

2023 LiveLaw (SC) 221

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
AJAY RASTOGI; J., C.T. RAVIKUMAR; J.
CIVIL APPEAL NO(S). 706 OF 2014; March 15, 2023

M/S PENNA ELECTRICITY LIMITED (NOW M/S PIONEER POWER LIMITED)

versus

THE TAMIL NADU ELECTRICITY BOARD & ORS.

Electricity Act, 2003 - Diversion of gas to other generating stations not sufficient ground to seek compensation when Power Purchase Agreement (PPA) has no such provision.

For Appellant(s) Mrs. Parag. P. Tripathi, Sr. Adv. Mr. Buddy.a.ranganadhan, Adv. Ms. Nandini Tomar, Adv. Mr. A. V. Rangam, AOR

For Respondent(s) Mr. Vinodh Kanna B., AOR

J U D G M E N T

Rastogi, J.

1. The instant appeal has been filed under Section 125 of the Electricity Act, 2003 (hereinafter being referred to as the “Act 2003”) assailing the judgment and order of the Appellate Tribunal for Electricity dismissing the appeal filed at the instance of the present appellant.

2. The appellant initially filed a petition under Section 86(1)(f) of the Act, 2003 and sought the following reliefs:-

(a) direct the Respondent to make the payment of Rs.25.63 Crores towards fixed charges and Rs.8.10 Crores towards payment due on the actual variable charges payable in respect of the power generated and availed for 153.26 millions unit during the period 29.10.2005 to 30.06.2006 to the Petitioner.

(b) direct the Respondents to make the payment to the Petitioner of the sum of Rs.18.06 Crores towards under recovered fixed charges in respect of operations of the generating station of the Petitioner for the period 01.07.2006 to 15.06.2009.

(c) direct the Respondents to make the payment to the Petitioner of the sum of Rs.12.77 crores towards under recovered additional cost of generation (variable charges) in respect of operations of generating Station of the Petitioner for the period 01.07.2006 to 15.06.2009.

(d) direct the respondent to take immediate decisions on the use of Naphtha or any other compatible fuel as alternate/ supplemental fuel to increase and maintain the PLF of the plant as contemplated in the amending PPA dated 25.08.2004 in future thereby enabling the plant being operated at optional level so as to ensure the advantage to the Respondent and also the assured return to the Petitioner. The permission to use of the Naphtha/other compatible fuel should also contemplate dispatching the plant under merit order under gas based tariff only. If the Respondent desires otherwise, the Petitioner should be assured of the fixed charges.

(e) For any reason if the Respondent were not to consider any or all of the relief claimed above by the Petitioner, to direct the Respondent to make the payments due to the Petitioner as in prayer (a), (b) and (c) above and relieve the Petitioner from the obligations of the amendment PPA dated 25.08.2004.

3. The Tamil Nadu Electricity Regulatory Commission thereby disposed of the petition by order dated 30th December 2011, rejecting the claim of the appellant relating to unpaid fixed charges of Rs.18.06 under Combined Cycle Operation as well as the claim of underpaid variable charges of Rs. 12.77 crores under Combined Cycle Operation for the period between 1st July, 2006 to 15th June, 2009.

4. This came to be challenged by the appellant in appeal before the Appellate Tribunal for Electricity (hereinafter being referred to as the "Tribunal"). After the matter came to be heard, taking into consideration the material on record, the Tribunal returned a finding in paras 35, 36 and 38(1) and (2), and dismissed the appeal under the impugned judgment. The relevant paras are as under:-

"35. We find that there is no provision for compensation for capacity charges and variable charges due to the fact that the plant was not able to maintain the normative availability/Plant Load Factor on account of shortage of fuel in the Central Commission's Tariff Regulations, 2004 which were in vogue when the amended PPA was entered into between the parties or in the State Commission's Tariff Regulations, 2005. Admittedly, the State Commission's Tariff Regulations were made effective subsequent to the signing of the PPA. The State Commission could not intervene in allowing amendment in the provisions of the PPA in this regard which were voluntarily agreed by both the parties and which are not in contravention to any provision of the Act or Rules or the Regulations.

36. Therefore, there is no infirmity in the findings of the State Commission in not agreeing to interfere with the provisions of the PPA declaring the PPA unworkable with regard to compensation for fixed charges for the above period due to shortage of supply of gas.

37. xxx xxx

38. Summary of Our Findings

i) The Appellant is not entitled to payment of full fixed charges and actual variable charges in respect of supply of energy between 1.7.2006 to 15.6.2009 when the operational parameters were affected on account of shortage supply of gas by M/s GAIL in view of non availability of any provision in this regard in the PPA or Tariff Regulations.

ii) There is no infirmity in the findings of the State Commission in not agreeing to interfere with the provisions of the PPA or declaring the PPA unworkable with regard to compensation for fixed and variable charges for the above period due to shortage of supply of gas."

5. Mr. Parag P. Tripathi, learned senior counsel for the appellant submits that in the absence of any clause/provision under the amended Power Purchase Agreement dated 25th August, 2004 (hereinafter being referred to as the "PPA") in reference to payment of fixed charges, it was incumbent upon the Tribunal to have considered that the short supply of gas was due to the diversion of gas to other generating stations and on this account the Tamil Nadu Electricity Board (hereinafter being referred to as the "Board") could not have made the appellant to suffer by citing the terms of the PPA. However, the Tribunal omitted to note the unimpeachable evidence and it has not been disputed before the Tribunal that the short supply of gas was due to the diversion of gas to the generating stations of Board and the appellant has suffered financial losses due to the diversion of gas to the other generating stations.

6. Learned counsel further submits that there was sufficient evidence on record regarding the communication between Gas Authority of India Limited (GAIL) and the Board in reference to the diversion of gas to other generating stations and this has seriously impaired the functionality and efficiency of the appellant company.

7. Learned counsel further submits that it cannot be disputed that the generating station of the appellant is capable of achieving the technical parameters and 85% of Plant Load Factor (hereinafter referred to as the “PLF”). In the aforesaid premise, the Board cannot be allowed to take benefit due to its own wrong at the cost of the appellant Company.

8. Learned counsel further submits that the amended PPA dated 25th August, 2004 was not approved in terms of Section 86(1)(b) of the Act 2003 still it is a binding document between the parties inter se and since the electricity was sold to the Board otherwise than as a gratuitous act, Board needs to pay for the same on the principle of *Quantum Meriut*. In support of his submissions, learned counsel has placed reliance on the judgment of this Court in **State of West Bengal Vs. B.K. Mondal and Sons¹**; **Union of India Vs. Sita Ram Jaiswal²** and **Food Corporation of India and Others Vs. Vikas Majdoor Kamdar Sahkari Mandli Limited³**.

9. Learned counsel further pressed that even in the absence of PPA not been approved and enforceable, still the compensation payable to the appellant ought to be computed as per the tariff fixed by the Commission for open market purchases by Board, or at least in accordance with the relevant regulations and this being the manifest error which the Tribunal has committed in rejecting the claim of the appellant needs to be interfered by this Court.

10. Per contra, learned counsel for the respondents, while supporting the concurrent finding returned by the Commission and confirmed by the Tribunal under the impugned judgment submits that the appellant has failed to meet the PLF as agreed to under the PFA - apart from the fact that admittedly PPA was not approved under the Act 2003. That apart, there is no clause in the PPA which provides for payment of full fixed cost, even when generator fails to meet the PLF. Any compensation by way of deemed generation or relaxed heat rate due to partial loading of machine due to shortage of fuel supply is the sole responsibility of the appellant.

11. Learned counsel further submits that the shortfall in PLF and increase in tariff heat rate was due to two factors, (i) poor efficiency of the power plant; and (ii) short supply of natural gas by fuel supplier(GAIL). Further, during the period between 1st July, 2006 and 23rd October, 2007, sufficient quantity of natural gas was available to the appellant in order to operate the power at 52.8 MW (the contracted capacity) but tariff heat rate of the plant was always more than 1980 Kcal/Kwr due to its poor efficiency of the plant. The PLF achieved by the appellant’s power plant for the period between 1st July, 2006 and 1st July, 2009 is as under:-

Period Concerned	PLF Achieved
1st July, 2006 to 30th June, 2007	80.82%
1st July, 2007 to 30th June, 2008	73.20%
1st July, 2008 to 1st July, 2009	67.09%

¹ 1962(Suppl) 1 SCR 876

² 1976(4) SCC 505

³ 2007(13) SCC 544

12. In the given circumstances, the respondents cannot be held responsible to meet the short supply of gas to the appellant. Thus, issue of short supply of gas as alleged is an issue between GAIL and the appellant. It was submitted that the inability of the appellant to achieve 85% of the PLF is not due to any *Force Majeure* as claimed. More so, the appellant never initiated any proceedings under the clause of *Force Majeure* as per procedure provided under the PPA.

13. In addition, learned counsel further submits that PPA was entered into between the parties based on notification of Government of India dated 6th November, 1995. Therefore, claim of compensation by way of deemed generation due to shortage in fuel supply is the responsibility of the generator and not applicable in terms of PPA dated 25th August, 2004. Therefore, the State Commission's refusal to allow claim of underpaid charges and variable charges is well founded and rightly confirmed by the Tribunal under the impugned judgment.

14. We have heard learned counsel for the parties and with their assistance perused the material available on record.

15. From the facts, it manifest that the appellant is an Independent Power Producer (IPP) operating and maintaining a Combined Cycle Gas Turbine Power Generating station in Tamil Nadu with a generating capacity of 52.8 MW and the said generating station is dedicated to the Board and the entire power generated by the appellant is to be supplied to the Board.

16. It is not disputed that the PPA dated 25th August, 2004 was not approved under Section 86(1)(b) of the Act 2003. That apart, there is no clause in the PPA which provides for full fixed cost, even when appellant fails to meet the PLF. PPA between the parties was entered based on notification of Government of India dated 6th November, 1995 and in terms of clause 4.3 of the said notification, the responsibility of the fuel linkage would be that of the independent power producer and any fuel supply risk would have to be shared between the power and fuel producer/supplier and not by the Board to indemnify.

17. There is a bi-partite agreement executed between appellant and the GAIL, to which the respondent Board is not privy, and if any default has been committed by GAIL in supply of natural gas to the appellant, the respondent Board is not supposed to indemnify, that apart, there is nothing on record to show that any remedial action was taken by the appellant against the gas supplier on account of short supply of gas, if permissible under the law.

18. At the same time, the appellant has not been able to demonstrate any provision either under the Act, 2003 or under the PPA although has not been approved by the competent authority under the Act, 2003 which may protect the right and interest of the appellant. That apart, no clause of the PPA has been pointed out indicating if there is a short supply of gas due to diversion of gas to the other generating station of the Board, the respondent Board has to indemnify the appellant.

19. The thrust of submission of learned counsel for the appellant that it is the respondent Board who have sent letters to the GAIL to divert the gas to other generating units of the Board, at least on this account, the Board could not have made the appellant to suffer by citing the terms of the PPA. There is no dispute that the project was taken over on the basis of the notification dated 6th November, 1995 issued by Government of India and in terms of para 4.3 of the notification, the fuel of the power project was either fuel oils or natural gas. The said clause of the Notification is as under:-

“4.3 The responsibility of either indigenous or imported fuel linkage would be that of the Independent Power Producer (IPP) and any fuel supply risks would have to be shared between the IPP/Fuel suppliers. The State Electricity Board will not take any fuel supply risk.”

20. In terms of the notification referred to above, it is clear that the responsibility of fuel linkage - either heavy fuel or natural gas would be that of the appellant to the generator. If there is any risk in the supply, the same has to be shared between the generator and the fuel supplier. The notification has classified that the Board will not take any fuel supply risk and is not supposed to indemnify in the given situation.

21. It is also not disputed that there is no clause in PPA which provides for payment of full fixed cost to the generator, even when generator fails to meet the PLF. In the given circumstances, any compensation by way of deemed generation or released heat rate due to partial loading of machine, arising due to shortage to fuel supply which is the sole responsibility of the appellant, is not applicable as per the amended PPA dated 25th August, 2004. Furthermore, there is no provision for compensation by way of deemed generation or partial norms due to operation of the power plant at partial load due to shortage of fuel in Central Government's Tariff Regulations, 2004 which admittedly were in force when the agreement was entered into between the parties.

22. The submission made by learned counsel for the appellant that because of the diversion of gas to the other generating stations of the Board, at least on this account, the Board could not have made the appellant to suffer by citing the terms of PPA, on the first blush appears to be attractive but has no legs to stand for the reason that in the absence of there being any provision for compensation for capacity charges and variable charges due to the fact that the plant was not able to maintain the normative availability/PLF on account of shortage of fuel in terms of the Central Government's Tariff Regulations, 2004, at least the respondent Board cannot be said to be at fault and that was the reason prevailed upon the Commission to arrive at the conclusion that the appellant was not entitled to payment of fuel fixed charges and actual variable charges in respect of supply of energy between 1st July, 2006 and 15th June, 2009 during the period when partial parameters were rejected because of shortage of supply in view of the provision in PPA or tariff regulations.

23. We find no infirmity in the finding returned by the Tribunal in the impugned judgment which may call for our interference.

24. Consequently, the appeal fails and is accordingly dismissed. No costs.

25. Pending application(s), if any, shall stand disposed of.