COURT-I

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO. 227 OF 2019 &
IA NO. 1161 OF 2019

Dated : 26th August, 2019

Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. S.D. Dubey, Technical Member

In the matter of:

Rajasthan Solar Park Development Company Limited ...Appellant(s)

Versus

Central Electricity Regulatory Commission & Ors. ...Respondent (s)

Counsel for the Appellant(s) : Mr. Bipin Gupta

Counsel for the Respondent(s) : Mr. Jafar Alam
Mr. Sahil Kaul for R-2 to R-4

ORDER ON

MAINTAINABILITY OF THE APPEAL

PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON

The answering Respondents raised a preliminary objection as to the maintainability of the above appeal contending that the Appellant is not a 'person aggrieved' to come within the purview of Section 111 of the Electricity Act (**the Act**). To substantiate their contention, they submit that the Appellant is not a party to the PPAs and the Appellant is only a nodal agency implementing the project i.e., Bhadla Solar Park.

However, the Appellant entered into Implementation and Support Agreement (**ISA**) with the answering Respondents on 29.11.2016 and 23.01.2017 in respect of land and associated infrastructure for development of the projects in the Bhadla Solar Park.

2. So far as scheduled commissioning date (**SCD**) is concerned, it is governed by the PPA. The answering Respondents had not sought for any relief against the Appellant in the petition filed before the Central Electricity Regulatory Commission (**CERC/Commission**) i.e., for extension of time granted to the project. According to answering Respondents, they were entitled for extension of SCD in terms of PPA, therefore, they had approached the Commission when NTPC refused to provide requisite extension and stated its intention to invoke the performance bank guarantee furnished by the answering Respondents under the PPA. In the petition before the Commission they had sought for various reliefs against NTPC including extension of SCD and the release of performance bank guarantee for an amount of Rs.25.5 Crores. Since no relief came to be sought against the Appellant and the Appellant came on record at the instance of NTPC for effective adjudication of the matter, the Appellant cannot file this appeal.

3. They further contend that in terms of agreements between the Appellant and the answering Respondents, answering Respondents had furnished performance bank guarantees for a sum of Rs.4.2 Crores. In terms of Clause 5 of the ISA, answering Respondents were required to keep the bank guarantees alive till the time period stipulated by NTPC for commissioning the projects. In case of failure to commission the projects within the time stipulated by NTPC, the Appellant was entitled to encash the said bank guarantees on a per day basis in proportion to the capacity that was not commissioned. In the impugned Order, the reason for delay in SCD was attributed to the Appellant. Therefore, the Appellant is not in a position to invoke the above mentioned bank guarantees since extension of SCD for the projects was granted attributing delay on the part of the Appellant in handing over the land. Therefore, according to answering Respondents extension of SCD being exclusive prerogative of NTPC and since NTPC has extended the SCD after the impugned order, nothing remains for the Appellant to raise in the appeal. They also contend that answering Respondents are not required to keep the agreements executed between them and the Appellant valid and subsisting beyond the commissioning dates of the projects. Since NTPC has already extended the time, the Appellant has no right for invocation of bank guarantees. Therefore, no loss or

prejudice as such has been caused to the Appellant to approach this Tribunal. Even if the projects are delayed, no loss would be caused to the Appellant. The only grievance of the Appellant seems to be the Appellant is unable to invoke performance bank guarantees towards two projects. Since it has not suffered any loss or legal injury on account of impugned order, it cannot be brought under the caption of 'aggrieved person'. With these submissions, they sought for dismissal of the appeal as not maintainable by placing reliance on the following three judgments relying on certain paragraphs, which read as under:

i) ***RAVI YASHWANT BHOIR vs. DISTRICT COLLECTOR, RAIGAD AND OTHERS (2012) 4 SCC 407***

"58.

…….

Thus, a person who suffers from legal injury can only challenge the act or omission. There may be some harm or loss that may not be wrongful in the eye of the law because it may not result in injury to a legal right or legally protected interest of the complainant but juridically harm of this description is called damnum sine injuria.

59. The complainant has to establish that he has been deprived of or denied of a legal right and he has sustained injury to any legally protected interest. In case he has no legal peg for a justiciable claim to hang on, he cannot be heard as a party in a lis. A fanciful or sentimental grievance may not be sufficient to confer a locus standi to sue upon the individual. There must be injuria or a legal grievance which can be appreciated and not a stat pro ratione voluntas reasons i.e., a claim devoid of reasons."

ii) **M/s Kailash Nath Associates vs. Delhi Development Authority & Anr. (**Civil Appeal No. 193 of 2015 dated 09.01.2015)

"43.1

…….

Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation.

43.2 ……

43.3

Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the Section.

44.

…….

If damage or loss is not suffered, the law does not provide for a windfall."

iii) **GRIDCO LTD. vs. JINDAL STAINLESS LIMITED** (2009 SCC Online APTEL 58 : (2009) APTEL 58)

" 17. Before dealing with this question, it would be appropriate to refer to the ratio decided by the Supreme Court in various authorities cited by both the Counsel, in regard to the locus standi of the party to file an Appeal as an aggrieved person. Those propositions are as follows:

....

iii. The words 'person aggrieved' did not mean a man who is merely disappointed of a benefit which he may have received if some other order had been passed; the person aggrieved must be a person who has suffered a legal grievance; a person against whom a decision has been pronounced, which has wrongfully deprived him of something; or wrongfully refused him of something; or wrongfully affected his title to something.

....

21. In the light of the above settled law, we shall see whether the Appellant has established that he is a really aggrieved party which would entitle him to file an Appeal.

22. The relief which was sought by the R-1 Jindal Stainless was for a short-term open access transmission for transmitting power from its generating unit at Duburi in Orissa to its own stainless steel manufacturing unit at Hissar in Haryana. The cause of action for the R-1 Jindal Stainless to approach the Central Commission is the refusal of the permission by the R-2 herein, Orissa Power Transco for the short-term open access. Only against that order, the R-1, Jindal Stainless Ltd. filed a Petition before the Central Commission seeking direction to the R-2 Orissa Power Transco to give permission for the same.

23. Admittedly, no relief was claimed by the R-1 Jindal Stainless as against the Appellant herein, Gridco as it was not at all concerned either with the grant or the refusal of open access to R-1 Jindal Stainless Ltd.

... ...

32. As held by the Hon'ble Supreme Court, the mere expectation that the Appellant would not be supplied power as per the MOU or mere disappointment over the non-supply because of the open access permission being granted to R-1 Jindal Stainless, would not confer any right to Gridco to claim that it is an aggrieved party. When the R-1 Jindal Stainless has been permitted by the Central Commission to use its own

power for transmitting the same to its own units, the Appellant cannot contend that it is entitled to the said power and the permission granted by the Central Commission has wrongfully deprived him of his right to purchase the said power, particularly when the said power permitted to be transmitted to its two units cannot be said to be surplus power.

... ...

39. In view of the foregoing paragraphs, we are to conclude that the Appellant is not entitled to file this Appeal as he cannot be considered to be a person aggrieved. Hence, the Appeal is dismissed as not maintainable. No costs."

4. As against this, the Appellant contends that the submissions of the answering Respondents are totally unjustified and baseless. In the entire petition filed before the Commission, answering Respondents have made various allegations against the Appellant. Based on these allegations at the instance of NTPC, the Appellant was brought on record as a party to the main petition before the Commission as Respondent No.6. They also presented their reply.

5. The Appellant further contends that, at Para 155 of the impugned order the entire reasoning is against the Appellant. Therefore, the Appellant has approached this Tribunal since the opinion expressed at Para 155 of the impugned order is contrary to record. In terms of guidelines, the land was supposed to be allotted within three months of

execution of PPA. By misconstruing the factual aspect, the impugned order has been passed making remarks against the Appellant. The Appellant further contends that NTPC can extend SCOD of the plant by maximum three months that too on certification of the present appellant in terms of guidelines at 3.4. In terms of agreement between the Appellant and the answering Respondents, if there is delay in completion of the project, the Appellant is entitled for liquidated damages. The Appellant has not certified any delay beyond 28 days as required, and without considering this aspect, the Commission has wrongly extended the time beyond three months, which is contrary to law. Again, based on the impugned order, NTPC has extended SCOD without certification of Appellant, which was absolutely necessary. They have mentioned various guidelines pertaining to the solar park implementing agency to contend that the Commission had to take into consideration these guidelines before attributing delay against the Appellant, therefore, the Appellant being aggrieved is before this Tribunal.

6. Apart from factual situation, the Appellant also contends that Section 111 of the Act is wide enough to include any person who is not a party to the proceedings. Since allegations have been levelled against the Appellant, the Appellant falls within purview of ‘aggrieved person’.

With these submissions, the Appellant contends that the objections raised by answering Respondents with regard to maintainability of the appeal are not sustainable. The Appellant places reliance on the following two judgments, wherein they refer to relevant paragraphs, which read as under:

i) <u>Emmar MGF Construction Pvt. Ltd. vs. Delhi Electricity Regulatory Commission & Ors. (Appeal No. 123 of 2008 dated 08.09.2009)</u>

"25) Question No.(i): Finally we come to question No.(i) - whether the appellant has locus standi to challenge the impugned order. Section 111 of the Act gives any person aggrieved by an order of an appropriate Commission to prefer an appeal. The relevant part of section 111 is as under:

"111. Appeal to Appellate Tribunal- (1) Any person aggrieved by an order made by an adjudicating officer under this Act (except under Section 127) or an order made by the Appropriate Commission under this Act may prefer an appeal to the Appellate Tribunal for Electricity.

26) The words "person aggrieved" in the Act are in contrast with the concept of appeal as stipulated in the Code of Civil Procedure 1908 wherein right of appeal is with the party aggrieved and not to any person aggrieved. For filing an appeal under section 111 of the Act, it is not necessary that the appellant be a party in the proceedings before the Commission.

27) The Commission has passed an order which prejudicially affects the DDA, the respondent No.3. It is submitted on behalf of the respondents that the order gives no direction against the appellant who is the project developer and a contractor under the DDA. The DDA has accepted an order and has taken upon itself the responsibility of bearing 100% cost of the electrification. The appellant

can claim, it is submitted, only through the DDA and the DDA having not challenged the order the appellant has no locus standi to do so. It is further submitted that the appellant having conceded to the DDA to bear the liability under the contract cannot come up here to challenge the impugned order.

28) So far as the contract between the appellant and the DDA is concerned the appellant has agreed to pay "charges, if any", for the external electrification which may be payable to BYPL. This does not mean that the appellant is liable to pay 100% cost of electrification. The appellant has agreed to pay whatever is legally payable by him. It is not disputed that Regulation 30 was in place when the contract was entered into. Accordingly, the legal liability of the contractor/appellant on the date he entered into the contract was only 50% of the cost of construction of HT and LT system.

29) Now by the circumstances, mentioned earlier, the DDA has pushed the liability of paying the 100% cost of electrification including HT & LT on to the appellant. BYPL has sent a bill to the appellant and insists on the appellant to pay the same. Both the respondents 2 & 3 are working under the shelter of the impugned order. The appellant in a way is aggrieved by the action of both the respondents who are themselves working under the impugned order. In this situation is the appellant not a person aggrieved by the impugned order made by the Commission? In our opinion in the facts of this case the appellant is a person aggrieved.

... ...

34) Following these judgments we are of the opinion that the meaning to the expression "person aggrieved" has to be given in the widest term possible and the appellant who as a contractor of DDA is made to comply with this order is a person aggrieved of the order although order directly mentions DDA as a person who has to bear the

extra burden. The appellant is therefore eligible to file an appeal under section 111 of the Act."

ii) **RELIANCE INDUSTRIES LIMITED vs. *PETROLEUM & NATURAL GAS REGULATORY BOARD (****2014 SCC Online APTEL 5 : (2014) APTEL 7**

"16. The principles regarding the aspects of the person aggrieved and his locus-standi have been laid down by the Hon'ble Supreme Court as referred to above are as follows:

(a) The meaning of the term "person aggrieved" will have to be ascertained with reference to the purpose and the provisions of the statute.

(b) A person will be held to be aggrieved by a decision if the decision is materially adverse to him.

(c) The term "person aggrieved" are of wide import. It should not be subject to a restricted interpretation of possession or denial of legal rights. The test is whether the words "person aggrieved" includes "a person who has a genuine grievance because an order has been passed which prejudicially affects his interests".

(d) In order to have locus-standi to invoke the extraordinary jurisdiction under the Article 226, an applicant should ordinarily be one who has a personal or individual right in the subject matter of the application. In other words, infringement of some legal right or prejudice to some legal interest inhering in the applicant is necessary to give him locus-standi in the matter.

(e) In exceptional cases even a stranger or a person who was not a party to the proceedings before the authority but has a substantial and genuine interest in the subject matter of the proceedings will be covered by this Rule.

(f) Normally, a person aggrieved, must be a man who has suffered legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something.

(g) To be an aggrieved person, he must be one whose interest is affected in some possible way. It must not be a fanciful suggestion of grievance but a likelihood of some injury or damage to the Applicant may make a test of locus standi.

(h) In order to earn a locus standi as a "person aggrieved", other than the arraigned party before the adjudicating authority, it must be shown that such a person aggrieved being third party has a direct legal interest in the goods involved in the adjudication process.

(i) The expression "any person aggrieved" will have to be interpreted in the context in which it appears, having due regard to the provisions of the act and scheme. Any person aggrieved, is a person whose legal rights have been affected, injured or damaged in a legal sense or who has suffered a legal grievance. The person is entitled to file an Appeal.

(j) It is one of the fundamental rules of our constitutional set-up that every citizen is protected against exercise of arbitrary authority by the statute. If there is power to decide and determine to the prejudice of a person, the duty to act judicially is implicit in the exercise of such powers. In those cases, the rule of natural justice operates. This warrants the hearing of the party who is likely to get prejudiced of the order passed by the adjudicating authority."

7. On going through the impugned order and the submissions made by learned counsel for both the parties, it is noticed that initially the Appellant was not a party to the proceedings before the Commission.

When NTPC appeared and filed its reply making allegations against the present Appellant being the cause for delay in handing over the land, thereby causing delay of the projects, the Respondent Commission added this Appellant as 6th Respondent opining that it is just and proper party for adjudication of the matter. Therefore, the Appellant is not a stranger to the proceedings and the Appellant did appear and contest the allegations made against it before the Respondent Commission. The Respondent Commission at Para 155 of the impugned order observed as under:

> *"155. From the above discussion, the Commission observes that the PPAs were executed by the parties on 12.05.2016 (effective date 26.04.2016). It was the duty of RSPDCL/SPIA to allot encumbrance-free land to the Petitioners on the Effective date of the PPAs. The Effective date being earlier than the date of signing the PPAs, the land should have been allotted by 12.05.2016. The Respondents changed the land coordinates three times and finally gave the correct coordinates only on 22.08.2016 i.e. after a delay 101 days from the date of signing the PPAs i.e. 12.05.2016. The Respondents kept on changing the size, boundary and location of the plots and in our opinion, it is the Respondents who are responsible for any such delay since it was their responsibility for handing over encumbrance-free land to the Petitioners for development of the projects. Hence, the Commission is of the view that RSPDCL/SPIA could allot the encumbrance-free land to the Petitioners only on 22.08.2016 and not with the execution of PPAs with a delay of 101 days and the Petitioners could not have commenced significant project development activities before 22.08.2016."*

8. Apart from this, the various guidelines referred to in the agreements between the Appellant and the answering Respondents refer to the role or the duties/responsibilities which have to be complied with by both the parties including the Appellant. Since Para 155 of the impugned order clearly observes, the cause of delay being attributable to the Appellant, the remarks made against the Appellant would remain uncontroverted if appeal is not filed. The Appellant did contest the petition before the Commission and the Commission has passed impugned order only after hearing the Appellant. Therefore, irrespective of the fact that certain financial benefit would have been passed on to the Appellant if the impugned order was not made; otherwise, the fact remains that the remarks (allegations) made against the Appellant were seriously contested by the Appellant. We are of the opinion that the Appellant has every right to seek such remarks being removed against them. Ultimately, if the Appeal is proceeded with, it would be heard on merits giving opportunity to all the parties; therefore, no prejudice whatsoever would be caused to the Respondents especially answering Respondents. Therefore, we opine that the appeal is maintainable.

9. Registry is directed to list the matter on 23.09.2019**.**

10. Pronounced in the Open Court on this 26th day of August, 2019.

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~