

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

Appeal No74 of 2007

Dated: July 24, 2009.

Present: - Hon'ble Shri H.L. Bajaj, Technical Member

IN THE MATTER OF:

Ajmer Vidyut Viteran Nigam Ltd.
Hathibhata Power House
Ajmer-305 001

.....Appellant

Versus

1. Rajasthan Electricity Regulatory Commission
Vidyut Bhawan, Jyoti Nagar
Jaipur-302005

2. Rajasthan State Mines & Minerals Ltd.
4, Meera Marg
Udaipur- 313004

3. Jaipur Vidyut Vitran Nigam Ltd.
Jaipur

4. Jodhpur Vidyut Vitran Nigam Ltd.
Jodhpur

...Respondents

Counsel for Appellant(s) : Mr. Shyam Moorjani
Ms Anuradha Anand
Mr. R.B. Agrawal, Sr. A.O.
Mr. Prakash Chand Sharma
Jr.Accountant, AVVNL.Ajmer

Counsel for Respondent(s): Mr. P.N. Bhandari
Ms Pranati for RSMM Resp.2
Mr. R.C.Sharma,Jt.Secretary
(RERC)

JUDGMENT

Per Hon'ble Member Mr. H.L. Bajaj

The present appeal is directed against the order dated November 04, 2006 in Petition No. 100 of 2006 and the subsequent order dated April 13, 2007 declining to review the order dated November 04, 2006. The appellant, Ajmer Vidyut Vitran Nigal Ltd. (AVVNL), is the successor in interest of the Rajasthan State Electricity Board (RSEB).

2. This appeal was heard by Hon'ble Bench consisting of Hon'ble Judicial Member, Mrs. Justice Manju Goel and Hon'ble Technical Member, Mr. A.A.Khan. The judgment written by Hon'ble Shri A.A.Khan concludes that the appeal has to be allowed subject to the Limitation Act, 1963 setting aside the impugned order and the principle of estoppel is not applicable in the case. The other member namely Hon'ble Mrs. Justice Manju

Goel has concluded that the appeal be dismissed and that during the continuance of the wheeling and banking agreements and the HT agreements, unless the same are expressly modified by the parties, the appellant will be billed by respondent No. 2 in the method applied before November, 2005. The points of divergence brought out by the two Hon'ble members are given below:

- (a) Whether the billing pattern for the energy consumption of RSMML, the respondent No. 2, should be the one that was being followed before November, 2005 or whether the billing pattern should be the one which was challenged before the Commission, respondent No. 1.
- (b) Whether the principle of conduct of the parties to the contract deciding the future operation of the contract is applicable in the instant case.
- (c) Whether the principle of estoppel has any application in the facts of the case.
- (d) Whether a remand order is required to be passed directing the Commission to consider the respondent's prayer for waiving the minimum charges.

3. The aforementioned points of divergence have been referred to me under Section 123 of The Electricity Act, 2003. As the entire details of the appeal, the contentions advanced by the appellant and the respondent have already been recorded by Hon'ble Members, the same are not being repeated and can be referred from the earlier judgments delivered by Hon'ble Judicial Member and Hon'ble Technical Member. However, it is necessary to briefly set out below the background of the case.

The background facts:

4. The respondent No.2, which runs the Jhamarkotra Mines in District Udaipur, has been a consumer of electric energy in bulk. The first agreement for High Tension supply by the Rajasthan State Electricity Board (RSEB for short) to the respondent No.2 i.e. Rajasthan State Mines and Minerals Ltd. (RSMML for short) is of April 15, 1984. The respondent No.2 continues to be a consumer of High Tension electricity of the appellant and the contract dated April 15, 1984 has been

renewed from time to time. The agreement will be referred to as the HT agreement and electricity supply under the agreement as HT supply. The respondent No.2 set up various wind energy power plant at Barabagh in Jaisalmer District of Rajasthan. The Government of Rajasthan has been promoting generation of wind energy for which the Government issued a policy on February 04,2000 and April 03, 2003. Having set up the wind energy power plant, on account of such encouragement, the respondent No.2 entered into a wheeling and banking agreement with the appellant on August 29, 2001. Banking of electricity is a facility to help small generating stations based on non-conventional energy sources to produce power by maximizing utilization of available fuel stock/wind flow without demand restrictions. The purchaser i.e. the transmission licensee or distribution licensee, purchases the entire power generated by the plant and to the extent it is in excess of the need of the purchaser or the demand of the third parties, the same is, so to say, deposited or banked with the licensee which can be later released or returned to the generator as and when the generator

may require. The policy paper dated February 04, 2000 issued by Rajasthan Energy Development Agency incorporated the clause that the State Electricity Board will permit the power generated in a financial year by eligible producers to be banked for the period up to 31st March of the said financial year and that the banked energy, if not consumed within this period would be treated to have been sold to the RSEB at 60% of the prevailing valid HT rates. The policy paper also includes wheeling or transmission clauses requiring RSEB to transmit on its grid the power generated by eligible producers and make it available to them for their captive use or to third party nominated by eligible producer for sale at a uniform wheeling charge of 2% of energy wheeled. The same provisions reappear in the next policy paper with the only amendment that the wheeling charges would be 10% of the energy wheeled. By the time the second policy paper was issued in 2003, the three distributing companies known as Jaipur Vidyut Vitaran Nigam Ltd., Jodhpur Vidyut Vitaran Nigam Ltd. and Ajmer Vidyut Vitaran Nigam Ltd. had come into existence as successors of the RSEB for the function of

distribution of electricity. They were briefly described as Jaipur DISCOM, Jodhur DISCOM and Ajmer DISCOM in the policy paper. The wheeling and banking agreement was entered into by the respondent No.2 or RSMML with the Rajasthan Rajya Vidyut Prasaran Nigam Ltd. or the RVPN which was the transmission licensee at the time and with the Jodhpur DISCOM and Ajmer DISCOM (the appellant). This agreement was entered into for an initial term of 20 years. The RSMML, under the agreement, is entitled to make use of the power generated by it for its captive consumption at its industrial units or to sell to third parties after paying wheeling charges @ 2% to RVPNL and to wheel the energy to any place within the jurisdiction of the appellant or the Jodhpur DISCOM. RVPN was obliged to bank in a financial year up to 31st March of the financial year. The respondent No.2, RSMML was to bear the entire cost of grid interfacing including laying of HT lines from the point of generation to the nearest HT line of the Jodhpur DISCOM i.e. up to the technically feasible point. RSMML required energy at the wind farm for back up purposes. Meters were stipulated to be installed at the point of

export of power to the grid and another for import from the grid. The meter for measuring outgoing energy i.e. power delivered by RSMML to RVPN was required to be installed at delivery point. Banking provision is as under:

“2.2 (iii) The energy supplied by RSMML at the delivery point shall be considered as the energy supplied to RVPN and deemed banking to RVPN after adjustment of Units for captive use and/or sale to third party by RSMML in case the total generation is more than the captive consumption and/or sale to third party plus wheeling charges.”

5. The main metering system and back up metering system were required to be sealed in the presence of the parties. Since billing provision is of importance in this case the same needs to be reproduced in its entirety.

“3.4. Billing Provision.

The billing will be on monthly basis. This shall be done after deducting the units for adjustment towards captive use and/or sale to third party by RSMML. The detailed account of units generated & used for captive

use and/or sale to third party shall be kept in a pass book & or subsidiary pass books and such pass books shall be used for adjustment of bills. It is clarified that the users shall continue to be the consumer of Ajmer/Jodhpur Discom and shall be billed for the fixed charges and minimum charges as applicable for large industrial service as per the tariff determined by RERC. The Energy Charges shall be worked out on the net energy drawl from the grid (Total energy drawn less captive generation less losses & wheeling charges. In the event the received Energy plus the banked energy so available for supply to the User(s) in any month is less than the Energy consumption of the User(s) in that month, the Energy supplied to each User from the plant shall be in the ratio, as intimated by RSMML two months in advance and such intimation shall be restricted to once a year and the balance of Energy consumed by each User will be deemed to have been supplied by the Jodhpur Discom/ Ajmer Discom to the User(s) at the applicable Energy Charges of Large Industrial Service Tariff.”

6. Annexure-‘A’ to the agreement showed location of RSMML’s industries which were in Jhamarkotra (District Udaipur), Sanu

(District Jaisalmer) and Rishabdev (District Udaipur) and the third party user is at Debari (District Udaipur). Subsequent amendment to the wheeling and banking agreement was effected vide a letter dated April 16, 2003, thereby fixing the price of energy supplied by RSMML to RVPN at Rs.3.18 per unit with provision to raise the rate annually. A fresh agreement was entered into on February 19, 2004 between the same parties when the power producer i.e. RSMML intended to set up a 5 MW power plant at Village Pohara, District Jaisalmer. In this agreement, the power purchaser was to sell 95% of electric energy produced by it for commercial purposes to RVPN and to DISCOMs and consume 5% as captive use. This agreement also had a wheeling and banking condition. The RSMML was allowed to use the energy to its industrial units anywhere in Rajasthan after paying wheeling charges @ 10% of energy fed into the grid commensurate to the captive use to RVPN/DISCOMs. Banking was also allowed in the same terms as in the previous agreement. The billing provision in this agreement was as under:

“7.4 Billing Provision.

The billing will be on monthly basis. This shall be done after deducting the units for adjustment towards captive use by Power Producer. The detailed account of units generated & used for captive use shall be kept in a pass book & or subsidiary pass books and such pass books shall be used for adjustment of bills.

Concerned Discom shall prefer monthly bills as per applicable Tariff Rate for the electric power made available and energy supplied to the scheduled captive user out of their system after accounting for the energy delivered by Power Producer for captive use. It is clarified that the scheduled captive user shall continue to be the consumer of concerned Discom and shall be liable to pay minimum billing, fixed charges, excess demand surcharge, power factor surcharge and any other charges leviable and as may be applicable from time to time as per concerned Discom’s Tariff for supply of electricity and General Conditions of supply.”

7. The RSMML has been receiving power at Jhamarkotra mines as an HT consumer under the agreement. As an HT

consumer RSMML was required to pay various charges including the minimum charge which has been mentioned in the billing provision. The two wheeling and banking agreements do not stipulate combining the two bills required to be served on the RSMML – one for consuming electricity as HT consumer and other for wheeling charges of the energy wheeled from its wind farms to its mining units. The two agreements however stipulate a pass book to be maintained and it appears that the parties did maintain a pass book.

8. There was no dispute till the appellant Ajmer DISCOM/AVVNL changed the billing pattern in November, 2005. The new billing pattern led to increase in the amount payable by the RSMML to the appellant Ajmer DISCOM. RSMML challenged the new billing pattern before the Commission in Case No. 100/06 in which the impugned order dated November 04, 2006 was passed.

9. During the course of hearing before me, learned Advocate for the 2nd Respondent Shri P.N. Bhandari pleaded that I need

not be confining my opinion only on the issues of divergence culled out by the Hon'ble Members but I could hear the entire case *de novo* and decide on all the issues. In this context it is necessary to extract below Section 123 of The Electricity Act, 2003 wherein it is very explicitly stated that referee member has to decide only on the points on which the Hon'ble Members have differed in their judgments.

Section 123 of The Electricity Act, 2003.

“ Decision to be by majority.- If the Members of the Appellate Tribunal of a Bench consisting of two Members differ in opinion on any point, they shall state the point or points on which they differ, and make a reference to the Chairperson of the Appellate Tribunal who shall either hear the point or points himself or refer the case for hearing on such point or points by one or more of the other Members of the Appellate Tribunal and such point or points shall be decided according to the opinion of the majority of the Members of the Appellate Tribunal who have heard the case, including those who first heard it.”

10. In view of the above said unambiguous explicit provision in the Act, I am confining myself only on the issues of divergence referred to me.

11. I now advert to the first point of divergence (a) at para 2, set out below:

(a) Whether the billing pattern for the energy consumption of RSMML, the respondent No. 2, should be the one that was being followed before November, 2005 or whether the billing pattern should be the one which was challenged before the Commission, respondent No. 1.

12. Billing pattern being followed by the appellant before November, 2005 and the billing pattern which was challenged before the Commission by the 2nd Respondent, Rajasthan State Mines and Minerals Ltd. (RSMML) are given below:

(i) Billing pattern before November, 2005.

Ajmer DISCOM adjusted the wheeled power of wind farm in monthly energy bills from captive consumption after

adjusting the minimum consumption charges. The balance wheeled units of wind farm were adjusted towards captive consumption of the petitioner. If in any month, the balance units were not sufficient the same used to be adjusted in future months up till the month of the calendar year. By the end of the calendar year if the banked units could not be adjusted then the same were treated as sale to DISCOM at 60% of the applicable tariff as per the wind power policy.

(ii) Billing pattern challenged by RSMML.

Ajmer DISCOM started first adjusting the wind power of wind farm against the captive consumption of the mines and the balance units consumed, if any, are calculated towards minimum consumption charges and in case the same is not enough to cover the minimum charges, then Ajmer DISCOM recovers minimum charges in the monthly energy bills.

Analyses and Decision

13. One is required to bear in mind that the respondent RSMML has the following two distinct agreements with the appellant:

- (I) Agreement for High Tension supply dated April 12, 1984.
- (II) Wheeling and banking agreement dated August 29, 2001 and dated February 19, 2004.

14. The High Tension Supply Agreement established the relationship between the RSMML as a consumer and the appellant as the supplier of electricity. This agreement inter alia binds RSMML to pay minimum charges even if no units of electricity are consumed by it.

15. Wheeling and Banking Agreement amongst RSMML and RVPN, Jodhpur Discom and Ajmr Discom enables RSMML to set up and generate wind energy for its captive use and/or sale to

third party by wheeling such power through grid of RVPN based on the terms and conditions of the agreement. This agreement also provides banking of the power generated by RSMML.

16. Despite entering into the Power Purchase-cum- Wheeling and Banking Agreements, RSMML still remains bound by the HT agreement with the distribution company entered in 1984. Billing provisions of the Power Purchase-cum-Wheeling and Banking Agreements clearly state that “ *the scheduled captive user shall continue to be the consumer of concerned Discom and shall (be) liable to pay minimum billing, fixed charges, excess demand surcharges, power factor charges and any other charges liable as may be applicable from time to time as per concerned Discom Tariff for supply of electricity and General Conditions*”. Energy consumed by RSMML from the grid is recorded by the import meters. The concerned Discoms are to prefer monthly bills after deducting the units for adjustment towards captive use by power producer. The detailed accounts of units generated and used for captive use is to be kept in a Pass Book

and or subsidiary Pass Books and such Pass Books are used for adjustment of bills. The concerned Discoms are to prefer monthly bills as per applicable Tariff Rate for electric power made available and energy supplied to the scheduled captive users out of their system after accounting for the energy delivered by the Power Producer for captive use. This being so, it is very clear that as far as the HT agreement is concerned, its conditions including minimum charge shall be applicable. The minimum charge has to be paid by RSMML even if it does not consume even a single unit of electricity.

17. The whole issue can be examined by treating the two agreements in isolation as these indeed are. As far as the HT agreement is concerned, RSMML is a consumer and is required to pay for the electricity it consumes and is also liable to pay minimum charge; RSMML as a producer is exporting energy to the grid of the appellant with the facility of wheeling and banking. As the cost of energy corresponding to the minimum charges is a sunk cost, there is no reason or rationale for any generator who has the facility of banking and third party sale of

energy to allocate its own generation towards its minimum consumption for which it has to pay the Discom anyway. The billing provisions of the agreements and the Power Purchase-cum- Wheeling and Banking Agreements do not come in the way of the generator to have flexibility of adjusting its excess energy generated over and above the energy consumed corresponding to the minimum charges. In view of this I conclude that the billing pattern for the energy consumption of RSMML being followed before November, 2005 was the correct pattern.

18. Having concluded, *de hors* the principle of estoppel and principle of conduct of parties, that the billing pattern of energy consumption of RSMML being followed before November, 2005 was the correct method, it is not necessary for me to answer the points at (b) and (c) .

19. Regarding point (d), the Commission in its order dated November 4, 2006 has not considered the prayer of the 2nd respondent for waiver of the provision of minimum charges. The respondent RSMML has not challenged this part of the tariff

order by filing any appeal or cross appeal. It is the appellant before us who has challenged the Commission's order and not RSMML. If RSMML is aggrieved of this, it should have come in appeal before this Tribunal for redressal. It is, therefore, not necessary to remand the matter to the Commission to consider abolition of the minimum charges.

20. In conclusion I decide that the billing pattern for the energy consumption of RSMML, the Respondent No. 2, should be the one that was being followed before November, 2005. It is not necessary for me to examine points at (b) and (c) of para 2 above. As far as point (d) at para 2 regarding remand order, in my opinion remand order directing the Commission to consider the prayer of RSMML for waiving the minimum charges need not be passed.

21. Pronounced in the open court on 24th day of July, 2009.

(H.L. Bajaj)
Technical Member