

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

**Appeal No. 250 of 2018, IA No. 1954 of 2021,
IA No. 361 of 2019 & IA No. 1075 of 2021**

Dated: 10th January, 2022

**Presided over by : Hon`ble Mr. Justice R.K. Gauba, Officiating Chairperson
Hon`ble Mr. Sandesh Kumar Sharma, Technical Member**

In the matter of:

**GRIDCO Limited
Janpath
Bhubaneshwar 751022
Odisha**

... Appellant(s)

**1. Odisha Electricity Regulatory
Commission
Bidyut Niyamak Bhawan
Plot No. 4, Chunokoli
SailashreeVihar
Bhubaneshwar 751021**

... Respondent no.1

**2. Jindal India Thermal Power Limited
Regd. Office : Plot No. 12
Pocket B 1, Vasant Kunj
New Delhi – 110017
Operational Office: (for service of
notice)
Plot No. B / 6
Palashpalli, Bhubaneshwar 751010**

... Respondent No.2

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

**Counsel on record for the Respondent(s): Mr.Ganesan Umapathy
Mr.Rutwik Panda
Ms.Anshu Malik for R-1**

**Mr. SajanPoovayya, Sr. Adv.
Mr. Matrugupta Mishra
Ms. Shikha Ohri
Mr. Hemant Singh
Mr. Nishant Kumar
Ms. Ritika Singhal
Mr. Pratibhanu Singh
Ms. Raksha Agarwal
Ms.AnkitaBafna
Mr.Tushar Srivastava
Mr. Ambuj Dixit
Mr. Shariq Ahmed
Mr. Lakshyajit Singh Bagdwal
Ms. Soumya Singh
Mr. Shourya Malhotra for R-2**

**Mr.Arunav Patnaik
Mr.ShikharSaha
Ms.Mahima Sinha for R-3**

JUDGMENT (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. Upon request, and with the consent of all parties, in the context of application (IA-1954/2021) moved by the second Respondent, the

first of us (*Justice R.K. Gauba*) in exercise of the power vested in him by virtue of section 122 read with Section 118 of the Electricity Act, 2003 has withdrawn the captioned matter from the file of Court-1, it being presently dysfunctional on account of vacancies in the offices of Hon'ble Chairperson and Hon'ble Technical Member, and transferred it to this bench for consideration and disposal.

3. This appeal by M/s. GRIDCO Limited challenges the order dated 26.02.2018 passed by the Odisha Electricity Regulatory Commission (hereinafter "*the State Commission*") in case no. 26/2014 disposing of the petition that had been presented by the second Respondent – M/s. Jindal India Thermal Power Limited (for short "*JITPL*") under Section 61, Section 62 and Section 86 (1)(b) of the Electricity Act, 2003, holding that the issue of determination of tariff of power to be sold by the Petitioner (*JITPL*) and to be purchased by GRIDCO (the Appellant herein) fell under the *exclusive* jurisdiction of Central Electricity Regulatory Commission (hereinafter "*the Central Commission*"), primarily accepting the contention of *JITPL* that its generating stations having achieved commercial operation with effect from 19.04.2015 and 12.02.2015, the project having been conceived as an intra-State generating station to supply power to consumers both within and outside the State of Odisha, *JITPL* having tied up various *Power Purchase Agreement* ("*PPA*") with Distribution Licensees in the States of Kerala and Bihar, and with Indian Railways, it fell within the definition of "composite scheme", and covered by Section 79(1)(b) of the Electricity Act, 2003, thus within the domain of the Central Commission.

4. The Appellant assails the above decision referring to the provisions of Section 79(1)(b), Section 86(1)(b) and Section 64(5) of the Electricity Act, 2003, the provisions of Tariff Policy 2016 (particularly para 5.2) promulgated by the Central Government in exercise of its power under Section 3 of the Electricity Act, 2003. The Appellant also contends that it was agreed stipulation of the PPA between the parties that the variable cost would be determined (on a petition to be made) by the State Commission, the change of heart reflected by the JITPL by making submissions contrary to the said agreement being incorrect and impermissible.

5. Broadly speaking, the factual matrix of the case is that the second Respondent (JITPL) had set up the power project in the State of Odisha, it having tied up for supply of part of the electricity thereby generated to the Appellant (GRIDCO) which is the bulk purchaser of electricity for Distribution Licensees operating within the State of Odisha. The PPA was executed by the parties on 05.01.2011 and had not been yet approved by the State Commission till the date of the impugned order. It was indeed a stipulation of the said PPA that the parties would approach the State Commission for determination of the variable cost. The tariff petition was submitted, in pursuance of the said agreement between the parties, in 2014, it having been amended more than once, the last version being the one dated 27.05.2014.

6. It is not in dispute that after the two units of the power station had achieved commercial operation, the second Respondent (*Generator*) proceeded to tie up for supply of electricity also to Distribution Licensees in the other States – Kerala and Bihar as indeed with Indian Railways, such supply being in the nature of inter-State sale.
7. The tariff petition (Case no. 126 of 2014) came up for hearing before the State Commission on 02.01.2018. By that time, the arrangements in above nature for supply of substantial quantity of electricity generated outside the State of Odisha had been put in position. It is with reference to such subsequent events that JITPL, the petitioner before the State Commission, made submissions to above effect seeking its contention about the project being covered under a *composite scheme*, the jurisdiction to determine tariff being of Central Commission, to be accepted.
8. Having heard the learned counsel for both sides we find the view taken by the State Commission appropriate, not suffering from any error or impropriety. We elaborate our reasons hereinafter.
9. Section 79 (1)(b) of the Electricity Act confers jurisdiction on the Central Commission to regulate of the tariff of such generating companies as enter into or otherwise have a *composite scheme* for generation and sale of electricity in more than one State. In contrast, Section 86(1)(a) and (b) confers the jurisdiction on the State Commission to determine the tariff of generation, supply, transmission etc. of electricity “*within the State*” as also the purchase

and procurement process of Distribution Licensees including price at which the electricity is to be procured through agreements for purchase of power for distribution and supply "*within the State*". Undoubtedly, in situation where the procurement or sale of electricity is "*within the State*", the jurisdiction of tariff determination is of the State Commission. But, in cases where the generating company from which the supply is taken is covered by a "*composite scheme for generation and sale of electricity in more than one State*", the jurisdiction is shifted to the Central Commission.

10. Section 64(5) of the Electricity Act, 2003 carves out an exception to the above general rule in the context of tariff orders. The provision reads thus:-

"Section 64(5)

Section 64. (Procedure for tariff order): ---

...

(5) Notwithstanding anything contained in Part X, the tariff for any inter-State supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor."

11. The learned counsel for the Appellant has referred to the Tariff Policy promulgated by the Central Commission on 28.01.2016 (hereinafter "Tariff Policy-2016"), in exercise of its power under

Section 3 of the Electricity Act, 2003, in particular its para 5.2, which reads thus:

“5.2 All future requirement of power should continue to be procured competitively by distribution licensees except in cases of expansion of existing projects or where there is a company owned or controlled by the State Government as an identified developer and where regulators will need to resort to tariff determination based on norms provided that expansion of generating capacity by private developers for this purpose would be restricted to one time addition of not more than 100% of the existing capacity.

Provided further that the Appropriate Commission, as defined in the Electricity Act, 2003, shall ensure that in case of expansion of such projects, the benefit of sharing of infrastructure of existing project and efficiency of new technology is passed on to consumers through tariff.

Provided also that the State Government can notify a policy to encourage investment in the State by allowing setting up of generating plants, including from renewable energy sources out of which a maximum of 35% of the installed capacity can be procured by the Distribution Licensees of that State for which the tariff may be determined under Section 62 of the Electricity Act, 2003.

Provided that notwithstanding the provision contained in para 5.11(j) of the policy, the tariff for such 35% of the installed capacity shall be determined by SERC.

However, the 15% of power outside long term PPAs allowed under para 5.7.1 of National Electricity Policy shall not be included in 35% allowed to be procured by Distribution Licensees of the State.”

(Emphasis supplied)

12. The prime argument of the Appellant is that the power project of the second Respondent is covered by the provisions contained in second and third proviso of para 5.2 of Tariff Policy-2016, as quoted above, and, therefore, the impugned decision holding that the State Commission does not have the requisite power to determine tariff in the case of the second Respondent is incorrect.

13. The fallacy of the above line of arguments lies in the fact that the Tariff Policy-2016 cannot be invoked for present purposes for more than one reasons. Firstly, para 2.2 of the Tariff Policy-2016 makes it clear that it is made not as a mandatory document but for *guidance* of the appropriate Commissions. The document was issued on 28.01.2016 and para 1.1 itself makes it clear that it would come into effect from the date of its publication. It cannot have any retrospective effect. The events relevant for the present matter had occurred during the period anterior to the issuance of the notification of the revised policy. Even further, the second proviso of para 5.2 of Tariff policy-2016 makes it clear that the provision is made in relation to “*all future requirements*”, the power projects of JITPL and the contractual arrangement with the Appellant being not covered by such qualifying clause.

14. It is pertinent to quote ruling of Hon’ble Supreme Court on the expression “composite scheme”, as used in Section 79(1) of the Electricity Act, 2003, in the judgment reported as *Energy Watchdog v. CERC*, (2017) 14 SCC 80:

“24. The scheme that emerges from these sections is that whenever there is inter-State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79(1) itself in clauses (c), (d) and (e) speaks of inter-State transmission and inter-State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression “within the State” in clauses (a), (b) and (d), and “intra-State” in clause (c). This being the case, it is clear that the PPA, which deals with generation and supply of electricity, will either have to be governed by the State Commission or the Central Commission. The State Commission's jurisdiction is only where generation and supply takes place within the State. On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act. What is important to remember is that if we were to accept the argument on behalf of the appellant, and we were to hold in the Adani case that there is no composite scheme for generation and sale, as argued by the appellant, it would be clear that neither Commission would have jurisdiction, something which would lead to absurdity. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. This being the case, we are constrained to observe that the expression “composite scheme” does not mean anything more than a scheme for generation and sale of electricity in more than one State.”

(Emphasis supplied)

15. The following provision contained in Rule 8 of the Electricity Rules, 2005 takes care of the arguments based on responsibility of the State Commission under Section 86 regarding approval of procurement of electricity and determination of its price and should

leave no room for any arguments or doubt as to the correctness of the view taken by the State Commission in the impugned order:

“8. Tariffs of generating companies under section 79.- The tariff determined by the Central Commission for generating companies under clause (a) or (b) of subsection (1) of section 79 of the Act shall not be subject to re-determination by the State Commission in exercise of functions under clauses (a) or (b) of sub-section (1) of section 86 of the Act and subject to the above the State Commission may determine whether a Distribution Licensee in the State should enter into Power Purchase Agreement or procurement process with such generating companies based on the tariff determined by the Central Commission.”

(Emphasis supplied)

16. Even a bare reading of the statutory prescription makes it vivid that Section 64(5) of the Electricity Act, 2003 is created as an exception to provisions contained in Part-X (Regulatory Commissions) in context of the determination of “*tariff for any inter-State supply, transmission or wheeling of electricity*”. In the case of parties herein, the contractual arrangement was for *intra-State* sale of electricity rather than *inter-State* sale of electricity.
17. The argument that the JITPL unfairly and improperly took an about-turn on its stand and made submissions contrary to its own tariff petition is not correct. It has been pointed out by the learned counsel for the second Respondent, and rightly so, that the second respondent had, *inter alia*, pleaded thus before the State Commission:

“10. The Petitioner would be supplying 72 MW power from the first commissioned unit (Unit No.1 of 600 MW) less auxiliary consumption to GRIDCO Limited in terms of the Power Purchase Agreement (PPA). On the date of this Petition, the Petitioner does not have any PPA with Distribution Licensee of any other State (other than GRIDCO Limited). Further, the sale of electricity to Distribution Licensees in more than one State, ought to be covered under Composite Scheme of generation and sale under 79(1) of the Electricity Act, 2003. However, mere sale of electricity to more than one Distribution Companies of different States does not ipso facto become a composite scheme. A Composite Scheme should mean that there is a commonality on aspects such as tariff, terms and conditions for generation and sales as in case of bulk Power Supply Agreements entered into by Central Sector Generating Stations such as NTPC, NHPC, etc., where under the same agreement, the electricity is supplied to distribution licensees of more than one State. In this regard, reference may be had, to the CERC Order in Case no. 103/2005 dated 29.03.2006, wherein the Hon’ble CERC had clarified its jurisdiction under Section 79(1) vis-à-vis a composite scheme of generation and sale to more than one state. As per para 2B of the Said order of Hon’ble CERC, a generating station could come under composite scheme, when it is set up in one State but the beneficiaries would be pre-identified and be in more than one State. Accordingly, as the Petitioner has not defined its other beneficiaries, it should not be treated under category of 79(1)(b) of the Act.

Therefore, the Hon’ble State Commission is the appropriate Commission to determine variable tariff of power to be procured by GRIDCO Limited from the plant of the Petitioner as per the PPA. However, it is submitted that in the event the Petitioner executes a power purchase agreement with a Distribution licensee outside the State of Odisha, the tariff of the generating station/Project, or any revision and/or modification of tariff will be then determined by the Hon’ble Central Commission in terms of section 79(1)(b) of the Electricity Act, 2003.”

(Emphasis supplied)

18. As has been pointed out the contractual arrangements with other entities outside the State of Odisha were entered upon after filing of the tariff petition. In these circumstances, it is observed that, the generator was within its right, as reserved in the above quoted pleadings, to contend that the tariff determination exercise would consequently now vest in the Central Commission in terms of Section 79(1)(b) of the Electricity Act, 2003.
19. For the foregoing reasons, the appeal is found devoid of merits and is dismissed. The pending applications are rendered infructuous and are disposed of accordingly.

**PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO
CONFERRING ON THIS 10th DAY OF JANUARY, 2022.**

**(Sandesh Kumar Sharma)
Technical Member**

**(Justice R.K. Gauba)
Officiating Chairperson**

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