(2007) 10 SHI CK 0021

In the High Court Of Himachal Pradesh

Soffimat S.A. and Another APPELLANT

Vs

State of H.P. and Others RESPONDENT

Date of Decision : 01-10-2007

Acts Referred:

Citation : (2007) 10 SHI CK 0021

Hon'ble Judges : V.K. Ahuja, J;Deepak Gupta, J

Bench : Division Bench

Judgement

Deepak Gupta, J.—The State of Himachal Pradesh pursuant to the policy guidelines of the Government of India to allow power generation in the private sector, invited bids from private parties for the purpose of setting up Hydro Electric Projects (HEP) in the State of Himachal Pradesh.

2. The petitioner No. 1 M/s. Soffimat is a Company having its registered office at Paris. In the competitive bidding it also bid for setting up HEPs at Bharmour (45 MW) and Harsar (60 MW). The petitioner No. 2 M/s. Sobra Power Ltd. a Company registered under the Companies Act having its registered office at Chandigarh is stated to be a subsidiary of petitioner No. 1.

3. On 21st June, 2000, Memorandum of Understandings (MOUs) were entered into between the State of Himachal Pradesh and M/s. S. offimat for the projects at Harsar and Bharmour. Clause 9 of the MOUs provided that the Company would provide 15% of the energy generated at the project and as measured at the Interconnection point free of cost to the State for the first 12 years after starting generation and 20% thereafter till the expiry of the agreement period. It is pertinent to mention that this agreement was entered into between the State of Himachal Pradesh and petitioner No. 1 only, and in the entire agreement there was no mention of any other Company. Clause 9 of the MOU?s reads as follows:

9. The Company agrees to provide 15% of the energy generated at the Project and as measured at the Interconnection point for the first 12 years and 20% thereafter, till the expiry of the Agreement period, free of cost, to the

Government or its Agent. The Company shall be free to sell the balance power to any party outside the State of Himachal Pradesh.

4. Dispute arose between the Company and the MOUs were terminated by the Government of Himachal Pradesh on 7th September, 2001. Thereafter, M/s. Soffimat made representations to the Government of Himachal Pradesh and the termination orders were revoked and Supplementary Memorandum of Understandings (SMOUs) were entered into between the parties. The decision of the State of Himachal Pradesh to revoke the orders terminating the earlier MOUs was conveyed to the petitioner No. 1 Company vide letter dated 16.2.2002 in which it was mentioned that SMOUs shall be signed with the original member of the consortium and no change in the consortium members shall be permitted except with the prior permission and on such terms and conditions as decided by the Government of Himachal Pradesh.

5. The SMOUs were entered into between the State of Himachal Pradesh and M/s. Soffimat on 12th July, 2002. Clauses 8&9 of the SMOUs which are relevant for our purpose read as follows:

8.The Company shall comprise the consortium members with equity participation and their roles as under:

Consortium Member Equity Role in the Project M/s. Soffimat 46.5% Lead Developer M/s Hydro Quebec 46.5% Co-Developer,EPC Equipment Supplier. M/s. Sobra Power Ltd. 7.0% Contractor & O&M Contractor

The Company agrees that no change in the consortium members, their equity participation and responsibilities whatsoever will be done in any event without the prior approval of the Government. Any change in the consortium without the approval of the Government would automatically result in the termination of the SMOU and the Project would revert back to the Government. No compensation whatsoever shall be payable by the Government in this regard.

9.This SMOU dated 12th July 2002 and the Clause Nos. 1,2,3,5,9,12,13,14,15 and 16 of the MOU dated 21.6.2000 shall be in force simultaneously till the validity of this SMOU.

6. These SMOUs clearly envisaged that the consortium would consist of three Companies, that is, both the petitioners and M/s. Hydro Quebec. The SMOUs for both the projects were identical. Even after these SMOUs were signed on 12th July, 2002 not much progress was made. The Detailed Project Reports (DPRs) were not prepared by the petitioners and show cause notices were issued to the Company why the SMOUs be not cancelled. Finally on 24th January, 2003 the SMOUs were terminated and the earnest money deposited by petitioner No. 1 was also forfeited.

7. The petitioner No. 1 herein filed CWP No. 137 of 2003 before this Court challenging the said order. The said petition was taken up by the Court on 24th February, 2003 and an ad-interim order was passed restraining the State of

Himachal Pradesh from entering into any fresh MOU with any party in respect of two HEPs at Bharmour and Harsar. Replies were filed and vide detailed order dated 23.12.2004 this Court while admitting the writ petition vacated the stay order. The petitioner No. 1 challenged the order passed by this Court in the Apex Court. The Apex Court found no merit in the SLP and the same was rejected. However, the Apex Court gave the petitioner liberty to approach this Court for disposal of the writ petition stating that DPR has been prepared. Thereafter, a learned Single Judge of this Court vide judgment dated 27.12.2005 disposed of the writ petition in the following terms:

In view of the specific orders of the Supreme Court, it is directed that the detailed project report, as prepared by the petitioner, shall be submitted to the State Government by the petitioner within one week from today. On receipt of such detailed project report, the same shall be studied by the State Government within six weeks thereafter and if found feasible shall reconsider the matter and grant the project to the petitioner subject to such terms as deemed fit.

8. It is clear from the order of this Court that this Court had not directed the State Government to decide the matter one way or the other but had only directed the State Government to study the matter and if found feasible to reconsider the same on such terms as it deemed fit.

9. In the meantime, on 9th August, 2005, fresh power policy guidelines for allotment of medium/mega hydro projects and allotment thereof were approved by the Council of Ministers. Clause 10 of the policy envisage that royalty in the shape of free electricity in case of these projects would be @ 12% of the electricity generated for the first 12 years and 18% for the period 13 to 30 years and 30% thereafter. Clause 23 of this policy envisage that the Government may consider the request of the IPPs for changing the name of the Company or consortium subject to the condition that the principal promoter shall retain the controlling interest of 5%. In the event of any contravention the GOHP shall terminate the Implementation Agreement (IA) forthwith.

10. After the decision of CWP No. 137 of 2003, a letter dated 10th February, 2006 was sent by the Principal Secretary (Power) to the Government of Himachal Pradesh to the Chairman, H.P. State Electricity Board with copy to petitioner No. 2 that the Government had reconsidered the proposal and it had been decided to offer the project to M/s. Soffimat subject to the condition that the Company shall abide by the terms and conditions of the fresh power policy of the Government, subject to the modification that the promoter shall retain equity percentages as per the original application at least for a period of 5 years from commercial operation date. This was followed by another letter dated 24th August, 2006 in which it was stated that since Soffimat, Hydro Quebec Canada and petitioner No. 2 Sobra Power had 46.5%, 46.5% and 7.0% equity in the consortium respectively the Government required that all the major equity stake holders shall sign and enter into the implementation agreements and the principal promoters would retain the equity percentage for a period of five years from the

date of start of commercial production. In this letter it was also stated that the agreements should be signed by the principal promoters i.e. M/s. Soffimat, SA and Hydro Quebec, Canada and the authorized representatives of the Company will not be entertained. The Company was also directed to sign the implementation agreements on or before 15th September, 2006. M/s. Soffimat replied to this letter and stated that the conditions imposed were very onerous and legally untenable. It was stated that Ms. Babli Brar has been authorized by M/s. Soffimat to sign all agreements on their part. It was alleged that M/s. Hydro Quebec could not be asked to sign the agreement. This letter was signed by Mr. Babli Brar. It was further prayed that time of 15 days given to study the implementation agreement was not sufficient.

11. The Government of Himachal Pradesh only acceded to the request to increase the time to study the IA and vide letter dated 22nd September, 2006 the time was extended upto 20th October, 2006. On 25th October, 2006 the petitioner No. 1 sent another letter to the Government of Himachal Pradesh. According to the petitioners the letter dated 22nd September, 2006 sent by the Government of Himachal Pradesh was received by them only on 20th October, 2006.

12. The petitioners took up a plea that in terms of the fresh power policy issued by the government the Company should only be held liable to provide 12% free electricity for the first 12 years and 15% thereafter as against 15 & 18% as earlier agreed to by it. The petitioner Company also took up the plea that M/s. Hydro Quebec, Canada had decided to withdraw from execution of the hydro electric projects. Petitioner No. 1 requested the Government of H.P. that M/s.RSWI of Canada be permitted to join the consortium in place of M/s.Hydro Quebec. It was also stated that the equity of the petitioner Companies herein was jointly was more than 50%. Letter of M/s. RSWI was also enclosed to show that they were interested in the Projects. Thereafter, the petitioner received no intimation in this behalf except a termination order dated 12.1.2007. This has been challenged in the present writ petition.

13. The stand of the petitioners is that both the MOUs as well as the SMOUs were entered into between the Government of Himachal Pradesh and Petitioner No. 1 and therefore the question of signing the agreements by other members of the consortium did not arise. According to the petitioners as per the SMOUs and other correspondence exchanged between the parties as well as the new policy the consortium partners could be changed with the consent of the Government and the Government erred in not taking a decision on the request of the petitioners. Lastly, it was urged that the implementation agreement in so far as it relates to providing of free electricity @ 15% for the first 12 years and 18% for the remaining period of the Project is against the new policy. It is also alleged that the petitioner Company is being discriminated against inasmuch as with other Companies the Government has applied the new condition of the policy and is not insisting on the terms of the original MOUs.

14. This writ petition was contested by the State on various grounds. It is alleged that the petitioner Company has been delaying the project on one pretext or the other and though more than 7 years have elapsed since the first MOU was signed not a brick has been laid. It is submitted that the policy guidelines are only in the nature of guidelines and there is nothing which prevents the State from entering into a contract which is different from the guidelines. It is submitted that MOUs were entered into between the parties and the parties are governed by the MOUs. It is also stated that in view of the orders of the learned Single Judge passed in CWP No. 137 of 2003 the Court could have laid down any conditions as it deemed fit and therefore a condition was laid down that the agreement should be signed by both the principal promoters.

15. We have heard Sh. S.K. Kapoor, learned senior counsel appearing for the petitioners as well as Sh. M.S. Chandel, learned Advocate General for the State.

16. Mr. Kapoor has urged that whenever a Government formulates any policy it is bound by the same. He, therefore, submits that the terms of the MOUs stood superseded by the guidelines and therefore the Company cannot be bound by its initial commitment to provide free electricity at 15% for the first 12 years and 20% thereafter. He urges that the clause in the implementation agreement whereby the parties were bound to provide free electricity @ 15% and 20% is against the new policy. He submits that as per Clause 23 of the new policy as well as the terms of the SMOUs the promoter could request for change in the consortium subject to retaining the controlling interest and the Government was bound to take a decision on this request. It is further submitted that in the initial letter issued on 10th February, 2006 all that was stated was that the Projects had again been offered to M/s. Soffimat subject to the condition that the Company shall abide by the terms and conditions of the fresh power policy and the promoter shall retain the equity percentages as per the original application for a period of 5 years from the date of commercial operation. He submits that once this power has been exercised by the Government it could not review the matter and issue the letter dated 24th August, 2006 asking all the promoters to sign the agreement.

17. On the other hand Sh. Chandel, learned Advocate General submits that the petitioner is guilty of delaying the project for a very long period which has resulted in loss to the Government and therefore is not entitled to any relief. He also submits that the Government has exercised its power in view of the fact that the petitioners refused to sign the implementation agreements. He in fact contends that since the petitioners had not signed the implementation agreements the State had no other option but to terminate the agreements.

18. It is clear from the documents placed on record that the first MOU was entered into only between the State of H.P. and M/s. Soffimat and there was no mention of petitioner No. 2 or any other Company. Ms.Babli Brar was appointed Special Power of Attorney on behalf of petitioner No. 1 in her personal capacity and there was no mention of petitioner No. 2. However, it seems that thereafter

some negotiations were held and it was decided that both the petitioners i.e. M/s. Soffimat and M/s. Sobra Power Ltd. alongwith M/s. TIWAG of Austria would prepare a joint plan for cost effective implementation of four projects on the Budhil Nadi which including the two projects at Bharmour and Harsar as well as two other project of Budhil and Kukti. These MOUs as already stated above were cancelled and fresh SMOUs were entered into. These SMOUs were also entered into between the petitioner No. 1 and the Government of Himachal Pradesh but it was clearly stated that the petitioner No. 1 and M/s. Hydro Quebec would each have 46.5% equity in the consortium and M/s. Sobra would have 7% equity in the consortium. Unfortunately these SMOUs were also cancelled leading to litigation. We are clearly of the view that we cannot go into the question of delay from 21st June, 2000 till 29th December, 2005 when the earlier writ petition was decided by the Court. The first MOUs were terminated by the State Government in the month of September, 2001 but on the representation of the petitioner the State itself revoked the termination orders and entered into the SMOUs. Thereafter, fresh termination orders were issued in January, 2003. These were challenged in CWP No. 137 of 2003. This petition was disposed of finally on 29th December, 2005 with a direction that the respondents should consider the case of the petitioner. The Court did not order that the projects should be awarded to the petitioner. The State decided to again award the projects in favour of the petitioner. In the first letter dated 10th February, 2005, all that was stated was that the Company shall abide by the terms and conditions of the fresh power policy subject to the modification that the promoters shall retain the equity participation as per the original application. The State vide letter dated 24th August, 2006 asked all the principal promoters to sign the draft I.A. The State having taken a decision to revoke the earlier termination agreement cannot now turn around and say that the projects have been delayed by the petitioner Company.

19. The next question which arises is whether all terms of the policy will apply ipso facto and supersede the terms of the contract. In our opinion this cannot be so. When two parties (even if one happens to be the State) enter into a commercial contract they take into consideration various factors. These factors by and large will be economical factors. In a case like the present one the petitioner Company before entering into the MOUs must have carried out a study to see how much electricity can be generated, what would be the cost of production and it was only thereafter that the Company agreed to provide 15% free electricity for the first 12 years and 20% thereafter. This was an agreement willingly entered into by the Company. In the meantime the Government introduced another policy. The terms of the policy cover a broad spectrum and matters which were not part of the MOUs and SMOUs would be governed by the new policy. However, if a matter was squarely covered by the MOUs and SMOUs, in our opinion, the policy guidelines cannot supersede the same.

20. The contention of the petitioners Company that it has been discriminated against is also not correct. The argument raised on behalf of the petitioners

Company was that in the implementation agreement entered into between the State and M/s. Himachal Consortium Power Projects Pvt. Ltd. the State has fixed percentage of royalty in Clause 5.4.1 at 12% for the first 12 years and 18% for the balance agreement period of 28 years. It is contended that this has been done in terms of the fresh policy and therefore the same is applicable to the petitioners also. To verify this fact we had called for the original MOUs dated 13th June, 2002 entered into between the Government and HCPPL. We find that in Clause 13 of the MOU the condition prescribed was for providing 12% energy for the first 12 years and 18 % thereafter. In the case of the petitioner Company there was a stipulation in the original MOUs to provide 15% free electricity for the first 12 years and 20 % thereafter. It is thus clear that even in the case of HCPPL the Government followed the MOUs. Thus, there is no discrimination.

21. Therefore, we are clearly of the view that the petitioner Company is bound to provide the free electricity as per the original MOUs which condition remained unaltered in the SMOUs i.e. @ 15% for the first 12 years and 20% thereafter.

22. With regard to the change of the consortium members the SMOUs contained a stipulation that the petitioner No. 1 would be the leading developer with 46.5% equity, M/s. Hydro Quebec was to be Co-developer, EPC contractor and equipment supplier with 46.5% equity. The petitioner No. 2 M/s. Sobra Power Ltd. was to be the O&M contractor with 7% equity. The equity participation and responsibility of the consortium members could not be changed without the prior approval of the Government. Any change in the consortium without the approval of the Government would automatically result in the termination of the SMOUs. This clearly means that the Company had the right to approach the Government for change in the composition of the consortium and also the equity stakes therein. The policy guidelines as issued also envisage that the composition and equity of the consortium can be changed subject only to the condition that at least 51% equity remains with the principal developer. In the present case the principal developer M/s. Soffimat only had 46.5% equity at the initial stage. M/s. Sobra Power Ltd. is the subsidiary of the petitioner No. 1. Together they have controlling interest of 53.5% which is obviously more than 51%. Before any decision was taken to terminate the project the petitioner Company had approached the government to permit it to introduce M/s. RSWI as the co-developer in place of M/s. Hydro Quebec. An affidavit has been filed during the course of arguments to show that M/s. RSWI is actively involved in the setting up of a number of hydro electric projects in India. In respect of Himachal it is alleged that M/s. RSWI was involved in the setting up of the HEP?s at Malana, Allain Dhuangan, Chemera-I, Bara Bangal and Chango Yang Thang. Sh. Kapoor therefore submits that the State be directed to permit the petitioners to replace M/s. Hydro Quebec with M/s. RSWI as co-developer. On the other hand on behalf of the State it is urged that this is just a ruse to further delay the project. It is also contended that in view of the letter dated 24th August, 2006 the petitioner Company had no right to change the equity participation.

23. We are of the considered view that though in terms of the orders of the learned single Judge it was open to the State Government to impose conditions, no party in a bilateral contract can impose any condition without the consent of the other. An agreement is the meeting of mind between two parties. There can be no agreement unless two parties agree to the conditions. As pointed out above the SMOUs and the policy envisaged a change in the consortium members with the permission of the State. A request for change was made by the petitioners. It was for the State to take a decision on this request. The State in our considered view cannot abdicate its functions and not take a decision. It can accept or reject the proposal of the petitioners. However, this decision must be taken on the basis of the relevant material and not on extraneous considerations. One cannot loose sight of the fact that any Multinational company shall not wait endlessly for a project to complete. In the present case the State has cancelled the agreement on two occasions and on both occasions has revoked the order of termination. It may be true that the petitioners were tardy but why did the State decide to revoke the cancellation? After the last orders of revocation were passed on 10th February, 2006/24th August, 2006 there is no delay on the part of the petitioners.

24. We are also unhappy to note that the manner in which the case has been dealt with by the State is not proper. A request was made by the petitioner Company on 25th October, 2006 for permitting it to bring in RSWI as a co-developer. It had also prayed that it can only be liable to give free electricity by way of royalty at 12% and 18%. The respondents should have dealt with the requests of the petitioners. We had called for the records and find that this request was never considered by the Cabinet which was the appropriate Authority. Without taking any decision on this request it was decided to terminate the agreement.

25. The termination order is dated 12th January, 2007. Even before the termination order was issued the respondent-State awarded the project in question to the H.P. Power Corporation Ltd. on 8th January, 2007. This could definitely not have been done. It may be true that Cabinet had taken a decision in November, 2006 to terminate the contract but till the formal order of termination was communicated to the petitioner Company this project could not have been awarded to any other party. It would be pertinent to mention that M/s. H.P. Power Corporation have not filed any separate reply in the writ petition. For the reasons stated above, we hold that the order dated 8th January, 2007 granting the Project in favour of M/s. H.P. Power Corporation respondent No. 3 is illegal.

26. In view of the above discussion, we quash the order of termination dated 12.1.2007 issued by the respondent-State cancelling the SMOUs dated 12.7.2002 which incorporated certain terms and conditions and the Original Memorandum of Understanding dated 21.6.2002. We also quash the allotment of the Harsar and Bharmour (HEPs) in favour of respondent No. 3. We however

reject the contention of the petitioner Company that it is only liable to give free electricity @ 12% and 18%. In terms of the SMOUs it is bound to give free electricity at 15% for the first 12 years and thereafter 18% for the subsequent period of the Project.

27. This Court is not oblivious of the fact that these two HEPs have been delayed for an inordinately long time. For some of the delay the petitioner Company is also responsible. The relief to be granted to the petitioner has to be moulded to ensure that the public also should not suffer. Both the petitioners are directed to furnish affidavits with the Principal Secretary, MPP & Power to the Government of Himachal Pradesh on or before 25th October, 2007 to the effect that they are willing to provide free electricity @ 15% of the generation at the interconnection point for the first 12 years from start of commercial production and 20% thereafter for the remaining period of the agreement as per the original MOUs. The petitioner No. 1 shall also ensure that an affidavit is filed by a duly authorized person on behalf of M/s. RSWI to this effect. In the affidavit the petitioners and M/s. RSWI shall also give a clear cut time schedule frame in which the Projects will be completed after execution of the implementation agreement. In case the petitioners & M/s. RSWI file such affidavits the respondents-State shall consider the request of the petitioner Company to introduce M/s. RSWI as a member of the consortium in place of M/s. Hydro Quebec. The Government shall consider this request on the basis of the track record of M/s. RSWI which is already handling a number of projects in Himachal and shall take an objective decision in the matter and a speaking order shall be passed on this request on or before 15th November, 2007. In case the petitioners or M/s. RSWI do not furnish the affidavits in the aforesaid terms the State shall not be bound to consider any such request and the MOUs shall be deemed to be terminated and the State shall be at liberty to allot the Projects in terms of the new policy guidelines.

28. The writ petition is disposed of in the aforesaid terms. No order as to costs.

