

(2015) 04 SC CK 0162
In the Supreme Court Of India
Case No : C.A. No. 5612 of 2012

Bangalore Electricity Supply Co. Ltd.

APPELLANT

Vs

Konark Power Projects Ltd. and Others

RESPONDENT

Date of Decision : 28-04-2015

Acts Referred:

Electricity Act, 2003 — Section 181, 61, 62, 86(1)
Karnataka Electricity Reform Act, 1999 — Section 27(2)
Karnataka Electricity Regulatory Commission (Power Procurement from Renewable Sources by Distribution Licensee and Renewable Energy Certificate Framework) Regulations, 2011 — Regulation 5.1, 5.2, 5.3, 5.4, 9

Citation : (2015) 5 SCALE 711

Hon'ble Judges : F.M. Ibrahim Kalifulla, J; Shiva Kirti Singh, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. Heard Mr. K.V. Viswanathan, learned senior Counsel for the Appellant and Mr. G. Umapathy for Respondent No. 1. Appellant is a State Electricity Board. Respondent No. 1 had entered into a Power Purchase Agreement (PPA) with the Karnataka Power Transmission Corporation Ltd. (KPTCL) for supply of power by an agreement dated 04.04.2002. Paragraphs 5.1 and 5.2 of the said Agreement are relevant for our purpose, which are as under:

"5.1 Monthly Energy Charges: Corporation shall for the Delivered Energy pay, for the first 10 years from the date of signing of Agreement to the Company every month during the period commencing from the Commercial Operation Date on the basis of the base price applicable for the year 1994-95 at the rate of Rs. 2.25 (Rupees Two and twenty five paise) per kilowatt hour (the tariff) for energy delivered to the Corporation at the Meeting Point with an escalation to the Corporation at the Metering Point with an escalation at a rate of 5% per annum over the tariff applicable for the previous year as per guidelines issued by the Ministry of Non-Conventional Energy Sources of the Gol.

5.2 From the 11th year onwards, from the date of signing of Agreement, Corporation shall pay to the Company for the energy delivered at the Meeting Point at a rate agreed by mutual negotiations. In case the Parties do not arrive at a mutual agreement on the tariff, the Company shall be permitted to sell power to third parties and enter into a Wheeling and Banking Agreement with Corporation to sell power through the rates applicable from time to time in addition to banking charges at the rates applicable from time to time as approved by the Commission based on the month and balance of the energy banked."

2. Subsequently, by a Supplemental Agreement dated 29.10.2005 entered into between the Appellant and Respondent No. 1, Paragraphs 5.1 and 5.2 of the Agreement dated 04.04.2002 came to be modified. Under Paragraph 5.1 of the Supplemental Agreement, the rate of tariff was altered providing for a slightly higher tariff for purchase of power from Respondent No. 1.

3. In the year 2004, the KERC (Power Procurement from Renewable Sources by Distribution Licensee) Regulations, 2004 (for short "the 2004 Regulations") dated 27.09.2004 came to be notified by the Karnataka Electricity Regulatory Commission, Respondent No. 2 herein, in the Karnataka Gazette on 21.10.2004. Under Regulation 5.1, it was stipulated that the Commission should determine the tariff for purchase of electricity from renewable sources by a buyer. The proviso, however, provided that the PPAs approved by the Commission including the PPAs deemed to have been approved Under Section 27(2) of the Karnataka Electricity Reforms Act, 1999, prior to the notification of those Regulations shall continue to apply for such period as mentioned in those PPAs.

4. Subsequently, in the year 2011, fresh Regulations, viz., KERC (Power Procurement from Renewable Sources by Distribution Licensee and Renewable Energy Certificate Framework) Regulations, 2011 (for short "the 2011 Regulations") came to be issued and notified. Under Regulation 9 of the 2011 Regulations, it was provided that the Commission may determine at any time the tariff for purchase of electricity from renewable sources of energy by Distribution Licensees either suo motu or on an application either by generator or by Distribution Licensee. The proviso to Regulation 9, however, was identical to the proviso to Regulation 5.1 of the 2004 Regulations. It is needless to state that the above Regulations came to be framed by virtue of the power vested in the State Commission Under Section 181 read with Section 86(1)(e) of the Electricity Act, 2003.

5. Pursuant to the original Agreement dated 04.04.2002 and supported by the Supplemental Agreement dated 29.10.2005, the tariff which was originally fixed Under Paragraph 5.1 in the year 2002 and subsequently modified in the Supplemental Agreement was implemented and was holding the field. However, Respondent No. 1, for various reasons such as high cost of raw material, fuel, etc., filed an application before the Commission, being Original Petition No. 28 of 2010, with a prayer for amending the Power Purchase Agreement dated

04.04.2002 read along with the Supplemental Power Purchase Agreement dated 29.10.2005 insofar as they relate to Clause 1 of Article 5 by directing the Appellant herein to pay to the Respondent - Company a sum of Rs. 5.6/- for every unit of electricity generated by it.

6. The Commission, while dealing with the said petition, by its order dated 16.09.2010, took the view that it had the Authority to alter the rate of tariff, but held that Respondent No. 1 failed to make out a case for granting higher rate of tariff.

7. Aggrieved by the order of the Commission, Respondent No. 1 filed the appeal on 05.01.2011 before the Appellate Tribunal for Electricity. The Tribunal, by the impugned order, allowed the appeal and remitted the matter back to the State Commission with a direction to Respondent No. 1 to place all the materials before the State Commission to enable it to decide the issue in the proper perspective. In fact, it held that the power to modify the tariff for concluded PPA was very much available with the State Commission in larger public interest and that the Commission had to maintain a balance so that the generators also may not suffer unnecessarily.

8. Being aggrieved by the said order of the Tribunal, the Appellant is before us.

9. Mr. K.V. Viswanathan, learned senior Counsel for the Appellant, drew our attention to the relevant paragraphs in the original Agreement dated 04.04.2002 as well as the Supplemental Agreement dated 29.10.2005. By making further reference to Regulation 5.1 of the 2004 Regulations as well as the subsequent Regulations of the year 2011, viz., Regulation No. 9, learned senior Counsel submitted that applying the above said Regulations, once the Power Purchase Agreement as between the Appellant and Respondent No. 1 was signed and approved by the Commission, by virtue of the first part of the proviso, the tariff approved by the Commission would continue to remain till the end of the contract period which cannot be varied as there was no power vested in the Commission under the 2004 Regulations. Even though the power of Commission was enlarged Under Regulation 9 of the 2011 Regulations, the proviso to Regulation 9 restricted such enlarged power not to operate in respect of the PPAs which were covered by the earlier Regulations, viz., the 2004 Regulations.

10. Mr. G. Umapathy, learned Counsel appearing for Respondent No. 1, however, took us through the Regulations 5.2, 5.3, 5.4 of the 2004 Regulations as well as Sections 61, 62 and 86(1)(b) and 86(1)(e) of the Electricity Act, 2003 and contended that when the Commission is empowered to determine the tariff separately for each category of renewable energy, the Commission was fully empowered to vary the tariff taking into account the circumstances which existed and which necessitated for making such upward variation depending upon the NCER, i.e., Non-Conventional Energy Supplier and the only obligation on the Commission was to give reasons in writing in order to accommodate the specific nature of renewable sources.

11. Having heard learned Counsel for the parties, we find that the whole issue lies within the narrow compass of power of the Commission Under Regulation 5.1 of the 2004 Regulations as well as Regulation 9 of the 2011 Regulations. When we applied Regulation 5.1, we find that the substantive Regulation does not empower the Commission to vary the tariff for purchase of electricity after its determination. In fact, the proviso is more emphatic to the effect that the Power Purchase Agreement, once approved by the Commission, such Agreement should continue to remain for the period mentioned in the said Agreement. Even in the 2011 Regulations, though the power has been slightly enlarged Under Regulation 9(1), empowering the Commission to determine at any time the tariff for purchase of electricity from renewable sources of energy by Distribution Licensees, the proviso creates an embargo insofar as the Power Purchase Agreements approved by the Commission which were covered by the previous Regulations and in the case on hand the 2004 Regulations.

12. While reading Regulation 5.1 of the 2004 Regulations along with Regulation 9 of the 2011 Regulations and its provisos, what emerges is, whatever terms agreed between the parties should continue to remain in force without any alteration at least for a period of ten years as provided Under Paragraph 5.1 of the original Agreement dated 04.04.2002 at the rate at which it was agreed and as modified, insofar as it related to the rate alone, under the amended Paragraph 5.1 of the Supplemental Agreement dated 29.10.2005. Only other scope for Respondent No. 1 to work out any higher tariff can be as provided under Paragraph 5.2 of the original Agreement as well as the Supplemental Agreement. Beyond that, there is no scope for the Commission to vary the tariff, thus, what has been agreed between the parties under the above referred Agreements having regard to the specific provisions contained in Regulation 5.1 of the 2004 Regulations and Regulation 9(1) of the 2011 Regulations.

13. The contention that Under Regulations 5.2, 5.3, 5.4 of the 2004 Regulations as well as Sections 61 and 62 of the Electricity Act, power is vested with the Commission to vary the tariff is concerned, such power specifically provided for in the said Regulations will only operate prior to fixing of the tariff once the concerned Power Purchase Agreements are ultimately concluded and the terms are agreed between the parties under the Power Purchase Agreements, thereafter, in our considered opinion, Regulation 5.1 of the 2004 Regulations alone would apply in the case of the parties before us. Consequently, there was no scope for the Commission to vary the tariff agreed between the parties under the approved Power Purchase Agreement.

14. Unfortunately, the Commission as well as the Tribunal have failed to apply the stipulations contained in the Regulations in the proper perspective. In fact, the Tribunal even while making reference to Regulation 9 has completely omitted to refer the proviso and has gone by the substantive part of Regulation 9(1) of the 2011 Regulations. The said glaring omission of the Tribunal, in applying the proviso, has resulted in the passing of the impugned order of remand to the

Commission. We, therefore, do not find any scope to sustain the impugned order of the Tribunal. The impugned order is, therefore, set aside. Original Petition No. 28 of 2010 filed by Respondent No. 1 stands dismissed. The appeal stands allowed. It is, however, open to Respondent No. 1 to approach the Commission for working out its other remedies in accordance with law.