

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No. 229 OF 2020

Dated : 24th April, 2024

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

In the matter of:

M/S. ADANI TRANSMISSION (RAJASTHAN) LIMITED

31 (A), 6th Floor, Plot No. 5
Swej Farm, Mahima Trinity,
New Sanganer Road,
Jaipur – 302019, Rajasthan
Email- bhovesh.kondalia@adani.com
Phone- 9099991282

... Appellant(s)

Versus

1. RAJASTHAN ELECTRICITY REGULATORY COMMISSION

Through its Secretary,
Vidhyut Viniyamak Bhawan,
Sahakar Marg, Near State Motor
Garage, Jaipur – 302001, Rajasthan
Phone No- 0141-2741181,
0141-2741016
Email- recjpr@yahoo.co.in

2. RAJASTHAN RAJYA VIDYUT PRASARAN NIGAM LIMITED

Through its Superintending Engineer (Energy Accounting)
SLDC Building,
Ajmer Road, Heerapur,
Jaipur, 302005, Rajasthan

Phone No – 0141-2740381

Email- athaiya.manish@rvpn.co.in

... Respondent (s)

Counsel for the Appellant(s) : Hemant Sahai
Apoorva Misra
Aditya K. Singh
Samarth Kashyap
Parichita Chowdhury

Counsel for the Respondent(s) : Anish Maheshwari
Samir Malik
Yunus Malik
Aman Malik
Sandeep Pathak
Harsha Vinoy for Res. 2

JUDGMENT

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. The Appellant, a company incorporated under the provisions of the Companies Act, 2013, is a transmission licensee within the meaning of the term envisaged under Section 2(73) of the Electricity, Act, 2013.
2. The Respondent No. 1 is the State Electricity Regulatory Commission in the State of Rajasthan exercising its functions in terms of the Section 86 of the Electricity Act.

3. The Respondent No. 2, Rajasthan Rajya Vidyut Prasaran Nigam Limited hereinafter (referred as RRVPNL) has been established by the Govt. of Rajasthan under the provisions of Rajasthan Power Sector Reforms Act, 1999 as the successor of erstwhile Rajasthan State Electricity Board. It is the State Transmission Utility (STU) in terms of Section 39(1) of the Electricity Act and is also operating as State Load Despatch Centre (SLDC).

4. The 2nd Respondent in its capacity of State Transmission utility decided to develop super critical thermal power plant at Suratgarh through competitive bidding process under public private partnership model on Design- Build-Finance-Operate –Transfer basis using Viability Gap Funding (VGF).

5. M/s. Adani Transmission Limited, the parent company of the Appellant was selected as successful bidder in competitive bidding process adopted by the 2nd Respondent. Subsequently, letter of award was issued to it on 16th March, 2016 informing that its bid i.e. premium equal to 20% of the unitary charge for each year commencing from the COD of the project has been accepted by the 2nd Respondent. Thereafter, the Appellant Company was incorporated as an SPV (Special Purpose Vehicle) to implement the project as the successful

bidder and a Transmission Service Agreement dated 9th May, 2016 was executed between the Appellant and the 2nd Respondent. The project achieved COD on 28th July, 2018.

6. Vide order dated 30th August, 2016, the Appellant was granted transmission license by the 1st Respondent-Commission to establish 400KV Suratgarh Bikaner double circuit transmission system from Suratgarh Thermal Power station to Bikaner for evacuation of power from 2x660 MW unit 7 & 8 of super critical thermal power plant at Suratgarh with a design capacity to transmit electricity equal to 1066 MW.

7. The Parliament passed the Finance Act, 2016 to give effect to the financial proposals of the Central Govt. for the financial year 2016-2017. As a consequence thereof, the effective rate of service tax which was prevailing at that time increased by 0.5% w.e.f. 1st July, 2016 on account of new levy by the name of Krishi Kalyan Cess on taxable services. Further, pursuance to One Hundred and First Amendment to the Constitution of India, various legislations including Central Goods and Services Act, 2017/Union Territory Goods and Services Act, 2017 were enacted for levy of tax on Inter State Supplies and Integrated Goods. Simultaneously, Integrated Goods and Services Tax Act, 2017

was also enacted for levy of tax on inter State supplies including imports.

8. Majority of the provisions of these newly enacted legislations including the provision for levy and calculation of goods and services tax became effective from 1st July, 2017. The Government of Rajasthan also stipulated the effective date of these newly enacted legislations as 1st July, 2017 under Rajasthan GST Act, 2017.

9. Since, according to the Appellant, on account of introduction and levy of Krishi Kalyan Cess and GST, there has been increase in effective rate of taxation from the original bid date which effected the project cost during the construction period and was going to affect the costs during the operation period, the same qualified as Change in Law event covered under Article 41 of the Transmission Service Agreement dated 9th May, 2016 thereby entitling concessionaire i.e. the Appellant to seek restitution to the original economic position that existed as on original bid date, it sent Change in Law notices to the 2nd Respondent vide letter dated 30th June, 2016 & 1st August, 2017.

10. The 2nd Respondent vide its letter dated 20th August, 2017 and 18th October, 2017 asked the Appellant to furnish details in support of the effect of GST on unitary charges in any accounting year as well as

on taxes and duties considered at the time of RFP stage to ascertain the aggregate financial effect due to Change in Law under Article 41 of the Act. However, the Appellant vide its letter dated 14th November, 2017 submitted that the project is under implementation stage and hence it is unable to ascertain the financial project cost in pursuance of Change in Law impact and will revert with complete details as soon as the project achieves COD.

11. Upon the project achieving COD on 28th July, 2018, the Appellant vide letter dated 05.02.2019 again sent a notice to the 2nd Respondent for payment of compensation under Change in Law as per Article 41 of the agreement. The 2nd Respondent, vide its letter dated 27th February, 2019 requested Appellant to furnish claim duly verified/certified from independent engineer and statutory auditor of the project as per the agreement.

12. The Appellant furnished its claim regarding Change in Law duly verified/certified by the Independent Statutory Auditor of the project M/s KARM & Co. vide its letter dated 28th May, 2019. The claim was for an amount of Rs.3,39,21,104/- as the extra financial cost incurred by the Appellant as a result of extra tax burden due to Change in Law and introduction of GST Bar.

13. Vide its letter dated 4th June, 2019 in response to various previous communications of the Appellants, the 2nd Respondent informed the Appellant that its claim on account of Krishi Kalyan Cess and GST imposed by the Government is not supported by documents and the certificates given by the statutory auditor of the project is also incomplete. It was further stated that in terms of Rupee loan agreement between the Appellant and PTC India Financial Services Limited, the estimated cost of the project was Rs.160 crores whereas as per the statutory auditor's report the total capital cost of the project as on 30.11.2018 was Rs.134.48 crores with the project having achieved commercial operations on 28th July, 2018. Thus, it was stated that the Appellant cannot claim any extra financial burden up to the expenditure of capital cost of Rs.160 crores.

14. The Appellant submitted certain clarifications in this regard to the 2nd Respondent vide letter dated 7th June, 2019 and reiterated that in terms of Article 48 of the Transmission Services Agreement, any change in rates of any of the taxes that have direct effect on the project will be considered as a Change in Law event if the same has occurred after the bid date. Vide another letter dated 10th July, 2019, the Appellant proposed to get the Change in Law claims verified from the

Chartered Engineer. However, the 2nd Respondent again rejected the Appellant's requests for consideration of Change in Law events vide letter dated 11th July, 2019 while reiterating its position that since there was no increase in project cost, the Appellant cannot possibly suffer from the increase in the expenses on account of Change in Law.

15. It is in this factual backdrop that the Appellant approached the 1st Respondent Commission by way of petition No. 1536 of 2019 with the prayer that the implementation and imposition of Krishi Kalyan Cess as well as GST be considered as Change in Law events which had an impact on the project cost of the Appellant leading to increase in the costs in terms of Article 41 & 48 of the Transmission Service Agreement. The petition came to be dismissed by the Commission vide order dated 14th September, 2020 which has been impugned in this appeal.

16. After referring to Article 41.3 of the Transmission Services Agreement dated 9th May, 2016 executed between the parties which provides that the party shall rely on the financial model to establish a net present value of the net cash flow to procure that the NPV of the net cash flow is the same as it would have been if no Change in Law

had occurred as well as Article 48 provides the definition of “Financial Model”, the Commission held as under :-

“13. As per definition of Financial Model, the Financial Model submitted by Petitioner shall set forth the capital and operating cost along with revenue to settle the financial viability of the Project. It includes all assumptions and parameters thereby freezing the financial viability or net cash flow.

14. Further, as per Clause 41.3, in case of Change in Law for placing the Petitioner in the same financial position the Financial Model shall be relied upon which is the basis for financial viability.

15. In the present case, Petitioner submitted the Financial Model having estimated project cost as Rs. 160 Crore and the same unitary charges as furnished in the bid.

16. Commission observed that the financial viability of the project of the Petitioner was based on the project cost of Rs. 160 Crore and admittedly Petitioner has made expenditure of Rs. 134 Crore only, therefore, in Commission’s considered view Petitioner does not suffer any adverse financial implication on its project, hence not entitled for payment of compensation under Change-in-Law.”

17. We have heard the learned counsels appearing for the parties and have perused the entire record including the written submissions filed by the Learned Counsels. We have also gone through the judgement cited at par.

18. There is no dispute between the parties on the proposition that the introduction of Krishi Kalyan Cess and GST in the year 2017

constituted Change in Law events as envisaged under Article 41 of the Transmission Services Agreement dated 9th May, 2016 executed between the Appellant and 2nd Respondent. Even otherwise also these have been held to be Change in Law events by this Tribunal in various judgements including in the cases of **DNH Power Distribution Company Ltd. Vs. CERC & ors. and Coastal Gujrat Power Limited Vs. Central Electricity Regulatory Commission & Ors.**

19. The issue which arises for adjudication in this appeal is whether the Krishi Kalyan Cess and GST has impacted the project cost in the instant case entitling the Appellant to seek restitution under Article 41 of the Transmission Services Agreement.

20. We find it apposite to refer to and to reproduce Article 41.1, 41.3 and 48.1 of the Transmission Services Agreement dated 9th May, 2016 executed between the Appellant and the 2nd Respondent hereunder :-

“41.1 Increase in costs

*If as a result of Change in Law, the Concessionaire suffers an increase in costs or reduction in net after-tax return or other financial burden, the aggregate financial effect of which exceeds the higher of Rs. 25 lakh (Rupees twenty five lakh) and 0.5% (zero point five percent) of the Unitary Charge in any Accounting Year, **the Concessionaire may so notify the Authority and propose amendments to this Agreement so as to place the Concessionaire in the same financial position as it would have enjoyed had there been no Change in Law resulting in increased costs,** reduction in return or other financial burden as aforesaid. Upon notice by the Concessionaire, the Parties shall meet, as*

soon as reasonably practicable but no later than 30 (thirty) days from the date of notice, and either agree on amendments to this Agreement or on any other mutually agreed arrangement:

.....

41.3 Protection of NPV

Pursuant to the provisions of Clauses 41.1 and 41.2 and for the purposes of placing the Concessionaire in the same financial position as it would have enjoyed had there been no Change in Law affecting the costs, returns or other financial burden or gains, the Parties shall rely on the Financial Model to establish a net present value (the “NPV”) of the net cash flow and make necessary adjustments in costs, revenues, compensation or other relevant parameters, as the case may be, to procure that the NPV of the net cash flow is the same as it would have been if no Change in Law had occurred. For the avoidance of doubt, the Parties expressly agree that for determination of NPV, the discount rate to be used shall be equal to the weighted average rate of interest at which the Concessionaire has raised the Debt Due under its Financing Agreements.

.....

“Article 48.1 Definitions

“Financial Model” means the financial model adopted by Senior Lenders, setting forth the capital and operating costs of the Project and revenues therefrom on the basis of which financial viability of the Project has been determined by the Senior Lenders and includes a description of the assumptions and parameters used for making calculations and projections therein”

21. It is not in dispute that the Appellant had duly notified the 2nd Respondent about these Change in Law events as envisaged under Article 41.1 of the agreement. The Commission has rejected the claim of the Appellant regarding restitution due to Change in Law events mainly on the ground that in the financial model and other financial documents the projected cost was estimated as Rs.160/- crores and

since the actual project cost was only Rs.134.48 crores which is much lesser than the projected cost of Rs.160 crores, the Appellant did not suffer any adverse financial implication on its project due to these Change in Law events.

22. We find the reasoning given by the Commission in the Impugned Order for rejecting the claim of the Appellant totally flawed and erroneous for the simple reason that the Commission has not made any attempt to ascertain whether the Change in Law events has actually any impact on the cost of the project in question and if so, whether the Appellant was entitled to be compensated/restituted for any such increase in the project cost due to introduction of Krishi Kalyan Cess and GST. It was incumbent upon the Commission to make an exercise to determine the consequences if any, of these Change in Law events on the over all project cost.

23. We may note that Article 41.1 of the Transmission Services Agreement executed between the parties embodies an inbuilt restitution principal entitling the concessionaire i.e. the Appellant herein to be restored to the same economic position as if such Change in Law had not occurred. This clause creates a fiction requiring the

party affected by the Change in Law events i.e. the Appellant herein to be put in same economic position as if such Change in Law had not occurred.

24. Therefore, the Commission was duty bound to ascertain if there was any extra financial burden upon the Appellant on account of the above noted Change in Law events which had admittedly occurred after the execution of Transmission Services Agreement between the parties.

25. The Commission has itself recorded in the Impugned Order that the Appellant has incurred a cost of Rs.134.48 crores upon the completion of the project. According to the Appellant, this total cost included additional cost of Rs.3.39 crores (Rs.3.35 crores on GST and 0.04 crores towards Krishi Kalyan Cess) on account of Change in Law events. It cannot be gainsaid that the compensation arising out of the Change in Law event has to be ascertained and allowed as per the actual additional expenditure incurred by the affected party. The case of the Appellant is that the actual total cost of the project would have been only Rs.131.09/- crores if Change in Law has not taken place. Thus, the Appellant claims entitlement to be compensated for the

additional cost of Rs.3.39/- crores which itself incurred on account of Change in Law events.

26. We do not find any sound basis or reasoning for comparing the financial model with the estimated cost of the project as Rs.160/- crores with the actual cost incurred by the Appellant on the project on the amount of Rs.134.48/- crores for rejecting the claim of the Appellant on the ground that actual cost incurred on the project is much less than the estimated project cost, without making any endeavor to ascertain whether the Change in Law events had actually placed any extra financial burden upon the Appellant.

27. We have already noted clauses 41.1, 41.3 & 48.1 of the Transmission Service Agreement dated 9th May, 2016 executed between the Appellant and the 2nd Respondent. It is manifest that Article 41.3 has been engrafted in the agreement as an aid to Article 41.1 and provides the basis or mechanism for ascertaining the impact on Change in Law upon the project cost. It provides the basis for calculation of Net Present Value (NPV) which needs to be restored in case the concessionaire i.e. the Appellant is found eligible for relief due to Change in Law events in terms of Article 41.1. The Article

contemplates the comparison of the NPV of the project by including the impact of Change in Law *vis-à-vis* NPV of the project without the impact of Change in Law by using the financial model which has been adopted by the lenders but with suitable adjustments in cost, revenues compensation as well as other relevant parameters. Therefore, in essence it has to be ascertained as to whether the NPV of the project from the actual completion cost has gone up or down by comparing the same by comparing the NPV of the actual project cost including the impact of Change in Law with the NPV of the actual project cost without the impact of Change in Law. Such an exercise would involve four steps:-

- **Step 1** – Ascertain NPV of net cashflows with completed project cost of Rs. 131.09 Cr (excluding CIL impact) using the financial model adopted by the lenders. (NPV-1). The revenue stream (Unitary Charge per Year) in this case shall be same as provided in Article 26 of the TSA.
- **Step 2** – Using the same financial model adopted by the lenders, ascertain the NPV of net cashflows with complete project cost of Rs. 134.48 Cr which includes the impact of Change in Law on account of GST and KKC. (NPV-2).
- **Step 3** – Make adjustments in the revenue stream (Unitary Charges per Year) of the financial mode in Step 2 so as to bring NPV-2 equals to NPV-1.

- **Step 4** – *The difference between the revenue stream of Step 3 and revenue stream of Step 1 is to be allowed as compensation for CIL. The Difference works out to increase in Revenue by 2.51%.*

28. The financial models corresponding to Steps 1, 2 & 3 hereinabove have been calculated by the Appellant and annexed to its written submissions as Annexure I, J & K respectively. Perusal of these financial models reveals that the difference between the revenue stream of Step 3 and revenue stream of Step 1 works out to increase in revenue by 2.51 percent which has to be allowed as compensation due to Change in Law. These calculations, so made by the Appellant and placed before this Tribunal along with the Written Submissions, have not been disputed on behalf of the Respondents.

29. We find ourselves in agreement with the submissions made on behalf of the Appellant to the effect that the financial plans being an estimate only, is not the basis for the bidding done by the Appellant. The purpose of submitting financial model to the lenders/banks is to obtain loan/finance for the project and, therefore, the same cannot be considered as the project cost on the basis of which bidding was initiated by the Appellant and to be compared with the actual project cost in order to determine the impact of Change in Law. Hence, in our

opinion, the 1st Respondent-Commission has erroneously relied upon the financial model submitted by the Appellant to its lender for obtaining security for finances of the project, to reject the claim of the Appellant due to Change in Law events stating that the actual project cost being less than the estimated project cost, there has not been any impact on the project cost due to Change in Law events.

30. Merely, because the actual project cost is less than the estimated project cost, it cannot be said that there has been no additional expenditure incurred by the Appellant on the project due to Change in Law events noted hereinabove.

31. It beats all imagination to say that even after the imposition of GST and Krishi Kalyan Cess w.e.f. 1st July, 2017, there was no extra financial burden upon the Appellant in completing the project. These two Change in Law events would have certainly impacted the overall cost of the project thereby placing additional financial burden upon the Appellant, which required to be determined by the Commission in order to ensure that the Appellant is placed in the same financial position as it could have enjoyed if there had been no Change in Law resulting in increase in costs/project, in terms of Article 41.1 of the Transmission

Service Agreement. We find force in the submissions made on behalf of the Appellant that in case the Krishi Kalyan Cess and GST had not been imposed in July, 2007, the actual cost of the project would have been less than Rs.134.48 crores and hence it is liable to be compensated for the additional expenditure incurred by it in completing the project.

32. In the light of the above discussion, the impugned order of the Commission cannot be sustained. Same is found to be absolutely flawed and erroneous and is hereby set aside.

33. The Appellant has claimed an amount of Rs. 3,39,21,104/- towards compensation as the additional expenditure incurred in completing the project due to afore-stated Change in Law events. The 2nd Respondent has contended that the Appellant did not provide requisite documents/details to substantiate its claim for the sum of Rs. 3,39,21,104/-. However, we note that the Appellant has filed certificate issued by the Statutory auditor chosen by the 2nd Respondent itself from the mutually agreed list of reputable chartered Accountant firms to support its claim for compensation. In this certificate, the statutory auditor M/s. Karm & Co. has certified Rs.3,39,21,104/- as additional

financial cost incurred by the Appellant due to Change in Law (which amount also includes carrying cost of Rs.49,57,955/- upto 30th April, 2019,) due to additional tax burden on account of imposition of Krishi Kalyan Cess and GST. Therefore, having regard to the said certificate issued by independent statutory auditor, we find the appellant entitled to compensation in the amount of Rs.3,39,21,104/- due to Change in Law event as explained hereinabove.

34. Accordingly, the impugned order of the Commission cannot be sustained. The same is hereby set aside. The Appellant is held entitled to compensation in the amount of the Rs. 3,39,21,104/- along with carrying cost w.e.f. 1st May, 2019 due to the Change in Law event noted hereinabove.

35. Hence, the Appeal stands allowed in the above terms.

Pronounced in the open court on this 24th day of April, 2024.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member (Electricity)

Js