

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

**EXECUTION PETITION NO.6 OF 2015  
IN  
APPEAL NO.15 OF 2011**

**Dated : 10<sup>th</sup> November, 2016.**

**Present: Hon'ble Smt. Justice Ranjana P. Desai, Chairperson  
Hon'ble Shri T.Munikrishnaiah, Technical Member.**

**IN THE MATTER OF:**

**LANCO AMARKANTAK POWER )  
LIMITED )  
Lanco House, Plot N.397 Phase III, )  
Udyog Vihar, Gurgaon -122 016 )  
(Through its Authorized Signatory )  
(Mr. Anil Sharma) ) ....Execution  
Petitioner/Appellant**

Versus

**1. HARYANA ELECTRICITY )  
REGULATORY COMMISSION )  
Bays No.33-36, Sector-4, )  
Panchkula 134 112, )  
Haryana(through its Secretary) )**

**2. M/S. HARYANA POWER )  
GENERATION CORPORAION )  
LTD. )  
Urja Bhawan, C-7, Sector 6 )  
HPGCL, Panchkula-134 009, )  
Haryana )  
(through its Managing Director) )**

- 2(a) M/S. HARYANA POWER PURCHASE CENTRE (On Behalf of M/s HARYANA POWER GENERATION CORPORATION LTD.)** )  
 2<sup>nd</sup> floor, Shakti Bhawan, )  
 Sector-6, )  
 Panchkula-134 109, )  
 Haryana )  
 (through its Chief Engineer) )
- 3. PTC INDIA LTD.** )  
 2<sup>nd</sup> Floor, NBCC Tower, 15, )  
 Bhikaji Cama Place, )  
 New Delhi -110 066 )  
 (Through its Chairman and )  
 Managing Director) )
- 4. CHHATISGARH STATE POWER TRADING CO.LTD.** )  
 Vidyut Seva Bhawan, Danganiya, )  
 Raipur-492013, Chhattisgarh, )  
 (Through its Managing Director) )
- 5. WESTERN REGIONAL LOAD DISPATCH CENTER** )  
 F-3, MIDC Area, Marol, )  
 Andheri(East), Mumbai-400093. )  
 (Through its General Manager) ) ....Respondent(s)

Counsel for the  
 Execution Petitioner/  
 Appellant

... Mr. Krishnan Venugopal, Sr.Adv.  
 Mr. Gopal Jain, Sr. Adv.  
 Mr. Akhil Sibal  
 Mr. Deepak Khurana  
 Ms. Aditi Sharma  
 Mr. Udai Rathore  
 Mr. Alok Shankar

Counsel for the  
 Respondent(s)

...Mr. M.G. Ramachandran  
 Mr. Avinash Menon

Ms. Ranjitha Ramchandran  
Ms. Poorva Saigal and  
Mr. Shubham Arya for **R-2**

Mr. Mr. Amit Kapur  
Mr. Vishrov Mukherjee,  
Ms. Nishtha Kumar for **R-3**

Ms. Suparna Srivastava  
Ms. Anushka Arora for **R-4**

## **ORDER**

### **PER HON'BLE MR. T.MUNIKRISHNAIAH – TECHNICAL MEMBER:**

**1.** The Petitioner Lanco Amarkantak Power Limited ("**Lanco**") has filed this Execution Petition under Section 120(3) of the Electricity Act 2003 ("**the said Act**") for execution and implementation of order dated 04/11/2011 passed by this Tribunal in Appeal No.15 of 2011.

**2.** For the disposal of this petition it is not necessary to narrate the facts in detail. We shall only state the relevant facts.

**3.** Lanco, the generating company entered into a Power Purchase Agreement ("**PPA**") dated 19/10/2005 (as

supplemented by agreement dated 18/09/2006) with PTC India Ltd. (**“PTC – Respondent No.3”**) for sale of 273 MW (net power output) from 2<sup>nd</sup> Unit of 300 MW from Lanco’s Thermal Power Project situated at Pathadi, Korba, Chhattisgarh for a period of 25 years. PTC was to resell the power purchased from Lanco to the procurers.

**4.** On 21/09/2006 PTC entered into a Power Sale Agreement (**“PSA”**) with Haryana Power Generation Corporation Ltd (**“Haryana Power-Respondent No.2”**) for sale of 273 MW of power purchased from Lanco for a period of 25 years. In the meantime Haryana Power approached the Haryana Electricity Regulatory Commission (**“the State Commission”**) for approval of the PSA which was granted on 06/02/2008.

**5.** According to Lanco on account of occurrence of certain events it became impossible for it to perform its obligation under the PPA and hence Lanco communicated this to PTC. On 13/05/2010 PTC filed a petition before the State Commission seeking directions *inter alia* to Haryana Power to purchase

electricity at a tariff calculated in accordance with the Central Commission's Regulations 2009. Haryana Power filed a separate petition before the State Commission seeking a direction against PTC and Lanco to comply with its obligation under the PSA in favour of Haryana Power and for a direction to restrain Lanco from selling the contracted capacity to any third party. Lanco filed a reply raising preliminary objection to the jurisdiction of the State Commission. On 29/10/2010, the State Commission heard the parties and reserved its judgment.

**6.** During the pendency of these proceedings on 01/08/2009 Lanco entered into an Implementation Agreement with the Government of Chhattisgarh. By this Implementation Agreement Lanco had to provide 35% of the Net Power generated by Lanco's Amarkantak project at variable charges to any person nominated by the Government of Chhattisgarh. In furtherance of this agreement Lanco received a letter on 03/01/2011 from Respondent No.4 Chhattisgarh State Power Trading Company Ltd. ("**CSPTCL**") asking Lanco to sign the PPA for supply of 35% of the power from Unit-II to it failing which the Government of Chhattisgarh would be constrained to withdraw all facilities and

concessions provided for Lanco's power generating plant situated in Chhattisgarh. Under these circumstances, pending orders reserved by the State Commission, Lanco terminated the PPA between itself and PTC by letter dated 11/01/2011 for the reason that PTC had failed to comply with one of the mandatory Conditions Precedent of the said PPA. Thereafter Lanco executed the PPA with CSPTCL for supply of 35% of the Net Power generated by its project.

**7.** The State Commission passed the order dated 02/02/2011 holding that it has got the jurisdiction and directing Lanco to supply 300 MW power from Unit-II to Haryana Power. The State Commission restrained Lanco from selling the same to CSPTCL.

**8.** Aggrieved by the finding recorded in order dated 02/02/2011 that the State Commission has jurisdiction Lanco filed Appeal No.15 of 2011. Aggrieved by part of the said order preventing CSPTCL from getting the supply on the basis of the Implementation Agreement from Lanco CSPTCL filed Appeal No.52 of 2011.

**9.** On 23/03/2011 this Tribunal passed interim order directing Lanco to supply 35% of power to CSPTCL and the balance 65% to PTC so that PTC can discharge its obligations to Haryana Power. Relevant part of the said order reads as under:

*“Accordingly, the Appellant is permitted to supply 35% of the power to Chhattisgarh Government Company and is directed to supply the balance power to the PTC (R-3) so that PTC (R-3) can discharge its obligation to the Power Generation Corporation (R-3) in pursuance of the PSA entered into between them.”*

**10.** On 04/11/2011 this Tribunal dismissed Lanco’s Appeal No.15 of 2011. This Tribunal allowed CSPTCL’s Appeal No.52 of 2011 and remanded the matter to the State Commission with directions to hear CSPTCL on issue of entitlement of supply of 35% power generated by Lanco. This Tribunal directed that the interim order dated 23/03/2011 would continue till final disposal of the matter by the State Commission.

**11.** Lanco filed Civil Appeal No.10329 of 2011 before the Supreme Court challenging the order dated 04/11/2011 along with an application for interim relief. By interim order dated

16/12/2011, the Supreme Court directed the State Commission to fix/approve the tariff for sale and purchase of power for the disputed period in question and also continued the interim order dated 23/03/2011 passed by this Tribunal.

**12.** Lanco accordingly filed a petition before the State Commission. By order dated 17/10/2012 the State Commission determined the tariff. Lanco challenged the said order by filing IA No.7 of 2012 in Civil Appeal No.10329 of 2011 pending before the Supreme Court. The Supreme Court by its order dated 19/02/2013 directed Lanco to avail statutory remedy of appeal to this Tribunal. Accordingly, Lanco filed Appeal No.65 of 2013 before this Tribunal. By order dated 03/01/2014 this Tribunal allowed the said appeal and remanded the matter to the State Commission for re-determination of tariff. The State Commission by its final order dated 23/01/2015 re-determined the tariff. Haryana Power filed Civil Appeal No.3800 of 2014 before the Supreme Court challenging order dated 3/1/2014 passed by this Tribunal which is pending adjudication.



**13.** On or about 11/3/2015 (prior to the filing of the present Execution Petition on 9/9/2015) Lanco filed an application before the Supreme Court for directions being IA No.9 of 2015 in Civil Appeal No.10329 of 2011 making following prayers.

*“It is therefore, most respectfully prayed that this Hon’ble Court may be pleased to:*

- a) Pass an Order directing Southern Eastern Coalfields Limited (SECL) to commence supply of linkage coal to Unit-II of the Applicant so that the Applicant can supply power to the APTEL identified beneficiaries (HPPC and Chhattisgarh) as per the interim order dated 16.12.2011 of this Hon’ble Court;*
- b) Pass an Order directing Respondent No.3 (PTC) and PGCIL to arrange and ensure unhindered transmission of power treating the supply of power from the Applicant’s Unit-II to Haryana (HPPC) as supply made on long term basis;*
- c) Pass an order directing SECL and PGCIL to consider the supply of power to the APTEL identified beneficiaries (Haryana and Chhattisgarh) pursuant to Order dated 16.12.2011 equivalent to long term supply for the purpose of supplying coal by SECL and transmission of power by PGCIL.*
- d) In the alternative, vacate the interim Order dated 16.12.2011 and allow the Applicant to sell power from its Unit-II to third parties.*

e) *Pass such “further order as this Hon’ble Court may deem fit and proper in the interests of justice.”*

**14.** By order dated 18/9/2015, the Supreme Court gave directions to SECL and Powergrid to make available the coal and Long Term Access to the transmission system to Lanco subject to Lanco complying with the terms and conditions specified in the said order.

**15.** Against the backdrop of above relevant facts we must consider the prayers made by Lanco in this petition. They are as under:

a) *Execute the Order dated 04/11/2011 by directing Respondent Nos.2, 2(a) and 3 to forthwith schedule the power from Unit-II of the Petitioner as per the said Order or appoint a person to ensure compliance of the said Order under the relevant provisions of the Code of Civil Procedure, 1908;*

b) *Pass an Order directing Respondent No.3/PTC and Respondent No.2 (a)/HPPC to pay the outstanding fixed charges since April 2014 amounting to Rs.299 crores based on the 65% capacity reserved and made available by the Petitioner in terms of the Order dated 04/11/2011 and continue to pay fixed charges*

*till the time power is not scheduled by the said Respondents;*

*c) Pass an order for attachment and sale of properties/assets including attachment of bank accounts, of the Respondent Nos. 2, 2(a) and 3 under Section 120 (3) of the Act read with the applicable provisions of the Code of Civil Procedure, 1908 and further pass an Order directing the Officers of the said Respondents to make disclosures of the assets of the said Respondents under the applicable provisions of Code of Civil Procedure, 1908;*

*d) Pass such other and further Order(s) as this Hon'ble Tribunal may deem fit in the facts and circumstances of the present case."*

**16.** We have heard Mr. Gopal Jain learned counsel appearing for Lanco in support of the above prayers. We have also perused the written submissions filed by him. The gist of the relevant submissions is as under:

a) Vide order dated 23/03/2011 passed in Appeal No.15 of 2011, this Tribunal directed Lanco to supply 35% of power to CSPTCL and the balance 65% to PTC so that PTC can discharge its obligations to Haryana Power. On 04/11/2011, this Tribunal dismissed Lanco's appeal. While remanding the matter to the State Commission to decide the issue relating to the Implementation

Agreement and PPA entered into between Lanco and CSPTCL, this Tribunal continued the interim order dated 23/03/2011 till the disposal of the matter by the State Commission. This direction for supply of power was confirmed by the Supreme Court vide order dated 16/12/2011 in appeal filed by Lanco being Civil Appeal No.10329 of 2011. The Supreme directed the State Commission to determine the tariff for supply of power to the Respondents. Finally, vide order dated 23/01/2015 the State Commission determined the tariff. As per orders dated 03/01/2014 and 23/01/2015 Lanco is entitled to cost of coal as pass through in the tariff as per the relevant regulations.

- b) Lanco had to shut operations of its Unit-II from 21/3/2013 as the coal company refused to supply linkage coal. Lanco requested PTC to schedule power on the basis of alternate coal. PTC did not schedule power despite repeated requests made by Lanco. Inasmuch as the direction to supply power was issued to Lanco by this Tribunal vide its order dated 04/11/2011, the non-fulfilment of corresponding obligation by the Respondent

in off-taking the power gave a right to Lanco to get the said order executed from this Tribunal.

c) The objection raised by the Respondent that the principal issue that was decided by this Tribunal vide order dated 04/11/2011 was the issue of jurisdiction of the State Commission and therefore other issues like whether Haryana Power was scheduling power to full extent, the reason or justification for non-scheduling of power etc cannot be raised in the present execution proceedings is without substance. Order dated 04/11/2011 contains direction for supply of power by Lanco to the Respondent and corresponding obligation on the Respondent to off-take and schedule the said power.

d) Since the Supreme Court has confirmed the directions contained in the order dated 23/03/2011 passed by this Tribunal Lanco is seeking execution of the final judgment of this Tribunal dated 04/11/2011. Merely because an appeal is pending against the said order in the Supreme Court it would not mean that the statutory remedy under Section 120(3) of the said Act is

extinguished. The Supreme Court has not stayed the said order. Lanco cannot approach the Supreme Court for execution of the order passed by this Tribunal.

- e) The contention that Lanco can approach the Supreme Court to seek reliefs that are sought in the present petition is legally untenable. This is evident from order dated 19/02/2013 passed by the Supreme Court in IA No.7 of 2012 filed by Lanco in the pending civil appeal.
- f) The objection that Lanco could have made claim relating to non-scheduling of power by the Respondents in IA No.9 of 2015, filed in the Supreme Court seeking direction to SECL for supply of linkage coal and since Lanco did not make any claim therein relating to non-scheduling of power by the Respondents the said issue stood settled and cannot be re-agitated is misconceived because prayers made in the said application and the present petition are different and the scope of the two proceedings is different.

**17.** Mr. Ramachandran learned counsel for Respondent No.2 has opposed the prayers made in the petition. Counsel has submitted written submissions also. Counsel submitted

that inasmuch as the Petitioner has challenged the order dated 04/11/2011 in the Supreme Court and the said civil appeal is pending, this Tribunal cannot direct execution of order dated 04/11/2011. Counsel submitted that besides, the Supreme Court has on 16/12/2011 directed that the interim order of this Tribunal dated 23/03/2011 which was confirmed by this Tribunal by its final order dated 04/11/2011 should continue to be in operation pending hearing and final disposal of the civil appeal. Thus the order dated 04/11/2011 became an order of the Supreme Court in the pending civil appeal. Counsel also pointed out that the Petitioner had filed IA No.9 of 2015 prior to filing the present petition praying *inter alia* for a direction to SECL to make coal available to it. At that time the Petitioner could have raised the claim raised by it in this petition *inter alia* about non-scheduling of power of Haryana Utilities which it did not do. Counsel submitted that in Appeal No.15 of 2011 the only issue for consideration was the jurisdiction of the State Commission. The order dated 04/11/2011 is not on the aspect of whether the Haryana Utilities are scheduling power to the full extent or in case of non-scheduling of power, the

reason or justification for the same or otherwise on the aspect of liability to pay capacity charges or deemed fixed charges payable by Haryana Utilities to Lanco. None of the above aspects which are sought to be raised in this petition were the subject matter of the proceedings before this Tribunal in Appeal No.15 of 2011. Counsel submitted that therefore the present petition seeking deemed fixed charges, capacity charges, attachment etc is totally unrelated to the subject matter decided by this Tribunal in the order dated 04/11/2011. Counsel submitted that in the circumstances the petition is liable to be dismissed.

**18.** Mr.Vishrov Mukherjee, learned counsel for PTC has also opposed the prayers made in the petition. His submissions are similar to the submissions of Mr. Ramachandran. Hence it is not necessary to repeat them. We may only add that he has submitted that this Tribunal's interim order dated 23/03/2011 has merged in the Supreme Court's interim order dated 16/12/2011. In support of doctrine of merger



counsel relied on **Kunhayammed and Others v. State of Kerala and Others**<sup>1</sup>

**19.** We have considered the submissions advanced by the parties. We are unable to direct execution of the order dated 04/11/2011 for more than one reason. The first and foremost reason for not granting the prayers of the Execution Petition is that the Petitioner has challenged order dated 04/11/2011 in the Supreme Court in Civil Appeal No.10329 of 2011. The Supreme Court by its order dated 16/12/2011 has continued the interim order dated 23/03/2011 passed by this Tribunal. Relevant portion of the said order reads thus:

*“.....Pending hearing and final disposal of the appeal we issue following directions*

- (i) “The appellant will continue to supply electricity as per the interim order of the Tribunal dated 23<sup>rd</sup> March,2011*
- (ii) .....*”

Thus as per the interim order of the Supreme Court which will be in operation pending hearing and final disposal of Civil

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<sup>1</sup> (2000) 6 SCC 359

Appeal No.10329 of 2011 Lanco has to supply 35% of the power to CSPTCL. Lanco has to supply balance power to PTC. Needless to say that Civil Appeal No.10329 of 2011 is not yet disposed of. The Supreme Court has yet to examine the challenge raised by Lanco to order dated 04/11/2011. In such a situation we cannot direct execution of order dated 04/11/2011, particularly when the Supreme Court has passed an interim order and specifically observed that it would be in place pending hearing and final disposal of the appeal. It would be highly improper for us, particularly in the facts of this case to direct execution of an order correctness of which is yet to be examined by the Supreme Court.

**20.** Moreover the primary claim made by Lanco in the present petition is that the Haryana Utilities did not schedule power which Lanco was willing to generate after the order dated 04/11/2011 passed by this Tribunal. This is evident from the following paragraphs of the petition.

*“5.26. It is submitted that the Petitioner’s consistent stand has been that the Petitioner is ready to resume generation of power from its Unit-II and has been requesting the Respondent No.3/PTC to schedule the power on the basis of alternate coal procured from e-auction in view of non-availability of linkage coal. Considering the alternate coal procured by the Petitioner,*

*it has been declaring its plant availability on a daily basis to generate and supply power to PTC/HPPC; however PTC/HPPC has not been scheduling power. In this regard, vide several letters including but not limited to letters dated 03.04.2014, 25.04.2014, 15.05.2014, 05.08.2014 the Petitioner has been requesting the Respondent No.3/PTC that its Unit-II is available for supplying power to PTC for onward supply to Haryana. However, PTC has paid no heed to the said requests of the Petitioner. The Petitioner submits that it cannot generate or inject power into the grid without firm dispatch schedule given by the Procurer. In this regard, the Petitioner has written letters dated 06.02.2015 and 26.02.2015 to PTC, to which no reply has been received by the Petitioner. Thus, even after determination of tariff by HERC pursuant to the Order dated 03.01.2014 of this Hon'ble Tribunal, the Petitioner is unable to resume operation of its Unit-II and as such the direction issued by this Hon'ble Tribunal vide order dated 04.11.2011 to supply 35% of power from Unit-II of its Project to CSPTCL and the balance 65% power to Respondent NO.3/PTC is not being complied with. That it is only on account of refusal of the Respondent No.3/PTC and the Respondent No.2(a)/HPPC to accept the scheduling of the power from Unit-II the order dated 04.11.2011 passed by this Hon'ble Tribunal is not being complied with by the concerned parties and therefore appropriate directions are required to be issued to Respondent No.3/PTC and the Respondent No.2(a) HPPC. A copy of the letters dated 03.04.2014, 25.04.2014, 15.08.2014, 06.02.2015 and 26.02.2015 sent by the Petitioner to the Respondent No.3/PTC is annexed herewith and collectively marked as **ANNEXURE-P-6(Colly).**"*

**21.** All the prayers made in the present petition emanate from the above claim of Lanco. Similarly the principal submission of the Petitioner's counsel is that order dated 04/11/2011 contains direction for supply of power by Lanco to the Respondents and

corresponding obligation on the Respondents to off take and schedule the said power. It is contented that non-fulfillment of this obligation by the Respondents in off taking power has given Lanco a right to get the order executed by this Tribunal.

**22.** In this connection it is significant to note that on or about 11/3/2015 i.e. prior to the filing of the present petition on 09/09/2015, Lanco filed an application before the Supreme Court in Civil Appeal No.10329 of 2011. Following prayers were made:

*“It is therefore, most respectfully prayed that this Hon’ble Court may be pleased to:*

- a) Pass an Order directing Southern Eastern Coalfields Ltd. (SECL) to commence supply of linkage coal to Unit-II of the Applicant so that the Applicant can supply power to the APTEL identified beneficiaries (HPPC and Chhattisgarh) as per the interim order dated 16/12/2011 of this Hon’ble Court;*
- b) Pass an Order directing Respondent No.3 (PTC) and PGCIL to arrange and ensure unhindered transmission of power treating the supply of power from the Applicant’s Unit-II to Haryana (HPPC) as supply made on long term basis;*
- c) Pass an order directing SECL and PGCIL to consider the supply of power to the APTEL identified beneficiaries (Haryana and Chhattisgarh) pursuant to Order dated*

*16.12.2011 equivalent to long term supply for the purpose of supplying coal by SECL and transmission of power by PGCIL.*

- d) In the alternative, vacate the interim Order dated 16.12.2011 and allow the Applicant to sell power from its Unit-II to third parties;*
- e) Pass such further orders as this Hon'ble Court may deem fit and proper in the interests of justice."*

Thus by this application Lanco sought directions in relation to interim arrangement put in place by the Supreme Court by its order dated 16/12/2011. Lanco prayed for supply of linkage coal from SECL to Lanco's Unit-II so that it can supply power to identified beneficiaries. By its order dated 18/09/2015 the Supreme Court disposed of the said application directing *inter alia* that linkage coal be supplied to Lanco. At this stage Lanco could have raised the claims raised by it in this petition before the Supreme Court, particularly when it was seeking directions in relation to the interim arrangement made by the Supreme Court vide its order dated 16/12/2011. Lanco should have comprehensively urged all points before the Supreme Court which it did not.

**23.** The contention that Lanco could not take up the issue relating to generation and supply of electricity in IA No.9 of 2015 cannot be accepted. It was open to the Petitioner to raise all contentions before the Supreme Court. In any event, we are informed that pursuant to the order dated 18/09/2015 passed by the Supreme Court in IA No.9 of 2015 SECL has given coal linkage to Lanco and power is being scheduled by Haryana Discom through PTC. It is submitted that the Petitioner cannot get the order of this Tribunal executed from the Supreme Court. Only this Tribunal can execute it. We can only reiterate that since the appeal challenging the order dated 04/11/2011 passed by this Tribunal is pending before the Supreme Court and the interim order passed by the Supreme Court is in place we cannot direct execution of order dated 04/11/2011.

**24.** It is submitted by counsel for Respondent No.2 that in guise of getting order dated 04/11/2011 executed, the Petitioner is seeking various other reliefs which are not the subject matter of Appeal No.15 of 2011. This is denied by the Petitioner's counsel. It is not necessary for us to go into this aspect. The principal relief claimed by the Petitioner is execution of order dated

04/11/2011 which we are unable to grant. The petition is, therefore, dismissed.

**25. Pronounced in the Open Court on this 10<sup>th</sup> day of November, 2016.**

**(T.Munikrishnaiah)  
Technical Member**

**(Justice Ranjana P. Desai)  
Chairperson**

**✓ REPORTABLE / NON-REPORTABLE**