

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

(APPELLATE JURISDICTION)

APPEAL NO.291 OF 2017

AND

APPEAL NO. 292 OF 2017

Dated: 18.08.2022

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

In the matter of:

M/S HINDALCO INDUSTRIES LIMITED

Through its General Manager
having its Registered office at:
Ahura Centre, 1st Floor, B Wing,
Mahakali Caves Road,
Andheri (East) Mumbai-400093

And

having its Works & Principal Office
P.O.: Renukoot-231217,
District: Sonebhadra(U.P)

.... Appellant(s)

VERSUS

**1. THE UTTAR PRADESH POWER CORPORATION LTD
(UPPCL)**

Through it's Managing Director
Shakti Bhawan, 14-Ashok Marg,
Lucknow (U.P)-226001

2. PURVANCHAL VIDYUT VITRAN NIGAM LTD,

Through its Managing Director
132 KV Sub-Station,
Bhikaripur Vidyut Nagar
Varanasi (U.P) - 221004

**3. THE UTTAR PRADESH ELECTRICITY REGULATORY
COMMISSION (UPERC)**

Through its Secretary,

*Kisan Mandi Bhawan, IIndFloor,
Gomti Nagar,
Lucknow-226010*

..... Respondents

Counsel for the Appellant (s): Mr. Buddy A. Rangandadhan
Mr. Kausthubh Mishra
Ms. Aditi Raghuvanshi
Mr. Ashish Prasad

Counsel for the Respondent (s): Mr. Amit Kapur
Mr. Akshat Jain
Mr. Pratyush Singh
Mr. Aditya Dubey for R-2/PUVVNL

Mr. C.K. Rai
Mr. Sumit Panwar for R-2/UPERC

J U D G M E N T (Oral)

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

1. These appeals have been filed by Hindalco Industries Limited (hereinafter referred to as “the *Appellant*” or “*Hindalco*”) under Section 111 of the Electricity Act, 2003 challenging the Judgment dated 22.08.2017 passed by the Uttar Pradesh Electricity Regulatory Commission (hereinafter referred to as “the *State Commission*” or “*UPERC*”) in Case nos. 925/2013 and 1030/2015. By the impugned order, the State Commission rejected Hindalco’s prayer in Case no. 1030/2015 for grant of approval to the PPA dated 13.07.2009 executed between Hindalco and Respondent nos. 1 & 2 and referred the parties to arbitration for resolution of issues agitated in Case no. 925/2013 in relation to invoices and demands raised by respondent nos. 1 & 2 upon Hindalco for supply of power at peak hours (i.e., between 1700 hours till 2200 hours) during the

period 01.04.2009 till 31.03.2014 without adjustment against banked energy.

2. The background facts may be noted.

3. The appellant is engaged in the business of manufacturing aluminum and allied products. In 1959, it established an aluminum plant at P.O. Renukoot, Sonbhadra District in Uttar Pradesh which was commissioned in 1962. Since uninterrupted supply of power is vital for manufacture of aluminum, several agreements were executed over the period since 1959 for supply of power at special rates by the State of Uttar Pradesh to Hindalco for its aluminum plant.

4. In 1967, Hindalco set up a captive thermal power plant (“CPP”) at Renusagar, Uttar Pradesh to meet its power requirements. The capacity of CPP has increased with passage of time, and statedly stands currently at 840 MW. Hindalco also has co-gen units with current capacity of 84 MW. From January 1997 onwards, Hindalco started supplying surplus power from the CPP to the erstwhile Uttar Pradesh State Electricity Board (“UPSEB”). Prior to 17.09.1998, the power supplied to UPSEB was treated as sold. Subsequently, banking facility of 30% was allowed to Hindalco from 17.09.1998 to 14.05.1998, which was further enhanced to 50% w.e.f. 15.05.1999. Considering the special arrangement between parties and

requirement of Hindalco for uninterrupted power supply, there was no limitation on adjustment of power drawn by it (Hindalco) during peak hours against the banked energy.

5. On 12.02.2002, an Agreement was executed between Hindalco and Uttar Pradesh Power Corporation Limited (“UPPCL”), hereinafter “2002 Agreement” which contained, *inter alia*, the terms and conditions for sale and banking of power supplied by Hindalco to UPPCL as well as terms and conditions for supply of power from UPPCL to Hindalco for the period between 30.06.1995 to 31.03.2004, there statedly being no limitation on adjustment of power drawn by Hindalco during peak hours against the banked energy. After the expiry of the 2002 Agreement, another PPA dated 13.05.2005 was executed between Hindalco and the respondents for the period 01.04.2004 to 31.03.2009 (“2005 PPA”) where under Hindalco was allowed to supply prescribed power to UPPCL on 50% banking and 50% sale basis with no limitation on adjustment of power drawn during peak hours against the banked energy.

6. In November 2005, the first and second respondents viz. UPPCL and Purvanchal Vidyut Vitran Nigam Ltd. (“PVVNL”) filed a petition bearing Case no. 294/2005 before UPERC seeking approval of the 2005 PPA. The respondents sought approval of the 2005 PPA on the basis, *inter alia*, that the historical arrangement between Hindalco and respondents has been in

place since 1959 and was of a “special type” and in the interest of consumers.

7. On 23.02.2006, the *UPERC (Terms and Conditions for Supply of Power and Fixation of Tariff for sale of power from Captive Generating Plants, Co-generation, Renewable Sources of Energy and Other Non-conventional Sources of Energy based Plant to a Distribution Licensee) Regulations, 2005* (“2005 Regulations”) were promulgated by the State Commission in exercise of powers under Section 181 read with Sections 9, 61, 86(1)(a), 86(1)(b) and 86(1)(e) of the Electricity Act, 2003. The 2005 Regulations came into force w.e.f. 28.07.2005 and were stipulated to govern for a period of 5 years unless reviewed earlier or extended by the Commission. By the said 2005 Regulations, a fetter was introduced for the first time, whereby power drawal by Captive Generating Plants (“CGPs”) against banked energy (subject to deduction of banking charges of 12.5% of banked energy) was permitted only during the period other than 1700 Hrs. to 2200 Hrs., the energy drawn during peak hours (i.e., 1700 Hrs. to 2200 Hrs.) by CGPs being considered as power purchased by the CGPs from the licensees.

8. By Order dated 25.11.2005, the Commission approved the 2002 PPA and the 2005 PPA up to 27.07.2005 despite some deviations therein from the regulations, observing that the transactions had already been made

and the parties to the said agreements had shown no grievance whatsoever. The Commission, however, directed the parties to submit a revised draft of the PPA for approval in accordance with the Electricity Act, 2003 and regulations made there-under.

9. In February 2006, both Hindalco and UPPCL filed petitions bearing nos. 313/2006 & 318/2006 respectively before the Commission seeking review of the Order dated 25.11.2005 seeking approval of the 2005 PPA for the period till 31.03.2009. In March 2006, both Hindalco and UPPCL filed affidavits before the Commission demonstrating that the deviations in the 2005 PPA from the 2005 Regulations were in continuation of a special arrangement existing between parties since 1997 and being in the interest of the consumers. By Order dated 31.03.2006, the Commission approved the 2005 PPA notwithstanding the deviations from the 2005 Regulations, including the stipulation regarding no limitation for adjustment for power drawn during peak hours against banked energy on the ground that the said arrangement was safeguarding consumer interest.

10. With the term of the 2005 PPA coming to an end, Hindalco vide letter dated 03.01.2009 requested UPPCL for renewal of the said PPA on similar terms for the subsequent period to 31.03.2009. On 28.03.2009, UPPCL gave consent to Hindalco's request for continuation of the 2005 PPA till execution of the renewed PPA. Thereafter, another PPA dated 13.07.2009

was executed between Hindalco and the respondents for a period of five years from 01.04.2009 to 31.03.2014 (“2009 PPA”). The clause 22(A) of the 2009 PPA permitted Hindalco to consume 75% of the energy banked during a particular financial year at any point of time during the said financial year. Even under the 2009 PPA, there was no limitation on adjustment of power drawn during peak hours against banked energy, which arrangement was in place since 1998 and had already been approved by the Commission in 2005-06 while granting approval to the 2005 PPA.

11. Under execution of the 2009 PPA on 13.07.2009, Hindalco addressed letters dated 15.09.2009 and 09.12.2009 requesting the UPPCL to submit the 2009 PPA before the Commission for approval but no steps for submission of the PPA for approval by the Commission were taken.

12. On 22.03.2010, the *UPERC (Captive and Non-Conventional Energy Generating Plants) Regulations, 2009* were promulgated by UPERC in exercise of powers under Section 181 read with Sections 9, 61, 86(1)(a), 86(1)(b) and 86(1)(e) of the Electricity Act, 2003 (“2009 Regulations”), the said Regulations having come into force w.e.f. 01.10.2009 and stipulated to be valid up to 31.03.2014, unless reviewed earlier or extended by the Commission. The 2009 Regulations contained similar provisions as the 2005 Regulations on the subject of the permissibility of drawal of banked

energy only during non-peak hours, and treatment of power drawn during peak hours as power purchased by the CGPs from the licensees. The 2005 Regulations were repealed by the 2009 Regulations without a savings clause.

13. Upon execution of the 2009 PPA, the parties seem to have acted in terms thereof till September 2013 without any dispute or differences. The respondents raised monthly bills upon Hindalco after adjustment of power drawn by Hindalco during peak hours against the banked energy, and Hindalco duly made payments towards such bills from time to time. Consequently, for a period of about fifty months since execution of the 2009 PPA, the parties seem to have been *ad idem* regarding the terms and conditions of the 2009 PPA including in relation to permissibility of adjustment of power drawn during peak hours against banked energy.

14. On 24.09.2013, UPPCL raised a bill upon Hindalco treating the power drawn by Hindalco during peak hours and power purchased by Hindalco, without adjustment of power drawn during peak hours against banked energy, purportedly in terms of the 2009 Regulations. The bill raised by UPPCL is stated to have been issued pursuant to certain observations made by the auditors of the Comptroller and Auditor General (“CAG auditors”). By response dated 29.09.2013, Hindalco disputed and denied the liability to make payment as demanded by UPPCL. Subsequently,

revised bills were raised upon Hindalco by UPPCL on 01.10.2013, 01.11.2013 and 22.11.2013 for a total amount of Rs. 40.77 Crores, which were disputed and denied by Hindalco vide responses dated 07.10.2013 and 23.11.2013.

15. In December 2013, Hindalco approached the Commission and filed Case no. 925/2013 challenging the invoices dated 24.09.2013, 01.11.2013 and 22.11.2013 raised by UPPCL. During the hearing on the said petition, the Commission enquired as to the status of approval of the 2009 PPA. In the wake of this, Hindalco filed Case no. 1030/2015 seeking approval of the 2009 PPA.

16. On 20.01.2015, i.e., during the pendency of the proceedings on the above two matters before the Commission, the *UPERC (Captive and Renewable Energy Generating Plants) Regulations, 2014* (“2014 Regulations”) were promulgated by UPERC in exercise of powers under Electricity Act, 2003, which came into force on 01.04.2014, stipulated to regulate the subject up to 31.03.2019, unless reviewed earlier or extended by the Commission. Unlike the 2009 Regulations, under the 2014 Regulations, CGPs were permitted to adjust power drawn during peak hours against the energy banked during peak hours. The 2009 Regulations were repealed by the 2014 Regulations again without a savings clause.

17. Both the aforesaid petitions filed by Hindalco were disposed of by the State Commission vide Orders dated 22.08.2017, impugned in these appeals with the result noted earlier. On 25.08.2017, the respondents raised a demand of Rs.80,81,38,721/- upon Hindalco towards supply of power during peak hours for the period from 01.04.2009 to 31.03.2014 along with late payment surcharge (“LPS”) in terms of the 2009 Regulations.

18. By Order dated 26.10.2017, this tribunal dismissed IA nos. 753/2017 and 754/2017 filed by Hindalco seeking stay of the impugned order. Hindalco filed Civil Appeal nos. 17375/2017 and 17376/2017 before the Hon’ble Supreme Court against this tribunal’s Order dated 26.10.2017. By Order dated 31.10.2017, the Hon’ble Supreme Court stayed 50% of the demand of Rs.80,81,38,721/- and directed Hindalco to make payment of the balance 50% of the demand to the respondent nos. 1 & 2 within two weeks. On 13.11.2017, Hindalco is stated to have deposited an amount of Rs. 40,40,69,361/- with respondent no.2.

19. It may be noted here that during the pendency of the appeals at hand, the *UPERC (Captive and Renewable Energy Generating Plants) Regulations, 2019* were promulgated by UPERC on 25.07.2019 (“2019 Regulations”) which came into force on 01.04.2019 and are stipulated to

remain valid up to 31.03.2024 unless reviewed earlier or extended by the Commission. The 2014 Regulations were repealed by the 2019 Regulations.

20. The learned counsel appearing for the appellant (Hindalco) has argued that the 2009 Regulations on the basis of which the impugned bills and demands were raised by respondents upon Hindalco have been repealed by the 2014 Regulations. There is no savings clause in the 2014 Regulations. He submitted that repeal without a savings clause means that the 2009 Regulations have been effaced from the statute book as if the same never existed. Consequently, he argued, any proceedings undertaken pursuant to the 2009 Regulations – including the impugned bills and demands raised by respondents – have no legal foundation and cannot survive. The appellant also contends that Section 6 of the General Clauses Act would not apply to save any action taken under the 2009 Regulations since the said provision cannot be applied to delegated legislation.

21. It is also the argument of the Hindalco that there is inherent contradiction in the approach of UPERC. On the one hand, the Commission has refused to approve the 2009 PPA, while on the other it has referred the parties to arbitration based, *inter alia*, on the arbitration clause contained in the very same unapproved 2009 PPA.

22. It is further the argument of the appellant that the conduct of parties (prior to September 2013 and post April 2014) wherein Hindalco was permitted to adjust power drawn during peak hours against banked energy, and the special arrangement between the parties which was in the interest of consumers has not been considered by the Commission which renders the adjudication perverse. It is also submitted that the responsibility and obligation for obtaining approval of the 2009 PPA is that of the distribution licensees under Section 86(1)(b) of the Electricity Act, 2003 and that such obligation cannot be diluted through the regulations and foisted upon CGPs as collective responsibility.

23. The learned counsel for the appellant fairly conceded that the preliminary issue regarding the legal consequences of repeal of the 2009 Regulations was not pressed before the State Commission or in the appeal; however, this being purely a question of law which has a material bearing on this case is necessarily required to be considered and adjudicated upon.

24. *Per contra*, the learned counsel appearing for PVNNL argued that the bills for supply of power during peak hours for the period in question (from 01.04.2009 to 31.03.2014) were raised by respondents upon Hindalco strictly in terms of the *UPERC (Captive and Non-Conventional Energy Generation Plants) Regulations, 2009* ("2009 Regulations"). It is his

submission that the power drawn by CGPs during peak hours is to be considered as power sold to them (CGPs) by licensees and cannot be adjusted against banked energy supplied by CGPs to the licensees, for the drawal of power against banked energy by CGPs is permitted only during non-peak hours in terms of the 2009 Regulations. Placing reliance on the ruling of Hon'ble Supreme Court in *PTC India Ltd v. CERC*, (2010) 4 SCC 603, it was argued that the 2009 Regulations are statutory in nature and would thus prevail over the contractual arrangement between parties as recorded in the 2009 PPA. The respondent defends the impugned decision refusing to grant approval to the 2009 PPA retrospectively as prayed for by Hindalco on the ground that the petition seeking approval of PPA was filed by Hindalco in 2015 after the expiry of the term of the 2009 PPA.

25. Having heard the learned counsel for the parties and in light of the issues which have arisen for consideration, particularly the legal effect and consequences of repeal of the 2009 Regulations, we note that the State Commission has not fully addressed certain crucial issues. It needs to be examined, *inter alia*, as to what are the legal consequences and effect of repeal of the 2009 Regulations without a savings clause. Further, the question arises as to whether in light of repeal of the 2009 Regulations, the PPA dated 13.07.2009 can be approved by the Commission in exercise of powers under Section 86(1)(b) of the Electricity Act, 2003. It also calls for examination as to whether the submission of the 2009 PPA for approval

was the responsibility of the CGP of the procurer (the respondents) and if of the latter as to whether the petition for approval ought to have been left undecided. Also, if invoking arbitration clause of said PPA is the correct approach under the law when the Commission has declined to approve the PPA. The scrutiny of the contentions of both sides on these questions of law is necessary to adjudicate on the authorization and validity of the impugned demands. In the given facts and circumstances, we deem it necessary and proper that the matter be remitted for complete and effective adjudication by the Commission.

26. For the foregoing reasons, subject to directions as to interim arrangement as ordered hereafter, the impugned Order dated 22.08.2017 is set aside and the matters remanded and restored to the file of the Commission for consideration and decision afresh, *inter alia*, on the issues indicated earlier.

27. The interim arrangement directed by the Hon'ble Supreme Court vide Oder dated 31.10.2017 in CA nos. 17375/2017 and 17376/2017 shall continue *inter se* parties until the final outcome of the remand proceedings before the Commission.

28. All contentions of parties are expressly left open to be considered by the Commission on their merits. Nothing observed in this judgment shall be construed as final expression of opinion on the subject by this tribunal.

29. The appeals are disposed of in above terms.

(Sandesh Kumar Sharma)
Technical Member

(Justice R.K. Gauba)
Officiating Chairperson

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