

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

Appeal No. 161/09

Dated: 10th December 2009

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. H.L.Bajaj, Technical Member

IN THE MATTER OF:

Damodar Valley Corporation Ltd. Appellant

Versus

BSES Rajdhani Power Ltd. & Ors. Respondents

Counsel for the Appellant(s) : Mr. Janaranjan Das
Mr. S. Misra
Mr. P.P. Wagle
Mr. MG. Ramachandran
Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Counsel for the Respondent(s) : Mr. Amit Kapoor &
Mr. Mansoor Ali for R 2 to 4

Per Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson

JUDGMENT

1. Damodar Valley Corporation (DVC) is the appellant herein.
2. BSES Rajdhani Power Ltd. (BRPL) and others, the R-2 to R-4 herein filed an application before the Central Commission under Clause (f) of Sub-section(1) of 79 the Electricity Act, for giving direction to DVC to ensure supply of power to them as per the PPA executed. On receipt of the notice, the DVC

appeared before the Central Commission and filed the petition, questioning the jurisdiction of the Central Commission on the ground that the performance of contractual obligations cannot be gone into by the Central Commission u/S 79(1)(f) and also that there is no privity of contract between the Appellant and the Respondents, as there is no agreement between them.

3. The Central Commission, by the Order dated 19/8/09 decided on the question of jurisdiction and disposed of the petition filed by the Appellant questioning the maintainability, holding that it has indeed got jurisdiction to go into the dispute in question. This Order is under challenge before this Tribunal in the present appeal filed by the DVC, the Appellant.

4. The Ld. Counsel for the Appellants DVC, raised the following two-fold contentions which are as follows:

- I. The DVC has never executed any agreement in favour of the Discoms i.e. the R-2 to R-4 herein, and the agreement referred to is only the PPA dated 24/8/06 which was executed between the DVC and the Delhi Transco Ltd. (DTL), the R-5 herein. As such there is no privity of contract between the Appellant and R-2 to R-4. Even though the Delhi State Commission (DERC), by the Order dated 31/3/07 allocated capacities of the PPA to the Discoms, the R-2 to R-4, the same has not come into effect as yet, as the formal

agreement of the PPA has not been executed by the Appellants with the R-2 to R-4, viz. the three Discoms. Therefore, the Respondents have no locus-standi to file a petition before the Central Commission seeking for a direction to the Appellant.

- II. The Central Commission does not have jurisdiction u/S 79(1)(f) to adjudicate upon the issues which were raised in the Petition as they are purely contractual disputes and hence, do not fall under any of the provisions u/S 79(1)(a) to (d) and (f). The Central Commission can have jurisdiction u/S 79(1)(a) which relates to the determination of tariff only, but not over contractual disputes. Therefore, the petition filed before the Central Commission by the Respondents 2 to 4 is not maintainable.

5. In reply to these two contentions, the Ld. Counsel for the R-2 to R-4 would urge the following submissions:

- I. The Distribution Companies (Discoms), the Respondents 2 to 4 herein filed a petition u/S 79(1)(f) praying the Commission to direct the DVC to commence supply of power and also ensure supply of the said power to them as per the PPA executed/LTOA granted to them. This prayer encompasses the quantum of power and the

rate at which such power is to be supplied by DVC in pursuance of the PPA. Though, the original PPA was entered into between the DVC, the Appellant and Delhi Transco Ltd. (DTL), the R-5 herein, the rights accrued to the DTL (R 5) have been assigned to the Discoms R-2 to R-4 by the Order dated 31/3/07 passed by the Delhi State Commission (DERC) which was also acted upon through the supply of power and also through various letters (dated 4/4/07, 31/5/07 and 13/6/07). The DVC, thus having recognized and acted upon the Order passed by the DERC, cannot now raise the issue of locus standi on the mere ground that the formal agreement has not been executed by the DVC with the Respondent Discoms.

- II. U/S 79(1)(f), the Central Commission is empowered to adjudicate upon disputes involving the generating companies (gencos) with regard to any matter connected with regulation of the tariff of a genco owned by the Central Government. Admittedly, the DVC is a generating company and it is also controlled by the Central Government. The issue with reference to the dispute between the genco and the Discoms over the supply of power, and the tariff rate as fixed in the PPA, the rates of which were assigned to the Discoms. Since the Central Commission is the sole authority empowered to determine the rate for the sale of power by DVC to

DTL/Discoms, it has got jurisdiction. Therefore, the Order impugned is perfectly valid in law.

6. We have heard the Learned Counsel for the parties on the above aspects and perused the records. We have considered them carefully. The questions that arise for consideration are these:

- i) Whether the Distribution Companies namely R-2 to R-4 have got locus standi to file the Petition praying for the relief referred to above, before the Central Commission when they were not a party to the PPA.
- ii) Whether the dispute raised in this Petition would fall in any of the categories specified u/S 79(1)(a) to 79(1)(d) r/w 79(1)(f) of the EA

Before going into these questions, it would be better to refer to the minimal facts which are required to understand the core issue before this Tribunal.

7. The DVC the Appellant has undertaken the functions of generation, transmission and distribution in the Damodar Valley command area. After enactment of the Electricity Act, the Appellant has been deemed to be a licensee. The Delhi Transco Ltd. (DTL), the R-5 herein entered into an agreement with the Appellant on 24/8/06 for the purchase of electricity. Pursuant to the divestment of the power purchase functions from DTL, the R-5

and vesting of those functions with the Distribution Companies, the R-2 to R-4, the said Discoms have to enter into an agreement with the Appellant DVC for assignment of the rights of R-5 under the PPA entered into with the Appellant. To this effect, an Order had been passed by the Delhi State Commission (DERC) on 31/3/07 by which the functions of power purchase of R-5 were transferred to the Discoms, the R-2 to R-4. Even though the DERC passed the order as early as 31/3/07, the Appellant DVC has not executed the said agreement for assignment of the rights of R-5 to the Discoms R-2 to R-4.

8. Having failed to get the said agreement executed and having noticed that DVC had increased the rate, which was not in consonance with the PPA, the Discoms on 19/1/09 filed a Petition before the Central Commission (CERC) raising the dispute, relating to the non-supply of electricity and non performance of the PPA dated 24/8/06 entered into between R-5 and the Appellant DVC. The CERC issued notice to DVC. The Appellant, on receipt of the said notice, had filed the Petition raising the preliminary objection regarding jurisdiction of the Central Commission to adjudicate the dispute in question, and also with regard to the locus standi of the Discoms R-2 to R-4 to raise this dispute. Ultimately, the Central Commission passed the impugned Order dated 19.08.2009 rejecting the preliminary objection that the R-2 to R-4 have got locus standi to file the said petition and the Central Commission has got jurisdiction to adjudicate the dispute raised in this petition on merits. Then the

Central Commission adjourned the main petition to consider the same on merits. At this stage, the Appellant DVC, has filed this Appeal. In the light of the above facts, let us now deal with the questions raised in this Appeal.

9. According to the Ld. Counsel for the Appellant, the Respondents R-2 to R-4 have no locus standi to file the said application as they are not a party to the agreement. On the other hand, it is contended by the learned counsel for Respondent 2 to 4 that the prayer sought by the Respondents is for directions to be issued to the DVC to commence and ensure supply of 100 MW of power to them as per the PPA executed / LTOA granted to the Respondent Discoms and hence they have locus standi.

10. It is not in dispute that there was only one PPA which was entered into between the DVC, the Appellant and the DTL, R-5 herein on 24/8/06 for sale of different quantum of power on a round the clock basis. It is also not in dispute that there was an Order passed by the DERC, the Delhi State Commission on 31/3/07 reassigning and reallocating the said PPA entered into between the DVC and the R-5 Delhi Transco, to the Respondent Discoms R-2 to R-4. This Order was passed by Delhi Commission in pursuance of an enactment of the EA 2003 which prohibited transmission companies (transcos) from purchasing and selling power and also in pursuance of a policy directive issued by the Government of NCT Delhi on 28/6/06 u/S 108 of the EA, to the State

Commission for making power arrangements and reallocations in Delhi beyond 1/4/2007. Therefore, as per this Order passed by the State Commission, the R-5 Delhi Transco was prohibited in law from procuring power under the PPA and consequently, the Order passed by the State Commission on 31/3/07 has come into effect from the next day i.e. 1/4/07 under which the responsibility for arranging and getting supply of power from the DVC rests with the three Discoms the R-2 to R-4 herein.

11. It is the contention of the learned counsel for the Appellant DVC, that the Distribution Companies do not have locus standi to file this Petition before the Central Commission in the absence of an assignment deed being finalized and executed between them. However, In the light of the directions given by the Govt. of NCT of Delhi under Section 108 of the EA to the State Commission for reallocating the existing PPA to the Delhi Transco (DTL), to the other Respondent Discoms R-2 to R-4 in the NCT of Delhi and also in the light of the Order passed by the DERC on 31/3/07 allocating all the PPAs, including the PPA between the DVC and the DTL, to the Respondent Discoms R-2 to R-4, this contention urged by the Ld. Counsel for the Appellant does not deserve acceptance. Further, it is noticed that the PPA which has been reallocated to the Respondent Discoms had been recognized by the DVC immediately after passing of the order by the Delhi State Commission through the intimation sent

by the Appellants to all the Respondents 2 to 5 vide its letter dated 4/4/07, the contents of which are as under:

“As per DERC Order dated 31/3/07, PPA executed between DVC and Delhi Transco Ltd. is to be assigned to three Discoms namely NDPL, BRPL and BYPL in terms of PPA dated 24.08.06 existing allocation to Delhi Transco Ltd. is 100 MW and as per DERC Order dated 31.3.07, this allocation is to be apportioned to NDPL, BRPL & BYPL as 29 MW (29.18), 44 MW (43.58%) & 27 MW (27.24%) respectively.

Though Tri-partite Draft PPA in this regard is being prepared and will be sent shortly, in order to continue supply of power to Delhi, it is requested to please send the following confirmation:

- 1. Till execution of this Tri-partite PPA amongst DVC, DTL & Discoms (NDPL, BYPL & BRPL) power supply to three Discoms will be guided by the terms and conditions of the PPA executed between DVC and DTL on 24.8.06.*
- 2. All other terms and conditions will be guided by the already mutually agreed terms and conditions through correspondences.*
- 3. There will be no legal complication in supplying power to three Discoms prior to execution of the tri-partite PPA.”*

13. On receipt of the above letter through fax, the Discoms R 2 to 4 had also given consent to the same through a letter dated 11/4/07. Acting upon the State Commission's Order, the Appellant had also supplied power to the Respondent Discoms specifically admitting that as per the Order of the State Commission dated 31/3/07 under which the PPA executed between the DVC and the R-5 DTL has been assigned to the other three Respondent Discoms No. 2 to 4, the Appellant is prepared to supply power to the three Respondent

Discoms as per the terms and conditions of the PPA dated 24/8/06, till the execution of the formal tri-partite PPA amongst the DVC, the R-5 DTL and the Discoms R-2 to R-4. Through the said letter dated 11/4/07, R 2 to R 4, the Discoms in response to the confirmation dated 4/4/07 sought by DVC, accepted and affirmed that till the execution of the Tri-partite PPA amongst DVC, DTL and Discoms, power supply to Discoms will be guided by the terms and conditions of the PPA executed between DVC and DTL on 24/8/06.

14. Thus, it is clear from the foregoing that the Appellant has recognized the fact of the PPAs having been reassigned, in terms of the Order dated 31/3/07 passed by the State Commission, in favour of the Respondent Nos. 2 to 4, and has further acted upon the same by supplying power to the Respondent Discoms, which accepted the same through the letter dated 11.4.07. When such being the case, how could the Appellant be permitted to contend that there was no finalized deed of assignment ? Therefore, the objection raised by the DVC with reference to the locus standi has no legs to stand and the same is rejected.

15. The second question relates to the jurisdiction. It is contended by the Ld. Counsel for the Appellant that the Central Commission does not have jurisdiction to adjudicate upon the issue as this dispute raised in the petition did not relate to the determination of tariff, and that it is merely a contractual

dispute, and the same would not fall within the provision of Section 79(1)(a) r/w Section 79(1)(f).

16. A perusal of Section 79 (1) (a) would make it clear that Section 79 empowers the Central Commission (CERC) to adjudicate the dispute involving generating companies (gencos), with regard to matters connected with regulation of tariff of the gencos owned by the Central Government. Admittedly, the DVC is a Generating Company and is controlled by the Central Government. The provision does not show as if the CERC can deal with a dispute between the gencos and transmission companies (transcos) only, but on the other hand, it is specifically stated that under the said Section, issues relating to regulation of tariff involving the gencos or transcos can be dealt with by the Central Commission.

17. In this case, the petition has been filed by the Respondent Nos. 2 to 4 before the Central Commission for regulating the rate of price of electricity as per the PPA by giving a suitable direction to the genco, the Appellant. As a matter of fact, clause 4.1 of the PPA provides that the DVC shall supply 100 MW of power during the period December 2006 to September 2007 on a negotiated rate and for rest of the period the rate was to be determined by the Central Commission. Since no tariff was fixed by the Central Commission, at the rate at which power was to be supplied, was to be negotiated and both the

parties had to agree to the rates so fixed. It is noticed that the R-5 DTL sent a letter on 12/2/07 agreeing to the rate of Rs. 6.26 per kwh for the period April 2007 to June 2007 subject to the decision taken by Central Commission. In pursuance of this letter, the Appellant sent a letter on 21/5/07 reaffirming the above understanding and endorsing that the power supply will be guided by the existing terms and conditions including the rate with R-5 DTL, till execution of the PPA with the other Respondent Discoms.

18. It cannot be debated that Section 79(1)(a) deals with the generating companies to regulate the tariff. The term 'regulate' as contained in Section 79(1)(a) is a broader term as compared to the term 'determined' as used in Section 86(1)(a). In various authorities, the Supreme Court, while discussing the term 'regulation' has held that as part of regulation, the appropriate Commission can adjudicate upon disputes between the licensees and the generating companies in regard to implementation, application or interpretation of the provisions of the agreement and the same will encompass the fixation of rates at which the generating company has to supply power to the Discoms. This aspect has been discussed in detail in the *Judgments of the Supreme Court in 1989 Supp(2) II SCC 52 Jiyajirao Cotton Mills vs. M.P.Electricity Board, D.K.Trivedi & Sons vs. State of Gujarat, 1986 Supp SCC 20 and V.S.Rice & Oil Mills vs. State of A.P., AIR 1964 SC 1781, and also in Tata Power Ltd. vs. Reliance Energy Ltd. 2009 Vol.7, SCALE 513.*

19. Thus, the factual details and the legal position mentioned above would clearly indicate that in the petition before the Central Commission the Respondents 2 to 4 have raised the issues relating to the rates at which the power has to be supplied to the Respondent Discoms especially when the Appellant has been said to have arbitrarily enhanced the rates in violation of Clause 4.1 of the PPA, which was not agreed upon by the Respondent Discoms through their letters dated 19/6/07 and 28/6/07. Therefore, regarding fixing of the rate, the R-2 to R-4 rightly in our view approached the Central Commission, raising the issues relating to the rate at which the power has to be supplied to them by way of implementation of the PPA u/S 79(1)(a) r/w Section 79(1)(f) of the EA. The Central Commission, in turn, has rightly decided the issue with reference to the locus standi as well as the jurisdiction. As such, there is no merit in the Appeal.

18. In view of the above discussions, the impugned Order has to be held valid and accordingly the same is confirmed. Consequently, the Central Commission is permitted to proceed with the main petition to consider the case on merits and dispose of the same in accordance with law. Hence, the Appeal is dismissed as devoid of merits. No costs.

(H.L.Bajaj)
Technical Member

(Justice M.Karpaga Vinayagam)
Chairperson

Dated: 10th December, 2009

REPORTABLE