

COURT-I

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

**IA No. 481 of 2020 in
APPEAL NO. 110 OF 2016 &
IA No. 260 of 2016 & IA No. 1573 of 2018**

Dated : 8th June , 2020

**Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. S.D. Dubey, Technical Member**

In the matter of:

GMR Kamalanga Energy Limited & Anr.

...Appellant(s)

Vs.

Central Electricity Regulatory Commission & Ors.

...Respondent(s)

Counsel for the Appellant(s) : Mr. Amit Kapur
Mr. Vishrov Mukherjee
Mr. Rohit Venkat for App.1
Mr. Amit Kapur for App.2

Counsel for the Respondent(s) : Mr. Ravi Kishore for Res.5

Counsel for the Applicant(s) : Mr. G.Umapathy for Res.2,3 & 4

ORDER**PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON**

1. This Application is filed by the Applicants - Haryana Discoms (the Original Respondent Nos.2 to 4 in the appeal) for modification of the Order dated 30.05.2019 passed by this Tribunal in I.A. No. 1573 of 2018 directing that no further action be taken by the Applicants/Discoms as far as liquidated damages are concerned.
2. By the present application, the Applicants seek appropriate directions directing the Appellants herein to make payment of liquidated damages of Rs. 155.25 crores along with late payment surcharge in accordance with Article 4.6.1 of the PPA from the date of impugned order passed by CERC i.e., 07.03.2016 till the date of payment.
3. The facts which led to filing of this application, in nutshell, are as under:

The Appellants filed the present appeal being Appeal No. 110 of 2016 against the impugned order dated 07.03.2016 passed by CERC in Petition No. 81/MP/2013 claiming relief for certain alleged force majeure and change in law events along with an Application being I.A. No. 260 of 2016 seeking interim relief to restrain the Applicants-Respondents from taking any coercive steps in relation to the claim for liquidated damages as per Article 4.6 of the Haryana PPA for delay in achieving Scheduled Commercial Operation Date (SCOD). According to the Appellants, the appeal was admitted by this Tribunal, however no stay was granted in favour of the Appellants.

4. On 02.11.2018, the Applicants-Respondents filed I.A. No 1573 of 2018 seeking a direction to the Appellants to make the payment of liquidated damages. Vide its order dated 30.05.2019, this Tribunal recorded the statement of the counsel for the Haryana Discoms that they would not take any coercive step to recover the damages till the next date of hearing and adjourned the matter. On 04.03.2020 while listing the matter for hearing on 08.07.2020 this Tribunal ordered that

the statement made by learned counsel for the Discoms on 30.05.2019 to continue till 08.07.2020

5. The Applicants/Respondents state that the present scenario of total lockdown in the State of Haryana is resulting in the closure of all industries, commercial establishments etc, therefore, the finances are severely affected inasmuch as the revenue collection has crippled and the Applicants are struggling to meet their liabilities, which necessitated the Applicants to file the instant Application. The Applicants pray that the Appellants should not be allowed to withhold the amounts rightfully due under the PPA to the Applicant/Respondent. The Applicants further state that CERC has considered in detail the prayer for extension of time sought by the Appellants on account of alleged Force Majeure events for achieving the SCOD and held that the Appellants were not affected by Force Majeure events as claimed by it except on account of change in Visa policy. Applicants assert that as per PPA, it is the Appellant's responsibility and obligation to ensure that the project achieves its SCOD as per the time schedule, and If the Appellants fails to achieve the SCOD on time, in the absence of any

Change in Law or Force Majeure events, the consequences as provided in the PPA would follow. Article 4.6 of the PPA deals with liquidated damages for delay in providing Contracted Capacity. The relevant portion at 4.6.1 reads as under:

“ If the contracted capacity is not commissioned by its scheduled Commercial Operation date other than for the reasons specified in Article 4.5.1, the Seller shall pay to the Procurer liquidated damages for the delay in such Commissioning or making the Contracted Capacity available for dispatch by such date. The sum total of the liquidated damages payable by the Seller to the Procur for such delayed Contractual Capacity shall be calculated as follows.....”

6. According to the Applicants, the Appellant is liable to pay liquidated damages of Rs. 155.25 Crores as principal amount along-with late payment surcharge in accordance with Article 4.6.1 of the PPA since there is default on the part of the Appellant in not meeting the SCOD as provided in the PPA.

7. The Applicants further state that the Appellant has filed an Execution Petition before this Tribunal for execution of the judgment

passed by this Tribunal on 20.12.2019 in Appeal No. 135 of 2018. However, the Applicants have filed an Appeal being Civil Appeal No.1929 of 2020 before the Hon'ble Supreme Court against the above Order along with an application for interim order. In this regard, it is stated that if the prayer in the said Execution Petition is allowed, that will have further financial duress on the Applicants and will severely cripple its operations.

8. According to the Applicants, CERC in para 44 of the impugned Order (pg 152 of the Appeal) has extracted the findings given in another Petition filed by the Appellant i.e., Petition No.77/GT/2013 wherein the issue was similar to the present case i.e. with regard to time and cost overrun on account of delay in land acquisition under Section 62 of the Act. The Appellant filed an appeal against the said order being Appeal No. 35 of 2016 before this Tribunal, which was disposed of by this Tribunal by its judgment dated 1.8.2017. Aggrieved thereby, the Appellant carried the matter to the Hon'ble Supreme Court in Civil Appeal No. 17384 of 2017, wherein the Hon'ble Supreme Court by its order dated 10.11.2017 issued Notice and no order of stay

was granted. According to the Applicants, the issue involved in the present case is fully covered by the said judgment dated 01.08.2017 passed by this Tribunal.

9. The grievance of the Applicants is that since the issue of delay in land acquisition is covered by the said judgment dated 01.08.2017 of this Tribunal in Appeal No. 35 of 2016, the Appellants is bound to pay the amount of liquidated damages along with Late Payment Surcharge to the DISCOMs. The Applicants state that due to the total lockdown in the State of Haryana, the financial position of the Applicants has crippled down and they are struggling to meet their liabilities. In the circumstances, it is just, proper and necessary that the interim order dated 30.5.2019 as extended from time to time, be modified and the Appellant be directed to pay to the Applicants the liquidated damages along with Late Payment Surcharge in terms of the PPA. Thus, the Applicants have filed the present application praying for the following reliefs:

- (a) Vacate the order dated 30.05.2019 passed by this Hon'ble Tribunal in I.A. No. 1573 of 2018 and direct the appellant to

forthwith pay the Liquidated damages of Rs 155.25 crores in accordance with Article 4.6.1 of the PPA along with Late Payment Surcharge: and

(b) pass such further or other orders as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case.

10. The Appellant-GKEL, which is respondent in this application, filed a reply denying all averments and contentions made in the present Application. GKEL states that the present proceedings deal with claims regarding Force Majeure and Change in Law. Haryana Discoms alleged claim for liquidated damages is on a completely different cause of action and needs to be adjudicated on its own merits. GKEL states that the present application is in the nature of reviewing the order dated 30.05.2019 passed by this Tribunal, therefore not maintainable.

11. It is submitted that GKEL had filed I.A No. 260 of 2016 in the present appeal seeking stay of the Impugned Order. During the course of hearing, learned counsel for Haryana Discoms voluntarily undertook

not to precipitate the hearing. This understanding has been continuing till date. However, the Applicants-Haryana Discoms have filed I.A. No. 1573 of 2018 on 2.11.2018 before this Tribunal and this Tribunal in its order dated 30.05.2019 recorded the undertaking of the learned counsel for Haryana Discoms that no steps for recovery of liquidated damages have been taken by them in the last three years. If that is the situation, according to the Appellant, the prayer for vacation of the Order dated 30.05.2019 and payment of Liquidated Damages is an afterthought without any basis in law and contrary to the solemn undertaking given by Haryana Discoms.

12. The Appellant GKEL states that the claim made by Haryana Discoms is Rs. 155.25 Crores whereas the amount due to GKEL in terms of various Orders passed by the CERC and this Tribunal is more than Rs. 535 Crores. Apart from this, GKEL has claims of Rs. 507 Crores pertaining to Change in Law and Force Majeure events in the present Appeal.

13. The Appellant GKEL further submits that the Haryana Discoms have neither raised any invoice for liquidated damages nor CERC has adjudicated upon the issue of entitlement of Haryana Discoms on liquidated damages. It is settled law that even in cases of liquidated damages, the loss has to be proved before damages can actually be claimed. Therefore, the request for directions for payment of liquidated damages is unsustainable.

14. It is further stated that COD of Unit 1 of the Project was 30.04.2013, which was acknowledged by the Haryana Discoms vide letter dated 20.05.2013. Therefore, the cause of action for claiming liquidated damages arose on 30.04.2013. But, the Haryana Discoms have not raised any claim for liquidated damages till date. It is settled law that the claim ought to have been raised within 3 years of the cause of action i.e. within 3 years of COD. Since Haryana Discoms have not raised the claim within three years, the claim for liquidated damages is barred by limitation.

15. Further, Article 3.4.6 of the PPA empowers the Haryana Discoms to encash the Performance Bank Guarantees, if the Appellant-GKEL fails to ensure COD as per Scheduled COD. Therefore, Haryana Discoms had two options, either to return the Performance Bank Guarantees or deduct liquidated damages for delay in commissioning and return the balance Performance Bank Guarantee. However, Haryana Discoms returned the Performance Bank Guarantee on 16.01.2015 and 06.05.2015 without any deductions or reservation of rights, which makes it clear that there was no default attributable to GKEL. In view of this, according to the Appellant, it is clear that the present Application is an afterthought by the Haryana Discoms.

16. The Appellant-GKEL denies the claim of Haryana Discoms for Late Payment Surcharge since the issue of liquidated damages does not arise and liquidated damages are not at all payable. Moreover, no invoice or claims have ever been raised/made till date by the Haryana Discoms *qua* liquidated damages. It is stated that if the present application is entertained, it would tantamount to an original

adjudication at the appellate stage since the court of first instance has not adjudicated on this issue.

17. It is submitted that the Haryana Discoms have placed reliance on the judgment of this Tribunal dated 1.8.2017 in Appeal No. 35 of 2016. It was in respect of a PPA between GRIDCO and GKEL in the context of Section 62. The provisions pertaining to force majeure under the GRIDCO PPA and the Haryana PPAs are different. According to the Appellant, therefore, the judgment in Appeal No. 35 of 2016 will apply solely in the facts of that case and has no bearing on the case on hand.

18. This Hon'ble Tribunal vide Judgment dated 01.08.2017 in Appeal No. 35 of 2016 filed by GKEL had partly allowed the same. The Appellant has preferred an Appeal against the said Judgment being Civil Appeal No. 17384/2017 and same is pending in the Hon'ble Supreme Court. In any case, the present case will have to be considered on its own merits since the terms of the PPA are different.

19. It is further submitted that GKEL is under severe financial distress and is unable to service its debt obligations to its lenders and also to meet its expenses including the procurement cost of additional coal to meet power supply obligation. It is stated that the GKEL has exhausted all available option for arranging the shortfall in the working capital as the lenders are reluctant to extend any loan in the stressed power sector.

20. In case this Tribunal grants interim relief to the Haryana Discoms directing the Appellant to pay Rs. 155.25 Crore (excluding late payment surcharge), the same will irreparably harm GKEL resulting in losing control over the Project and would be declared a Non-Performing Asset.

21. The Appellant states that the Haryana Discoms already owes Rs. 483 Crores pursuant to various Orders passed by this Tribunal in other matters relating to the same Project. Apart from this, GKEL has pending claims pertaining to Change in Law and Force Majeure events in the present Appeal, amounting to Rs. 507 Crores. Therefore, the

Appellant-GKEL states that balance of convenience is in its favour and further no prejudice would be caused to Haryana Discoms if the relief under the present Application is denied to the Applicants.

22. In view of the above, the Appellant-GKEL states that the application filed by the Applicant deserves to be rejected.

23. The Applicants, Haryana Discoms, have filed a detailed rejoinder refuting the stand of the Appellant.

24. As regards the contention of the Appellant that the delay in land acquisition has not attained finality, the Applicant asserts that the Appellant himself in the instant Appeal specifically sought a prayer restraining Haryana Discoms from taking any coercive step towards claim for liquidated damages for delay in Scheduled Commercial Operation Date.

25. The above order has attained finality by the judgment of this Tribunal in Appeal No. 35 of 2016 filed by appellant where this Tribunal with regard to delay in land acquisition, has held as under:-

xi. In view of our discussions at 10 b) A. ii to x above we hold that the initial delay in possession of land to the Appellant was due to reason beyond the control of the Appellant and the impugned findings of the Central Commission denying time overrun in initial delay of handing over possession of land to the Appellant by GoO/IDCO is set aside. The Central Commission is hereby directed to rework and grant consequential reliefs to the Appellant by considering time overrun from 27.7.2009 to 9.2.2010 i.e. initial delay in handing over possession of land to the Appellant for all the three units of the Station.

26. The issue of delay in land acquisition has attained finality and the issue is no longer *res integra* as far as the Appellant is concerned.

27. The contention of the Appellant that the application for modification is barred by limitation, according to the Applicants, is wholly misplaced since it is well settled that the interim orders are subjected to modification from time to time based on the change in circumstances; and the existing circumstances i.e., lockdown in the State of Haryana resulting in finances of Haryana Discoms being severely affected. The Applicants-Haryana Discoms are struggling to

meet its liabilities and the present application is filed only to realise the liquidated damages from the Appellant which is a concluded issue in the present Appeal as the same is covered by the decision of this Tribunal in Appeal No 35 of 2016.

28. The Applicant points out that the undertaking recorded in the Order dated 30.05.2019 not to initiate action for recovery of liquidated damages was only limited to the date of the next hearing i.e. 18.07.2019 and that the Applicant did not initiate any action to recover liquidated damages till that date. Subsequently however, the matter was adjourned from time to time and this interim order was extended by this Tribunal. It is submitted by the Applicants that on the last date of hearing, i.e. 04.03.2020, a statement was made before the Bench that the undertaking not to initiate action to recover liquidated damages was never intended to continue in perpetuity to the detriment of the Applicants where the claim of liquidated damages under Article 4.6.1. of the PPA operates on its own.

29. As far as the contention of the Appellant that the status quo order is continuing with effect from 10.08.2016 is concerned, the Applicant submits that there is no status quo order passed by the Tribunal and it is only an oral understanding that the Applicants will not precipitate action in respect of the liquidated damages in the light of the specific averment made by the Appellant in the Application for Stay filed along with the Appeal.

30. It is submitted by the Applicants that the assertion of the Appellant that the prayer for payment of Liquidated Damages was an afterthought is baseless. The Appellant has to suffer the consequences of its default in not meeting the SCOD as provided in the PPA and is liable to pay Liquidated Damages to the Applicant.

31. As regards the issue of return of Performance Bank Guarantee without deduction or reservation of rights, it is submitted that non-encashing the Performance Bank Guarantee does not in any way amount to a waiver or foreclosure of the right of the Applicants to claim Liquidated Damages. It is not open to the Appellant to approbate and

reprobate with regard to the claim of liquidated damages which flows from the PPA on account of delay.

32. The submission of the Appellant that the finding in Appeal No. 35 of 2016 arose out of a PPA under section 62 of the Act and would not be applicable to the present case is wholly misplaced.

33. The Applicants further point out that the prayer restraining the Applicants from taking coercive steps has not been granted by this Tribunal while deciding the stay application which was taken up at the time of admission of the appeal. The counsel for the Discoms made an oral statement that it will not take coercive steps for liquidated damages, and the order dated 30.5.2019 was also based on the undertaking of the counsel recording the said statement in the order. This clearly establishes that the Appellant has no prima facie case.

34. The Applicants submit that the Appellant is liable to pay the liquidated damages of Rs. 155.25 crores as principal amount along

with late payment surcharge in accordance with Article 4.6.1 of the PPA on account of delay in COD.

35. We have heard Mr. G. Umapathy, learned counsel appearing for the Applicant and Mr. Basava Prabhu Patil, learned senior counsel appearing for the Appellant/Respondent. Learned counsel for both the parties have filed their written arguments, the gist of which, is as under:

In support of the IA, learned counsel for the Haryana Discoms while reiterating his contentions made in the instant application as well as in rejoinder, submits that the Appellant filed Petition No. 81/MP/2013 for declaring the delay in Land Acquisition as a force majeure event and thus the matter was sub judice before CERC which decided the said petition on 07.03.2016, wherein it had held that the delay in land acquisition could not be considered as a force majeure event. Therefore, the liability of the appellant to pay liquidated damages as a consequence of an adjudication is crystalised on 07.03.2016.

36. It is further submitted that the Appellant while assailing the said order, has rightly sought an interim relief restraining the Applicant-Haryana Discoms from taking any coercive action towards liquidated damages for delay in Scheduled Commercial Operation Date [SCOD]. In that event, it is not open to the Appellant to approbate and reprobate with regard to the claim of liquidated damages which flows from the PPA on account of delay in SCOD. In support of his contention, he relies upon the judgment of the Hon'ble Supreme Court in "**Panchanan Dhara & Ors vs Monmatha Nath Maity**" (2006 (5) SCC 340). Learned counsel states that the conduct of the Appellant in this behalf is relevant as also the conduct of the Applicant who made a oral undertaking not to precipitate any action for recovery of liquidated damages. It is well settled that the act of the Court cannot prejudice the rights of the parties.

37. Learned counsel for the Appellant submits that the Haryana Discoms have neither raised any invoice nor letter claiming liquidated damages and the issue of entitlement of Haryana Discoms to liquidated damages is not adjudicated, hence allowing interim relief without any adjudication is contrary to law.

38. Learned senior counsel for the Appellant contends that in the event of any delay in SCOD, the Haryana Discoms shall release the PBG after any deductions. According to the learned counsel as per Article 4.6.3, if the Appellant-GKEL had failed to pay the amount of damages within 10 days of the date of COD or expiry of 12 months from SCOD, Applicant-Haryana Discoms can recover liquidated damages by invoking the PBGs. However, the Haryana Discoms have not claimed liquidated damages either on the expiry of 10 days from the date of COD or 10 days from the expiry of 12 months from SCOD. Learned counsel contends that failure to claim liquidated damages within the stipulated timeframe is barred by limitation. In support of his contention, he relies upon the findings in the judgment of the Hon'ble Supreme Court dated 06.05.2020 in “ **CLP India Private Limited vs. GUVNL &Anr.**”

39. According to the Applicant / Haryana Discoms the observations/findings made in the judgment in Petition No. 77/GT/2013 was relied upon by CERC in the impugned judgment, therefore, the

delay in commencement of the project was not condoned except for three months. Therefore, according to the Discoms, the Appellant has to pay liquidated damages on account of delay in commissioning the power plant.

40. It is noticed from the records that Petition No. 77/GT/2013 pertains to GRIDCO in respect of power supply to Orissa. The impugned order pertains to Haryana Discoms. The PPA between the Appellant and Haryana Discoms is under Section 63 of the Act. So far as the PPA of GRIDCO (Orissa) is concerned, it was a PPA under section 62 of the Act.

41. The petition pertaining to the present appeal came to be filed seeking certain compensation on account of force majeure and change in law events. This was MP No. 81/MP/2013 pertaining to Haryana Discoms. The contention of the Appellant is that placing reliance on the orders pertaining to GRIDCO without considering the facts and the PPA in question by the CERC while proceeding with the impugned order, was not justified. Therefore, they contend that the facts

pertaining to present case vis-à-vis the terms of PPA have to be looked into before accepting the contention of the Applicant-Discoms.

42. According to the Applicant/Discoms since the cause for delay in commissioning the project pertaining to land acquisition issue was denied/rejected by CERC, automatically the payment of liquidated damages by the Generator to the Discoms in terms of PPA comes into effect.

43. As against this, Appellant's counsel contends that though PPA clause refers to payment of liquidated damages for delay in commissioning the project, one has to see the conduct of the parties right from the date of PPA till commissioning of the power plant apart from subsequent conduct. According to them, the conduct of the Applicant-Discoms in not raising /demanding liquidated damages till date amounts to abandoning such claim or not claiming such amount having knowledge that such claim is not tenable at this stage. To substantiate this contention, Appellant submits that subsequent to commissioning of the project, without raising any invoice/demand for

liquidated damages, performance guarantee executed by the Appellant in favour of Applicant-Discoms was returned by Haryana Discoms to PTC and PTC in turn has returned /released the same to the Appellant, therefore at this belated stage when the claim of the Applicant- Discoms is barred by limitation, it is not open to the Applicant-Discoms to seek the reliefs sought in the above IA.

44. Learned counsel appearing for the Applicant-Discoms Mr. Umapathy submits that on 10.08.2016 oral undertaking was given by the Applicant-Discoms not to precipitate the situation in the above appeal, which was not recorded but the Applicant-Discoms have sincerely followed the said commitment. In that view of the matter, on 30.05.2019, second time the undertaking was given by the Applicant-Discoms that Applicant-Discoms would not precipitate the issue. But the Applicant-Discoms submits that on 04.03.2020 a statement was made before the Bench that the undertaking not to initiate action to recover liquidated damages was never intended to continue forever without payment of liquidated damages. They further contend that in the other appeal since the Applicant Generator was demanding for

payments determined by CERC, the Applicant-Discoms claims payment of liquidated damages.

45. From the records, we notice that the SCOD was on 07.12.2011 and COD was on 13.04.2013. On the face of the record, without further entering into merits or demerits, the cause of action for claim/demand of liquidated damages seems to have arisen somewhere in the year 2011/2013. Such clause of PPA was not invoked by Applicant-Discoms. That apart, in 2015 subsequent to COD, they released/returned performance guarantee without demur. In view of the above facts, what we notice is that the order pertaining to GRIDCO, which is relied upon by CERC for the impugned order is under challenge before the Hon'ble Supreme Court and that Civil Appeal is pending. At this stage, we do not know either before the CERC or this Tribunal, in the matter pertaining to GRIDCO, that the issue of limitation was dealt with. Even otherwise the issue or objection pertaining to limitation must be dealt with based on the facts pertaining to the present PPA and the conduct of parties with reference to various clauses of the PPA in question. This has to be done only

while considering the appeal filed by the Appellant challenging the impugned order on merits. This is to be done while disposing of the appeal on merits filed by the Appellant before this Tribunal. Under these circumstances, we decline to grant any relief sought in the application filed by Applicant-Discoms at this stage. Applicant-Discoms can take steps to seek early disposal of the appeal on merits. Accordingly, the IA is disposed of.

46. Pronounced in the Virtual Court on this the 8th day of June 2020.

S.D. Dubey
[Technical Member]

Justice Manjula Chellur
[Chairperson]

REPORTABLE/~~NON-REPORTABLE~~