

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

APPEAL NO. 48 OF 2019

Dated: 13.01.2022

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

In the matter of:

1. LANCO AMARKANTAK POWER LIMITED

Lanco House
Plot No. 397, Phase-III
Udyog Vihar, Gurgaon-122016
Haryana
[Through its Authorized Signatory]

... **APPELLANT**

VERSUS

1. HARYANA ELECTRICITY REGULATORY COMMISSION

Bays No. 33-36, Sector-4
Panchkula-134109
[Through its Secretary]

2. PTC INDIA LIMITED

2nd Floor, NBCC Tower
15, Bhikaji Cama Place
New Delhi- 110066
[Through its Chairman and Managing Director]

3. HARYANA POWER PURCHASE CENTER

(On behalf of M/s Haryana Power
Generation Corporation Ltd.)
2nd Floor, Shakti Bhawan
Sector-6, Panchkula
[Through its Chief Engineer]

... **RESPONDENTS**

Counsel for the Appellant (s) : Mr. Deepak Khurana
Mr. Abhishek Bansal
Ms. Nishtha Wadhwa
Mr. Ashwini Kumar Tak

Counsel for the Respondent (s) : Mr Janmali Manikala for R-2
Mr. Shubham Arya
Ms. Shikha Sood for R-3

J U D G M E N T (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. The claim of the appellant, a thermal power generator, for recovery of its dues towards supply of electricity to respondent Haryana Power Purchase Centre (“HPPC”), it being the nodal agency for distribution licensees for procurement of electricity for supply in the State of Haryana, continues to plague the relationship of the parties even after several rounds of litigation, at one stage it having gone up to the Hon’ble Supreme Court. By the impugned order dated 31.10.2018, passed in case / petition no. HERC/PRO-5 of 2014 and PRO-3 of 2016, the respondent Haryana Electricity Regularity Commission (for short “*the State Commission*”), pursuant to an order of remand by order dated 21.03.2018 in appeal nos. 107 and 117 of 2015 has rendered an appropriate decision on the issue of Operation and Maintenance (O&M) expenses, bringing it in line with the regime under Central Electricity Regularity Commission dispensation but denied the benefit of “interest” observing that there was no direction in the order of remit vis-à-vis claim of interest. The appellant is aggrieved and has come up yet again before this Tribunal by the present appeal.

3. The background facts may be noted in brief.

4. The appellant, thermal power generator had entered into a Power Purchase Agreement (“PPA”) with respondent Power Trading Corporation (“PTC”) on 19.10.2005, PTC having arrangement in the shape of Power Sale Agreement (“PSA”) dated 21.09.2006 with HPPC. The generating station of the appellant achieved commercial operation in May 2011 and pending decisions on the issues such as tariff, the supply was commenced under the PPA / PSA with effect from 07.05.2011, HPPC making payments on *ad hoc* basis. Eventually, by an order passed in December 2011, the Supreme Court directed proper tariff determination. This led to a tariff order being passed by the State

Commission on 23.01.2015 which would cover the period commencing from May 2011 onwards.

5. The tariff order dated 23.01.2015 led to challenges by appeal nos. 107 and 117 of 2015 filed by the appellant herein and HPPC, the contention of the appellant in the said appeal being that it was entitled to a higher capacity charge on the element of O&M. The said appeals were decided by order dated 21.03.2018, wherein the contention of the appellant on the issue of O&M was upheld and the matter was remanded to the State Commission for fresh decision in light of directions passed in the said judgment. It is the said remand order which led to the impugned order being passed on 22.09.2019 wherein while granting the necessary relief on O&M expenses in relation to the tariff determination exercise, the State Commission has declined to award any interest observing simply that the remand order passed by this Tribunal is silent on the issue.

6. While the above proceedings were held up at one stage or the other, pursuant to the tariff order, the appellant had filed a claim before the State Commission in 2016 seeking award of differential tariff based on tariff determined by the State Commission by order dated 23.01.2015 and the *ad hoc* payments that had been received since the commencement of the supply of electricity, the claim agitated at that stage being inclusive of the award of interest on the principle of time value of money.

7. The State Commission by its order dated 12.07.2016 granted the principal amount claimed but denied the interest part. That order was challenged by appeal no.308/2017 before this Tribunal. It is necessary to extract the relevant part of the said decision of this Tribunal particularly on the issue of interest:

“93. Our findings and analysis

- i) *There was a change in law and as a result of which the Appellant had to buy coal which was three to four time costlier than the linkage coal resulting into increased cost of generation.*
- ii) *Under these circumstances the Appellant was forced to arrange additional funds to keep the plant in operation*

and generate electricity to supply power as per its commitment. The State Commission has accordingly redetermined tariff and has given enhanced tariff from the date of commencement of supply.

- iii) The payment of interest was a issue framed by the State Commission, however, the State Commission did not record any reason for not granting the same. The most important aspect in this Appeal is that the Appellant incurred additional expenditure over and above the capped tariff of Rs. 2.32/kWh and accordingly the State Commission redetermined it to Rs.2.8875/kWh for FY 2011- 12 and Rs.2.9218/kWh for the FY 2012-13. Though the differential amount have been paid by the Respondent No.3 to Appellant. No carrying cost/interest was paid.*

However, it is pertinent to note that the differential amount between the capped tariff and the redetermined tariff was payable in the FY 2011-12 and FY 2012-13 but was actually paid subsequently after a gap of several years. It is a well established fact that money not paid in time but paid subsequently at a much later stage after lapse of several years, losses its real money value to a great extent and is effectively less money paid.

- iv) Therefore, for equity and restitution payments made at a later stage, of the amount, due in the past, must be compensated by way of appropriate rate of interest so as to compensate for the loss of money value. This is a proven concept of time value of money to safeguard the interest of the receiving party.*
- v) The Appellant has placed reliance on several judgments passed by this Tribunal in several similar matters wherein it has been clearly brought out that the developers are entitled to interest on the differential amount due to them as a consequences of redetermination of tariff. It has been clarified in various judgments that the interest is not a penal charge if it is fixed according to commercial principles. It is only compensation for the money denied at the appropriate time. The Appellant has also relied on the judgment by this Tribunal in the following:*

- i. *SLS Power Limited V. Andhra Pradesh Electricity Regulatory Commission and Ors. in Appeal Nos. 160, 166, 168, 172, 173 of 2011 and 9,18,26,29 and 38 of 2012*
 - ii. *The judgment of this Tribunal in SLS Power case has been reaffirmed recently in Adani Power Limited v. Central Electricity Regulatory and Ors. in Appeal No. 210 of 2017*
 - iii. *The judgment in Adani case has been reaffirmed by this Tribunal in its decision dated 21.12.2018 in Appeal No. 193 of 2017- GMR Kamalanga Energy Ltd. v. CERC*
 - iv. *The judgment in Adani case has been reaffirmed by this Tribunal in its decision dated 21.12.2018 in Appeal No. 193 of 2017- GMR Kamalanga Energy Ltd. v. CERC*
 - v. *Alok Shanker Pandey v. Union of India (2007) 3 SCC 545, wherein the Hon'ble Supreme Court of India*
- vi) *In view of the above it emerges that the State Commission committed an error by not taking these aspects into consideration while deciding on the matter and not granting interest to the Appellant.*
- vii) *The Respondent No.3 have submitted that interest cannot be paid until the amount is crystallized. It is pertinent to note here that though the amount was crystallized by the State Commission vide their Impugned Order but the most important fact to be kept in mind is that the State Commission redetermined the tariff from the date of commencement of supply which clearly shows that the due date is the date of commencement of supply. In such matters the crucial point for consideration is that interest is not a penalty or punishment at all. But, it is the normal accretion on capital. Equity demands that the paying party should not only pay back the principal amount but also the interest thereon to the recipient and therefore the argument of the Respondent does not hold any ground and needs to be rejected.*
- viii) *The Respondent No.3 has however submitted that the interest was not claimed by the Appellant in their earlier proceedings. The Appellant have submitted that it cannot have and did not claim interest in the tariff application*

filed before the State Commission as the said proceedings was for tariff determination only and not for recovery of amount as such the scope of proceedings and the order was limited to determination of tariff.

ORDER

For the foregoing reasons, as stated supra, the instant Appeal filed by the Appellant is allowed in part.

The Impugned Order dated 12.07.2016 passed in Petition No. HERC/PRO-3 of 2016 by the first Respondent/the State Commission to the extent regarding not granting interest as indicated above is hereby set aside.

The matter stands remitted back to the first Respondent/the State Commission with the direction to pass the order in the light of the observations made in the preceding paragraphs above in accordance with law as expeditiously as possible within a period of three months after receiving the copy of this judgement.

The Appellant and the Respondents are hereby directed to appear before the 1st Respondent/the State Commission personally or through their counsel on 01.07.2019 without further notice.

...”

8. The judgment dated 22.05.2019 wherein this Tribunal ruled on the issue of interest was a decision rendered *inter partes*, involving the same parties as are present before us in this fresh round of appeal. The principle has already been decided. It is a matter of surprise that even while noting the said decision dated 22.05.2019, the State Commission chose to ignore the principles settled therein, so as to deny benefit of element of interest to the appellant vis-à-vis the addition in the tariff on account of O&M expenses on the specious reasoning that the remand order dated 21.03.2018 was silent on the issue. There can be no doubt that the legitimate expectation of the appellant, the generator and supplier of electricity, is for recovery of actual cost. The payments made after such a long gap cannot be treated as the recovery of full or actual charges in as much as real value has eroded over the period.

9. We are not impressed with the argument of HPPC that in the execution proceedings such claims cannot be made. In the given circumstances, reliance on Judgment dated 31.05.2011 in Appeal No. 195

of 2009 *Mumbai International Airport Pvt. Ltd. v. Maharashtra Electricity Regulatory Commission*; Judgment dated 27.08.1990 in *State of Punjab v. Krishan Dayal Sharma* (2011) 11 SCC 212; *Nabha Power Limited v. Punjab State Electricity Regulatory Commission* (2018) 11 SCC 508; *Commissioner of Income Tax v. T.P. Kumaran* (1996) 10 SCC 561; *Coffee Board v. Ramesh Exports (P) Ltd.* (2014) 6 SCC 424; and Judgment dated 25.10.2018 in Appeal No. 185 of 2015 *Kalani Industries Pvt. Ltd. v. Rajasthan Electricity Regulatory Commission* and Judgment dated 18.05.2011 in Appeal No. 172 of 2010 *Bihar Steel Manufacturers Association v. Bihar Electricity Regulatory Commission* passed by this Tribunal - is misplaced.

10. In the above facts and circumstances, the judgment on the issue of interest rendered by this Tribunal on 22.05.2019 in the appeal no. 308/2017 having become final and binding on the parties, we hold the denial of interest part on the added element of O&M expenses is unjust and unfair.

11. We, thus, set aside the impugned order to the extent it denied the element of interest, and direct that the State Commission shall pass a fresh order on this issue in light of the observations recorded above. Needless to add, the issue having persisted for too long, the Commission will have to render its fresh order expeditiously, not later than four weeks of today. Further, we would expect the respondent HPPC to honour and discharge its liability without any further demur or delay.

12. The appeal is disposed of in above terms.

**PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO CONFERENCING
ON THIS 13th DAY OF JANUARY, 2022.**

(Sandesh Kumar Sharma)
Technical Member

vt/TP

(Justice R.K. Gauba)
Officiating Chairperson