

BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY
(APPELLATE JURISDICTION)

Appeal No. 44 of 2014 &
IA-65 of 2014 (For Stay)

And

Appeal No. 74 of 2014
& IA-143 of 2014 (For Stay)

Dated : 30th May, 2014

Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice Surendra Kumar, Judicial Member

In the matter of:

Appeal No. 44 of 2014 & IA-65 of 2014 (For Stay)

Dakshin Haryana Bijli Vitran Ltd & Ors. ... Appellant(s)
Versus
GMR – Kamalanga Energy Ltd. & Ors. ... Respondent(s)

Appeal No. 74 of 2014 & IA-143 of 2014 (For Stay)

GRIDCO Ltd. ... Appellant(s)
Versus
GMR Karmalanga Energy Ltd. & Ors. ... Respondent(s)

ORDER ON I.A. NOS. 65 OF 2014 (FOR STAY) & 143 OF 2014 (FOR STAY)

1. Appeal No. 44 of 2014 has been filed by the appellants against the order dated 16.12.2013, passed by the CERC in Petition No. 79/MP/2013 & Petition No. 81/MP/2013 under Section 79 of the Electricity Act, 2003. In the said Appeal, I.A. No.65 of 2014 has been filed by the appellant(s) praying therein for stay of the operation of the impugned order dated 16.12.2013 as well as the stay on the proceedings in Petition No. 79/MP/2013 & Petition No. 81/MP/2013 before the CERC.

2. Appeal No. 74 of 2014 has been filed by the appellant-GRIDCO Limited against the order dated 03.01.2014 in Petition No. 77/GT/2013, passed by the CERC, in which I.A. No. 143 of 2014 has been filed for staying the operation of the impugned order dated 03.01.2014 and also to stay the further proceedings of the Petition No. 77/GT/2013 pending before the CERC.

3. Order on I.A. No. 65 of 2014 (for stay) in Appeal No. 44 of 2014 & I.A. No. 143 of 2014 (for stay) in Appeal No. 74 of 2014 was reserved by us on 16.05.2014 giving opportunity to the learned counsel for the respondent no.1 to file his written submissions on or before 19th May, 2014. The same has been filed on 19th May, 2014.

4. In both the above noted appeals, the aforesaid Interlocutory Applications being numbered 65 of 2014 and 143 of 2014 were filed seeking stay. It has been averred in the interim applications filed on behalf of the appellant(s) that the impugned order passed by the Central Electricity Regulatory Commission is contrary to the provisions of Electricity Act, 2003 and terms of the PPA for the reasons stated in the Appeal memo.

5. In the said impugned order a direction was issued by the CERC to proceed on the merits of the petitions seeking compensation on account of change in law filed by the respondents. It has further been stated therein that the appellant(s) has strong prima facie case and the balance of convenience is also in favour of the appellant(s) and no prejudice or hardship would be caused to the respondents if the operation of the impugned order is stayed by this Tribunal pending disposal of the Appeal.

6. The following submissions have been made on behalf of the appellant(s):-

A. that the CERC has no jurisdiction to entertain the petition filed by the respondent under Section 79 (1) (b) of the Electricity Act, 2003. The word “composite scheme” has not been defined under Electricity Act, 2003 but has been interpreted by rulings of CERC and this Appellate Tribunal. The essential ingredient to constitute a composite scheme is that the sale of electricity has to be in more than one State and that it should have uniform tariff.

B. that the CERC, by its earlier order dated 16.05.2012, while dismissing the petition filed by GMR held that it may file an appropriate application for determination of tariff as and when it enters into or otherwise has a composite scheme for generation and sale of electricity in more than one State.

- C.** that the CERC, by the impugned order, following the judgment of Delhi High Court dated 15.05.2012 in the case of PTC Vs. J.P. Ventures has held that the Commission has power to regulate the tariff of the generating station under clause 79 (1) (b) of the Electricity Act, 2003 and that it is a composite scheme. The appellant raised objection as to the jurisdiction of the Central Commission saying that there is no composite scheme for sale of electricity, there is no uniform tariff to all the distribution licensees and the PPAs have been approved by the respective regulatory Commissions except Orissa Commission.
- D.** that the CERC, without considering the above objection of the appellant(s), has proceeded to hold that the present is a composite scheme and it has jurisdiction to entertain the petition. CERC has relied on its earlier order dated 12.05.2012.
- E.** that the CERC, in its earlier judgment dated 29.03.2006, in the case of Uttranchal Jal Vidyut Nigam Ltd Vs. Uttranchal Power Corporation Ltd. held that a composite scheme is one in which a generating station is originally conceived for the purpose of meeting the power requirement of pre-identified beneficiaries in more than one State with uniform tariff and the aforesaid judgment dated 29.03.2006 was followed by the CERC in the subsequent order dated 16.05.2012 in Petition No. 20/MP/2012.
- F.** that the CERC, in its one more judgment, dated 16.10.2012, in Petition No. 155/MP/2012 (Adani Power) took a different view without referring to the earlier judgments. Moreover, contrary to the earlier judgments, CERC has bifurcated the requirement of Section 79 (1) (b) of a Composite Scheme for generation and sale of electricity in more than one State into two parts i.e. (i) Composite Scheme for Generation and Sale of Electricity and (ii) Sale of Power in more than one State. This interpretation amounts to adding words to the plain language of the Section which is not permissible.

- G.** that, in the impugned order, the Central Commission has taken a view contrary to its earlier order 16.05.2012 in the identical case which is not distinguishable and is contrary to law.
- H.** that a Co-ordinate Bench of same or lesser strength cannot take a contrary view and a Co-ordinating Bench of equal strength can refer the matter to a larger Bench as held by the Supreme Court in (2011) 2 SCC 94 and (2012) 4 SCC 516 .
- I.** that the impugned order of the CERC is also contrary to the judgment dated 23.11.2006 in Appeal No. 228 & 230 of 2006 as well as judgment dated 04.09.2012 in Appeal No. 94 of 2012, which took the view that for a Composite Scheme under Section 79 (1) (b) the tariff for sale of power to different beneficiaries should be uniform.
- J.** that there is no justification in making the appellant go through the two parallel proceedings before the CERC when the issue of maintainability, which goes to the root of the matter, is pending before this Appellate Tribunal in several cases and in case CERC goes on with the proceedings and this Appellate Tribunal subsequently comes to the conclusion that the petitions before CERC are not maintainable, the entire exercise by the CERC in the two cases would be rendered infructuous and nugatory and no useful purpose would be served by resorting to a procedure which may end in futility.
- K.** that in case this Appellate Tribunal ultimately holds the petitions before CERC to be maintainable, time bound directions can be issued to CERC to dispose of the matter within a fixed time frame

7. The aforesaid interim applications seeking stay have been opposed on behalf of the respondents saying that the appellant(s) has no prima facie case and balance of convenience is not in favour of the appellant(s) but in favour of the respondents. The respondents shall suffer irreparable loss in case further proceedings pending before the CERC are stayed by this Appellate Tribunal.

The interim application ought to be dismissed with costs with a direction to CERC to dispose of the pending petitions expeditiously.

8. We have heard Mr. G. Umapathy & Mr. Raj Kumar Mehta, the learned counsel for the appellant(s) and Mr. Amit Kapur & Mr. K.S. Dhingra, the learned counsel for the respondents.

9. Since both the instant Appeals being numbered 44 of 2014 and 74 of 2014 are pending before us for hearing and disposal on merits, we are not considering different aspects of the matter on merits. We only confine ourselves to the point of interim stay on the proceedings pending before the CERC.

10. It is a legal point whether the CERC has jurisdiction to entertain the petition filed under Section 79 (1) (b) of the Electricity Act, 2003 in the light of the judgment delivered on 15.05.2012 by Hon'ble Delhi High Court in OMP No. 677 of 2011 in PTC India Limited Vs. Jaiprakash Power Ventures Ltd. and the above referred rulings of this Appellate Tribunal. We shall discuss in detail and decide this jurisdictional point while deciding the Appeals on merits.

11. After considering the aforesaid submissions of the rival parties, we deem it proper to order that the proceedings, in the petitions pending before the CERC, shall be subject to the result/outcome of the instant Appeals being Appeal No. 44 of 2014 and 74 of 2014 and we order accordingly.

12. The aforesaid interim applications being numbered 65 of 2014 in Appeal No. 44 of 2014 and 143 of 2014 in Appeal No. 74 of 2014 are disposed of.

13. Both the aforesaid appeals be now listed for hearing on 1st July, 2014.

14. Post the main appeal for hearing on 28.7.2014. In the meantime, pleadings be completed.

(Justice Surendra Kumar)
Judicial Member

rkt

(Rakesh Nath)
Technical Member