

IN THE SUPREME COURT OF INDIA  
CIVIL APPELLATE JURISDICTION  
CIVIL APPEAL NO. 9485 OF 2017

ODISHA POWER GENERATION  
CORPORATION LIMITED

Appellant(s)

VERSUS

ODISHA ELECTRICITY REGULATORY  
COMMISSION & ORS.

Respondent(s)

O R D E R

1. The appellant and respondent No. 2- M/s GRIDCO Ltd. entered into Power Purchase Agreement ("PPA") dated 13.08.1996 which was amended on 19.12.2012. On 26.02.2014, a joint application was filed before the Orissa Electricity Regulatory Commission ("the State Commission") for approval of the PPA. On 8.09.2014, Orissa Electricity Regulatory Commission (Terms and Conditions for Determination of Generation Tariff) Regulations 2014 were promulgated. The said Regulations inter alia provided as follows:

"4.4 The annual Fixed Cost for OHPC and OPGC will be determined by the Commission by taking into account the notification(s) issued by the Government of Odisha from time to time."

2. Taking into account the above Regulations, the

State Commission vide Order dated 27.04.2015 after referring to Notification dated 21.06.2008 directed as follows:

"12. The Regulation 2.7 of OERC (Terms and Conditions for Determination of Generation Tariff) Regulations, 2014 provides as follows:

"The existing generation plants of OHPC and OPGC may make an application as per the Format prescribed by the Commission for determination of tariff as per annual schedule, by November 30<sup>th</sup> of every year for determination of tariff in respect of the units of the generating station completed or projected to be completed within six months from the date of application.

Provided that the OHPC and OPGC shall make an application as per the prescribed Format with necessary information and explanations, for determination of tariff based on capital expenditure incurred duly certified by the auditors or projected to be incurred up to the date of commercial operation and additional capital expenditure incurred duly certified by the auditors or projected to be incurred during the period for which application for determination of tariff is filed of the generating station."

13. Due to the above provision in the Regulation read with Regulation 7.13 of the same Regulations, OPGC shall make an application before the Commission as per the above approved PPA each year for determination of tariff for the rest of the control period starting from FY 2016-17 onwards since the tariff for the FY 2014-15 and 2015-16 has already been

approved by the Commission in the ARR of GRIDCO for the said year basing on the submission of GRIDCO."

3. Thereafter, the issue of tariff for subsequent period was considered by the State Commission vide Order dated 21.03.2016 and the State Commission declined to go by the Notification dated 21.06.2008 and the PPA on the issue of fixed costs and other costs observing as follows:

"The Electricity Act, 2003 is a comprehensive piece of legislation. Cherry picking of the provisions of the Act would lead to chaos in the Regulatory regime. When a cost plus tariff is determined under a particular provision of the Act and its related Policies it is not possible to overlook other provisions of the same Act to the advantage of the Petitioner. Moreover agreements cannot override statutory provisions. The Petitioner cannot take the shelter of the agreement to insulate itself from the statutory norms. The Notification of the Government dated 21.06.2008 also favours tariff fixation in line with CERC Regulation in absence of any Regulation by OERC. Since in the meantime OERC Generation Regulation, 2014 has come into force we have to be guided by the same. Accordingly, we proceed to determine the tariff of power purchased by GRIDCO from OPGC under Section 62 of the Act. OERC has carefully examined and analysed the tariff proposal of OPGC. The written and oral submissions of the objectors have been taken into consideration while deciding the generation tariff of OPGC for FY 2016-17. The response of OPGC on the points raised by objectors have also been considered."

4. The above view has been upheld by the Appellate Tribunal as follows:

"In view of the above, we are of the opinion that the impugned order which determines the tariff on the basis of the norms stipulated in the OERC Regulations deserves to be confirmed. Needless to repeat that when regulations are in field, they have to be followed in entirety and this will also apply to the OERC Regulations."

5. We have heard learned counsel for the parties. Learned counsel for the appellant submits that there is no dispute with the proposition that the Regulations override the PPA but in the present case the Regulations itself provide for a carve out enabling the Notification dated 21.06.2008 and the PPA to be applied. This submission has been noted in the impugned order as follows:

"The OERC Regulations contain certain carve outs for the Appellant's generating station. Therefore, the PPA order dated 27/04/2015 was passed in exercise of the State Commissions's power under the OERC Regulations approving separate norms for the Appellant's generating station. However, by the impugned order, the State Commission has sought to overturn the PPA order dated 27.04.2015."

6. We are of the view that the Commission vide Order dated 27.04.2015 on the joint application of the parties dated 26.02.2014 rightly fixed the tariff but the view taken in subsequent order dated 21.03.2016 which has been upheld on appeal is unsustainable.

7. Accordingly, we set aside the impugned order and remand the matter to the State Commission for fresh decision. The State Commission may take into account the Notification dated 21.06.2008 for the fixed costs, the PPA for the variable costs specified therein and for other costs not reflected in the PPA, statutory Regulations may be applied.

8. The appeal shall stand disposed of as indicated above.

9. The parties may appear before the State Commission for further proceedings on 2.07.2018.

.....J.  
(ADARSH KUMAR GOEL)

.....J.  
(ROHINTON FALI NARIMAN)

NEW DELHI,  
APRIL 19, 2018

ITEM NO.102

COURT NO.11

SECTION XVII

S U P R E M E C O U R T O F I N D I A  
R E C O R D O F P R O C E E D I N G S

Civil Appeal No(s). 9485/2017

ODISHA POWER GENERATION CORPORATION LIMITED

Appellant(s)

VERSUS

ODISHA ELECTRICITY REGULATORY COMMISSION &amp; ORS.

Respondent(s)

(IA No. 61323/2017-FOR STAY and IA No. 49217/2018-PERMISSION TO PLACE ON RECORD ADDL. DOCUMENTS)

Date : 19-04-2018 This appeal was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE ADARSH KUMAR GOEL  
HON'BLE MR. JUSTICE ROHINTON FALI NARIMAN

For Appellant(s)      Mr. Jayant Bhushan, Sr. Adv.  
                                 Mr. Sitesh Mukherjee, Adv.  
                                 Mr. Syed Jafar Alam, AOR  
                                 Mr. Deep Rao, Adv.  
                                 Mr. Divyanshu Bhatt, Adv.

For Respondent(s)      Mr. Rutwik Panda, AOR  
RR-1                              Ms. Nikhar Berry, Adv.  
                                 Ms. Anshu Malik, Adv.

RR-2                              Mr. Raj Kumar Mehta, AOR  
                                 Ms. Himanshi Andley, Adv.

UPON hearing the counsel the Court made the following  
O R D E R

The appeal stands disposed of in terms of the signed order.  
Pending applications also stand disposed of.

(SUSHIL KUMAR RAKHEJA)  
COURT MASTER (SH)

(SAROJ KUMARI GAUR)  
BRANCH OFFICER

(Signed order is placed on the file.)