

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 15.05.2017

+ **O.M.P. (COMM) 74/2016**

PTC INDIA LTD

..... Petitioner

Versus

**PUNJAB STATE POWER CORPORATION
LTD. & ORS.**

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Ravi Kishore, Mr Alok Kumar and
Mr Deepak Jaswal. .

For the Respondents : Mr Anand K. Ganesan and Mr Sandeep
Rajpurohit for R-1.
Mr D.K. Thakur, Advocate for R-2.
Mr Aditya Dhawan and Ms Kiran Dhawan
for R-4.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. PTC India Ltd. (hereafter 'PTC') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') assailing the interim arbitral award dated 05.12.2015 (hereafter 'the impugned award') passed by the arbitral tribunal constituted by the sole arbitrator, Justice Anil Dev Singh (Retd.). The impugned award was rendered in respect of the disputes that had arisen in connection with the Power Sale Agreement dated 06.05.2010 (hereafter 'the PSA').

2. PTC is a public company engaged in purchase and sale of electricity throughout the territory of India. PTC and Government of Himachal

Pradesh (hereafter 'the HP Government') entered into a Power purchase Agreement dated 04.11.2009 (hereafter 'the PPA'), whereby PTC agreed to buy power from the HP Government from the generating stations located in Himachal Pradesh during the period 01.11.2008 to 31.10.2010.

3. PTC also entered into the PSA (Power Sale Agreement dated 06.05.2010) with Punjab State Power Corporation Ltd. (hereafter 'PSPC') to supply 200 MW RTC power from 01.05.2010 to 30.06.2010 and 300 MW RTC power from 01.07.2010 to 30.09.2010, purchased under the PPA.

4. The disputes between the parties essentially relate to the price payable by PSPC for the power purchased under the PSA. In essence, PSPC's case is that since the power supplied by PTC was not from the sources as agreed under the PSA - that is, the hydro power stations specified in the PPA - it is not liable to pay for the power on the contracted rates. PTC disputes the same. It is PTC's case that the power was scheduled by it and PSPC had used the scheduled power and is, therefore, required to pay for the same at contracted rates. Due to high silt levels, Nathpa Jhakri Hydro Power Station (hereafter 'NJHPS') faced complete shutdown with effect from 24.06.2010. Similarly, plants at Baira Siul and Chamera were also unable to generate electricity on several occasions during the months of July and August. In view of the outages, the HP Government supplied electricity under the PPA by drawing from the grid. PTC claimed that it has purchased the power from the HP Government under the PPA and whether Himachal Pradesh State Electricity Board (HPSEB) had overdrawn electricity from the grid for making it available would be of no consequence insofar as PSPC is concerned.

5. Briefly stated, the factual background of the aforesaid disputes is as under:-

5.1 Northern Region Load Dispatch Center (hereafter 'NRLDC'), by a letter dated 24.06.2010, informed all chiefs of State Load Dispatch Centers (hereafter 'SLDC') of Northern India amongst others that the generation schedule of NJHPS has been reduced to zero as the power station would be under complete shutdown with effect from 1200 hrs on 24.06.2010 due to high silt level; the import of Total Transfer Capability (hereafter 'TTL') of Northern Region was revised from 5000 MW to 4200 MW. On the same date, Power Controller, SLDC Himachal Pradesh sent a fax to PTC wherein PTC was requested to get the reverse schedule filed by the beneficiary states/utilities as the grid parameters due to overdrawl from its system were not favourable. In response to the same, PTC sent a fax to NRLDC with the revised schedule for approval.

5.2 NRLDC, by a fax sent to PTC informed that rescheduling of Short Term Open Access (STOA) Schedule was not possible as Regulation 6.5.19 of the Central Electricity Regulatory Commission (Indian Electricity Grid Code Regulations, 2010 (hereafter 'IEGC Regulations') applied to sellers who are generators and Himachal Pradesh State Electricity Board (hereafter 'HPSEB') did not fall within that category. Approval was also not granted as the consent of buyers was not attached and no anticipated time for restoration of the unit was mentioned in the request.

5.3 SLDC sent a letter to NRLDC supporting the case of PTC for revision of the STOA Schedule in case of buyers like Punjab, Haryana and Delhi on the ground that the HP Government which supplies power is not

only entitled to 12% free power from NJHPS but also has 22% equity participation in it; therefore the HP Government ought to be considered as a deemed generator under Regulation 6.5.19 of the IEGC Regulations.

5.4 On 26.07.2010, SLDC again sent a letter to PTC requiring it to get applications filed to NRLDC for reverse scheduling for beneficiary states/utilities as the generation schedule of the NJHPS had been reduced to zero with effect from 10:30 hrs on 26.07.2010. Pursuant thereto, PTC filed a request with NRLDC for revision of schedule for utilities including the Punjab State Electricity Board.

5.5 Thereafter, twice in August 2010, PTC was asked to file applications before NRLDC for reverse scheduling for similar reasons as given above. By letter dated 06.08.2010, PSPC expressed its dissatisfaction on account of drawl of energy from the grid by the HP Government as energy was drawn at Unscheduled Interchange (hereafter 'UI') rates which were lower than the contractual rates charged from the buyer (PSPC). PSPC suggested that energy may be billed during forced outages at UI rates or contracted rates, whichever was lower during the contract period.

5.6 On account of revision of schedule of the HP Government due to forced outages, by letter dated 12.08.2010, PSPC requested PTC that before application is filed before NRLDC for reverse scheduling, PSPC be intimated regarding the expected revival time so that power can be procured from other sources at the earliest. In response, PTC assured PSPC that intimation will be given whenever the schedule is received.

5.7 By letter dated 19.08.2010, PSPC apprised PTC that it has been charged more than what the HP Government paid as UI charges for

overdrawl from the grid under the UI mechanism, resulting in loss to it. PTC was requested to take up the matter with the HP Government. PSPC also made a grievance that it was not notified about the forced outages of the power plant in advance.

5.8 PTC, by letter dated 23.08.2010, again requested NRLDC to treat the HP Government as a deemed generator and to allow revision on account of force outages.

5.9 Thereafter, on 31.08.2010, PSPC notified that on account of forced outages, it had suffered financial loss for a sum quantified at ₹3,15,11,355/-. It was stated that the loss sustained would be deducted from the next energy bills. Further, it was stated that PSPC was required to pay contracted rates only for the power supplied from NJHPS, Baira Siul and Chamera Hydel Projects and not for energy drawn under the UI mechanism.

5.10 By letter dated 15.09.2010, PTC refuted the aforesaid allegations. It referred to clause 1(c) of the PSA and stated that the clause stipulated that PTC would apply for open access based on the implemented schedule of the preceding day or 'zero schedule' or 'revision 1 schedule for the next day' as posted by NRLDC on its website. PTC disagreed with the contention that UI rates are generally on the lower side.

5.11 By communication dated 07.10.2010, PSPC reiterated that it was not liable to pay for energy drawn under the UI mechanism at contracted rates. Accordingly, PSPC deducted ₹3,15,11,355/- from the bills of PTC. On 11.10.2010, PTC asked PSPC to release the amount deducted to avoid any surcharge. This was followed by other letters to similar effect.

6. In view of the aforesaid disputes, the arbitration clause was invoked. Before the arbitral tribunal, PTC raised a claim for ₹3,15,11,355/- with surcharge at the rate of 15 % p.a. along with *pendente lite* interest.

7. The arbitral tribunal considered the recitals and clauses 1(a) and (c) of the PSA and held that the PSA necessitated that power be supplied to PSPC from the Hydro Projects located in Himachal Pradesh.

8. It was noted that several times in July and August 2010, PSPC was supplied power under the UI mechanism on account of outages due to high silt level in the river. Although the supply of quantum of power as agreed was not affected but PSPC was charged at the contractual rates even though electricity supplied was not from the contracted sources.

9. The arbitral tribunal examined the letters dated 24.06.2010 and 26.07.2010 sent by SLDC along with letters dated 06.08.2010 and 12.08.2010 sent by PSPC and concluded that there was nothing on record to show that PTC attempted to secure any application from PSPC to be filed for reverse scheduling before NRLDC as required under the aforesaid letters sent by SLDC.

10. On a perusal of clause 1(c) of the PSA, it was held that the said clause leaves no scope for revision of schedule as it required the HP Government to schedule on 'day ahead basis' or 'same day basis' to minimize UI which was to be considered as deemed to be scheduled. And, once application for open access based upon the implemented schedule of the previous day was made, no revision in open access quantum was permitted. Therefore, in view of the stand taken by NRLDC - that is, not considering the HP Government as a generator - it was held that non-

securing of application(s) by PTC from PSPC did not affect the interests of PSPC.

11. Furthermore, on a reading of clauses 1 to 3 and 8 of the annexure to the PSA, the arbitral tribunal held that the tariff agreed between the parties for power supplied to PSPC has been fixed with reference to supply from the Hydro Projects located in Himachal Pradesh and not for supply from other sources including UI mechanism. The tariff mentioned in clause 2 cannot be applied to power supplied under the UI mechanism.

12. The arbitral tribunal was also of the view that the IEGC Regulations were inapplicable to PSPC as "*is not the beneficiary*" as defined in the Central Electricity Regulatory Commission (Unscheduled Interchange charges and related matters) Regulations, 2009.

Submissions

13. Mr Ravi Kishore, learned counsel appearing for PTC submitted that the arbitral tribunal had grossly erred in holding that PTC had supplied power under the UI mechanism and had also failed to recognise the importance of scheduling. He submitted that UI mechanism was not a source of supply but was merely a mechanism of grid discipline. He submitted that the mechanism of UI was to ensure that the concerned parties maintained the discipline of supply and drawl of power on a scheduled plan basis, as any variation in the supply as well as drawl of electricity would tend to destabilize the grid. Thus, any electricity drawn in excess of the quantum scheduled would be visited with consequences of payment at UI rates. He submitted that in the present case, there was no dispute that the power drawn by PSPC was as per the schedule and,

therefore, there was no question of PSPC paying for the power drawn at UI rates. He contended that PSPC was not involved in the UI settlement process under the relevant regulations and the question whether the HP Government was penalized for overdrawing power would be of no concern to PSPC. He submitted that the arbitral tribunal had fallen in error on proceeding on the basis that UI mechanism was a source of power. He referred on the decision of the Supreme Court in ***Central Power Distribution Company and Ors. v. Central Electricity Regulatory Commission & Anr.: (2007) 8 SCC 197*** in support of his contention that maintenance of discipline is regulated by the mechanism of UI which is a commercial mechanism to control the utilities in scheduling, despatch and drawl of electricity.

14. Mr Kishore also submitted that PTC was only a trader and, thus, acted as a conduit between the generating companies and the distribution licensees. As a trader, PTC was only entitled to a 3 paisa margin per unit. He further submitted that PSPC was fully aware of the PPA with the HP Government and was, thus, also aware from where PTC was sourcing the electricity. He submitted that there is no dispute that the HP Government had supplied electricity in terms of the PPA and the same was scheduled for drawl by PSPC. It is stated that schedule of electricity was done on 'day ahead basis' or 'same day basis' and could not be rescheduled on account of outage of the power generation operations. He stated that as there is no dispute that power had been scheduled, PSPC would be obliged to pay for the same at the contracted rates in terms of the PSA.

15. Lastly, he submitted that although the arbitral tribunal had held that PTC had slackened its efforts for reverse scheduling, the arbitral tribunal

had also held that the same did not affect the interest of PSPC as reverse scheduling was not permitted.

16. Mr Anand K. Ganesan, learned counsel appearing for PSPC had submitted that the fundamental basis of the PSA was to ensure that PSPC purchases the electricity sourced from the specified hydro power stations and not from any other source. He stated that it cannot be disputed that electricity drawn by PSPC was not from the source as agreed but had been drawn by HPSEB/HP Government under the UI mechanism. He stated that this would defeat the purpose of the PSA as in the absence of power from the specified source, PSPC could also draw electricity under the UI mechanism and there was no requirement for PSPC to insist on supplies by PTC. He submitted that the only issue to be considered was whether PTC could supply electricity from any source other than as specified under the PSA as there is no dispute that the electricity supplied was not from the specified sources. He submitted that there was no infirmity with the decision of the arbitral tribunal in interpreting the PSA and holding that the supply of electricity by PTC was not in terms of the PSA; and, since the supply of electricity was not in terms of the PSA, PSPC was also not obliged to pay for the electricity at contracted rates.

Reasoning and Conclusion

17. It was earnestly contended on behalf of PTC that UI mechanism is not a source of electricity and, therefore, the arbitral tribunal had erred in holding that PTC had supplied power under the UI mechanism. However, it is seen that there was no dispute between the parties as to the source of the power supplied to PSPC. It was PTC's stated case before the arbitral

tribunal that the HP Government had overdrawn electricity by way of UI mechanism to supply power to PTC, which in turn was supplied to PSPC.

18. Mr D.K. Thakur, learned counsel for the HP Government (respondent no.2) had also confirmed that there was no dispute that electricity supplied by the HP Government in terms of the PPA was overdrawn under the UI mechanism. He submitted that the HP Government was committed to supply certain power under the PPA at the periphery of the grid. In the event of shortage of supply of power - such as caused by shutting down of the hydro power stations in this case - HP Government had various tools to ensure compliance with its obligations to provide power. It could reduce the consumption by load shedding within the state, it could enter into separate agreements to purchase electricity or it could overdraw from the grid under the UI mechanism. In the present case, the HP Government had supplied power by overdrawing under the UI mechanism. In the circumstances, the contention that the arbitral tribunal had erred in proceeding on the basis that electricity supplied by PTC was under the UI mechanism cannot be accepted. PTC's case was that although electricity was drawn under the UI mechanism, the same was done by the HP Government and, therefore, the UI charges under the UI settlement process would be payable by the HP Government and PSPC would have no concern with the same. There is no dispute that UI mechanism is a system of grid discipline and not a source of power and overdrawl of power is to be settled under the said mechanism. However, overdrawing of power from the grid was admittedly the source of the power scheduled by PTC for PSPC.

19. There is no dispute that PSPC had no obligation to pay under the UI mechanism because electricity supplied by PTC and drawn by PSPC was scheduled. Admittedly, PTC had scheduled the drawl of electricity by PSPC and, therefore, there was no question of PSPC participating in the UI settlement process which would only be applicable between the generator who had failed to supply power as per schedule and/or the entity that had drawn power in variation to the schedule. In the present case, it was plainly the HP Government that would be responsible for paying the UI charges under the UI mechanism since the HP Government had drawn electricity and had supplied to PTC.

20. Having stated the above, it is also necessary to examine the terms of the PSA. Clauses 1(a) and 1(c) of the PSA are relevant and are quoted below:-

"1(a) Delivery Point:

The Delivery Point of power shall be HPSEB periphery i.e. interconnection of HPSEB system with CTU system in Northern Region.

1(b) xxxx xxxx xxxx xxxx

1(c) Scheduling:

This quantum of power is total of various powers available with GoHP from various projects located in Himachal Pradesh. The power shall be the summation of ex-bus generation by the respective generators in different time blocks. Power available under this contract is from Hydro Projects located in Himachal Pradesh which are a 'Must run' station. Therefore, the total power declared available from the generator in each time block on day ahead basis or same day from the

project will have to be necessarily scheduled by PSPCL as per the contracted share."

21. It is clear from the above that the parties had expressly agreed that power under the PSA would be the power available from the Hydro Projects located in Himachal Pradesh, which are "Must run" stations. PSPC was also obliged to accept the contracted share of the power scheduled on 'day ahead basis' or 'same day basis' from the Hydro Projects located in the State of Himachal Pradesh. It is not disputed that the Hydro Projects referred to under the PSA were the Hydro projects mentioned in the PPA. The HP Government was entitled to a part of the energy generated by virtue of the said projects being located in Himachal Pradesh. In addition, the HP Government also had 22% equity participation in one of the projects (Nathpa Jhakri-2).

22. The arbitral tribunal had examined the same and had concluded that the power supplied to PSPC was not in conformity with the terms of the PSA. This Court finds no infirmity with the aforesaid finding as although there maybe merit in the contention that PSPC had no obligation to pay UI rates for power drawn under the UI mechanism but there is no denying the fact that the electricity supplied to PSPC was not in terms of the PSA. In view of the aforesaid finding, the arbitral tribunal has come to the conclusion that PSPC was not liable to pay the rates contracted under the PSA. The said view can by no stretch be stated to be patently illegal or unreasonable (on the touchstone of the *wednesbury* principle). It is necessary to bear in mind that the scope of judicial review under Section 34 of the Act is limited and it is not open for this Court to supplant its view in place of the decision of the arbitral tribunal unless the same is palpably

erroneous and falls foul of any of the grounds as set out under Section 34(2) of the Act.

23. As stated above, this Court is unable to accept that the view of the arbitral tribunal is flawed. In the circumstances, no interference with the impugned award is warranted.

24. The question as to what would be the charges payable by PSPC for the electricity consumed is yet to be adjudicated by the arbitral tribunal. Needless to mention that it is always open for the parties to raise such contentions in that regard as may be advised. PTC is also not precluded from contending that it is a trader and the margins available to it were specified and known to PSPC.

25. In view of the above, the present petition is dismissed. The parties are left to bear their own costs.

MAY 15, 2017
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VIBHU BAKHRU, J