

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

I.A. NO. 2605 of 2023 & IA No. 178 of 2024

**in
APPEAL NO.939 OF 2023**

Dated: 19th March, 2024

**Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Smt. Seema Gupta, Technical Member (Electricity)**

In the matter of:

PHOTON SUNBEAM PRIVATE LIMITED

8th Floor, Statesman House,
Barakhamba Road,
New Delhi – 110001.

... Appellant(s)

VERSUS

- 1. PUNJAB STATE POWER CORPORATION LIMITED,**
Through its Chairman,
PSEB Head Office,
The Mall, Patiala,
Punjab – 147001, India ... Respondent No.1
- 2. PUNJAB ENERGY DEVELOPMENT AGENCY,**
Through its Chairman,
Solar Passive Complex,
Plot No.1 & 2, Section 33-D
Chandigarh – 160020, India ... Respondent No.2
- 3. PUNJAB STATE ELECTRICITY REGULATORY COMMISSION**
Through the Secretary
Site No.3, Sector 18-A,
Madhya Marg,
Chandigarh – 160018 ... Respondent No.3

4. SYNDICATE BANK LIMITED

Through the Manager
Arunachal Bhawan,
Building 19, Barakhamba Road,
New Delhi – 110001

... Respondent No.4

Counsel on record for the Appellant(s) : Anuradha Mukharjee
Pallavi Singh Rao
Shatrajit Banerji
Shree Sinha
Dwijesh Kapila
Shivam Tiwari
Meghna Bhaskar for App.1

Counsel on record for the Respondent(s) : Poorva Saigal
Shubham Arya
Pallavi Saigal
Ravi Nair
Reeha Singh
Anumesha Smiti
Gaurav Dhama
Sumit Kumar Gaur
Malvika Raghavan for Res .1

Aditya Grover
Arjun Grover
Pooja R.Sharma for Res. 2

Gargi Kumar for Res.3

Himanshu Sharma
Sahil Sharma for Res. 4

ORDER

(PER HON'BLE MRS. SEEMA GUPTA, TECHNICAL MEMBER)

I.A. No. 2605 of 2023 & IA No. 178 of 2024
(for interim relief)

1. The Applicant/Appellant has filed the Interlocutory Applications (in short IAs) IA Nos.2605 of 2023 & IA No. 178 of 2024 in Appeal No 939 of 2023 against the order dated 31.10.2023 ("**impugned order**"), passed by the Punjab State Electricity Regulatory Commission ("**Respondent No 3**" / "**State Commission**") whereby the State Commission has reduced the applicable tariff for the commissioned capacity of 40 MW (25MW + 15MW) from the bid tariff of Rs 5.57 per kWh to Rs 4.494 per kWh, as payable by Respondent No.1 for purchase of electricity from the Appellant's Project. The Appellant is further aggrieved by the demand for tariff recovery totaling approximately Rs 26.84 Crores, inclusive of interest, attributable to the reduction in tariff from the commissioning date of the project.

2. The facts and submissions in nutshell, for the disposal of these Interim Applications, are as under:

The Appellant, Photon Sunbeam Private Limited, is a Special Purpose Vehicle of Photon Ultrawave Private Limited, a generating Company, which was incorporated for execution of 50 MW Solar Photo Voltaic Power Project in the State of Punjab. Respondent No.1, Punjab State Power Corporation Limited, is the electricity generating and

distribution company of the Government of Punjab. Respondent No.2, Punjab Energy Development Agency (PEDA), is a nodal agency under the Department of Non-Conventional Energy Sources, Government of Punjab, which is responsible for promotion and development of renewable energy programmes/projects and energy conservation programmes in the State of Punjab. Respondent No.3 is the Punjab State Electricity Regulatory Commission.

3. Pursuant to a Request for Proposal issued by Respondent No.2 for developing 50MW Solar Photo Voltaic Power Project in the State of Punjab under Phase III of the Grid Connected Solar Photo Voltaic Power Project, the Appellant was issued a Letter of Award dated 19.10.2015 on the Net Aailed Tariff mechanism, wherein the Appellant offered a discount of Rs.1.47 per kWh on the generic tariff ceiling in terms of the State Commission's order in Suo-Moto Petition No. 43 of 2015 i.e., 2015-16 Generic Tariff Order, setting the tariff rate at Rs 6.35/7.04 per kWh (with /without accelerated depreciation) for projects commissioned up to 31.03.2017, thus arriving at a Net Aailed Tariff of Rs. 5.57 per kWh. Accordingly, Implementation Agreement dated 30.11.2015, thereafter, Power Purchase Agreement dated 13.01.2016 were entered into between the Appellant and Respondent No.2 for sale/purchase of power at the Net Aailed Tariff. The State Commission, vide its order dated 10.06.2016, in Petition No. 31 of 2016, had approved the said Net Aailed Tariff and also clarified that barring Force majeure/change in law etc, said Tariff shall not be allowed in case project is commissioned beyond 31.03.2017. As per Implementation agreement and PPA, the project was obligated to attain

commissioning on or before 12.01.2017 (Scheduled Commercial Operation Date).

4. The Appellant had submitted that the project capacity was split into two projects of 25 MW each to allow for easy evacuation at Respondent No.1 grid substation. The Appellant submitted that due to force majeure events/change in law/acts and omissions of Respondent No.1 etc., the commissioning of the project was achieved only on 08.05.2017 for 25 MW and on 10.06.2017 for 15 MW. Further, balance 10 MW has not yet been commissioned. The Appellant filed a Petition No. 15 of 2017 before the State Commission for adjudication of the disputes with Respondent No.1 and Respondent No.2. The State Commission vide its order dated 10.10.2017 referred the dispute (barring determination of tariff) to an arbitral Tribunal, which passed an Award dated 07.12.2020 holding that the delay in commissioning of the project was due to occurrence of force majeure events but also held that there are some lapses on the part of the Appellant. The prayers of the Appellant, seeking to restrain the Respondent from encashing the balance of the performance guarantee (Rs. 3 Crore from the performance bank guarantee had already been encashed by Respondent No. 2, PEDDA), non termination of LOA dated 19.10.2015, Implementation Agreement dated 30.11.2015 and PPA dated 13.01.2016 by respondents was accepted. The Appellant submitted that in response to IA No. 28 of 2022 in the Petition No. 15 of 2017 for keeping the tariff same as that of PPA, the State Commission, vide its order dated 31.10.2023 (impugned order), declined to apply the tariff as per the PPA and re-determined and reduced the tariff payable to the Appellant from Rs.5.57

per kWh to Rs.4.494 per kWh by applying 2016-17 Generic tariff. Aggrieved thereby, the Appellant initiated the current appeal alongside IA No. 2605 of 2023 and IA No. 178 of 2024, seeking interim relief to stay the impugned order and to prevent the Respondents from coercively recovering excess tariff paid since commissioning. The Appellant has submitted that since the arbitral tribunal has held that delay in commissioning of the project after 31.03.2017 is due to Force majeure and therefore they should be allowed tariff of 5.57/ kWh as approved in PPA in line with State Commission order dated 10.06.2016. Furthermore, it is argued that the State commission has erroneously determined the tariff of Rs 4.494 / kWh by applying the discount (offered by Appellant on FY 2015-16 Generic tariff) on the ceiling tariff under 2016-17 Generic tariff order albeit a proportionate discount which is not contemplated under implementation agreement, PPA, State commission Order dated 10.06.2016 or at any stage during bidding or thereafter. Such arbitrary reduction in Tariff from Rs 5.57 /kWh (approved tariff arrived through competitive bidding process) to Rs 4.494/ kWh have caused grave injustice and financial duress to the Appellant resulting in its inability to service its loans and borrowings and has put the Appellant at the risk of being declared NPA.

5. Per contra, the Respondents have submitted that the Appellant has submitted its bid in response to RFS document dated June 2015 which illustrates that selection of bidder shall be based on Net Aailed Tariff after providing discount on generic tariff notified by CERC for solar PV projects for FY 2015-16. Accordingly, the Appellant has been selected as

successful bidder subsequent of it offering a discount of Rs 1.47/kWh over a ceiling generic tariff of FY 2015-16 (Rs 6.35/7.04 per kWh, with /without accelerated depreciation). In terms of the implementation agreement and PPA, project was to be commissioned by 12.01.2017, however, the Appellant could commission 25 MW on 08.05.2017, 15 MW on 10.06.2017 and balance 10 MW has not yet been commissioned. In case of delay in commissioning of project after 31.03.2017, ideally the entire discount of Rs 1.47/ kwh offered by the Appellant over generic ceiling tariff of FY 2015-16 should have been applied over Generic ceiling tariff of FY 2016-17 but the State commission has applied proportionate discount, which works out to Rs 1.18/kwh, over ceiling Generic tariff of FY 2016-17 and determined the Tariff of Rs 4.494/kWh. The tariff so determined by the State commission is in line with prevalent market tariff of Rs 4.36/ kWh and Rs. 4.50/kw has determined by the Karnataka and Tamil Nadu State Commission, respectively. It was further submitted that Arbitral award dated 07.12.2020 has not attained finality as petition has been filed under section 34 of the Arbitration and Conciliation act 1996 to set it aside before District court Chandigarh and is pending adjudication.

6. In determining whether or not an interim order should be granted in the Appellant's favour, it is imperative to underscore that the decision to grant or refusal of interlocutory relief is governed by three firmly established principles, namely viz.,(1) whether the Appellant has made out a *prima facie* case, (2) whether the balance of convenience is in their favour i.e., whether it would cause greater inconvenience to them if interim relief is not granted than the inconvenience which the opposite party would

be put to if it is granted, and (3) whether the Appellant would suffer irreparable injury. With the first condition as a *sine qua non*, at least two conditions should be satisfied by the Appellant conjunctively, and a mere proof of fulfillment of one of the three conditions does not entitle them to the grant of interlocutory relief in their favour.

7. We have heard the learned Counsel for the Appellant and the Respondents in interim applications. In the instant case, the Appellant has commissioned 40 MW of capacity out of total 50 MW though with some delay which is contended by them on account of Force Majeure. The Arbitral Tribunal in its order dated 07.12.2020 has also held it in favour of the Appellant that delay is on account of Force majeure but also observed that there have been some lapses on the part of the Appellant. Though Arbitral Tribunal has restrained the Respondents from encashing further Performance of Bank Guarantee but have not asked the Respondent to return encashed performance Bank Guarantee of Rs 3 Crore. So *prima facie* it appears that the Arbitral Tribunal has also not held that entire delay in commissioning of the project to be attributable to Force Majeure and, as such, the Arbitral Tribunal order dated 07.12.2020 is under challenge by the Respondents. Let's refer few relevant Clauses of signed Implementation agreement and PPA. The Clause 10.5 (ix) of Implementation agreement dated 30.11.2015 stipulates as under:

“(ix) In case the commissioning of the project is delayed due to force majeure conditions stated above and the same are accepted by the competent authority, the due dates for encashment of

*performance security and imposition of liquidated damages shall be extended accordingly. **In case the delay affects the COD of the project and it gets extended to the next financial year then the tariff payable shall be as determined by PSERC.***

8. Clause 19.4.0 under Force majeure Clause of PPA, dated 13.01.2016, provides for:

“This clause as provided in this PPA will be operative after the project achieves COD. For force majeure events occurring during the commissioning period of the project, provisions of IA will be applicable.”

9. The State Commission in its order, dated 10.06.2016, while approving the PPA along with the tariff determined in the competitive bidding process on the basis of discount offered by the bidders, explicitly stipulated that the sanctioned tariff would only be enforceable if the entire capacity specified in the PPA is commissioned on or before 31.03.2017, subject to exceptions such as force majeure events or change in law.

10. It can be inferred from the bare reading of the above Clauses that the approved tariff of Rs 5.57/ kwh shall be applicable if the entire capacity is commissioned on or before 31.03.2017 barring Force Majeure/ Change in law etc as per state commission order dated 10.06.2016. However, as per approved PPA, Clause 19.4.0 for Force majeure condition occurring during the commissioning period of the project, provision of Implementation

Agreement shall be applicable which *inter alia* states that in case commissioning of the project is extended to next financial year, tariff payable shall be determined by the PSERC, the State Commission.

11. Although the Arbitral Tribunal has acknowledged that the delay in commissioning of the project is on account of Force majeure condition, but at the same time, the arbitral Tribunal has pointed out that some lapses have occurred on the part of the Appellant, and the Respondents were allowed to retain the proceeds of encashed Bank Guarantee amounting of Rs 3 Crore. Consequently, it remains unclear, at this stage, that how many days of delay in commissioning of the project is attributable to Appellant and to the Force majeure condition. Based on the rival contentions, there are various issues which require comprehensive deliberation and adjudication when the main appeal is heard like;

- a) is the entire delay on account of Force Majeure,
- b) even if entire delay is on account of Force majeure then would approved tariff shall continue in line with State Commission order dated 13.01.2016 or as per Clause 10.5 (ix) of the Implementation Agreement dated 30.11.2015, which governs delay during project commissioning, tariff would need to be determined by the State Commission,
- c) In case, Tariff is to be determined by the State commission, what would constitute for "determination of Tariff". Whether the methodology adopted by the State Commission by applying percentile of discount offered by the Appellant (for ceiling generic

tariff of 2015-16) over ceiling of Generic Tariff of 2016-17 or some other methodology need to be adopted.

12. Though the Appellant has been able to make out a *prima facie* case, and balance of convenience lies in its favor considering Arbitral Tribunal has held that delay is mainly on account of Force majeure and respondents have been restrained from encashing balance bank guarantees and termination of PPA & IA, we are not inclined to grant absolute stay of the impugned order as an interim arrangement considering various Clauses of PPA and Implementation Agreement and other issues which need detailed deliberations and consideration. In fact, stay of the impugned order would tantamount to rewarding for the delay in commissioning of the project by the Appellant even when it has not been conclusively held that it is only on account of Force Majeure and as furthermore the Appellant has agreed for determination of tariff by State commission in the event of delay arising from Force Majeure condition by allowing approved tariff of Rs 5.57/ kWh in PPA. During the course of hearing, we were informed that during the pendency of the Petition before the State Commission, the Appellant was paid a tariff of Rs 5.08/ kWh on *ad-hoc* basis, which was agreed to by the Appellant for business continuity, servicing critical debts and mitigating cash flow problems. Under these circumstances, viewed from any angle, it is considered to be reasonable to maintain the interim ad-hoc tariff of Rs. 5.08/kWh until the main appeal is heard on merits and disposed of.

13. For the reasons delineated above, the applications for interim stay are hereby allowed to the extent indicated. As an interim measure, the

Respondent shall continue to pay an ad-hoc tariff of Rs. 5.08/kWh towards purchase of electricity from the Appellant's Project until the main appeal is heard and decided on merits. Needless to state that this arrangement of interim ad-hoc tariff is subject to the result of the main appeal. The IAs are, accordingly, disposed of. There shall be no order as to costs.

14. After pleadings are complete Registry to verify the same and then include the appeal in the 'List of finals' to be taken up from there, in its turn.

Pronounced in open court on this 19th Day of March, 2024

**(Seema Gupta)
Technical Member(Electricity)**

**(Justice Ramesh Ranganathan)
Chairperson**

REPORTABLE / NON-REPORTABLE