CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 137/MP/2011

Coram:

Dr. Pramod Deo, Chairperson
Shri S. Jayaraman, Member
Shri V.S. Verma, Member
Shri M. Deena Dayalan, Member

Date of Hearing: 11.12.2012
Date of Order : 22.4.2013

In the matter of

Petition under section 79 (1) (f) of the Electricity Act, 2003 for recovery of ₹ 6.45 crore along with interest thereon related to recovery of Fixed Charges on account of Regulation of supply of Power in the month of October, 1998.

And in the matter of

NTPC Ltd. Petitioner

Vs

1. West Bengal State Electricity Distribution Co. Ltd
2. Damodar Valley Corporation Respondents:

Parties Present
1. Shri M.G. Ramachandran, Advocate, NTPC
2. Ms. Swapna Sheshadri, NTPC
3. Shri Sakya Chaudhuri, Advocate, WBSEDCL
4. Shri Anand Shrivastava, Advocate, NTPC
5. Shri Pravakar Jena, DVC
6. Shri A.K. Bishoi, NTPC
7. Shri Shyam Kumar, NTPC
8. Shri Shri Shailendra Singh, NTPC

ORDER

NTPC has made this application under clause (f) of sub-section (1) of Section 79 of the Electricity Act, 2003, (hereinafter referred to as "the Act") for recovery from the

respondents of an amount of ₹ 6.45 crore with interest on account of fixed charges for the month of October 1998 in respect of its generating stations in Eastern Region, namely Farakka STPS, Kahalgoan STPS and Talcher STPS.

2. The petitioner, NTPC entered into the Bulk Power Supply Agreement dated 25.5.1993 (BPSA) with West Bengal State Electricity Board (the predecessor of the first respondent), Bihar State Electricity Board, Orissa State Electricity Board, Damodar Valley Corporation (the second respondent) and Government of Sikkim (collectively referred to as "the Bulk Power Customers") for supply of power from the above-named generating stations,. Stage I of Farakka STPS was already in commercial operation when the BPSA was signed and Stage II of Farakka STPS and other two generating stations were declared under commercial operation subsequently.

3. In accordance with Article 5 of the BPSA, the tariff and terms and conditions for supply of electricity were regulated under the notification issued by the Ministry of Power vide letter No. 3/19/92-US (CT) dated 17.3.1993 as applicable to Farakka STPS, Stage I and other notifications that may be issued by the Central Government from time to time under Section 43A of the Electricity (Supply) Act. It was further provided that in case of any difference between the terms and conditions of the BPSA and the notifications issued/to be issued by the Central Government, the provisions of the said notifications were to be applicable. According to Article 7 of the BPSA, all charges were billed by NTPC and paid by the Bulk Power Customers in accordance with the

provisions of clause A.7 of Appendix A of the BPSA, (hereinafter referred to as "the Appendix").

4. Clause A.7.5 of the Appendix which is considered relevant, laid down the consequences of non-payment of NTPC's dues by the Bulk Power Customers. It provided that in the event of any bill remaining unpaid for a continuous period exceeding two months, NTPC could discontinue supply of electricity to the defaulting Bulk Power Customer. It was further provided that when supply of electricity to a defaulting Bulk Power Customer was discontinued for the reason of its default in making payment for a continuous period exceeding two months, NTPC could advise the Eastern Regional Electricity Board (EREB) to exclude allocation made to such defaulting Bulk Power Customer from scheduling and energy accounting and the share of the defaulting Bulk Power Customer was treated as unallocated power. Under this clause, the Central Government and NTPC were authorized to issue necessary directions for reallocating the share of the defaulting Bulk Power Customer among other Bulk Power Customers in accordance with clause A.2 of the Appendix. Clause A.7.5 of the Appendix is extracted below:

> "Non-Payment of bills and non-establishment of LC
>
> In the event of failure to establish/enhance LC as above, or any bill(s) remaining unpaid for a period exceeding two months from the date of issue of the bill, NTPC shall have the authority to discontinue supply of power from NTPC station(s) to such bulk power customer(s) and advice EREB to exclude its allocation from scheduling and energy accounting and treat its share in the same manner as unallocated power under clause A.2 till restored by NTPC in case of outstanding dues against any bulk power customer(s) amount to two months of average monthly billing the Govt. of India or NTPC shall have the authority to issue necessary directions for reallocating the share of such customer among other bulk power customers."

5. The procedure for allocation of unallocated power as contained in clause A.2.1 of the Appendix was as under:

(a) Allocation of power from the unallocated capacity was made by Central Government\, or its authorised representative, to such parties and in such manner and on such conditions as it deemed fit.

(b) Unallocated capacity not allocated to any of the beneficiaries (Bulk Power Customers) by the Central Government was to be allocated by CEA/ EREB in accordance with the guidelines issued by that Government from time to time.

(c) If for some reasons, the unallocated capacity was not fully allocated, the balance unallocated capacity was deemed to have been allocated to the bulk power customers in the ratio of their respective allocations specified in the BPSA.

6. The notification dated 17.3.1993 annexed to in the BPSA as its inalienable part initially valid up to 31.12.1994, was extended from time to time and up to 31.3.2000. Ministry of Power issued similar notifications in respect of Kahalgaon STPS and Talcher STPS For the purpose of this order, all the notifications are being collectively referred to as “the notifications”. According to the notifications, the tariff comprised the fixed charges (expressed in ₹ in crore payable yearly) and the variable charges (expressed in paise/kWh); the fixed charges being recoverable on monthly basis (from each beneficiary) in the accordance with the following formula, namely –

Fixed Charges = **FC/12 X EB/ES**

Where **FC** = Annual Fixed Charges payable by Beneficiaries at 400 kV bus bar of STPS,

EB = Monthly energy sale from STPS at 400 kV bus of STPS to each beneficiary individually as per Regional Energy Account, and

ES = Total monthly energy sale from STPS at 400 kV bus bar of STPS.

7. It has been alleged that the respondents defaulted in making payments of bills of NTPC for a continuous period exceeding two months. Therefore, NTPC discontinued (regulated) power supply from the generating stations from 11.10.1998 to 31.10.1998, by virtue of power under clause A.7.5 of the Appendix. NTPC billed the Bulk Power Customers for the fixed charges in respect of the generating stations in accordance with the formula given in the notifications. Grid Corporation of Orissa Ltd (for short, GRIDCO) (the successor in interest of Orissa State Electricity Board) was billed ₹13.72 crore for the month of October 1998. GRIDCO filed Petition No. 16/2006 before this Commission alleging that for reason of regulation of power supply per unit cost became abnormally high. GRIDCO worked out that against the amount of ₹13.72 crore billed by NTPC, an amount of ₹7.27 crore only was payable. Thus, according to GRIDCO, there was an excess billing of an amount of ₹6.45 crore. In the proceedings before this Commission NTPC justified billing based on the formula given in the notifications but also took an alternative plea that in the event of the petition being allowed in favour of GRIDCO, the respondents be directed to make payment of the amount of ₹6.45 crore.

This Commission in its order dated 30.9.2008 allowed the petition filed by GRIDCO and directed NTPC to refund the amount of ₹6.45 crore along with interest to GRIDCO. However, the alternative prayer of NTPC was not considered by this Commission as it was found to be beyond the scope of the proceedings initiated by GRIDCO and left this question open and undecided.

8. Aggrieved by the order of this Commission, NTPC filed an appeal (Appeal No 43/2009) before the Appellate Tribunal. The appeal was dismissed by the Appellate Tribunal vide its order dated 18.1.2011. The Appellate Tribunal held as under:

> "19. In view of the above conclusion arrived at by the Central Commission, there cannot be any grievance on the part of the Appellant with reference to the liability on part of the West Bengal State Electricity Board and Damodar Valley Corporation in regard to the payment of fixed charges to be required from them. Since the Central Commission has kept this question open, the Appellant is at liberty to take appropriate steps to recover the amount, if any, due to it from the said beneficiaries. As such, this point urged by the learned Counsel for the Appellant also does not deserve consideration."

9. NTPC filed the second appeal before the Hon'ble Supreme Court which was dismissed *in limine* vide its order dated 6.5.2011.

10. NTPC filed the present petition before this Commission on 31.5.2011 after dismissal of its second appeal, pursuant to the liberty granted by the Appellate Tribunal in its judgment dated 18.1.2011 for recovery of the proportionate amount of fixed charges of ₹6.45 crore from the respondents.

11. The first respondent in its reply-affidavit dated 10.12.2012 has pointed out that NTPC has not produced any evidence that it had defaulted in making payment of dues. The first respondent has objected to the maintainability of the present petition on ground of limitation or delay and laches as it has not been filed within a period of three years or within the reasonable time. The first respondent has denied existence of any contractual or legal basis for recovery of fixed charges during the period of regulation of power supply. It has pointed out that because power was not supplied during the period of regulation of power supply, EB in the formula for recovery of fixed charges given in the statutory notifications issued by the Central Government under Section 43 A (2) of the Electricity (Supply) Act was 'zero' and as such no fixed charges were payable for that period. The first respondent has stated that the notifications provide for recovery of fixed charges in proportion to actual supply and not in proportion to allocation. The first respondent has also pointed out that NTPC did not comply with the procedure laid down under clause A.7.5 of the Appendix as it did not take any step for re-allocation of the regulated power among other beneficiaries and rather stopped generation of power. The first respondent has alleged that NTPC failed to meet its obligation to mitigate the loss and thereby reducing the liability to pay compensation.

12. NTPC in its rejoinder affidavit has refuted the averments of the first respondent. NTPC has submitted the claim was not barred by limitation since it was filed immediately after the proceedings initiated by GRIDCO came to an end. NTPC has averred that it was granted liberty by the Appellate Tribunal in its judgment dated 18.1.2011 to pursue its alternative claim against the regulated entities. NTPC has relied

upon Section 14 (2) of the Limitation Act to urge that the period spent in defending the proceedings initiated by GRIDCO is to be excluded for computation of limitation. On the question of its obligation to mitigate the loss, NTPC has stated that there was no saleable power during the period of regulation as there was no generation and as such it could not be offered to other beneficiaries. NTPC has further explained that the regulated power could not be offered to other beneficiaries as their track record of making payments was equally poor. According to NTPC, power supply to the respondents was regulated as per the decision of the Union Cabinet and the procedure laid down by CEA. Accordingly, NTPC has claimed that the fixed charges are payable by the respondents.

13. The second respondent in its reply affidavit dated 5.11.2012 has submitted that no power was sold to it during the month of October 1998 from the generating stations and accordingly fixed charges were 'nil' as EB in the formula for recovery of fixed charges was 'nil' and for this reason NTPC did not raise any bill. It has stated that since NTPC stopped generation without reference to the Central Government or CEA its claim should be rejected. The second respondent has pointed out that NTPC had not claimed the fixed charges for 13 years and meanwhile all disputes had been sorted out consequent to implementation of one time settlement in line with the securitisation scheme of the Central Government. The second respondent has also expressed difficulty to recover the amount now claimed.

14. NTPC in its rejoinder filed under affidavit dated 5.12.2012 has stated that the petition has been filed based on the liberty granted by the Appellate Tribunal to take appropriate steps for recovery of fixed charges from regulated entities. It has asserted that the second respondent was liable to compensate NTPC and has clarified that no bill was raised earlier since supply of power to the respondents was regulated. NTPC has further stated that the claim of ₹6.45 crore could not have been raised by NTPC earlier, either at the time of one time settlement or during the course of subsequent reconciliation as the case of NTPC was that the said claim amount had already been agreed to by GRIDCO in one time settlement between NTPC and GRIDCO and till the proceedings in Petition No. 16/2006 before this Commission came to an end, the present claim could not have been raised.

15. We have heard the representatives/counsel for the parties. We have carefully perused the pleadings and other documents on record. We have bestowed our serious consideration to the issues raised.

16. The notifications do not contain any provision for regulation (discontinuation) of power supply on account of default by a beneficiary in making payment of the charges determined thereunder or recovery of fixed charges in the event of regulation of power supply. It is only clause A.7.5 of Appendix of the BPSA that authorised NTPC to discontinue supply of power to the defaulting Bulk Power Customer. The procedure agreed to in this regard was that NTPC was to advise EREB to exclude the allocation of the respondents from scheduling and energy accounting and treat their shares as

unallocated power. On exclusion of the shares of the respondents from scheduling and treating those shares as unallocated power, the procedure under clause A.2.1 was required to be followed. Briefly stated, the procedure laid down under clause A.2.1 was that the Central Government was to be informed of discontinuance of the power supply to enable that Government to issue necessary directions for temporarily re-allocating the power to any other Bulk Power Customer(s) within or outside the Eastern Region and capacity not allocated by the Central Government was to be allocated by CEA / EREB in accordance with the guidelines on the subject. However, if for some reasons, the unallocated capacity was not fully allocated by the Central Government or CEA or EREB, the balance unallocated capacity was deemed to have been allocated to the Bulk Power Customers in the ratio of their respective allocations specified in the BPSA and the fixed charges were to be claimed accordingly from the Bulk Power Customers.

17. As NTPC's claim for loss of fixed charges is based on the provisions of the BPSA it is to be examined in the light of provisions of the Contract Act. Section 73 of the Contract Act enacts the principles for claiming compensation or loss by the innocent party in case of breach of contract by the other party to the contract. Section 73 is extracted hereunder:

> "73. Compensation for loss or damage caused by breach of contract.- When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
>
> Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

> Compensation for failure to discharge obligation resembling those created by contract.-When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.
>
> Explanation.-In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused-by the non-performance of the contract must be taken into account."

18. The principle enshrined in the explanation below Section 73 is that for claiming the loss or damage the innocent party has the duty of taking all reasonable steps to mitigate the loss consequent on the breach and debars the innocent party from claiming any part of the loss which is due to his neglect to take the steps for mitigation of loss. The Hon'ble Supreme Court in **Murlidhar Chiranjilal vs Harishchandra Dwarkadas (AIR 1962 SC 366)** has held that

> "The first principle on which damages in cases of breach of contract are calculated is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it; in as good a situation as if the contract had been performed; but this principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damages which is due to his neglect to take such steps. These two principles also follow from the law as laid down in S. 73 read with the explanation thereof." (Emphasis added)

19. A similar view was expressed by the Hon'ble Bombay High Court which expressed itself in the following words in the case reported as K.G. **Hiranandani Vs Bharat Barrel and Drum Mfg Co (AIR 1969 Bom 373)**

> "4. Before I proceed to deal with the rival contentions of the learned counsel on either side, it would be convenient to refer to material portions of Section 73 of the Contract Act which is the section which lays down what may be called the measure of damages in case of breach of contract. The substantive portion of that section lays down the basic rule that a party who suffers by the breach is entitled to receive from the party in breach "compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach." The Explanation to the section lays down that in estimating the loss or damage arising from the breach of a contract, "the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into

> account." Though what the Explanation enacts is popularly called the "rule" in regard to mitigation of damages, and has been so referred to even in some decided cases and standard works, and though it is loosely called a "duty" to mitigate, the position really is, as our legislature has rightly stated, merely this, that what the Explanation enacts is not in the nature of an independent rule or duty but is merely a factor to be taken into account in assessing the damages naturally arising from the breach, for the purpose of the main part of Section 73. That is precisely the reason why it is enacted, not as a sub-section or a separate paragraph, but as an "Explanation" to the substantive rule in the first part of Section 73. Support is to be found for this view which I am taking in a passage in Mayne on Damages (12th ed.) para 149, point (2), in which it is stated that the expression "duty to mitigate" is the common and convenient way of stating the position, but that expression is a somewhat loose one, since there is no duty which is actionable or which is owed to any one by the plaintiff. It is further pointed out in the said passage that the plaintiff cannot own a duty to himself, and that the position is similar to that of a plaintiff whose damages are reduced because of his contributory negligence. If means existed of remedying the inconvenience caused by the breach of contract which have not been availed of by the plaintiff, the damages claimed by him cannot be said to arise "naturally" from the breach within the main part of Section 73 of the Contract Act or, to put it in another way, the means, if any, of remedying the inconvenience caused by the breach of contract are factors that go to reduce the damages that might otherwise have been said to have arisen "naturally" from the breach. That, in my opinion, is the proper construction that should be placed upon, what is popularly called the rule in regard to mitigation of damages"

20. From the above discussion it becomes clear that it is the obligation of the innocent party to take all steps necessary to mitigate its loss consequent to breach or anticipated breach by the defaulting party. The procedure agreed to under the BPSA was based on the principle enacted in the explanation to Section 73 of the Contract Act and also expounded by the superior Courts that NTPC was under an obligation to mitigate its loss by offering supply of power to other utilities.

21. NTPC did not make any effort to comply with the procedure laid down in the BPSA. NTPC did not in the first instance inform the Central Government of its decision to discontinue power supply to the respondents and get their share reallocated. The involvement of the Central Government in the process as agreed to under the BPSA was necessary since the original allocation of power to the respondents were made by

that Government. In case the Central Government was unable to re-allocate the regulated quantum of power to any other person the onus was on CEA or EREB to re-allocate the power. As a last resort, the power was to be supplied to the grid (generation of power could not be stopped) for which the Bulk Power Customers had agreed to share the fixed charges in proportion of their normal allocation under the BPSA. It has come on record that without resorting to the agreed procedure NTPC stopped generation of power during the period of regulation. NTPC has explained that there was no power available for re-allocation. This argument is based on the fact that NTPC stopped generation altogether. In our opinion, stoppage of generation was contrary to the procedure provided under the BPSA and even against the general public interest in view of the prevailing shortages. NTPC has further explained that track record of other bulk power customers was not good enough to persuade it to offer them supply of regulated quantum of power. The argument runs contrary to the procedure agreed to by NTPC. Therefore, NTPC is not absolved of its obligation. Even if it is accepted that the Union Cabinet had authorised NTPC to discontinue power supply to the entities that had defaulted in making payment, the decision could not be executed *de hors* the agreed procedure and the law of the land. For the reason that the procedure laid down under the BPSA as also Section 73 of the Contract Act was not complied with, it is not possible to assess the loss NTPC would have incurred had the procedure been followed. Accordingly, NTPC cannot be permitted recovery of fixed charges for the period of regulation from the respondents.

22. In view of the above findings, we do not consider necessary to go into the other issues raised by the parties.

23. The petition is accordingly dismissed. However, in view the peculiar facts of the case, the parties shall bear their own costs.

sd/-	sd/-	sd/-	sd/-
(M. Deena Dayalan)	**(V.S. Verma)**	**(S. Jayaraman)**	**(Dr. Pramod Deo)**
Member	**Member**	**Member**	**Chairperson**