IN THE HIGH COURT OF SINDH, KARACHI

H.C.A. Nos.214, 215, 216, 217, 218, 219, 220, 221,
230 and 293 of 2015

Olympia Power Generation (Pvt.) Ltd. and others

Vs.

Sui Southern Gas Company Limited

Before: **Mr. Justice Sajjad Ali Shah, the Chief Justice**
Mr. Justice Zulfiqar Ahmad Khan

Date of Hearing : 18.05.2016

Date of Order : 18.08.2016

Appellants : Through M/s Muneer A. Malik a/w Anas Makhdoom and Ameen Bundukada, Advocates

Respondent : Through Mr. Asim Iqbal and Farmanullah, Advocates

JUDGMENT

Zulfiqar Ahmad Khan, J.:- This judgment will dispose of the above High Court Appeals arising out of the Judgment dated 30.06.2015, passed by the learned Single Judge dismissing the following Suits.

S.No.	Suit No. & Year	Parties	Remarks
1.	1145/2008	M/s. Bhanero Energy Ltd. v. SSGC	Classification of IPP/CPP
2.	1146/2008	M/s. Nadeem Power Generation (Pvt.) Ltd. Vs. SSGC	Classification of IPP/CPP
3.	1147/2008	M/s. Olympia Power Generation Ltd. vs. SSGC	Classification of IPP/CPP
4.	1148/2008	M/s. Adnan Pvt. Ltd vs. SSGC	Classification of IPP/CPP
5.	1149/2008	M/s. Jubilee Energy Pvt. Ltd. vs. SSGC	Classification of IPP/CPP
6.	1150/2008	M/s. TATA Energy Pvt. Ltd. vs. SSGC	Classification of IPP/CPP
7.	1263/2008	M/s. Lucky Energy) Pvt. Ltd. vs SSGC	Classification of IPP/CPP
8.	1307/2008	M/s. Gulistan Power Generation Pvt. Ltd. Vs. SSGC	Classification of IPP/CPP
9.	367/2014	M/s. Olympia Power Generation Ltd. vs. SSGC	Closure notice / Gas Curtailment
10.	1616/2014	M/s. Gulistan Power Generation Pvt. Ltd vs. SSGC	Closure notice / Gas Curtailment
11.	1783/2014	M/s. Nadeem Power Generation Pvt. Ltd. vs. SSGC	Closure notice / Gas Curtailment
12.	192/2015	M/s. Bhanero Energy Ltd. vs. SSGC	Closure notice / Gas Curtailment
13.	572/2015	M/s. TATA Energy Pvt. Ltd. vs. SSGC	Closure notice / Gas Curtailment

Parties to these suits consented to have the entire suits disposed of upon the determination of the following two legal issues:

1. Whether the Plaintiff is Independent Power Project (IPP) hence the tariff for captive power unit does not apply to the plaintiff?
2. What should the decree be?

Vide the impugned judgment, the learned single Judge decided the issue No.1 against the plaintiffs as they failed to establish that they are IPP and with regards suit Nos. 9 to 13, where the plaintiffs were seeking uninterrupted gas supply (upon they being treated as IPP), these suits also became infructuous for the reasons that the plaintiffs therein also failed to satisfy the learned single judge that they ought to be treated as IPPs.

Opening his side of arguments, the learned counsel for the appellants stated that appellant No.1 is a company incorporated with the object of generating and selling electricity and set up its power plants in Kotri and Sheikhpura. Pursuant to an agreement dated 23.02.1995, the Respondent agreed to supply natural gas to fuel power generating units of the appellants.

Per learned counsel, the appellants were granted power generation license under section 15 of the Regulations of Generation, Transmission and Distribution of Electric Power Act, 1997 (the 1997 Act) and that the electricity generated by the appellants was used by themselves, as well as, it was also provided by the appellants to their neighboring industries. Examination of the agreement entered into between the appellants and the respondent (Sui Southern Gas Company, **"**the Gas Company**"**) shows that the appellants were accorded the category of an 'industrial user' by Gas Company and tariff applicable to them was accordingly fixed in line with other general industrial consumers of the Gas Company. While the thrust of the arguments put forwarded by the appellants' counsel was that the appellants were set up with the objective to sell electricity to other

consumers, however, through Annexure D/1 at page 527, it was examined by us that the Enquiry Form (filled and signed by the appellants - which became foundation of the agreement entered into between the appellants and the Gas Company) in terms of clause (i) shows a clear admission of the appellant that the power generated by them is for "self use" only. A similar undertaking was also provided by the appellants on 03.08.1994 (page 533), where they signed and undertook that the power generation through gas shall not be sold to WAPDA or any other consumer at any stage. Similar fact can also be noted from page 535, which is a letter from the appellants to the Gas Company, where, as per item No.8, the appellants admitted that the generators are to be installed for "self use" only.

With regard to tariff, we observe from page No.539 which is a letter issued by Department of Petroleum and Energy Resources, Directorate General Gas, dated 01.12.1994 to the appellants, where in terms of clause (d) it is mentioned that "gas price will be fixed with consultation with Finance Division, pending which power tariff may be applicable on adhoc basis subject to retrospective adjustment after final approval of the same." On page 543, once again, the appellants confirmed to the Gas Company in paragraph 8 that the power generation will be for "self use" only. From the record it could also be noted that a letter has been sent by the Gas Company to the appellants on 21.05.2001 where the appellants were informed that their request for additional supply of natural gas to the tune of 0.259 MMCF per day at 8 psig was to be approved only if the electricity generated by them will be for self use only and the said approval was given by the Gas Company subject to the condition that the price of gas used for power generation will be fixed in due course by the Ministry of Petroleum and Natural Resources in consultation with the Finance Division, Government of Pakistan, pending which power tariff may be applicable on adhoc basis subject to final approval of the same.

A letter dated 03.03.2004 can also be examined, at page 547, written by the Gas Company to the appellants with a subject titled "Gas connection for Captive Power Generation" where the request of the appellants has been accepted for the provision of the natural gas for maximum daily off-take of 0.270 mmcfd at 8 psig as a Captive Power Unit. In relation thereto, the learned counsel for the appellants submitted that in the year 2004, Oil and Gas Regulatory Authority (OGRA) introduced the said Captive Power Units (CPU), which included the industrial units generating electricity for their own use and had installed power generating units at their manufacturing and processing units. Notwithstanding therewith, the counsel contended that the appellants were continued to be provided gas as an industrial concern rather than a CPU. It can be seen that notwithstanding the addition of this nomenclature of CPU, the Gas Company continued to apply the same tariff for the industrial consumers as it was applied to CPUs for the reason that there was no material difference as to the charges payable by the appellants in respect of the gas supplied to them.

Being regularly supplied gas at the industrial tariff, the cause of action seemingly arose on 30.06.2008 when OGRA issued a Notification, where it created different categories of consumers, of which one was Independent Power Projects (IPPs), to whom gas was supplied at a different tariff (at lower rates) as compared to industrial or CPU consumers.

Being cognizant of the fact that now there was a new (IPP) category creating a theoretical possibility that gas could have been supplied to the appellants at a cheaper rate if they could somehow satisfy the Gas Company/OGRA that they are neither industrial nor a CPU but fall in the category of an IPP, the appellants approached the Gas Company on 28.07.2008, requesting that they should be categorized as IPP and gas should be supplied to them at reduced (IPP) rates, notwithstanding the

fact that the appellants time and again admitted that they were using electricity for 'self use' only and they were neither in fact established nor permitted to sell or supply electricity to any third party and were only given a license under Section 15 of the 1977 Act to merely produce electricity. At this juncture it is also worth mentioning that separate licenses for transmission and distribution of electricity are needed under Sections 16 and 20 of the 1997 Act respectively, which the appellants do not possess.

As it could be rightly seen from the foregoing, the entire dispute before the learned Single Judge was whether the appellants qualify to be treated as IPP or not? It could be noted that extensive rationale has been given in the impugned judgment where the learned Single Judge has eloquently discussed as to what amounts to be an IPP and by mere supplying electricity to their sister concern or to any third party a company producing electricity does not acquire the status of an IPP.

To best answer the above question, in our view one has to consider the pre-requisites of an IPP, which came into being pursuant to the 1994 Power Policy aimed to seek private company's help to fill the demand-supply gap (prevalent at that instant) of 2,000 MW in the country. The said policy created the Private Power & Infrastructure Board (PPIB) and ensured production capacity of IPPs to be purchased by offering them bulk power-purchase rates. To a large extent, a number of overseas investors responded to such offer with unprecedented interest and MoUs for over 10,000 MW were signed at that instant alone.

While a number of incentives were provided in the said Policy, of which the key component was that WAPDA/KESC will buy all electricity generated by such private producers at the rate of US 6.5 Cents /kWh for the initial period of 10 years calculated on annual plant factor of 60%. These projects also required a minimum of 20% equity. All such

companies were given a security package which included model Implementation Agreements, Power Purchase Agreements and Fuel Supply Agreements. To restrict the policy for serious players, there was a requirement of making a deposit/bank guarantee of Rs.100,000 for each MW intended to be generated by the private entity before a Letter of Support (LOS) was to be issued to it.

While this Policy have seen many changes, a large number of IPPs are currently operating in the country, which are listed at http://www.ntdc.com.pk wherefrom it could also be noted that none of the plaintiffs are listed therein.

Also of relevance is the study of the steps required for setting up an IPP in the country. These details are found in the policy document and could be examined from http://www.ppib.gov.pk. These perquisites, inter alia, include:

(a) Registration with PPIB by depositing US$ 200 along with a request letter

(b) Submission of proposal to PPIB as per given guidelines, along with Proposal Processing Fee of US$ 20,000

(c) Examination of proposal and evaluation of credentials of the sponsors by PPIB

(d) Approval by PPIB Board

(e) Submission of Performance Guarantee (PG) @US$1000 per MW by Sponsors / project company to PPIB for Issuance of Letter of Intent (LOI), which PG would be cashable in case the sponsors fail to approach NEPRA for tariff determination within three (03) months from issuance of Notice to Proceed by PPIB or fails to obtain LOS thereafter

(f) Submission of Tariff Petition and application for Generation License to NEPRA by the sponsors

(g) Tariff Determination and issuance of Generation License by NEPRA

(h) Submission of PG @ US$ 5,000 per MW with validity of three months in excess of committed COD along with Processing Fee (US$ 80,000) to PPIB by the sponsors

(i) Issuance of Letter of Support (LOS) by PPIB, after acceptance of PG by PPIB

(j) Negotiations and Finalization of Project Agreements (IA, PPA, FSA/GSA)

(k) Achievement of Financial Close within nine (9) months from issuance of LOS

(l) Commencement of construction activities; and

(m) Achievement of Commercial Operation Date (COD) within the deadline stipulated in the LOS/IA/PPA

As it could be seen from the above, a detailed and cumbersome procedure is laid down for setting up an IPP, on the other hand, it is also evident that the appellants have not gone through any of the above listed stringent requirements to attain the status of an IPP. By merely getting an industrial gas connection in their factory and hooking the said gas pipeline to a gas-generator intended to produce electricity under Section 15 of the 1997 Act and that too upon giving the undertaking that the said electricity shall be for 'self use' only, the appellants by no stretch of imagination could be classified as an IPP.

At this juncture it is worth mentioning that the present power needs of the country are met by the IPPs to a larger extent. Studies show that IPPs primarily aim to take away Government's burden of power generation, thereby making more funds available for health, education and agriculture sectors. Soon after their inception, IPPs met with an unfortunate mismatch between the increasing cost of supply of fuel and demand for lowering of tariff of the electricity generated by IPPs, which

triggered birth of circular debts, which adversely affected the fuel supply to IPPs and indirectly hampered the provision of electricity to people at large. To reduce the said circular debts as well as to provide electricity at cheaper rates to the public, the Government made a policy decision by reducing the tariff on the supply of gas to IPPs, which facility is not available to CPU and industrial consumers who generate electricity for self-use only.

As evident from the foregoing, IPPs and CPUs (or industrial units) are different breed of industrial undertakings and separate laws and procedures regulate them. Therefore the appellants could not be provided any benefit accorded to IPPs in any form including special rates or manners (interruptability) at which gas or other supplies are provided to IPPs.

We, therefore, do not find any reason to interfere with the findings of the learned single Judge. These appeals are accordingly dismissed with no orders as to costs.

Judge

Chief Justice