2020 INSC 73

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 4407-4408 OF 2011

HARYANA POWER PURCHASE CENTRE **Appellant(s)**

VERSUS

MAGNUM POWER GENERATION LIMITED & ANR. **Respondent(s)**

WITH

CIVIL APPEAL NOS. 7446-7447 OF 2012

J U D G M E N T

R.F. Nariman, J.

Civil Appeal Nos. 7446-7447 OF 2012:

1) The present appeals arise from an Appellate Tribunal for Electricity order dated 23.03.2012, which, in turn, upheld the HERC order dated 23.03.2010. The brief facts necessary for decision of these appeals are as follows:-

(i) A Power Purchase Agreement (PPA) dated 12.08.1998 was entered into between the appellant and the respondent for sale by the appellant of energy produced by it after setting up of a power plant. The salient terms of this PPA are as follows:-

> **"5.1. Terms of Agreement: This Agreement shall become effective upon execution and delivery by the Parties here to and unless earlier terminated pursuant to Article 5 shall have a term from the date here of until fifteen (15) years from the Synchronization Date of last Unit. (180) days prior to the end of the full (15) Year term described above the HSEB**

shall have the right for an extension of this Agreement for an additional period as required on the same terms except the Tariff (as defined in Schedule 4) which shall be re-negotiated. Such extension shall begin upon the end of the full fifteen (15) Year term.

In the event the term is not extended, the company shall have the option to sell power to third party.

In the alternative HSEB shall have the first right to refusal to buy the Project at the book value.

5.2. <u>Company Default</u>

The following events unless occurring as a result of a breach by HSEB of its obligations under this agreement or an event of force majeure, shall constitute an event of default by the Company:-

(a) The Company is adjudicated bankrupt or dissolved or a receiver is appointed for its assets or proceedings for the company's liquidation (except for the purpose of amalgamation or restructuring on terms not detrimental to HSEB) are continuing more than 120 days after they were commenced.

(b) Any license or consent required by the company to perform its obligation under this Agreement is revoked or is not renewed because of the company's default.

(c) The Company fails to commence construction of the Power station to a material extent within (6) months after the date of financial closing or abandons the Power Station due to the company's default or repudiates this Agreement, contrary to the terms of this Agreement.

(d) The Company declares neither generating unit available, or no generating unit is capable of generating any electricity due to company's default for a continuous period of six (6) months.

(e) The Company commits a serious breach of this Agreement and which results in the Company being unable to carry out its obligations and

where the breach is capable of being remedied it has not been remedied within 60 days after HSEB notified the company in writing of the nature of the breach and required it to be remedied.

5.3 HSEB DEFAULT

The following events unless occurring as a result of a breach by the company of its obligations under the agreement or an event of Force Majeure, shall constitute an event of default by the HSEB.

(a) HSEB is adjudicated bankrupt or dissolved or a receiver is appointed of the whole or any part of its assets or proceedings for its liquidation (other than for the purpose of amalgamation or restructuring on terms not detrimental to the company) which are continuing more than 120 days after they were commenced.

(b) If an amount due equal to one months billing at 75% PLF, payable by HSEB to the company shall remain unpaid more than 60 days after the payment became due.

(c) Any license or consent required by the HSEB or any of its entitled successors pursuant to clause 18.10 to purchase electricity in bulk from the company or to transmit that electricity for the purpose of supplying electricity to consumers or any licensee in the State of Haryana is revoked or expires for any reason whatsoever.

(d) HSEB commits a serious breach of this Agreement which results in the company being unable to carry out its obligation and where the breach is capable of being remedied it has not been remedied within 60 days after the company notified HSEB in writing of the nature of the breach and required it to be remedied.

(e) HSEB fails to provide, maintain, restore or replenish the letter of Credit and Escrow Account as per provisions of this Agreement."

ii) The appellant covenanted and agreed with the HSEB to design, construct and complete the Project, arrange fuel for

the Plant and make available to the HSEB not later than the Required Synchronization Date, the Contracted energy and the Contracted Operating Characteristics of each Unit. Clause 8.2 which deals with "operation" is important and is set out herein below:

> **"8.2 Operation**
>
> **(a) The HSEB shall issue daily Dispatch Instructions directing the Company's generating plant operator to comply with clause 5.2(a) of Schedule 6 but ensuring annual PLF of 75% failing which the Company will be compensated for the Constant Component of the tariff for the short fall. The adjustment for PLF will be on semi annual basis. However, if in subsequent six months declared availability is not sufficient to achieve 75% PLF then the overall annual PLF shall be considered on the basis of declared availability over the year.**
>
> **(b) Procedures for despatch of the Project shall be in accordance with despatch procedures set out in Schedule 6.**
>
> **(c) The HSEB shall have the right to request that the Project be shutdown subject to ensuring annual PLF of 75%.**
>
> **(d) The company shall not be required to operate the Project other than in accordance with Prudent Utility Practices or except as provided in Section 8.4, the Technical Limits as such limits may be temporarily modified.**
>
> **(e) The company shall make reasonable efforts to employ qualified personnel preferably from within the State of Haryana in the operation and maintenance of the Project and to institute appropriate training programs for such personnel; provided, however, that the Company shall have sole discretion as to the personnel employed for the operation and maintenance of the project within the bounds permitted by law."**

(iii) Schedule-3 of the PPA laid down a Formula for Contracted Electrical Output as well as Annual Plant Load

Factor as follows:-

> **"3.1 <u>Formula for Contracted Electrical Output</u>**
>
> **Contracted Electrical output per year in Million KWH (MU)**
>
> **=<u>(8760x0.75x1000)</u> (1-Aux Cons%) x Tested Capacity in MW**
> **1000000**
>
> **3.2 Annual Plant Load Factor (PLF) shall be calculated as under:**
>
> **PLF% = <u>Actual net electrical output in interconnection point, in MU by the project x 100</u>**
> **Net electrical output plant is capable of delivery at the interconnection point as per tested capacity of the project.**
>
> **<u>Note: Auxiliary consumption maximum allowed 3.5% including transformation losses</u>."**

(iv) Schedule-4 which spoke of "determination of tariff" laid down the tariff as the applicable rate upto 75% Plant Load Factor (PLF) which shall be Rs. 2.40 for every KWH respondent delivered out of Rs.2.40; Rs. 1.29 shall be the constant component during the term of the PPA and Rs. 1.11 is adjustable as per a certain formula with which we are not directly concerned.

(v) Under Schedule-6, which speaks of Despatch Procedure, the appellant is first to make an Availability Declaration as follows:

> **"<u>Availability Declaration</u>:**
>
> **Magnum Power Generation Ltd. shall, by not later than 10.00 hrs each day, submit HSEB an Availability Declaration, prepared as a best estimate on good faith, in respect of an Availability Period during the following Scheduled Day."**

The respondent is then to give the appellant a Generation Schedule under Clause 5 as follows:-

"5. <u>Generation Schedule</u>

5.1. HSEB shall issue to the Company a schedule of its energy requirement with respect to the generation by the Power Plant during each Schedule day by 17:00 hrs on the proceeding Day, provided that the Company had submitted an Availability Declaration containing all the necessary information by 10:00 hrs on such proceeding Schedule Day. However, if HSEB is unable to furnish its energy requirements by the stipulated time of 17.00 hrs. on preceding day, the energy generated as per the availability declaration shall be deemed to be the energy requirement.

5.2 Each Generation Schedule will contain the following information in respect of each relevant Schedule day:

(a) The level of Active Power which the Power Plant is required to produce by way of base load generation. The level of Active Power shall be within (-) 10% (minus ten per cent) of the Declared Availability of that Schedule Day; subject to minimum of 75% of the contracted energy.

(b) HSEB shall ensure that the Power Station is despatched as per the Generation Schedule given to the Company for the Schedule Day.

(c) In exceptional cases during the monsoon season, HSEB shall have the right to despatch below 75% PLF, irrespective of the provisions of Clause 5.2 (a) above."

(vi) The Commission issued a Tariff Order dated 12.08.2003 in which it heard the Haryana Vidyut Prasaran Nigam Limited, the HERC and members of the public. In the finding insofar as the present appellant is concerned, the Commission in sub-para (G) held as follows:-

"G. Availability of power from IPPs (Magnum)
Magnum (liquid fuel based plant) provided 94.9 MUs to HVPNL during FY 2002-03. HVPNL has proposed to procure 160 MUs from this source. This being the most expensive source is being dis-allowed by the Commission."

The Commission then held as follows:-

> **"The Commission has not allowed any power to be sourced from Magnum. However, against the volume of 160 MUs proposed by the licensee the fixed cost at the rate of Rs. 1.29 per unit is being allowed."**

Ultimately, the Commission concluded:

> **"For Magnum, the fixed cost of Rs. 206.4 million based on the HVPNL projected volume of 160 MUs and per unit fixed charge of Rs. 1.29 has been considered. The Commission has not approved any purchase from this source in FY 2003-04, however, Commission recognizes the Fixed Cost that has to be paid to the generator irrespective of the fact whether any energy is purchased or not."**

(vii) This Tariff Order which binds both parties was a final order, not being challenged by either party.

(viii) Despite this order and the clear direction of the Commission that fixed costs have to be paid to the generator irrespective of whether energy is purchased or not, the HERC order dated 23.03.2010 ultimately dismissed the appellant's appeal filed under Section 86(1)(f) of the Electricity Act as follows:-

> **"Final Order**
>
> **The above order of the Commission on each issue needs to be given a concrete shape by calculating the due amount payable to the either party and whatever is the net to be paid to the petitioner as per the following directions:-**
>
> **After calculating the due amount within a period of one month, first instalment of the same may be paid within a period of two months and the balance amount two months thereafter. This amount however would not be reimbursed by HERC through any claim or through FSA since the respondents have been claiming FSA in respect of MPGL under the head "Deemed Generation**

> **Charges" and the same stands recovered from the electricity consumers. Hence, whatsoever the excess recovery they have made from the consumer on this account, after settlement of account with MPGL in the light of the findings in the earlier paragraphs, the remaining amount either be refunded back to the consumer or to be adjusted against the future filing with the prior approval of HERC. FSA formula approved by the Commission itself provides for subsequent adjustment of/under/over recovery of the same.**
>
> **In passing, the Commission would wish for the revival of the plant to augment the generating capacity in the State. It is advised that both the parties may request a generation expert at the Central Electricity Authority (CEA) Govt. Of India to pay a visit to the site to check up the present state of the plant in presence of both the parties. The fees for this maybe equally shared. Thereafter the parties may work out a scheme for operationalising the plant for the benefit of all the stakeholders by entering into a fresh PPA/renegotiating the existing one which is workable and takes into account the financial interest of both the parties and the interest of the consumers of Haryana at large.**

(ix) An appeal from this order was also dismissed by the Appellate Tribunal by judgment dated 23.03.2012 in which after setting out the various clauses of the PPA, the Appellate Tribunal held as follows:-

> **"33. The above analysis of Article 8.2 would indicate that the Appellant was under obligation to make available the plant to generate atleast 148.79 MU at 75% PLF. This conclusion is supported by Article 6.1(j) & (k) under which the Appellant has undertaken to supply the Contracted Capacity as defined in Schedule 3 of the PPA and works out to 143.79 for tested capacity of the Plant. These provisions are reproduced below for better understanding and completeness.**
>
> **(i) Make available to HSEB not later than the Required Synchronization Date, the Contracted energy and the Contracted operating**

Characteristics of each Units; and

(k) Operate and maintain the Project so as to provide the HSEB with the Contracted energy and the Contracted Operating Characteristics of the Units reliably over the Term of this Agreement, taking into account permissible degradation.

3.1 Formula for Contracted Electrical Output
Contracted Electrical output per year in Million Kwh (MU) =
(8760 x 0.75 x 1000) (1-AuxCons.%)xTested Capacity in MW
1000000

= 8760 x 0.75 x 0.965 x 22.67/1000 = 143.79 MU.

34. In the light of above analysis, we hold that the Appellant was under obligation to declare annual availability of the plant to atleast 75% of tested capacity so as to obtain an annual PLF of 75%."

2) Mr. Jayant Bhushan, learned senior counsel appearing on behalf of the appellant has argued that because of the Commission's order of 12.08.2002 and because the power generated by the appellant would impact the consumer as electricity charges would then become very high, the Commission made it clear that the appellant's electrical energy was not a source of power which could at all be tapped as a result of which not even a single mega watt of power was supplied or sold by the appellant to the respondent. He, however, contended that this very Commission's order made it clear that this was in the consumer interest, but that the appellant would be entitled to recover its fixed cost, which unfortunately has been missed by both the Commission as well as the Appellate Tribunal in the impugned order. He also argued that both the orders were faulty in their reading of Clause 8.2 of the

PPA which cannot be read so that supply at atleast 75% of the Plant Load Factor be made a condition precedent for claiming fixed energy charges, as that clause when properly read makes it clear that the PPA itself made it clear that once the power project has been set up by the appellant, the fixed energy cost will have to be paid in any event.

3) As against this, Mr. Gurinder Singh Gill, learned senior counsel appearing on behalf of the respondent, supported the judgments of the Commission and the Tribunal, and argued that a proper reading of Article 8.2 would make it clear that it would become operative only when declared availability is more than 75% of the Plant Load Factor.

4) Having heard learned counsel for both sides, these appeals can be disposed of on the short ground that the Commission's Tariff Order of 12.08.2003 had made it clear that fixed costs during the currency of the agreement for generating electricity must be paid despite no supply having been made because the tariff order itself interdicted such supply in consumer interest. We have also noted that for the years in question it is clear that the fixed cost that has been demanded by the appellant from the respondent has in fact been collected from the consumer but not paid over to the appellant, which would result in an unjust windfall for the respondent. On this ground, therefore, we set aside the impugned order and declare that for the years in question the demanded amount by the appellant towards fixed cost of running their unit @ Rs. 1.29 per unit be paid by

the respondent within a period of 3 months from today.

5) Given the fact that the appellant has lost in both the original forum as well as the appellate forum, and which has taken over 15 years to decide, and given the fact that the respondent is a Government-Company, we deem it appropriate that this amount be paid with simple interest @ 3% per annum. In case the amounts are not paid within three months from today, the interest component shall become 6% p.a. for payment made beyond 3 months. The impugned judgment is set aside to the extent that the appeals are decided against the respondent. The appeals are accordingly allowed.

<u>Civil Appeal Nos. 4407-4408 OF 2011:</u>

6) The appeals before the Appellate Tribunal were dismissed on the ground that 327 days delay be not condoned. In any case, we find that nothing survives in these appeals after we have partly allowed the appeals in Civil Appeal Nos. 7446-7447 OF 2012. These appeals are disposed of accordingly.

..... J.
(ROHINTON FALI NARIMAN)

..... J.
(V. RAMASUBRAMANIAN)

New Delhi;
January 21, 2020.