

APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

Appeal No. 47 of 2010

Dated : 16th December, 2010

Coram: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice Partha Sakha Datta, Judicial Member

In the matter of:

M/s. Vijaylakshmi Hydro Power Pvt.Ltd.

H. No.2, 40 feet Road,
Off: Kalpana Chawla Road,
4th Cross, 5h Main Bhoopsandra, Sanjaynagar,
Bangalore 560 094

... Appellant

Versus

Karnatka Power Transmission Corporation Ltd.,

Kavery Bhavan,
Bangalore-560 009.

Chamundeshwari Electricity Supply Corporation Ltd.

927, LJ Avenue Commercial Complex,
New Katharaj Urs Road,
Saraswathipuram,
Mysore 570 009.

Karnatka Electricity Regulatory Commission,

6th & 7th Floor, Mahalaxmi Chambers,
9/2, M.G. Road, Bangalore 560 001.

... Respondents

Counsel for the Appellant: Mr. Varun Singh,
Mr. Pratap Venugopal, Ms. Deepti
Mr. Purshottam Kumar Jha
Ms. Surekha Raman
Mr. Deleep Poolakkot

Counsel for the Respondents: Mr. M.G. Ramachandran
Mr. Anand K Ganesan
Ms. Sneha V & Ranjitha
Ms. Swapna Seshadri

Judgment

Per Justice P.S. Datta, Judicial Member

1. The only question that calls for consideration in this Appeal is whether the Appellant is entitled to interest in terms of the Power Purchase Agreement dated 1.3.2001 executed by and between it and Respondent No.1, since assigned to Respondent No.2, because of non payment of dues on time payable by Respondent No. 1 and then by the Respondent No. 2 on account of supply of electrical energy to the Respondent No.1- Respondent No.2 by the Appellant.

2. The facts are these:

The Appellant runs a Mini Hydro Power Generating Station of 3 MW capacity at Hebbakavadi Branch canal at Mandya in Karnataka which was installed pursuant to the sanction by Government of Karnataka on 4.9.2000, and

consequent thereto there came into being a Power Purchase Agreement between the Appellant and Respondent No.1 on 1.3.2001. The project commenced its commercial operation on 22.7.2002. Article 5 of the Agreement deals with rates and charges, while article 6 deals interalia with payment and late payment which are reproduced below:

*“6.2 **Payment** – Corporation shall make payment of the amounts due in Indian Rupees within fifteen (15) days from the date of receipt of the Tariff Invoice by the designated official of Corporation.*

*6.3 **Late payment:** If any payment from Corporation is not paid when due, there shall be due and payable to the Company penal interest at the rate of SBI Prime Lending rate plus 2% per annum for such payment from the date such payment was due until such payment is made in full.”*

3. But according to the Appellant since October 2002 the first Respondent contrary to the Power Purchase Agreement started making part payments and withheld the legitimate dues of the Appellant. In the meantime, Power Purchase Agreement was assigned to the 2nd respondent being the successor of the first Respondent. The second Respondent also continued on making part payments in violation of the Agreement. On 28.3.2006 State Power Procurement

Coordination Centre (SPPCC) wrote to the Appellant intimating that the tariff has been frozen at Rs.3.32 w.e.f. 1.4.2003. The Appellant wrote back to say on 31.3.2006 and 11.7.2006 that freezing tariff was a rude shock to the Appellant as it has invested huge amount by borrowing and also through equity. Pressure was mounted upon the Appellant by SPPCC who desired discussions on the tariff issue with the Appellant. On the threat of non payment of dues, the Appellant had to say that it could consider the revision in the tariff provided its legitimate dues were cleared with suitable interest, but on 14.2.2007 the SPPCC proposed that the balance payment due would be released only after the Appellant would execute Supplemental Agreement. Under acute distress and mounting duress of the SPPCC, the Appellant signed Supplemental Agreement in draft. The SPPCC also on 13.6.2007 wrote a letter to the 2nd Respondent with a copy to the Appellant intimating that directions were sought from the Commission, the Respondent No.3 on the question as to whether the parties would adhere to the tariff in the Power Purchase Agreement or to enter into Supplemental Agreement with revised tariff. By the said letter, the SPPCC also requested the 2nd Respondent to submit the Supplemental Agreement for approval of the Commission but the 2nd Respondent acted upon the Power Purchase Agreement and did not submit the Supplemental Agreement to the Commission. Still then residual payments were not made in

terms of the agreement. On 14.7.2008 the Appellant rescinded its consent given under the extreme duress and annulled its draft Supplemental Agreement with immediate effect. Now the Appellant moved the Respondent No. 3, the Commission through petition No. 21 of 2008 alleging violations of the conditions of the Power Purchase Agreement and praying for direction upon the Respondent No.2 to make payment of dues in terms thereof. The Commission disposed of the petition on 16.4.2009 holding that the Power Purchase Agreement dated 1.3.2001 was still binding on the parties and there was not concluded Supplemental Agreement between the parties. While observing so, the Commission directed the Respondents to pay in terms of tariff as provided in the Power Purchase Agreement but qualified the order with the words that the Respondents would pay the difference of the amounts not paid with effect from 1.4.2003 within a period of 4 months from the date of the order and in case the Respondents would fail to make the payment within the period, the amount would carry interest in terms of the agreement.

4. This part of the qualifying words that interest would be chargeable in terms of the agreement only when the difference in amount payable with effect from 1.4.2003 was not paid within 4 months from the date of the order (16.4.2009) is the subject matter of challenge in this Appeal before this Tribunal.

5. The Respondent No. 1 and 2 in their joint counter affidavit contended interalia that since applying the escalation rate of 5% as provided in the Power Purchase Agreement the tariff was working out to be substantially higher than the power available from other sources, it was decided to negotiate with the Appellant for reduction in tariff and pegging the same at Rs.3.32 per unit from 1.4.2003. Other generators who were in the same position as the Appellant were also negotiated with. The Appellant conveyed its agreement on a revised tariff of Rs.3.32 per unit applicable from the year 2003-04 with an annual escalation of 2%. The SPPCC forwarded the draft Supplemental Agreement to the Appellant for its consent and signature. On 14.2.2007 a re-negotiated tariff agreed to between the parties was sent for approval of the State Commission. But the Supplemental Agreement could not be acted upon as it could not be signed by the parties, and in the meanwhile by the letter dated 14.7.2008, the Appellant revoked its earlier concurrence to the revised tariff and annulled its consent to the Supplemental Agreement. However, Respondent No.3 by the order dated 16.4.2009 ruled on the petition being number 21/08 of the Appellant in the form of direction to the Respondent No. 1 and 2 to make payments to the extent of the difference of amount with effect from 1.4.2003 within the period of 4 months from the date of the order and in the event of the failure the amount

would carry interest as agreed in the Power Purchase Agreement. Consequent upon the order of the Commission, the entire amount has been paid on 12.6.2009 well before the time stipulated in the order. As on date there are no dues payable to the Appellant any longer in terms of the order of Respondent No.3. It is contended further that the dispute between the parties was a bona fide dispute for which the payments were withheld and parties entered into negotiations and agreed to a reduced tariff. But the Supplemental Agreement could not be placed before the State Commission for approval as the Appellant backed out from the draft agreement. In such circumstances, the State Commission was correct in not allowing interest for the period from 1.4.2003 as it would be not in consonance with equity.

6. The Appellant submitted a rejoinder traversing what were reiterated by it in their memorandum of Appeal. It also filed an additional affidavit disputing the Respondents' version that as on date no payments were due to be payable to the Appellant.

7. We have heard Mr. Varun Singh, the learned Counsel for the Appellant and Mr. Anand K Ganeshan, the learned Counsel for the Respondent No. 1 and 2. Despite service, there has been no appearance on behalf of the Respondent No.3, the Commission.

8. A large mass of facts are not in dispute. It was the Appellant's Mini Hydro Power Generating Station of 3 MW capacity which commenced its commercial operation on 22.7.2002 and the electrical energy was to be supplied to Respondent No. 1 in terms of the Agreement on 1.3.2001. The Power Purchase Agreement received approval of the Commission and both the parties started acting upon it. As reproduced above, in terms of article 6.2 payment is to be made within 15 days from the date of receipt of the tariff invoice and in case of late payment, there shall be due and payable to the Company penal interest at the rate of SBI Prime Lending Rate plus 2% per annum for such payment from the date when such payment was due until such payment is made in full. Admittedly, payments on account supply of electricity was not made in full and on time and, as the Appellant says, Respondent No. 1 went on making part payments which according to the Appellant caused financial hardship since it invested huge amounts both in equity and barrowing. Meanwhile, the agreement came to be assigned to the Respondent No.2 as it was the successor of the Respondent No.1 but still then the Respondent No.2 went on making part payments which was in clear violation of the relevant clauses of the agreement that binds the parties. Also is the admitted position that there were held negotiations and discussions between the parties at the instance of the Respondent No.2 for

reduction in tariff, as according to the Respondent No.2 annual escalation at 5% as provided in the Power Purchase Agreement would lead the tariff to be substantially higher. But, according to the Appellant she was made to sit for negotiation under threat and coercion. We are not entering into question as to whether there was a threat and coercion perpetrated upon the Appellant so as to compel him to sit on the table for agreement for revision of tariff although a Supplemental Agreement was drawn up in draft, but it was rescinded by the Appellant. It was the SPPCC who requested the Respondent No. 2 to send the Agreement to the Commission. It is not in dispute that the Supplemental Agreement was not signed by the parties in fair form. There was also no approval of the Commission on the Supplemental Agreement. Admittedly, the Appellant rescinded its consent on 14.7.2008, The Commission, therefore, rightly observed that there could be no legal existence of any Supplemental Agreement and in the absence thereof, the Power Purchase Agreement dated 1.3.2001 which got the seal of approval of the Commission earlier and which has not been rescinded is still binding on the parties. Mr. Ganeshan's submission that there was a bona fide dispute with respect to the rate of tariff for which the parties sat together for reduction in tariff is of no avail. So far, it is not the case of 2nd Respondent that the Power Purchase Agreement dated 1.3.2001 was the outcome of any unconscionable bargain. The Agreement has been

implemented and now so long the Agreement has not been substituted by any new agreement with the approval of the Commission, it stands as it is. Therefore, the Commission was right in directing for the payment of the difference amount with effect from 1.4.2003.

9. Now, the question is whether the Commission is justified legally in holding that in the event of the failure to make payment of the difference amount since 1.4.2003 within 4 months from the date of the order, the amount would carry interest as agreed to in the Power Purchase Agreement. To us, it is impermissible. The Commission again substituted its own view with respect to the payment of penal interest for what was agreed to by and between the parties in terms of the Agreement dated 1.3.2001 particularly when the Commission itself observed that Power Purchase Agreement dated 1.3.2001 was binding between the parties because of not concluding any Supplemental Agreement for modification of the tariff. As there is no Supplemental Agreement and the Respondent No.2 honoured the Commission's order by making payment of the due amount there is no other way but to say that because of the default in making payment on time in terms of the agreement, interest would be chargeable against the Respondent No. 1 and 2 at the rate as was agreed upon between the parties in the agreement. To hold otherwise will

be the rescission of the contract which was lawfully entered into by and between the parties.

10. Thus, the Appeal succeeds and is allowed. That part of the order dated 16.4.2009 by which the Commission directed to pay the penal interest since 1.4.2003 in terms of the agreement only when payment is not made within a period 4 months from the date of the order dated 16.4.2009 is set aside. Interest is, therefore, payable in terms of the agreement. No costs.

(Justice P.S. Datta)
Judicial Member

(Rakesh Nath)
Technical member

Date: 16th December, 2010

Index: Reportable/Not Reportable

Pk

