

Rajasthan High Court holds that interest levied on discoms due to delay in clearing principal outstanding dues, cannot be recovered from consumers

On November 9, 2023, the High Court of Judicature for Rajasthan at Jodhpur, (“**Rajasthan High Court**”) has rendered its final Judgment in the case of *Bhansali Dyeing v State of Rajasthan & Ors.*¹ While partly allowing a batch of writ petitions filed by various consumers of distribution licensees in Rajasthan, the Rajasthan High Court has held that carrying cost/interest levied on the distribution licensees of Rajasthan (“**Rajasthan DISCOMs**”) for their failure to clear their principal outstanding dues cannot be recovered by the Rajasthan DISCOMs from their consumers. In doing so, the Rajasthan High Court has partly quashed and set aside orders dated June 6, 2019, September 1, 2022, and September 20, 2022 (“**Impugned Orders**”) passed by Rajasthan Electricity Regulatory Commission (“**RERC**”).

Brief Facts and Procedural History

Adani Power Rajasthan Ltd (“**APRL**”) had executed a power purchase agreement (“**PPA**”) with the Rajasthan DISCOMs for generating and selling electricity from its coal-based power plant at Kawai, District Baran. Due to the State’s inability to allocate a coal block to APRL for its power plant, APRL was constrained to import coal from Indonesia. To offset the commercial impact of importing Indonesian coal, APRL approached RERC. The ensuing litigations are summarised hereunder:

1. APRL filed a petition before RERC seeking compensation under change in law to offset commercial impact of importing of coal from Indonesia. By its order dated May 17, 2018², RERC allowed the petition and directed Rajasthan DISCOMs to pay the claim amount of approximately INR 5,000 crore (Indian Rupees five thousand crore) to APRL.
2. Aggrieved by RERC’s order dated May 17, 2018, Rajasthan DISCOMs filed an appeal before the Appellate Tribunal for Electricity (“**APTEL**”). On September 24, 2018³, APTEL passed an interim order directing Rajasthan DISCOMs to pay 70% of the compensation amount to APRL, pending adjudication of the appeal.
3. Aggrieved by APTEL’s interim order, Rajasthan DISCOMs filed an appeal before the Supreme Court of India (“**Supreme Court**”). The Supreme Court *vide* order dated October 29, 2018⁴ dismissed Rajasthan DISCOM’s appeal but modified APTEL’s order and directed Rajasthan DISCOMs to pay 50% of the amount claimed by APRL.
4. Pending the appeal before APTEL, Rajasthan DISCOMs filed a petition before RERC seeking recovery of the amounts paid by them to APRL pursuant to the Supreme Court’s interim order (i.e., additional power purchase cost) through special fuel surcharge. RERC allowed the petition *vide* order dated June 13, 2019, and held that the Rajasthan DISCOMs were entitled to recover the amount of INR 2709.36 crore (Indian Rupees two thousand seven

¹ 2023 SCC OnLine Raj 3292 (S.B. Civil Writ Petition No. 11242/2023)

hundred and nine point three six crore) on account of fuel surcharge adjustment, from consumers over a period of 36 (thirty six) months.

5. In the meantime, APTEL dismissed Rajasthan DISCOMS Appeal by its Judgment dated September 14, 2019⁶.
6. Aggrieved by the judgment dated September 14, 2019, Rajasthan DISCOMS filed an Appeal before the Supreme Court. By its judgment dated August 31, 2020⁷, the Supreme Court upheld the orders passed by RERC and APTEL. However, the Supreme Court granted limited relief to the Rajasthan DISCOMS by reducing the rate of interest/ late payment surcharge payable by the Rajasthan DISCOMS to APRL.
7. Aggrieved by the Supreme Court's judgment, Rajasthan DISCOMS filed a review petition, which was dismissed on March 2, 2021⁸.
8. Thereafter, APRL filed a contempt petition⁹ against the Rajasthan DISCOMS before the Supreme Court alleging non-compliance of the judgment dated August 31, 2020. By its order dated April 19, 2022, the Supreme Court closed the contempt proceedings while noting that the principal due along with interest was paid by the Rajasthan DISCOMS to APRL. The Supreme Court further left open the issue of late payment surcharge to be decided by the appropriate forum.
9. Eventually, Rajasthan DISCOMS filed a petition before RERC seeking to recover the additional power purchase cost incurred by them in complying with the judgment dated August 31, 2020 of the Supreme Court, from their consumers, through special fuel surcharge.
10. By the Impugned Orders, RERC permitted the Rajasthan DISCOMS to recover said additional power purchase cost through special fuel surcharge. Being aggrieved by the Impugned Orders, a batch of writ petitions were preferred before the Rajasthan High Court.

Findings of the Rajasthan High Court

The Rajasthan High Court, while partly allowing the writ petitions has held that only the principal amount of INR 3048.64 crore (Indian Rupees three thousand and forty eight point six four crore) can be recovered from consumers through special fuel surcharge. The carrying cost/ interest cannot be recovered from the consumers. In this regard, the Rajasthan High Court has noted and held that:

1. RERC has levied special fuel surcharge on consumers for an amount of INR 7,438.58 crore (Indian Rupees seven thousand four hundred and thirty eight point five eight crore) [INR 3,048.64 crores (Indian Rupees three thousand and forty eight point six four crore) towards the principal amount + INR 2,947.81 crore (Indian Rupees two thousand nine hundred and forty seven point eight one crore) towards interest/carrying cost on principal amount + INR 1,442 (Indian Rupees one thousand four hundred and forty two) being additional interest amount due to lending from financial institutions].
2. In terms of the RERC Tariff Regulations read with Section 62(4) of the Electricity Act, 2003, RERC is empowered to levy special fuel surcharge to recover additional power purchase cost incurred by the Rajasthan DISCOMS.
3. The principal amount has become liable to be paid by Rajasthan DISCOMS due to a change in law which is an uncontrollable factor in terms of Regulation 9 of the RERC Tariff Regulations.
4. However, Rajasthan DISCOMS's liability to pay interest / carrying Cost on the principal amount has arisen due to non-payment of the principal amount in time – this cannot be considered as an uncontrollable factor in terms of Regulation 9 of the RERC Tariff Regulations. While the original principal amount was only INR 3,048.64 crores (Indian Rupees three thousand and forty eight point six four crore), the carrying cost/ interest amounts have been levied due to the delay by Rajasthan DISCOMS in paying the principal amount.
5. Recovering interest/ carrying cost from consumers through special fuel surcharge is unjustified. The delay in paying the principal amount has resulted due to Rajasthan DISCOMS pursuing consecutive litigations. In *GMR Warora Ltd. v. Central Electricity Regulatory Commission & Ors*¹⁰, the Supreme Court has deprecated the conduct of

generators and DISCOMS in pursuing repeated and unnecessary litigation on change in law issues which are settled by courts through concurrent findings.

6. Consumers of Rajasthan cannot be compelled to bear the consequences of Rajasthan DISCOMS failure to discharge their liability on time.

Accordingly, the Rajasthan High Court has ruled that any excess amounts already recovered from consumers will be duly adjusted while levying a special fuel surcharge for the principal amount.

Conclusion

The Rajasthan High Court has stepped in to protect consumer interest by ensuring that consumers are not burdened with unnecessary interest/carrying cost/late payment surcharge incurred by the Rajasthan DISCOMS due to their imprudence.

Under the extant regulatory framework, DISCOMS are revenue neutral utilities and are entitled to return on equity at a fixed rate. The costs which are not passed onto consumers will have to be borne by DISCOMS and can have a significant impact on their financials. However, in commercial matters, it is imperative that unnecessary and prolonged litigations, especially on settled issues, is discouraged. The party which suffers an order/ decree of court ought to make payments in terms of such order/ decree while exercising its rights against such order/ decree. This is an important judgment which protects consumer interest and lays down an important precedent for commercial disputes in the regulatory sector.

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