



ARUNACHAL PRADESH STATE ELECTRICITY REGULATORY COMMISSION
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No. F. APSERC/RA-8/III/2023-24/155

BEFORE THE

ARUNACHAL PRADESH STATE ELECTRICITY REGULATORY COMMISSION,
ITANAGAR

PETITION NO: MP-02 of 2024.

Coram:

Hon'ble Chairperson, Mr. R. K. Joshi

Hon'ble Member (Law), Mr. Nich Rika

Appearance:

1. Er. Duyu Tacho, Chief Engineer (Commercial) Department of Power
2. Er. Zomba Nasho, EE (Commercial), Department of Power.
3. Er. Rajesh Kumar Sharma, JE (Commercial), Department of Power. **(For Petitioner)**
4. Ms. Swapna Seshadri, Advocate
5. Ms. Kriti Soni, Advocate.
6. Mr. Adivi Leela Nagaraju.
7. Mr. Dorjee Wangdi Thungon. **(For Respondent)**

In the matter of:

Petition for first amendment of PPA between M/s Devi Energies Pvt Ltd and Department of Power,
Government of Arunachal Pradesh .

In the matter of:

Department of Power, Arunachal Pradesh, Vidyut Bhawan,

Itanagar, Arunachal Pradesh (DOPAP)

... Petitioner

Versus

M/s Devi Energies Pvt Ltd, E-351, Rupa Town, P.O Rupa, P.S Rupa,
West Kameng District, Arunachal Pradesh. (DEPL)

... Respondent.

DATE OF ORDER: 13th June, 2024

This petition has come up for hearing finally on **8.05.2024**. After carefully considering the materials available on record and after hearing the arguments from both the parties, the commission passed the following:

ORDER

1. Petition No. MP-02 of 2024 has been filed by the Petitioner, Department of Power, Arunachal Pradesh (herein referred to as "DOPAP"). The petitioner has filed this instant petition for first Amendment of Power Purchase Agreement (herein referred to as "PPA") entered with the Respondent "M/s Devi Energies Pvt Ltd". (herein referred to as "DEPL"). The petitioner seeks following reliefs:
 - a. To admit this petition for first Amendment of PPA between M/s Devi Energies Pvt. Ltd., and Department of Power, Govt. of Arunachal Pradesh.
 - b. To grant any other relief as the Hon'ble Commission may consider appropriate.
 - c. To pass any other as the Hon'ble Commission may deem fit and appropriate under the circumstances of the case and in the interest of justice.
 - d. The petitioner craves leave of the Hon'ble Commission to allow further submissions, addition and alterations to this petition as may be necessary from time to time.
2. The respondent, DEPL on 21.03.2024 had submitted affidavit in reply to the petition for unilateral amendment of PPA filed by the petitioner.
3. The petitioner has not made any prayer or sought liberty to file any rejoinder in reply of the respondent.

BRIEF BACK GROUND OF THE CASE:

4. On 17.03.2011 a Memorandum of Agreement (MOA) was signed between the Government of Arunachal Pradesh and M/s Devi Energies Pvt Ltd for the development of the Dikshi Hydro Electric project 24 MW in West Kameng District, Arunachal Pradesh in accordance with the State Small Hydro Power Policy, 2007. As per provision of Section 5.1 of Memorandum of Agreement (MoA) signed between State Government and the respondent, Power Purchase Agreement (PPA) was entered on 16.10.2018 between petitioner and the respondent for purchasing power generated by Dikshi Hydro Electric Project 24 MW. The commission in exercise of the powers vested in section 62 (1) (a) read with section 62 (3) and section 64 (3) (a) of the Electricity Act, 2003 and Arunachal Pradesh State Regulatory Commission (APSERC) RE Regulations, 2018 had determined and approved the Tariff in the petition No. TP- 06 of 2018. The plant achieved Commercial Operation Date (COD) on 19.09.2019 and since the COD, electricity is being supplied to petitioner, DOPAP. That after a period of more than two years since the PPA was entered by both petitioner and the respondent, the petitioner on 18.03.2021 by letter correspondence has raised the issue of modification and amendment to the PPA by inserting the provisions of the Small Hydro Power Policy, 2007 –more particularly with Clauses 17 (1) and 28 (6) of the said policy.

SUBMISSIONS OF THE PETITIONER:

5. The petitioner submitted that on review of the Power Purchase Agreement (PPA) signed on 16.10.2018, the provision of section 17 (1) and Section 28 (6) of the Small Hydro Power Policy, 2007 has not been incorporate in the PPA.

Section 17 (1) which states

"the developer under IPP Category can enter into contact to sell power to the State Government through a PPA to be Signed within 6 months after signing of MOA at a tariff 10 paise lower than the tariff as determined by the CERC/SERC or the State Government as the case may be for sale to outside the State. The point of sale of power shall be at the place of injection to the State grid, unless such point of sale is expressly incorporated in the PPA. The Metering point shall be located at the point of sale defined in the PPA under this policy."

The provision of section 28 (6) of the Small Hydro Power Policy, 2007 which states

"The developer shall pay an amount worked out at the rate of 1 (one) paise per unit power sold during every financial to the State Government for raising local area development fund affected by the project (s)."

6. The petitioner in their submission has relied on Article 4.3 of MOA of 17.05.2011 which states

"The company agreed to comply with the Small Hydro Power Policy of the State Govt. as would be in force at the relevant point of time, during the course of implementation and subsequent operation and maintenance of the Hydel Station."
7. The petitioner further made submissions that matter was taken up for consideration before the State Government for inclusion of relevant clauses to be amended in the PPA. Draft amended PPA was approved by the Department of Law and Finance, Government of Arunachal Pradesh. On 18.03.2021 a letter correspondence along with documents of amended PPA was sent to the respondent DEPL. The approved amended PPA till date has not been accepted and signed by the respondent DEPL.
8. Thus, petitioner pray that the present petition may be considered and the PPA be amended as to the provision of section 17 (1) and Section 28 (6) of the Small Hydro Power Policy, 2007.

SUBMISSIONS OF THE RESPONDENT:

9. The respondent, in its affidavit in reply has vehemently challenged the unilateral amendment sought to be made to the PPA both on maintainability as well as on merits. In the preliminary issues, the respondent stated that the petition is not maintainable on two counts, *firstly* from

the reading of the petition, it is not clear as to under which provisions of Electricity Act, 2003 the petition has been filed. *Second*, there is no power in this Hon'ble Commission to force or amend a contract validly entered into between a generating company and a distribution licensee.

10. The learned counsel for the respondent submits that the Hon'ble Commission, being a statutory tribunal is a court of limited jurisdictions which operate strictly under the contours of the Electricity Act, 2003 and cannot exercise its powers beyond the terms of the Act. In support, the learned counsel would carve reference to the judgment by Hon'ble Appellate Tribunal for Electricity in **Mr. Gagan Narang v. Delhi Electricity Regulatory Commission in DFR 254 and 247 of 2023** and the relevant paragraphs are reproduced herein below:

"43. The State Commission is a creation of the Electricity Act under Section 82(1), and a body corporate under Section 82(2) thereof. It exercises adjudicatory functions, and its tariff orders are quasi-judicial in nature (**BSES Rajdhani Power Ltd vs DERC: (Judgment of the Supreme Court in Civil Appeal No.4324 of 2015 dated 18.10.2022)**). Such tribunals exercise limited jurisdiction (**S.D. Joshi v. High Court of Bombay, (2011) 1 SCC 252**) strictly in terms of the Act by which they are governed. Every tribunal of limited jurisdiction is bound to determine whether the matter, in which it is asked to exercise its jurisdiction, comes within the limits of its special jurisdiction, and whether the jurisdiction of such tribunal is dependent on the existence of certain facts or circumstances. Its obvious duty is to see that these facts and circumstances exist to invest it with jurisdiction, and where a tribunal derives its jurisdiction from the statute that creates it, and that statute also defines the conditions under which the tribunal can function, it goes without saying that, before that tribunal assumes jurisdiction in a matter, it must be satisfied that the conditions requisite for its acquiring seisin of that matter have in fact arisen. (**Mohd. Hasnuddin v. State of Maharashtra, (1979) 2 SCC 572**).

44. The jurisdiction conferred on the Regulatory Commission, both Central and States, is by the Electricity Act, 2003, an Act of Parliament. Wherever jurisdiction is given to a court (or Tribunal) by an Act of Parliament, and such jurisdiction is only given upon certain specified terms contained in that Act, these terms must be complied with, in order to create and raise the jurisdiction for, if they be not complied with, the jurisdiction does not arise. (**Nusserwanjee Pestonjee v. Meer Mynodeen Khan [LR (1855) 6 MIA 134 (PC); Mohd. Hasnuddin v. State of Maharashtra, (1979) 2 SCC 572]**).

45. The State Regulatory Commission is a creation of the Electricity Act, and derives its powers from the express provisions of the said Act. The powers, which have not been expressly given thereby, cannot be exercised by it. (**Rajeev Hitendra Pathak v. Achyut Kashinath, (2011) 9 SCC 541**). Quasi-judicial tribunals function within the limits of its jurisdiction, and its powers are limited. Its area of jurisdiction is clearly defined. (**Union of India v. Paras Laminated (P) Ltd., (1990) 4 SCC 453 AIR 1991 SC 696**). An authority created by a statute must act under the Act and not outside it. As it is a creation of the statute it can only decide the dispute in terms of the provisions of the Act. (**K.S. Venkataraman & Co. v. State of Madras, AIR 1966 SC 1089; Mysore Breweries Lt. v. Commissioner of Income-Tax, (1987) 166 ITR 723 (KAR)**). The State Regulatory Commission can exercise jurisdiction only when the subject matter of adjudication falls within its competence, and the order that may be passed is within its authority, and not otherwise. (**Dakshin Haryana Bijli Vitaran Nigam Ltd. v. Princeton Park Condominium:2007 Aptel 764; BSES Rajdhani Power Limited v. Delhi Electricity Regulatory Commission, 2009 SCC online APTEL 52**).
48. This aspect can be examined from another angle also. The chief distinctions between superior and inferior courts are found in connection with jurisdiction. Prima facie, no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognizance of the particular court. An objection to the jurisdiction, of the superior courts of general jurisdiction, must show what other court has jurisdiction, so as to make it clear that exercise by the superior court of its general jurisdiction is unnecessary. This principle would squarely apply to Superior courts in India also. (**Halsbury's Laws of England (4th Edn., Vol. 10, para 713; M.M. Thomas v. State of Kerala, (2000) 1 SCC 666**)
49. Apart from the Supreme Court, the High Courts in India are also superior courts of record. They have inherent and plenary powers. Unless expressly or impliedly barred, and subject to the appellate or discretionary jurisdiction of the Supreme Court, the High Courts have unlimited jurisdiction, including the jurisdiction to determine their own powers. (**Naresh Shridhar Mirajkar :AIR 1967 SC 1; M.V. Elisabeth v. Harwan Investment & Trading (P) Ltd.(1993) Supp (2) SCC 433: AIR 1993 SC 1014; M.M. Thomas v. State of Kerala, (2000) 1**

SCC 666; Election Commission of India v. Ashok Kumar, (2000) 8 SCC 216; and T.D. Dayal v. Madupu Harinarayana, 2013 SCC Online AP 565).

50. While Superior Courts, like the Supreme Court and the High Courts, are courts of unlimited jurisdiction, the State Regulatory Commission, a creation of the Electricity Act, is a tribunal of limited jurisdiction i.e. its jurisdiction is limited to what has been specifically conferred on it by the provisions of the Electricity Act, the Rules and the Regulations made there under. Nothing is within the jurisdiction of an inferior court (or Tribunal such as the State Regulatory Commission) unless it is expressly shown on the face of the proceedings that the particular matter is within its cognizance. The test to determine the jurisdiction of a tribunal, created under a Statute, is whether the relevant Section of the said Enactment so provides, and not whether the said Section prohibits. Consequently, since Section 63 does not specifically provide for the MCD to file a petition seeking adoption of tariff, the DERC must be held to lack jurisdiction to entertain and adjudicate a petition filed by them."
11. The respondent's counsel submitted that only power of this Hon'ble Commission is to decide whether a PPA should be entered into by the Distribution Licensee exercising its power under Sections 86 (1) (b). However, once the PPA has been approved by the Hon'ble Commission under the Act, it is not open to either of the parties to approach this Hon'ble Commission to demand an amendment to the provision of the PPA unless the PPA stipulates so. Clause 24 of the PPA stipulates Amendment to the PPA and read as under:
- "Amendment "
- Any waiver, alteration, amendment or modification of this Agreement or any part hereof shall not be valid unless it is in writing, signed by both the parties.
12. Therefore, even under the terms of the PPA, amendment can be carried out only by mutual consent of parties. The present petition nowhere specifies the provision of the Act under which it is seeking an amendment and nor does the PPA provide that the amendment may be sought from this Hon'ble Commission unless agreed by parties. even otherwise, this Hon'ble Commission cannot create a contract or amend the same, the limited exception in law being through framing of Statutory Regulations. No unilateral amendments can be sought to be made by petitioner.
13. In further continuation of the submissions the counsel for the respondent contended that the Hon'ble Commission has no power to force the parties to amend the PPA. The respondent relies on **Haryana Power Purchase Centre v. Sasan Power Limited & Ors., 2023 SCC online**

SC577. Wherein it has upheld the above position and has specified that the Commission /Tribunal cannot rewrite the terms of the contract entered into between the parties even under changed circumstances.

The relevant portion of the decision reads as under:

"91. We are of the view that the Tribunal cannot indeed make a new bargain for the parties. The Tribunal cannot rewrite a contract solemnly entered into. It cannot ink a new agreement. Such residuary powers to act which varies the written contract cannot be located in the power to regulate. The power cannot, at any rate, be exercised in the teeth of express provisions of the contract.

(92). We notice this for the reason that the first respondent has a case that what is provided in Article 13.2(a) (since we are dealing with the case of alleged change in law during the construction period) does not do justice to the parties or that it is incapable of producing a fair result and therefore, the Tribunal would necessarily be clothed with power bearing in mind its regulatory nature. In a matter where the parties have entered into a contract with express provisions, we are unable to agree with the first respondent that the Tribunal would have power to disregard the express provisions of the contract on the score that as it turns out that with passage of time and even change in circumstances, it is found that the contract cannot be worked except at a loss for the contractor."

14. Thus, the respondent submitted on the above two counts alone; the petition is liable to be dismissed as not maintainable.

COMMISSION'S OBSERVATION AND FINDING:

15. Having gone through the pleadings and the submission made by petitioner, DOPAP and learned Counsel Ms. Swapna Seshadri for the respondent, DEPL. At this stage, the Commission feels it not necessary to go into the merits and claims of the parties, rather discuss and analyse the preliminary objections raised by the respondent on maintainability.
16. As per the records submitted by both the parties, the matter of amendment was under discussion between them since March 2021 and the petitioner had filed this petition in January 2024. The MoA was signed between State Government and Respondent on 17th March 2011 for development of a project of 24 MW. A Power Purchase Agreement (PPA) was signed between petitioner and Respondent on 16th October 2018. The plant achieved Commercial Operation Date (COD) on 19.09.2019 and since the COD, the electricity is being supplied to petitioner, DOPAP. The petitioner seeks amendments in the PPA by inserting the provisions of the Small Hydro Power Policy, 2007 as amended time to time – more particularly with Clauses

17 (1) and 28 (6) of the said policy. In this back drop it has become imperative and necessary for the petitioner to invoke jurisdiction of this Hon'ble Commission to issue appropriate orders as prayed for in the petition.

17. In the petition, petitioner prayed for the amendment of PPA but without referring to any relevant provision of the Electricity Act, 2003, under which it seek such amendment in the signed Power Purchase Agreement (PPA). As per Clause 24 of the PPA entered by the parties on 16.10.2018 any waiver, alteration, amendment or modification of the PPA or any part thereof shall not be valid unless it is in writing, signed by both the parties. The petition is silent about the relevant clauses of PPA for such proposed amendment too. The instant petition is silent and vague as to under what provision of the Act, the petitioner had filed present first amendment petition. It is rather bit confusing situation for the Commission to decide on the reliefs prayed by the present petitioner.

18. The Learned counsel for the respondent argued and raised preliminary objections and stated that the petition is not maintainable on two counts, *firstly* from the reading of the petition, it's not clear as to under which provisions of Electricity Act, 2003 the present petition has been filed. *Second*, there is no power in this Hon'ble Commission to force or amend a contract validly entered into between a generating company and a distribution licensee. In its support the learned counsel had placed emphasis and reliance on cited case Judgments:

(i) Mr. Gagan Narang v. Delhi Electricity Regulatory Commission in DFR 254 and 247 of 2023.

(ii) Haryana Power Purchase Centre v. Sasan Power Limited & Ors ., 2023 SCC online SC577.

19. Taking into consideration that The State Regulatory Commission is a creation of the Electricity Act, and derives its powers from the express provisions of the said Act. The powers, which have not been expressly given thereby, cannot be exercised by. The Commission can exercise jurisdiction only when the subject matter of adjudication falls within its competence, and the order that may be passed is within its authority, and not otherwise. The petitioner has also not specified any such clause of EA-2003, under which the relief for amendment is sought from the Commission.

20. Based on the above discussions and findings, this Commission holds that this present petition is therefore not maintainable in absence of any specific provision of EA-2003 or the PPA signed; to note further that we have not expressed any views on the merits raised in the petition.

21. We notice that the PPA has in-built mechanism for operation of PPA, Resolution of disputes, Arbitration, Default and Termination, Amendment etc.

21. We notice that the PPA has in-built mechanism for operation of PPA, Resolution of disputes, Arbitration, Default and Termination, Amendment etc.
22. Accordingly, the petitioner is at liberty to seek redressal of its grievances before the appropriate forum on appropriate provisions.
23. In the Interest of Justice, the present petitioner is also at liberty to approach the Commission if so, by satisfying the provisions of the Electricity Act.
24. The petition is dismissed accordingly in the terms of the observations and directions contained in para 15-23 cumulative of this order.
25. Ordered accordingly.

Sd/-
(Nich Rika)
Member (Law)

Sd/-
(R. K. Joshi)
Chairperson