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Supreme Court upholds gas power plant's entitlement to fixed charges

The Supreme Court of India (“**Supreme Court**”) in the case of *Maharashtra State Electricity Distribution Company Limited v. Ratnagiri Gas and Power Pvt. Limited & Ors.*¹ upheld the decisions rendered by both Central Electricity Regulatory Commission (“**CERC**”) and the Appellate Tribunal for Electricity (“**APTEL**”) that Ratnagiri Gas and Power Pvt. Limited (“**RGPPL**”) is entitled to fixed charges for the duration the Maharashtra State Electricity Distribution Company Ltd. (“**MSEDCL**”) did not schedule electricity from RGPPL.

MSEDCL did not schedule power from RGPPL (for a certain duration) as RGPPL executed an alternate arrangement with Gas Authority of India Ltd. (“**GAIL**”) for supply of Recycled Liquefied Natural Gas (“**RLNG**”), without taking MSEDCL’s permission. RGPPL declared capacity for its gas power plant based on RLNG (to be) supplied by GAIL. The issue before CERC, APTEL and Supreme Court was whether MSEDCL should pay fixed charges to RGPPL for capacity declared based on RLNG (to be) supplied by GAIL.

CERC and APTEL recognized that this alternate arrangement was executed due to shortage of domestic gas supply since September 2011. Both CERC and APTEL held that provisions of the power purchase agreement (“**PPA**”) between MSEDCL and RGPPL allowed RGPPL to declare capacity based either on liquid gas or RLNG and it was only for payment of variable charges that MSEDCL’s permission was required for executing agreements for gas supply/transport.

Brief Facts

RGPPL owns a gas based generating plant with installed capacity of 1967.08 MW (one thousand nine hundred and sixty seven point zero eight megawatt). The plant has a liquid natural gas (“**LNG**”) terminal of 5 MMTA (five million metric tonnes per annum). 95% of the plant’s capacity is allocated to MSEDCL with balance capacities of Daman & Diu etc.

On April 10, 2007, RGPPL and MSEDCL executed a PPA.

On August 18, 2010, CERC approved tariff for RGPPL till FY 2013-14 where CERC determined the normative annual plant availability factor as 80% from FY 2009 till FY 2013-14. CERC noted that RGPPL executed contracts with Reliance India Ltd. and Oil and Natural Gas Ltd. for supply of domestic gas.

September 2011 onward, RGPPL suffered shortage of domestic gas supply and despite efforts on part of RGPPL, the domestic gas supply could not be restored.

In December 2011, RGPPL entered into an arrangement with GAIL for supply of RLNG under spot cargo on a reasonable endeavour basis (take and pay contract). Thereafter, through communications dated December 19, 2011,

¹ 2023 INSC 993. Judgment dated November 9, 2023.

and December 23, 2011, MSEDCL sent letters to RGPPL stating that if MSEDCL purchased power at high cost of INR 7.05 (Indian Rupees seven paise zero five) per unit, then the consumers would un-necessarily be overburdened.

In 2012, RGPPL had filed a petition before the CERC i.e. *RGPPL v. MSEDCL & Ors.*², seeking resolution of issues related to no availability of domestic gas etc. MSEDCL during the hearing in this petition submitted that as per Article 5.9 of the PPA, RGPPL was required to obtain MSEDCL's permission for executing an agreement with GAIL and therefore, MSEDCL is not obligated to pay fixed charges to RGPPL for capacity declared based on agreement with GAIL.

On July 30, 2013, CERC passed its order in the abovementioned petition ("**CERC Order**") holding that as per Article 4.3 of the PPA, RGPPL was permitted to use RLNG as a primary fuel. This provision suffices so far as declaration of capacity using RLNG is concerned. MSEDCL relying on Article 5.9 of the PPA for refusing to pay fixed charges is incorrect since as per Article 5.9, the only permission required is related to variable charge i.e. cost of natural gas/RLNG- Article 5.9 cannot render Article 4.3 redundant.

In 2013, MSEDCL filed an appeal challenging the CERC Order before APTEL in *MSEDCL v. CERC & Ors.*³. MSEDCL contended that as per Article 5.9, RGPPL was to take MSEDCL's permission to execute any gas supply/transport agreement.

On April 22, 2015, APTEL passed its judgment in Appeal No. 261 of 2013 and held as under (*Para 13 and 14*):

1. It is clear from the analysis of the provisions of Article 4.3 of the PPA that the primary fuel for RGPPL is LNG, natural gas or R-LNG and the normal capacity of the generating station will be declared on gas or R-LNG. The consent or agreement by a distribution licensee will be required only in the case the power generator makes the arrangements of liquid fuel(s) for the quantum required by MSEDCL.
2. In the case in hand, RGPPL, due to heavy scarcity of domestic gas had to change the nature of primary fuel namely LNG/natural gas to R-LNG. The consent of MSEDCL is not required prior to entering into the GSA/GTA as this is not a case of change from LNG/natural gas or R-LNG to liquid fuel but it is a case of change of inter se primary fuel.
3. Since there was a heavy shortage of domestic gas at the relevant time and MSEDCL was not agreeing to schedule power for the declared availability, RGPPL was left with no other option except to enter into GSA/GTA with GAIL in order to generate electricity for which purpose the plant in question was set up after a lot of efforts between the State Government, the Government of India and different other institutions of the highest level to meet the requirements of electricity of the State as well as the centre.
4. Since the declared capacity is in accordance with Article 4.3 of the PPA the capacity charges as provided in Article 5.2 of the PPA are payable.

Issue

Whether RGPPL is entitled to fixed charges for capacity declared based on execution of an alternate gas supply arrangement with GAIL for RLNG for which no permission was taken from MSEDCL by RGPPL?

Contentions of MSEDCL

MSEDCL had broadly contended as follows:

1. CERC and APTEL have virtually re-written the contract between the parties which is impermissible under settled principles of contractual interpretation.
2. There is an "organic interlinking" between Article 5.9, commercial implications, plant availability, declared capacity, and declaration of capacity in terms of choice of fuel as provided in Article 4.3. Therefore, the compartmentalization of Article 4.3 and 5.9, which is the premise of the impugned decision is flawed.

² Petition No. 166/MP/2012.

³ Appeal No. 261 of 2013.

Findings of the Supreme Court

The Supreme Court interpreted the clauses of PPA and held that such permission was not required since PPA recognised RLNG as a primary fuel. The Supreme Court recognised that alternate arrangement was executed only due to domestic gas shortage i.e., circumstances beyond RGPPL's control. Relevant paragraphs of the judgment are as follows:

“28. In accordance with settled principles governing the interpretation of contracts, the PPA is required to be read as a whole. Clause 4.3 has two parts: according to the first, primary fuels include LNG/Natural gas and/or RLNG; according to the second, the appellant's agreement is required in case liquid fuels are to be employed. A bare reading of the clause indicates that the requirement to seek such an agreement does not attach to the first part of the clause which envisages RLNG as a primary fuel. An arrangement involving a transition from one primary fuel to another primary fuel is permissible by the clause, even without the appellant's agreement.

29. The requirement of an agreement, mandated for an arrangement involving liquid fuel cannot be read into the plain text of the former part of Clause 4.3. Thus, the capacity declaration based on RLNG could be done unilaterally, unencumbered by the requirement of the appellant's consent in the latter half or the prior approval requirement under Clause 5.9 of the PPA.

30. We must remain mindful of the conspectus of facts that led to the establishment of the first respondent. It was set up consequent to the failure of M/s Enron International, and M/s Dabhol Power Company to meet the energy needs of the State of Maharashtra. The tariff requirements have been determined based on the need to preserve the viability of the unit.

31. The first respondent was compelled to make alternate arrangements in view of the country-wide shortage of domestic gas, making RLNG a viable and contractually permissible alternative. Notably, the appellant has not disputed the circumstances in which this need arose.

32. In the present case, CERC and APTEL have correctly held that the GSA/GTA with GAIL is permissible by the terms of the contract and the consent or approval of the appellant is irrelevant. Clause 5.9 and Clause 4.3 operate in different spheres and the requirements of the former cannot be foisted on an arrangement permissible by the latter...

35. A commercial document cannot be interpreted in a manner that is at odds with the original purpose and intendment of the parties to the document. A deviation from the plain terms of the contract is warranted only when it serves business efficacy better. The appellant's arguments would entail reading in implied terms contrary to the contractual provisions which are otherwise clear. Such a reading of implied conditions is permissible only in a narrow set of circumstances.

36. In the present context, bearing in mind the background of the establishment of the first respondent, and the shortfall of domestic gas for reasons beyond the control of the first respondent, such a deviation from the plain terms is not merited and militates against business efficacy as it has a detrimental impact on the viability of the first respondent.”

Conclusion

The Supreme Court recognised that a commercial document cannot be interpreted in a manner that is at odds with the original purpose and intendment of the parties to the document - a deviation from the plain terms of the contract is warranted only when it serves business efficacy better. The Supreme Court in this way recognised the circumstances that surrounded RGPPL rather than only reading the contractual terms between the parties.

The Supreme Court recognised that there was a shortage of supply of domestic gas to RGPPL and gave the necessary interpretation to clauses of the PPA. The Supreme Court differentiated between the contractual clause permitting a

generating station to declare capacity based on primary fuel versus a contractual clause putting condition on payment of energy charges i.e. mandating approval of gas supply agreements by the distribution licensee.

The Supreme Court not only recognised the circumstances of shortage of supply of gas, but also noted how in this dispute, MSEDCL never denied existence of this situation. The Supreme Court granted relief to RGPPL and protected the viability of the power generator.

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