

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

APPEAL NO. 129 OF 2019

Dated: 13.01.2022

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

In the matter of:

1. AZURE POWER ERIS PRIVATE LIMITED

Asset No. 301-4, World Mark 3,
Aerocity,
New Delhi-110 037

... **APPELLANT**

VERSUS

1. BIHAR ELECTRICITY REGULATORY COMMISSION

[Through its Secretary]
Ground Floor, Vidyut Bhawan-II
B.S.E.B. Campus, Jawahar Lal Nehru Marg (Bailey Road),
Patna – 800 021
Bihar

2. BIHAR STATE POWER (HOLDING) COMPANY LIMITED

[Through its Managing Director]
1st Floor, Vidyut Bhawan,
Jawahar Lal Nehru Marg,
Patna – 800 021
Bihar

3. NORTH BIHAR POWER DISTRIBUTION COMPANY LIMITED

[Through its Managing Director]
Vidyut Bhawan-II,
Jawahar Lal Nehru Marg,
Patna – 800 021
Bihar

4. SOUTH BIHAR POWER DISTRIBUTION COMPANY LIMITED

[Through its Managing Director]
Vidyut Bhawan-II,
Jawahar Lal Nehru Marg,
Patna – 800 021
Bihar ... **RESPONDENTS**

Counsel for the Appellant (s) : **Mr. Sanjay Sen, Sr. Adv.**

Mr. Aniket Prasoon
Ms. Mandakini Ghosh
Ms. Shweta Vashist
Mr. Md. Aman Sheikh
Mr. Rishabh Bhardwaj

Counsel for the Respondent (s) : Mr. Arijit Maitra for R-1

Ms. Anushree Bardhan
Mr. Ravi Nair
Ms. Srishti Khindaria
Ms. Shikha Sood for R2 to 4

JUDGMENT (ORAL)

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

1. This matter has been taken up by video conference mode on account of pandemic conditions, it being not advisable to hold physical hearing.
2. The present appeal by Solar Power Project Developer ("SPD") assails the order dated 07.12.2019 passed by the respondent Bihar Electricity Regulatory Commission (for short "*the State Commission*") in petition no. 30/2018 disallowing the benefit of increase in the tariff based on the *change in law* provision with respect to increased Operation and Maintenance (O&M) costs of its 10MW solar power generating system on account of *inter alia* the Finance Act, 2015, notification dated 06.11.2015 of Ministry of Finance, Government of India; Finance Act, 2016 (collectively referred to as "*service tax laws*") and the Integrated Goods and Services Tax Act, 2017; Central Goods and Services Tax Act, 2017 and the Bihar Goods and Services Tax Act, 2017 (collectively "*GST laws*") brought into effect from 01.07.2017.
3. The State Commission while accepting that the GST laws do constitute a change in law event within the meaning of the expression used in the Power Purchase Agreement (PPA) binding the parties, it denied the relief taking exception to the fact that the operation and maintenance work had been outsourced.

4. The appellant relies primarily on decision dated 27.04.2021 of this Tribunal in appeal no. 172 of 2017 (2021 SCC online APTEL Page 10) titled *Coastal Gujarat Power Limited v. Central Electricity Regulatory Commission and Ors.*, particular reference having been made to the following observations in the said decision:

"67. It is argued that the operation and maintenance of the plant is the responsibility of the appellant and if the appellant seeks to employ services of other agencies, the same cannot increase the liability of the Procurers; this was a commercial decision and choice of the appellant; and that if the appellant had not employed services of outside agencies, there would have been no impact of the alleged changes of tax rates."

68. We find no substance in the above submissions. The work contractors are engaged by the appellant within its discretion and there is no inhibition in PPA in such regard. In fact, it is pointed out by the appellant, and rightly so, that Article 7 of the Model PPA which was a part of the RFQ documents had envisaged that the generator (Seller) alone shall be liable to operate and maintain the power station at its own cost but, in the final PPA that was executed between the parties, the clause to such effect was removed, this clearly indicative of the common understanding of the parties that the generator (CGPL) would not be solely responsible for O&M, the definition of 'Project Documents' read with 'O&M contracts' contemplating that a third-party O&M contractor might be appointed by it (CGPL).

...

90. The respondents defend the impugned decision arguing that the Commission has duly allowed the claim of change in law in respect of the levy of Swatch Bharat Cess and Krishi Kalyan Cess in respect of such services as are linked to the business of generation and sale of electricity, ... The respondents submit that there may be various activities carried out by the appellant as a commercial decision but which are neither necessary nor concerned with the business of selling electricity.

...

91. It is not disputed that the appellant (CGPL) is a project specific Special Purpose Vehicle (SPV) set up solely for the purpose of generating and supplying electricity exclusively to the Procurers in accordance with the PPA. It engages in no other business undertaking. All services availed by CGPL are undoubtedly used for its sole objective of generating electricity for supply to the Procurers under the PPA. The

increased cost towards Krishi Kalyan Cess and Swachh Bharat Cess affects the cost of the business of the appellant for generation and sale of electricity. The twenty services left out by CERC also are connected to the commercial activities of the appellant adding to its cost of production and supply. In this view, there was no justification for disallowance of the claim for additional financial burden on other services covered under Swachh Bharat Cess and Krishi Kalyan Cess contrary to Article 13 of the PPA.

92. We agree with the submission that CERC erred to introduce an extraneous qualification or filter which is not borne out from the PPA. The qualifying factor under Article 13 of the PPA is whether or not a CIL event has an impact on the cost of, or revenue from, the business of generation and sale of electricity by the seller (CGPL). In this view, the test applied by CERC that taxable service should have a "direct relation to the input cost of generation" is extraneous to the provisions of the PPA and must be rejected. **It is trite that explicit terms of a contract (PPA) bind and it is not open for the adjudicating forums to substitute their own view on the presumed understanding of the commercial terms by the parties [Nabha Power Limited v. PSPCL & Anr. (2018) 11 SCC 508]. Once it is established that levy of a tax on services availed by CGPL has an impact on the cost of or revenue from business of generation and sale of electricity - whether directly or indirectly - compensation must follow."**

5. After some hearing, it was fairly conceded by the learned counsel for the appellant and for the respondent procurers (distribution licensees) through their respective counsel that it would be appropriate that the matter is remitted to the State Commission for revisit of the decision taken denying the relief on the above mentioned reason, in as much as should the State Commission now accept the contention of the appellant that the relief is admissible in terms of ruling in Coastal Gujarat (*Supra*), it would also be required to undertake prudence check of the actual expenditure incurred which exercise has not been undertaken in the previous round.

6. In the forgoing facts and circumstances, we set aside the impugned order of the State Commission and remit the matter to it for fresh consideration, after hearing the parties, in accordance with law. Needless to add we would expect the State Commission to hold the proceedings on remand expeditiously and decide the matter at an early

date, preferably within two months, and dispassionately not feeling bound in any manner by the view taken earlier.

7. The appeal is disposed of in above terms.

**PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO CONFERENCING
ON THIS 13th DAY OF JANUARY, 2022.**

(Sandesh Kumar Sharma)
Technical Member
Vt/TP

(Justice R.K. Gauba)
Officiating Chairperson