

**APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)**

**E.P. NO. 2 of 2020 IN
APPEAL NO. 135 OF 2018**

Dated : 22nd May, 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 Petitioner/
Appellant

Versus

Haryana Power Purchase Centre & Ors. Respondents

Counsel for the Petitioner(s) : Mr. Amit Kapur
Mr. Vishrov Mukherjee
Mr. Rohit Venkat
Mr. Pratyush Singh
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Counsel for the Respondent(s) : Mr. Ravi Kishore for PTC

ORDER ON INTERIM PAYMENT

(PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON)

1. This Execution Petition is filed by the Petitioner/Appellant- GMR Kamalanga Energy Limited ("GKEL") for execution of the judgment dated 20.12.2019 passed by this Tribunal in Appeal No. 135 of 2018 and direct the Respondents to pay Rs. 483.74 Crore towards CPT (along with late payment surcharge) in accordance with CERC's Order dated 03.02.2016 in Petition No. 79/MP/2013.

2. The facts as narrated by the Appellant-Petitioner in the Execution Petition are as under:

The Appellant-Petitioner, GKEL is a public limited company, which was set up to undertake the construction and operation of the Kamalanga Power Plant. Respondent No. 1 is Haryana Power

Purchase Centre, which is the nodal agency for procurement of power on behalf of the distribution licensees in the State of Haryana.

3. Respondent No. 2 is Dakshin Haryana Bijli Vitran Nigam Limited (“**DHBVNL**”), Respondent No. 3 is Uttar Haryana Bijli Vitran Nigam Limited (“**UHBVNL**”), which are distribution licensees operating in the State of Haryana. Respondent No. 4 is Haryana Power Generation Corporation Limited (“**HPGCL**”) through whom Respondent Nos. 2 and 3 have initiated the process for procurement of power from Appellant-GKEL. Respondent No. 5 is PTC India Limited (“**PTC**”) through which Appellant-GKEL supplies power to Respondent Nos. 2 and 3 on back-to-back basis by virtue of PPA dated 07.08.2008 between PTC and Haryana Discoms and back-to-back PPA dated 12.03.2009 between GMR Energy Limited and PTC.

4. Petitioner-GKEL has developed a coal-fired 1050 MW (350 X 3) Power Project at village Kamalanga in Odisha, and power generated from the said Project is being supplied to the States of Odisha,

Haryana and Bihar as per the terms of respective PPAs entered into between the parties.

5. Petitioner-GKEL filed a Petition No. 79/MP/2013 before Central Electricity Regulatory Commission ("CERC") on 23.04.2013 claiming compensation for certain Change in Law events in relation to the Haryana PPAs including increase in cost of fuel due to shortfall of linkage coal on account of deviation from the New Coal Distribution Policy, 2007 and changes in the Fuel Supply Arrangements. By its Order dated 03.02.2016, CERC allowed the said petition.

6. The Respondents-Discoms partly complied with the said order dated 03.02.2016 passed by CERC by making payments to GKEL till June 2016. Subsequently, in defiance of the said order, the Respondents started asserting that the entire Linkage Coal was to be used for supply of power to it and refused to make the payments against the Supplementary Invoices raised by Appellant-GKEL from the billing month of July 2016.

7. In view of the refusal of the Respondents, Appellant-GKEL again approached the CERC on 24.05.2017 by filing another petition bearing No. 105/MP/2017 seeking confirmation that the bills raised by them were validly raised in accordance with the earlier order of CERC dated 03.02.2016 passed in petition No. 79/MP/2013. By Order dated 20.03.2018, CERC disposed of the said Petition No. 105/MP/2017 holding as under:

“ (a) GKEL has correctly apportioned the linkage coal in proportion to the capacity being supplied to the DHBVNL and UHBVNL, and issued Supplementary Bills in accordance with the formula devised in the 79/MP Order; and

(b) Directed HPPC to pay Supplementary Bills raised by GKEL from July 2016 to March 2017 along with late payment surcharge within one month of the date of issue of the order.”

8. Aggrieved thereby, on 27.04.2018, Respondent No.1- HPPC filed an Appeal No. 135 of 2018 before this Tribunal challenging the order dated 20.03.2018 passed by CERC in MP.105/MP/2017.

9. After hearing both the parties at length, this Tribunal by order dated 20.12.2019 disposed of Appeal No.135 of 2018 along with other batch of matters holding that both the FSA dated 26.03.2013 as well as the captive coal block / tapering linkage are common for supply of power to all the three beneficiaries and cannot be related to specific PPA. This Tribunal further held that the order dated 03.02.2016 passed by CERC in Petition No. 79/MP/2013 had attained finality since the Respondents therein had not challenged the same and that the order passed in Petition No.105/MP/2017 was a confirmation of the methodology pertaining to the directions laid down in order dated 03.02.2016 passed by CERC in Petition No. 79/MP/2013. The relevant portion of the said Judgment of the Tribunal reads as under:-

“11.12...As such, the Central Commission vide its order dated 03.02.2016 ruled that for computing the Energy Charge Rate, the coal coming from all modes of procurement has to be apportioned among the three said procurers namely GRIDCO,

Haryana & Bihar. This order has attained finality as none of the appellants has challenged the same and the impugned order dated 20.03.2018 is nothing but confirmation of the findings and derived methodology as per order dated 03.02.2016...

11.13 While referring to SLC minutes of meeting dated 14.02.2012, it is noticed that tapering linkage coal of 2.384 MTPA is to be utilised for all 3 PPAs with GRIDCO, Haryana and Bihar discoms. Further, clause 4.2 of the FSA dated 26.03.2013 signed with MCL also states as under:-

“4.1.1... The ACQ shall be in proportion of the percentage of Generation covered under long term Power Purchase Agreements executed by the Purchaser with the DISCOMs either directly or through PTC(s) who has/have signed the back to back long term PPA(s) with DISCOMs.”

We also take note of a letter dated 02.05.2018 issued by MCL stating that CIL and its subsidiaries had allocated coal to the project on pro rata basis vis-a-vis the operational capacity and not on the basis of procurers PPAs.

11.14 In view of the above, it would thus emerge that if the contentions of the Appellants are upheld, it will lead to an anomalous situation wherein GRIDCO and Bihar Discoms will end up cross subsidising supply of power to Haryana discoms.

...

11.15 In the light of the above, we are of the opinion that the supply of coal from all modes of procurement has to be considered for the power plant as a whole and not specific to PPA of the State beneficiaries. The Central Commission has rightly analysed the matter considering all the relevant material placed before it and has passed the impugned order by assigning cogent reasoning. The impugned order as such does not suffer from any infirmity or perversity and intervention of this Tribunal is not called for as far as this issue is concerned.

...

12.7 We have gone through the analysis and findings of the Central Commission in the impugned order as well as in its previous order dated 03.02.2016 vide which it has held that the coal coming to power plant is meant for the entire capacity as a whole and not PPA specific as claimed by the Appellants. It is also noticed that the impugned order is mere confirmation of the methodology derived by the Central Commission vide its order dated 03.02.2016 which has not been challenged by any of the Appellants and has attained

finality. Also looking at FSA dated 26.08.2016 signed with MCL, it reflects that

“the total quantity of coal supplied pursuant to this Agreement is meant for use at Power Plant (3x350 MW), 500 MW under Normal Linkage (425 MW generation capacity covered under long term PPA).”

It is pertinent to note that condition of having a long term PPA before operationalisation / execution of FSA was introduced on 04.04.2012 vide presidential directives through Ministry of Coal requiring CIL and its subsidiaries to enter into FSA only with those generating companies which had a long term PPA. Hence, neither the firm nor tapering linkage could be premised or allocated to any specific PPA. In fact, the requirement under FSA to provide PPA details is to ensure that quantum of coal despatched relates to requirement for generation of power under long term PPAs and the coal supplies are not diverted / sold to third party. It is also noted that issue of proportionate uses of coal stands settled by this Tribunal’s judgment dated 01.08.2017 in Appeal No.45 of 2016 and GRIDCO is seeking to re-open those issues through this instant Appeal...”

10. Pursuant to the judgment in Appeal No.135 of 2018, the Appellant-GKEL wrote letters dated 24.12.2019 and 13.01.2020 to

Respondent Nos. 2 and 3/DHBNL and UHBNL informing them that Appellant-GKEL had raised invoices towards Coal cost Pass Through (“CPT”) claims amounting to Rs. 294 Crore for the period February 2014 till April 2018 and requested them to release the same. By the said letters, the Haryana Discoms were also inter alia requested to release *ad hoc* payment of Rs. 40 Crore by 26.12.2019 so that Appellant-GKEL can make interest payment and avoid their account being declared a Non Performing Asset, for the time being.

11. Appellant-GKEL claims to have written letters dated 30.01.2020 and 13.02.2020, which are not denied, to PTC India Ltd. requesting for settlement of CPT amounts which were kept in abeyance in view of MoM dated 20.06.2018.

12. Appellant-GKEL states that it received a sum of Rs. 40 Crores from Haryana Discoms towards the CPT claim, which said to have been adjusted subsequently against monthly bills raised by the Haryana Discoms.

13. Appellant GKEL further submits that the total amount due by GKEL to the Banks (lenders) as on date is as under:-

Months	Interest dues(Rs cr)	Principal instalment
Jan-20	41.85	-
Feb-20	39.50	-
Mar-20	41.00 (Int statement to be generated)	44.00
Total	122.35	44.00

Note: These amounts are due for the past period and do not cover the benefit of moratorium announced by RBI on account of Covid 19 pandemic.

14. The Appellant-GKEL states that since the Respondents failed to comply with the directions given in the judgment of this Tribunal in Appeal No. 135 of 2018, Appellant is under the threat of becoming a non-performing asset (NPA). Further, it received a letter dated 10.03.2020 from the State Bank of India stating that GKEL's account has been categorised as SMA-2 on 29.02.2020 and requested for

clearance of outstanding dues to avoid applicability of Guidelines issued by Reserve Bank of India dated 07.06.2019. Canara Bank has also sent an e-mail dated 26.03.2020 stating that if outstanding dues are not cleared immediately, GKEL's account would be classified as a NPA.

15. When the things stood as stated above, PGCIL vide its notice dated 24.01.2020 called upon GKEL to pay the amounts outstanding for a period exceeding 60 days, which would amount to Rs. 71.63 Crore by 06.02.2020. However, on account of failure of GKEL to make payment, PGCIL vide notice dated 10.02.2020 regulated 100 MW quantum of power injected by GKEL in ISTS network. Further, PGCIL vide letter dated 06.03.2020 increased and regulated the power injected by GKEL to 175 MW with effect from 21.03.2020. However, owing to the ongoing COVID-19 pandemic and the lockdown declared by the Government of India, the said regulation of power has been deferred from 24.03.2020 till further notice. But once the restrictions are lifted, PGCIL will resume regulation of power.

16. It is submitted that the Appellant-GKEL is under severe financial distress and it immediately requires its outstanding dues amounting to Rs.483.74 Crore from the Respondents in order to operate the power plant including procurement cost of fuel and etc., to continue the supply of power to HPPC and other beneficiaries. Further, Appellant has to service its debt obligations to its lenders and make payment of POC charges to PGCIL. In view of the foregoing factual situation, Appellant-GKEL is constrained to file the present Petition seeking the following reliefs.

“(a) Execute the judgment dated 20.12.2019 passed by this Hon’ble Tribunal in Appeal No. 135 of 2018 and direct the Respondents to pay Rs. 483.74 towards CPT (alongwith late payment surcharge) in accordance with Ld. CERC’s Order dated 03.02.2016 in Petition No. in 79/MP/2013.

(b) Pass an order for attachment of bank accounts and other immovable and movable properties of the Respondents for part or full satisfaction of the judgment dated 20.12.2019 passed by this Hon’ble Tribunal in Appeal No. 135 of 2018.

(c) *Award the costs of this proceedings in favour of the Petitioner and against the Respondents.*

(d) *Pass any such further order as this Hon'ble Tribunal may deem necessary in the interest of justice."*

17. Respondent – Haryana Discoms filed reply/objections, in brief, as under:

Respondents-Discoms in their reply submissions, *inter alia*, denied the allegation of wilful default on their part. They further submit that there was no direction to pay any amount nor any time frame to pay was specified in the Order dated 20.12.2019 passed by the Tribunal.

(a) Respondents – Haryana Discoms further submit that they have filed an Appeal being Civil Appeal No. 1929 of 2020 before the Hon'ble Supreme Court against the Order dated 20.12.2019 along with an application for interim orders. However, in view of the circumstances of COVID 19 and the lockdown in the country,

the matter has not been listed before the Hon'ble Supreme Court. These are extraordinary circumstances prevailing in the country and in such conditions, the Petitioner is not justified in seeking urgent execution of the Orders and thereby rendering the interim application filed by the Answering Respondents before the Hon'ble Supreme Court infructuous. Therefore claim of imminent urgency does not arise at this stage for recovery of money since the claim has not been accepted by the Answering Respondents. Further, the Execution Petition was served by the Petitioner on the Answering Respondents only on 13.04.2020.

(b). The Respondents - Haryana Discoms also submit that the Petitioner is currently supplying power to three Procurers i.e. Respondents, GRIDCO and Bihar Utilities. Therefore, Appellant is not financially dependent only on the Respondents-Discoms. That apart, Respondents-Discoms are regularly making various payments to the Petitioner viz, (a) the monthly invoices of capacity charges and the energy charges as duly payable, (b) change in law claims

such as for taxes, duties etc. and even for the impact of New Coal Distribution Policy (other than the disputed claim which is in issue), and (c) payments towards the Point of Connection Charges payable by the Petitioner to Power Grid Corporation of India Limited related to the open access/transmission charges.

(c). If the Petitioner has not made payments to Power Grid despite claiming the same from PTC/Answering Respondents, the same is objectionable and patently erroneous allegation on the part of the Appellant. If the power supply is regulated by Power Grid, the same is solely attributable to the Petitioner.

(d). The claim of Appellant-GKEL that it is unable to meet its debt service obligations despite the fact that capacity charges and monthly invoices as well as change in law claims (other than disputed claims) are being paid is not correct.

(e). If Appellant's contention that it is unable to service the borrowings is accepted, it would mean that the Appellant-

Petitioner cannot survive in future. If the Hon'ble Supreme Court decides pending Civil Appeal in favour of the Respondents, this would affect the ability of the Respondents to recover money from the Appellant-GKEL.

(f) They further contend that the threat of being declared as Non-Performing Assets is not imminent. On the other hand, the Petitioner has withheld certain amounts towards liquidated damages payable to the Respondents. The Central Commission had vide Order dated 07.03.2016 rejected extension of time for COD in favour of the Appellants. This Order of the Central Commission was in favour of the Answering Respondents. This was before the orders dated 20.03.2018 passed by CERC pertaining to the subject matter. The Appellant-Petitioner has filed an appeal being Appeal No. 110 of 2016 before the Tribunal and the same is pending. Pertaining to this subject matter, Appellant owes Rs. 155.25 crores to the Respondent as principal amount apart from late payment surcharge, which would amount to Rs. 432 Crores. The Answering

Respondent is filing an application for modification of the order dated 04.03.2020 passed in the said appeal No.110 of 2016 and further hearing of the said Appeal along with the above execution Petition for equitable and just consideration of the claims of the respective parties.

(g) The grounds on which the Petitioner herein is challenging the decision of CERC as to the liability to pay liquidated damages namely, the delay in the commissioning and commercial operation of the power plant due to events such as visa restriction, land and exchange rate fluctuations etc. as force majeure stands decided by the Tribunal in the case of the Petitioner itself in ***Appeal No. 35 of 2016*** and by the Hon'ble Supreme Court in ***Energy Watchdog's Case [(2017) 14 SCC 80]***.

(h) The Answering Respondent has paid and is continuing to pay monthly amounts to the Appellant-Petitioner. The claim of the Appellant-Petitioner for grave financial hardship and being unable to

meet the operating expenses is not acceptable. Further, from time to time, Respondents - Discoms have made payments in advance to the Appellant-Petitioner in September 2019 as well as October 2019, which are to be adjusted in April 2020. Further, the Respondent has also made payment in advance for the month of December 2019.

(i) They further submit that in view of the prevailing circumstances, the finances of the distribution companies are also affected as the revenue collection has been impacted. In such circumstances, the distribution companies across the country, including Haryana are facing extreme difficulties to meet their current liabilities including the payments to Generating companies for the supply of power. Therefore, these are not the circumstances in which the arrears should be sought to be claimed.

(j) Further, the claim of Rs. 402 crores for the period from February 2014 to December 2019 is not admitted. Even as per the Order dated 20.12.2019, the amounts would not be as claimed by

the Appellant-Petitioner, as some items raised by Respondents are yet to be addressed by the Appellant-Petitioner. The Respondent has already informed the Appellant-Petitioner of the issues along with the computation and the Appellant-Petitioner has not yet responded to the same.

(k) With these averments, Respondents-Discoms submit that any direction to the Respondents to pay the amounts would be unjust and unfair.

18. Per contra, the Petitioner-GKEL submitted rejoinder, in brief, as under:

(a) On the claim that the Appellant-GKEL owes liquidated damages to Haryana Discoms is concerned, the Appellant-GKEL submits that the present proceedings are for execution of the Judgment in Appeal 135 of 2018, which are distinct and separate from the proceedings in Appeal No. 110 of 2016, which relate to force majeure and change in

law events during the construction period. This is evident from the fact that the Haryana Discoms have raised the question of payment of liquidated damages to counter the claim of Appellant either in Appeal No. 135 of 2018 or in the Civil Appeal, which is pending before the Hon'ble Supreme Court. The claim of liquidated damages is only an afterthought to avoid making payment to Appellant-GKEL pertaining to the present proceedings. Moreover, it is settled law that executing court cannot go beyond the terms of the decree to be executed and ought to execute the decree as it is.

(b) They further submit that the Respondents-Haryana Discoms have not raised any bill claiming liquidated damages. Neither before CERC proceedings nor the Appeal proceedings in Appeal No. 135 of 2018 before this Tribunal Respondent-Discoms made any claim towards liquidated damages. The issue of liquidated damages is yet to be claimed and adjudicated upon. Therefore, Haryana Discoms are precluded from seeking adjustment/claiming an amount which is yet to be billed and adjudicated upon. On the other hand, the amount

claimed in the execution petition has been adjudicated upon by the CERC, which is upheld by this Tribunal.

(c) The Appellant-GKEL also contends that Respondents-Haryana Discoms cannot unilaterally set-off/deduct amounts/dues of Appellant-GKEL especially since the claim raised by the Haryana Discoms has neither been billed nor adjudicated. In the present case the Haryana Discoms have not raised any invoice for liquidated damages. Further, the maximum amount that can be set-off by the Procurer (Haryana Discoms) under the PPAs (Article 11.3.2) is Rs. 2.5 Lakhs/MW would amount to Rs. 7.5 Crores that can be set-off by the procurer.

(d) According to the Appellant-GKEL, Respondents-Haryana Discoms have accepted timely completion and declaration of COD of the Project since they have returned the Performance Bank Guarantees offered by GKEL without seeking any deductions (in terms of Article 3.4.6) as liquidated damages for delay in achieving

COD by the Scheduled Commercial Operation Date as contended now.

(e) They also submit that this Tribunal had in terms of Order dated 30.05.2019 passed in I.A No. 1573 of 2018 in Appeal No. 110 of 2016 directed that no further action be taken by the Haryana Discoms to precipitate the situation so far as liquidated damages are concerned. This was continued by order dated 04.03.2020 by the Tribunal.

(f) The Appellant-GKEL further submits that even assuming without admission that GKEL is liable to pay liquidated damages, the same are capped at Rs. 155.25 crores (corresponding to liquidated damages for a maximum period of twelve months) whereas the principal amount towards coal cost pass-through is Rs. 402 Crores. In addition, GKEL has certain capital cost claims in Appeal No. 110 of 2016 amounting to Rs. 507 Crores.

(g) On the issue of urgency for payment the Petitioner-GKEL submits that the amounts being claimed in the Execution Petition relate to NCDP shortfall for the period starting from February, 2014. Despite lapse of 6 years, the Respondents-Haryana Discoms have avoided payment on one pretext or the other. Appellant-GKEL has undertaken steps for execution of the order passed in Appeal 135 of 2018. Appellant-GKEL cannot be expected to initiate proceedings in the Civil Appeal. No stay has been granted by the Hon'ble Supreme Court on operation of Judgment in Appeal 135 of 2018. Accordingly, the Haryana Discoms are bound to comply with the Judgment and make payments in accordance with the same. The fact that GKEL is supplying power to other beneficiaries cannot be used by Haryana Discoms to renege from their legal obligations under the PPA and the MOM dated 20.06.2018. However, despite three orders in favour of GKEL, the Haryana Discoms are refusing to pay the dues.

19. We have gone through the pleadings of both the parties. Respondent-PTC has not taken any stand denying the liability except

saying that once Haryana Discoms pays money; they would pay to the Petitioner-Generator.

20. The main objection of the Respondent-Discoms seems to be that certain amounts are due to them from the Appellant-Petitioner in respect of alleged liquidated damages on account of delay in commissioning the project. This stand of Respondent-Discoms indicate that they are not at all denying their liability to pay but they are asking for set off of the alleged claim of liquidated damages. It is pertinent to note that till filing of this Execution Petition, at no point of time either before CERC or before this Tribunal, they made such claim of set off towards the liability of them as claimed in the Execution Petition now.

21. It is also relevant to point out that the performance guarantee executed by the Petitioner-Generator were returned to the generator without any claim for alleged liquidated damages on the ground of so called delay in COD.

22. It is well settled that in a Execution proceedings one cannot go beyond the terms of decree. In that view of the matter, at this stage, it is not justified on the part of the Respondent-Discoms to allege that their liability to pay the amounts to the Appellant-Petitioner would not arise in the light of their claim of alleged liquidated damages.

23. Coming to the allegation of financial deficiency on account of existence of Novel COVID -19, it is seen that the dues (claimed by Appellant) in question did not arise all of a sudden in the last 4 ½ months after the decree. These were the dues persistently claimed by the Appellant right from 2016 onwards but not paid by Respondents-Discoms.

24. The Appellant-Petitioner has stated that up to March 2020, they have to pay EMI overdues to the lenders/Banks amounting to Rs.122.35 Crores towards interest and 44 Crores towards principal amount. The concession, if any, given by the RBI on account of

Covid-19 is from March onwards and not towards past dues. The problem of lockdown and other financial difficulties have started only in March 2020 and not during the earlier period. Therefore, the Bank is at liberty to take action against the Petitioner-Generator, if past dues are not cleared. Financial crunch and difficulties to make payments would be a general problem faced by all Discoms. If such objection is taken into consideration, no Generator would be able to get its dues.

25. The Petitioner is claiming about 484 Crores as dues towards principal amount. Respondents-Discoms are claiming alleged liquidated damages of 155 Crores. Even on assumption, if the principal amounts of both are taken into consideration, still about Rs.300 Crores would be due from the Respondents-Discoms to the Appellant-Petitioner towards the principal claim, which is already approved by CERC and this Tribunal in the appeal concerned.

26. So far as Civil Appeal pending before the Apex Court is concerned, Respondent-Discoms did not file appeal with any urgent listing application and further they did not even remove defects at an early date. That apart, till date no order of any restriction like order of stay etc., for the implementation of order of this Tribunal is forthcoming.

27. In that view of the matter, at this stage, pending disposal of the Execution Petition, we are of the opinion that as an interim measure the Respondent-Discoms must pay 50% of the principal amount claimed i.e., Rs.483.74 Crores forthwith to the Petitioner.

28. List the Execution Petition for hearing on merits on 20.07.2020.

29. Pronounced in the Virtual Court on this the 22nd day of May, 2020.

S.D. Dubey
[Technical Member]

Justice Manjula Chellur
[Chairperson]

REPORTABLE/~~NON-REPORTABLE~~