-1905/MP/2021 for adoption of the tariff for 1070 MW Solar PV Power under Section 63 of the Electricity Act, 2003 impleading, *inter-alia*, the appellant herein as one of the respondents. The said petition was decided by the impugned Order dated 23.07.2021 whereby the Commission has recorded satisfaction that the bid discovered tariff merited acceptance and adoption in as much as the process undertaken

was in accord with the guidelines issued by the Central Government, the process undertaken being transparent.

8. In the run-up to the impugned decision, certain events had occurred in which regard the appellant had engaged the other relevant parties in exchange of correspondence, the claim being that the events in question qualified as *change in law* or *force majeure* on which account the bid discovered price required to be suitably revised such that the appellant was duly compensated on such account. The events which were mentioned in that context included the following:

- (i) Increase in rates of Basic Customs Duty on import of Solar Inverters pursuant to Ministry of Finance Notification No. 07 /2021-Customs dated 01.02.2021 whereby custom duty exemption notification no. 1/2011 dated 06.01.2011 has been rescinded;
- (ii) Levy of Basic Customs Duty on import of Solar Cells, Modules/Panels pursuant to Ministry of New and Renewable Energy Office Memorandum dated 09.03.2021;
- (iii) The direction issued by Hon'ble Supreme Court of India by its Order dated 19.04.2021 in Writ Petition (Civil) No. 838 of 2019 titled *M.K. Ranjitsinh & Ors. v. Union of India & Ors.* in terms of which all existing and future overhead low and high voltage power lines in the Priority and Potential habitats of Great-Indian Bustard are necessarily required to be laid under-ground;

- (iv) Imposition of lockdown on account of Covid-19 by the Authorities in the Government of Rajasthan; and
- (v) Strike by Patwaris in Rajasthan from 15.01.2021 it having continued till last week of April, 2021 disrupting ongoing project work.

9. According to the case of the appellant, the claims of compensation with reference to the imposition of lockdown during pandemic and strike of Patwaris were to be treated as *force majeure* events, the other three events having been pressed as *change* in law events.

10. The State Commission, by the impugned order, declined to grant any relief in above nature and closed the proceedings by the impugned order leaving the appellant to approach it again after adoption of tariff on the tentative view that at the stage of adoption of tariff, the Commission could only examine whether the competitive bidding process under Section 63 of the Electricity Act, 2003 was in accord with the guidelines issued by the Government of India and whether the process was held in a transparent manner.

11. The appellant is aggrieved by the summary rejection of its claims in the nature above mentioned on the grounds that no reason or

rationale has been set out in the impugned order for disinclination expressed by the Commission to grant the necessary relief at the stage, the approach taken having the effect of forcing the parties into multiplicity of proceedings, the Commission having ignored the express terms of Article 12.1.3 of the PPA in terms of which change in basic customs duty has to be considered (and if found) to be a change in law event, an approval accorded even at the time of adoption of tariff. It is the submission of the appellant that adoption of tariff and approval of change in law are both responsibilities of the State Commission in exercise of its Regulatory Powers under Section 86(1)(b) of the Electricity Act, 2003. It is contended that the events having occurred after the bid deadline and before adoption of tariff, the proper stage for their consideration was in the same proceedings wherein the bid discovered price was being adopted.

12. The learned senior counsel for SECI fairly conceded that it was incumbent on the part of the State Commission to consider the claim on account of change in the basic customs duty on inverters in terms of the provision contained in Article 12.1.3 in the very Order whereby the bid discovered price was being considered for adoption. It was, however, submitted that rest of the claims, particularly those claimed under the *force majeure* clause of the PPA, could not have been pressed at the

stage of adoption, it being not yet clear at such stage as to whether such changes will impact the financial burden of the project developer (the appellant herein).

13. During the course of hearing, the learned senior counsel for the appellant fairly agreed that the two claims on account of *force majeure* events will have to be pursued, pressed by the project developer and considered by the State Commission at a later stage in as much as that would require presentation of detailed facts and consideration of the relevant data, etc. In this view, he restricted his grievance in this appeal to the non-consideration of the three *change in law* events, mentioned earlier.

14. It is fairly conceded that Articles 12.1 and 12.2 of the PPA define the scope and import of the expression “*Change in law*” and set out the detailed procedure for claiming relief on its basis.

15. As was pointed out by learned senior counsel arguing for the appellant regulatory certainty is essential for a project developer, as indeed for the other stakeholders in such projects [*APTEL’s judgment dated 28.08.2020 passed in Appeal nos. 21 of 2019 and 73 of 2019 – Talwandi Sabo Power Limited v Punjab State Electricity Regulatory*

Commission & Anr. and Appeal no. 73 of 2019 – Nabha Power Limited v The Secretary, Punjab State Electricity Regulatory Commission & Anr].

16. During the hearing, we pointedly asked but no regulation or contractual clause or, for that matter, any other provision was shown as could reflect an inhibition or prohibition against consideration of claim of *change in law* compensation at the stage of adoption of the tariff discovered by the bid process under Section 63 of the Electricity Act, 2003. We agree with the appellant that deferring such claim for later date creates a whole lot of confusion and, what is of utmost concern to the project developers, regulatory uncertainty and consequent difficulties in attaining financial closure. It cannot be ignored that the impact on the cost of the development of the project of such *change in law* events that have occurred after the submission of the bid and closure of the bid process but before the adoption of the bid discovered price renders the bid price unrealistic and in terms of Section 86 (1) (b) of the Electricity Act, it is the duty of the State Commission to inquire into such claim at the first opportune time and bring in suitable corrections, may be first by declaration and followed up by detailed tariff orders. If the event referred to actually constitutes change in law within the four corners of its definition under the PPA, there is no reason why it cannot be duly recognized as a change in law at the stage of tariff adoption, the actual

impact and extent of the relief admissible to be determined at the appropriate stage.

17. For the forgoing reasons, we allow the appeal finding the impugned order to be an adjudication that is incomplete and proceedings wherein the appellant had sought the above-mentioned declarations having remained inchoate. The State Commission is directed to hear the parties further in the light of the above observations and pass further orders specifically in relation to the three *change in law* event claims presented by the appellant, rendering its decision as expeditiously as possible, preferably within two months from today.

18. The appeal stands disposed of in above terms. The pending application is rendered infructuous and is disposed of accordingly.

(Sandesh Kumar Sharma)
Technical Member

pr/vt

(Justice R.K. Gauba)
Judicial Member