2023 INSC 402

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.5684 OF 2021

UTTAR HARYANA BIJLI VITRAN NIGAM LIMITED AND ANOTHER ...APPELLANT(S)

VERSUS

ADANI POWER (MUNDRA) LIMITED AND ANOTHER ...RESPONDENT(S)

J U D G M E N T

B.R. GAVAI, J.

1. The present appeal challenges the judgment and order dated 30th June 2021, passed by the Appellate Tribunal for Electricity, New Delhi (hereinafter referred to as "APTEL") in Appeal No. 358 of 2019, thereby dismissing the appeal filed by the Uttar Haryana Bijli Vitran Nigam Limited and Dakshin Haryana Bijli Vitran Nigam Ltd. (hereinafter referred to as "Haryana Utilities"), appellants herein, and maintaining the judgment and order dated 13th June 2019 passed by the Central Electricity Regulatory Commission (hereinafter referred to as "CERC") in Petition No. 251/MP/2018.

2. The facts, in brief, giving rise to the present appeal are as under:

Haryana Utilities had entered into two Power Purchase Agreements (for short, "PPA") dated 7th August 2008 with the first respondent-Adani Power (Mundra) Limited (hereinafter referred to as "AP(M)L") for a contracted capacity of 1424 MW from the generating Units 7, 8 and 9 established by AP(M)L in the State of Gujarat on the terms and conditions contained in the said PPAs. The said PPAs were entered into between Haryana Utilities and AP(M)L in pursuance to a Tariff Based Competitive Bidding Process initiated by the Haryana Utilities under Section 63 of the Electricity Act, 2003 as per the guidelines notified by the Central Government.

3. AP(M)L filed a petition being Petition No. 155/MP/2012 on 5th July 2012 seeking, *inter alia*, relief of increase in tariff from the quoted tariff mentioned in the bid on various grounds. The CERC had passed orders in the said petition on 2nd April 2013 and 21st February 2014. The said orders were challenged before the APTEL. Finally, a batch of appeals challenging the order of APTEL reached this Court by way of Civil Appeal Nos. 5399-5400 of 2016. This Court, in the case of ***Energy Watchdog v. Central Electricity***

Regulatory Commission and Others[1] decided on 11th April 2017, observed thus:

> "**57.** Both the letter dated 31-7-2013 and the revised Tariff Policy are statutory documents being issued under Section 3 of the Act and have the force of law. This being so, it is clear that so far as the procurement of Indian coal is concerned, to the extent that the supply from Coal India and other Indian sources is cut down, the PPA read with these documents provides in Clause 13.2 that while determining the consequences of change in law, parties shall have due regard to the principle that the purpose of compensating the party affected by such change in law is to restore, through monthly tariff payments, the affected party to the economic position as if such change in law has not occurred. Further, for the operation period of the PPA, compensation for any increase/decrease in cost to the seller shall be determined and be effective from such date as decided by the Central Electricity Regulation Commission. This being the case, we are of the view that though change in Indonesian law would not qualify as a change in law under the guidelines read with the PPA, change in Indian law certainly would.
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> **58.** .....The Central Electricity Regulatory Commission will, as a result of this judgment, go into the matter afresh and determine what relief should be granted to those power generators who fall within Clause 13 of the PPA as has been held by us in this judgment."

1 **(2017) 14 SCC 80**

4. In pursuance to the aforesaid order passed by this Court, AP(M)L filed a petition being Petition No. 97/MP/2017 before the CERC, claiming relief on the ground of Change in Law. The CERC, vide order dated 31st May 2018, allowed the said petition in terms of Change in Law.

5. A review petition being Review Petition No. 24/RP/2018 was also filed by the Haryana Utilities before the CERC. The CERC, vide judgment and order dated 3rd December 2018, rejected the said review petition. Being aggrieved thereby, the appellants filed an appeal before the APTEL. The APTEL, vide judgment and order dated 3rd November 2020, dismissed the said appeal. Challenging the same, Civil Appeal No. 4143 of 2020 came to be filed before this Court. By an order of even date, this Court dismissed the said appeal.

6. In the meantime, the Ministry of Coal, Government of India (for short, "MoC"), on 22nd May 2017, brought into effect a new regime for allocation of coal under SHAKTI Policy. Under SHAKTI Policy, the projects, which were approved under the old regime, were entitled to continue to get supply of 75% of the Assured Coal Quantity (for short, "ACQ") even beyond 31st March 2017.

7. Contending that there was a shortfall from 75% ACQ, AP(M)L filed a petition being Petition No. 251/MP/2018 claiming relief for shortfall on account of Change in Law. The CERC, vide order dated 13th June 2019 allowed the said claim. Being aggrieved thereby, an appeal, being Appeal No. 358 of 2019, was filed before the APTEL.

8. Three basic grounds, along with other grounds, were raised before the APTEL. The first ground was that the SHAKTI Policy could not be considered to be Change in Law. The second ground was that the AP(M)L had not given a Notice of Change in Law and, as such, was not entitled to the benefit on the ground of Change in Law. The third ground was with regard to award of Carrying Cost. The APTEL, vide impugned judgment and order dated 30th June 2021, dismissed the said appeal.

9. Being aggrieved thereby, the Haryana Utilities have preferred the present appeal.

10. By an order of even date, we have decided the appeals filed by Maharashtra State Electricity Distribution Company Limited (MSEDCL), wherein all these grounds were raised and considered, and held against DISCOMs. The findings

given by the APTEL in the present appeal are identical with the findings given in the judgment and order dated 28th September 2020, which has been upheld by us in Civil Appeal Nos. 677-678 of 2021.

11. It will further be relevant to note that the present appeal arises out of concurrent findings of fact arrived at by both the authorities.

12. This Court, in the case of ***Maharashtra State Electricity Distribution Company Limited (MSEDCL) v. Adani Power Maharashtra Limited (APML) and Others***[2]**,** after considering the relevant provisions under the Electricity Act, 2003 with regard to appointment, qualifications and Members of the CEA, CERC and the learned APTEL, held that these bodies are bodies consisting of experts in the field. After considering various judgments on the issue, this Court observed thus:

> "**123.** Recently, the Constitution Bench of this Court in the case of *Vivek Narayan Sharma* v. *Union of India* has held that the Courts should be slow in interfering with the decisions taken by the experts in the field and unless it is found that the expert bodies have failed to take into consideration the mandatory statutory provisions or the decisions taken are

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> based on extraneous considerations or they are *ex facie* arbitrary and illegal, it will not be appropriate for this Court to substitute its views with that of the expert bodies."

13. In our opinion, the concurrent view taken by the CERC & APTEL cannot be said to be a view taken in ignorance of the mandatory statutory provisions nor can it be said that it is based on extraneous consideration. The view also cannot be said to be ex-facie arbitrary or illegal. As such, no interference would be warranted in the present appeal.

14. In the result, the appeal is dismissed. Pending application(s), if any, shall stand disposed of. No costs.

.....J.
[B.R. GAVAI]

.....J.
[VIKRAM NATH]

NEW DELHI;
APRIL 20, 2023