

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
NEW DELHI**

(APPELLATE JURISDICTION)

**APPEAL NO.202 OF 2019
AND
APPEAL NO.205 OF 2019**

Dated: 19th May 2022

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

APPEAL NO.202 OF 2019

In the matter of:

PSPN SYNERGY PRIVATE LIMITED

122/235, 3A, Plot No.17,
Fazal Ganj,
Kanpur - 208012

.... Appellant(s)

VERSUS

**1. UTTAR PRADESH ELECTRICITY
REGULATORY COMMISSION**

[Through its Secretary]
Vidyut Niyamak Bhawan,
Vibhuti Khand, Gomti Nagar,
Lucknow - 226010

2. UTTAR PRADESH POWER CORPORATION LIMITED

[Through its Managing Director]
7th Floor, Shakti Bhawan,
14-Ashok Marg,
Lucknow-226001

**3. UTTAR PRADESH NEW AND RENEWABLE ENERGY
DEVELOPMENT AGENCY,**

[Through its Director]

Vibhuti Khand,
Gomti Nagar,
Lucknow – 226010

... Respondent(s)

APPEAL NO. 205 OF 2019

In the matter of:

SALASAR GREEN ENERGY PRIVATE LIMITED

{A Project Company of NP Agro (India) Industries Limited}

253, Madhowari,
Behind Madhu Ice Factory,
Bareilly – 243005

.... Appellant(s)

VERSUS

**4. UTTAR PRADESH ELECTRICITY
REGULATORY COMMISSION**

[Through its Secretary]

Vidyut Niyamak Bhawan,
Vibhuti Khand,
Gomti Nagar, Lucknow - 226010

5. UTTAR PRADESH POWER CORPORATION LIMITED

[Through its Managing Director]

7th Floor, Shakti Bhawan,
14-Ashok Marg,
Lucknow-226001

**6. UTTAR PRADESH NEW AND RENEWABLE ENERGY
DEVELOPMENT AGENCY,**

[Through its Director]

Vibhuti Khand, Gomti Nagar,
Lucknow – 226010

... Respondent(s)

Counsel for the Appellant (s) : Mr. Sourav Roy

Counsel for the Respondent (s) : Mr. C.K. Rai
Mr. Sumit Panwar for R-1

Mr. Arjun Pall
Mr. Aashish Gupta
Ms. Sadhika Gulati for R-2

J U D G M E N T

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

1. These matters were taken up by video conference mode on account of pandemic conditions, it being not advisable to hold physical hearing.

2. The appellants are Solar Power Project Developers (Generators) who are aggrieved by similar orders passed by the first respondent i.e. *Uttar Pradesh Electricity Regulatory Commission* (hereinafter referred to as 'UPERC' or 'State Commission') on 15.05.2019 in Petition nos. 1373 & 1374 of 2018 thereby disallowing the claim for direction for payment of *Late Payment Surcharge* (LPS) against the second respondent i.e. Uttar Pradesh Power Corporation Limited ("UPPCL" or "the Procurer") for the delay in payment of monthly bills for the relevant period - i.e. April to November, 2017 in case of the appellant in first captioned matter and May to November, 2017 in the case of the appellant in the second captioned matter. It appears that the appellants had also questioned amendment of the *Power Purchase Agreement* (PPA) in the wake of Tariff Adoption Order dated 21.11.2017 whereby the term of the PPA, as originally stipulated, was allegedly, unilaterally altered by the procurer statedly to the disadvantage of the appellants.

3. Each appellant had entered into the PPA with the procurer on 02.12.2015 concerning supply of electricity from their respective solar power plants, 15 MW in the case of first appellant and 5 MW in the case of second appellant, at the bid discovered tariff of Rs. 8.60/unit and Rs.8.496/unit respectively for initial term of twelve years, with provision for extension, the relevant clause in which regard (as quoted herein below from the PPA of the first appeal) reading thus:

“2.1 Effective Date

2.1.1 This Agreement shall be deemed to have come into force with effect from the date of signing of this agreement and shall remain in full force from the date of commissioning of last unit of the Solar PV Plant from which solar power is committed to be supplied under this Agreement and such date shall be referred to as the Effective Date.

2.2 Term of Agreement

2.2.1 This Agreement subject to Article 2.4 and 2.5 shall be valid for a term from the Effective Date until the Expiry Date. This Agreement may be extended for a further period on mutually agreed terms and conditions at least one hundred eighty (180) days prior to the Expiry Date.

2.3 Extension of PPA

2.3.1 180 Days prior to expiry of the agreement, on willingness of SPP, UPPCL will extend this agreement with SPP for a further period of 13 years at the price of eleventh year Average Pooled Purchase Cost (APPC). However the budgetary support from UP State Government as incentive as per provision in the solar policy will be available only for initial 12 years of PPA and will not be available for the extended PPA of 13 years.”

4. Concededly, in terms of the contractual arrangement, the appellants were to achieve the commercial operation of their respective project within

thirteen months of the signing of the PPA, the Scheduled Commercial Operation Date (SCOD) thus being 01.01.2017. Admittedly, the appellants achieved the commercial operation of their respective project beyond the said date, the *Commercial Operation Date* (COD) in their respect being 13.03.2017 and 31.05.2017 respectively. Indisputably, the PPAs contained provisions allowing some room for such delay, with possible invocation of the clause for levy of liquidated damages, should the procurer choose to do so, but not beyond the period of six months. Admittedly, no liquidated damages were demanded for the delay in achievement of COD by the appellants herein, the parties to the PPAs having gone ahead with generation, supply and procurement of electricity there under from the respective dates of COD.

5. The bid discovered tariff was admittedly conditional upon a formal order of adoption by the State Commission in terms of the requirement of Section 63 of the Electricity Act, 2003. A petition to that end was filed in 2016 and the tariff adoption order was issued by the State Commission on 21.11.2017. The parties in the first captioned appeal had agreed on the bid discovered tariff of Rs. 8.60/unit while those in the second captioned appeal had agreed on tariff of Rs. 8.496/unit for the first twelve years. The State Commission, by its Order dated 21.11.2017, reduced the said tariff to Rs. 7.02/unit for the first twelve years of the term of PPA and, *inter-alia*, directed as under:

“14. The Commission after hearing the concerned parties is of the view that the revised tariff recommended by UPNEDA and UPPCL is somewhat near the benchmark tariff indicated by CERC on the basis of cost structure of FY 2015-16 in which the bidding was carried out. In order to enable the aforesaid nine bidders to recover their cost of generation with adequate return on their equity and also safeguarding the interest of consumers, in the public interest it will be fair to adopt the tariff of Rs. 7.02/unit for aforesaid nine bidders whose projects have been commissioned.

15. The Commission adopts the tariff of Rs. 7.02/Unit for the aforesaid 9 bidders for a period of 12 years and for next period of 13 years the bidders shall be bound to supply power to UPPCL at APPC as agreed in PPA, subject to a ceiling of Rs.7.02/Unit. The Commission also approves the PPA of these nine bidders with the directions that necessary modifications be made in the signed PPA, according to these orders.”

(Emphasis supplied)

6. It appears that after the commencement of the generation and supply of electricity by the respective appellants (from 31.03.2017 and 31.05.2017 respectively), certain invoices were raised on the basis of agreed terms of PPA, each such invoice issued prior to the tariff adoption Order dated 21.11.2017 having been returned by procurer on the plea that payments could not be demanded on the basis of tariff which had not yet been adopted by the Commission. In the case of first appellant, there were eight invoices for the period of April, 2017 to November, 2017. In the case of the second appellant only one such invoice was raised for the month of May, 2017.

7. The parties entered into amended PPAs on 05.12.2017 in the wake, and pursuance, of the tariff adoption Order dated 21.11.2017. The amended PPA dated 05.12.2017, to the extent relevant (quoted from the document submitted in the case of first appellant which is similar to the case of the second appellant) reads thus:

“
...
NOW, THEREFORE, in consideration of the foregoing and respective covenants and agreements set forth in this PPA and other consideration, the receipt, sufficiency and adequacy of which is hereby acknowledged, and intending to be legally bound hereby, the Parties agree as follows:

1- The SPP shall be entitled to receive a tariff of Rs. 7.02 per unit instead of Rs. 8.60 per unit of PPA dated 02-12-2015 for the energy supplied at the Metering Point during a Contract Year pertaining to the Contracted Capacity.

2- If UPPCL desired then SPP shall be bound to supply power to UPPCL under this agreement for further 13 years and tariff for the extended period shall be the price of eleventh year Average Pooled Purchase Cost (APPC) subject to ceiling of Rs.7.02/unit. However, the budgetary support from UP State Government as incentive as per provision in the solar policy will be available only for initial 12 years of PPA and will not be available for the extended PPA of 13 years.”

8. It is an admitted case of the parties that the generator of electricity is required by the contractual terms to raise an invoice on monthly basis to claim payment of the cost of electricity supplied, the relevant term in which regard may be quoted as under:

“10.1 General

10.1.1 *From the commencement of supply of power by the Seller, the Procurers shall pay to the Seller the monthly Tariff Payments, on or before the Due Date, in accordance with Tariff as specified in this Article 9 and Schedule 10. All Tariff Payments by the Procurers shall be in Indian Rupees.*

10.2 Delivery and Content of Monthly Bills

10.2.1 *The Seller shall issue to each Procurer a signed Monthly Bill for the immediately preceding Month not later than the (10) days of the next Month. In case the Monthly Bill for the immediately preceding Month issued after ten (10) days of the next Month, the Due Date for payment of such Monthly Bill shall be extended by thirty (30) days. Provided that:*

- a. *if the date of commencement of supply of power falls during the period between the first (1st) day and up to and including the fifteenth (15th) day of a Month, the first Monthly Bill shall be issued for the period until the last day of such Month, or*
- b. *if, the date of commencement of supply of power falls after the fifteenth (15th) day of a Month, the first Monthly Bill shall be issued for the period commencing from the Delivery Date until the last day of the immediately following Month.*

Provided further that if a Monthly Bill is received on or before the second (2nd) day of a Month, it shall be deemed to have been received on the second (2nd) Business Day of such Month.

10.2.2 *The Monthly Bill prepared as detailed in Schedule 5 of the PPA, shall include the following:*

- i) *Provisional Bill for Solar PV power supplied in the immediately preceding Month;*
 - (a) *Adjustments against the Provisional Bill(s) based on Energy Accounts for the Solar PV power supplied in the Month(s) preceding to the previous month(s)*
 - (b) *Any other adjustment to cover changes in open access related charges and any other prior-period adjustments.*

- ii) *Late Payment Surcharge, if any, and*
- iii) *Taxes, Duties, Levies etc as applicable.*

10.3 Payment of Monthly Bills

10.3.1 *The Procurer shall pay the amount payable under the Monthly Bill on the Due Date to such account of the Seller, as shall have been previously notified to the Procurers in accordance with Article 10.3 below.*

10.3.2 *The Seller shall open a bank account at Lucknow, Uttar Pradesh (“Seller’s Designated Account”) for all Tariff Payments be made by the Procurers to the Seller, and notify the Procurers of the details of such account at least ninety (90) Days before the dispatch of the first Monthly Bill. The Procurers shall also designate a bank account at Lucknow (the “Procurer’s Designated Account”) for payments to be made by the Seller to the Procurers, if any, and notify the Seller of the details of such account ninety (90) days before the dispatch of the first Monthly Bill. The Seller and the Procurers shall instruct their respective bankers to make all payments under this Agreement to the Procurers’ Designated Account or the Seller’s Designated Account, as the case may be and shall notify either Party of such instructions on the same day.*

10.3.3 *Late Payment Surcharge*
In the event of delay in payment of a Monthly Bill by the Procurers sixty (60) days beyond its due date, a Late Payment Surcharge shall be payable by the Procurers to the Seller at the rate of 1.25% per month on the outstanding amount calculated on a day to day basis. The Late Payment Surcharge shall be claimed by the Seller through the next Monthly Bill.

10.3.4 *Rebate*
For payment of any Bill within due date, the following Rebate shall be paid by the Seller to the Procurers in the following manner:

- (a) *A Rebate of 2% shall be payable to the Procurers for the payments made in full within one Business Day of receipt of the Bill by the Procurer.*

- (b) For payment of Bill subsequently but up to the Due Date, a rebate of 1% shall be allowed or the payments made in full.*
- (c) No Rebate shall be payable on the Bills raised on account of taxes, duties and cess etc.”*

9. After the PPA had been amended on 05.12.2017, the appellants raised revised invoices for the entire period beginning with the achievement of COD i.e. 31.03.2017 and 31.05.2017 respectively. The fresh invoices issued on 08.12.2017 were duly honored by the respondent procurer (UPPCL) within the stipulated period of thirty days. Concededly, in the revised invoices, or for that matter in the invoices issued earlier, there was no claim made for LPS.

10. After the payments had been made by UPPCL against the revised invoices dated 08.12.2017, the appellant approached the State Commission by the petitions in which the impugned orders were passed, the prime grievance being that payments not having been made against the invoice that had been issued earlier, UPPCL was liable to pay late payment surcharge. It is this grievance and the alleged unilateral alternation of terms related to extension as incorporated in the amended PPA dated 05.12.2017 which were the subject matter of the proceedings before the State Commission.

11. The submissions of the parties and the views of the Commission rejecting the contentions of the appellants were recorded in the impugned orders, the relevant part whereof (as quoted from the file of first appellant, it being similar in the other case) reads thus:

“7. Mr. Roy, reiterated his arguments regarding other issues i.e. non-payment of late payment surcharge and deduction of rebate. Sri Rajiv Srivastava, Advocate appearing on behalf of UPPCL stated that the Commission in its tariff adoption order dated 21.11.2017 has clearly mentioned in para 15 of the order that the adopted tariff of Rs. 7.02 per unit is applicable for a period of 12 years and for next period of 13 years the bidders shall be bound to supply power to UPPCL at APPC subject to a ceiling of Rs. 7.02 per unit. The Commission had approved the PPA with necessary modifications in the order dated 21.11.2017 therefore, UPPCL has strictly followed the Commission’s directions so far as the term of the PPA and the tariff is concerned. Regarding late payment surcharge and the rebate, the Counsel of UPPCL stated that since the tariff was adopted in November 2017, therefore they are not liable to pay a surcharge on the bills have been paid within the time period therefore the Respondents are entitled for the rebate.

8. After perusing the documents filed by both the parties and the arguments raised during the course of hearing by the parties, the Commission is of the view that the Petitioner is not entitled for late payment surcharge on bills raised before the adoption of tariff on 21.11.2017. The revised term of PPA and the conditions regarding tariff are also as per the orders of the Commission. Regarding rebate for timely payment of bills the Commission directs that on the bills raised before the adoption of tariff no rebate is admissible as no surcharge is being allowed for the intervening period. Accordingly, if any excess rebate has been deducted the same shall be refunded back to the Petitioner.”

12. It is the argument of the appellants that the PPAs had come into force w.e.f. date of signing (i.e. 02.12.2015) by virtue of Article 2.1 (on the subject of effective date). It is their submission that though the financial terms on which the electricity was to be supplied by the appellants and procured by UPPCL was subject to formal adoption order passed by the State Commission, the liability to pay for the electricity supplied on the contractual terms, then tentative in nature, had commenced from the date of the respective COD. It is stated that since it is not in dispute that UPPCL had failed to make any payment for the electricity supplied till payments were made in response to revised invoices dated 08.12.2017, a case of delay in payment had been properly made out, this giving rise to legitimate cause of action in favor of the appellants to claim LPS. Reference is made to Section 32 of Sale of Goods Act, 1930 to argue that delivery of goods and payment of price are concurrent conditions, a purchaser being liable to pay for the supply at the time of purchase or consumption. Reliance is also placed on Section 70 of Indian Contract Act, 1872 to argue that a person who supplies goods or services, not intending to do so gratuitously, is entitled in law to claim compensation from the person who enjoys the goods thus supplied and service rendered.

13. It is stated that the procurer (UPPCL) could not have returned the invoices previously issued or refused to pay even if it had reservations about the same on account of the petition for tariff adoption being still

pending before the State Commission. It is further stated that UPPCL instead of making payment in time, has illegally deducted rebate on the invoices which were raised in December, 2017. The appellants submit that they are entitled to LPS on the illegally deducted rebate amount as well.

14. Upon careful consideration of the above submissions, we find the view taken by the State Commission through the impugned order to be correct, just and proper. Undoubtedly, the PPAs had come into effect from the date of signing by the parties but the contractual terms, particularly the price at which the electricity was to be supplied or procured, was subject to a formal order of adoption by the State Commission in view of the provision contained in Section 63 of the Electricity Act by which the transactions were governed. No doubt, the appellants were within their rights to raise invoices even while the formal tariff adoption order was awaited, the invoices raised at that stage being on the agreed terms. But then, UPPCL had some reservations to pay price at a tariff which was yet to be adopted and it chose to return the invoices previously issued. The appellants did not raise any grievance on such conduct at that stage. Under the contract, they could have raised invoices in the subsequent monthly bills also claiming the LPS for the delayed payment. The appellants chose to remain silent and await the tariff adoption order which came on 21.11.2017. After the said tariff adoption order had been passed,

the appellants opted, without demur, to abide by the direction and signed the amended PPA as well on 05.12.2017. In the wake of such development, they now chose to issue revised invoices for the entire period of supply made till then. The revised invoices issued on 08.12.2017 were restricted to the claim for the payment at the adopted tariff for the supply made. Conspicuously, even in the revised invoices, there was no claim for any LPS for the past period.

15. It is not a case where the recipient of the goods (electricity) has not paid for the same. The obligation to pay for such supply may have been concurrent but the supplier (appellants) had acquiesced in the deferment of payment till the order of adoption of tariff under Section 63 had been issued by the Regulatory Authority. In these circumstances, the provisions contained in Section 32 of Sale of Goods Act, 1930 or Section 70 of the Indian Contract Act, 1872 do not come to the aid of the appellants.

16. We note that by the impugned order, the State Commission has directed refund of the excess rebate deducted in respect of the bills raised for the period prior to the order of adoption of tariff which relief takes sufficient care of the grievance of the appellants on that account.

17. In the above facts and circumstances and for the foregoing reasons, we do not find any substance in the grievances of the appellants about denial of LPS.

18. As noted earlier, the appellants are also aggrieved by the amendment of the PPA on 05.12.2017 recasting the terms as to the extension beyond the initial term of twelve years. In our considered view, this grievance is also without merit in as much as the revised formulation is in *sync* with the directions of the State Commission by Order dated 21.11.2017 on that subject, such direction being not subject matter of challenge before us in these appeals.

19. Thus, appeals are found devoid of merit or substance and accordingly dismissed.

**PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO CONFERENCING
ON THIS 19TH DAY OF MAY, 2022.**

(Sandesh Kumar Sharma)
Technical Member

vt

(Justice R.K. Gauba)
Officiating Chairperson