

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 304/MP/2013

Subject : Petition for adjustment of generation tariff and other consequential reliefs.

Petitioner : Godavari Green Energy Limited.

Respondents : NTPC Vidyut Vyapar Nigam Ltd. and Union of India, Ministry of New and Renewable Energy .

Petition No. 312/MP/2013

Subject : Petition under Section 79 of the Electricity Act, 2003 for grant of compensatory tariff on account of depreciation in rupee.

Petitioner : Rajasthan Sun Technique Energy Private Limited.

Respondents : NTPC Vidyut Vyapar Nigam Ltd. and Union of India, Ministry of New and Renewable Energy .

Petition No. 313/MP/2013 alongwith I.A. No. 49/2017

Subject : Petition for compensatory tariff on account of depreciation in rupee in terms of Power Purchase Agreement dated 8.1.2011 entered into between NTPC Vidyut Vyapar Nigam Limited and Rajasthan Sun Technique Private Limited.

Petitioner : Rajasthan Sun Technique Energy Private Limited.

Respondents : NTPC Vidyut Vyapar Nigam Ltd. and Union of India, Ministry of New and Renewable Energy .

I.A. No. 52/2017 in Petition No. 327/MP/2013

Subject : Interlocutory Application seeking amendment of pleadings/prayers and bringing on record subsequent facts.

Petitioner : Diwakar Solar Limited.

Respondents : NTPC Vidyut Vyapar Nigam Ltd. and Union of India, Ministry of New and Renewable Energy .

I.A. No. 53/2017 in Petition No. 14/MP/2014

Subject : Interlocutory Application seeking amendment of pleadings/prayers and bringing on record subsequent facts.

Petitioner : KVK Energy Venture Private Limited

Respondents : NTPC Vidyut Vyapar Nigam Ltd. and Union of India, Ministry of New and Renewable Energy .

Petition No. 16/MP/2014

Subject : Petition under Section 79 (1)(b) read with Section 79(1)(f) of the Electricity Act, 2003 for adjustment of capacity utilization factor, extension of time for execution of project and other consequential relief.

Petitioner : MEIL Green Power Limited.

Respondents : NTPC Vidyut Vyapar Nigam Ltd. and Union of India, Ministry of New and Renewable Energy .

I.A. No. 48/2017 in Petition No. 41/MP/2014

Subject : Interlocutory Application seeking amendment of pleadings/prayers and bringing on record subsequent facts.

Petitioner : Aurum Renewable Energy Limited

Respondents : NTPC Vidyut Vyapar Nigam Ltd. and Union of India, Ministry of New and Renewable Energy .

Petition No. 42/MP/2014

Subject : Petition for adjustment of tariff, extension of time for execution of project and other consequential reliefs.

Petitioner : Corporate Ispat Alloys Limited.

Respondents : NTPC Vidyut Vyapar Nigam Ltd. and Union of India, Ministry of New and Renewable Energy .

Date of hearing : 15.9.2017

Coram : Shri Gireesh B. Pradhan, Chairperson
Shri A.K. Singhal, Member
Shri A.S. Bakshi, Member
Dr. M.K. Iyer, Member

Parties present : Shri Gopal Jain, Senior Advocate, KVKEVPL & DSL
Shri S.B. Upadhyay, Senior Advocate, AREL
Shri Buddy A. Ranganadhan, Advocate, GGEL & RSTEL
Shri Raunak Jain, Advocate, GGEL & RSTEL
Ms. Malvika Prasad, Advocate, GGEL & RSTEL
Shri Surya Kant, RSTEL
Shri Manoj Pongde, RSTEL
Shri Sakya Singha Chowdhury, Advocate, MEIL, KVKEVPL & AREL
Ms. Molshree Bhatnagar, Advocate, MEIL, KVKEVPL & AREL
Ms. Manpreet Kaur, Advocate, MEIL, KVKEVPL & DSL
Shri N.M. Venugopal, MEIL
Shri M.G. Ramachandran, Advocate, NVVNL
Ms. Anushree Bardhan, Advocate, NVVNL
Shri Shubham Arya, Advocate, NVVNL
Shri Dharmendra Singh, NVVNL
Shri R.Mishra, Advocate, MNRE
Shri Sanjay Karndhar, MNRE
Shri Chaturman Das, MNRE
Shri anand K. Ganesan, Advocate, PSPCL
Ms. Swapna Seshadri, Advocate, PSPCL
Shri Soumyajit Pani, Advocate, WBSEDCL
Shri Surajit Chakraborti, WBSEDCL

Record of Proceedings

At the outset, learned counsel for Megha Engineering and Infrastructure Limited (MEIL) submitted as under:

a). 'Damages' is provided under the Indian Contract Act, 1872 to restitute a contracting party for any loss caused to him due to the breach of contract committed by the other party. Section 74 of the Contract Act, 1872 provides that the person claiming damages has to prove the factum of loss suffered by him. Where the court is unable to

assess the compensation, the sum mentioned by the parties in the contract can be awarded by the court as reasonable compensation if it can be regarded as a genuine pre-estimate of the measure of compensation. However, where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him.

b). Since, Section 74 of the Indian Contract Act, 1872 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the Section. The expression “whether or not actual damage or loss is proved to have been caused thereby” means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded and reasonable compensation will be fixed as per Section 73 of the Contract Act, 1872.

c). In the present case, Article 4.4.1 of the PPA under which NVVNL has sought to recover liquidated damages from the petitioner, clearly require such damage to be quantified/crystallized in a certain manner. The said Article 4.4.1 states that the amount of compensation shall be computed at the rate equal to the compensation payable by the DISCOMs towards non-meeting of RPOs, subject to a minimum of 25% of the applicable tariff. Therefore, Article 4.4.1 of the PPA clearly requires the injured party to demonstrate two aspects by leading evidence namely, rate at which compensation is paid by the DISCOMs for non-meeting of RPO and some form of demand by the DISCOMS to NVVNL requiring NVVNL to pay the above amount.

d). With regard to applicability of Article 4.4.1 of the PPA, NVVNL has failed to demonstrate whether there has been any claim by DISCOMs against NVVNL and there is no documentary proof to demonstrate that DISCOMS were not able to meet its RPO obligations due to MEIL. Moreover, it is clear from MNRE’s letter dated 17.8.2016 to the Commission that most of the DISCOMs have refused to procure such expensive power. Therefore, it becomes clear that NVVNL is trying to unjustly enrich itself by recovering damages from the petitioner without meeting the pre-conditions under the contract. Unjust enrichment through recovery of damages has been prohibited by the Hon’ble Supreme Court in various cases.

e). MEIL is not liable to pay compensation towards shortfall in contracted capacity and energy under Article 4.4.1 of the PPA since the reasons for shortfall in generation of energy is not on account of MEIL. Shortfall in generation of energy is due to fall in DNI irradiations and consequent reduction in CUF of the power plant. These reasons are not attributable to the petitioner. The claim of compensation under Article 4.4.1 of the PPA can only be imposed if it is established that the default is attributable to the petitioner. Since, the issue on both law and facts is sub-judice before the Commission, NVVNL cannot adjust the invoices.

f). The petitioner's bank guarantee is liable to be encashed under the PPA for delay in achieving scheduled date of commercial operation of the project or for short supply of power. The bank guarantee cannot be encashed to compensate for loss suffered by NRVNL in so far, the same is not demonstrated by NRVNL. It is a settled law that a party claiming damages has to necessarily demonstrate actual loss suffered by it, to have a legal claim over Bank Guarantees furnished to secure such eventualities. Both NRVNL and the impleaded DISCOMs have failed to put on record actual loss suffered by them due to non-supply of power by MEIL. In support of his contentions, learned counsel relied upon the following judgments of the Hon'ble Supreme Court:

- i. Maula Baux Vs. Union of India [1969 (2) SCC 554];
- ii. Union of India Vs. Rampur Distillery & Chemical Co. Ltd. [(1973) 1 SCC 649];
- iii. Kailash Nath Associates Vs. DDA [(2015) 4 SCC 136];
- iv. M. Lachia Setty and Sons Ltd. Vs. Coffee Board [(1980) 4 SCC 636];
- v. M/s Gangotri Enterprises Ltd. Vs. Union of India [(2016) 11 SCC 720]; and
- vi. Union of India Vs. Raman Iron Foundry [(1974) 2 SCC 231].

2. Learned counsel for Godavari Green Energy Limited (GGEL) and Rajasthan Sun Technique Energy Private Limited (RSTEL) submitted that the issue of the liquidated damages is pending before the High Court of Delhi .

3. The Commission heard the applications for amendment filed in Petition Nos. 327/MP/2013, 14/MP/2014 and 41/MP/2014 and pronounced that the amendments were not allowed for which detailed order would be passed on 18.9.2017.

4. The Commission reserved the order in Petition Nos. 313/MP/2013, 304/MP/2013, 312/MP/2013, 16/MP/2014 and 42/MP/2014.

By order of the Commission
Sd/-
(T. Rout)
Chief (Legal)