

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO. 182 OF 2022

Dated: 20.10.2022

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

In the matter of:

- 1 M/S ASCENT HYDRO PROJECTS LIMITED
[Through its Director]
6, Shiv Vastu Tejpal Scheme,
Road No. 5, Ville Parle (East)
Mumbai – 400 057
 - 2 M/S VE COMMERCIAL VEHICLES LTD.
[Through its Authorized Representative]
Plot N. 102 Sector-1, Pithampur
Distt. – Dhar (M.P.) 454 775
 - 3 M/S PIRAMAL ENTERPRISES LTD.
[Through Senior Vice President – Operation]
67-70, Sector II, Pthampur,
Distt. Dhar (M.P.) – 454 775
- ... Appellants

VERSUS

1. MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION
[Through its Secretary]
5th Floor, Metro Plaza, Arera Colony, Bittan Market,
Bhopal – 462 016, Madhya Pradesh
2. MADHYA PRADESH PASCHIM KSHETRA
VIDYUT VITARAN COMPANY LIMITED
(Successor of MPEB)
[Through its Managing Director]
GPH Compound, Polo Ground
Indore – 452 002 (MP)
3. MADHYA PRADESH POWER TRANSMISSION
COMPANY LIMITED
(Successor of MPEB)
[Through its Managing Director]
Block No.2, Shakti Bhawan, Rampur,
Jabalpur – 482 008 (MP)

4. MADHYA PRADESH POORVA KSHETRA
VIDYUT VITARAN COMPANY LIMITED
(Successor of MPEB)
[Through its Managing Director]
Shakti Bhawan, Rampur,
Jabalpur – 482 008 (MP))
5. M P POWER MANAGEMENT COMPANY LIMITED
(Successor of MPEB)
[Through its Managing Director]
Shakti Bhawan, Rampur,
Jabalpur – 482 008 (MP))
6. GOVERNMENT OF MADHYA PRADESH
ENERGY DEPARTMENT
[Through its Principal Secretary]
Mantralaya, Vallabh Bhawan,
Bhopal – 462004 (MP)
7. NEW AND RENEWABLE ENERGY DEPARTMENT
GOVERNMENT OF MADHYA PRADESH
[Through its Principal Secretary]
Mantralaya, Vallabh Bhawan,
Bhopal – 462004 (MP) ... Respondent(s)

Counsel for the Appellant(s) : Mr. Arijit Maitra

Counsel for the Respondent(s) : Ms. Preeti Goel for R-1

Ms. Poorva Saigal
Mr. Shubham Arya
Ms. Shikha Sood
Mr. Ravi Nair
Ms. Rhea Singh for R-3

Mr. G. Umapathy, Sr. Adv.
Mr. Nitin Gaur
Ms. Anuradha Mishra for R-2 & 4 to 6

J U D G E M E N T (Oral)

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

1. The first appellant is a generating company while second and third appellants are its *High Tension* (“HT”) consumers procuring supply of

electricity from its hydro power plant. They are aggrieved by the Order dated 10.01.2020 passed by the first respondent, *Madhya Pradesh Electricity Regulatory Commission* (“State Commission”) on their petition (no. 17 of 2019), as a result of which their claim for exemption from liability to pay the *Cross Subsidy Surcharge* (“CSS”) under Section 42(2) of the Electricity Act, 2003 and for continued benefit of the rate of wheeling charges @ 2% in terms of Order dated 19.10.2004 granted by the State Commission in earlier proceedings has been declined.

2. The facts which need to be noticed for purposes of examining the grievances of the appellants lie in a very narrow compass. Indisputably, the first appellant had entered into an agreement with erstwhile *Madhya Pradesh Electricity Board* (“MPEB”) on 14.01.1999 for setting up of two Mini-hydel projects, one is Birsinghpur (2 x 1100 kw) and second at Barna (2 x 750 kw) in the State of Madhya Pradesh allowing third-party sale of electricity, as per policy of the Government of Madhya Pradesh notified on 26.09.1994 providing certain incentives for generation of power through non-conventional energy sources in the State of Madhya Pradesh whereunder the wheeling charges for sale of power to HT consumers was fixed at Rs. 2%. The first appellant and MPEB had entered into a formal *Power Purchase Agreement* (“PPA”) on 26.07.1999 for a term of thirty years in terms of which MPEB was responsible for transfer of land required for purposes of setting up of the power projects and time-lines had been fixed

for financial closure, start of construction and commercial operation to commence. It appears that there were delays in the allotment of the land.

3. Noticeably, when the above events were happening, the electricity sector was governed *inter alia*, by the *Electricity (Supply) Act, 1948* (hereinafter referred to as, “the 1948 Act”), the said law having since been repealed by virtue of Section 185 of the Electricity Act, 2003 which came into force from 10.06.2003. It may also be added that prior to coming of the Electricity Act, 2003 on the statute book, the State of Madhya Pradesh, as indeed certain other States, had enacted own electricity reform legislation, it being (for purposes of present case) the *Madhya Pradesh Vidyut Sudhar Adhiniyam, 2000* (hereinafter referred to as, “MP Electricity Reforms Act”), the provisions contained in the said State legislation having been saved, to the extent not inconsistent with the provision of Electricity Act, by virtue of Section 185(3).

4. Section 43A of the 1948 Act would provide as under:

“ 43 A. *Terms, conditions and tariff for sale of electricity by Generating Company*

(1) *A generating Company may enter into a contract for the sale of electricity generated by it—*

(a) *with the Board constitute for the State or any of the States in which a generating station owned and operated by the company is located;*

(b) *with the Board constituted for any other State in which it is carrying on its activities in pursuance of sub-section (3) of section 15 A; and*

(c) with any other person with consent of the competent government or governments

(2) The tariff for the sale of electricity by a Generating Company to the Board shall be determined in accordance with the norms regarding operation and the Plant Load Factor as may be laid down by the Authority ...”

5. It is not in dispute, it having been so held by the State Commission by the impugned order as well, that the first appellant had secured consent from the State Government on 20.06.2002, in terms of Section 43A(1)(c) of 1948 Act for selling the power generated by it to third party or any person other than the erstwhile MPEB.

6. It is own case of the appellant that its hydro-power project started generation of electricity and supply of power from its first and second units from 03.07.2006 and 15.07.2006 respectively, admittedly after the 1948 Act had been repealed and the Electricity Act, 2003 had come into force.

7. It is admitted that by virtue of Section 42(2) of the Electricity Act, while availing of open access for supply of electricity to its consumers, the first appellant is obliged to bear not only wheeling charges but also surcharge which is meant to be utilized to meet the requirements of the current level of cross subsidy within the area of distribution licensee. The requirement of “consent” from the State Government in terms of 1948 Act no longer exists, there being nothing in the MP Electricity Reforms Act to give renewed relevance to such consent obtained during earlier regime.

8. The second to fifth respondents representing the interest of the distribution licensees had resisted the contentions of the appellant before the State Commission which were founded primarily on the Electricity (Removal of Difficulties) Second Order, 2005 as had been notified by the Central Government on 08.06.2005 in exercise of power conferred upon it by Section 183 of the Electricity Act. It is para 2 of the said order granting exemption from payment of surcharge which is relied upon and reads as under:

“2. Exemption from payment of surcharge on the sale or supply of electricity. – No surcharge would be required to be paid, in terms of sub-section (2) of section 42 of the Act on the electricity being sold by the generating companies with consent of the competent government under clause (c) of sub-section (1) of section 43A of the Electricity Act, 1948 (now repealed by the Act), and on the electricity being supplied by the distribution licensee on the authorization by the State Government under section 27 of the Indian Electricity Act, 1910 (now repealed by the Act), till the current validity of such consent or authorisations.”

[Emphasis supplied]

9. The State Commission has rejected the claim for exemption of the appellants primarily on the reason that generation, supply and sale of electricity had not commenced prior to coming into force of the Electricity Act, 2003. Having heard the learned counsel for the appellant and the respondents, we find the view taken by the State Commission to be correct. All that needs to be noted are certain portions of the preamble to the Electricity (Removal of Difficulties) Second Order 2005 which read as under:

“Whereas the Electricity Act, 2003 (36 of 2003) (hereinafter referred to as the Act) came into force on the 10th June, 2003;

And whereas sub-section 42 of the Act provides that the State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constraints;

And whereas the first proviso to sub-section (2) of section 42 of the Act provide that such open access may be allowed before the cross subsidies are eliminated on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Commission;

And whereas the second proviso to sub-section (2) of section 42 of the Act provides that such surcharge shall be utilized to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee;

And whereas generating companies were allowed to enter into a contract for sale of electricity with any other person with the consent of the competent government under the provisions of clause (c) of sub-section (1) of section 43A of the Electricity (Supply) Act, 1948 (repealed by the Act), and sale of electricity by such companies was not subject to payment of any surcharge under that repealed law;

And whereas distribution licensees were authorized by the State Governments to supply energy to any person outside the area of supply under section 27 of the Indian Electricity Act, 1910 (repealed by the Act), and supply of energy (electricity) by such distribution licensee was not subject to payment of any surcharge under the said repealed law;

And whereas in case of electricity being sold or supplied under permissions from competent government or authorisations of the State Government, as the case may be, under the said repealed laws, there was no element of cross subsidy and, therefore, there was no requirement of any surcharge for the same;

...”

[Emphasis supplied]

10. We may add that the consent taken from the State Government under Section 43A of the 1948 Act on 20.06.2002 had not been put to use till the new law came into force from 10.06.2003. The appellant had not

commenced generation of electricity from its project till July, 2006, the date(s) on which its project attained commercial operation. Prior to the attainment of the commercial operation, there was no question of any sale or supply of electricity on which any exemption could have been claimed. The consent under Section 43A of 1948 Act thus had lost its purpose and meaning when the Electricity Act, 2003 came into force. After the new enactment had been enforced, the first appellant would not depend on any such consent, it being free to sell or supply electricity to its consumers. In these circumstances, The Electricity (Removal of Difficulties) Second Order, 2005 would have no application to the case of the appellant.

11. The reliance on the Order dated 19.10.2004 to claim the cap on the rate of wheeling charges at 2% is also not acceptable. Such order was granted by the State Commission on 19.10.2004 with reference to the State Policy then in force. With the enactment of Electricity Act, 2003, the rate of wheeling charges is a subject matter of determination by the appropriate commission *from time to time*. This is precisely the basis of the Seventh amendment to *Madhya Pradesh Electricity Regulatory Commission (Cogeneration and Generation of Electricity from Renewable Sources of Energy) (Revision-I) Regulations, 2010* [ARG-33(I)(vii) of 20187]. The State Commission has amended the Regulatory frame-work, Regulation 12.2, as thereby modified, reading as under:

“12.2 Wheeling charges, Cross subsidy surcharge, additional surcharge on the wheeling charges and such other charges, if any, under Section 42 of the

Electricity Act, 2003 shall be applicable at the rate as decided by the Commission from time to time in its retail supply tariff order.”

12. In view of the above quoted amendment to the regulations, the continued reliance on Order dated 19.10.2004 is not correct.

13. Thus, the appeal is found to be devoid of merits and is dismissed.

PRONOUNCED IN THE OPEN COURT ON THIS 20TH DAY OF OCTOBER, 2022.

(Sandesh Kumar Sharma)
Technical Member

(Justice R.K. Gauba)
Officiating Chairperson

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