

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 18/SM/2015

Subject : Suo-moto petition in the matter of declaration of commercial operation of Unit 20 to 50 of Mundra Ultra Mega Power project developed by Coastal Gujarat Power Limited.

Date of hearing : 24.5.2016

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

Respondents : Coastal Gujarat Power Limited and others

Parties present : Shri Amit Kapoor, Advocate, CGPL
Shri Kunal Kaul, Advocate, CGPL
Ms. Raveena Dhamija, Advocate, CGPL
Shri Bijay Mohanty, CGPL
Shri Gautam Chawla, Advocate, WRLDC
Shri Deep Rao Palepu, Advocate, WRLDC
Shri Aditya P.Das, WRLDC
Shri S.S.Barpanda, WRLDC
Ms. Abiha Zaidi, WRLDC
Ms. Pragya Singh, WRLDC
Ms. Divya Chaturvedi, Advocate, B & V
Shri M.G. Ramachandran, Advocate, GUVNL
Shri M.C. Bansal, Proforma respondent
Shri Venkatesh, Advcoate for the Proforma respondent
Shri Shashank Khurana Agarwal, Advocate, Proforma respondent

Record of Proceedings

Learned counsel for the Coastal Gujarat Power Limited (CGPL) submitted as under:

(a) As per Sections 142 and 146 of the Electricity Act, 2003 ("Act") read with Regulation 24 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 2009, the Commission's *suo moto* power to initiate proceedings can be invoked only in case of violation of provisions of the Act, rules or regulations made thereunder. However, the present case at best involves alleged violation of the provisions of the PPA.

(b) The Hon`ble Appellate Tribunal for Electricity in its judgment dated 31.3.2016 in Appeal No. 233 of 2014 (Sasan Power Limited v. CERC & Ors) dated 31.3 2016 and the Commission in the Explanatory Memorandum to the draft Central Electricity Regulatory Commission (Indian Electricity Grid Code) (Fourth Amendment) Regulation 2015 has concluded that the issue relating to

commissioning of a Unit is a contractual issue and does not involve a question relating to violation of the provisions of the Act, rules and regulations. In the present case, no dispute has been raised by any of the Procurers or the statutory bodies qua the Commissioning of Units 20 to 50 of Mundra UMPP.

(c) The Hon`ble Appellate Tribunal in its judgment dated 7.4.2016 in the Compensatory Tariff batch matters has held that PPA is the controlling document and the regulator does not have overarching powers de-hors the bidding document. Accordingly, the Commission can only exercise its adjudicatory power when a dispute is raised and not its regulatory power.

(d) The Appellate Tribunal in the judgment dated 20.12.2012 in the case of Bharat Jhunjhunwala v. UPERC in I.A. No. 392, 393, 394 and 399 of 2012 in DFR No. 1844 of 2012 which was confirmed by the Hon'ble Supreme Court vide its judgment dated 19.8.2013 in Civil No. 7303-7304 of 2013, has held that the Commission does not have the power of a writ court to entertain Public Interest Litigation.

(e) With regard to Shri Bansal's contention that CGPL had conceded to the Commission's jurisdiction, it is clarified that it is a settled position of law that grant of jurisdiction is a legislative function and the same cannot be conferred by mere acceptance, acquiescence or consent of the parties or by a court order. In this regard reliance was placed on the following judgments: Municipal Committee, Hoshiarpur v. Punjab Electricity Board : (2010) 13 SCC 216; Veer Kunwar Singh University Ad hoc Teachers Association v. Bihar State University Service Commission : (2009) 17 SCC 184: and Rajasthan SRTC v. Zakir Hussain : (2005) 7 SCC 447.

(f) With regard to the *locus standi* of Shri Bansal, it is clarified that dispute pertaining to commissioning of Units 20 to 50 is a contractual dispute and not one of morals or public interest. None of the procurers or statutory authorities has raised a dispute qua commissioning of the aforesaid units. Shri Bansal cannot be allowed to do what is not permitted directly, indirectly. In this regard, learned counsel placed his reliance upon judgments in State of Tamil Nadu & Ors. v. K. Shayam Sunder and Ors.: (2011) 8 SCC 737; Dayal Singh & Ors. vs. Union of India & Ors. and Powergrid Corporation Ltd. & Ors. vs. Rajasthan Rajya Vidyut Prasaran Nigam Ltd. and Ors. [2007 ELR (APTEL.) 342].

(g) As per the Electricity Act, 2003 read with Regulation 24 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 2009, only an aggrieved or interested person can raise a dispute/ participate before the Commission. A person aggrieved means a person who has suffered a legal grievance. A person cannot be said to be an aggrieved person, if he cannot establish that he has suffered or been deprived of a legal right or if he is not subjected to a legal wrong. Since, Shri Bansal is not an aggrieved/affected party, he cannot be made a party to the present proceedings.

(h) Shri Bansal has not been recognized by the Commission to represent consumer interests under Regulation 18(1) of the Conduct of Business Regulations, 2009 as amended from time to time, he cannot be said to represent consumer interest in the present matter.

(i) CEA, vide its letter dated 17.3.2016, had only provided factual information and has nowhere made an observation regarding the maintainability of the present Petition.

2. Learned counsel for GUVNL submitted that the lead procurer has no objection on the merit of the matter as it had accepted the commissioning of Units 20 to 50.

3. Learned counsel for Shri M.C. Bansal argued at length and submitted as under:

(a) The present proceedings were premised on Shri Bansal's letter to the Ministry of Corporate Affairs and not by the Commission. The present proceedings were thereafter referred by a statutory authority to the Commission.

(b) The judgments relied upon by the learned counsel for CGPL with regard to the aggrieved/ affected party are in the context of aggrieved persons under Section 111 of the Act and not "Interested Persons". Regulation 24 of the Conduct of Business Regulations also deals with the initiation of proceedings by "Interested Persons". In the present case, Shri M.C. Bansal falls within the ambit of Interested Persons. In this regard, learned counsel placed his reliance upon the judgment in Workmen of Shri Ranga Vilas Motors (P) Ltd. v. Shri Rangavilas Motors (P) Ltd. [AIR 1967 SC 1040].

(c) CGPL was given an opportunity to respond to the complaint made by Shri Bansal regarding the mis-declaration of COD of Units 20 to 50 and CGPL had responded to the same vide its letter dated 27.7.2015. Further, even if CGPL was not consulted before passing of the order dated 30.12.2015 by the Commission, the same would not amount to violation of natural justice. In this regard, learned counsel placed his reliance upon the judgment in the case of Madhya Pradesh Industries Ltd. v. UOI [AIR 1966 SC 671].

(d) Regulations 18 and 19 of the Conduct of Business Regulations are independent provisions. Regulation 18 deals with granting of permission to consumer associations to participate in proceedings, while Regulation 19 is the enabling Regulation empowering the Commission to appoint any person/organization to represent consumer interests. Shri Bansal is authorized under Regulation 19 to represent consumer interests.

(e) The Hon'ble Tribunal's judgment in Compensatory Tariff batch matters only pertains to determination of tariff as an activity for Section 63 projects. CGPL's reliance on the same cannot be accepted since that would lead to the finding that the Commission is having no power over such projects. Therefore, the Commission can in exercise of its regulatory role, examine the provisions of PPA under Section 63 of the Act.

(f) Learned counsel relied upon the judgment in Central Power Distribution Company v. CERC [(2007) 8 SCC 197] and submitted that the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 prescribe the manner in which COD can be achieved by the thermal generating station. Therefore, the Commission is within its powers under Section 142 and 146 of the Act read with Regulation 24 of the Conduct of Business Regulations to ensure that COD declaration is in accordance with the Regulations.

(g) The Hon'ble Tribunal's findings in Sasan Power's Judgment cannot be applied to the present case since the applicability of the findings in the said judgment is a matter of merits and cannot be gone into at the preliminary stage of maintainability. In Sasan Power's case, there was de-rating of the capacity of the unit in question which was certified by the Independent Engineer. The present case does not involve such a scenario.

(h) Learned counsel replied upon the judgment in the case of Punjab v. Davinder Pal Singh Bhullas and Ors. [(2011) 14 SCC 770] and submitted that the issue of waiver was decided after examination of all facts pertaining to commissioning in detail and after ensuring that the parties had waived their rights. Mere acceptance of commissioning does not amount to waiver.

(i) Learned counsel relied upon in the cases in PTC India Ltd. v. GERC [Civil Appeal No. 7524 of 2012 dated 18.10.2012], State of Madras Vs. G.J. Coelho [(1964) 8 SCR 60] and Kavita Trehan and Another V Balsara Hygiene Products Ltd. [(1994 5 SCC 380)] and submitted that the issue of jurisdiction needs to be finally decided along with merits of the matter to enable expeditious adjudication.

4. After hearing the learned counsel for the parties, the Commission reserved the order in the petition on the issue of maintainability of the proceedings.

By order of the Commission

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