

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

APPEAL NO. 189 OF 2018

Date : 04.11.2022

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

In the matter of:

ACB (INDIA) LIMITED

Through Authorised Secretary
7th Floor, Corporate Tower,
Ambience Mall, N.H-8,
Gurgaon - 122002

.... Appellant(s)

Versus

**1. CENTRAL ELECTRICITY REGULATORY
COMMISSION**

(Through Secretary)
3rd & 4th Floor, Chanderlok Building,
36, Janpath, New Delhi - 110001

2. GUJARAT URJA VIKAS NIGAM LIMITED

(Through Secretary)
Sardar Patel Vidyut Bhavan,
Race Course, Vadodara - 390007
Gujarat, India.

**3. CHHATTISGARH POWER TRANSMISSION
COMPANY LIMITED**

(Through its Managing Director)
Vidyut Seva Bhawan,
Danganiya
Raipur, Chhattisgarh – 492013

4. PRAYAS (ENERGY GROUP)

(Through its Group Coordinator)
Unit-II, A & B, Devgiri,
Joshi Railway Museum Lane,
Kothrud Industrial Area, Kothrud
Pune, Maharashtra – 411038.

.... Respondent(s)

Counsel for the Appellant(s) : Mr. Matrugupta Mishra
Mr. Nipun Dave
Ms. Ishita Thakur

Counsel for the Respondent(s) : Mr. Anand K. Ganesan
Ms. Ashabari Thakur for R-2

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

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

1. The claim of the Appellant, a thermal power generator, presented as petition No. 239/MP/2016, for compensation on account of change in rates of water charges described as change in law event along with carrying cost was rejected by the first Respondent, *Central Electricity Regulatory Commission* ("the Central Commission"), by order dated 28.03.2018. Feeling aggrieved, the present appeal was filed by the generator.

2. The facts lie in a narrow compass. The generator was selected through bidding route under section 63 of the electricity Act, 2003. At the time of submission of the bids in the competitive based tariff bidding, the water charges payable for industrial purposes or use of thermal power projects were regulated by notification dated 21.03.2006 issued by Water Resources Department of the Government of Chhattisgarh in exercise of the authority vested in the said department by the relevant State law, referred to before us as the *Madhya Pradesh Irrigation Act, 1931*, read with *Madhya Pradesh*

Irrigation Rules, 1974. The provision contained in Section 37 of the said Act provided as under:

“37. Purpose for which water may be supplied

(1) Water may be supplied from a canal:-

a. Under an irrigation agreement, in accordance with the provisions of Chapter VI.

b. On demand, for the irrigation of specified areas;

c. To supplement a village tank;

d. For industrial urban or other purposes not connected with agriculture;

e. For the irrigation of a compulsorily assessed area

(2) Charges for the supply of water under clause (a), (b), (c), or (e) of sub-section (1) shall be paid at such rates as may be fixed by the State Government in accordance with rules made under this Act.”

3. Reliance is also placed on the following provision in the MP Irrigation Rules, 1974:

“36. Proposals for the fixation of rates for the supply of water under clause (a), (b) or (c) of sub-section (1) of section 37 shall be considered by the Standing Committee for Irrigation after which the said proposals and the opinion of the Standing Committee shall be placed on the table of the Madhya Pradesh Legislative Assembly. The State Government shall give the Assembly an opportunity of discussing them and shall take into consideration any resolution concerning them that may be passed by the Legislative Assembly before fixing the rate to be charged:

Provided that if the State Government considers any case to be so urgent as to necessitate the immediate issue of orders, it may take action at once.

All orders issued under this proviso shall, within six months of their issue, be placed before the Standing Committee and there-after laid on the table of the Legislative Assembly.”

4. It is pointed out that the Appellant was obliged to pay for the water at Rs. 0.90 per cubic meter, it falling in the category described as “from Natural/Created Own Sources”. It is noted that under the above said

notification dated 21.03.2006 there were two other sources they being “Dam/Reservoir” and “Canal Systems”, the applicable rates being Rs. 3 and Rs. 3.60 per cubic meter respectively. Pertinent also to note that the notification expressly stated that the rates as fixed “shall be revised after every 3 years”.

5. It appears that the Appellant had approached the Water Resources Department of the Government of Chhattisgarh seeking allocation of 10 million cubic meter annual water supply (approximately 27397 cubic meter daily) from Kholar/Saliha drain and Ahran river for its then proposed 250 (2x125) MW thermal power plant. This had to be arranged by construction of a stop dam, the off-take point being Korai Enect. The State Government granted approval to such effect by a formal communication issued on 21.01.2008 subject to certain conditions, the same being inclusive of expectation that the Appellant would bear the expenditure for survey and construction of the dam and pay the requisite charges for the water supply taken, contingent upon execution of formal agreement.

6. The Water Resources Department of the Government of Chhattisgarh, by another notification issued on 31.05.2010, raised the charges to Rs. 2 per cubic meter for water taken from “Natural/Created Own Sources” category, the rates for dams/reservoir and canal systems being also upgraded to Rs.6 and Rs.7 per cubic meter respectively. It may be added that it was made

clear by this notification dated 31.05.2010 that the rates will undergo increase to the extent of 15% per annum.

7. What, however, is crucial to the case at hand is the fact that the Appellant entered into a formal agreement with the State of Chhattisgarh acting through Executive Engineer, Water Resources Division, Korba on 04.12.2013, agreeing thereby to pay to the State Government water rates for water drawn by it at Rs. 9.12 per cubic meter as per the relevant government order.

8. Referring to the increase in the expenditure on account of procurement of water supply and pleading it to be a case of change in law within the meaning of Article 13 of the *Power Purchase Agreement* ("PPA") dated 26.02.2007, the Appellant had approached the Central Commission by the petition which has been dismissed by the impugned order. The Central Commission has held that only imposition of new taxes or cess or levies on the prevailing price of water charges can be treated as change in law and not increase in charges. It has referred to a decision of this Tribunal by judgment dated 12.09.2014 in Appeal No. 288 of 2013 holding as under:

"24. We find that as per the provisions of the PPA, there is no correlation of the base price of electricity quoted by the Seller and computation of compensation as a consequence of Change in Law. The compensation is only with respect to the increase/decrease of revenue/expenses of the Seller following the Change in Law. The minimum financial impact to qualify for claim of compensation is also linked to the increase in expenses/decrease in revenue of the seller.

25. For example, if the tax on cost of coal has been increased from 5% to 8%, then for computing the impact of Change in Law, only the increase in the actual expenditure of Seller due to increase in tax from 5% to 8% has to be considered. This is because if the tax had not increased, the Seller would have paid tax of 5% on the actual cost of coal. With the Change in Law, the Seller has now to pay 8% on the actual cost of coal. Therefore, to restore the Seller to the same economic position as if such Change in Law has not occurred, the Seller has to be compensated for additional tax of 3% on the actual cost of coal. However, the Seller will have to submit proof regarding payment of tax on coal.”

9. It is the contention of the Appellant that upon execution of the water supply agreement dated 04.12.2013 the category under which the Appellant was treated stood changed and, as such, the enhanced liability of water charges at Rs. 9.12 per cubic meter constitutes change in law scenario. It is the grievance of the Appellant that this aspect, though argued before the Central Commission, has not been considered or adjudicated upon.

10. Having bestowed our consideration to the submissions of the learned counsel for the Appellant, we find no substance in the appeal. The expression “Change in Law” as is defined in the PPA binding the Appellant and the beneficiaries is as under:

“13.1.1 “Change in Law” means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline.

(i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law or (ii) a change in interpretation of any Law by a Competent Court of law, tribunal of Indian Governmental Instrumentality provided such court of law, tribunal or Indian Governmental Instrumentality is final authority under law for such interpretation or (iii) change in any consents, approvals or licenses available or obtained for the Project, otherwise than for default of the Seller, which results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurer under the terms of this Agreement or (iv) any change in the

cost of implementing Environmental Management Plan for the Power Station;

But shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) change in respect of UI Charges or frequency intervals by an Appropriate Commission.

Provided that if Government of India does not extend the income tax holiday for power generation projects under Section 80 IA of the Income Tax Act, upto the Scheduled Commercial Operation Date of the Power Station, such non-extension shall be deemed to be a Change in Law.”

11. Indisputably, it is not a case of new tax or cess or levy being imposed by the governmental instrumentality. The fact that water rates were determined from time to time by the State Government was well known to the Appellant from outset. The notification dated 21.09.2006 also cautioned that the rates thereby fixed were subject to revision after every three years. The revision took place in 2010 with another caution that the rates would thereafter stand increased by 15% per annum. It may be that at the initial point of time the Appellant had arranged sourcing of water supply directly from the drain/river systems but then that had undergone change pursuant to the approval taken from, and granted by, the competent authority. The Appellant entered into a formal agreement on 04.12.2013 to construct a dam to draw water from the pool thereby created and at that point of time consented to the stipulation in the agreement that the charges would be payable at the enhanced rates of Rs. 9.12 per cubic meter. This increase in the liability towards water charges was thus assumed by the Appellant of

own volition and with open eyes. The increase in the expenditure arising against such background does not qualify as change in law event and has been rightly rejected by the Central Commission.

12. For the foregoing reasons, the appeal is found devoid of substance and, hence, dismissed.

PRONOUNCED IN OPEN COURT ON THIS 04th DAY OF NOVEMBER 2022

(Sandesh Kumar Sharma)
Technical Member

(Justice R.K. Gauba)
Officiating Chairperson

tpd/mk