REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1652 OF 2015

THE ELECTRICITY DEPARTMENT, REP. BY ITS SUPERINTENDING ENGINEER,PORT BLAIR AND ANR. APPELLANTS

VERSUS

M/S SURYACHAKRA POWER CORPORATION LIMITED. RESPONDENT

J U D G M E N T

NARIMAN, J.

1 We have heard Shri Rakesh Khanna, learned senior counsel appearing for the appellants for quite some time, and Shri. Gurukrishna Kumar, learned senior counsel appearing for the respondent in reply. Though Shri Rakesh Khanna has taken us through the PPA, various documents, and various orders in great detail, we do not find it necessary to go into any of these for the reason that we find that the appellants had set up various expert committees to go into the bone of contention in this appeal, namely, project cost and completed cost.

2 We find that M/s. K.P.C.L (M/s. Karnataka Power Corporation Ltd.) had been appointed by them in order to determine the project cost which was determined at

Rs.73.40 crores. M/s. Tamil Nadu Electricity Generation and Distribution Corporation Ltd. (TANGEDCO), another expert, arrived at a finding of Rs. 82.11 crores, which was reconfirmed by a subsequent report, and ultimately arrived at a figure of Rs.79.439 crores with other issues which were to be decided separately. A joint exercise between the appellants and respondent, also carried out in April, 2010, where a figure of Rs. 76.14 crores was arrived at, and the balance of Rs. 8.82 crores in respect of IDC, that is, interest during construction and preliminary expenses was left to be examined by the Central Electricity Authority. The Central Electricity Authority also came out with three separate reports in which it arrived at certain figures of project cost. Finally, the administration appointed a five member committee after all these reports, and in 2013, this five member committee ultimately arrived at Rs.70.61 crores as the final project cost. This was as follows :

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Description of items		Quantum of Expenditure Rs. Crores	Para Ref. of Committee Report
Approved Cost		63.14	15,17,29&30
IDC	(-)	3.00	
Cost excluding IDc	(+)	60.14	
Increase in cost of Establishment due to extended gestation period	(+)	3.30	17
Increase due to Exchange Rate variation considering only 5.13	(+)	5.67	Allowed as per actual utilization

MUS$ Rs.11.0445 per dollar			
Additional Transformer and Black Start DG Set-Work done after COD	(+)	0.31	22
Hard Cost excl. IDC		69.42	
Proportionate IDC on the hard cost of Rs.69.11 Cr.	(+)	4.91	Revised on hard cost
Completed cost including IDC/Project cost		74.33	
Liquidated damage @ 5% on Rs.74.33 crores	(-)	3.72	
Project Completed Cost		70.61	

3 Subsequently, it has been stated that the said report of the five member committee has been accepted by the Administration. The Respondent had prayed that the Hon'ble Commission determine the project cost and tariff thereon in accordance with the provisions of PPA/Techno Economic Clearance issued by A&N Administration and the report of the five members committee constituted by the A & N Administration for the purpose of determination of the cost of the project as Rs. 70.61 crores.

4 When we pointedly referred to these reports and the figures contained therein, together with the fact that the respondent itself accepted the five member committee report, which is then placed before the commission for acceptance, we find it a little difficult to now allow the respondent to go behind the said report. None of the expert committee reports allow certain amounts to be deducted from the project cost which would, if the

appellants were to succeed before us, amount to a figure of Rs. 18.25 crores as is now argued before us by the appellants. Even the five member committee report, accepted by the Administration, does not include any figures to be minused on account of under utilization of foreign currency component of Rs. 4.149 crores; custom-duty concession of Rs. 2.80 crores; concession in Land Registration Charges availed by the respondent amounting to Rs.0.3234 crores; and cost for start-up fuel and LUBE oil for trial and test run amounting to Rs.0.1971 crores.

5. Shri Khanna took us through the memo of appeal filed before the Appellate Tribunal and referred specifically to ground (C) and question of law 8(b)1 which read as follows:

> "The JERC has relied upon the reports of the `experts' which are contrary to the PPA. JERC has erred in giving foreign exchange variation on 7.96 MUSD. Documents submitted by the respondent clearly show that the respondent had utilised only 9472653 DEM (equivalent to 5.13 MUSD) as foreign currency for the purpose of importing the equipment which is mandated by the PPA.
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> "8(b)1. Whether the JERC has not erred by following recommendations/reports which are in contravention of the provisions of PPA for computation of completed cost."

6. We are afraid that these grounds do not help the appellants' case. Nowhere has it been stated, in any of the grounds that the statement made by the commission

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that the five member committee report had been accepted by the Administration is said to be incorrect. On the contrary, the ground sought to be raised in the appeal is that the commission has relied upon these reports, which reports are contrary to the Power Project Agreement. We are thus of the opinion that none of these aspects can be looked into by us in the present appeal. However, we find that the appellants are on solid ground when they contend that an increase in interest during construction, financing charges and incidental expenses incurred for the delay in the execution of the project due to reasons beyond the control of the respondent has been allowed in appeal by the Appellate Tribunal at para 23 and 36 suo moto.

7. Shri Rakesh Khanna has argued before us and shown us the ground taken in the present appeal that the tribunal has directed a suo moto payment of additional IDC, financing cost and incidental expenses during construction even though this was not part of the appeal filed by the appellant M/s. Suryachakra Power Corporation Limited before the Tribunal. This is sought to be answered by the respondent in its counter affidavit in this Court in paragraph (F) which reads as under:

> "In the synopsis the appellant has sought to contend that the Tribunal has suo-moto directed payment of additional interest during construction

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(IDC), financing cost (FC) and incidental expenses during construction (IEDC) for the period of delay in achieving commercial operation. The appellants have also sought to contend that the said issue regarding additional IDC, FC and IEDC was not a part of the appeal filed before the Tribunal. In this context, it is respectfully submitted that the said contention of the appellants is incorrect and misleading. It is respectfully submitted that the issue regarding the delay in achieving commercial operation and to whom was the delay attributable was pleaded and considered in detail by both the Joint Electricity Regulatory Commission as well as the Tribunal. Additional IDC, FC and IEDC are only consequences that follow the delay in achieving the commercial operation. Both the Courts below have concurrently held that the delay in achieving commercial operation of more than a year was attributable to the appellants themselves as they did not provide the transmission lines to evacuate the power from the project within the time prescribed under the PPA. Therefore the Respondents herein had claimed deemed generation charges for the whole period of delay in achieving commercial operation. It is pertinent to mention that the deemed generation charges is higher than the additional IDC, FC and IEDC. Thus, the Tribunal has granted the Respondents the lower of the two. The deemed generation charges have been awarded only for a period of four months out of the total delay of more than a year in achieving commercial operation. The Respondent is not claiming additional IDC, FC and IEDC for the said period of four months for which deemed generation charges have been granted."

8. In reply, Shri Gurukrishna Kumar, learned senior counsel appearing for the respondent, points out before us that in any case what was referred to in the commission's judgment in order to arrive at the figure of Rs. 78.29 crores as the project cost in fact started with the figure of Rs. 77.595 crores, being CEA approval as per "funds tied up" basis, which according to the learned senior counsel, would include the aforesaid

expenditure. He argued before us that certain figures which were referred to and relied upon by the CEA to arrive at this figure specifically included the aforesaid. We were not shown any such figures. We, therefore, allow the appeal only to this limited extent and set aside the judgment of the Appellate Tribunal insofar as it allows an increase in interest during construction (IDC), financing charges (FC) and incidental expenses during construction (IEDC) incurred for the delay in execution of the project for reasons beyond the control of the respondent. To this limited extent alone the appeal stands allowed, and on other points it is dismissed.

9 We are also of the view that apart from the above, no substantial question of law is raised in this appeal.

10 For the aforesaid reasons, we dispose of the appeal with no other costs.

....................J.
[KURIAN JOSEPH]

....................J.
[ROHINTON FALI NARIMAN]

NEW DELHI;
SEPTEMBER 22, 2016