SKV LAW OFFICES

NEWSLETTER

ENERGY AND INFRASTRUCTURE

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SEI Aditi Power Private Limited & Ors. vs. KERC & Ors.

(Represented by SKV)

Introduction

The Appellate Tribunal for Electricity (**Tribunal**) passed a Judgment on 14.07.2021 wherein the Tribunal was pleased to allow the Appeals filed by SEI Aditi Power Private Limited, (**SAPPL),** SEI Bheem Pvt. Ltd. (**SBPL**) and SEI Suryashakti Pvt. Ltd**.** (**SSPL**) and SEI Diamond Private Limited, (**SDPL)** and SEI Venus Pvt. Ltd**.** (**SVPL**) which arose out of Common Order dated 26.09.2019 passed by the Karnataka Electricity Regulatory Commission (**KERC**). The Tribunal held that in terms of the PPA, the DISCOMs were not obligated to approach the KERC seeking an extension of SCOD and that the non-availability of transmission line by KPTCL was an event of *Force Majeure*.

Brief facts

The said O.Ps were filed by the Appellants invoking Section 86 (1)(e) and 86(1)(f) of the Act seeking approval of Ld. KERC to amend the PPAs dated 18.12.2014 executed between the Appellants and Bangalore Electricity Supply Company Ltd. (**BESCOM**) along with Hubli Electricity Supply Company Ltd. (**BESCOM**) [collectively referred to as **DISCOMs**], by modifying the Scheduled Commissioning Date (**SCOD**) on account of Force Majeure, namely non-availability of the evacuation system of Karnataka Power Transmission Company Ltd. (**KPTCL**) which eventually delayed the commissioning of the Appellants' Solar Power Plants.

The KERC by way of the Impugned Order had rejected the contention of the Appellants and *inter alia* held that due to non-

availability of the evacuation system of KPTCL, on or after SCOD cannot be treated as a *Force Majeure* Event and that the DISCOMs in any case had no jurisdiction to extend the SCOD. Pursuant to the said Judgment, the Appellants on the following grounds:

a) The DISCOMs itself whilst exercising its powers under the PPA had extended time up to 3 months previously. Therefore, since the PPA itself conferred power upon the DISCOMs to extend the SCOD, the DISCOMs were not required to approach the Ld. KERC again.

b) The inordinate delay on the part of the Statutory Authority i.e., KPTCL in granting evacuation clearance/approval, which in turn hampered the Appellants' performance of its obligation under the PPA is a Force Majeure event. Therefore, the DISCOMs should not unilaterally adjusted/set off by amounts as levy of Liquidated Damages.

Ruling

The Tribunal opined that in terms of the PPA, the SCOD was 18 months from the Effective Date, i.e., the date of execution of the PPA. However, in the present case, the PPA immediately after execution did not have the force of law as the statutory approval was only granted by the KERC on 04.05.2015, i.e., after a lapse of almost 5 months. The said delay of the KERC in granting approval to the PPA from the date of signing was not at the instance of the Appellants and therefore, the PPA only came into effect on 04.05.2015.

The Tribunal further held that KERC erred in holding that the DISCOMs were justified in opining that the extension granted by DISCOMs had to be struck down as the PPA itself confers upon the DISCOMs the right to extend the SCOD under Force Majeure Conditions. Therefore, there was no need for the DISCOMs to approach KERC. Further, the SCOD automatically stood extended for the period from the date of signing of the PPA to the approval of the said PPA by Ld. KERC.

The Tribunal further held that in terms of the PPA, it was the obligation of the Appellants to apply for evacuation approval from KPTCL which was accordingly done by the Appellants. However, it was KPTCL's failure to keep the transmission line ready due to which the project could not be commissioned, and it was only after repeated persistence by the Appellants, that the alternative line was provided. Hence the same was beyond the control of the Appellants, thereby amounting to a Force Majeure event.

In so far as the payment of LDs is concerned, the DISCOMs had only averred that Appellants are liable to pay LD on account of delay in SCOD and never raised it as a ground before the KERC. Therefore, the amounts claimed by DISCOMs seeking adjustment from the amount claimed by the Appellants is erroneous, as there was a specific procedure to be followed in terms of the PPA. Therefore, no lien can be exercised by the DISCOMs on the amounts payable to the Appellants in terms of Section 171 of the Indian Contract Act, 1872.

In view of the aforesaid findings, the Hon'ble Tribunal passed the following directions:

a) The Appellants are entitled to the Tariff in terms of the PPA.

b) The DISCOMs were directed to refund the amounts withheld by them on the pretext of adjusting the same towards Liquidated Damages.

Appellants are entitled to Carrying Cost on the amounts delayed and withheld by the DISCOMs.

Please find a link to the Judgment here

> *In our opinion, this comes as a welcome move for Power Generators as the Hon'ble Tribunal has held that the SCOD shall get extended automatically in case of a force majeure event if there is a provision for the same in the PPA. Further, the Hon'ble Tribunal has rightly held that DISCOMs cannot exercise lien on the amounts payable to the Power Generators on account of delay in SCOD.*
>
> ***SKV Comment***

Ministry of Power: Smart Meters Made Mandatory

(17th August, 2021)

Introduction

On 17.08.2021, the Ministry of Power (**MoP**) issued a notification directing all consumers (other than agricultural consumers) to be supplied electricity with smart meters. A "smart meter" is one which is a static watt per hour meter which registers time of use and has internal connect and disconnect switches with two-way communication capability. It is designed to measure both outward and inward flow. The replacement work shall be completed in two phases, by December 2023 and March 2025.

Summary

The smart meter shall operate in a prepayment mode, conforming to relevant industry standards and in accordance with the Central Electricity Authority (Installation and Operation of Meters) (Amendment) Regulations, 2019. The meters shall be supplied in areas with communication network.

Timeline Provided for Installation

The following are expected to have fully functional smart meters with prepayment mode installed in the areas specified within the notification by December 2023:

- All electric divisions of Union Territories which have more than 50% consumers in urban areas with Aggregate Technical & Commercial (**AC&T**) losses more than 15% in financial year (**FY**) 2019-20.
- Other electric divisions with AT&C losses more than 25% in FY 2019-20
- All government offices at Block level and above,
- All industrial and commercial consumers

The following are expected to have fully functional smart meters with prepayment mode installed in

the areas specified within the notification by March 2025:

- All other areas that have not been mentioned above.

- *Except* areas which do not have communication network, installation of prepayment meters, conforming to relevant industry standards may be allowed by the respective State Electricity Regulatory Commission.

- Consumer connections having current carrying capacity beyond that specified in relevant industry standards, may be provided with smart meters having Automatic Meter Reading (**AMR**) facility.

The following timelines shall be met to provide meters for all feeders and distribution transformers (**DTs**) based on their AMR facility or that are covered under Advanced Metering Infrastructure (**AMI**)

- All feeders are to be metered by December 2022.

- All DTs in electrical divisions having more than 50% consumers in urban areas with AT&C losses more than 15% in financial year 2019-20, and in all other electrical divisions with AT&C losses more than 25% in financial year 2019-20, shall be metered by December 2023.

- All DTs in areas other than those mentioned above, shall be metered by March 2025.

DTs and High Voltage Distribution System (**HVDS**) transformers having capacity less than 25 kVA may be excluded from the above timelines.

Please find link to Notification here

> *The direction passed by Ministry of Power would support DISCOMs to come back to the path of financial sustainability and would serve as a model to promote pre-payment of electricity.*
>
> ***SKV Comment***

Prayagraj Power Generation Company Limited (PPGCL) v. Uttar Pradesh Power Corporation Limited & Ors.

(18th August, 2021)

Introduction

This matter was held before the Uttar Pradesh Electricity Regulatory Commission **(UPERC),** Lucknow. The matter sough declaration from UPERC to acknowledge and approve the developments in the form of new environment regulations issued by the Ministry of Environment, Forest & Climate Change (**MOEF&CC**) via notification dates 07.12.2015 and 28.06.2018 as an event of Change in Law.

Brief Facts

PPGCL carried out the bid process for selection of a successful bidder for 1980MW Thermal Power Plant (**TPP**) consisting of 3 x 660MW Units at Tehsil Bara, District, Allahabad, Uttar Pradesh (**Project**).

M/s Jaiprakash Associate Limited (**JAL**) was declared as the successful bidder in the bidding process with a levelled tariff of Rs 3.020 per/kWh and a Letter of Intent dated 02.03.2009 was issued in favour of JAL

On 21.11.2008, PPGCL executed a Power Purchase Agreement (**PPA**) with the Distribution Licensees for the sale of 1648 MW contracted capacity. The three units of 660 MW Plant at Bara, Allahabad were commissioned on 29.02.2016, 10.09.2016 and 26.05.2017 respectively.

On 08.09.2009, MoEF granted Environmental Clearance (**EC**) certificate for setting up of Project under the provisions of Environment Impact Assessment Notification, 2006.

Thereafter, on 23.03.2015, MoEF&CC issued a letter to PPGCL thereby extending the validity of EC issued by Ministry vide letter dated 08.09.2009 for a period of two years to start the operation of the Power Plant and thereby incorporating clause xxxvi which provided requirement of space to be provided for future installation of FGD.

MOEF&CC by its Notification dated 07.12.2015 amended the Environment (Protection) Rules, 1986 (**EP Rules**), thereby prescribing revised emission norms for Oxides of Nitrogen (**NOx**), Oxides of Sulphur (**SOx**), Particulate Matter, Mercury, quantum of water consumption, and stack height. As per PPGCL, the MOEF&CC Notification would fall within the definition of a 'Change in Law' event as envisaged in the PPA, having an effect of amending the existing EP Rules and thereby imposing new requirements for the Project for getting the environmental clearances.

On 11.12.2017, Central Pollution Control Board (**CPCB**) issued a letter to PPGCL to install FGD by 28.02.2021 of all the units of the Power Plant.

On 30.05.2018, Ministry of Power notified Central Commission about the Revised norms are to be applicable to existing as well as upcoming TPPs and same are to be complied by 2022 and that the MoEF&CC notification requiring compliance of Environment Amendment Rules, 2015 is of the nature of Change in Law.

On 28.06.2018, MOEF&CC by its Notification prescribed the specifications for Chimney / Stack Height for TPP.

On 01.05.2019, PPGCL issued a Change in Law Notice under Article 13 of the PPA to the Respondents and thereafter, filed the Petition before UPERC seeking recognition of the Notifications as a Change in Law event and In-principle approval of the estimated capital cost for installation of Flue-gas Desulphurization system Project in order to comply with the above notifications.

In furtherance to the Change in Law notice, PPGCL filed the Petition seeking acknowledgment of revised emission norms as an event of Change in Law.

Ruling

UPERC after analysing the documents i.e. RfP, EIA Report and Environmental Clearance was pleased hold that circumstances requiring FGD Installation for PPGCL plant at the time of issuing ECs were absent, therefore, installation of FGD was mandatory as a statutory requirement.

UPERC further hold that considering that there were no emission norms prescribed for compliance by PPGCL, 7 days before the Bid dated 21.02.2009, therefore, MoEF&CC notification dated 07.12.2015 mandating emission norms read with subsequent notification dated 28.06.2018 mandating Chimney height is a Change in Law event. However, the In-Principle approval of estimated capital cost was declined by UPERC and the same shall be approved after timely installation of FGD and associated system subject to prudence check.

Please find link to the Order here

In our opinion, UPERC has rightly held the MOEF&CC Notifications dated 07.12.2015 and 28.06.2018 to be Change in Law events. This is in accordance with the long line of orders passed by the Central Electricity Regulatory Commission as well as the Appellate Tribunal for Electricity which have recognised the said MOEF&CC Notifications to be Change in Law events. However, the rejection of in-principle approval of cost of FGD by UPERC is in contrast to the decision of the Central Electricity Regulatory Commission in the case of NTPC Limited.

SKV Comment

Kay Bouvet Engineering Limited vs. Overseas Infrastructure Alliance (India) Private Limited

(10th August, 2021)

Introduction

On 10.08.2021, the Supreme Court of India pronounced a Judgment in matter titled "Kay Bouvet Engineering Limited vs. Overseas Infrastructure Alliance (India) Private Limited" whereby the decision passed by National Company Law Tribunal, Mumbai (**NCLT**) which had rightly rejected the Section 9 Petition by Overseas Infrastructure Alliance (India) Private Limited (**OIAPL**) on the count that there was a dispute existing between the parties, therefore, the National Company Law Appellate Tribunal (**NCLAT**) had erred in passing a direction seeking admission of Section 9 Petition filed by OIAPL.

Brief Facts

Government of India (**GoI**) extended USD 150 Million Line of Credit (**LoC**) to Republic of Sudan through Exim Bank of India for carrying out Mashkour Sugar Project in Sudan in two tranches of $25 Million (executed on 26.01.2009) and $125 Million (executed on 24.07.2013).

On 11.10.2019, Mashkour Sugar Company Limited (**Mashkour**) entered into an agreement with OIAPL for USD 149,975,000 to be financed by Exim Bank. In terms of the above agreement, Mashkour had to nominate a sub-contractor, therefore, on 14.04.2010, a subsequent agreement was entered between Mashkour and OIAPL for payment of USD 25 Million to OIAPL towards design and engineering and plant civil package.

Kay Bouvet Engineering Limited (**Kay Bouvet**) submitted its bid as a subcontractor for supply, erection and completion of the Sugar Plant at Sudan which was subsequently accepted by Mashkour.

On 18.12.2010, a Memorandum of Understanding (**MoU**) was entered between Mashkour, OIAPL and

Kay Bouvet at Khartoum Sudan which provided that the Contract must be governed by the laws of Sudan. On the same date, a Tripartite Agreement was executed between all the three parties as per which Kay Bouvet was appointed as a sub-contractor for executing the whole work of Factory Plant for Mashkour Sugar Company.

Under the Tripartite Agreement, Mashkour was to release payment to OIAPL and in turn was to release payment to Appellant on the furnishing of requisite bank guarantees by the Appellant.

On 15.06.2017, Mashkour terminated the Contract with OIAPL for failure on its part to perform the duties which led to filing of Civil Suit by OIAPL before the High Court of Bombay seeking specific performance of contract and an order of injunction from appointing Kay Bouvet as Contractor in the Mashkour Project.

OIAPL issued a Demand Notice under Section 8 of the Insolvency and Bankruptcy Code, 2016 upon Kay Bouvet alleging default under the Tripartite Agreement and claimed an amount of USD 10.62 Million paid by OIAPL to Kay Bouvet.

Kay Bouvet responded to Demand Notice denying the claim of OIAPL and stated that amount which was paid to Kay Bouvet by OIAPL was received on behalf of Mashkour and was routed through Overseas which stands adjusted under the new agreement.

Thereafter, on 27.12.2017, OIAPL filed a Petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 before NCLT, however, the same was dismissed vide Order dated 26.07.2018 on the count that there was an existing dispute between the parties.

Being aggrieved by the Order, OIAPL filed an Appeal before NCLAT and the same was allowed with a direction passed to NCLT, Mumbai to admit the Petition filed by OIAPL.

Ruling

The Supreme Court, relying upon its decision in ***Mobilox Innovations Private Limited vs. Kirusa Software Private Limited*** held that all that the Adjudicating Authority is required to see at the stage of admission of Petition is that whether there is a plausible contention which requires further investigation and that the question of existing dispute raised by Respondent is not a patently feeble legal argument or an assertion of fact unsupported by evidence.

In view of the facts and circumstances of the present case, the Supreme Court of Indi was pleased to held that the case of Kay Bouvet that the amount of Rs 47,12,10,000/- which was paid to it by OIAPL was paid on behalf of Mashkour from the funds released to Overseas by Exim Bank, therefore, it cannot be said to be a dispute which is spurious, illusory or not supported by the evidence placed on record.

In view of the position laid down above, the Supreme Court of India was pleased to hold that NCLT has rightly rejected the application of OIAPL in terms of Section 9(5)(ii)(d) of the Insolvency and Bankruptcy Code, 2016 after concluding that there existed a dispute between Kay Bouvet and OIAPL, therefore, Order under Section 9 of the Insolvency and Bankruptcy Code, 2016 could not have been passed.

Please find link to Judgment here

In our opinion, the Supreme Court of India has rightly upheld the rejection Order passed by NCLT, Mumbai in conformity of Section 9(5)(ii)(d) of the Insolvency and Bankruptcy Code, 2016 considering the fact there was an existing dispute against the claim of OIAPL which was duly supported by documentary evidence and was recorded in the Information Utility.

SKV Comment

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