

**ODISHA ELECTRICITY REGULATORY COMMISSION
BIDYUT NIYAMAK BHAWAN
PLOT NO.4, CHUNOKOLI, SHAILASHREE VIHAR
BHUBANESWAR - 751 021**

**Present: Shri U. N. Behera, Chairperson
 Shri S. K. Parhi, Member**

Case No. 13/2019

M/s. Andhavarapu Power Projects (P) Ltd.		Petitioner
Vrs.		
M/s. OREDA		Respondent

In the matter of: **An application under S.86(1)(f) read with S.158 of the Electricity Act, 2003 and as per Clause 19 of the agreement dated 22.01.2010 for arbitration of disputes that has arises between the parties in respect of illegal forfeiture of the commitment fee of Rs. 50 lakhs deposited for setting up of 10MW Biomass based power project in Nawarangpur district and refund of the above amount with@ 12% interest per annum from 24.11.2014.**

For Petitioner: Shri Avijit Pal, Advocate

For Respondent: Shri Bijay Kumar Dash, Advocate

ORDER

Date of hearing: 14.01.2020

Date of order:29.10.2021

The Petitioner M/s. Andhavarapu Power Projects Pvt. Ltd. has filed this petition under Section 86(1)(f) and Section 158 of the Electricity Act, 2003 for arbitration of disputes arising between the parties in respect of illegal forfeiture of the commitment fee of Rs. 50 lakhs deposited for setting up of 10MW Biomass based power project in Nawarangpur district and refund of the above amount with@ 12% interest per annum from 24.11.2014.

2. The petitioner proposed to set up 10MW Biomass based power project at Nawarangpur District in Odisha to the Respondent-OREDA as it is the State Nodal Agency and acts as the single window for promotion and facilitation of power projects based on non-conventional sources of energy i.e. renewable energy on 11.07.2007. OREDA vide their letter dated 01.11.2007 issued in-principle clearance for setting up the above project with certain terms and conditions. The in-principle clearance was valid for six months from the date of issue of letter. During the said six months time

the petitioner was supposed to submit the registered copy of the land purchase agreement/ sale deed along with the location of the project site providing every details pertaining to water sources, nearest Grid substation and biomass collection area. The above six months time could be extended for further six months provided that the petitioner pays Rs.15,000/- to OREDA as extension charges with proper justification. The petitioner should apply at least 15 days in advance in this regard failing which the clearance will be cancelled without giving any notice thereof. Subsequently the firm deposited commitment fee of Rs.50 lakh on 15.12.2009 and also signed the implementation agreement on 22.01.2010. But the firm could not stick to the implementation agreement and failed to establish the plant. As a result M/s. OREDA forfeited the commitment fee of Rs.50 lakh vide its letter dated 24.11.2014.

3. The Petitioner stated that M/s. OREDA has not refunded the above amount deposited by the petitioner, the petitioner moved to the Hon'ble High Court of Orissa in W.P.(C) No. 6211 of 2015 seeking direction of the Hon'ble Court for refund of the amount deposited by it. The Hon'ble Court vide their order dated 25.02.2019 has referred the matter to OERC and the Commission will proceed with the matter in accordance with law in view of Clause 19 of their Agreement and the parties will come before the Commission and will not raise any technical objection under Section 86 of the Act, 2003.
4. The counsel appearing on behalf of the petitioner submitted that as per order dated 25.02.2019 of the Hon'ble High Court of Orissa in W.P.(C). No. 6211/2015, the petitioner has filed the above case for resolution of disputes in respect of illegal forfeiture of the commitment fee of Rs.50,00,000/- deposited by the petitioner for setting up of 10 MW bio-mass based power project in Therubali. The Petitioner has therefore prayed that the Commission may quash the letter of forfeiture dated 24.11.2014 of the Respondent OREDA and direct the Respondent to refund the commitment fee of Rs.50,00,000/- (Rupees Fifty lakh) along with 12% interest per annum w.e.f. 24.11.2014.
5. The Respondent OREDA in its reply has stated the following.
 - (a) Regarding the question whether the Respondent can forfeit the commitment fee, OREDA has stated that Clause 12 of the Implementation Agreement executed between the Petitioner and the Respondent on 22.01.2010 authorises

the Respondent to forfeit the deposit made by the Petitioner in connection with the projects in the event of non-completion of financial closure of the project within six months from the issue of techno-economic clearance dated 22.10.2010. Since the Petitioner has failed to complete the financial closure inspite of ample opportunities, the technical committee proceeded to forfeit the deposits on 24.11.2014.

- (b) Regarding the averment that OREDA could not provide good rate per unit price to be paid by GRIDCO is not based on facts. OREDA has the responsibility of providing a good tariff to the Petitioner. Since the tariff is determined by OERC, Respondent has no control over fixation of tariff. Moreover in the implementation agreement no direction or advice has been given to the Petitioner to execute PPA with GRIDCO.
- (c) As regards the question whether the impossibility to fulfill the contractual obligation would make the agreement dated 22.01.2010 void, OREDA has submitted that it was never impossible to fulfill the contractual obligation by the Petitioner. This is evident from the fact that one of the developers M/s. Shalivahana Green Energy Pvt. Ltd. under the same contractual agreement with the Respondent have successfully commissioned the project and is also successfully running it till date.
- (d) OREDA has further stated that the matter was referred to the Law Department, Government of Odisha who viewed that since the firm opted to quit, proposed action of cancellation of their agreement and forfeiture of deposit appears to be justified as per the provisions of Clause 12 and 14 read with provisions of Clause 22 of the Agreement.
- (e) The tariff fixed by the state of Andhra Pradesh has no connection with or obligation on OERC to fix the tariff for the state of Odisha.
- (f) The matter was placed before the 12th STC convened on 24.09.2013. The Committee observed that show cause notice be issued to all concerned developers before final cancellation and forfeiture of the commitment fee and other deposits. Accordingly the show cause notice dtd.25.09.2013 was served on the petitioner.

- (g) The responses of the developers were placed before the 13th STC meeting held on 05.12.2013 and the committee recommended forfeiture of commitment fee deposited by all 8 developers in accordance with clause 12 & 14 of the Implementation Agreement. The committee also advised to seek opinion of the Law department on the matter. As per the views of the Law department, OREDA proceeded to cancel the agreement and forfeit the deposits as per clause 12 & 14 read with provisions of clause 22 of the respective Implementation Agreement.
 - (h) The petitioner having fallen short of its own commitment made in the agreement has violated terms and conditions of the agreement. Therefore the forfeiture is justified, proper and is in accordance with the law.
 - (i) The petitioner was given ample scope by the respondent. The petitioner has stated that the tariff of Rs.4.87 is not viable; the price of land is very high and they are not able to locate suitable land for setting up the project. The petitioner also cited the reason that bankers are not willing to finance the project since biomass tariff is not financially viable. On these above grounds the petitioner opted to withdraw from the project proposal vide their letter dtd.04.05.2011.
 - (j) The submission of the petitioner that all biomass projects in the state are cancelled is factually incorrect. Only 6 projects out of 11 were cancelled by the STC.
 - (k) The petitioner in his DPR proposed a tariff of Rs.3.90 per unit which ensures him a pay-back period of 5 years. OERC subsequently determined tariff of Rs.4.09 vide its order in suo-motu Petition No. 37 of 2008 and further after review based on the petition of the petitioner revised the same to Rs.4.87. Thus the allegation of the petitioner that such tariff was unviable is devoid of any logic.
6. The petitioner in its rejoinder to the reply filed by the respondent OREDA has stated the following:
- (a) As per the agreement with the OREDA, the petitioner was supposed to implement the project within six months but, as the tariff was low, loan was

not sanctioned by the bank and also OREDA cancelled all the projects throughout the State including that of petitioner's.

- (b) In terms of Sec.56 of Indian Contract Act, 1872, the impossibility to perform is caused by an event which is beyond the control of both the parties. The matter was sent for legal opinion from the legal retainer of OREDA who opined that the biomass power project allotted to the petitioner be cancelled immediately keeping in view the decision taken in 34th GB Meeting of OREDA. The opinion also stated that the commitment fees of rupees fifty lakh deposited by the developer may be refunded and service charges of rupees five lakh can be forfeited.
- (c) At the time of executing the agreement with the Secretary, Science & Technology Department, the petitioner was forced to execute MoU with OREDA without announcement of tariff. The petitioner at that time was assured of refund of commitment fees of rupees fifty lakh if the tariff to be announced is not viable. Since the OERC approved a Tariff of Rs.4.87 which was not viable, no bank provided loan to run the project.
- (d) Considering the plea of petitioner the Minister, Department of Science & Technology who is ex-officio-Chairman of OREDA decided to forfeit the service charges of Rs.5,00,000/- and refund the commitment fee of rupees fifty lakh. The project was cancelled only due to the fault of respondent while the petitioner was willing to develop the project.
- (e) The commitment fees are refundable deposits and the respondent had no lien on the money. Clause 22 of the agreement does not speak of the forfeiture of the commitment fee in case of the withdrawal of the project. The deposit referred in clause 22 only relates to the service charge of rupees five lakh. The respondent has not sustained any loss due to withdrawal of the project but the commitment fee has been forfeited only due to breach of terms of the MOU. The respondent had no rights to take a penal action or impose the penalty of forfeiture on the petitioner. As such the penalty of forfeiture of the commitment fee by OREDA is illegal and bad in law.
- (f) The OREDA should abide by the decision of the Minister without any further litigation in the matter. The legal retainer of OREDA after verifying the

records and considering the nature of impossibility to perform the said contract was of opinion that there is no such loss occurred to OREDA due to cancellation of the project.

- (g) There is no valid reason to forfeit the commitment fees of rupees fifty lakh and order of forfeiture dt.24.11.2014 is liable to be quashed.
- (h) The OREDA has used its dominant position and monopoly in the field towards forfeiture of rupees fifty lakh.

7. The respondent OREDA filed a reply to the rejoinder filed by the petitioner and submitted the following:

- (a) As per clause 12 of the Implementation Agreement the respondent has the authority to forfeit the commitment fee deposited by the petitioner in the event of non-completion of the financial closure of the project within 6 months from the issue of techno economic clearance dtd.22.01.2010. The petitioner having failed to complete the financial closure the STC proceeded to forfeit the deposits on 24.11.2014.
- (b) The in-principle clearance to the project was given on 29.06.2007 against the feasibility report submitted by the petitioner on 10.04.2007. Subsequently the firm deposited commitment fee on 15.12.2009 and also signed the implementation agreement on 22.01.2010. Since the petitioner could not complete the project and thereby violated the terms and conditions of the agreement the respondent forfeited the commitment fees.
- (c) There is no assurance from the respondent to provide good tariff for the project as the tariff is determined by OERC. The respondent has also not directed/advised the petitioner to execute PPA with GRIDCO. The respondent is not responsible for non sanction of loan by the banks due to the tariff.
- (d) As alleged it is never impossible to adhere to the terms and conditions of agreement executed by OREDA since the developer M/s. Shalivahana Green Energy Pvt. Ltd. under the same contractual agreement with OREDA have successfully commissioned the project.
- (e) The STC is the bonafide and appropriate committee for taking decision with regard to biomass/RE project in the State of Odisha. The forfeiture has been

done as per the recommendation of the STC for all the 8 developers in terms of the implementation agreement. The view of the Law department was also in conformity with the opinion of the STC.

- (f) The petitioner has admitted to the violation of the agreement as he could not proceed with the project on account of problem relating to tariff, land dispute, financial and bank problem.
- (g) There is no dispute that exists between petitioner and OREDA and further it is not a regulated body under OERC. The matter relating to commitment fees and its recovery of money claim is not maintainable and appropriate forum to adjudicate the money claim is the civil court.

8. We heard the parties at length. From the date chart we find that the Techno-economic clearance for the project was issued on 21.03.2009 by clearing the proposed project in Nawarangpur district of Odisha. The Petitioner company deposited the commitment fee (Rs.50,00,000/-) and processing fee (Rs.5,00,000/-) with OREDA on 15.12.2009. The Implementation Agreement was executed on 22.01.2010 for setting up of 10 MW Bio-mass project in Nawarangpur district of Odisha. The relevant clause of implementation agreement under which forfeiture was made is reproduced below:

- “12. The company/developer shall complete the financial closure within 6 months from the date of issue of Techno-economic clearance. Non-adherence of the same will result in cancellation of the project and **forfeiture of all deposits made in connection with the project with OREDA.***
- 14. The company/developer shall in normal conditions complete the commissioning of the project within 18 months of financial closure. OREDA reserves the right to grant extension in the period of execution of the project under extraordinary situation following submission of due justification by the developer. Such extension can be granted maximum for a period of 6 months at stretch on depositing an extension fee of Rs.50,000/- per MW.*
- 19. In case of any dispute regarding any clause in this agreement, the matter shall be referred to OERC and the decision of the OERC shall be binding on both the parties.*
- 22. OREDA reserves the right to withdraw the approval upon noticing major default in adherence to the terms and conditions laid down in this agreement. In case of withdrawal on such grounds the Company/Developer shall forfeit all its deposits with OREDA in connection with the said project.”*

9. From the perusal of the Implementation Agreement it is clear that the financial closure of the Petitioner's project should have been completed before 21.07.2010. But without doing the same the Petitioner has signed power purchase agreement with GRIDCO on

30.12.2010 committing that it would supply 10 MW of bio-mass power to GRIDCO. Subsequent to that, surprisingly the Petitioner had changed its mind and knocked at the door of the OREDA on 04.05.2011 for the first time to withdraw from the project. The reasons for withdrawal from the project had been cited as non-remunerative tariff and non-availability of land.

10. This matter after crossing several steps had reached the State Technical Committee (STC) on 24.09.2013 along with cases of several project developers. The State Technical Committee went through the status of 11 nos. of bio-mass power projects that were cleared earlier by it for implementation in the State.
11. The State Technical Committee (STC) also noted that six nos. of developers had communicated their inability to implement the project and requested for refund of their commitment fee. The State Technical Committee had concluded that in accordance with the provisions under Clause 12 and 22 of the Implementation Agreement executed with the respective developers (6 nos.), the allotment made in their favour be cancelled and the said commitment fee and all other deposits made with OREDA be forfeited. Subsequently, considering the replies of six developers the STC in their meeting finally dated 05.12.2013 advised OREDA to forfeit the commitment fee deposited by the above developer along with some other developers.
12. We find that the project is a self defined project and OREDA has no role for the location of the project or its financial viability. OREDA has also no role in fixing tariff for the said project. While executing PPA with GRIDCO, the Petitioner was well aware about the prevailing tariff of bio-mass power project declared by OERC. In its DPR the Petitioner had proposed a tariff of Rs.3.50 per unit with a payback period of five years. Subsequently, OERC declared its tariff at Rs.4.87 per unit (for the base year 2011-12). The Petitioner in its own volition had entered into PPA with GRIDCO accepting the role of OERC on tariff determination. Therefore, we cannot accept the plea of the Petitioner that the project became unviable due to low tariff. Similarly, making land available to the Petitioner in its place of choice is not the responsibility of OREDA. This amounts to self withdrawal from the project by the Petitioner knowing clearly its consequence. The forfeiture of commitment fee has not only happened in the present case but has been uniformly decided for all the six developers who have not adhered to the timeline of financial closure.

13. Accordingly, we concur in the decision of OREDA to forfeit the commitment fee of Rs.50,00,000/- as per Clause 12 and 22 of the Implementation Agreement executed on 22.01.2010 with the Petitioner. The forfeiture of Rs.5,00,000/- of processing fee is also justified since the matter has been processed at several levels by OREDA over a period of time and go ahead signal had been given to the Petitioner through implementation agreement.
14. With this observation, the case is disposed of.

Sd/-

(S K Parhi)
Member

Sd/-

(U N Behera)
Chairperson