IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No. 230 OF 2018

Dated : 18th December, 2023

Present: Hon`ble Mr. Sandesh Kumar Sharma, Technical Member
Hon`ble Mr. Virender Bhat, Judicial Member

In the matter of:

MANGALAM CEMENT LTD.
P.O. ADITYA NAGAR-326520,
MORAK, DIST. KOTA (RAJ.)
THROUGH ITS AUTHORISED SIGNATORY.
Email: email@mangalamcement.com;

.....APPELLANT

VERSUS

1. **JAIPUR VIDYUT VITRAN NIGAM LIMITED**
VIDYUT BHAWAN, JANPATH JAIPUR-302005
THROUGH ITS MANAGING DIRECTOR
Email: cmd@jvvnl.in.

2. **RAJASTHAN ELECTRICITY REGULATORY COMMISSION**
"VIDYUT VINYAMAK BHAWAN",
NEAR STATE MOTOR GARAGE,
SAHAKAR MARG, JAIPUR-302 005
THROUGH ITS SECRETARY
Email: rercjpr@yahoo.co.in.

Counsel on record for the Appellant(s) : P.N. Bhandari For App1

Counsel on record for the Respondent(s) : S.K. Agarwal For Res1
Raj Kumar Mehta For Res2

JUDGEMENT

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. The appellant, Mangalam Cement Ltd. has assailed the order dated 26.09.2017 passed by Respondent No. 2, the Rajasthan Electricity Regulatory Commission (RERC) whereby its petition has been dismissed. The Appellant had prayed for quashing of the electricity bill dated 12th June, 2016 as well as two letters dated 2nd June, 2016 and 8th June, 2016 issued by 1st Respondent and also for a direction to the 1st Respondent to abide by the terms and conditions of the PPA executed between the parties. Interest on the amount of Rs.84,46,503/-, deposited by the Appellant under protest with the 1st Respondent, was also claimed.

2. The Appellant is a wind energy generator and has set up wind energy plants in Rajasthan in the years 2007, 2008 & 2010 under the Govt. of Rajasthan Policy of 2004. Separate PPAs have been executed between the Appellant and the 1st Respondent for these wind energy plants on 21st September, 2007, 29th January, 2008 and 31st May, 2010. As per clause 8.2 of GOR Policy of 2004, these power purchase agreements were to remain in operation for a period of 20 years.

3. The second Respondent RERC issued fresh tariff regulations in the year 2014 which were notified on 24th February, 2014 and were applicable for determination of Tariff for the control period of five years i.e. 1st April, 2014 to 31st March, 2019.

4. Vide the above referred letters dated 7th June, 2016 & 8th June, 2016, the 1st Respondent has applied these tariff regulations of 2014 on the PPAs executed between the Appellant and accordingly has issued the bill dated 12th June, 2016. Feeling aggrieved by the actions of the 1st Respondent, the Appellant had approached the 2nd Respondent, Commission with its petition, which came to be dismissed vide the impugned order.

5. Be it noted that a review petition filed by the appellant was also dismissed by the Commission vide order dated 27.02.2018.

6. Clause 6 of GOR Policy of 2004, which related to Wheeling and Banking, reads as under :-

> *"**6. WHEELING AND BANKING** :*
>
> *6.1 Except in case of power sold to Discom, the power producer shall pay wheeling charges @ 10% of the energy billed into the grid irrespective of the distance from the generating station and such charges will be inclusive of the T&D losses.*
>
> *6.2 The power producer may have the facility of power banking with the Discom. The Discoms at the end of 31st December of every calendar year, will pay the power producer for the energy billed into the grid but has remained unutilized (after self-use of sale to consumers/licensees other than Discoms) by the power producer during the said calendar year at the pooled rate for procurement of power by the Discom in the preceding financial year."*

7. The tariff regulations of 2014 seeks to alter the provision related to wheeling and banking and provide as under :-

> *"Period of Banking:- the Banking shall be on monthly basis, energy accounting RE Power generator/developer would be*

entitled to get payment @60% of energy charges applicable for the large industrial power tariff excluding fuel surcharge if any in respect of 10% of unutilized Banking Energy after end of Month of unutilized Banking Energy in excess of 10% shall lapse."

8. Thus these regulations reduce the banking period to one month as well as the entitlement of the power producer (appellant) with regards to unutilized banked energy to only 10% payable @60% of the energy charges applicable for the large industrial power tariff. The banked energy in excess of 10% shall lapse.

9. The contentions of the Appellant before the 2nd Respondent (RERC) were that these provisions regarding wheeling, banking etc. were part of GOR policy of 2004 and cannot be amended by the subsequent tariff regulations. It was stated that neither the tariff regulations of 2009 nor of 2014 have any retrospective effect and therefore these could not be applied to the PPAs between the Appellant and the 1st Respondent with regards to wind energy power plants established by the Appellants in the year 2007, 2008 & 2010. It was further contended that these tariff regulations of the year 2014 cannot govern the disputes arising out of the earlier PPAs executed between the parties under the GOR Policy of 2004 for the reasons that actually no tariff determination was involved in the cases related to the generating plants of the Appellants, which stands determined at the time of execution of these PPAs.

10. The Commission, relying upon its earlier order dated 7th October, 2015 passed in Petition No. 497 of 2014 filed by M/s. Kishangarh Hi-tech Textile Park Ltd., disagreed with the contentions of the Appellant and accordingly dismissed the petition. The Commission has held as under:-

"The applicability of the terms and conditions of transmission charges and wheeling charges have been separately specified under Regulations 90(other charges) and for banking facilities under Regulation 92 (Banking) of the Tariff Regulations, 2009. These are independent from the calculations for tariff determination.

The contention of the Petitioner that the provision of Regulation 1 (2) of the RE Tariff Regulations, 2014 also governs the applicability of transmission and wheeling charges and banking facility cannot be accepted since the proviso under this Sub-Regulation clearly indicates that only the issues related to determination of Tariff shall be governed by the Tariff Regulations, 2009.

The Commission under Tariff Regulation, 2009 has determined the transmission and wheeling charges and banking facility for the control period of 01.04.2009 to 31.03.2014. Similarly, Commission has determined the above charges for the control period 01.04.2014 to 31.03.2019 under the RE Tariff Regulations, 2014. Therefore the contention advanced by the Petitioner that charges determined under 2009 Regulation shall continue to supply throughout the agreement period does not hold water. The above charges determined under 2009 Regulation cannot apply beyond the control period of the said Regulation, and charges determined under 2014 Regulation shall apply thereafter.

No tariff charge or billing charge can remain static. They have to be determined from time to time depending on the cost incurred by the Licensees. No. Licensee can be made to give the service dehors its actual cost. The tariff shall always reflect the actual cost & other factors of the relevant period.

The contention of the Petitioner that the agreement specifying the charges payable by it shall be governed by Regulation, 2009 ignores

the words used in the EWA and WBA ' as amended from time to time'. The interpretation of the Petitioner that 2009 Regulations have not been amended is also not correct. 2014 Regulations are nothing but amendment of 2009 Regulations. The Hon'ble Supreme Court in the case of I.C. Golknath V/s State of Punjab AIR 1967SC1643 has interpreted the word ' amend' to mean "change". In the instant case the word used from time to time and context in which it is used mean changed ones. Therefore, we are of the view that Petitioner is liable to be charged from 01.04.2014 as per the changed charges determined under 2014 Regulations and not as per 2009 Regulations.

The Petitioner has referred to the judgement of Hon'ble Supreme Court in Civil appeal No. 5612 of 2012 Bangalore Electricity Supply Co. Ltd. V/s Konark Power in support of its case. We are of the view that this judgement has no application to the present case.

In the Petitioner's case, the WBA specifically states that the Regulation as amended shall apply whereas PPA referred to in the judgment did not have a similar provision.

Viewed from any angle we are of the considered opinion that there is no merit in the contention of the Petitioner. We hold that Petitioner shall be charged according to the charges determined under 2014 Regulation from the control period covered by it. Accordingly, Petition stands dismissed."

11. We have heard the learned counsels for the parties extensively and have gone through the impugned order as well as the records of the case. We have also perused the written submissions filed by the learned counsels.

12. It was in vehemently argued by the learned counsel for the appellant that once the PPAs between the Appellant and the 1st Respondent had been executed under the GOR Policy of 2004 for a period of 20 years, these are

specifically protected from the application of the tariff regulations of 2009 or 2014 and could be amended or superseded only by another policy promulgated by the Government. According to the Learned Counsel, it is fallacious to hold that every time when fresh tariff regulations are notified by the Government, all the PPAs would be effected and would get to be re-opened. It is submitted by him that the wind energy plants were set up by the Appellant on the basis of promises/declarations of the State Government through its policy of 2004, in black and white, by investing huge amount for setting up of these plants and therefore it was not open for the Government or the 1st Respondent to apply the subsequent tariff regulations of 2014 to the PPAs of the Appellant. And by doing so, the doctrine of promissory estoppels has been seriously violated.

13. He argued that even otherwise also the tariff regulations of 2014, cannot be applied to the PPAs executed between the Appellant and the 1st Respondent for the reason that the Regulations expressly state that these are meant for cases requiring tariff determination during the control period whereas the PPAs do not require any tariff determination at all. It is also canvassed by him that the Regulations applied to the wind energy plants set up during the control period of five years as mentioned in the regulations and therefore cannot be applied to the wind energy plants of the Appellant which have been set up much before.

14. Learned counsel also argued that the Commission has erred in placing reliance upon its earlier decision in the case of M/s. Kishangarh Hi-tech Textile Park Tech for the reason that the facts of that case were totally distinct from the facts of the instant case and the contentions raised by the Appellant in this case.

15. To buttress his submissions, learned counsel has cited the judgement of this Trubunal dated 29th March, 2019 in a batch of Appeals, leading case being Appeal No. 42 of 2018, M/s. Fortune Five Hydel Projects Pvt. Ltd. vs. Karnataka Electricity Regulatory Commission and Ors.

16. Learned Counsel's appearing for the Respondents entirely supported the Impugned Order stating that no error or infirmity can be found in the same. It is argued that clause 5(d) of the Wheeling & Banking Agreement (WBA) unambiguously provides that banking of energy has to be regulated as per Commission's order and amendments made from time to time and hence the appellant cannot claim that amended provisions regard banking of energy in 2014 tariff regulations are not applicable.

17. The issue which arises for consideration in the present appeal is whether the tariff regulations of the year 2014 are applicable to the PPAs/WBAs executed between the parties in the years 2007, 2008 & 2010 that is much prior to the date when the regulations were notified or are these PPAs/WBAs immune from the impact of these Regulations.

18. In order to decide the said issue, it is necessary to peruse the WBAs executed between the Appellant and the First Respondent. Clause (5)(B)(d) is relevant in this regard and is reproduced here as under :-

> "*Payment of unutilized banked energy at the end of each quarter will be @60% of energy charges (including power purchase and fuel cost adjustment if any) applicable for large industrial power tariff. The banking of energy will be governed by RERC order & amended from time to time."*

19. It is manifest from reading of the said clause in the WBA that the intention of the parties was not to keep payment of unutilized banked energy unchanged for the entire period of 20 years. For this reason, it has been provided in the said clause that the banking of energy shall be governed by the orders to be passed by RERC and amended from time to time. Therefore, the provisions related to banking of energy and payment for un-utilised banked energy in the WBAs was/is amenable to any subsequent rules/regulations to be promulgated by the RERC and the amendments to be carried out in such rules/regulations. The contentions raised on behalf of the Appellant that the expression "as amended from time to time" used in the said clause in the WBA is only a written expression and not intended to be followed or applied cannot be accepted. There is nothing in the entire WBA or in any other document on record to show that the said expression was never intended to be applied in case of these WBAs. It is a fundamental principle of interpretation of documents that the document must be read as a whole in its entire context and cannot be read in piecemeal and none of its terms can be said to be superfluous unless it is found that any particular term/provisions of the agreement is out of context. The above referred term in the WBAs cannot be said to be out of context and therefore can't be ignored.

20. Relying upon the judgement of Hon'ble supreme Court in the **THE GODHRA ELECTRICITY CO. LTD. AND ANOTHER V/S. THE STATE OF GUJARAT AND ANR. (1975) 1 SCC 199,** the Learned Counsel for the Appellant had argued that since there was no dispute about the terms and conditions of the PPA for the last about nine years, such conduct of the parties indicates that the parties had kept the PPA/WBA outside the realm

of any Rules and Regulations issued thereafter by the RERC. He argued that an agreement can be interpreted by looking into the conduct of the parties also subsequent to its execution and if the parties had given a particular interpretation to the terms of the agreement, the same cannot be changed unilaterally thereafter by the Commission. The submissions of the Learned Counsel have been noted only to be rejected. It is true that intention of the parties to an agreement can be ascertained from the language of the agreement and also can be elucidated by the conduct they have exhibited subsequent to the execution of the agreement. However, when the terms of an agreement are unambiguous and not shrouded by any iota of doubt, the interpretation of the terms by the agreement cannot be guided by any contrary interpretation given to its terms of the parties by their conduct. The reliance placed upon the above noted judgement by the Appellant's Counsel is totally misplaced. It does not advance the case of the Appellant and in fact demolishes the Appellant's case. A question was posed in the said judgement by the Bench to itself in following words :-

"Is the fact that the parties to a document and particularly to a contract, have interpreted its terms in a particular way and have been in the habit of acting on the document in accordance with that interpretation, any admissible guide to the construction of the document?"

21. The question was answered by the Bench in emphatic "NO". It was stated that in case of an unambiguous document, any particular interpretation given to its terms by the parties cannot be any guide to the construction of the document. In the instant case also, the language of clause 5(B)(d) of WBA is absolutely limpid and unambiguous while

providing that the banking of energy will be governed by the RERC order and amended from time to time. Therefore, even if the parties may have, by their conduct, given some particular interpretation to the terms of the agreement which is contrary to its specific terms particularly the said clause 5(B)(d), the same cannot be made basis for meaningful interpretation of the said agreement.

22. We also find ourselves in complete agreement with the observations of the Commission that the tariff charges or billing charges cannot remain static for all times to come and these have to be determined from time to time depending upon the cost incurred by the licensees and shall always reflect the actual cost as well as other factors prevailing at the relevant period of time.

23. It is true that the tariff regulations of the year 2014 are applicable for determination of tariff for the control period of five years from 1st April, 2014 till 31st March 2019 but it is equally true that it is specifically nowhere provided that these are not applicable to the previously executed WBAs for determination of tariff during the said control period. In this regard, we may also profitably refer to the judgement of the Hon'ble Supreme Court in PTC India Ltd. v. Central Electricity Regulatory Commission (2010) 4 SCC 603 which is a Constitution Bench Judgement and in which it has been specifically held that any regulations issued under Section 178 of the Indian Electricity Act, as a part of regulatory framework, intervenes and overrides the existing contracts between the regulated entities in as much as it casts statutory obligations on the regulated entities to align their existing and future contracts with the said regulations. It has been clarified that even the existing power purchase agreements have to be modified and aligned with

the regulations made after the execution of those agreements and in fact the regulations make an inroad into the existing contracts also.

24. In view of the specific law laid down by the Apex Court in the above cited judgement, the case of the Appellant squarely falls to the ground. It is clear that the regulations of the year 2014 override the existing PPAs/WBAs executed between the Appellant and the 1st Respondent and those PPAs/WBAs have to be modified/aligned with these regulations.

25. Reliance placed by the Learned Counsel for the Appellant upon the judgement of this Tribunal in the case of Fortune Five Hydel Projects Pvt. Ltd. is totally misplaced. In that case, the terms and conditions of the banking arrangements in the concluded contracts were sought to be modified by the Karnataka Electricity Regulatory Commission by its order which was set aside by this Tribunal on the ground that the same appeared to been passed without adhering to the principle of natural justice, the doctrine of Promissory Estoppel and Legitimate Expectation. Whereas in the instance case, the regulations of 2014 have been made by the Rajasthan Electricity Regulatory Commission in the exercise of powers under Section 178 of the Indian Electricity Act, under the authority of subordinate legislation which are applicable to existing as well as the future PPAs.

26. In our considered opinion, the doctrine of promissory estoppel & legitimate expectation, as espoused by the Appellant's counsel, are not applicable to the present case. It is well established that the doctrine of estoppel applies only in cases where promise was made and the other party had acted to its detriment in pursuance to the said promise but it is

not applicable where no such promise has been made. In the instant case, it is difficult to say that any promise was held out to the Appellant by the Respondent to the fact that the terms of the PPAs/WBAs would remain totally unchanged for the period of 20 years. In this regard, one may again refer to the specific clause (5)(B)(d) in the WBAs, as noted herein above, which provides that banking of energy shall be governed by the further orders to be passed by the RERC and amendments to be made from time to time. Therefore that the Appellant was aware as well as conscious of the fact that provisions relating to the banking of energy contained in the WBAs can be altered at any time by the RERC. Even otherwise also, since the Hon'ble Supreme Court has also held in the PTC India Ltd. v. Central Electricity Regulatory Commission (2010) 4 SCC 603 that any tariff regulations issued under Section 178 of the Indian Electricity Act override the existing contracts between the regulated entities, it has become the law of the land and there cannot be any estoppel against such law.

27. For the afore-stated reasons, we do not find any error or infirmity in the impugned order of the Commission, i.e. the 2nd Respondent. No merits found in the appeal. Same is hereby dismissed.

29. Pronounced in the open court on this 18th day of December, 2023.

(Virender Bhat) Judicial Member	(Sandesh Kumar Sharma) Technical Member (Electricity)

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