



**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No.283/MP/2012

Coram:

Shri Gireesh B.Pradhan, Chairperson

Shri A.K.Singhal, Member

Shri A.S.Bakshi, Member

Date of Order : 04.8.2015

In the matter of

Petition under Sections 61, 63 and 79 of the Electricity Act, 2003 read with statutory framework governing procurement of power through competitive bidding, including the PPA.

And

In the matter of

Coastal Andhra Power Limited
I-Block, 2nd Floor, North Wing,
Dhirubhai Ambani Knowledge City,
Thane Belapur Road, Koperkhairne,
Navi Mumbai -400 710

.....Petitioner

Vs

1. Andhra Pradesh Central power Distribution Co. Ltd.
6-1-50, APCDCL Corporate Office,
Mint Compound, Hyderabad-500 063

2. Andhra Pradesh Southern Power Distribution Co. Ltd.
Raghavendra Nagar,
Trichanoor Road,
Tripuati-517 501

3. Andhra Pradesh Eastern Power Distribution Co. Ltd.
Corporate Office, TPT Colony,
Seethammadhara, Visakhapatnam-530 020

4. Northern Power Distribution Company Ltd.
Corporate Office, 1-1-478 & 503



Opp REC Petrol Pump,
Chaitenyapuri, Warangal-506 004

5. Bangalore Electricity Supply Co. Ltd.
5th Floor, KPTCL Complex, Kavery Bhawan,
Bangalore-560 009.

6. Gulbarga Electricity Supply Co. Ltd
5th Floor, KPTCL Complex, Kavery Bhawan,
Bangalore-560 009.

7. .Hubli Electricity Supply Co. Ltd.
5th Floor, KPTCL Complex, Kavery Bhawan,
Bangalore-560 009.

8. Mangalore Electricity Supply Co. Ltd.
5th Floor, KPTCL Complex, Kavery Bhawan,
Bangalore-560 009.

9. Chamundeshwari Electricity Supply Co. Ltd.
5th Floor, KPTCL Complex, Kavery Bhawan,
Bangalore-560 009.

10. Maharashtra State Electricity Distribution Co. Ltd.
Prakashgad, Plot No. G-9,
Bandra (East)
Mumbai-400 051

11. Tamil Nadu Electricity Board
NPKRR, Maaligai, 800 Electricity Avenue,
144 Anna Salai, Chennai -600 002

.....Respondents

Following were present:

Shri J. J. Bhatt, Senior Advocate, CAPL
Ms. Poonam Verma, Advocate, CAPL
Shri Akshat Jain, Advocate, CAPL
Shri N.K.Deo, CAPL
Miss Mahima Sinha, Advocate, Karnataka Discoms



ORDER

On the basis of the competitive bidding carried out under Section 63 of the Act, Reliance Power Ltd. was selected as the successful bidder to execute the 3960 MW UMPP (the generating station) in Krishnapatnam district of Andhra Pradesh and acquired Coastal Andhra Power Ltd. as its fully owned subsidiary. Coastal Andhra Power Ltd., the petitioner herein, entered into a Power Purchase Agreement dated 23.3.2007 with the respondents to supply electricity for a period of 25 years. The tariff of the generating station was adopted by the Commission under Section 63 of the Electricity Act, 2003 (the Act) vide order dated 25.1.2008 in Petition No.170 of 2007. Subsequently, the Commission vide its order dated 2.8.2010 in Petition No. 128 of 2010, also approved the changes of unit configurations of the project from 5x800 MW to 6X660 MW.

2. The project was envisaged to be executed on the basis of the imported coal as per the provisions of the Power Purchase Agreement. The petitioner entered into a Fuel Supply Agreement dated 8.4.2010 with Reliance Coal Resources Private Limited (RCRPL), whereunder RCRPL agreed to supply imported coal at fixed price from the mines located in Indonesia.

3. The Government of Indonesia promulgated "Regulations of Ministry of Energy and Mineral Resources" (hereinafter referred to as Indonesian Regulation) on 23.9.2010 mandating that with effect from 23.9.2011, holders of mining permits for production and operation of mineral and coal mines would be obliged to sell mineral and coal in



domestic and international markets with reference to international benchmark price. The petitioner vide its letter dated 3.6.2011 informed the lead procurer namely, Andhra Pradesh Power Coordination Committee ('APPCC') about the new Indonesian mining law and its impact on the project viability. A meeting of the 12th Joint Monitoring Committee ('JMC') was held on 22.6.2011 under the aegis of the Central Electricity Authority ('CEA') to discuss the change in Indonesian law and its impact on the project. The petitioner vide its letter dated 25.7.2011, addressed to APSPDCL, pointed out that the change in Indonesian law had made the project unviable and that it would be impossible for it to procure coal at the price fixed under the current FSA and sought adjustment of energy charges. Further discussions were held on 28.11.2011 and 22.12.2011 with the procurers without any solution. APSPDCL vide its letter dated 28.1.2012 advised the petitioner to resume the construction works forthwith. In response, the petitioner by its letter dated 21.2.2012 informed the procurers about the progress made by the petitioner fulfilling its obligations under Articles 3.1.2 and 4.1 of the PPA and requested APSPDCL not to take any coercive measures on account of the adverse impact of the changed Indonesian law. Subsequently, the petitioner issued notice dated 13.3.2012 under Article 17.3.2 of the PPA raising a dispute regarding force majeure. APSPDCL vide its letter dated 15.3.2012 issued notice for termination of the PPA and requested the petitioner to pay a sum of ₹ 400 crore for the default in complying with the terms of the PPA, failing which APSPDCL threatened to invoke the bank guarantee of ₹ 300 crore furnished by the petitioner under Article 3.2.2 of the PPA.



4. The petitioner filed OMP No. 267/2012 before Hon`ble High Court of Delhi challenging the Notice of Termination dated 15.3.2015 and to adjudicate the dispute between the petitioner and the respondents under Section 9 of the Arbitration and Conciliation Act, 1996. Hon`ble High Court vide its order dated 2.7.2012 dismissed the said OMP No. 267 of 2012 with the following observations:

“17. In the present case, while the issue concerning increase in price of the Indonesian coal and the consequent invocation of the *force majeure* clause by CAPL may not be strictly construed as a dispute arising from a claim by either party “for any change in or determination of the tariff or any matter related to tariff”, it is not as if the change in the price of coal will not affect the tariff at all. It is possible that the determination of such dispute could result in a change in the tariff. Such a dispute can then be said to have arisen within the ambit of Article 17.3.1. Therefore, one way of approaching the problem would be for CAPL to approach the CERC which will, in terms of Section 79(1)(f) of the EA, determine which part of the dispute between the parties is referable to arbitration. The words “and to refer any dispute for arbitration” occurring at the end of Section 79 (1) (f) of the EA contemplates such a course. This power to refer any dispute to arbitration, which is common to both the CERC under Section 79 (1) (f) and the SERC under Section 86 (1) (f), has to be seen in addition to the power of the CERC to decide the disputes arising under Sections 79 (1) (a) to (d). Where the CERC is of the view that the dispute actually relates to the determination of tariff, it will exercise its jurisdiction and decide such dispute. On the other hand, a dispute not involving the tariff can be referred to arbitration. This interpretation harmonises Section 79 (1) (f) of the EA with Article 17.3.1 of the PPA. Although the decision of the Supreme Court in **GUVNL case** concerned the scope of the powers of the SERC, it would equally apply to the interpretation of Section 79 (1) (f) of the EA insofar as it concerns the power of the CERC to refer disputes to arbitration.

18. Resultantly, CAPL will have to first approach the CERC as regards the dispute arising out of the letter dated 15th March 2012 of the APSPDCL. Therefore, the present petition under section 9 of the Act is not maintainable at this stage. The preliminary objection of the Respondents as regards maintainability of the petition is accordingly upheld.”

5. Aggrieved by the said judgment, the petitioner filed FAO No. 272/2012 before the Division Bench of the High Court of Delhi challenging the findings of the Single Judge as quoted above. Pending consideration of the appeal, Hon'ble High Court permitted



the parties to make efforts to resolve the matter amicably and were granted time for arriving at a settlement.

6. During pendency of the appeal before the Hon`ble High Court, the petitioner has filed the present petition with the following prayers:

“(a) Declare that the events factor/events that have occurred subsequent to the submission of the Bid and award of the Project constitute Force Majeure and Change in Law as per the PPA, to grant the following consequential relief:

(i) Adjust the tariff to restore the Project to the same economic condition prior to occurrence of Subsequent Events mentioned hereinabove;

(ii) Evolve a methodology for future fuel price and variation in foreign exchange pass through to secure to the Project a viable economic condition while building suitable safeguards to pass to Procurers benefit of any reduction in importing coal price;

(iii) Evolve methodology to address the other issues mentioned in the petition, to make the Project commercially viable.

(iv) Grant suitable extension of time to the Petitioner to implement the project as per the PPA and waive any penalties or any other consequences thereof under the PPA in this behalf.

(b) In the alternative,

(i) Discharge the petitioner from performance of the PPAs on account of frustration of the PPAs due to Subsequent Events as mentioned herein above.

(ii) Permit the petitioner to develop and operate as an Independent Power Producer.”

7. The petition was listed for admission before the Commission on 30.1.2013. After hearing the learned counsel for the petitioner and TNEB, the Commission issued notice on maintainability of the petition. During the next hearing of the petition on 6.6.2013, learned counsel for the petitioner submitted that IA had been filed before the Hon`ble High Court of Delhi for withdrawal of the appeal and continuation of the interim order during the proceedings of the petition before the Commission. Learned counsel sought



time for listing the petition after the IA was taken up by the High Court. On the next date of hearing on 27.8.2013, learned counsel for the petitioner submitted that the IA could not be taken up by the Hon`ble High Court and requested to adjourn the matter *sine die* with liberty to the petitioner to approach the Commission as and when matter was listed before the High Court which was allowed. Since progress about the proceeding before the High Court was not placed on record by the petitioner, the petition was listed for hearing on 27.11.2014. During the hearing of the petition, learned counsels for the respondents submitted that the petition should be dismissed by the Commission or withdrawn by the petitioner as appeal before the Hon`ble High Court was still pending. Learned senior counsel for the petitioner submitted that the petitioner would move an IA for listing the matter before the Hon`ble High Court and requested to keep the petition pending till further order of the Hon`ble High Court. The Commission allowed the request of the learned senior counsel and directed the petitioner to place on record the steps taken by the petitioner to expedite the hearing of the matter before the Hon`ble High Court by 5.1.2015 to enable the Commission to take a view on the petition. On the next date of hearing on 12.2.2015, the counsel for the petition sought time to file the affidavit which was allowed.

8. In pursuance to our direction, the petitioner filed an affidavit dated 24.2.2015. In the said affidavit, the petitioner has assured that on 1.8.2014, the petitioner submitted a letter to the Hon`ble Chief Minister of Andhra Pradesh requesting Andhra Pradesh as the lead procurer to take lead in convincing the other procurers to withdraw the termination notice of the PPA so that the petitioner could withdraw the LPA before the



Hon`ble High Court and the matter can proceed before the Commission. The petitioner has submitted that the petitioner's proposal to the procurers for withdrawal of the termination notice was under consideration of the procurers as a positive outcome would enable the petitioner to proceed with the matter before the Commission.

9. The matter was heard on 28.5.2015. Learned senior counsel for the petitioner submitted that the matter before Hon`ble High Court of Delhi and before this Commission are completely different in nature arising out of different causes of action. Learned senior counsel submitted that while the relief prayed for before the Hon`ble High Court is whether the dispute should be referable to the Arbitration in terms of the PPA or it should be adjudicated by the Commission, the cause of action for the present petition is 'Force Majeure' and 'Change in Law' as per the PPA on account of the promulgation and operation of the mining laws in Indonesia whereas the cause of action for the appeal filed before Hon`ble High Court is the termination of the PPA by the respondents and invocation of Bank Guarantee. Learned senior counsel for the petitioner submitted that the matter is still pending before the Hon`ble High Court and requested to adjourn the matter.

10. Learned counsel for the respondents objected on the request for adjournment. Learned senior counsel for the petitioner submitted that if the Commission decides to dispose of the petition on account of the pendency of the appeal before the Hon`ble High Court of Delhi, the petitioner may be granted liberty to approach the Commission after disposal of the appeal presently before the Hon`ble High Court of Delhi.



11. We have considered the submission of learned senior counsel for the petitioner and the counsel for the respondents. After going through the pleadings in the present petition and the pleadings in FAO (OS) No.272/2012, it is difficult to agree with the learned senior counsel for the petitioner that the matter before the Commission and the Hon`ble High Court are completely different from each other. In FAO (OS) No. 272/2012, the petitioner has made the following submission:

“The dispute raised in the present case relates to the consideration of the terms of PPA and more specifically the issue relating to occurrence of Force Majeure event which is not within the jurisdiction of the CERC.”

In the present petition, the petitioner has prayed as under:

“Declare that the factors/events that have occurred subsequent to the submission of the Bid and award of the project constitute Force Majeure and Change in Law as per the PPA, to grant consequential reliefs.”

Therefore, the issue before the Hon`ble High Court and this Commission is the same i.e. whether the change in the coal prices on account of promulgation of Indonesian Regulations is an event of Force Majeure and Change in Law. Moreover, while the petitioner is challenging the jurisdiction of the Commission to deal with the said Force Majeure event before the Hon`ble High Court of Delhi, the petitioner is invoking the jurisdiction of this Commission for a declaration that increase in coal price on account of Indonesian Regulations is covered under Force Majeure or Change in Law. In our view, the petitioner should either pursue the appeal before the Hon`ble High Court or pursue the petition before this Commission. It is pertinent to mention that despite committing before this Commission, the petitioner did not take any effective steps to expedite the hearing before the Hon`ble High Court of Delhi. Since the petitioner is pursuing the



appeal before the High Court, we are of the view that no useful purpose will be served by keeping the petition pending in the Commission. Accordingly, we dispose of the petition, with liberty to the petitioner to approach the Commission at the appropriate stage in accordance with law, if so advised.

Sd/-
(A.S.Bakshi)
Member

sd/-
(A.K.Singhal)
Member

sd/-
(Gireesh B.Pradhan)
Chairperson