IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

IA NO. 1927 OF 2022 IN DFR NO. 492 OF 2022

Dated : 24.01.2023

Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member

In the matter of:

Mahan Energen Limited .... Appellant(s)
[Formerly known as Essar Power M.P. Limited]
Vs.
Central Electricity Regulatory Commission & Ors. .... Respondent(s)

Counsel for the Appellant(s) : Sanjay Sen, Sr. Adv.
Hemant Singh
Lakshyajit Singh Bagdwal
Robin Kumar
Roberta Ruth Elwin

Counsel for the Respondent(s) : Swapna Seshadri
Amal Nair for R-2

Suparna Srivastava
Tushar Mathur
Astha Jain for R-3

Abiha Zaidi for R-4 & 5

Nitin Gaur for R-7

ORDER

IA NO. 1927 OF 2022
(For Interim Relief)

1. The present Interlocutory Application i.e. IA No. 1927 of 2022 ('IA') has been filed by the Appellant, namely; Mahan Energen Limited ("MEL") (formerly known as Essar Power M.P. Limited) assailing the Order dated 14.03.2022 ("Impugned Order") passed by the Central Electricity Regulatory Commission ("CERC") in Petition No. 145/TT/2018 ('145-

Petition'), *inter alia,* seeking stay of the said impugned order and the consequential actions of the Central Transmission Utility of India ("CTUIL") in raising invoices and, thereafter, the Grid Controller of India ("GC") in regulating the Short Term Open Access ("STOA") of the generating station under the powers vested by the Electricity (Late Payment Surcharges and Related Matters) Rules, 2022 ("LPS Rules").

2. After filing the present Appeal, the Appellant had separately filed Review Petition No. 27/RP/2022 in the aforementioned 145-Petitionbefore the CERC which has since been dismissed.

3. A brief background of the case is detailed as under:

(a) The erstwhile Essar Power M.P. Limited ('EPML') established a 1200 MW thermal power generating station, and additionally the Transmission System was also commissioned by Essar Power Transmission Company Limited ('EPTCL'), the Transmission Licensee for evacuation of power from the generating station.

(b) The transmission system in question consists of 400 kV D/C Mahan-Sipat Transmission Line (Quad Moose Conductor) along with associated bays at Mahan and Sipat and 2x50 MVAR line reactors at Sipat Pooling Sub-station, 2x50 MVAR line reactors at Mahan Pooling Sub-station and 1x80 MVAR, 420 kV switchable bus reactor at Mahan TPS along with its associated 400 kV bays.

(c) The Impugned Order was passed in the 145-Petition filed by EPTCL, the sister company of erstwhile EMPL, seeking

determination of the transmission tariff for the aforesaid transmission system built and commissioned by EPTCL.

(d) There was a change in configuration of the said transmission system during the pre-construction stage. The relevant portion of the letter dated 21.08.2009, written by the erstwhile EPML, reads as under:

> *"5. As per the approved scheme, originally for evacuation of power from Mahan Project, 400 KV D/C Triple, Mahan – Sipat line was envisaged and planned. When we have conducted a detailed survey for laying of the line it was observed that the said line was required to be set up through a large amount of forest area say about 78 kms. Now it has been decided to change from Triple to Quad configuration keeping in view future expansions for the following reasons:*
>
> *a. To minimize the usage of forest area (in case we go for expansion it may lead to usage to further forest area for laying additional line); and*
>
> *b. To optimize the right of way (ROW)*
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> *In this regard it is hereby clarified and confirmed that any additional tariff which may arise on account of increase in cost of Mahan – Sipat line due to change in configuration from Triple to Quad shall be borne by EPMPL and such cost shall not be passed on to Madhya Pradesh Electricity Board (MPEB) on account of transmission of power allocated to MPEB."*

(e) The changed configuration resulted in additional costs which was to be borne by the aforesaid generating company (EPML) to the tune of 24% of the total transmission capital cost.

(f) On 07.01.2009, EPML signed a Bulk Power Transmission Agreement ("BPTA") with CTUIL for the grant of 1200 MW Long Term Access ("LTA").

(g) While amending the transmission licence, due to change in configuration of the transmission elements, i.e. Triple Conductor to Quad Moose conductor, the CERC had observed as under:

"2. The licensee vide its affidavit dated 29.08.2009 has submitted that one of its group company, namely Essar Power M.P. Limited (EPMPL) is in the process of setting up 2x600 MW pit head coal fired thermal power project in the State of M.P. for which licensee is constructing the transmission system. The licensee has further submitted that at the request of EPMPL, it has decided to change the configuration of 400 kV D/C Tripe, Mahan-Sipat transmission line from Triple conductor to Quad Moose conductor, keeping in view future expansion for the following reasons, namely;

(i) To minimize the usage of forest area; and

(ii) To optimize the right of way (ROW).

3. According to the licensee, the Central Transmission Utility vide letter No. C/ENG/SEF/W/06/MAHAN, dated 8.5.2009 has conveyed its no objection to the change of configuration from Triple conductor to "Quad Moose conductor. EPMPL vide letter dated 21.8.2009 has confirmed that the additional tariff on account of increase in the construction cost of the transmission system because of change in configuration from Triple conductor to Quad Moose conductors shall not be passed on the consumers in the State of Madhya Pradesh, for transmission of power allocated from the generating station.

We have considered the request of the applicant and approve the modification in the configuration from Triple conductor to Quad Moose conductor for 400 kV D/C Mahan-Sipat transmission line."

(h) The Long-Term Access ("LTA") for 1200 MW obtained by them earlier, was relinquished by EPML in two tranches of 750 MW and 450 MW, and approval was obtained thereto from CTUIL vide letters dated 19.05.2017 and 30.05.2018 respectively.

(i) The Appellant's case is that they were not in the picture either during the commissioning of the project or even when the provisional tariff Order was passed by the CERC on 14.03.2019, and they took over the said generating station, through the Insolvency and Bankruptcy Code (IBC) proceedings, only in the year 2022.

(j) Prior to commencement of the IBC proceedings, it was duly accepted by CERC that the subject transmission system was built under the ISTS System, and the transmission charges shall be borne by the beneficiaries through the POC Pool mechanism. Prior to the actual construction of the transmission system, the original scheme of construction was amended, and the Triple Conductor configuration was modified to Quad Moose conduct or having higher transmission capacity, however, with additional cost which was to be borne by the erstwhile generating station ie EPML.

(k) As an interim arrangement, the CERC passed the interim order in the 145-Petition determining the provisional tariff for EPTCL's subject transmission system whereby 100% transmission charges were to be recovered by CTUIL, through the POC Pool mechanism, from the beneficiaries i.e. LTTCs.

(l) No explanation is forthcoming from any of the Respondents as to why, despite having earlier amended the transmission license of EPTCL providing for levy of 24% of the total transmission charges on the erstwhile EPML, the CERC had failed to fasten such liability on EPML in the provisional tariff Order passed by it thereafter.

(m) The Generating Company, EPML went through reorganization and insolvency resolution under the Insolvency and Bankruptcy Code, 2016 ("IBC"). On 10.10.2020, the Interim Resolution Professional ("IRP") made a public announcement in Form-A inviting claims to be filed by the creditors (both operational and financial) against the erstwhile EPML in terms of Regulation 6(1) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. CTUIL had also participated in the Corporate Insolvency Resolution Process ("CIRP").

(n) On 25.11.2020, the IRP issued Information Memorandum in terms of Section 29 of the IBC 2016, indicating the assets and liabilities of the Corporate Debtor meant to be dealt in the CIRP. The creditors list of erstwhile EPML, uploaded on the website, did not also refer to the claim of CTUIL/EPTCL qua the transmission charges. However, CTUIL filed I.A. No. 3015/2021 seeking admission of Rs. 26,325,400,000/- as operational debt, against the erstwhile EPMPL, referring to the relinquishment compensation as 'Government dues'

(o) The National Company Law Tribunal ("NCLT") passed an Interim Order, in Petition No. (IB)863(PB)/2020 filed by the financial creditors, under Section 7 of IBC, *inter alia,*

transferring ownership of the assets of EPML to M/s Mahan Energen Limited ("MEL").The relevant portion of the order is quoted as under:

> *"IA 3015/2021*
>
> *28. That IA 3015/2021 has been filed by Central Transmission Utility of India Limited, claiming to be an Operational Creditor against the RP. That through this IA Central Transmission Utility of India Limited has sought admission of Rs. 26,325,400,000 as an Operational Debt.*
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> *29. That the necessary of adjudicating the claim of the Operational Creditor in IA 3015/2021 is not required since all the Operational Creditors, irrespective of their claim amount, are awarded with 'NIL' amount in the Resolution Plan. Therefore IA 3015/2021 is dismissed as infructuous."*

(p) Subsequently, CERC passed the Impugned Order dated 14.03.2022 determining the transmission tariff for EPTCL wherein, for the first time, 24% of the transmission charges was levied exclusively on the generating station (ie on the Appellant), which was neither indicated/ determined as part of the earlier provisional tariff nor was the Appellant,(the newly acquiring entity of the assets of erstwhile EPML), made a party to the proceedings before the CERC.

(q) In compliance with the CERC order, CTUIL raised invoice dated 23.05.2022 for the subsequent periods till the month of June, 2022) on the Appellant.

(r) On the failure of the Appellant to pay these invoiced amounts, the Grid Controller of India, vested with the powers under the LPS Rules as notified by Ministry of Power (MoP), regulated

short term access of the said generating station vide letter dated 11.11.2022.

(s) While these orders were initially stayed by this Tribunal, the interim stay was not extended as the Appellant could not, in law, avail two parallel remedies simultaneously (ie the present Appeal and the Review Petition before the CERC). The proceedings in the Appeal were deferred, leaving it open to the Appellant to pursue the Review Petition filed by them before the CERC.

(t) After the Review Petition was dismissed by the CERC, the Appellant requested that the present I.A. be heard, contending that the Grid Controller had regulated supply in the interregnum, resulting in the complete shutdown of their generating station.

4. Sri Sanjay Sen, Learned Senior Counsel appearing on behalf of the Appellant, submits that the subject generating station was taken over by the Appellant under the IBC proceedings; the NCLT, while passing the interim order, has not fastened any liability on them with respect to the claims of the operational creditors; the NCLT held that the claim amount of the operational creditors was awarded with 'NIL' amount in the resolution plan; at the time of filing the tariff 145-Petition before the CERC, EPTCL has not referred to the letter dated 21.08.2009 written by EPML earlier; it was only on 04.06.2021 that this letter was placed before the CERC i.e. after initiation of proceedings before the NCLT; during the pendency of proceedings in Petition No. 145/TT/2018, EPTCL has also not informed CERC that EPMPL was undergoing CIRP under the provisions of the IBC, 2016; and, while passing the interim order determining the provisional tariff, CERC had erred in not determining and levying 24% of the transmission

charges on the erstwhile EPML, a condition which was stipulated in the revised transmission licence granted to EPTCL.

5. Reliance is placed by Mr. Sanjay Sen, Learned Senior Counsel appearing on behalf of the Appellant, on the judgement of the Supreme Court, in "Ghanshyam Mishra and Sons Private Ltd. v. Edelweiss Asset Reconstruction Company Limited: 2021 SCC Online SC 313" to submit that, since the claims of CTUIL/EPTCL do not find place in the approved Resolution Plan, they stand automatically extinguished with the approval of the Resolution Plan. Learned Senior Counsel also places reliance on "Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta: (2020) 8 SCC 531", in support of his submission that the Appellant, as the successful resolution applicant, cannot suddenly be made to face "undecided" claims once the resolution plan submitted by it had been accepted. as this would throw into uncertainty the amounts payable by a prospective resolution applicant who had successfully take over the business of the corporate debtor; and all claims must be submitted to, and be decided by, the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor.

6. Mrs. Swapna Seshadri, Learned Counsel for EPTCL, submits that the terms 'transmission charges' and 'Long Term Access Charges' are distinct and different; while transmission charges lead to recovery of capital cost of a transmission asset, LTA charges are payable for long term access to the transmission system; in the instant case, CTUIL has not raised any bill on the Appellant for LTA charges as LTA was relinquished; however, CTUIL raised the bills for transmission charges for the dedicated portion as the Appellant is liable to bear the additional 24% of the capital cost; the tariff determined for the ISTS transmission assets go towards recovery of the

capital cost invested by an ISTS licensee over the life of the assets which is 35 years; the Appellant's contention that they cannot be made liable for payment of dues, not provided in the Resolution Plan prior to the date of acquisition of the asset, is untenable; their contention that EPTCL was not in the category of a 'creditor' and, as 100% charges have been paid, there was no occasion for CTUIL/ EPTCL to raise any claim for any 'debt' during this period as per Section 2(11) and Section 5(20) of the IBC 2016 when IBC proceedings were continuing, is also devoid of merits; the bills raised by CTUIL cannot be described as an 'operational debt' under Section 5(21) of the IBC 2016; and the regulatory billing of transmission charges is neither a 'claim' as per section 3(6) of IBC 2016 nor is CTUIL an 'operational creditor' as per Section 5(20) of the IBC 2016.

7. On being asked why CTUIL did not raise bilateral bills on EPMPL, between COD of the asset and the date of the provisional tariff order (14.3.2019), Mrs. Suparna Srivastava, Learned Counsel for the CTUIL, submitted that bills were raised as per the tariff order of the CERC, and it was EPTCL's responsibility to claim it, which, for reasons best known to them, they failed to.

8. It does appear, prima facie, that the provisional tariff was determined by CERC in ignorance of the assurance given by EPML to bear the additional cost of the transmission system due to change in the conductor type, though it was recorded in the revised transmission licence of EPTCL; and that NCLT, while passing the order, has not made the Appellant liable to pay the dues claimed by the operational creditors prior to the said date. The question whether failure of EPTCL, to bring these facts to the notice of the CERC, was deliberate or accidental, must await final hearing of the main appeal.

9. The Appellant would be entitled for grant of the interim prayers sought for, only if they fulfil the three well established principles for grant of interlocutory relief ie (1) a prima facie case should have been made out, (2) the balance of convenience should lie in their favour i.e., it should cause greater inconvenience to them if interim relief is not granted than the inconvenience which the opposite party or persons claiming through the opposite party would be put to if interim relief is granted, and (3)they should suffer irreparable injury if they are not granted the said relief.

10. Proof of prima facie case is the sine quo non for the grant of interlocutory relief. However, as the appeal before this Tribunal is an appeal both on facts and law, and is more in the nature of a first appeal, we shall proceed on the premise, for the limited purpose of this interlocutory application, that the Appellant has made out a prima facie case. With the first condition of a prima facie case being made out as the sine quo non, at least two conditions should be satisfied by the Appellant conjunctively, and mere proof of fulfilment of one of the three conditions would not entitle them to the grant of interlocutory relief. (**Nawab Mir Barkat Ali Khan V/s Nawab Zulfiquar Jah Bahadur and others – AIR 1975 AP 187; Gone Rajamma vs Chennamaneni Mohan Rao: 2010 (3) ALD 175 – dated 3rd March, 2010; Kishoresinh Ratansinh Jadeja v. Maruti Corpn. [(2009) 11 SCC 229]; Best Sellers Retail (India) Private Ltd. v/s Aditya Birla Nuvo Ltd. – (2012) 6 SCC 792).** The Appellant must satisfy at least one of the other two requirements of (1) the balance of convenience being in their favour, and (2) they would suffer irreparable loss if they are not granted the interim relief they seek.

11. This Tribunal, while granting or refusing to grant interim relief, should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties if interim relief is refused,

and compare it with that which is likely to be caused to the other side if interim relief is granted. (**Dalpat Kumar v. Prahlad Singh: AIR1993 SC 276 b; Mahadeo SavlaramShelke and Ors. Vs. Puna Municipal Corporation and Ors.: MANU/SC/0673/1995).** This Tribunal must satisfy itself that the comparative hardship or mischief or inconvenience which is likely to occur from withholding the interlocutory relief will be greater than that would be likely to arise from granting it. (**Dalpat Kumar v/s Prahlad Singh – AIR 1993 SC 276**).

12. For the purposes of deciding whether this Interlocutory Application satisfies the test of balance of convenience, we have drawn a distinction between levy of charges for the period prior to the order passed by NCLT, in the IBC proceedings, on 01.11.2021 (ie the period prior to the Appellant taking over the said generating station which belonged to EPML earlier), and the levy of transmission charges for the period thereafter, bearing in mind that, even prior to the IBC proceedings, EPML had relinquished 100% LTA, for the said transmission system, against payment of relinquishment charges determined on the final cost of the transmission system including the additional cost incurred on account of a change in configuration.

13. As noted hereinabove, the Appellant procured the Generation Station pursuant to the Order passed by the NCLT on 01.11.2021, We are, prima facie, of the view that the Appellant cannot be mulcted with liability for the charges pertaining to the period prior to their having taken over of the subject asset through the IBC, as such a liability has not been fastened on them by the aforesaid order of the NCLT. The substantial injury which is likely to be caused to them, if interim relief is refused, would far outweigh the injury which is likely to be caused to EPTCL if interim relief is granted, since this liability has been fastened on the Generating Company only in terms of the Order under appeal, and EPTCL had not made any such claim

when the CERC had determined the provisional tariff earlier, which the Appellant contends is only because, prior to commencement of IBC proceedings, the liability to pay these amounts would have been fastened on EPML, a sister company of EPTCL. Consequently, the dues for the period September, 2018 till October 2021 shall remain stayed during the pendency of this Appeal.

14. Prima facie, for the period subsequent to 01.11.2021, the subject asset belongs to the Appellant, and while they contend that even this liability cannot be fastened on them, these contentions necessitate detailed examination at the stage of final hearing of this Appeal. Consequently, 24% of the total cost of the transmission system is liable to be paid by the Appellant, to the extent it relates to the period after 01.11.2021, subject to the rider that such payment by them shall be subject to the result of the main appeal.

15. This Tribunal must also satisfy itself that non-interference would result in “irreparable injury” to the party seeking relief ie the Appellant, and they need protection from the consequences of the apprehended injury. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages (**Dalpat Kumar v. Prahlad Singh: AIR 1993 SC 276; Mahadeo SavlaramShelke and Ors. Vs. Puna Municipal Corporation and Ors.: MANU/SC/0673/1995**). This Tribunal would refuse to grant interlocutory relief if the injury suffered by the Appellant, on account of refusal to grant interim relief, is not irreparable.

16. Directing the Appellant to pay the dues from September,2018 till October,2021 to EPTSL would undoubtedly cause them irreparable injury since they would be required to pay the dues relating to a period prior to

their even having secured ownership of the asset. Further, EPTSL did not even choose to make such a claim before the CERC when the provisional tariff was determined, which the Appellant alleges is only because, during the said period, the liability to make payment was that of their sister Company, whereas, by the time the order under appeal was passed, the Appellant had secured ownership thereof in terms of the order of the NCLT.

17. We are satisfied that both the ingredients, apart from a prima facie case being made out, ie the test of balance of convenience and irreparable injury, are satisfied in the present case. The IA is partly allowed, and there shall be interim stay of payment of the invoices raised by CTUIL for the period from September, 2018 till October, 2021. The Appellant shall, however, pay the dues for the period from 01.11.2021 till date, and thereafter till the main appeal is finally disposed of, subject, of course, to the result of the main appeal.

18. CTUIL shall, forthwith, undertake the exercise of bifurcating the dues for the period prior to 01.11.2021, and for the period subsequent thereto. A fresh invoice shall be raised on the Appellant, for the period subsequent to 01.11.2021 till date, within two weeks from today, and the Appellant shall make payment thereof within four weeks from the date of receipt of the invoice from CTUIL.

19. Regulation of short-term access, as directed by the Grid Controller, shall cease to operate henceforth till the Appeal is finally heard and decided, subject to the Appellant making payment of the invoice raised by CTUIL within the stipulated period. Failure of the Appellant to make payment, as directed hereinabove, would result in automatic vacation of this order, and would enable the Respondents to proceed and take action against the Appellant in accordance with law.

20. All other contentions, urged by Learned Senior Counsel/Learned Counsel on both sides, shall be examined when the Appeal is finally heard. The I.A, is, accordingly, disposed of.

PRONOUNCED IN THE OPEN COURT ON THIS 24TH DAY OF JANUARY, 2023.

(Sandesh Kumar Sharma) Technical Member (Elect.)	(Justice Ramesh Ranganathan) Chairperson

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