

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

**APPEAL NO.209 OF 2019 &
IA NO.1218 OF 2019**

Dated: **04.07.2022**

Present: **Hon'ble Mr. Justice R.K. Gauba, Officiating Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member**

In the matter of:

INLAND POWER LTD.

[Through Director –Finance & Corporate Affairs]

**30, Chowringhee Lane,
Flat No.12, 3rd Floor,
Kolkata – 700016**

.... **Appellant(s)**

Versus

**1. JHARKHAND STATE ELECTRICITY
REGULATORY COMMISSION & ANR.**

[Through its Secretary]

**2nd Floor, Rajendra Jawan Bhawan-cum-Sainik
Bazar, Main Road, Ranchi-834001**

Email: info@jserc.org, azmi.farrukh@gmail.com

2. JHARKHAND BIJLI VITRAN NIGAM LIMITED

[Through its Chairman & Managing Director]

**Engineers' Building,
Dhurwa, Ranchi – 834004**

Email: mdvitran@gmail.com, aabhasparimal@gmail.com

.... **Respondent(s)**

Counsel for the Appellant(s) : Mr. Anand K. Ganesan
Ms. Ritu Apurva

Counsel for the Respondent(s) : Mr. Farrukh Rasheed for R-1
Mr. Anup Kumar
Mr. Kumar Anurag Singh
Ms. Ekta Bharati
Ms. Shruti Singh for R-2

JUDGMENT (Oral)

PER HON'BLE MR. JUSTICE R.K. GAUBA, OFFICIATING CHAIRPERSON

1. The Appellant is an Independent Power Producer (IPP) having setup a coal based thermal power station, one of its units having a generation

capacity of 63 MW (unit-1) located in the State of Jharkhand. It had entered into a Memorandum of Understanding (MoU) with the Government of State of Jharkhand and pursuant thereto entered into a Power Purchase Agreement (PPA) on 23.02.2012 with erstwhile Jharkhand State Electricity Board, the second respondent Jharkhand Bijli Vitran Nigam Limited (distribution licensee) being the successor in interest of Jharkhand State Electricity Board. It may be mentioned here itself that subsequently the parties i.e. the appellant and the distribution licensee entered into a supplementary PPA on 22.04.2013. In terms of the MoU, the appellant was to provide 25% of its capacity to the distribution licensee out of which 12% was to be paid for at variable cost, the remainder 13% to be procured by the distribution licensee at Power Purchase Cost determined by the appropriate Regulatory Commission. The initial intendment of purchase of 25% of 63 MW capacity would mean the procurement of 15.75 MW only, out of which 7.56 MW would constitute 12% payable at variable cost. By the time the PPA was executed, the procuring entity (second respondent) had persuaded the generator (the appellant) to supply 35 MW of its total capacity of 63 MW. Subsequently, by the supplementary PPA, it had been agreed between the parties that the second respondent would procure the entire capacity of 63 MW.

2. The second respondent approached the first respondent i.e. Jharkhand State Electricity Regulatory Commission (the State Commission) by case no.04/2018 invoking section 86(1)(b) of the Electricity Act, 2003, seeking approval of the PPA and the supplementary PPA for procurement of the entire quantum of the power of said first unit of 63 MW. It is the said petition which was considered by the State Commission and decided upon by order dated 28.05.2019 holding, *inter alia*, that the approval of the PPA was a mere formality, reference being made in this context to certain earlier

proceedings, which had been taken out in context of certain facts which we shall note in due course, right up to the Hon'ble Supreme Court of India. While granting approval to the PPA, the State Commission, however, has held that the tariff applicable for the entire quantum of power generated for the first unit of the appellant will be same as of the levelized tariff of the principal PPA i.e. weighted average of 12% of power procured at variable cost only and 13% power procured at the tariff approved by the State Commission. It is this observation and consequent direction which is assailed by the appeal at hand.

3. At this stage, we would like to take note of certain relevant parts of the MoU, PPA, and supplementary PPA, which bind the parties with certain financial terms and obligations.

4. In the MoU, the relevant terms on the subject matter of sale of power and the tariff payable there against are governed by the following clauses:

“10.0 SALE OF POWER:

10.1 The Government of Jharkhand or distribution licensees authorized by it will have the first right of claim on purchase up to 25% of power delivered to the system by the proposed Power Plant under terms of a Power Purchase Agreement to be mutually agreed on the basis of existing laws and regulations in force and the tariff for such power purchase will be determined by the appropriate Regulatory Commission.

10.2 Out of 25% under first right of refusal to the State, the rate of 13% share will be as approved by JSERC, and 12% share will be on variable cost by M/s Inland Power Limited.

10.3 M/s Inland Power Limited will have the right to sell the balance power outside the State of Jharkhand.

10.4 In case the Government of Jharkhand or its designated licensee is unable to honor the terms of the Power Purchase Agreement above mentioned, then M/s Inland Power Limited will have the right to sell the entire power outside the State of Jharkhand.

10.5 *In order to support the industrial development in the State of Jharkhand, M/s Inland Power Limited can supply power directly to the bulk consumers in the State of Jharkhand at mutually agreed tariff and terms and conditions within the frame work of the applicable Laws and Regulations.*

(a) *The state will get 12% of the total power generated at variable cost by the M/s Inland Power Limited operating within its territory.*

(b) *An appropriate legal mechanism to allow generating States to levy duty on power produced so that there is equitable distribution of resources generated between consuming and generating States.*

Therefore, as and when the Government of Jharkhand succeed in levying such duty as per item (b) above or obtain concession as per item (a) above, such duties or concessions would be applicable to this power plant of M/s Inland Power Limited.”

5. The PPA concededly was executed in pursuance of the MoU, this having been clarified and the understanding as to the tariff payable there against being set out in the recitals “D” and “F” which read as under:

“D. Pursuant to the aforesaid MoU, the Buyer is desirous of purchasing the Contracted Capacity (35MW from 1st unit i.e. 63 MW), RTC on a long term basis from Seller and Seller is desirous of selling the Contract Capacity (35MW from 1st unit i.e. 63 MW), from the Project RTC on a long term basis of Buyer. The Parties have agreed to sign this Agreement setting out the terms and conditions for sale and supply of Contracted Capacity (35MW from 1st unit i.e. 63 MW) by the Seller to the Buyer.

...

F. The generation Tariff of Seller which is payable by the Buyer shall be as determined by Jharkhand State Electricity Regulatory Commission (JSERC). Out of 25% of 63 MW i.e. 15.75 MW, Board will purchase 12% of 63 MW i.e. 7.56 MW at variable cost only and balance at the tariff determined by Hon’ble JSERC.”

6. The supplementary PPA whereby the appellant had agreed to allocate the entire capacity for the purposes of second respondent included the following declaration:

“WHEREAS the Buyer “Jharkhand State Electricity Board” and the Seller “Inland Power Ltd” are mutually agreed for the purchase and sale of entire quantity of power to be generated from the 1st unit of 63 MW inclusive of quantity mentioned in earlier Principal PPA.

WHEREAS parties are mutually agreed that all the terms and condition will remain the same as on the Principal PPA.”

7. The appellant had approached the State Commission for determination of generation tariff and also for annual revenue requirements for financial year FY 2013-14 to FY 2015-16. This concededly led to MYT order being passed on 27.05.2014. A similar exercise was later done for FY 2016-17 to FY 2020-21 at which stage the Commission also undertook the truing up of ARR for FY 2014-15 and ARR for FY 2015-16, the relevant order passed in which proceedings was rendered on 16.05.2017. Admittedly, in both the said orders, the State Commission had determined tariff for 12% of total net capacity separately from the tariff for the remainder 88% of the total net capacity. The second respondent had challenged the tariff order dated 27.05.2014 by appeal (DFR No.3024 of 2016) which was dismissed, on account of inordinate unexplained delay, by judgment dated 04.07.2017 of this Tribunal, no challenge there against having been taken out before Hon’ble Supreme Court. No appeal was filed by the licensee on the tariff determination separately for 12% capacity as against the remainder 88% capacity by subsequent order dated 16.05.2017. Both the said tariff orders thus have attained finality.

8. It appears that the second respondent, having entered into the supplementary PPA whereby it had agreed to procure the entire capacity generated by the appellant found it economically unviable and attempted to back out by reducing its requirement to the initial 15.75 MW only and also

committed defaults in payments at the tariff determined by the State Commission. The resultant dispute was taken by the appellant to the State Commission by Case No.26 of 2014 which was decided by order dated 29.07.2015, the second respondent having been thereby directed to make payment of pending bill at the tariff determined by the State Commission within the period specified and in default levying interest, also imposing cost of Rs.50,000/-. Noticeably the issues which were raised before the State Commission included the entitlement of the appellant to claim the rate of Rs.4.36 per unit for the energy supplied under the PPA and also in terms of the tariff determined by the State Commission as indeed the entitlement of the second respondent to unilaterally reduce the quantum of power.

9. The contentions of the second respondent having been rejected by the State Commission by its decision dated 29.07.2015, the appeal no. 296 of 2016 was brought before this Tribunal. The contentions of the second respondent in appeal were rejected by judgment dated 23.12.2016, the relevant part thereof reading thus:-

"The Appellants have belatedly after the impugned order was passed on 29/07/2015, in August 2015, filed appeal challenging the tariff order dated 27/05/2014. If that appeal is decided in favour of the Appellants, legal consequences will follow. The Appellants will get necessary adjustment in the bills. The Appellants, however, cannot at this stage, deviate from the determined tariff. Impugned order merely directs the Appellants to pay as per the tariff order dated 27/05/2014. That cannot be interfered with. As per Clause 8.4.1.1 of the PPA, the Appellants had to provide to the seller for payment of its monthly bill, a monthly unconditional, revolving and irrevocable stand-by letter of credit and maintain the same in terms of the PPA. The Appellants have not done so. Therefore, the impugned order directs the Appellants to open a letter of credit in favour of Respondent No.1 and operate and maintain the same in terms of the PPA. This order cannot be called illegal. No interference is necessary with it".

10. It may be mentioned here that the second respondent took out second appeal - Civil Appeal No.11105 of 2017 (Diary No. 6347 of 2017) before Hon'ble Supreme Court which was dismissed, it having been found devoid of merit, by order dated 04.08.2017.

11. The core reasons for taking the impugned view, as set out in the order under challenge, read thus:-

“24.

...

On closer examination of the MoU dated 18.10.2011 and the Principal PPA dated 23.02.2012, it transpires that the petitioner-JBVNL has to procure 25% power from IPL under first right of refusal at the levelised tariff. Levelised tariff is the weighted average rate of 12% power procured at the variable cost only and 13% power procured at the rate approved/determined by JSERC i.e. variable cost plus fixed cost. Further, the supplementary PPA provides that the terms and conditions of the supplementary PPA are same as on the Principal PPA and also the supplementary PPA will be treated as a part of the Principal PPA.

25. Hence, it derives from the above observations that the tariff applicable for supplementary PPA, which is for entire quantity of power to be generated from the 1st unit of 63 MW will be same as of the levelised tariff of the Principal PPA i.e. weighted average of 12% power procured at variable cost only and 13% power procured at the tariff approved by the JSERC.”

12. The appellant is aggrieved by the impugned order submitting that the PPA having been approved, as was the main prayer before the State Commission, the understanding of the relevant clauses of MoU, PPA and supplementary PPA having been same between the parties throughout, no such contentions having been urged by the procurer, the financial terms acted upon and having become the subject matter of previous round of litigation, being based on the tariff determined by the State Commission, it

was improper for the State Commission to *suo motu* tinker with the effect thereof by treating the relevant clause where under 12% of the power procured is payable at variable cost only as ‘weighted average cost of 12% power’. The respondents, on the other hand, seek to defend the impugned decision, *inter alia*, referring to the view taken by the State Commission vis-à-vis similar contract of another IPP i.e *Adhunik Power & Natural Resources* (AP&RL) wherein payment of 12% procured by the State Distribution licensee has been regulated at variable cost, the remainder 13% at the tariff determined by the Commission.

13. In our considered view, the contractual terms of a third party i.e. AP&RL cannot determine or regulate the relationship between the parties herein. In our considered view, the approach of the State Commission has been wholly misdirected it having overlooked and glossed over Clause 10.5(a), quoted earlier, which leaves no room for doubt that the procuring agency is entitled to get only 12 % of the total power generated ‘at variable cost’, it being impermissible to translate it into 48% of the total power generated as is the result of the view taken by the State Commission. The view taken by the State Commission amounts to re-writing the contract between the parties, which is impermissible.

14. In the foregoing facts and circumstances, we are unable to uphold the impugned order to the extent the Commission has introduced formula of ‘weighted average of 12% power procured’. The financial terms under the PPA/supplementary PPA shall be governed by the tariff orders already passed by the State Commission as referred to earlier.

15. We are informed at this stage by the counsel for the second respondent that certain subsequent orders of the State Commission would also have a bearing on the financial obligations, the same being presently subject matter of appeal nos. 125 of 2020 and 411 of 2019 which are pending on the file of this Tribunal. We clarify that this judgment will be without prejudice to the contentions of the parties vis-à-vis such subsequent orders of the State Commission.

16. The appeal and the pending application(s) are disposed of in above terms.

(Sandesh Kumar Sharma)
Technical Member

pr/tp

(Justice R.K. Gauba)
Officiating Chairperson