(2022) 01 GUJ CK 0008

In the Gujarat High Court

Case No : R/Special Civil Application No. 15827 Of 2020, Civil Application (For Direction) No. 1 Of 2021

Goodwatts Solar Modasa Private Ltd APPELLANT

Vs

Uttar Gujarat Vij Company Ltd RESPONDENT

Date of Decision : 05-01-2022

Acts Referred:
Constitution Of India, 1950 — Article 14, 226
Electricity Act, 2003 — Section 2(17), 2(28), 79, 86, 86(1)(f), 158, 228

Citation : (2022) 01 GUJ CK 0008

Hon'ble Judges : Biren Vaishnav, J

Bench : Single Bench

Advocate : Saurabh Soparkar, Tabish Samdani, Saunak Rajguru, Lilu K Bhaya

Final Decision : ?Dismissed

Judgement

Biren Vaishnav, J

1. The petitioners who are â??Generating Companiesâ? in terms of Section 2(28) of the Electricity Act, 2003, have filed this petition under Article

226 of the Constitution of India to quash and set aside the communication dated 09.09.2020 issued by the Gujarat Urja Vikas Nigam Limited

(â??GUVNLâ?? for short) by the Uttar Gujarat Vij Company Limited (â?? UGVCLâ?? for short)

2. Facts in brief are as under:

2.1 The petitioners are generating solar power and in turn supplying such power to UGVCL, which is a distribution company. The same has been

defined as â??distribution licenseeâ?? under Section 2(17) of the Electricity Act 2003.

2.2 It is the case of the petitioners that the power supplied to UGVCL is in terms of the Power Purchase Agreements (â??PPAsâ?? for short).

Article 6.2 obliges UGVCL to make payments towards the monthly tariff invoices raised by the petitioners within 30 days of receiving such invoices.

It is the case of the petitioners that despite having raised invoices in September, 2020, for month of August 2020, no payments are being made on the

basis of the instructions referred to herein above by the communication dated 09.09.2020. When the petitioners sought for details, the UGVCL by its

communication dated 15.09.2020 informed the petitioners that the payments are not being made and are being so withheld as per the directives of

GUVNL.

3. Mr.Saurabh Soparkar learned Senior Advocate with Mr.Tabish Samdani and Mr.Saunak Rajguru learned advocates for J Sagar Associates learned

advocates for the petitioners would submit as under:

3.1 The action of withholding payments payable to the petitioners under Article 6.2 of the PPAs is bad inasmuch as no directives can be issued by the

GUVNL who is not a party to the PPAs which is between the petitioners and the UGVCL. It is a settled position of law that the third party cannot

dictate the terms of the bilateral contract. He would rely on the decision of Andhra Pradesh High Court in case of Renew Power Ltd. v. State of

Andhra Pradesh, decision dated 24.09.2019 passed in Writ Petition No.9844 of 2019. He would submit that contractual rights and liabilities are

confined only to the parties of contract. Once GUVNL had assigned all its rights and obligations to UGVCL by agreements on 22.06.2011 and

10.08.2011, only UGVCL is bound to perform the same.

3.2 Mr.Soparkar would further submit that withholding of the tariff payments is mala-fide, arbitrary and unreasonable and therefore violative of Article

14 of the Constitution of India. He would submit that UGVCL has failed to exercise its independent decision making powers and has thus acted

against the â??rule of dictationâ??.

3.3 He would submit that GUVNL and UGVCL are separate legal entities though UGVCL is a subsidiary of GUVNL, in Mr.Soparkarâ??s

submission, a subsidiary company is a legal entity than its original company. They are two distinct legal persons. In support of this submission,

Mr.Soparkar would rely on the decision in case of Vodafone International Holdings B.V. v. Union of India (UOI) and Ors. (2012) 6 SCC 613.

3.4 For the rule against dictation, Mr.Soparkar relied on the decision in case of Maha Premchandra v. Commercial Tax Officer, Calcutta & Ors.

reported in AIR 1958 SC 667.

3.5 Mr.Soparkar would further submit that the GUVNLâ??s direction amounts to unlawful enticement to committing a breach of contract. He would

call it â??tortuous interferenceâ??.

3.6 Without prejudice to the contentions raised above, Mr.Soparkar would submit that the GUVNLâ??s claim against Biomass plants will no longer

survive. For that submission, he would state as under:

(a) GUVNLâ??s direction to UGVCL was on the basis of the fact that it was entitled to recover certain sums of money from the petitionersâ??

sister concerns.

This was pursuant to the order of Gujarat Electricity Regulatory Commission (â?? GERCâ?? for short) dated 09.10.2020 in Petition No.1888 of 2020.

(b) that order of GERC has been set aside by the orders of the Supreme Court and the Appellate Tribunal for electricity. In support of his submission,

he would read through the relevant portions of the interim order dated 09.10.2020 of GERC, order dated 19.10.2020 and 20.01.2021 of APTEL, order

dated 18.06.2021, 22.03.2021 and 21.09.2021 of the Supreme Court. He would also rely on the extracts of the APTELâ??s remand judgment dated

12.11.2021 where the APTEL has disposed of the matter directing GERC to consider the petition on merits continuing the interim arrangement of the

Supreme Court vide its order dated 21.09.2021.

4. Ms.Lilu Bhaya learned counsel appearing for the respondent no.2 would make the following submission:

(A) Inviting the Courtâ??s attention to prayer 32B, she would submit that the dispute is between the generating company and the distribution license

in respect of monthly tariff invoices. In view of Section 86(1)(f) of the Electricity Act, the dispute has to go before GERC.

(B) She would submit that Abellon Clean Energy Limited (â??Abellonâ?? for short) is a parent company of the three bio-mass power companies viz.

Amreli Power, Bhavnagar power and Junagadh power. Abellon entered into PPA with GUVNL on 07.12.2012. GUVNL has then assigned the PPA

to UGVCL. The petitioners are incorporated as wholly owned subsidiary of Abellon. A special PPA was executed on 04.01.2018 between Abellon, Goodwatt and UGVCL, wherein, all the rights and obligations of Abellon have been assigned to Goodwatt.

(C) She would further submit that in view of Articles 6.2 and 6.6 read with Article 10.4 of the PPA, only GERC will have jurisdiction and the petition

is not maintainable.

(D) She would further submit that in context of the prayer made regarding default notice, the subject matter is sub-judice before the GERC in petition

No.1888 of 2020 filed by Amreli Power Project. She would submit that the communication dated 09.09.2020 is based on the same issue for the same

default notice dated 05.08.2020 to Amreli Power Projects and other two bio-mass companies which are a subject matter before the GERC. The

GERC in its interim order had observed that the bio-mass companies were under injecting and therefore had earned an excess amount of Rs.53.86

crores for which notice was issued on 05.08.2020. GERC in its interim order dated 09.10.2020 had directed the companies to make payments of 75%

of the amount to GUVNL. Neither these facts are brought to the notice of the Court in the petition nor are the orders of the APTEL dated 16.10.2020

and 19.10.2020. Though the petition was filed subsequently on 27.11.2020.

(E) She would rely on the Government Resolution dated 10.12.2004 wherein it provides for functions and powers of GUVNL. She would further

submit that the petition be dismissed as it is. Bared by alternative remedy and even extensively relying on the affidavit in reply and the orders of the

Tribunal and the Supreme Court she would submit that the issue of the same notice is before the GERC and the petition is therefore barred by the

availability of an alternative remedy.

5. Having considered the submissions made by the learned advocates for the respective parties, the Court will need to answer the issue on merits with

regard to the validity of the notice dated 09.09.2020 in context of the legal submissions made by learned Senior Advocate Shri Soparkar on the

contentions raised by him only if the Court was to overrule Ms.Bhayaâ??s preliminary objections as to the maintainability of the petition. Therefore,

before deciding the question on merits, I deem it fit to consider the preliminary objection raised by the counsel for the respondents.

6. The provisions of the Electricity Act, 2003, especially Section 86(1)(f) read as under:

86. Functions of State Commission.- (1) The State Commission shall discharge the following functions, namely:-

â?¦

â?¦

(f) adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration;

7. Definition Clause (2) would define distribution licensee in sub-section (17) of Section 2 and generating company in Section 228 which read as under:

2(17) â??distribution licenseeâ? means a licensee authorised to operate and maintain a distribution system for supplying electricity to the consumers in

his area of supply;

8. Admittedly from the petition itself it is not in dispute even by the petitioners that the respondent â?" UGVCL is a distribution licensee and so are the

petitioners, a generating company. Power purchase agreements have been entered into between the petitioners and the UGVCL for the generating

company i.e. the petitioner to supply solar power at a fixed tariff to the distribution licensee.

9. It is also not in dispute that the petitioner companies are only subsidiary of Abellon Clean Energy Limited. What is under challenge in this petition is

a communication dated 09.09.2020 by which, the stand of the UGVCL is that it will not be in position to honor payments to the petitioners of monthly

tariffs as the GUVNL has directed it to withhold those payments as GUVNL has issued default notices dated 05.08.2020 to the three biomass power

project companies which too are wholly owned subsidiaries of Abellon Clean Energy Limited. For the purposes of appreciating the submission of

Ms.Bhaya, the communication dated 09.09.2020 by GUVNL is reproduced hereunder:

â??To

The Chief Engineer,

Uttar Gujarat Vij Company Ltd. (UGVCL),

Corporate Office,

Visnagar Road,

Mehsana-384001,

(O2762) 222080-81

Fax: (02762) 223574

Sub: Withholding of payment of M/s. Goodwatts solar Modasa Private Limited, 3MW and Goodwatts Solar Modasa 2MW Pvt. Ltd. 2MW.

Dear Sir,

GUVNL has issued default notices dated 05.08.2020 to M/s. Bhavnagar Biomass Power Project Pvt. Ltd. (M/s, Bhavnagar), M/s.Amreli Power

Projects Limited (M/s.Amreli) Under article 9.2.1.(f) of the PPA Under the said default notice GUVNL is entitled to recover huge amount from the

aforesaid parties. (Emphasis Supplied)

In this regard it is pertinent to mention that, UGVCL is having two PPAs for purchase of solar energy with Goodwatts Solar Modasa 2 MW Pvt. Ltd.

(GSM2PL) for 2MW and Goodwatts Solar Modasa Pvt. Ltd. For 3MW project both located at Vill: Bhatkota Tal Modasa, Dist : Sabarkantha and

both these companies are wholly owned subsidiaries of M/s. Abellon Clean Energy Limited (ACEL) and aforesaid parties viz. M/s. Bhavnagar, M/s.

Junagadh and M/s. Amreli are also wholly owned subsidiary of ACEL.

In view of the same, you are requested to withhold payments against purchase of solar energy from projects of GSM2PL and GSMPL towards

recovery of the amount receivable from the above three biomass parties and transfer the said amount to GUVNL till further instructions from

GUVNL.

Thanking You,

Yours faithfully

Sd/-

(Sailaja Vachhrajani)

General Manager (IPP)â??

10. Independently too, reading the affidavit in reply filed by the respondent no.2 would indicate that the present power purchase agreements have a

direct connection with Abellon Clean Energy Limited from the side of the petitioners and that of UGVCL with GUVNL. In the year 2005, the Gujarat

Government under the provisions of the Electricity Act restructured GEB into seven functional entities viz. One power generating company, one

transmission company, four region wise distribution companies and one holding company â?" GUVNL engaged in the purchase of power in bulk on behalf of four distribution companies. GUVNL had entered into agreements with the bio-mass subsidiaries of Abellon similar to the present PPAs with

the petitioners for solar power. On 05.08.2020, GUVNL issued notices dated 05.08.2020 to the three bio-mass power companies under the respective

power purchase agreement which were called default notices. These notices were issued by the GUVNL on the ground that by indulging in unfair

gaming and under-injection, the bio-mass companies had earned Rs.53.86 crores in excess. These notices were the subject matter of challenge by the

bio-mass companies before the GERC an interim order passed by the GERC on 09.10.2020 the interim relief was refused and the bio-mass companies

were directed to refund the 75% of the amount to GUVNL as per their claims within 15 days from the date of the +order. Relevant paras from the

order of GERC are reproduced hereunder:

â??17.42 From the above it is clear that the prima facie case is not in favour of the Applicants/Petitioners but it is in favour of the Respondent No. 1

from whom the Applicants/Petitioner have recovered huge amount of Rs. 53.86 Crore and ultimately the said amount which is paid by the Respondent

No. 1 to the Applicants/Petitions can be claimed in the ARR/Tariff Petitions and thereby gets passed on to the consumers of the subsidiary distribution

licensees of the Respondent No.1. It is against the spirit of the Electricity Act, 2003 as well as the provisions of Tariff Policy, National Electricity

Police, Regulations, Orders of the Commission to promote the renewable energy and provisions of the PPAs. Thus, payment at lower rates for under-

injected energy through the UI Mechanism and claiming higher preferential tariff for Scheduled Energy which qualifies as unjust enrichment by the

Applicants/Petitioners. The payments as per preferential tariff as per the Scheduled Energy is an admitted fact as per the documents submitted by the

parties before the Commission and the Respondent is now objecting to the payments made by it and received by the Applicants as per Scheduled

Energy without actually generating up to the Schedule. Hence, we note that the prima facie case is in favour of the Respondent No.1 and not in

favour of the Applicants / Petitioners. ...

17.54 If the Article 10 be given effect only then in that case Article 9.3.1 and Article 9.3.2 become redundant, which is not the intent of the parties.

Therefore, it is incorrect to say that the default notices issued by the

Respondents is not valid and legal. However, we are of the view that the

Applicant/Petitioners plants are biomass based power plants and generate the renewable energy from the agricultural waste helpful to the licensees to

meet their RPO. Further, the plant capacity is small and supporting distributed generation through the power supply to the licensees. Hence, any

eventuality affecting to the termination of the PPAs without going into merits of the case with respect to legal issues and issues of complete fact will

affect the power projects of the Applicants/Petitioners. Therefore, we are of the view that the default notices dated 05.08.2020 given by the

Respondent GUVNL shall to be implemented till the outcome of the main petition is decided by the Commission. We are also of the view that the

Applicants/Petitioners who have recovered huge amount from the Respondent by giving mis-declaration of capacity / Scheduled Energy and under-

injection at lower UI rates while recovering preferential tariff for Scheduled Energy through UI Mechanism will be ultimately part of relevant ARR /

Tariff Petition filings and accordingly, the aforesaid amount to be recovered from the consumers by the licensees. We, therefore, decide that the

Applicants/Petitioners shall refund 75% of the said amount to the Respondent GUVNL as per their claims within 15 days from the date of this Order.

However, the said amount refunded is subject to adjustment at the time of the final outcome of the present Petition. It does not qualify as refund

granted by the Commission on merits. Once the Applicants/Petitioners pays the said amount to the Respondent GUVNL, the Respondents are

directed to start buying the power from the Applicants/Petitioners biomass based power plants and pay the amount for the same including past dues if

any subject to outcome of the present petition. So far as the claim of â?? interestâ?? on the amounts paid and recovered by Applicants/Petitioners by

way of mis-declaration claimed by the Respondent GUVNL is concerned, we are of the view that the said matter be decided while deciding the main

matter by the Commission.

11. This order was challenged by the GUVNL in appeal before the Appellate Tribunal of Electricity (APTEL), wherein, the Tribunal passed the

following order:

â??Heard Mr. Sajjan Poovayya, learned senior counsel arguing for Appellant, Mr. M.G. Ramchandran, learned senior counsel arguing for

Respondent No.2 and Ms. Swapna Seshadri, learned counsel arguing for SLDC on the application for directions not to terminate PPA. All the parties

shall place concise written submissions of the arguments within two daysâ?? with advance copy on the other side.

We direct Respondent/discom not to take any coercive action on terminating the PPA till we dispose of the IA on merits.

Order is reserved.â??

12. The second interim order was passed by the APTEL on 02.01.2021 wherein the interim order read as under:

â??ORDER

Proceedings of this matter are conducted through video conferencing.

Heard Ms. Sajjan Poovayya, learned senior counsel for the Appellant and Mr.M.G. Ramchandran, learned senior counsel for the respondent No.2 at

some length.

We have gone through the order dated 19.10.2020. On perusal of record and considering the submissions, we are of the opinion that the last sentence

of the said order has to be reframed as under:-

â??We direct Respondents not to take any coercive action like termination of PPA till we dispose of the Appeal on merits.â??

We stay the direction of refund of amount as stated in the impugned order. We further direct not to take any coercive action till disposal of the appeal

on merits.

The Appellant shall supply power and Respondents shall pay for the actual power injected.â??

13. The GERCâ??s direction was stayed. Aggrieved by this, GUVNL went in appeal before the Supreme Court and the Supreme Court on

21.09.2021 disposed of the civil appeal with the following observations:

â??...we direct the appellant not to take any coercive action like termination of PPA till the disposal of the appeal. We permit the respondents to

supply the power to the appellant, which may be accepted by the applicant, during the interregnum without paying any amount to the respondents till

the disposal of the appeal. The amount payable will be settled and adjusted subject to the determination of the issue(s) raised in the pending appeal, by

the Appellate Tribunal for Electricity;â??

14. When on remand, the APTEL also disposed of the appeal holding that the interim order of the Supreme court will operate and in the meantime, no

coercive steps would be taken by the GUVNL. The contention of Mr.Soparkar that these proceedings would bring to an end the controversy against

the bio-mass plants and therefore the notice of 09.09.2020 be withdrawn is clearly misconceived.

15. Reading the impugned notice which we have reproduced herein above, the first very line of the notice itself states that it is in continuation of the

notice dated 05.08.2020 i.e. the notice which is at large now on remand before the GERC. On this count therefore, the petition at the hands of the

power companies supplying solar power from whom recovery is sought for in compliance of the interim order of the GERC which refuse interim order

vis-a- vis the notice of 05.08.2020 would directly in purview of the GERC. The matter involving the present notice dated 09.09.2020 which is issued

for compliance of the notice dated 05.08.2020 is a matter sub-judice before the GERC.

16. Even otherwise, when the relevant Articles of PPA agreement are read viz. Article 6.6 and particularly

10.4 thereof which are reproduced hereunder:

â??6.6 Disputes: In the event of a dispute as to the amount of any Tariff Invoice, GUVNL shall notify the Power Producer of the amount in dispute

and GUVNL shall pay the Power Producer 100% of the undisputed amount plus 85% of the disputed amount within the due date provided either party

shall have the right to approach the GERC to effect a higher or lesser payment on the disputed amount. The parties shall discuss within a week from

the date on which GUVNL notifies the Power Producer of the amount in dispute and try and settle the dispute amicably. Where any dispute arising

out of or in connection with this agreement is not resolved mutually then such dispute shall be submitted to adjudication by the appropriate Commission

under Section 79 or 86 of Electricity Act 2003 and the appropriate Commission may refer the matter to Arbitration as provided in the said provision

read with Section 158 of Electricity Act 2003. For dispute beyond the power conferred upon the appropriate Commission, such dispute shall be subject

to jurisdiction of High Court of Gujarat. If the dispute is not settled during such discussion then the payment made by GUVNL shall be considered as a payment under protest. Upon resolution of the dispute, in case the Power Producer is subsequently found to have overcharged, then it shall return the

overcharged amount with an interest of SBI base rate per annum plus 7% for the period it retained the additional amount. GUVNL/ power producer

shall not have the right to challenge any tariff invoice, or to bring any court or administrative action of any kind questioning/modifying a tariff invoice

after a period of three years from the date of the tariff invoice is due and payable.

10. DISPUTE RESOLUTION:

10.4 In the event that such differences of disputes between the Parties are not settled through mutual negotiations within sixty (60) days, after such

dispute arises, then it shall be adjudicated by the Commission in accordance with law.â??

This would squarely indicate that the dispute would fall within the jurisdiction of GERC.

17. The default notice under challenge therefore of 09.09.2020 is a direct fallout of the default notice dated 05.08.2020 which is a subject matter of

challenge and pending before the GERC.

18. By an interim order dated 24.12.2020 the Court had passed the following order:

â??Heard learned Senior Advocate Mr. Saurabh Soparkar assisted by learned advocate Mr. Siddharth Sindha with learned advocate Ms. Poonam

Verma, learned advocate Mr. Saunak Rajguru for J. Sagar Associates for the petitioners and learned advocate Ms.Lilu K. Bhaya for the respondents

through video conference.

Learned advocate Ms.Bhaya for the respondents prays for time to go through the affidavit-in-rejoinder along with the compilation of judgments filed

by the petitioners.

In that view of the matter let this matter be adjourned for final disposal as agreed by both the sides. To be listed on 11th January, 2021 on top of the

Board.

In the meanwhile, by way of ad-interim arrangement, the respondent No.1 shall pay to the petitioners an amount equivalent to 85% of the amount of

invoices raised for the months of November and December, 2020 onwards till the final disposal of this petition meaning thereby that the respondents shall continue to pay 85% of the invoice to be raised by the petitioners till the final disposal of the petition.

The amount of 85% of the invoices raised on 3rd November, 2020 and 3rd December, 2020 shall be paid to the petitioners by the respondent no.1 on

or before 4th January, 2021. Such ad-interim arrangement during the pendency of the petition will be without prejudice to the rights and contentions of

both the sides.â??

19. The above order shall not operate henceforth and the respondent No.1 shall not be obliged to pay tariff amounts raised from month to month

henceforth subject to further orders that may be passed, in the event the petitioners choose to avail a remedy before the GERC. Even the amount that

has been paid by the respondents in compliance of the order dated 24.12.2020 shall be forthwith refunded to the respondents within four weeks from

the date of receipt of certified copy of this order, subject to further orders that may be passed by the GERC on the petitionerâ??s so choosing to do

so.

20. In view of the above, the petition is dismissed.

21. In view of the dismissal of the main petition, Civil Application will also not survive and hence, the same is also disposed of.

