

SUPREME COURT OF INDIA

Uttar Haryana Bijli Vitran Nigam Ltd.

Vs.

Adani Power Ltd.

C.A.No.5865 of 2018

(R.F.Nariman and Navin Sinha,JJ.,)

25.02.2019

JUDGMENT

R.F. Nariman,J.,

1. The appellants in Civil Appeal No. 5865 of 2018 are Uttar Haryana Bijli Vitran Nigam Ltd. and Dakshin Haryana Bijli Vitran Nigam Ltd. [collectively referred to as the “Haryana Discoms”], which are distribution licensees in the State of Haryana. The appellant in Civil Appeal No. 6190 of 2018 is the Gujarat Urja Vikas Nigam Ltd. [“GUVNL”], which has been assigned with the task of procuring power by the State of Gujarat. The respondent, Adani Power Ltd., is a generating company in terms of Section 2(18) of the Electricity Act, 2003 and has a 4620 MW coal-fired power plant at Mundra, District Kutch, Gujarat. On 23.06.2005, the Special Economic Zones Act, 2005 [“SEZ Act”] was enacted. Section 26 of this Act provides that every Developer shall be entitled to various exemptions, such as duty leviable under the Customs Act, 1962, Customs Tariff Act, 1975, Central Excise Act, 1944, etc. The Government of India approved the respondent as a Co-Developer (which is included within the term “Developer”). The Ministry of Commerce and Industry [“MoC&I”], by a letter dated 19.12.2006, granted approval to the appellant for setting up a power plant in the aforesaid SEZ. Thus, the appellant has established the aforesaid power plant in four phases consisting of four units of 330 MW in Phase I and II, two units of 660 MW in Phase III, and three units of 660 MW in Phase IV. The respondent has entered into various Power Purchase Agreements [“PPAs”] with the appellant. We are concerned in the present case with the PPAs dated 07.08.2008 and 02.02.2007. The MoC&I, vide notification dated 06.04.2015 has withdrawn the exemption of all duties under the Customs Act, Customs Tariff Act, Central Excise Act, etc. on goods imported/procured by the respondent for authorized operations w.e.f. 01.04.2015. Equally, vide notification dated 16.02.2016, fiscal benefits including exemption of service tax on power plants approved prior to 27.02.2009 was promulgated, as a result of which, exemption from service tax, to which the respondent was entitled, has been withdrawn. On 15.10.2015, the respondent filed Petition No. 235/MP/2015 before the Central Electricity Regulatory Commission [“CERC” or “Commission”], seeking compensation for change in law by invoking Article 13 of the respective PPAs. On 04.05.2017, the CERC allowed, as a change in law, the added cost by way of payment of tax consequent to withdrawal of the exemption

notifications thus:

“35 However, the change in rates of custom duty, excise duty, withholding tax and service tax on taxable services which have been imposed pursuant to the Acts passed by the Parliament shall be covered under Change in Law. As regards the Green Energy Cess, it was imposed after the cut-off date and satisfied the requirements of Change in Law. Accordingly, the Petitioner shall therefore be entitled for reimbursement of custom duty, excise duty on import/procurement of any other goods and service tax on the spares and consumables payable by it from 1.4.2015 on account of the withdrawal of exemption to the power plants located in the SEZ by the Ministry of Commercial [sic Commerce] and Industry only to the extent of difference in the duty or tax as on the cut-off date and as prevailing as on 1.4.2015 and thereafter.”

However, the CERC followed its earlier order dated 06.02.2017 in Petition No.156/MP/2014, in which it stated that “carrying cost” under Article 13 of the PPA must be given to the respondent as it is to be restored to the same economic position as if the change in law – which is withdrawal of the exemption notifications - did not take place. After setting out Article 13 of the PPA and distinguishing a Supreme Court judgment in *National Thermal Power Corporation Ltd. v. Madhya Pradesh State Electricity Board'*, [“National Thermal Power Corporation Ltd.”], the Commission came to the conclusion that there is no provision in the PPA for payment of carrying cost for the period from the date of the change in law till the date of approval by the Commission. This being the case, the Commission held that the prayer of the respondent to grant carrying cost on restitutionary principles from the date of change in law till the date of decision cannot be allowed. By the impugned judgment of the Appellate Tribunal for Electricity [“ Appellate Tribunal”] dated 13.04.2018, the Appellate Tribunal went through the relevant provisions of the PPAs and finally observed :

“x. Further, the provisions of Article 13.2 i.e. restoring the Appellant to the same economic position as if Change in Law has not occurred is in consonance with the principle of ‘restitution’ i.e. restoration of some specific thing to its rightful status. Hence, in view of the provisions of the PPA, the principle of restitution and judgment of the Hon’ble Supreme Court in case of *Indian Council for Enviro-Legal Action vs. Union of India & Ors.*, we are of the considered opinion that the Appellant is eligible for Carrying Cost arising out of approval of the Change in Law events from the effective date of Change in Law till the approval of the said event by appropriate authority. It is also observed that the Gujarat Bid-01 PPA have no provision for restoration to the same economic position as if Change in Law has not occurred. Accordingly, this decision of allowing Carrying Cost will not be applicable to the Gujarat Bid-01 PPA.” Accordingly, carrying cost was allowed and the judgment of the Commission was set aside.

2. Shri G. Umapathy, learned Advocate, and Shri V. Giri, learned Senior Advocate, appearing for the appellants in these appeals have argued before us that the judgment of the Commission was correct and that since carrying costs are not part of the PPAs in question,

any resort to rules of equity and interest being granted on rules of equity cannot be resorted to. For this purpose, they relied upon judgments of this Court. According to them, therefore, the finding of the Appellate Tribunal ought to be set aside.

3. On the other hand, Mr. Mukul Rohatgi, learned Senior Advocate appearing on behalf of the respondent, supported the Appellate Tribunal judgment and stated that the Appellate Tribunal has not gone outside the four corners of the PPA. Since Article 13.2, in particular, expressly provides a restitutionary principle, the respondents are entitled to avail of the same.

4. In order to appreciate the respective contentions of the parties, it is necessary to set out certain provisions of the PPAs. Thus, Articles 11.3.1 and 11.3.4 state as follows:

“11.3 Payment of Monthly Bills 11.3.1 The Procurer shall pay the amount payable under Monthly Bill on the Due Date to such account of the Seller, as shall have been previously notified by the Seller to the Procurer in accordance with Article 11.3.3 below. All payments made by the Procurer shall be appropriated by the Seller in the following order of priority:

1. towards Late Payment Surcharge, payable by the Procurer, if any;
2. towards earlier unpaid Monthly Bill, if any; and
3. towards the then current Monthly Bill”

“11.3.4. In the event of delay in payment of a Monthly Bill by any procurer beyond its Due Date, a Late Payment Surcharge shall be payable by the Procurer to the Seller at the rate of two (2) percent in excess of the applicable SBAR per annum, on the amount of outstanding payment, calculated on a day to day basis (and compounded with Monthly rest), for each day of the delay.”

Articles 11.8.1 and 11.8.3 are also important and provide as follows:

“11.8. Payment of Supplementary Bill

1.8.1 Either Party may raise a bill on the other Party (“Supplementary Bill”) for payment on account of:

- i. Adjustments required by the Regional Energy Account (if applicable);
- ii. Tariff Payment for change in parameters, pursuant to provisions in Schedule-5; or
- iii. Change in Law as provided in Article 13 and such Bill shall be paid by the other Party.”

“11.8.3 In the event of delay in payment of a Supplementary Bill by either Party beyond one month from the date of billing, a Late Payment Surcharge shall be payable at same terms applicable to the Monthly Bill in Article 11.3.4.”

Article 18.17 states as follows:

“18.17 No Consequential or Indirect Losses The liability of the Seller and the Procurer shall be limited to that explicitly provided in this Agreement. Provided that notwithstanding anything contained in this Agreement, under no event shall the Procurer or the Seller claim from one another any indirect or consequential losses or damages.”

5. Ultimately, the result of this appeal depends upon the interpretation of Article 13 of the PPAs which is set out in full hereinbelow:

“13. ARTICLE 13 - CHANGE IN LAW

13.1 Definitions

In this Article 13, the following terms shall have the following meanings:

13.1.1 “Change in Law” means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline:

(i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law or (ii) a change in interpretation of any Law by a Competent Court of law, tribunal or Indian Governmental Instrumentality provided such Court of law, tribunal or Indian Governmental Instrumentality is final authority under law for such interpretation or (iii) change in any consents, approvals or licenses available or obtained for the Project, otherwise than for default of the Seller, which results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurer under the terms of this Agreement; but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or

(ii) change in respect of UI Charges or frequency intervals by an Appropriate Commission. Provided that if Government of India does not extend the income tax holiday for power generation projects under Section 80 IA of the Income Tax Act, upto the Scheduled Commercial Operation Date of the Power Station, such non-extension shall be deemed to be a Change in Law (applicable only in case the Seller envisaging supply from the Project awarded the status of “Mega Power Project” by Government of India).

13.1.2 “Competent Court” means: The Supreme Court or any High Court, or any tribunal or any similar judicial or quasi-judicial body in India that has jurisdiction to adjudicate upon issues relating to the Project.

13.2 Application and Principles for computing impact of Change in Law While determining the consequence of Change in Law under this Article 13, the 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, to

the extent contemplated in this Article 13, the affected Party to the same economic position as if such Change in Law has not occurred.

a) Construction Period As a result of any Change in Law, the impact of increase/decrease of Capital Cost of the Project in the Tariff shall be governed by the formula given below:

For every cumulative increase/decrease of each Rs.8,90,00,000 [sic] (Rupees eight crore ninety lakh only) Rupees of the Contracted Capacity in the Capital Cost over the term of this Agreement, the increase/decrease in Quoted Capacity Charges shall be an amount equal to zero point two two seven (0.227%) per cent of the Quoted Capacity Charges. Provided that the Seller provides to the Procurer documentary proof of such increase/decrease in Capital Cost for establishing the impact of such Change in Law. In case of Dispute, Article 17 shall apply.

It is clarified that the above mentioned compensation shall be payable to either Party, only with effect from the date on which the total increase/decrease exceeds amount of Rs.8,90,00,000 [sic] (Rupees eight crore ninety lakh only)

b) Operation Period As a result of Change in Law, the compensation for any increase/decrease in revenues or cost to the Seller shall be determined and effective from such date, as decided by the Appropriate Commission whose decision shall be final and binding on both the Parties, subject to rights of appeal provided under applicable Law. Provided that the above mentioned compensation shall be payable only if and for increase/decrease in revenues or cost to the Seller is in excess of an amount equivalent to 1% of Letter of Credit in aggregate for a Contract Year.

13.3 Notification of Change in Law

13.3.1 If the Seller is affected by a Change in Law in accordance with Article 13.2 and wishes to claim a Change in Law under this Article it shall give notice to the Procurer of such Change in Law as soon as reasonably practicable after becoming aware of the same or should reasonably have known of the Change in Law.

13.3.2 Notwithstanding Article 13.3.1, the Seller shall be obliged to serve a notice to the Procurer under this Article 13.3.2 if it is beneficially affected by a Change in Law. Without prejudice to the factor of materiality or other provisions contained in this Agreement, the obligation to inform the Procurer contained herein shall be material. Provided that in case the Seller has not provided such notice, the Procurer shall have the right to issue such notice to the Seller.

13.3.3 Any notice served pursuant to this Article 13.3.2 shall provide, amongst other things, precise details of:

(a) the Change in Law; and

(b) the effects on the Seller of the matters referred to in Article 13.2

13.4 Tariff Adjustment Payment on account of Change in Law

13.4.1 Subject to Article 13.2, the adjustment in Monthly Tariff Payment shall be effective from:

(i) the date of adoption, promulgation, amendment, re-enactment or repeal of the Law or Change in Law; or

(ii) the date of order/judgment of the Competent Court or tribunal or Indian Governmental Instrumentality, if the Change in Law is on account of a change in interpretation of Law.

13.4.2 The payment for Changes in Law shall be through supplementary bill as mentioned in Article 11.8. However, in case of any change in Tariff by reason of Change in Law, as determined in accordance with this Agreement, the Monthly Invoice to be raised by the Seller after such change in Tariff shall appropriately reflect the changed Tariff.”

6. It will be seen that Article 13.4.1 makes it clear that adjustment in monthly tariff payment on account of change in law shall be effected from the date of the change in law [see sub-clause (i) of clause 4.1], in case the change in law happens to be by way of adoption, promulgation, amendment, re-enactment or repeal of the law or change in law. As opposed to this, if the change in law is on account of a change in interpretation of law by a judgment of a Court or Tribunal or governmental instrumentality, the case would fall under sub-clause (ii) of clause 4.1, in which case, the monthly tariff payment shall be effected from the date of the said order/judgment of the competent authority/Tribunal or the governmental instrumentality. What is important to notice is that Article 13.4.1 is subject to Article 13.2 of the PPAs.

7. Article 13.2 is an in-built restitutionary principle which compensates the party affected by such change in law and which must restore, through monthly tariff payments, the affected party to the same economic position as if such change in law has not occurred. This would mean that by this clause a fiction is created, and the party has to be put in the same economic position as if such change in law has not occurred, i.e., the party must be given the benefit of restitution as understood in civil law. Article 13.2, however, goes on to divide such restitution into two separate periods. The first period is the “construction period” in which increase/decrease of capital cost of the project in the tariff is to be governed by a certain formula. However, the seller has to provide to the procurer documentary proof of such increase/decrease in capital cost for establishing the impact of such change in law and in the case of dispute as to the same, a dispute resolution mechanism as per Article 17 of the PPA is to be resorted to. It is also made clear that compensation is only payable to either party only with effect from the date on which the total increase/decrease exceeds the amount stated therein.

8. So far as the “operation period” is concerned, compensation for any increase/decrease in revenues or costs to the seller is to be determined and effected from such date as is decided by the appropriate Commission. Here again, this compensation is only payable for increase/decrease in revenue or cost to the seller if it is in excess of an amount equivalent to 1% of the Letter of Credit in aggregate for a contract year. What is clear, therefore, from a reading of Article 13.2, is that restitutionary principles apply in case a certain threshold limit is crossed in both sub-clauses (a) and (b). There is no dispute that the present case is covered by sub-clause (b) and that the aforesaid threshold has been crossed. The mechanism for claiming a change in law is then set out by Article 13.3 of the PPA.

9. In Civil Appeal No. 6190 of 2018, the PPA contains Article 13.4 as follows:

“13.4 Tariff Adjustment Payment on account of Change in Law

13.4.1 Subject to Article 13.2, the adjustment in Monthly Tariff Payment shall be effective from:

(a) the date of adoption, promulgation, amendment, re-enactment or repeal of the Law or Change in Law; or

(b) the date of order/judgment of the Competent Court or tribunal or Indian Governmental Instrumentality, if the Change in Law is on account of a change in interpretation of Law.

(c) the date of impact resulting from the occurrence of Article 13.1.1.

13.4.2 The payment for Changes in Law shall be through Supplementary Bill as mentioned in Article 11.8. However, in case of any change in Tariff by reason of Change in Law, as determined in accordance with this Agreement, the Monthly Invoice to be raised by the Seller after such change in Tariff shall appropriately reflect the changed Tariff.”

It will be seen that sub-clause (c) does not occur in the PPA in Civil Appeal No.5865 of 2018. As we have held that the present case is governed by sub-clause (i) of Article 13.4.1, it is obvious that sub-clauses (b) and (c) have no application to the facts of the present case.

10. A reading of Article 13 as a whole, therefore, leads to the position that subject to restitutionary principles contained in Article 13.2, the adjustment in monthly tariff payment, in the facts of the present case, has to be from the date of the withdrawal of exemption which was done by administrative orders dated 06.04.2015 and 16.02.2016. The present case, therefore, falls within Article 13.4.1(i). This being the case, it is clear that the adjustment in monthly tariff payment has to be effected from the date on which the exemptions given were withdrawn. This being the case, monthly invoices to be raised by the seller after such change in tariff are to appropriately reflect the changed tariff. On the facts of the present case, it is clear that the respondents were entitled to adjustment in their

monthly tariff payment from the date on which the exemption notifications became effective. This being the case, the restitutionary principle contained in Article 13.2 would kick in for the simple reason that it is only after the order dated 04.05.2017 that the CERC held that the respondents were entitled to claim added costs on account of change in law w.e.f. 01.04.2015. This being the case, it would be fallacious to say that the respondents would be claiming this restitutionary amount on some general principle of equity outside the PPA. Since it is clear that this amount of carrying cost is only relatable to Article 13 of the PPA, we find no reason to interfere with the judgment of the Appellate Tribunal.

11. We now come to some of the judgments cited by learned counsel on behalf of both sides. In *South Eastern Coalfields Ltd. v. State of Madhya Pradesh and Ors.*², [“South Eastern Coalfields”], this Court held that interest is payable in equity in certain circumstances and finally concluded:

“24. We are, therefore, of the opinion that in the absence of there being a prohibition either in law or in the contract entered into between the two parties, there is no reason why the Coalfields should not be compensated by payment of interest for the period for which the consumers/purchasers did not pay the amount of enhanced royalty which is a constituent part of the price of the mineral for the period for which it remained unpaid. The justification for award of interest stands fortified by the weighty factor that the Coalfields themselves are obliged to pay interest to the State on such amount. It will be a travesty of justice to hold that though the Coalfields must pay the amount of interest to the State but the consumers/purchasers in whose hands the money was actually withheld be exonerated from liability to pay the interest.”

What was argued by Shri Giri was that this judgment cannot be applied to fact situations that arise under the PPA in view of Article 18.17 of the PPA which clearly states that the liability of the seller and the procurer shall be limited to that explicitly provided in this agreement and that, in no event, shall either procurer or seller claim any indirect or consequential losses or damages. Since we have found that the claim

12. Shri Giri also relied upon *National Thermal Power Corporation Ltd.* (supra), in which, *South Eastern Coalfields* (supra) was distinguished in the following manner:

“25. In this connection, it is material to note that the claim in *South Eastern Coalfields* [(2003) 8 SCC 648] was essentially covered under Section 61 of the Sale of Goods Act, 1930, and the interest by way of damages was payable as per this statutory provision itself. The liability had been crystallised and the interest had become payable because of the failure to pay the amount as per the liability. Besides, there was nothing in the agreement between the parties to the contrary on the issue of grant of interest. In the present matter, we have the second proviso to Regulation 79(2) of the 1999 Regulations which permitted the generating company to continue to charge the existing tariff for such period as may be specified in the notification by the Commission, and the notifications permitted continuation of the existing tariff as on 31-3-2001, until the final tariff was determined. There was no provision for payment of interest therein. The very fact that interest came to be

provided subsequently by a notification under the Regulations of 2004 is also indicative of a contrary situation in the present matter viz. that interest was not payable earlier.”

13. Article 13 of the PPAs provides for payment of carrying costs, as held by us above. This judgment also turned on the interpretation of Regulation 79(2) of the Central Electricity Regulatory Commission

14. In *Indian Council for Enviro-Legal Action v. Union of India and Ors.*, (2011) 8 SCC 161, this Court was concerned with whether a successful party in a litigation should not be compensated by way of restitution for deprivation of its legitimate dues. While dealing with restitutionary principles as applicable in the context of environment pollution, this Court laid down certain principles in paragraph 197. This judgment, again, has no manner of application to the facts of the present case which are confined to the interpretation of Article 13 of the PPAs.

15. The next judgment relied upon by Shri Giri was *All India Power Engineer Federation and Ors. v. Sasan Power Ltd. and Ors.*³. Paragraph 31 of this judgment was relied upon to state that in context of Section 63 of the Electricity Act, the Commission alone can accept amended tariff that would impact consumer interest, and therefore, public interest, and waiver of any rights of one of the parties under the PPA, if it impacts such consumer interest, would have to pass muster under the Commission which would look into all factors and then pass a reasoned order. We fail to see how this judgment has any application on the facts of the present case as, in the present case, we are concerned with the interpretation of Article 13 of the PPAs.

16. Lastly, the judgment of this Court in *Energy Watchdog v. Central Electricity Regulatory Commission and Ors.*⁴, was also relied upon. In this judgment, three issues were set out and decided, one of which was concerned with a change in law provision of a PPA. In holding that change in Indonesian law would not qualify as a change in law under the guidelines read with the PPAs, this Court referred to Clause 13.2 as follows:

“57 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 ”

There can be no doubt from this judgment that the restitutionary principle contained in Clause 13.2 must always be kept in mind even when compensation for increase/decrease in cost is determined by the CERC.

17. In this view of the matter, the appeals are accordingly dismissed.

Judgment Referred.

¹(2011) 15 SCC 0580

²(2003) 8 SCC 0648

³(2017) 1 SCC 0487

⁴(2017) 14 SCC 0080