

M/S SAGAR SUGARS & ALLIED PRODUCTS LTD.

v.

THE TRANSMISSION CORPORATION OF A.P. LTD. &
ORS.

(Civil Appeal No. 5159 of 2005)

OCTOBER 13, 2011

[R.V. RAVEENDRAN AND A.K. PATNAIK, JJ.]

Electricity: Price and tariff of power – Fixation of – Power generated from bagasse, by-product of sugar industry run by appellant – Supply of power to respondent no.1 – Dispute between the appellant and respondent No.1 was whether or not during the period 13.01.2003 to 21.01.2004, when the sugar plant of the appellant had not commenced production of sugar, the unutilized power supplied by the appellant to respondent No.1 would have the same price as the price of power supplied by non-conventional energy projects in the State of Andhra Pradesh determined by the Andhra Pradesh Electricity Regulatory Commission (APERC) – Held: It would be more appropriate for the APERC, which is a regulatory commission with expertise in determination of price and tariff of power, to decide what would be the price for supply of power by the appellant to the respondent no.1 during the disputed period and thereafter – Matter remitted to APERC – APERC to consider all relevant materials and factors and finally determine the price of power supplied during the disputed period and thereafter.

On 29.04.2000, the appellant entered into a Memorandum of Understanding with Non-Conventional Energy Development Corporation of Andhra Pradesh Limited (NEDCAP), a nodal agency for non-conventional projects up to 20 MW, for setting up of a power plant in which power was to be generated from bagasse, a by-product of sugar factory. On 25.01.2002, the Andhra

A Pradesh Electricity Regulatory Commission (APERC) set up under the Andhra Pradesh Electricity Reforms Act, 1998, permitted the appellant-company to supply the power generated in its plant to the respondent no.1, which had taken over the functions of the erstwhile
 B Andhra Pradesh Electricity Board. On 10.07.2002, a Power Purchase Agreement (PPA) was entered into between the appellant and respondent no.1 which inter alia provided that the power to the extent of 9.99 MW would be supplied during the season and the power to the extent of 16.94
 C MW would be supplied during the off season. On 11.01.2003, respondent no.1 permitted the appellant to synchronize its plant with the power grid and on 13.01.2003, the appellant started supplying electricity energy to the power grid. On 01.03.2003, the appellant wrote to the APERC to direct respondent no.1 to purchase unutilized power of the appellant as sugar plant of the appellant could not be commissioned due to some difficulties and power generated in its power plant remained unutilized. On 17.03.2003, APERC directed
 D respondent no.1 to amend the PPA to provide for surplus/ additional quantity of power from the appellant. On 17.03.2003, the Chief Engineer of respondent No.1 wrote to Superintending Engineer directing him to stop evacuation of power from the power plant of the appellant and to cut off the supply on the ground that the plant of
 E the appellant could not be classified as co-generation till the sugar plant of the appellant was commissioned.
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In the instant appeals the dispute between the appellant and respondent No.1 was whether or not during
 G the period 13.01.2003 to 21.01.2004, when the sugar plant of the appellant had not commenced production of sugar, the unutilized power supplied by the appellant to respondent No.1 would have the same price as the price of power supplied by non-conventional energy projects

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in the State of Andhra Pradesh determined by the APERC. A

Disposing of the appeals and remanding the matter to the APERC, the Court

HELD: It would be more appropriate for the APERC, B
which is a regulatory commission with expertise in
determination of price and tariff of power, to decide what
would be the price for supply of power by the appellant
to the respondent no.1 during the disputed period
13.01.2003 to 21.01.2004 and thereafter. The APERC C
would have to consider all relevant materials and factors
and finally determine the price of power supplied during
the period 13.01.2003 to 21.01.2004 and thereafter and in
accordance with the determination made by the APERC, D
balance payments, if any, will be made by the respondent
no.1 to the appellant. [Paras 9-10] [1012-D-G-H]

*Transmission Corporation of Andhra Pradesh Limited
and Anr. etc.etc. v. Sai Renewable Power Private Limited and
Others etc.etc.* (2010) 6 Scale 541: (2010) 8 SCR 636 – relied E
on.

Case Law Reference:

(2010) 8 SCR 636 Relied on Para 7

CIVIL APPELLATE JURISDICTION : Civil Appeal No. F
5159 of 2005.

From the Judgment and Order dated 30.07.2004 of the
High Court of Judicature of Andhra Pradesh at Hyderabad in
C.M.A. No. 3613 of 2004. G

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Civil Appeal No. 5157 of 2005.

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A Dr. Rajeev Dhawan and R. Balasubramaniam, A.V. Rangam, Buddy A. Ranganadhan for the Appellant.

Rakesh K. Sharma, S. Ramsubramanian and Sangita Chauhan for the Respondents.

B The Judgment of the Court was delivered by

A. K. PATNAIK, J. 1. These are the appeals against the common order dated 30.07.2004 passed by the Division Bench of the Andhra Pradesh High Court in Writ Appeal No. 191 of 2004 and C.M.A No. 3613 of 2003.

2. The facts relevant for deciding these appeals very briefly are that on 29.04.2000 the appellant entered into a Memorandum of Understanding with Non-Conventional Energy Development Corporation of Andhra Pradesh Limited (for short 'the NEDCAP'), a nodal agency for non-conventional projects up to 20 MW, for setting up of a power plant in which power was to be generated from bagasse, a by-product of sugar factory. On 25.01.2002, the Andhra Pradesh Electricity Regulatory Commission (for short 'the APERC') set up under the Andhra Pradesh Electricity Reforms Act, 1998, permitted the appellant-company to supply the power generated in its plant to the respondent no.1, which had taken over the functions of the erstwhile Andhra Pradesh Electricity Board. On 10.07.2002, a Power Purchase Agreement (for short 'the PPA') was entered into between the appellant and the respondent no.1 which *inter alia* provided that the power to the extent of 9.99 MW will be supplied during the season and power to the extent of 16.94 MW will be supplied during the off season. On 11.01.2003, respondent no.1 permitted the appellant to synchronize its plant with the power grid and on 13.01.2003, the appellant started supplying electricity energy to the power grid. On 01.03.2003, the appellant wrote to the APERC to direct the respondent no.1 to purchase unutilized power of the appellant as sugar plant of the appellant could not be commissioned due to some difficulties and power generated

in its power plant remained unutilized and on 17.03.2003, A
APERC directed the respondent no.1 to amend the PPA to
provide for surplus/ additional quantity of power from the
appellant. On 17.03.2003, the Chief Engineer of respondent
No.1 wrote to Superintending Engineer directing him to stop
evacuation of power from the power plant of the appellant and B
to cut off the supply on the ground that the plant of the appellant
cannot be classified as co-generation till the sugar plant of the
appellant was commissioned.

3. The appellant then filed Writ Petition No. 7395 of 2003
in the Andhra Pradesh High Court challenging the letter dated C
17.03.2003 of the Chief Engineer of the respondent No.1 and
the learned Single Judge passed the orders on 02.05.2003
directing issue of notice to the respondents and directing the
respondents, as an interim measure, to purchase power from
the appellant and to pay to the appellant Rs.2.00 per unit. D
The respondent No.1 then filed a review petition before the APERC
for reconsideration of its earlier directions to amend the PPA
issued on 17.03.2003 and on 01.10.2003 the APERC allowed
the review petition and cancelled its directions issued on
17.03.2003. The appellant then challenged the order dated E
01.10.2003 of the APERC before the Division Bench of the
High Court in C.M.A. No. 3613 of 2003 and the Division Bench
of the High Court granted interim stay of the order dated
01.10.2003 of the APERC.

4. On 15.12.2003, the learned Single Judge of the High
Court allowed Writ Petition No. 7395 of 2003 of the appellant
and quashed the letter dated 17.03.2003 of the Chief Engineer
of the respondent No.1 and directed the respondent No.1 to
evacuate the power as agreed under the PPA and as directed F
by the APERC by order dated 17.03.2002. Against the said
order dated 15.12.2003 of the learned Single Judge, the
respondent filed Writ Appeal No. 371 of 2004 and on G
12.02.2004 the Division Bench passed an interim order that
no further payment need to be made by respondent no.1 to the
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A appellant. Thereafter, on 22.04.2004 the Division Bench modified its earlier interim order dated 12.02.2004 and directed the respondent to pay the appellant at the rate of Rs.2.69 per unit instead of Rs.2.00 per unit and the said order was to continue till further orders in the Writ Petition.

B 5. Finally on 30.07.2004, the Division Bench of the High Court passed the impugned order in Writ Appeal No. 191 of 2004 as well as in C.M.A. No. 3613 of 2003 setting aside the order dated 15.12.2003 of the learned Single Judge in Writ Appeal No. 7395 of 2003 and directed the parties to approach the appropriate forum chosen by the parties under the PPA for resolving the dispute. By the impugned order the Division Bench also held that the appellant will be entitled to tariff as fixed by the Division Bench of the High Court in Writ Appeal No. 371 of 2004.

D 6. Dr. Rajeev Dhavan, learned senior counsel for the appellant, submitted that the sugar plant has, in the meanwhile, commenced the production on 21.01.2004 and the only dispute which has to be decided by this Court is with regard to the price of the power supplied by the appellant to the respondent during the period from 13.01.2003 to 21.01.2004.

F 7. Mr. Dhavan submitted that by the order dated 22.04.2004 of the Division Bench in Writ Appeal No. 371 of 2004, the respondent No.1 was to be paid at the revised rate of Rs.2.69 per unit and on 08.02.2006, this Court has by an interim order, directed that the appellant would be entitled to receive payment at the rate of Rs.3.11 per unit as an interim measure for the period from 13.01.2003 to 20.01.2004 and also at the same rate of Rs.3.11 per unit for the period G 21.01.2004 onwards, as has been paid to other co-generating plants, excluding the money already paid. He submitted that in *Transmission Corporation of Andhra Pradesh Limited and Another etc. etc. v. Sai Renewable Power Private Limited and Others etc.etc.* [(2010) 6 SCALE 541= (2010) 8 SCR 636 = H JT 2010 (7) SC 1] this Court has issued some directions

relating to price payable for power supplied by non-conventional power projects. He referred to Para 4 of the judgment of this Court in the aforesaid case to show that the APERC had approved the rate of Rs.2.25 per unit with 5% escalation per annum from 1994-1995, being the base year, for supply of power generated by the non-conventional power projects and this was also the price fixed in clause 2.2 of the P.P.A for supply of electricity by the appellant to the respondent no.1. He submitted that the benefit of the aforesaid judgment of this Court delivered on 08.07.2010 should therefore be granted to the appellant and directions be issued to respondent no.1 accordingly.

8. Learned counsel for respondent no.1, on the other hand, submitted that the judgment of this Court delivered on 08.07.2010 in *Transmission Corporation of Andhra Pradesh Limited and Another etc. etc. v. Sai Renewable Power Private Limited and Others etc.etc.* (supra) was on tariff and purchase price of power produced by co-generation non-conventional energy plants and the plant of the appellant was not a co-generation plant during the period from January, 2003 to January, 2004, as there was no production of sugar in the plant during the aforesaid period and therefore the judgment of this Court in *Transmission Corporation of Andhra Pradesh Limited and Another etc. etc. v. Sai Renewable Power Private Limited and Others etc.etc.* (supra) has no relevance to the price of power supplied by the appellant to the respondent No.1 during January, 2003 to January, 2004.

9. We have considered the submissions of the learned counsel for the parties and we find that clause 2.2 of P.P.A. between the appellant and respondent no.1 reads as follows:

"2.2. The company shall be paid the tariff for the energy delivered at the interconnection point for sale to APTRANSCO at Rs.2.25 paise per unit with escalation at 5% per annum with 1994-95 as base year and to be revised on 1st April of every year up to the year 2003-

- A 2004. Beyond the year 2003-2004, the purchase price by APTRANSCO will be decided by Andhra Pradesh Electricity Regulatory Commission. There will be further review of purchase price on completion of ten years from the date of commissioning of the project, when the purchase price will be reworked on the basis of Return on Equity, O& M expenses and the Variable Cost.
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- C The dispute between the appellant and respondent No.1 before us is whether or not during the period 13.01.2003 to 21.01.2004, when the sugar plant of the appellant had not commenced production of sugar, the unutilized power supplied by the appellant to the respondent No.1 will have the same price as the price of power supplied by non-conventional energy projects in the State of Andhra Pradesh determined by the APERC. It will be more appropriate for the APERC, which is a regulatory commission with expertise in determination of price and tariff of power, to decide what would be the price for supply of power by the appellant to the respondent no.1 during the disputed period 13.01.2003 to 21.01.2004 and thereafter. By the judgment dated 08.07.2010 of this Court in *Transmission Corporation of Andhra Pradesh Limited and Another etc. etc. v. Sai Renewable Power Private Limited and Others etc.etc.* (supra), this Court has also remanded the matters to APERC to decide the 'purchase price' for procurement of the electricity generated by non-conventional energy developers in the facts of the circumstances of the case.
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- G 10. We, therefore, dispose of these appeals by directing that the APERC will consider all relevant materials and factors and finally determine the price of power supplied during the period 13.01.2003 to 21.01.2004 and thereafter and in accordance with the determination made by the APERC, balance payments, if any, will be made by the respondent no.1 to the appellant. The appeals are disposed of accordingly. There shall be no order as to costs.

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Appeals disposed of.