

**Before the Appellate Tribunal for Electricity  
(Appellate Jurisdiction)**

**Appeal No. 70 of 2009**

**Dated: 13 -01-2011**

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson  
Hon'ble Mr. Rakesh Nath, Technical Member**

**In the matter of:**

**GVK (GOINDWAL SAHIB) LIMITED  
PAIGAH HOUSE, 156-159  
SARDAR PATEL ROAD  
SECUNDERABAD-500 003  
ANDHRA PRADESH.**

**... Appellant(s)**

**Versus**

**1. Punjab State Electricity Regulatory  
Commission  
SCO 220-221, Sector 34A  
Chandigarh.**

**2. Punjab State Electricity Board  
The Mall, Patiala-147 001  
Punjab.**

**... Respondents**

**Counsel for Appellant(s)**

**Mr. M.G.Ramachandran  
Mr. Anand K. Ganesan**

**Counsel for the Respondent(s):**

**Mr. Avijit Kr. Lala for R.1  
Mr. Jayshree Anand for R.2  
Mr. J.C. Shukla (Registrar,  
PSERC)**

**JUDGMENT**

**PER HON'BLE JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON**

**M/s GVK Power (Goindwal Sahib) Limited is the Appellant. The Punjab State Commission is the 1<sup>st</sup> Respondent. Punjab State Electricity Board is the 2<sup>nd</sup> Respondent.**

**2. Aggrieved by the impugned order dated 6.3.2009, passed by the Punjab State Commission in the petition filed by the Punjab State Electricity Board for approval of the amended and restated Power Purchase Agreement entered into between the Appellant and the Respondents for the generation and sale of electricity by the Appellant to the Respondents, the Appellant has filed this Appeal.**

**3. The necessary facts for the disposal of this Appeal are as follows:**

- (i) M/s GVK Power Limited, the Appellant, is a generating company setting up a Thermal Power Project at Goindwal Sahib to supply electricity to the Electricity Board.**
  
- (ii) In the year 1996, the Government of Punjab formulated an international competitive bidding process for inviting proposal and selection of competitors to establish a Coal-based Thermal Power Generating Project at Goindwal Sahib in the State of Punjab.**
  
- (iii) In the process of the bidding, the Appellant was selected to bid, own and operate the Coal-based Generation Station at Goindwal Sahib for the sale of electricity to Punjab State Electricity Board. Between the Appellant and the Electricity Board,**

**Power Purchase Agreement was entered into on 17.4.2000.**

- (iv) Subsequent to the above, the negotiations were held by the Electricity Board with the Appellants whereby the Electricity Board sought better norms and Tariff for the purchase of electricity from the above project, consistent with the parameters notified by the Central Commission under its Tariff Regulation. In pursuance of the negotiations in November 3rd, 2006, the Appellants and the Respondents agreed to fresh norms and parameters which, in overall terms, substantially reduced the Tariff for the generation of electricity from the above Generating Station. Accordingly, the parties agreed to initial an amended and restated Power**

**Purchase Agreement in the interest of the consumers of the Electricity Board.**

**(v) In terms of the Section 86(1)(b) of the Act of 2003, the amended PPA, finalized between the Appellants and the Respondents has to get the approval of the State Commission. Therefore, the Electricity Board filed the petition before the said Commission being No.3 of 2007 on 20.3.2007 for the approval of the said amended and restated PPA.**

**(vi) The Appellants also filed a separate petition being No.4 of 2007 on 23.3.2007 before the State Commission for in-principle approval of the Capital Cost of the Project and Financing Plan of the Project. The State Commission decided the said petition No.4 of 2007 filed by the Appellants**

**first in regard to in-principle approval to the Estimated Project Cost of the Power Project.**

**(vii) In the said Order, the State Commission approved the Capital Cost of Rs.2,622.487 crores as against the proposed Capital Cost of Rs.2,987.86 crores by the Appellant. Aggrieved by the said order dated 29.4.2008, the Appellants filed the Appeal being Appeal No.104 of 2008 before the Tribunal on 30.6.2008.**

**(viii) In the meantime, the State Commission disposed of the Petition No.3/2007 filed by the Electricity Board on 20.03.2007 in regard to the approval of the amended and re-stated PPA between the Electricity Board and the Appellants on 6.3.2009 giving the following direction to both the parties:**

**(a) To modify the amended and re-stated PPA in line with the standard bidding documents**

**instead of examining the proposal contained in the amended PPA on merits.**

**(b) As regards the coal price, the Appellants should initiate a competitive bidding for selection of the contractor and coal cost determination as per the competitive bidding for development of the mine or coal price as stated in the amended and re-stated PPA whichever is lower shall be applicable to the coal price.**

**(c) The amended and re-stated PPA has got to be executed totally as per the draft PPA and as per the standard bid documents forming part of the guidelines notified by the Government of India under Section 63 of the Act, 2003. The provisions relating to the Performance Guarantee, Liquidated Damages, Performance**

**Test, appointment of Engineers and various other terms should be brought in line with the draft PPA forming part of the guidelines under Section 63 of the Act, 2003 instead of those incorporated in the amended and re-stated PPA.**

**4. Challenging this order giving the directions referred to above, the Appellant has filed the present Appeal No.70 of 2009 on 25.3.2009.**

**5. During the pendency of this Appeal, this Tribunal passed interim order, as requested by the parties on 19.5.2009 allowing the Appellant to execute PPA as per the order of the State Commission without prejudice to the Appellant's rights in this Appeal to enable the implementation of the project subject to the outcome of this Appeal. In pursuance of this order, the Appellant has proceeded to implement the Project.**



**6. In the meantime, the Appeal filed by the Appellant being Appeal No.104 of 2008 was allowed by judgment dated 8.4.2009 in favour of the Appellant directing the in-principle approval of the Capital Cost to be allowed.**

**7. In this Appeal, the basic submissions of the Appellant challenging the order impugned are as follows:**

**(i) There is no justification for the State Commission to have directed the Appellant to undertake competitive bidding process for selection of Developers or Contractors for mining operation keeping the Coal India price minus discount of 15%/12% as the ceiling and such a course is impracticable and would lead to anomaly besides being contrary to the scheme of the development of Coal blocks.**

**(ii) There is no justification for directing the Appellant to revise the amended and re-stated**

**PPA as per the standard bid documents including and, in particular, on various norms contained in the standard bidding documents to a competitive bidding which had taken place prior to the issue of the standard bidding document.**

**(iii) Though the challenge in the Appeal in regard to the direction to follow the standard bidding documents in all aspects, the Appellant is restricting the challenge to the following 3 aspects alone as the Project is being implemented in pursuance of the interim order:**

- (a) Performance Guarantee;**
- (b) Liquidated Damages;**
- (c) Coal Cost;**

**8. In reply to the above, the learned counsel for the Respondents submitted that the order impugned is well justified in view of the fact that the State Commission has**

**followed the electricity Tariff Policy issued by the Central Government dated 6.1.2006, especially when Section 86(4) of the Act provides that the State Commission shall be guided by the Tariff Policy in discharge of its functions under the Act. It is also submitted that the Central Government after detailed and long consultation with stake holders have notified standard documents including the standard PPA which are the accepted benchmark in the terms of the standard PPA often designed to ensure efficiency and economical operation of the Generating Station and any deviation from the standard documents would defeat the guidelines issued by the Central Government to the Tariff Policy.**

**9. In the light of the above rival contentions, the following Questions would arise for consideration:**

**I. Whether in the facts and circumstances of the case, the State Commission was right in directing the Appellant and the Electricity Board to modify the amended and re-**

**stated PPA agreed to and initialed between the parties to be in line with the Standard Bidding Documents issued by the government of India, when the process for International Competitive Bidding was formulated and concluded much prior to the issue of the Standard Bidding Documents by the Government of India?**

**II. Whether the State Commission in exercise of its powers under Section 86(i)(b) of the Act, 2003 can mechanically direct the Electricity Board to modify the amended and re-stated PPA concluded between the parties to be in line with the Standard Bidding Documents, instead of examining the proposal contained in the amended and re-stated PPA on merits?**

**10. On these questions, elaborate arguments were advanced by the learned Counsel for the parties.**

**11. At the outset, is to be stated that though the application originally had been filed by the Electricity Board, the 2<sup>nd</sup> Respondent herein, in Petition No.3 of 2007 on 20.3.2007 for approval of the amended and restated PPA and the same had been dismissed by the State Commission with the direction by order dated 6.3.2009 directing the parties to modify the amended and restated PPA in line with the Standard Bidding Documents and the amended and restated PPA to be executed totally as per the PPA of the Standard Bidding Documents, the Electricity Board, the 2<sup>nd</sup> Respondent has not chosen to file any Appeal as against the order dated 6.3.2009 on the other hand, GVK Power Limited, the Appellant herein, had chosen to file the Appeal challenging the said order dated 6.3.2009 on the ground that such a direction is not valid in law. On the contrary the Electricity Board, the 2<sup>nd</sup> Respondent had not chosen to support the claim of the**

**Appellant and filed the reply in justification of the impugned order praying for the dismissal of the Appeal.**

**12. Bearing this fact in our mind, let us analyse the Grounds of Appeal urged by the learned Counsel for the Appellant. As pointed out by the Appellant, the Appellant had restricted their contentions to the 3 aspects, alone i.e. (i) Performance Guarantee; (ii) Liquidated Damages; and (iii) Coal Costs, and also to the principal issue of a decision of the State Commission to incorporate the terms of the Standard Bidding Documents and the Power Purchase Agreement.**

**13. Let us first refer to the powers and duties of the State Commission with reference to the approval of the Power Purchase Agreements. The Central Government in compliance with Section 3(1) of the Act 2003 has notified**

**the Tariff Policy by the Notification dated 6.1.2006. In line with the objective of the Act of promoting competition in different segments of the Electricity industries, Tariff Policy notified provided that all future procurement of power by Distribution Licensees shall be through competitive route. That apart, the Central Government, in exercise of its power under section 63 of the Act 2003, has notified the Guidelines for determination of Tariff by bidding process for procurement of power by Distribution Licensees. The Central Government after detailed consultations with the stake holders have notified the Standard Documents including the PPA which are the accepted Bench Mark in the sector. Any deviation from the Standard Documents requires prior approval of the Appropriate Commission.**

**14. Section 86(4) of the Act provides that the State Commission shall be guided by the Tariff Policy in discharge of its functions under the Act. Section 86(1)(b) of the Act entrusts the State Commission with the power to regulate electricity purchase and procurement process of the Distribution Licensees including the price at which electricity shall be procured from Generating Companies. The power to regulate procurement process of a Distribution Licensee is wide ranging power. There is no provision in the Act which overrides the said powers of the State Commission.**

**15. The word “regulate” has wide import. It carries with it the powers to reject, modify, alter or vary the terms of the Agreement. The scope and ambit of the word “regulate” has found conclusive interpretation by the Hon’ble Supreme Court. In the case of Cellular Operators**



**Association Vs. Union of India – AIR 2003 SC 899, the Hon’ble Supreme Court has held as follows:**

*“The regulatory bodies exercises wide jurisdiction. They lay down the law. They may prosecute. They may punish. Intrinsicly, they act like an internal audit. They may fix the price, they may fix the area of operation and so on and so forth. While doing so, they may, as in the present case, interfere with the existing rights of the licensees.”*

**16. From the above observations, it is clear that the scope of approval under Section 86(1)(b) of the Act includes the power to reject, modify, alter or vary the terms of the agreements for purchase of power and to further direct the distribution licensee to re-write the terms found reasonable by the State Commission.**

**17. In view of the above, the powers of the State Commission under the Act to take measures conducive to the development of the electricity industry, promoting competition, protecting the interest of the consumers and the supply of electricity to all areas cannot be questioned.**

**18. In the present case, the Memorandum of Understanding was entered into between the Appellant GVK Power Limited and the Respondent Punjab State Electricity Board on 8.2.2006. In the said Memorandum of Understanding, both the parties had expressly agreed to enter into an Amended and Restated PPA in line with the draft Power Purchase Agreement published by the Ministry of Power to the extent applicable. It is also to be noticed that the parties in the said Memorandum of Understanding agreed to limit the value of the liquidated**

**damages as per the final Guidelines of the Government of India.**

**19. The relevant clause of the Memorandum of Understanding would clearly indicate that the Electricity Board shall have the option to terminate the Agreement for breach on the part of the company and claim an amount equivalent to six months of the billing, at the approved quarter Tariff and energy corresponding to 80% of the contracted capacity, as liquidated damages. Further, the Company shall not sell power to any third party till such termination payment is made to the Electricity Board. Since these are the conditions agreed to by the parties as per the Standard Draft Bid Documents, the Liquidated Damages shall be limited to the value as per the final Guidelines of the Government of India.**

**20. Admittedly the standard bidding documents and PPA issued by Government of India are for procurement of power through tariff based competition bidding in terms of Section 63. However, both the parties in this case mutually agreed to follow the PPA draft to the extent applicable for Goindwal Sahib Project even though the procurement is in terms of Section 62 where the tariff is to be determined by the State Commission. The Appellant having agreed to enter into an Amended and Restated PPA in line with the draft Power Purchase Agreement published by the Ministry of Power cannot retract and state that the Standard PPA is not applicable to their case.**

**21. The State Commission while examining the Amended and Restated PPA for considering the prayer made by the Electricity Board in Petition No.3/2007 for the approval, found that there were substantial deviations introduced by**

**the parties from the provisions of the Standard PPA with regard to the Operating Standards of the Project and other financial terms. The Amended and Restated PPA incorporated all the 18 Articles of the Standard PPA with substantial deviations resulting in the Articles losing their sanctity of purpose and they no longer remain equitable. According to the State Commission, in the impugned order, the Appellant and the Electricity Board-Respondent were unable to provide any reasonable justification for such deviation introduced by them in the Amended and Restated PPA. As a matter of fact, admittedly, both the parties had agreed to adopt the terms and conditions of the draft Power Purchase Agreement published by the Ministry of Power as part of the Standard Bidding Documents. Therefore, the conclusion arrived at by the State Commission with reference to the substantial**

**deviations found in the Amended and Restated PPA is perfectly justified.**

**22. Let us now discuss over the three aspects which are referred to earlier as urged by the Appellant:**

**(i) Performance Guarantee:**

**The Standard PPA provides for Performance Guarantee in the form of Bank Guarantee at the rate of Rs.7.5 lakhs per MW. The Amended and Restated PPA, on the contrary, provides for a Security Deposit in the form of Bank Guarantee of Rs.3.9 crores but the parameter provided under the Standard PPA, the Performance Guarantee comes to Rs.40.5 crores. Thus, it is apparent that the Security Deposit agreed between the parties under the Amended and Restated PPA is substantially poor. It is true that such a deviation could be justified only on the ground that**

**there was a higher risk associated with the developer in developing the project. But in this case, the facts and records show that the risk of the Appellant in the matter of land acquisition, obtaining clearances and fuel linkage, etc; was minimal and mostly achieved even prior to entering into the Amended and Restated PPA with the support of the State Government. Therefore, this did not constitute a valid ground for deviating from the Standard PPA clause.**

**(ii) Liquidated Damages:**

**The next aspect is Liquidated Damages. The Standard PPA provides that the Liquidated Damages for the first 60 days will be calculated at the rate of Rs.10,000/MW/day. It is also noticed that the rate provided after expiry of 60 days in the Standard PPA is Rs.15,000/MW/day. But Amended and Restated PPA provides that**

**the Liquidated Damages for the first 60 days will be calculated at the rate of Rs.4,000/MW/day. After expiry of 60 days, for calculating the Liquidated Damages will be enhanced to Rs.5,000/MW/day. Thus, the Liquidated Damages provided under the Amended and Restated PPA is insufficient to compensate loss which may be suffered by the Electricity Board. Further, the Liquidated Damage of Rs.78 lakhs is substantially low and does not provide adequate relief to the Electricity Board for the default of the Appellant.**

**If the said amount is compared with the Liquidated Damages as provided in the Standard PPA, the Liquidated Damages for the first 270 MW in the first month will come out to**



**Rs.8.1 crores as compared to Rs.78 lakhs as agreed between the parties in the Amended and Restated PPA. Therefore, the State Commission did not find justification for taking into account the inadequate amount of Liquidated Damages agreed between the parties. Therefore, the State Commission directed that the Liquidated Damages should be amended to be in accordance with the corresponding provisions of the Standard PPA.**

**(iii) Coal Cost:**

**The 3<sup>rd</sup> aspect relates to Coal Cost. It cannot be debated that the State Commission has been entrusted with the duty to protect the interest of the consumers. The competitive bid process was directed to ensure the discovery of the most competitive coal**

**prices in order to ensure cheap power to consumers. The cost of coal being a pass-through cost to the consumers has to be determined on an actual basis.**

**Though the fuel charges were intended under the Standard PPA to be linked to the cost of coal, it should not exceed the prevailing cost for the captive coal mines of the Electricity Board in Pachhwarra. This does not mean that the energy charged had to be fixed at Pachhwarra level automatically.**

**Energy charges are chargeable at actual cost of fuel. Hence, the actual coal cost for the project needs to be determined and the energy charges for the project had to be fixed on the basis of such actual cost.**

**23. In view of the above reasonings the State Commission had directed the Appellant to determine the actual coal cost on a competitive basis. The Electricity Board and its consumers are entitled as a matter of right to get the best value of the coal mine from the Tokisund coal block because this coal block was allotted to the Appellant exclusively for the Project at the request of the Electricity Board as well as the Government of Punjab.**

**24. According to the State Commission, in case the Appellant, GVK Power Limited wants to develop and operate the coal mines itself, the Appellant is free to match the lowest bid received in the bidding process and can reserve its rights for developing and operating the captive coal mines at such lowest bid received. Unless the Appellant undertakes the process of competitive bidding, the competitive rate for developing the coal mine will not be**

**discovered. The State Commission and its consumers are entitled to get the coal at the lowest rate possible, since the actual price of coal is a complete pass through to the consumers.**

**25. It is contended by the Appellant that the coal brought from different coal blocks will mix up thereby causing difficulty in determining the price of coal mined from separate blocks. This contention has no merit. The Appellant will always be aware of the coal received from each mine and can accordingly make payment as per the coal received from each mine. The payment for the coal has to be done on the basis of the quantum of coal sourced from each coal block and not where the coal is unloaded. Therefore, the mixing up of the coals from the different mines is irrelevant and inconsequential for determining the coal prices. In the power sector, it is an accepted practice**

**for thermal Power Plants to have coal linkages from more than one coal block.**

**26. Learned Counsel for the Appellant has argued that if the Appellant proceeds with competitive bidding for selection of coal mine developer, the developer may quote price of coal with escalable factors and the price may be higher than the reference coal price in future. We feel that if the competitive bidding is done on the same basis as applicable to Pachhwarra captive coal mine of PSEB i.e. coal price based on percentage of discount on the Coal India Ltd. price from time to time, for like to like comparison with the beach mark price of Pachhwarra mine. Linking the price to CIL Ltd. Price will also take care of future price escalation.**

**27. Learned Counsel for the Appellant has also informed that out of two coal blocks allotted to the Appellant one**

**block namely Tokisud North has been allotted exclusively to the Appellant's project but the second coal block namely Saregerha block has been allotted jointly with another developer where the Appellant has shared only to extent of 45%. The balance 55% has been allotted to Arcelor Mittal Steel Company. He has argued that International Competitive Bidding as directed by the State Commission may not be acceptable to the other developer. We find that this aspect has not been dealt with in the Impugned Order where reference has been made only to one coal block. Perhaps allotment of the second coal mine is a subsequent event. We give liberty to the Appellant to approach the State Commission if they experience any problem in development of the coal block through International Competitive Bidding as directed by the State Commission.**

**28. In view of the discussion made in the above paragraphs, the findings rendered by the State**

Commission with reference to the issues referred to above, as pointed out by the Respondent Electricity Board itself, does not suffer from any infirmity.

**29. Summary of findings:**

**(i) Amended and restated PPA in line with standard PPA issued by the Government of India:**

**The first issue is regarding direction of the State Commission to modify the amended and restated PPA agreed and initialed between the Appellant and Respondent No. 2 to be in line with the standard PPA issued by the Government of India. Section 86(1)(b) of the Act entrusts the State Commission with the power to regulate electricity purchase and procurement process of the distribution licensee including the price at which electricity shall be procured from the generating companies. The power to regulate**

**procurement process of a distribution licensee is wide ranging power. The approval under Section 86(1)(b) of the Act includes the power to reject, modify or vary the terms of agreement for purchase of power and to direct the distribution licensee to revise the terms of PPA. In the present case, the memorandum of understanding entered between the parties on 8.8.2006 expressly provided for amended and restated PPA in line with the draft PPA of the Ministry of Power to the extent applicable. Admittedly, the standard bidding documents and PPA of the Government of India are for procurement of power through tariff based competitive bidding in terms of Section 63 of the 2003 Act. However, both the parties in this case mutually agreed to follow the standard PPA to the extent applicable. The Appellant having agreed to**



**enter into an amended and restated PPA in line with the draft PPA of Ministry of Power can not retract and state that standard PPA is not applicable in their case.**

**ii) Performance Guarantee**

**The performance guarantee agreed in the amended and restated PPA is much lower than that is provided in the standard PPA issued by the Government of India. The facts and record show that risk of the Appellant in the matter of land acquisition, obtaining clearance, fuel linkages, etc., was minimal and mostly achieved even prior to entering into amended and restated PPA with the support of the State Government. Therefore, it did not construe a valid**

**ground for deviating from the standard PPA clause.**

**iii) Liquidated Damages**

**The liquidated damages provided in the amended and restated PPA are much lower than that is provided in the standard PPA. The liquidated damages as provided in the amended and restated agreement do not provide adequate relief to the Electricity Board for the default of the Appellant.**

**iv) Coal Cost**

**The State Commission has directed Respondent No. 2 to go through the competitive bid process for development of coal block to ensure discovery of most**

**competitive coal price in order to ensure cheap power to the consumers. According to the State Commission in case the Appellant wants to develop the coal mine itself, the Appellant is free to do so by matching lowest bid received in the bidding process.**

**The Appellant has pointed out difficulty in determining the price if coal is received from two separate coal blocks. This contention also has no merit as payment of coal has to be done on the quantum of coal sourced from each coal block. It is quite normal for thermal power plants to have coal linkages from more than one coal block.**

**The learned counsel for the Appellant expressed difficulty in development of Saragerha Coal block as per the directions of the State Commission as this block has been allotted to the Appellant jointly with another developer who has a share of 55% in the coal block. We find that this aspect has not been dealt with in the impugned order. Perhaps allotment of the second coal block is a subsequent event. We give liberty to the Appellant to approach the State Commission if they experience any problem in development of Saragerha coal block through competitive bidding as directed by the State Commission.**

**30.. In view of our finding referred to above, we conclude that there is no merit in the Appeal. Hence the Appeal is dismissed. No order as to costs.**

**(Rakesh Nath)  
Technical Member**

**(Justice M. Karpaga Vinayagam)  
Chairperson**

**Dated: 13 -01-2011**

**REPORTABLE/NON-REPORTABLE**