

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

IA No. 290 OF 2015
[Stay of Impugned Order]
IN
APPEAL NO.176 OF 2015

Dated: 10th September, 2015

**Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. I.J. Kapoor, Technical Member**

In the matter of:-

**CHAMUNDESHWARI ELECTRICITY)
SUPPLY COMPANY LIMITED, a)
Company incorporated under the)
Companies Act, 1956. Having its)
registered office at No.927, New)
Kantharaj Urs Road,)
Saraswaturam, Mysuru-570 009.) ... **Appellant****

AND

- 1. M/s SAISUDHIR ENERGY)
(CHITRADURGA) PRIVATE)
LIMITED, having its Office at)
No.401, G.P. Elite, 8-2-283/4,)
Road No.14, Banjara Hills,)
Hyderabad -500 034.)**
- 2. KARNATAKA ELECTRICITY)
REGULATORY COMMISSION,)
6TH & 7TH Floor, Mahalaxmi)
Chambers, No.9/2, M.G. Road,)
Bangalore 560 091.) ... **Respondents****

AND

**CHAMUNDESHWARI ELECTRICITY)
SUPPLY COMPANY LIMITED.) ... Applicant**

Counsel for the Appellant(s) : Mr. S. Naganand, Sr. Adv.
Ms. Srishti Govil

Counsel for the Respondent(s) : Mr. Ramji Srinivasan, Sr. Adv.
Mr. S.L. Gupta
Mr. Gowtham Polanki for **R-1**.

ORDER

PER HON'BLE (SMT.) JUSTICE RANJANA P. DESAI - CHAIRPERSON

1. Chamundeshwari Electricity Supply Company Limited (“**Chamundeshwari**”), the appellant herein was the Respondent before the Karnataka Electricity Regulatory Commission (“**the State Commission**”). M/s. Saisudhir Energy (Chitradurga) Private Limited (“**Saisudhir**”), the respondent herein was the petitioner before the State Commission. In the instant appeal, Chamundeshwari has challenged Order dated 28/1/2015 passed by the State Commission. By the impugned order, the State Commission has, *inter alia*, directed Chamundeshwari to restore the performance security furnished by Saisudhir by way of Bank

Guarantee. In this interim application, Chamundeshwari has sought stay of the impugned order.

2. For the disposal of this interim application, it will be necessary to set out a few facts. Saisudhir is a special purpose vehicle, which was allotted a 10 MW capacity solar power project to be set up in Chitradurga District in Karnataka. On 30/8/2012, Saisudhir entered into a PPA with Chamundeshwari, a distribution company. Under the PPA, scheduled commissioning date of the project was to be achieved on or before 28/1/2014. Saisudhir requested Chamundeshwari to grant extension of time upto 26/8/2013 for achieving conditions precedent and upto 26/5/2014 for achieving commercial operation. By letter dated 17/5/2013, Chamundeshwari extended the time. The parties entered into a supplemental PPA dated 28/5/2013 incorporating the extended date for fulfilling the conditions precedent and for achieving the commercial operation. By letter dated 6/2/2014, KPTCL granted provisional evacuation approval to Saisudhir with the condition that evacuation of power and

synchronization approvals for the project would be sanctioned only after commissioning of the 220 KV lines between Birenhalli - Thallak and Hiriya - Gowribidanur. Saisudhir furnished Bank Guarantee for an amount of Rs.24.90 crores in favour of Chamundeshwari as performance security. Saisudhir again wrote a letter dated 5/4/2014 requesting Chamundeshwari to grant extension of time. In the said letter, Saisudhir pointed out the numerous difficulties faced by it in obtaining different approvals. Saisudhir also pointed out that the evacuation of power was possible only after construction of 220 KV transmission line by KPTCL. Chamundeshwari agreed to extend the time upto 27/9/2014 vide its letter dated 17/5/2014. However, in the said letter, it stated that due to delay in achieving the commercial operation, the tariff for the energy would be Rs.2.39 per Kwhr as per Article 12.2 of the PPA. Saisudhir requested that earlier tariff of Rs.8.49 be retained as the delay was not attributable to it but it was due to the non-commissioning of 220 KV transmission line by KPTCL. Chamundeshwari, however, maintained its stand taken in letter dated 17/5/2014.

Apprehending that Chamundeshwari may invoke the performance security furnished by it, Saisudhir filed a petition before the State Commission praying *inter alia* that Chamundeshwari be directed to extend the scheduled commissioning date and also not to appropriate any portion of the performance security furnished by Saisudhir. During the pendency of the petition, Chamundeshwari encashed the Bank Guarantee.

3. After considering the relevant clauses of the PPA and other attendant circumstances, the State Commission observed that Chamundeshwari was not legally entitled to appropriate the performance security. The directions issued by the State Commission in the impugned order read thus:

- “(1) The Respondent shall restore the Performance Security, furnished by the Petitioner by way of Bank Guarantees from the respective dates of their appropriation by the Respondent, at its cost, within four weeks from the date of this Order.*
- (2) The Respondent may consider extending the time for fulfillment of the Conditions Precedent*

and achievement of the Commercial Operation, or terminating the PPA dated 30.8.2012 (ANNEXURE – A) under Article 5.7.3 thereof, as it deems fit in the circumstances.

(3) (a) *The re-fixation of tariff at the rate of Rs.2.39 per KWhr demanded by the Respondent is not valid.*

(b) In the event of the PPA being continued, the parties shall hold negotiations to arrive at the revised tariff to be paid to the Petitioner due to the delay that would occur in achieving the Commercial Operation of the Project, keeping in view the rates for Solar energy that might have been discovered in the recent bidding process for Solar energy in the State.”

As stated earlier, in this application, Chamundeshwari has prayed that the impugned order be stayed.

4. We have heard at some length Mr. Naganand, senior advocate for Chamundeshwari and Mr. Ramji Srinivasan, senior advocate for Saisudhir.

5. We shall first consider whether Chamundeshwari has a prima facie case for grant of stay of the impugned order as

contended by its counsel. In this connection, we must first refer to Article 4 of the PPA dated 30/8/2012 which pertains to conditions precedent. Clause 4(1) thereof reads thus:

“4.1 Conditions Precedent

Save and except as expressly provided in Articles 4, 14, 18 and 20 or unless the context otherwise requires, the respective rights and obligations of the Parties under this Agreement shall be subject to the satisfaction in full of the conditions precedent specified in this Clause 4 (the “Conditions Precedent”) by the Developer within 240 (Two Hundred and Forty) days from the Effective Date, unless such completion is affected by any Force Majeure event, or if any of the activities is specifically waived in writing by CESC Mysore.”

6. Clause 4.2(e) of the PPA reads as under:

“4.2(e) obtained power evacuation approval from [Karnataka Power Transmission Company Limited (KPTCL”) . CESC Mysore, as the case may be).”

7. We must also refer to Clause 5.4, to which our attention is drawn by the counsel for Chamundeshwari. It reads thus:

“5.4 Connectivity to the grid:

The Developer, shall be responsible for power evacuation from the Power Project to the nearest Delivery Point. The interconnection to the nearest Delivery Point shall be of the voltage level of 33/66/110 kV.”

8. There is no dispute about the fact that KPTCL could not commission the 220 KV transmission lines between Birenhalli – Thallak and Hiriyur – Gowribidanur. This fact is not disputed by the counsel for Chamundeshwari. Saisudhir could not have commissioned its project in the absence of 220 KV lines, which KPTCL was to commission. In fact, it is because of this reason that Saisudhir had to make a request for extension of time for completion of project and on two occasions, Chamundeshwari extended the time. It must be stated here that undisputedly the same position continues even today. KPTCL has not commissioned the 220 KV lines. Having regard to this fact, the State Commission came to a

conclusion and in our prima facie opinion rightly so that the performance of the contract became impossible and that non-obtaining of an effective evacuation approval by Saisudhir from KPTCL was for reasons beyond the control of Saisudhir and, therefore, Saisudhir could not have satisfied the conditions precedent specified in Article 4.2 of the PPA.

9. Article 4.4(b) of the PPA provides for appropriation of performance security as damages upon occurrence of developer's default or failure to make the condition precedent by the developer. However, in this case, it is not possible to come to a conclusion that there is any default on the part of Saisudhir or that it has intentionally failed to fulfill condition precedent. Had KPTCL commissioned 220 KV lines, situation would have been different. The State Commission has taken a similar view. *Prima facie* reasoning of the State Commission meets with our approval.

10. Apart from the fact that in our opinion Chamundeshwari does not have a prima facie case for grant of stay of the impugned order, its conduct irks us. The petition was filed by

Saisudhir in the State Commission on 10/7/2014. When the State Commission was in seisin of the issue of invocation of the Bank Guarantee, on 12/11/2014, Chamundeshwari addressed a letter to the bank for invoking the Bank Guarantee. On 13/11/2014, Saisudhir filed an application for an interim order restraining Chamundeshwari from invoking Bank Guarantee till the petition is decided. On 14/11/2014, the State Commission directed Chamundeshwari not to proceed with invoking of the performance security for a period of six weeks. Saisudhir was directed to ensure that the Bank Guarantee is kept current during the said period, failing which Chamundeshwari was free to encash the Bank Guarantee before its expiry date. It is pertinent to note that in this order, the State Commission has stated that pending a decision in the matter it would be appropriate for the parties to maintain status quo. This order was passed after hearing the parties. In fact this order records the statement of counsel for Chamundeshwari. The State Commission directed that the said order be communicated to both the parties. This order is not challenged by Chamundeshwari. It has assumed finality.

It is distressing to note that despite this order which was known to Chamundeshwari, Chamundeshwari wrote a letter to the bank on 4/12/2014 asking it to immediately encash the Bank Guarantee. Chamundeshwari threatened the bank that in case, the Bank Guarantee is not encashed, complaint will be made to the higher authorities as well as RBI. This resulted in encashment of Bank Guarantee on 6/12/2014. It is pertinent to note that the order dated 14/11/2014 is not placed on record by Chamundeshwari. It is brought to our notice by Saisudhir.

11. Assuming Chamundeshwari could have written a letter invoking the Bank Guarantee on 12/11/2014, in all fairness, in view of the order dated 14/11/2014 in which State Commission had expressed that the parties should maintain *status quo* and had directed Chamundeshwari not to proceed with the invoking of the performance security, Chamundeshwari should not have insisted upon the bank for encashment subsequent to order dated 14/11/2014. It is pertinent to note that encashment of Bank Guarantee was

done on 6/12/2014 i.e. about 22 days after the State Commission's interim order. The bank could have stayed its hands in deference to the State Commission's order till the issue as to whether Chamundeshwari was entitled to invoke the Bank Guarantee was decided, had Chamundeshwari informed the bank about the order. We are unhappy about Chamundeshwari's conduct.

12. We are mindful of the law laid down by the Supreme Court as regards enforcement of the Bank Guarantee. Contract of guarantee is a complete contract by itself and is separate from the underlying contract. It is not subject to judicial interference on the basis of the terms of the underlying contract and, injunctions restraining encashment of Bank Guarantee can be granted only when there is fraud or irretrievable harm or injury. In support of the above propositions counsel for Chamundeshwari has relied on **National Highways Authority of India v. Ganga**

Enterprises & Anr.¹ and **Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co.**² There can be no dispute about this position in law. But this is a case where Chamundeshari has shown utter disregard to State Commission's order of which it had knowledge. Chamundeshwari's conduct does not persuade us to interfere with the impugned order or grant any indulgence to it. Moreover, we find that the reasoning of the State Commission is sound and merits no interference. This is a case where status quo should have been maintained when the State Commission was seized of the issue regarding invocation of Bank Guarantee.

13. We also find substance in the submission of counsel for Saisudhir that the direction issued to Chamundeshwari to restore the Bank Guarantee is in the nature of a money decree. It can be stayed only if an exceptionally strong case is made out (**Malwa Strips Private Limited v. Jyoti Limited**³).

¹ (2003) 7 SCC 410

² (2007) 8 SCC 110

³ (2009) 2 SCC 426

We are unable to come to a conclusion that any exceptionally strong case is made out by Chamundeshwari. Balance of convenience tilts in favour of Saisudhir. Submission that there was no force majeure event or that the said contention was not raised by Saisudhir and hence could not have been considered by the State Commission has no substance. Admitted facts clearly make out a force majeure event and, therefore, the State Commission has rightly taken them into account.

14. We may also note that Saisudhir in its reply has stated that the encashment of Bank Guarantee has caused undue hardship to it. The banker has already debited the account of Saisudhir with the amount of the Bank Guarantees and the interest @ 11.25% has been charged. Saisudhir has to pay the monthly interest of more than Rs.23 lacs and till date more than Rs.2 crores has become payable on account of interest. It is further stated that in case the Bank Guarantee amount is not immediately restored, Saisudhir will not be able to bear

this burden which will result in the classification of the accounts of Saisudhir as Non Performing Assets (NPA) by the banker and the same will also adversely affect the working and functioning of the other power plants of Saisudhir.

15. In view of the above, we find no substance in the application. It will have to be dismissed. Chamundeshwari shall ensure requisite actions enabling restoration of the performance security as directed by the State Commission in the impugned order. Saisudhir will cooperate with Chamundeshwari for restoration of the performance security in the form of a Bank Guarantee and shall ensure that a Bank Guarantee in the sum of Rs.24.90 crores drawn in favour of Chamundeshwari is in place as before. The said Bank Guarantee shall be kept alive during the pendency of the present appeal and shall abide by the final order that will be passed in this appeal. For enabling Saisudhir to restore Bank Guarantee of requisite amount, necessary action for refund of the encashed amount shall be taken by Chamundeshwari immediately. We may mention here that in

fact Mr. Ramji Srinivasan, learned senior counsel for Saisudhir has made a statement in this Tribunal that Saisudhir will take steps to restore the said Bank Guarantee and shall keep it alive till the disposal of this appeal. We have accepted the said statement.

16. With the above direction, interim application for stay is dismissed. We make it clear that all observations made by us which touch the merits of the case of the parties are *prima facie* observations and shall not be treated as final expression on the merits of the case.

17. Pronounced in the Open Court on this 10th day of September, 2015.

I.J. Kapoor
[Technical Member]

Justice Ranjana P. Desai
[Chairperson]

✓REPORTABLE/NON-REPORTABLE