

Reportable

**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION**

Civil Appeal Nos 9218-9219 of 2018

Madhya Pradesh Power Management Co. Ltd. & Anr.

Appellant(s)

Versus

M/s Dhar Wind Power Projects Pvt. Ltd. & Ors.

Respondent(s)

WITH

Civil Appeal Nos 9220-9221 of 2018

Civil Appeal No 9222 of 2018

Civil Appeal No 9223 of 2018

J U D G M E N T

Dr Dhananjaya Y Chandrachud, J

These appeals arise from a judgment and order dated 21 September 2017 of the High Court of Madhya Pradesh at its Bench at Indore and an order in review dated 29 January 2018. In the companion appeals, the correctness of an interim order of the High Court dated 15 May 2018 in a subsequent petition under Article 226 of the Constitution is in question.

The Government of Madhya Pradesh issued a notification on 30 January 2012 laying down a policy to govern the generation of wind energy in the State. The policy was amended on 21 February 2013. The policy, which was known as the Wind Power Project Policy 2012, stipulated *inter alia* that the purchase/sale of power would be administered and governed by the Madhya Pradesh Electricity Regulatory Commission¹.

¹ “State Commission”

On 26 March 2013, the State Commission, in exercise of power under Sections 61 and 86(1)(e) of the Electricity Act 2003² issued a Tariff Order³ for procurement of power from Wind Electricity Generators⁴. Para 4.1 of the Tariff Order stipulated that it would be applicable to all new wind electricity generation projects commissioned on or after 1 April 2013 for sale of electricity to distribution licensees within the State of Madhya Pradesh. Para 5 provided for the “tariff review period/control period”:

“5. TARIFF REVIEW PERIOD/CONTROL PERIOD

5.1 The control period to which this order shall apply shall start from 01.04.2013 and will end on 31.03.2016 (i.e. end of FY 2015-16). The tariff decided in this order shall apply to all projects which come up during the above mentioned control period and the tariff determined shall remain valid for the project life of 25 years.”

The tariff prescribed by the Order was (i) to apply to all projects which came up during the period from 1 April 2013 till 31 March 2016; and (ii) to remain valid for 25 years.

Para 11 of the Tariff Order provided for the determination of tariff. Insofar as is material, it provided that the State Commission had set a tariff at the rate of Rs 5.92 per unit of generation from new wind energy projects to be commissioned after the issuance of the order for the project life of 25 years. Para 11.2 is extracted below:

“11.2 Considering the above parameters, the Commission sets the levelized tariff @ Rs. 5.92 per unit for generation from new wind energy projects to be commissioned after issue of this order for its project life of 25 years.”

2 “Act”

3 SMP-12/2013

4 “WEG”

Under the terms of Para 12.4, developers were permitted to execute agreements with the Madhya Pradesh Power Management Company Limited⁵ before commissioning plants for the exclusive sale of electricity for a period of 25 years and the commissioning certificate was to form a part of the agreement.

Para 12.30 provided thus:

“12.30 All existing projects i.e. projects commissioned before 01.04.2013 shall continue to be governed by the terms and conditions applicable at the time of their commissioning.”

On 10 November 2014, the first respondent applied for permission to set up a 12 MW project in Dhar District in pursuance of the Wind Power Project Policy 2012. The project was registered with the nodal agency. The registered capacity was subsequently enhanced to 15 MW comprising of ten wind turbine generators each of 1.5 MW. Final project approval was received from the competent agency of the State government for setting up 12 MWs on private land on 2 March 2016 and 3 MWs on revenue land on 10 March 2016. The first respondent acted on the basis of the project approval, completed construction and made the project ready for commissioning.

On 17 March 2016, the State Commission issued a fresh Tariff Order. Para 4 which dealt with applicability of the Order and Para 5 which specified the tariff review period/control period were in the following terms:

“4. APPLICABILITY OF THE ORDER

4.1 This tariff Order will be applicable to all new wind electric generation projects in the State of Madhya Pradesh commissioned at 00.00 hrs. on 01.04.2016 or thereafter for sale of electricity to the distribution licensees within the State of

⁵ “first appellant”

Madhya Pradesh. This order also specifies the terms & conditions (other than tariff) for captive user or for sale to third party.

4.2 It will be mandatory for the distribution licensees to submit to the Commission, quarterly progress reports on the capacity addition, purchase of energy and other relevant details in respect of wind electric generation projects commissioned in their licensed area, and also post them on their websites on a regular basis. The SLDC is also required to submit through e-mail/fax immediately, a list of WEGs commissioned during the month of March 2016 i.e. from 00.00 hrs. of 01.03.2016 to 24.00 hrs. of 31.03.2016.

5. TARIFF REVIEW PERIOD/CONTROL PERIOD

5.1 The control period to which this order shall apply shall start from 01.04.2016 and will end on 31.03.2019 (i.e. end of FY 2018-19). The tariff decided in this order shall apply to all projects which come up during the above mentioned control period and the tariff determined shall remain valid for the project life of 25 years."

Para 11 of the new Tariff Order provided for determination of the tariff.

The tariff which was fixed under the earlier tariff order at Rs 5.92 per unit was reduced to Rs 4.78 per unit:

"11.2 Considering the above parameters, the Commission sets the levelized tariff @ Rs. 4.78 per unit for generation from new wind energy projects to be commissioned after issue of this order for its project life of 25 years."

Para 12.29 provided that:

12.29 All existing projects i.e. projects commissioned before 00.00 hrs. of 01.04.2016 shall continue to be governed by the terms and conditions applicable at the time of their commissioning.

On 18 March 2016, a communication was addressed by the first appellant to distribution licensees and generators stating that:

Subject :- Issue of commissioning certificate for Renewable Energy Projects.

Procurement of Renewable Energy from Non-Solar RE projects, is being done by MPPMCL at preferential tariff till the issuance of bidding guidelines by Central Govt. Control period of most of the RE tariffs is being completed by 31.03.2016 and determination of the tariff for next control period are under

process. Looking to the financial year target and change of tariff, most of RE generators are trying to commission their projects on or before 31.03.2016. Tariff for the RE capacity commissioned on or after 01.04.2016 shall be governed by the tariff to be determined by MPERC. Therefore, it would be appropriate that while issuing commissioning certificate for these projects (especially wind based RE projects), status of actual capacity successfully injected power into the grid should be properly checked before issuing of commissioning certificate for the project.

In view of above, a format containing the commissioning details to establish the actual injection of power into the grid by particular WTG/Unit has been achieved, is enclosed. It is requested that concerning field officers may please be instructed to provide required information in the format and submit the same with commissioning certificate for the wind projects. Commissioning certificate for other Non-Solar RE category should also be prepared in the same line with the meter reading details to establish successful power injection into the grid by the RE plants.

It may please be noted that the commissioned capacity up to 31st March 2016 and after 31st March 2016 will have different tariff and will be fixed for entire plant life. Any dispute regarding commissioned capacity would yield considerable financial implications. Therefore, to avoid any controversy, commissioning certificate should be issued with due diligence and responsibility."

A format for the commissioning of wind power projects was annexed to the letter.

Essentially, the letter took notice of the fact that since the tariff was to change for projects which were commissioned on or after 1 April 2016, most generators of renewable energy were trying to commission their projects before 31 March 2016 to get the benefit of the higher tariff under the earlier Tariff Order. Hence, it was specified that the "status of actual capacity successfully injected power into the grid" should be verified before issuance of the certificate of commissioning.

According to the appellants, the then Superintending Engineer (O&M), Madhya Pradesh Paschim Kshetra Vidyut Vitran Company Limited, which is the concerned distribution licensee, issued a certificate to the first

respondent on 31 March 2016 stating that as of the date of the certificate, the project had been commissioned. The appellants have sought to dispute the certificate on the ground that the commissioning certificate was not in accordance with the format attached with the guidelines dated 18 March 2016, according to which the actual injection of power into the grid was the relevant criterion.

On 1 April 2016, the first respondent addressed a letter to the first appellant seeking the execution of a Power Purchase Agreement⁶ on the basis that it commissioned its project on 31 March 2016. The appellants dispute the factual contention that the project was commissioned on 31 March 2016 and submit that the data provided by the State Load Despatch Centre⁷, which maintains accounts of energy transmission to the grid, shows that the injection of power into the grid took place for the first time on 1 April 2016. The SLDC was requested to confirm the status of power injected into the grid in respect of the project of the first respondent on 2 April 2016. The data furnished by SLDC and its report for active power readings from 31 March 2016 to 2 April 2016 sets out time blocks during which power flowed into the grid. The data which has been placed on the record indicates the injection of three units in Block 1 as on 1 April 2016 and, thereafter, injection commenced with Block 8 on 2 April 2016, going up to Block 16. Thereafter, the data indicates that there was an injection of power into the grid during the course of several blocks on 2 April 2016. According to the appellants, on the basis of the SLDC data, power was injected into the grid on or from 1 April 2016 and not before. In

6 “PPA”

7 “SLDC”

consequence, the first respondent was not entitled to the benefit of the unit rate of Rs 5.92 fixed under the earlier Tariff Order.

On 30 April 2016, the first appellant informed the first respondent that since its project had not been commissioned before 31 March 2016, it would not enter into a PPA under the earlier Tariff Order dated 26 March 2013 under which the unit price was fixed at Rs 5.92. The letter, however, indicated that if the first respondent signified its consent by 30 May 2016, the tariff would be governed by the new Tariff Order dated 17 March 2016 for procurement of power from WEGs. On 1 February 2017, the first appellant informed the first respondent that if it did not enter into a PPA under the subsequent Tariff Order dated 17 March 2016, which fixed the unit price for power at Rs 4.78, it would not enter into any PPA with the first respondent nor allow injection of power into the grid.

The first respondent filed a writ petition under Article 226 of the Constitution before the High Court of Madhya Pradesh in order to challenge the letters dated 30 April 2016 and 1 February 2017. By a judgment and order dated 21 September 2017, the High Court allowed the writ petition and set aside the letters of the first appellant dated 30 April 2016 and 1 February 2017 and directed the first appellant to take appropriate steps in accordance with the Tariff Order dated 26 March 2013. In other words, by and as a result of the directions of the High Court, the first appellant was required to enter into a PPA with the first respondent for the purchase of electricity at the rate of Rs 5.92 per unit.

After the decision of the High Court, the appellant revoked the certificate of commissioning dated 31 March 2016.

A review petition was filed before the High Court which was dismissed on 29 January 2018.

The revocation of the commissioning certificate gave rise to the institution of the second set of writ petitions in the High Court in which, by an interim order dated 15 May 2018, the revocation has been stayed. That has given rise to two appeals before this Court.

Appearing on behalf of the appellants, Mr. Nitin Gaur, learned counsel submitted that:

- (i) The crucial provision for the application of the Tariff Order which came into force on 17 March 2016 is that it would apply to all new wind electric generation projects commissioned on or after 00.00 hrs on 1 April 2016;
- (ii) The appellants had, by the guidelines dated 18 March 2016, required the submission of data in the prescribed format to indicate the actual injection of power into the grid so as to furnish an objective basis for determining as to whether the project had been commissioned before or after the cut-off prescribed;
- (iii) As a result of the data which was obtained from the SLDC, it has emerged that the actual injection of power into the grid took place on 1 April 2016;
- (iv) In consequence, the first appellant offered to the first respondent that it was ready and willing to execute a PPA in terms of the new Tariff Order dated 17 March 2016 which was applicable to projects which had been commissioned on or after 1 April 2016;

- (v) The first respondent failed to take the benefit of the offer which was made by the first appellant and instead pursued its writ petition before the High Court;
- (vi) The High Court has erred in relying on the commissioning certificate issued by the Superintending Engineer, ignoring that the certificate was not in accordance with the format in which data was required by the first appellant for the purpose of establishing the actual commissioning of the project before 31 March 2016;
- (vii) As a result of the subsequent developments, the first appellant is now bound by the guidelines which have been issued by the State of Madhya Pradesh on 1 August 2014. Moreover, under the guidelines formulated by the Union Ministry of Power in the Government of India on 8 December 2017, the first appellant is required to pursue a competitive bidding process for the purpose of entering into a PPA;
- (viii) As a result of the PPAs which have been entered into by the first appellant following the competitive bidding process, it has been able to secure electric power at cheaper rates ranging between Rs 2.30 to Rs 2.59 per unit; and
- (ix) The first appellant would now be willing to enter into a PPA on the basis of competitive bidding and having due regard to the interests of the consumers, it would be appropriate if the first respondent is directed to do so.

On the other hand, it has been urged on behalf of the first respondent in the appeals by Mr Vivek K Tankha and Mr Gopal Sankaranarayanan, learned senior counsel, that:

- (i) Under the terms of the earlier Tariff Order which held the field for the period 2013-16, a rate of Rs 5.92 per unit was prescribed for all new wind generating units, which had been commissioned until 31 March 2016;
- (ii) The rate of Rs 5.92 per unit was to remain frozen for a life cycle of 25 years;
- (iii) In the present case, in terms of the Tariff Order, which referred to the successful commissioning of the project, the first respondent commissioned its project on 31 March 2016 as evidenced by the certificate issued by the Superintending Engineer;
- (iv) The High Court has not erred in directing the appellants to act on the basis of the certificate of commissioning and in staying the revocation which was issued only on 17 November 2017 after the writ petition was decided;
- (v) In the alternative, and without prejudice to the above submissions, in any event, there is no justification on the part of the first appellant not to enter into a PPA with the first respondent on the basis of the Tariff Order which was notified on 17 March 2016 for the control period 2016-19;
- (vi) The notification of the Union of India dated 8 December 2017 has no application since it applies to projects having an individual size of 5 MW and above at one site with a minimum bid capacity of 25 MW for intra-State projects.

- (vii) The revocation of the commissioning certificate was a unilateral act of the first appellant without allowing an opportunity of being heard to the first respondent and no show cause notice was issued.

The Tariff Order of March 2013 stipulated that it would be applicable to all new wind electric generation projects which were commissioned on or after 1 April 2013 for the sale of electricity to distribution licensees in the State. The control period of the Tariff Order commenced on 1 April 2013 and would end on 31 March 2016. The Tariff Order fixed a levelized tariff of Rs 5.92 per unit for new wind energy projects to be commissioned after the issuance of the Order for a project life of 25 years. Para 12.30 provided that all existing projects which were commissioned before 1 April 2013 would be governed by the terms and conditions applicable at the time of commissioning. Hence, the crucial ingredient in determining the tariff was the actual date on which the project was commissioned.

The Tariff Order of 17 March 2016 which replaced the earlier Tariff Order applied to all new wind electric generation projects which were commissioned at 00.00 hrs on 1 April 2016 or thereafter. The SLDC was required by Para 4.2 of the Tariff Order to submit a list of WEGs commissioned during the month of March 2016 from 00.00 hrs of 1 March 2016 to 24.00 hrs of 31 March 2016. This data was sought in order to provide an objective basis of determining whether a project had been commissioned before the new Tariff Order became applicable to projects which were commissioned with effect from 1 April 2016.

In line with the above provisions, the guidelines that were issued by

the first appellant on 18 March 2016 provided a format for the issuance of commissioning certificates. The format required readings of: (i) WTG meters; (ii) main billing meters; and (iii) check billing meters. The format required the submission of this data in order to establish the date on which a particular project had been commissioned. The actual date of commissioning would determine the applicable tariff; the tariff of Rs 5.92 per unit would apply to projects which were commissioned on or before 31 March 2016, while the new rate of Rs 4.78 per unit would apply to projects which were commissioned on or after 1 April 2016. Requiring the SLDC to submit data of the actual injection of power into the grid was with the objective of establishing the actual commissioning of the project.

In the present case, the principal submission of the appellants is that the data which was furnished by the SLDC indicates that the actual injection of power into the grid by the first respondent took place on 1 April 2016. It is on that basis that the first appellant has submitted that the commissioning certificate was not in accordance with the prescribed format and had to be revoked. Before this Court, the data which has been furnished by the SLDC is not in dispute. Indeed, that is the basis on which Mr Vivek K Tankha, learned senior counsel urged his alternative submission that in any event, even going by the SLDC data, it is evident that the power was injected into the grid on and from 1 April 2016.

On reviewing the documentary material on the record, we are not prepared to accept the view which has weighed with the High Court, namely, that the commissioning of the project was completed by 31 March 2016. The certificate of commissioning which has been issued by the

Superintending Engineer is belied by the objective factual data available from the SLDC which is a statutory body constituted under Section 31 of the Act. The objective data on the record indicates that the injection of power into the grid took place on 1 April 2016. Hence, we are of the view that this should be the basis on which the claim for the entering into a PPA should be founded.

Since the factual data has been placed before this Court, we are of the view that the project of the first respondent was commissioned on 1 April 2016 since the SLDC data indicates the injection of power into the grid with effect from that date. On the basis of the commissioning of the project on 1 April 2016, we find merit in the alternative submission which has been urged on behalf of the first respondent in the appeals that the Tariff Order that must apply is the Tariff Order dated 17 March 2016. The first respondent was before the Madhya Pradesh High Court in writ proceedings espousing its claim to the benefit of a higher rate of Rs 5.92 per unit on the basis of the earlier Tariff Order and on the basis that the commissioning of its project had taken place on 31 March 2016. The first respondent was *bona fide* pursuing its claim in that regard which found acceptance in the impugned judgment and order of the High Court. Though we have differed with the view which has been taken by the High Court, we are of the view that it would be unfair to deny to the first respondent the benefit of the rate which came to be prescribed by the Tariff Order of 17 March 2016. The rate which was prescribed by that Tariff Order of Rs 4.78 per unit was to apply during the control period beginning from 1 April 2016 and ending on 31 March 2019 and that rate would

continue to govern the life cycle of 25 years, as prescribed by Para 5 of the Tariff Order. The first respondent cannot be denied a parity of treatment, as has been allowed to other projects of a similar nature which would be governed by the control period stipulated in Para 5 of the Tariff Order dated 17 March 2016.

The competitive bidding guidelines upon which reliance has been placed by Mr Nitin Gaur, learned counsel appearing on behalf of the appellants, were formulated by the Union Ministry of Power subsequently on 8 December 2017. Moreover, Para 3.1 of those guidelines is not applicable to the project of the first respondent. Para 3.1 provides thus:

“3. APPLICABILITY OF GUIDELINES

3.1 These Guidelines are being issued under the provisions of Section 63 of the Electricity Act, 2003 for long-term procurement of electricity through competitive bidding process, by the ‘Procurer(s)’, from grid-connected Wind Power Projects (‘WPP’) having, **(a) individual size of 5 MW and above at one site with minimum bid capacity of 25 MW for intra-state projects**; and (b) individual size of 50 MW and above at one site with minimum bid capacity of 50 MW for inter-state projects.”

(emphasis supplied)

The above guidelines apply to grid-connected Wind Power Projects with an individual size of 5 MW and above at one site with a minimum bid capacity of 25 MW for intra-State projects. Since the first respondent is admittedly an intra-State project and does not fulfil the above requirement, the guidelines (which in any event came into force subsequently) will have no application.

For the above reasons, we allow the appeals in part and set aside the impugned judgments and orders of the High Court dated 21 September 2017 and 29 January 2018. We direct, in consequence of the above discussion, that the first respondent in the appeals shall be entitled to

the benefit of the Tariff Order dated 17 March 2016. The appellants shall process the application of the first respondent in the appeals for execution of a PPA on that basis with effect from 1 April 2016. In the view which we have taken, the second writ petition which has been filed by the first respondent before the High Court of Madhya Pradesh shall not survive and shall stand disposed of in terms of the present judgment. There shall be no order as to costs.

Pending application, if any, stands disposed of.

.....J.
[Dr Dhananjaya Y Chandrachud]

.....J.
[Indira Banerjee]

New Delhi;
July 25, 2019

ITEM NO.6

COURT NO.11

SECTION IV-A

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal No(s).9218-9219/2018

MADHYA PRADESH POWER MANAGEMENT CO. LTD. & ANR. Appellant(s)

VERSUS

M/S DHAR WIND POWER PROJECTS PVT. LTD. & ORS. Respondent(s)

(WITH IA No. 121382/2018 - CLARIFICATION/DIRECTION, IA No. 60776/2018 - EXEMPTION FROM FILING C/C OF THE IMPUGNED JUDGMENT, IA No. 60779/2018 - EXEMPTION FROM FILING O.T., IA No. 60778/2018 - PERMISSION TO FILE ADDITIONAL DOCUMENTS/FACTS/ANNEXURES)

WITH

C.A. No. 9220-9221/2018 (IV-A)

(WITH APPLN.(S) FOR EXEMPTION FROM FILING C/C OF THE IMPUGNED JUDGMENT, FOR PERMISSION TO FILE ADDITIONAL DOCUMENTS/ FACTS/ ANNEXURES, FOR EXEMPTION FROM FILING O.T. ON IA 59166/2018, FOR CLARIFICATION/DIRECTION ON IA 121384/2018)

C.A. No. 9222/2018 (IV-A)

(WITH APPLN.(S) FOR EXEMPTION FROM FILING C/C OF THE IMPUGNED JUDGMENT ON IA 93676/2018, IA No. 93676/2018 - EXEMPTION FROM FILING C/C OF THE IMPUGNED JUDGMENT)

C.A. No. 9223/2018 (IV-A)

(WITH APPLN.(S) FOR EXEMPTION FROM FILING C/C OF THE IMPUGNED JUDGMENT ON IA 94228/2018)

Date : 25-07-2019 These matters were called on for hearing today.

CORAM :

HON'BLE DR. JUSTICE D.Y. CHANDRACHUD
HON'BLE MS. JUSTICE INDIRA BANERJEE

For Appellant(s) Mr. Nitin Gaur, Adv.
 Mr. Ranjit Kumar Sharma, AOR

For Respondent(s) Mr. Vivek K Tankha, Sr. Adv.
 Mr. Gopal Sankaranarayanan, Adv.
 Mr. Sumeer Sodhi, AOR
 Mr. Aman Nandrajog, Adv.
 Mr. Ashish Tiwari, Adv.
 Mr. Vaibhav Gulia, Adv.
 Ms. Gayatri Verma, Adv.
 Ms. Rakhi Ray, AOR

UPON hearing the counsel the Court made the following
O R D E R

The appeals are allowed in terms of the signed reportable judgment. There shall be no order as to costs.

Pending application, if any, stands disposed of.

(SANJAY KUMAR-I)
AR-CUM-PS

(SAROJ KUMARI GAUR)
COURT MASTER

(Signed reportable judgment is placed on the file)