

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition Nos. 155/MP/2012

Subject: Application under Section 79 of the Electricity Act, 2003 evolving a mechanism for Regulating including changing and/or revising tariff on account of frustration and/or of occurrence of force majeure (Article 12) and/or change in law (Article 13) events under the PPAs due to change in circumstances for the allotment of domestic coal by GOI-CIL and enactment of new coal pricing Regulation by Indonesian Government.

Petitioner : Adani Power Limited

Respondents : Uttar Haryana Bijli Vitran Nigam Limited and others.

Petition No. 159/MP/2012

Subject: Petition under Sections 61, 63 and 79 of the Electricity Act, 2003 for establishing an appropriate mechanism to offset in tariff the adverse impact of the unforeseen, uncontrollable and unprecedented escalation in the imported coal price due to enactment of new coal pricing Regulation by Indonesian Government and other factors.

Petitioner : Coastal Gujarat Power Limited.

Respondents : Gujarat Urja Vikas Nigam Limited and others.

Date of hearing : 15.6.2016

Coram : Shri Gireesh B. Pradhan, Chairperson
Shri A.K. Singhal, Member
Shri A.S. Bakshi, Member
Dr. M.K. Iyer, Member

Parties present : Shri C. S. Vaidyanathan, Senior Advocate, CGPL
Shri Amit Kapur, Advocate, APL & CGPL
Ms. Poonam Verma, Advocate, APL & CGPL
Shri Apoorva Mishra, Advocate, APL & CGPL
Shri Kunal Kaul, Advocate, APL & CGPL
Shri Akshat Jain, Advocate, APL & CGPL
Shri Gaurav Dudeja, Advocate, APL & CGPL
Ms. Sarika Jerath, Advocate, APL & CGPL
Shri Malav Deliwala, APL
Shri Abhay Kumar, CGPL
Shri B.Mohanty, CGPL
Shri S.K.Nair, Advocate, GUVNL

Shri N.K.Patel, Advocate, GUVNL
Shri Adiyta Dewan, GUVNL
Shri M.G. Ramachandran, Advocate, Prayas Energy
Ms. Ranjitha Ramachandran, Advocate, Prayas Energy
Ms. Anushree Bardhan, Advocate, Prayas Energy
Ms. Ashwin Chitnis, Prayas Energy
Ms. Swapna Seshadri, Advocate, PSPCL
Shri Sandeep Rajpurohit, PSPCL
Ms. R. Mekhala, Advocate, HPPC

Record of Proceedings

In continuation of the submissions made on 9.6.2016, learned counsel for Prayas Energy referred to Article 12.7 (b) of the respective PPAs entered into by Adani Power Limited and Coastal Gujarat Power Limited and made submissions on the scope and extent of the said article. Learned counsel pointed out that Article 12.7 (b) deals with the relief in regard to the obligation of the parties. This article does not speak about the conferment of any right in any party to demand more tariff on the ground that the party is affected by Force Majeure and should be given higher amount to off-set the Force Majeure implication. He further submitted that the scheme of Article 12.7 is that under clause (a) the affected party is released of its obligation. This is consistent with the principle laid down by the Hon'ble Supreme Court in number of cases including in Dhanrajmal case as well as the Hon'ble Appellate Tribunal's conclusion that the objective of the Force Majeure provision is to save the party from performing the obligation affected by Force Majeure event. Learned counsel submitted that not only Article 12.7 (a) envisages the release of the affected party but also the non-affected party from performing the corresponding obligation. Learned counsel further submitted as under:

(a) It cannot be that the affected party is not subjected to consequences due to force majeure but the non affected party be made to pay higher tariff even though there is no fault or force majeure affecting it.

(b) Article 12.7 (c) starts with the expression 'For avoidance of doubt, it is clarified' and proceeds to say that no tariff would be paid for the quantum of power not generated. Thereafter, the clause 12.7 (c), (d) and (e), etc. deals with a limited relief in regard to debt service obligation, that too within the tariff applicable under the PPA being maximum of capacity charges. In any case Article 12.7 provides for no money to be given over and above the tariff admissible for the quantum of electricity to be generated and supplied.

(c) Article 12.7 is the complete remedy available in the event of Force Majeure Event affecting the performance of the contract. There is no other provision in the PPA which provides for any relief. Article 17.3 of the PPA dealing with the adjudicatory powers or clause 5.17 of the Guidelines, etc. are not substantive provisions giving any relief. These are provisions enabling the settlement of a dispute. These cannot be referred to and relied on as conferring a right in the Commission to grant monetary claim which is not covered by Article 12.7 (b). This is also clear from the decision of the Hon'ble Appellate Tribunal.

2. In response to the Commission's query, learned counsel submitted that the term 'obligation' viz-a-viz the term 'right' has a definitive meaning, although not defined in the PPA. The rights and obligations are well understood, in particular, the term obligation can be related to Article 4.1 in the case of a Seller (Adani Power/CGPL) and Article 4.2 in the case of Procurers. The obligation is the duty or responsibility to perform. The right is an entitlement to receive the benefit. Both are different. Article 12.7 (b) refers to the obligation in the above context and not a right to recover additional monetary compensation.

3. Learned counsel submitted that the reference made by the counsel for Adani Power to Regulations 111 and 112 of the Conduct of Business Regulations have no application. The use of inherent power would mean the use of regulatory powers to give compensatory tariff. This has been already decided by the Hon'ble Tribunal. The only source for considering the available relief for the Force Majeure Event is under Article 12.7 of the PPA.

4. In response to the Commission's query, learned counsel referred to Para 307 and 163 of the Full Bench judgment of the Hon'ble Appellate Tribunal and submitted that the said para clearly states that the 'relief as may be available under the PPA' are only admissible for the Force Majeure Event. The term 'as may be available' is the relief if available under the PPA.

5. In response to Commission's query that the interpretation of Article 12.7 in the manner made may lead to no relief at all to the Developer and in such an event, it may render the Full Bench decision to be nullity, learned counsel submitted the Full Bench decision is clear. The Full Bench had not considered the reliefs which may be available to the sellers, it had not considered Article 12.7 (b). The decision is left to the Hon'ble Commission. Unless the Developers are able to identify a specific provision in the PPA for the relief, no relief can be granted. If the Developers have failed to identify the

provision other than Article 12.7 (b) and if on the wordings of Article 12.7 (b) the relief is not available, it is too bad for the Developers.

6. Learned counsel referred to Article 12.6 which deals with the duty to mitigate and suggested that in a given case, it was possible for a Developer to approach the Commission to the effect that the Force Majeure Event has occurred which would entitle termination of the agreement but the Developer would like to mitigate the situation provided the Procurers and the Commission agree to pay compensatory amount in terms of Article 12.6 read with Article 12.7. However, in the present case, this would not arise as Adani Power had represented to the Hon'ble Supreme Court that it would not seek termination of the PPA. The order of the Hon'ble Supreme Court was passed at the instance of Adani Power and CGPL. Accordingly, there is no relief admissible to Adani Power/CGPL under the PPA and there cannot be any claim for any relief on equity, restitution or otherwise. The principles of restoration under change in law cannot be applied to force majeure relief under Article 12.7.

7. Thereafter, learned counsel proceeded on the assumption but not admitting that if a relief is admissible, the extent to which the relief can be considered under Article 12.7 (b). Learned counsel submitted that the relief is to be confined to the difference between the discounted price and the HBA Index and with reference to the quoted energy charges. Accordingly, the relief is confined to the quantum of coal to be imported from Indonesia which was subject to an agreement by the Indonesian Company to supply coal at a discounted price. If there is no discounted price and the coal import from Indonesia under the Coal Supply Agreement was envisaged to be at the market price, there cannot be any impact on the Indonesian Regulations. Learned counsel further submitted as under:

(a) The Indonesian Regulations provided for the bench marking of export price to be aligned to the international market price. The Coal Supply Agreement which provides for export of coal by the Indonesian Mining Company at the CERC Escalation rate, is already aligned to the international market price and there is no impact of Indonesian Regulations.

(b) In the case of Haryana, the evidence on record clearly shows that the domestic coal available from the Mahanadi Coalfield Limited to Adani Power is sufficient to comply with the generation and supply of electricity up to the normative target availability. Accordingly, there is no impact for Adani Power. Adani has not submitted any documents to demonstrate the extent of shortfall, if any and is claiming import of 30% without any proof. In the absence of any information, adverse inference is to be drawn against Adani. A reference was

made to the Affidavit dated 08.05.2015 filed by Adani on direction of the Hon'ble Tribunal wherein Adani Power had undertaken that the entire coal supplied by Mahanadi Coal fields would be used for Haryana. Further, reference was made to Minutes of RCCC Meeting held on 27.06.2013 wherein Adani had stated that it was satisfied with the coal received and the shortfall was negligible. The fuel supply agreement was entered into by Adani on the basis of the long term PPA of Adani with Haryana.

(c) Even assuming that there was import due to shortfall, the benefit of procurement of domestic coal at cheaper rates has to be off-set against the import of coal.

(d) In the case of Adani Power's sale to GUVNL, the impact of Indonesian Regulations considered from April 2012 to April 2016 shows positive and negative trends. If the net amount is taken and even the ensuing two months being May 2016 and June 2016 are considered, there will be no impact of Indonesian Regulations.

(e) Learned counsel gave detailed working for Adani Power Haryana, Adani Power GUVNL (PPAs dated 2.2.2007 and 6.2.2007) with a representation that the computation had been done to the best of its ability by a Lawyer and Engineer and any mistake in the calculation can be rectified. The counsel handed over the CD in pursuance to the above calculation.

(f) The Commission and the Hon'ble Appellate Tribunal having held that Adani Power's sale of electricity to Haryana and GUVNL being a composite scheme, same effect has to be given while computing the implication of the Indonesian Regulations. Any surplus tariff available to Adani Power in Haryana or in any of the PPAs with GUVNL need to be off-set against the losses on account of the impact of the Indonesian Regulations.

(g) In case of CGPL, only 3.22 MMTPA out of 11.2 MMTPA constituting 29% was subjected to discounted price. The balance quantum was subject to the CERC Escalation Rate. The relief in respect of CGPL should be confined to 3.22 MMTPA.

(h) CGPL should also place on record the status of the tax exemption granted by the Government of India for direct import of coal from Indonesia and the benefit passed on to mitigate the impact of Indonesian regulations. Learned

counsel also handed over a copy of the circular No. 41/2013-Custom issued on 21.10.2013 in this regard.

(i) Learned counsel extensively referred to the KPMG Report, the absence of underlying invoices, absence of month-wise computation given by the generator, the details of the coal import done, GCV, FOB price, etc. and submitted that a reading of the KPMG Report with other details suggest that the generators have not placed on record all the materials in a transparent manner. Learned counsel submitted that Prayas Energy would make detailed submissions once all the materials are available.

By order of the Commission

**Sd/-
(T. Rout)
Chief (Law)**