

Appellate Tribunal for Electricity

(Appellate Jurisdiction)

Appeal No. 180 of 2011

Dated 10th May, 2012

Coram : Hon'ble Mr. Justice P.S. Datta, Judicial Member

Hon'ble Mr. V.J.Talwar, Technical Member

In the matter of

Power Grid Corporation of India Ltd.
Saudamini, Plot No. 2,
Sector 29, Gurgaon – 122001,
Haryana

.... Appellant(s)

Vs.

1. Central Electricity Regulatory Commission
3rd and 4th Floor, Chanderlok Building,
36, Janpath, New Delhi – 110001.
2. Bihar State Electricity Board
Represented by its Chairman,
Vidyut Bhawan, Bailey Road,
Patna – 800 001.
3. West Bengal State Electricity Distribution Company Limited
Represented by its Chairman,
Block DJ, Sector – II, Salt Lake City,
Calcutta – 700 091.
4. Grid Corporation of Orissa Limited
Represented by its Chairman cum Managing Director,
Shahid Nagar, Bhubaneswar – 751 007
Orissa,

5. Damodar Valley Corporation
Represented by its Chairman
DVC Tower, Maniktala Civic Centre,
VIP Road, Calcutta – 700054.
6. Power Department, Government of Sikkim,
Represented by its Commissioner & Secretary (Power),
Gangtok – 737 101.
7. Jharkhand State Electricity Board
Represented by its Chairman
In front of the Main Secretariat,
Doranda, Ranchi – 834 002.

.... Respondents

Counsel for the Appellant : Mr.M.G. Ramachandran
Mr.Anand K. Ganesan

Counsel for the Respondent : Mr.R.B. Sharma, Adv. for R-2
and R-7
Mr. Manu Sehshadri for R-1

JUDGEMENT

HON'BLE MR. JUSTICE P.S. DATTA, JUDICIAL MEMBER

1. The appellant, Power Grid Corporation of India Ltd. , a Central Transmission Utility engaged in the activities of transmission of electrical energy amongst other functions assigned to it under the Electricity Act,2003 has undertaken implementation of the Transmission System associated with Eastern Region System Strengthening Scheme II in the Eastern Region. The

Board of Directors accorded approval and expenditure sanction and approved an estimated cost of the project of Rs.227.52 crore including interest during construction of Rs14.66 crore based on the 3rd quarter 2007 price levels.

2. The scope of the work covered under the project was as follows:-

Transmission Lines :

(a) Durgapur – Maithon 400 kV D/C line with twin Lapwing conductor (73 kms)

Substations:

(a) 2 nos. of 400 kV line bays at Durgapur

(b) 2 nos. of 400 kV line bays at Maithon

(c) Reactive Compensation at :

(i) Siliguri 400/220 kV sub-station

a) Shifting of 63 MVAR line reactor of Bongaigaon – Siliguri line installed at Siliguri end of one circuit of Tala – Siliguri 400 kv line.'

b) Shifting of two nos. of 63 MVAR bus reactors installed at 400 kV Siliguri bus to be installed as

fixed line reactor at Siliguri end on two circuits of Tala – Siliguri 400 kV lines. This will render two nos. of 400 kV reactor bays un-utilised.

- c) Installation of 2 nos. of new 125 MVAR bus reactor at Siliguri 400 kV bus. As mentioned above, the two nos. of 400 kV reactor bays which have become un-utilised shall be used for switching of two 125 MVAR reactors.

(ii) Purnea 400/220 kV sub-station

- a) Shifting of 1 no. of 63 MVAR bus reactor installed at 400 kV Purnea bus for installation as a fixed line reactor at Purnea end of one circuit of Siliguri – Purnea 400 kV D/c (quad) line. This will render one 400 kV reactor bay un-utilised.
- b) Installation of 2 nos. of new 125 MVAR bus reactor at Purnea 400 kV bus. The one un-utilised bay as indicated above, is proposed to be used for switching of one reactor (125 MVAR) and one new reactor bay shall be constructed for switching of the other 125 MVAR reactor.

(d) Installation of 1 no. of 220/132 kV 160 MVA ICT (2nd) at Baripada along with associated bays.

3. The project was scheduled to be commissioned within a period of 30 months from the date of investment approval and the scheduled date of completion was 1.7.2010. The second ICT at Baripada was a part of this Eastern Region System Strengthening Scheme –II. The pre-commissioning checks/tests on the said ICT commenced on 5.3.2010 but during testing some abnormality was observed in the ICT and it was found that the ICT suffered a heavy jerk during transportation due to bad conditions of the roads on account of heavy monsoon. The internal inspection of the ICT was then carried out on 15.3.2010 and the manufacturer recommended that the defects might be rectified at their factory in Mumbai. The ICT after necessary repairs was received at the Baripada sub-station on 28.2.2011 and was declared under commercial operation on 1.4.2011. Therefore, there was delay of nine months in the commissioning of the asset for the reasons beyond the control of the appellant. .

4. The appellant on 8.3.2011 filed a petition, being no 68 of 2011 before the Central Commission for approval of the final

transmission tariff from the date of the commercial operation of the above element of the system, that is, from 1.4.2011 to 31.3.2014. The appellant claimed Interest during Construction of Rs.47 lakh which was actually incurred though in the feasibility report of the project the IDC was approved at Rs.79 lakh. But the Central Commission rejected the claim by the impugned order dated 5.9.2011. Hence the appeal.

5. According to the appellants, the following factors were responsible for the delay and the appellant cannot be attributed with any amount of fault:-

- a) Bad road conditions on account of heavy monsoon
- b) Neither the vendor nor the appellant could envisage it.
- c) The circumstances were unforeseen.
- d) No fault was there with the appellant in not commissioning with the project in due time.
- e) The vendor cannot be sued against because the matter was not a bilateral one.
- f) The vendor was not responsible for the delay.
- g) There was no imprudence on the part of the appellant.

h) All eventualities could not be conceived in commercial relation

6. Of the seven respondents including the Central Electricity Regulatory Commission which is the respondent no 1 the other respondents are Bihar State Electricity Board, West Bengal State Electricity Distribution Company Limited, Grid Corporation of Orissa Limited, Damodar Valley Corporation, Power Department of the Government of Sikkim, and Jharkhand State Electricity Board. Bihar State Electricity Board and Jharkhand State Electricity Board, the respondents no 2 and 7 respectively are the only contesting respondents represented by Mr R. B. Sharma, learned Advocate and filed their separate written responses ,of course, in identical language, and Mr. Manu Seshadri, learned Advocate appeared for the Central Commission and made oral submission in justification of the order impugned.

7. The respondents no 2 and 7 contend that delay in completion of the second ICT at Baripada is a clear lapse on the part of the appellant and its vendor and the matter is a bilateral one between the two. The contention of the appellant that the delay in completion was beyond the control of the appellant is

incorrect. The transporter is expected to take due care and attention while transporting the equipment even when he confronts bad road conditions. The appellant's contention that the event was of the nature of force majeure is misconceived. Bad road condition is a very common feature in the infra-structure sector of economy and invoking of force majeure doctrine is not acceptable. The other contention of the appellant that the actual IDC is much less than the amount approved in the investment approval of the project does not hold much water as the approval for the investment along with its cost estimates and the time for completion of the project has been accorded by the appellant itself. The appellant had all the powers to provide liberal cost estimates and time for completion of the project. The issue related to the huge over-estimation of the cost estimates by the appellant was raised by the respondents before the Central Commission but no response came from the Commission in this regard.

8. We have heard Mr R. B Sharma, learned Advocate appearing for the respondents no 2 and 7 and he submitted what has been averred in the replies of the two parties and we refrain from reproducing the same points once again. Mr Manu Seshadri, learned Advocate for the Central Commission supports the order

appealed against. Mr. M.G.Ramachandran, learned Advocate for the appellant elaborated what has been contended in the memorandum of appeal. He also refers to a decision of the Hon'ble Supreme Court in M/S Dhanrajamal Gobindram vs. M/S Shamji Kalidas and Co reported in 1961 SCR 1020. Mr Ramachandran submitted that the delay cannot be attributed to the appellant as the machine developed defects in course of journey through rough road and when the defect was detected it was sent to Mumbai for repairs and it is on account of this that there occurred a period of nine months delay in commissioning the project. The premise of the manufacturer was at Mumbai where the machine had to be transported for effecting necessary repairs.

9. The point for consideration is whether the Central Commission was justified in disallowing the appellant's claim for IDC and IEDC for the period in question.

10. We have noticed the reasoning of the Central Commission which has been put in paragraph 14 of the order in this way:-

" The petitioner has submitted, in the petition, that the ICT was damaged in transportation and it was detected only at the time of conducting tests at the site, at Baripada. That the ICT was sent to the factory at Mumbai for repairs and it led to the delay in commissioning the transmission asset. The petitioner has further

submitted that the reason for the delay is beyond its control and has requested to condone the delay. The transportation of the transformer is the responsibility of the vendor and it is a bilateral issue between the petitioner and the vendor. The commissioning of the asset is delayed due to a bilateral issue between the vendor and the petitioner. The damages in the form of IDC and IEDC should not be passed on to the beneficiaries. Accordingly, the IDC and IEDC for the delayed period of nine months have been deducted from the capital cost of the asset as on the date of commercial operation.”

11. The question is whether the appellant is entitled to the effect of force majeure. As we all know, force majeure means a superior force, an event or effect that can neither be anticipated nor controlled. The term includes both acts of nature and acts of people like riots, strikes, and wars. The force majeure clause ordinarily occurs as a contractual provision allocating the risk of loss if performance becomes impossible or impracticable especially as a result of an event or effect that the parties could not have anticipated or controlled. In the reported decision which primarily related to facts arising out of contract and arbitration clause it has been observed:

“McCardie J. in Lebeaupin v. Crispin has given an account of what is meant by “force majeure” with reference to its history. The expression “force majeure” is not a mere French version of the Latin expression “vis major”. It is undoubtedly a term of wider import. Difficulties have arisen in the past as to what could legitimately be included in “force majeure”. Judges have agreed that strikes, breakdown of machinery, which, though normally not included in “vis major” are included in “force majeure”. An analysis of rulings on the subject into which it is

not necessary in this case to go, shows that where reference is made to "force majeure" , the intention is to save the performing party from the consequences of anything over which he has no control. This is the widest meaning that can be given to "force majeure" , and even if this be the meaning it is obvious that the condition about ";force majeure" in the agreement was not vague. The use of the word "usual" makes all the difference , and the meaning of the condition may be made certain by evidence about a force majeure clause, which was in contemplation of parties."

12. The facts in the reported case are completely different as the Hon'ble Court was referring to the bilateral contract between the parties where the clause appeared. The Central Commission has not unjustifiably held that the damages in the form of IDC and IEDC should not be passed on to the beneficiaries. The manufacturer of ICT and its transportation is essentially a matter between the appellant and its vendor. This is a matter contractual between them alone. A number of factors, namely, whether in the construction of the ICT at the manufacturer's end there were defects or not, whether adequate precautionary measures were taken for transportation of the machine or not, whether the ICT was sent back with utmost dispatch or not, whether there was any delay in effecting repairs or not, whether there was any agreement between the appellant and the manufacturer or not, what were the terms and conditions, if any, so agreed to between the manufacturer and the appellant, in this regard are all unknown

and in the circumstances it cannot be said in a broad sweep that the delay can not be attributed to appellant and/or the manufacturer. Rightly the Commission has said in the impugned order that it is a bilateral issue between the manufacturer and the appellant. Responsibility is upon both to ensure that the machine is transported and journeyed safely and it cannot be said that the parties must not take into account the condition of road for transportation. It is not a case of breakdown, while working without any human fault, of machinery all on a sudden over which the party could not have any prior control. In the circumstances, it cannot be said that the order complained of is devoid of reasonable analysis of the factual situation and the Commission committed any illegality.

13. In our considered view there is no merit in the appeal. Accordingly, we dismiss the appeal but without costs.

(V.J.Talwar)
Technical Member

(P.S.Datta)
Judicial Member

Reportable/Not Reportable

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