

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

**APPEAL NO. 159 OF 2015&
IA NO. 255 OF 2015**

Dated: **19.04.2022**

Present: **Hon'ble Mr. Justice R.K. Gauba, Officiating Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member**

In the matter of:

SRI AVANTIKA CONTRACTORS (I) LIMITED

401 A Wing, Door No 6-3-352/2&3,
Astral Heights Complex,
Banjara Hills, Road No 1,
Hyderabad – 500034

... Appellant

VERSUS

1. BIHAR ELECTRICITY REGULATORY COMMISSION

Vidyut Bhawan – II
Jawahar Lal Nehru Marg,
Patna 800021

2. BIHAR STATE POWER HOLDING COMPANY LTD

Vidyut Bhawan – I
Jawahar Lal Nehru Marg,
Patna 800021

**3. NORTH BIHAR STATE POWER DISTRIBUTION
COMPANY LIMITED**

Vidyut Bhawan – I
Jawahar Lal Nehru Marg,
Patna 800021

4. ENERGY DEPARTMENT

Government of Bihar
Vidyut Bhawan, Bailey Road
Patna – 800 001

5. STATE INVESTMENT PROMOTION BOARD

Department of Industries
Government of Bihar
Udyog Mitra, Ground Floor,
Indira Bhawan, RCS Path,
Patna – 800 001

... Respondents

Counsel for the Appellant (s) : Mr. Vishal Gupta
Mr. Divyanshu Gupta

Counsel for the Respondent (s) : Mr. Ravi Kishore for R-1
Mr. Shri Venkatesh
Mr. Ashutosh Srivastava
Ms. IsnainMuzamil for R-2/BSPHCL

J U D G M E N T (Oral)

PER HON'BLE MR. JUSTICE R.K. GAUBA, OFFICIATING CHAIRPERSON

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 assailed the Order dated 06.05.2015 passed by the Respondent *Bihar Electricity Regulatory Commission* (hereinafter variously referred to as “BERC” or “the State Commission” or “the Commission”) in Petition No. 7 of 2015 which had been presented by the appellant (M/s. Avantika Contractors India Limited), whereby the prayer for extension of time for achieving the *Commercial Operation Date* (COD) was declined. It may be mentioned here itself that by virtue of the impugned decision of the Commission, the Appellant lost the right to be paid levelized tariff of Rs. 10.90/kWh as would have been applicable if its prayer for extension of COD had been accepted, the COD concededly having been achieved on 31.01.2016, admittedly beyond the stipulated date of 31.03.2015, it being the contention of the appellant that the entire delay was attributable to the Second Respondent. i.e. *Bihar State Power Holding Company Limited*, it being the procurer acting for and on behalf of Distribution Licensees operating in the State of Bihar (hereinafter referred to as “the Procurer”).

3. The Solar Power Project developed by the Appellant is admittedly covered by State Policy on the subject of Solar Power and Rooftop Power Projects which had been promulgated on 24.06.2011. The appellant (Project Developer) and the second respondent (the Procurer) had entered upon a *Power Purchase Agreement* (PPA) on 01.03.2013. Some of the provisions of the State Policy, which were expressly referred to in the PPA, need to be taken note of. The same read as under:

“4.2 Grid interfacing and evacuation arrangement

4.2.1 The project developer shall necessarily offer to supply to Bihar State Electricity Board (BSEB)/ Distribution Licensee a minimum of 25% of power generated from the respective New and Renewable Energy project, except for captive projects, However, the acceptance of such offer for supply of power shall be at the sole discretion of BSEB/ Distribution Licensee.

4.2.2 The sale of power from such generation project to the grid or using the grid for wheeling of power the third parties will require the project developer to design and construct the system at its own cost, such that interfacing with the State grid/BSES grid is done as per the latter's specifications & requirements/Indian Electricity Grid Code/Bihar Grid Code as applicable and amended from time to time.

4.2.3 The capital cost of transmission system for evacuation of power to the nearest grid/ sub-station including all metering & protective instruments shall be borne by BSEB, which shall be reimbursed to BSEB by the State Government, provided that the project developer offer to supply BSEB/Distribution Licensee at least 50%, subject to a minimum of 2 MW of power generated from New and Renewable Energy projects. Else the entire project cost of transmission system for evacuation of power to the nearest grid/ sub-station including all metering & protective instruments shall be borne by the project developer.”

...

5.6 Loans as per guidelines and incentives or schemes of the Government of India and or Government of Bihar, India Renewable Energy Development Agency (IREDA) and Ministry of New and Renewable Energy Govt. of India (MNRE) will be offered/ available for proposal of power generation through New and Renewable Energy Sources.

4. Some of the crucial clauses of the PPA dated 01.03.2013 are as under:

“1.1.0 Sale of Energy by Company:

BSP(H)CL shall purchase and accept all energy contracted as per para 1.1.2 of the PPA with the developer which is made available at the Delivery point of BSP(H)CL from the Company’s facility, pursuant to the terms and conditions of this agreement. The purchase of power by BSP(H)CL/distribution Licensee(s) from Solar Generation Plant (Solar PV /Solar Thermal) established in the state of Bihar will be at the Generic Levelled tariff and other terms and conditions for Solar PV and Rooftop Solar PV and Solar Thermal project(s) determined by BERC vide order dated 29th May 2012 passed in Petition no. 12/2012 for the project which are commissioned during the Control period i.e. up to 31st March 2015 and for which PPA is signed up to 31.03.2013.

...

Further, the provisions of the “Bihar Policy for Promotion of New and Renewable Energy Sources 2011” issued vide memo no. 2845 dated 24.06.2011 by the Energy Department, Govt. of Bihar or as amended time to time by Govt. of Bihar will prevail before and after signing of the PPA by BSP(H)CL with Project developer.

...

1.1.3 Grid Interfacing and Evacuation Arrangements:

(a) xxx

(b) The Grid Interfacing and Evacuation Arrangement shall be done as per provision of Clause 4.2.2 & 4.2.3 of the “Bihar Policy for promotion of New and Renewable Energy Sources-2011” notified by Govt. of Bihar vide Resolution no. Pra 02/BREDA Apra Niti-11/08/2845 dated 24.06.2011 or amendment in the policy made by the State Government time to time shall also prevail for the project before and after signing of PPA.

...

1.8.1 *The project shall achieve the activity milestone within the time period as defined under Clause 4.4.1 “Bihar Policy for promotion of New and Renewable Energy Sources-2011” or as amended time to time. SIPB may extend the time schedule for commissioning and provide new time schedule for the project under provision of Clause 4.4.3 of the “Bihar Policy for promotion of New and Renewable Energy Sources-2011” or as amended time to time.*

...

5.3.0 ...

However, in case of supply of at least 50% power, subject to minimum 2 MW of power generated from solar generating plant (Solar PV/Thermal), the capital cost of the transmission system for evacuation of power to the nearest grid/substation including all metering & protective instruments at BSP(H)CL end shall be borne by BSP(H)CL.

...

26.0 **APPROVALS:**

26.1 *Wherever either BSP(H)CL or Company approvals are required in this agreement, it is understood that such approvals shall not be unreasonably withheld.”*

5. The capacity for which the Power Project was developed by the appellant is stated to be 5MW, which in entirety is committed to be supplied to the second respondent by the PPA. In this view, there can be no dispute as to the fact that the capital cost for the evacuation infrastructure was to be borne by the State Government, which was to be reimbursed to the second respondent, there being no contractual obligation on the part of the appellant for any role to play in such regard. The State Policy had also assured, by clause 5.6, that arrangement of requisite funds from the concerned agencies including IREDA, MNRE, etc. would also be facilitated. This, when seen in the light of clause 26, does confirm the mutual understanding that the second respondent, the intended beneficiary, was

under obligation to cooperate with the appellant in arranging the requisite funding.

6. It may be mentioned here itself that by virtue of the provisions of the State Policy and the PPA, the appellant was to be entitled to the aforementioned levelized tariff of Rs. 10.90/kWh provided it met the requirement of execution of PPA by 31.03.2013 and achieved COD by 31.03.2015. It is not in dispute that by virtue of subsequent Tariff Order dated 07.04.2015 for the control period FY 2015-16, the levelized tariff had come down to Rs. 7.69/kWh which was further reduced to Rs. 7.02/kWh by Tariff Order dated 29.02.2016 for control period FY 2016-17.

7. There were delays in the execution of the Project and attainment of the COD by 31.03.2015. It has been the case of the appellant that it had been granted extension by Department of Energy of the State Government and State Investment Promotion Board (SIPB) to the extent of three months and further that it was ready for commissioning by 30.06.2015. It explains the delay in achieving the COD by 31.01.2015 by attributing certain acts of commission or omission to the second respondent. It is in that context that it was constrained to approach the State Commission by Case no. 7 of 2015 in which the Impugned Order was passed, the prayer pressed being for grant of extension. The case was contested by the second respondent. Though a number of grounds were taken, for present

purposes two of them stand out for our scrutiny and comment, which we note at this stage.

8. It has been the contention of the appellant that it had approached IREDA for grant of loan facility for funding the project. IREDA had insisted on certain arrangement for securing the repayment of the said loan, it having approached the second respondent, *inter alia*, by a letter dated 11.08.2014 seeking the undertaking to be given, in terms of which the procurer would be obliged to open a bank account wherein the payments due for supply of electricity received would be deposited so that the loan repayment was ensured. The undertaking was given by the second respondent in a leisurely manner by its letter dated 05.12.2014. This, in submission of the appellant, caused unreasonable delay in proper progress being made in development of the project.

9. The other ground which is agitated with force is lack of the effort on the part of the second respondent to create the evacuation infrastructure. It appears that though under the contractual arrangement, it was not the responsibility of the project developer to create the requisite evacuation facility, it was asked to undertake the said work as well by the second respondent. No doubt, under the State Policy, the funding was to come eventually from the Government but then it was the second respondent which had asked the appellant to do the necessary work on its behalf and, therefore, money had to flow for such purpose to the appellant from the

second respondent, whether upfront or by way of reimbursement. It appears that reimbursement was the course chosen but before the appellant could incur such expenditure for and on behalf of the second respondent at whose instance it was undertaking the said additional work, it required appropriate approvals of the estimates given. On this subject, the appellant has shown from the record a number of letters exchanged beginning with letter dated 19.03.2014 and eventually culminating in letter dated 31.08.2015 whereby the second respondent granted the approval to the estimates for evacuation infrastructure to come up through the efforts of the appellant.

10. Even while the evacuation infrastructure was not in position, the petition of the appellant for extension of time had come up before the State Commission when it rendered the impugned decision of 06.05.2015. On the issue of lack of evacuation infrastructure and the difficulties in arranging funds for reasons of non-cooperation by the second respondent, this is what the State Commission observed:

“4.2.3 The Commission has considered various reasons for delay submitted by the petitioner and views that:

- 1. The issue of erection of transmission and evacuation arrangement and interpretation of clause 4.2.3 of Bihar Policy for Promotion of New & Renewable Energy Sources, 2011 is an exercise which could have been done simultaneously as a parallel activity along with the erection of the power plant at site. The exercise of seeking interpretation of clause 4.2.3 of the Bihar Policy, 2011 regarding funding of evacuation infrastructure did not prevent the petitioner in any way from erecting the Power Plant. Since the project is not*

ready for evacuating power, in spite of delay in construction of evacuation system, petitioner cannot blame others for the delay in plant erection.

2. *Petitioner has also raised the issue of funding of the project. Mobilisation of necessary funds for the project is necessarily the responsibility of the project developer and not so much of the respondent BSPHCL. Still meeting of Bankers and Solar Power Developers was called by BSPHCL and they interacted with various financial institutions of finance the projects in Bihar. This reason cannot be said to be beyond the control of the petitioner.*

...”

11. The contentions of the appellant as to justification for delay having been thus rejected, the petition was disposed of by the following observations:

“10. Extension of control period for the project of the petitioner at a levelled tariff of Rs. 10.90/kwh will amount to giving undue benefit to the petitioner and to abuse of the process of the Commission. Therefore, the Commission does not find any justification for extending the control period for the project of the petitioner.”

12. We find the approach of the State Commission wholly unfair. It has not examined the extensive material on record which indicated that the second respondent (the procurer for the state licensees) had failed to live up to its obligations under the contract to create the requisite infrastructure for evacuation of the power that was expected to be generated by the Solar Power Project of the appellant in time. In fact, it dragged its feet for reasons which have not been explained, even at a time when the estimates were being drawn up. Obviously, the appellant could not have been expected to incur on such infrastructure without such approvals because it was doing it

for and on behalf of the procurer from whom the requisite corresponding reimbursement would come. Any expenditure incurred on its own initiative would have put its funding to undue risk. The second respondent has not been able to explain the delay even in cooperating with the appellant in procuring its own funding from the State Agency (IREDA) for the development of the power project itself. In a contractual arrangement of this kind, wherein time was of essence, prompt responses to such requests were expected. We find the explanation offered that the second respondent was a government agency and had to internally examine each proposal at various levels which was a time-consuming exercise to be a specious explanation which must be rejected.

13. The Commission having failed to subject the prayer for extension of time to proper scrutiny, side-stepping the need for the scrutiny of the conduct of the second respondent as was necessary, has acted even more unfairly during the pendency of this appeal. We must revert to this aspect at this stage.

14. We recall that, by the impugned order dated 06.05.2015, the prayer for extension of COD had been rejected. The Commission had vaguely observed that the tariff would be applied as was in force for the corresponding control period in which the COD was achieved. In the result, the COD having been achieved subsequently on 31.01.2016, by virtue of the Impugned Order the appellant was entitled to the levelized tariff of Rs.

7.69 /kWh for the control period that immediately followed (i.e. FY 2015-16). Yet, the second respondent having called upon the appellant to execute the amended PPA by its letter dated 24.05.2016 started hedging on the rate of tariff payable under the amended PPA it taking the position that the further reduced tariff of Rs.7.02 /kWh which had been brought in force by subsequent order dated 29.02.2016 for FY 2016-17 would apply. This position taken by the second respondent was wholly improper and this led to further delay in the execution of the amended PPA. The COD had been achieved on 30.01.2016 where after the supply of electricity had commenced. For almost nine months no payment was made to the appellant because the amended PPA had not been signed, the appellant having responded by its letter dated 13.06.2016 showing inclination to sign the amended PPA so as to receive the tariff at Rs. 7.69/kWh without prejudice to its rights and contentions under the present appeal which by then had already been preferred. The issue remained unresolved till, on the subsequent petition of the appellant, the State Commission mercifully granted an order on 07.09.2016 holding that the tariff of Rs. 7.69 /kWh determined for FY 2015-16 would apply to the present case. The amended PPA thus was signed on 28.09.2016 regulating the business of sale and purchase of electricity under the contract between the parties.

15. Had the subsequent controversy rested at that stage, we would have appreciated the role of the State Commission in defusing the situation by its

order dated 07.09.2016. But, to our shock, the State Commission has tried to use the said order dated 07.09.2016 by arguing, and pleading before us through additional affidavit filed in 2018 bringing on record the fact of subsequent order as a new fact which had come to its knowledge around that period, that since the appellant had voluntarily accepted the lower tariff of Rs. 7.69 /kWh, the present appeal cannot survive. This kind of position taken by State Commission is wholly unacceptable. The State Commission, as the sector regulator, ought to have remembered that the appellant had accepted the reduced tariff of Rs. 7.69 /kWh expressly reserving its right and contentions under the appeal by its reply dated 13.06.2016 to the second respondent which, we assume would have been part of the material that was before the State Commission when it rendered the decision on the said issue by its Order dated 07.09.2016. We disapprove of such unfair and partisan approach of the Statutory Commission hoping that it would not indulge in such conduct in future.

16. To recapitulate, we note that the appellant has demonstrated by sufficient material on record that it was unable to achieve COD on 31.03.2015 on account of roadblocks created by the second respondent. There is no explanation worth the name for lack of cooperation in arrangement of the funds for the purposes of the solar power project developed by the appellant. Further, there is no explanation as to why the second respondent having asked the appellant to cooperate by creating

evacuation infrastructure on its behalf failed to give the necessary approvals despite it being pursued and persuaded by the appellant over a prolonged period. It has to be remembered that COD could not have been achieved without evacuation infrastructure being also correspondingly in position. In these circumstances, the rejection through the impugned order of the above two grounds pressed by the appellant was uncalled for and improper.

17. Thus, we find merit in the appeal. The impugned order is set aside. The extension of time for attainment of COD till 31.01.2016 is hereby granted. That is the date on which the COD was achieved and therefore, it shall be deemed that the project had been developed and COD achieved within the four corners of the PPA that was executed on 01.03.2013. In the result, the appellant would be entitled to the levelized tariff of Rs.10.90/kWh which was the tariff applicable for the corresponding period.

18. Needless to add the second respondent will be obliged to pay the differential. Of course, the appellant will also be entitled to the carrying cost as a consequence to the change of the tariff in terms of this decision. For such purposes, the appellant will be entitled to raise a proper invoice which shall be honored by the second respondent subject, however, to the remedy of the appeal against this judgment.

19. We must record that the conduct of officers of the second respondent responsible for taking timely decisions has been far from satisfactory. This has added to the delay in development of infrastructure which, but for the lethargy and ineptitude shown, might have come up much earlier to serve the interests of the State and the public at large. The second respondent must do some introspection and adopt better methods and operating procedures if it is live up to the legislative promises of efficiency and good performance. We would expect it to carry out internal inquiry to fix responsibilities for these delays to ensure accountability.

20. The appeal is disposed of in above terms. Pending application is rendered infructuous and disposed of accordingly

**PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO
CONFERRING ON THIS 19TH DAY OF APRIL, 2022**

(Sandesh Kumar Sharma)
Technical Member

vt/mkj

(Justice R.K. Gauba)
Officiating Chairperson