

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 10.09.2014

+ **W.P.(C) 3572/2012**

RVAKASH GANGA INFRASTRUCTURE LTD. Petitioner

versus

UNION OF INDIA AND ORS. Respondents

Advocates who appeared in this case:

For the Petitioners : Mr Anil K. Aggarwal and Mr A.B. Singh.

For the Respondent : Mr Sanjay Bhatt for R-2.

CORAM:-

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J (ORAL)

1. The petitioner has filed the present petition impugning the “Guidelines for Rooftop and Other Small Solar Power Plants Connected to Distribution Network” (hereinafter referred to as the ‘impugned guidelines’) issued by the Central Government and has further sought a refund of ₹40 lacs which was recovered by respondent nos.1 and 2 by invoking the bank guarantees submitted by the petitioner.

2. The principal ground urged by the petitioner is that the terms of the impugned guidelines cannot be construed as a valid contract within the provisions of Article 299 of the Constitution of India. It is submitted that the impugned guidelines are non-contractual and therefore, its terms (including terms for encashment of bank guarantees furnished under the

guidelines) would not be binding on the petitioner. It is further contended that the impugned guidelines embody a scheme to provide subsidy to the power distribution utilities and do not envision any subsidy to the power generating entity. It is contended that the electricity tariff has to be statutorily fixed on the basis of the cost of production and, therefore, no benefit is derived by the petitioner under the impugned guidelines. It is contended that providing bank guarantee to respondent no.2- Indian Renewable Energy Development Agency Limited (IREDA) is, thus, wholly extraneous to the statutory scheme of tariff fixation. It is argued that in the given circumstances, the requirement for furnishing bank guarantees is without consideration and the amount recovered by respondent no.2 by invoking the bank guarantees furnished by the petitioner are liable to be refunded.

3. The brief facts relevant for examining the controversy in the present petition are as under.

3.1 The Ministry of New and Renewable Energy initiated a programme – ‘Rooftop PV & Small Solar Power Generation Programme’ (hereinafter referred to as the ‘said programme’) under Phase I of the Jawahar Lal Nehru National Solar Mission in order to give an impetus to small solar power plants. The said programme envisioned selection of limited number of solar power projects (hereinafter referred to as the ‘project proponent’), which were to be connected to a distribution network at voltage levels below 33kV and were to be completed before 31.03.2013. Since the cost of generation of solar power is significantly higher than the tariff at which the power is supplied to consumers, the said programme envisaged a scheme

where the selected project proponent would sign a Power Purchase Agreement (hereinafter referred to as the 'PPA') with a local distribution utility at an appropriate tariff determined by the State Electricity Regulatory Commission (hereinafter referred to as the 'SERC') and a Generation Based Incentive (hereinafter referred to as the 'GBI') equal to the difference between the tariff determined and base rate would be paid to the distribution utility. The base rate for the financial year 2010-11 was fixed at ₹5.50 per kWh, which would be escalated by 3% every year.

3.2 In other words, the distribution utility would pay the tariff fixed by the State Electricity Regulatory Commission. This tariff would adequately compensate the power generation unit (i.e the project proponent) because it would be based on the cost of generation as well as a reasonable mark up thereon. Since this tariff in case of solar power generation would be significantly high, the said programme provided that the GBI would be paid to the distribution utility for the difference between the base rate and the tariff so fixed. The net effect being that the power would be available to the distribution utility at the base rate.

3.3 The impugned guidelines provided for a Project Proponent, fulfilling the eligible criteria, to pre-register with the State Competent Authority on first come first serve basis. After completing pre-registration, the Project Proponent would enter into a Memorandum of Understanding (MOU) with the concerned distribution utility. Applicants (Project Proponents) fulfilling the following four conditions would be eligible for registration with the programme administrator (IREDA):

- (a) issuance of relevant Tariff Order from concerned SERC;
- (b) MOU with the distribution utility;
- (c) pre-registration certificate from State Competent Authority; and
- (d) Commitment Guarantee of requisite amount.

3.4 The impugned guidelines also required certain milestones to be completed. The Project Proponents were obliged to provide Commitment Guarantees for their commitment to commission the project within the specified time i.e within 12 months from the date of the issuance of the registration certificate. The Project Proponents were required to give irrevocable Bank Guarantee initially for an amount ₹10 lacs/MW on a pro-rata basis and, thereafter, on signing of the PPA with the concerned Distribution Utility (milestone 1), the Project Proponents were required to submit additional Commitment Guarantees of ₹40 lacs/MW on a pro-rata basis.

3.5 The petitioner applied for pre-registration under the impugned guidelines on 14.07.2010, with the Uttarakhand Renewable Energy Development Agency (UREDA) which was the State Competent Authority for setting up of a solar power plant with a installed capacity of 2 MWs. On 21.08.2010, after obtaining pre-registration, the petitioner entered into a PPA with Uttarakhand Power Corporation Ltd. (UPCL) which was the concerned Distribution Utility. The petitioner also applied for a formal registration with IREDA which was the Programme Administrator and submitted the requisite bank guarantees for a sum of ₹20 lacs (i.e. computed at ₹10 lacs/MW).

3.6 On 17.09.2010, the petitioner submitted additional commitment guarantees of ₹80 lacs (i.e. computed at ₹40 lacs/MW) to the IREDA and the Generation Based Incentive Certificate was issued to the petitioner providing a registration number to the petitioner. The registration certificate clearly indicated that no change in particulars/location would be allowed.

3.7 Concededly, there had been delay in commissioning of the project. These delays were occasioned by the change in technology, which was to be employed by the petitioner. Initially, the petitioner had conceptualized the project on “Mono Crystalline Silicon PV Modules” which was subsequently changed to “Thin Film PV Modules”. The petitioner explained that the IREDA had issued general instruction on 14.01.2011 stating that no changes would be made in the name of the project proponent/company, name and location of the sub-station and the PPA. The petitioner contended that in view of these instructions, initially UPCL did not take into account the clarification issued by IREDA that permitted the petitioner to use any technology for PV modules subject to the technology conforming with the technical standards indicated in the impugned guidelines. It is stated that finally UPCL relented and an agreement amending the PPA was executed between UPCL and the petitioner on 24.05.2011. The petitioner states that this resulted in the disbursal of the loan from ICICI Bank being delayed as the same was contingent upon the PPA being executed. This in turn, resulted in commissioning of the project being delayed.

3.8 As there was a delay in commissioning of the project, the petitioner applied for extension of time for completion of Milestone no.2 –

commissioning of the project, which was rejected by IREDA on 20.09.2011 and by respondent no.1 on 21.09.2011.

3.9 Subsequently, after completion of the period of 12 months from the date of issuance of GBI certificate (i.e. 17.09.2010) and assuming the date of commissioning as 17.09.2011, Bank Guarantees for a sum of ₹20 lacs – being 20% of the total Commitment Guarantees - were invoked by IREDA and the time for completion of the project was extended by two months to 16.11.2009. Since the project was not completed within the extended period – IREDA encashed the bank guarantees for a further sum of ₹20 lacs and the time for commissioning of the project was further extended. The appeals made by the petitioner to consider taking a lenient view and condoning the delays caused on account of change in technology and in amendment of the PPA were rejected.

4. I have heard the learned counsel for the petitioner.

5. As is apparent from the above, the petitioner is aggrieved on account of the bank guarantees being encashed. Undisputedly, the guarantees were invoked by the respondents in terms of clause 3.2.13 of the impugned guidelines as the petitioner failed to adhere to the time schedule prescribed under the impugned guidelines. The said clause 3.2.13 is relevant and reads as under:-

“In case of delay in accomplishment of Milestone-2 (Project Commissioning) beyond stipulated time limit of 12 months for solar PV and 24 months for solar thermal from date of registration, 20% of BG (total Commitment Guarantee) shall be invoked by Programme Administrator. Delay in accomplishing

Milestone-2 (Project Commissioning) beyond two months from stipulated time limit, another 20% of BG (total Commitment Guarantee) shall be invoked by Programme Administrator. Further, delay in accomplishing Milestone-2 (Project Commissioning) beyond four months from stipulated time limit, another 20% of BG (total Commitment Guarantee) shall be invoked by Programme Administrator. Failure to accomplish Milestone-2 (Project Commissioning) beyond six months beyond stipulated time limit shall disqualify the Project Proponent from further participating in the Programme and the Programme Administrator shall invoke all the BGs (total Commitment Guarantee) of such Project Proponent and as a consequence, the project shall be removed from the list of the registered projects and shall not be eligible for GBI under this scheme.

Provided that in case of part commissioning of the project (not lower than 100KW capacity) at the end of 6 months beyond the stipulated period of 12 months for solar PV and 24 months for solar thermal from the date of registration, the partly commissioned capacity shall be considered to be eligible for GBI. The applicable tariff rate for such project and computation of GBI thereof shall be reckoned from the above date.”

6. There is no disputing the fact that commissioning of the project was delayed. Although the delay is sought to be explained by the petitioner as caused on account of delay in amending the PPA the respondents cannot be held responsible for the same. The facts, clearly, indicate that the petitioner had changed the technology subsequent to the signing of the PPA and even according to the petitioner, the delays had occurred because of incorporating this change in the PPA which in turn delayed the disbursal of loans.

7. The learned counsel for the petitioner has not challenged the decision of respondent nos.1 and 2 of not condoning the delay and has

focused his arguments only on the validity of the impugned guidelines in as much as the same included the condition of submission of bank guarantees by a Project Proponent.

8. The impugned guidelines/programme was premised on ensuring availability of solar power within the specified period. Therefore, one of the conditions for selection was a commitment to commission the power generation unit within the stipulated period. The petitioner participated in the selection process and the petitioner's registration under the said programme was based on its commitment to adhere to the terms and conditions. The commitment guarantees were an intrinsic part of the terms of the impugned guidelines to ensure adherence to the time schedule provided thereunder. The registration letter dated 17.09.2010 issued by IREDA required an express acceptance of the terms and conditions of the impugned guidelines as is evident from the last paragraph of the said letter which reads as under:

“Kindly acknowledge and send duly signed copy (duplicate) of this letter to IREDA in token of your acceptance of the terms, along with a copy of RPSSGP Guidelines duly signed at each page.”

9. The petitioner also entered into a PPA with UPCL. In terms of clause 2.4 of the PPA, both Project Proponent/petitioner and UPCL had agreed to comply with the impugned guidelines. Clause 2.4 of the PPA is relevant and reads as under:-

The Generating Company/Project Proponent and UPCL shall comply with all the guidelines for "ROOFTOP PV &

SMALL SOLAR POWER GENERATION PROGRAMME
(RPSSGP)" of MNRE, GOI.

10. Thus, the petitioner has not only accepted the impugned guidelines by signing the registration letter dated 17.09.2010 but also committed to comply with the impugned guidelines in terms of the contract entered into between the petitioner and UPCL. Even though the petitioner is disputing that the impugned guidelines are not binding, there is no dispute that the PPA is a binding contract and the PPA expressly records the obligation of the petitioner to conform to the terms of the impugned guidelines.

11. Further, in my view, the contention of the petitioner that it has not derived any benefit, from the impugned guidelines, is wholly erroneous. Admittedly, the cost of generating solar power is much higher in comparison to the cost of producing power by conventional methods. According to the petitioner, while the cost of solar energy is about ₹17 per unit, the cost of generating power by conventional method is about ₹5.50 per unit. This, clearly, would make the solar power units unviable. Thus, in order to promote solar power, the impugned guidelines provided for an incentive which is the difference between the base rate (₹5.50) and the tariff, based on cost payable to the solar generating unit. The fact that this incentive is not paid directly to the petitioner but to the distribution utility is of little relevance. This is so because, admittedly, the PPA was subject to the impugned guidelines. The PPA expressly records as under:-

“This agreement shall be subject to eligibility of project (or partly commissioned project) for availing Generation Based Incentive (GBI) under guidelines of RPSSG Programme of MNRE, Government of India. The letter confirming eligibility

to avail GBI for the project (or partly commissioned project) shall be issued by programme administrator to project proponent.”

12. Thus, in absence of the GBI under the impugned guidelines, UPCL would not have entered into the PPA with the petitioner. The impugned guidelines provided a selection scheme for selecting a project proponent for availing the aforesaid benefit without which a solar power generating unit may not be viable. Clearly, in absence of GBI from respondent no.1 and IREDA, the petitioner’s project would be a non starter.

13. Given the constraint of resources, the said programme was limited to providing GBI for an aggregate installed capacity of 100 Mega Watts. The pre-registration was to be done on a first come first serve basis and the short list was to close on the short list reaching the proposed capacity of 110 Mega Watts on all India basis and initial short list for a particular state was restricted to 20 Mega Watts.

14. In the given circumstances, the petitioner furnished the bank guarantees in terms of the impugned guidelines and never challenged the said condition either at the time of furnishing the bank guarantees or during the period of 12 months during which the project was required to be completed. As there was delay in commissioning the project, the respondents invoked the bank guarantees in terms of the impugned guidelines.

15. As discussed above, the petitioner availed all the benefit available under the impugned guidelines and is precluded from challenging the terms and conditions of the impugned guidelines which has a binding force. It is

well settled that a party having availed of benefits under a contract cannot question the validity of the conditions imposed by the said contract even if the contract is invalid by virtue of Article 299 of the Constitution of India. It is also well settled that those who contract with open eyes must accept the burdens of the contract along with its benefits.

16. The Supreme Court in the case of **Har Shankar v. Excise & Taxation Commr.:** (1975) 1 SCC 737 held as under:-

“16. Those interested in running the country liquor vends offered their bids voluntarily in the auctions held for granting licences for the sale of country liquor. The terms and conditions of auctions were announced before the auctions were held and the bidders participated in the auctions without a demur and with full knowledge of the commitments which the bids involved. The announcement of conditions governing the auctions were in the nature of an invitation to an offer to those who were interested in the sale of country liquor. The bids given in the auctions were offers made by prospective vendors to the Government. The Government's acceptance of those bids was the acceptance of willing offers made to it. On such acceptance, the contract between the bidders and the Government became concluded and a binding agreement came into existence between them. The successful bidders were then granted licences evidencing the terms of contract between them and the Government, under which they became entitled to sell liquor. The licensees exploited the respective licences for a portion of the period of their currency, presumably in expectation of a profit. Commercial considerations may have revealed an error of judgment in the initial assessment of profitability of the adventure but that is a normal incident of all trading transactions. Those who contract with open eyes must accept the burdens of the contract along with its benefits. The powers of the Financial Commissioner to grant liquor licences by auction and to collect licence fees through the medium of

auctions cannot by writ petitions be questioned by those who, had their venture succeeded, would have relied upon those very powers to found a legal claim. Reciprocal rights and obligations arising out of contract do not depend for their enforceability upon whether a contracting party finds it prudent to abide by the terms of the contract. By such a test no contract could ever have a binding force.”

(emphasis supplied)

17. In **Premji Bhai Parmar v. DDA: (1980) 2 SCC 129**, the petitioners (therein) had applied to DDA for allotment of MIG flats. The brochure issued by the DDA set out the terms and conditions of allotment, registration and price of the flat. The petitioners (therein) were allotted flats in the lots drawn by the DDA; the petitioners paid the whole amount they were called upon to pay and thereafter, the petitioner secured the possession of the flats. Subsequently, the petitioners (therein) alleged that the levy and collection of the surcharge amount by the DDA was illegal and unconstitutional and therefore, the petitioners sought for refund of the amount collected as surcharge. The Supreme Court rejected this contention of the petitioners (therein) and held that after securing the allotment and possession of the flat, the petitioners were trying to get back a part of the purchase price and thus trying to reopen and wriggle out of a concluded contract which is not permissible. The relevant portion of the said judgment is as under:-

“8. ... This brochure specifies the terms and conditions including price on which flat will be offered. It also reserves the right to surrender or cancel the registration, the mode and method of paying the price and handing over the possession. There is an application form annexed to the brochure.

Annexure 'A' to the brochure sets out the price of flat on the ground floor, first floor and second floor respectively. It sets out the premium amount payable for land as also the total cost in respect of the flats on the ground floor, first floor and second floor. The statement also shows the earnest money deposited at the time of the registration and the balance payable. It is on the basis of these brochures that the applicants applied for the flats in Lawrence Road and other MIG schemes. They knew and are presumed to know the contents of the brochure and particularly the price payable. They offered to purchase the flats at the price on which the Authority offered to sell the same. After the lots were drawn and they were lucky enough to be found eligible for allotment of flats, each one of them paid the price set out in the brochure and took possession of the flat, and thus sale became complete. There is no suggestion that there was a misstatement or incorrect statement or any fraudulent concealment in the information supplied in the brochures published by the Authority on the strength of which they applied and obtained flats. With this background the petitioners now contend that the Authority has collected surcharge as component of price which the Authority was not authorised or entitled to collect. Even if there may be any merit in this contention, though there is none, such a relief of refund cannot be the subject-matter of a petition under Article 32. And Article 14 cannot camouflage the real bone of contention. Conceding for this submission that the Authority has the trappings of a State or would be comprehended in 'other authority' for the purpose of Article 12, while determining price of flats constructed by it, it acts purely in its executive capacity and "is bound by the obligations which dealings of the State with the individual citizens import into every transaction entered into in the exercise of its constitutional powers. But after the State or its agents have entered into the field of ordinary contract, the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines rights and obligations of the parties inter se. No question arises of violation of Article 14 or of any other constitutional provision when the State or its agents, purporting to act within

this field, perform any act. In this sphere, they can only claim rights conferred upon them by contract and are bound by the terms of the contract only unless some statute steps in and confers some special statutory power or obligation on the State in the contractual field which is apart from contract” (see Radhakrishna Agarwal v. State of Bihar [(1977) 3 SCC 457]. Petitioners were under no obligation to seek allotment of flats even after they had registered themselves. They looked at the price and flats and applied for the flats. This they did voluntarily. They were advised by the brochures to look at the flats before going in for the same. They were lucky enough to get allotment when the lots were drawn. Each one of them was allotted a flat and he paid the price voluntarily. They are now trying to wriggle out by an invidious method so as to get back a part of the purchase price not offering to return the benefit under the contract, namely, surrender of flat. The Authority in its affidavit in reply in terms stated that it is willing to take back the flats and to repay them the full price. The transaction is complete viz. possession of the flat is taken and price is paid. At a later stage when they are secure in possession with title, petitioners are trying to get back a part of the purchase price and thus trying to reopen and wriggle out of a concluded contract only partially.”

18. In my view, the petition is devoid of any merit. Accordingly, the present petition is dismissed. No order as to costs.

VIBHU BAKHRU, J

SEPTEMBER 10, 2014
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