

(2019) 01 DEL CK 0094

In the Delhi High Court

Case No : First Appeal Order (OS) No. 272 Of 2012

Coastal Andhra Power Limited

APPELLANT

Vs

Andhra Pradesh Central Power Distribution Co Ltd & Ors

RESPONDENT

Date of Decision : 15-01-2019

Acts Referred:

Constitution of India, 1950 — Article 142, 226
Arbitration & Conciliation Act, 1996 — Section 9, 16
Electricity Act, 2003 — Section 61, 63, 79, 79(1)(f), 79(f), 94, 94(2)
Indian Contract Act, 1872 — Section 32, 56
Code of Civil Procedure, 1908 — Section 80

Citation : (2019) 1 ArbLR 434 : (2019) 256 DLT 764 : (2019) 4 R.A.J. 684 :
(2019) 3 AD(Delhi) 26

Hon'ble Judges : Sanjiv Khanna, J; Anup Jairam Bhambhani, J

Bench : Division Bench

Advocate : Parag Tripathi, Rishi Aggarwal, Gunika Gupta, Mahesh Agarwal, Parminder Singh, Lalitaksh Joshi, R.K. Sharma, Nishant, Arunav Patnaik, Shikha Saha, Pankaj K. Mishra

Final Decision : Dismissed

Judgement

Anup Jairam Bhambhani, J

1. By way of the present appeal, the appellant - Coastal Andhra Power Limited - impugns order dated 02.07.2012 made in OMP No. 267 of 2012 whereby an earlier interim order dated 20.03.2012 has been vacated. By order dated 20.03.2012 the respondents had in effect been restrained from encashing certain bank guarantees by directing that no coercive steps be taken against the appellant pursuant to letter dated 15.03.2012 issued by respondent No. 2.

2. The appellant Coastal Andhra Power Limited entered into a Power Purchase Agreement dated 23.03.2007 with the respondents for setting up and operating an Ultra Mega Power Project (UMPP) at Krishnapatnam, Andhra Pradesh (hereinafter the "Agreement"). Under the terms of the Agreement the fuel to be used for generating electricity was imported coal and the appellant had arranged

for import of the coal from Indonesia. The Agreement contained a dispute resolution clause, which reads as under:

"17.3 Dispute Resolution

17.3.1 Where any dispute arises from a claim made by any Party for any change in or determination of the Tariff or any matter related to Tariff or claims made by any Party which partly or wholly relate to any change in the Tariff or determination of any of such claims could result in change in the Tariff or (ii) relates to any matter agreed to be referred to the Appropriate Commission under Articles 4.7.1, 13.2, 18.1 or clause 10.1.3 of Schedule 17 hereof, such Dispute shall be submitted to adjudication by the Appropriate Commission. Appeal against the decisions of the Appropriate Commission shall be made only as per the provisions of the Electricity Act, 2003, as amended from time to time. The obligations of the Procurers under this Agreement towards the Seller shall not be affected in any manner by reason of inter-se disputes amongst the Procurers.

17.3.2 If the Dispute arises out of or in connection with any claims not covered in Article 17.3.1, such Dispute shall be resolved by arbitration under the Indian Arbitration and Conciliation Act, 1996 and the Rules of the Indian Council of Arbitration, in accordance with the process specified in this Article. In the event of such Dispute remaining unresolved as referred to in Article 17.2.3 hereof, any party to such Dispute may refer the matter to registrar under the Rules of the Indian Council of Arbitration.

(i) The Arbitration tribunal shall consist of three (3) arbitrators to be appointed in accordance with the Indian Council of Arbitration Rules.

(ii) The place of arbitration shall be Delhi, India. The language of the arbitration shall be English.

(iii) The arbitration tribunal's award shall be substantiated in writing. The arbitration tribunal shall also decide on the costs of the arbitration proceedings and the allocation thereof.

(iv) The award shall be enforceable in any court having jurisdiction, subject to the applicable Laws.

(v) The provisions of this Clause shall survive the termination of this PPA for any reason whatsoever."

3. It transpires that during the currency of the Agreement, Indonesian laws came to be amended and under the new regulations, the price of the coal escalated substantially. By reason of such price increase, perceiving that performance of the contract with the respondents would become onerous, the appellant caused a meeting to be convened with the respondents under the aegis of the Central Electricity Regulatory Commission (hereinafter the "CERC") to discuss the issues arising from the price increase. The discussion remained inconclusive ; and by letter dated 28.01.2012 respondent No. 2 called upon the appellant to resume

construction work as required under the Agreement, which the appellant had stopped doing earlier.

4. In view of the appellant's default in performing its part under the Agreement, by notice dated 15.03.2012, respondent No. 2 sought to terminate the Agreement and demanded that the appellant pay a sum of Rs. 400 crores for failing to comply with the terms of the Agreement; and further notifying the appellant that in the event of non-payment, respondent No. 2 would invoke the bank guarantees of Rs. 300 crores that had been furnished by the appellant in terms of Article 3.3.2 of the Agreement. On receiving notice dated 15.03.2012, the appellant filed a petition under Section 9 of the Arbitration & Conciliation Act, 1996 (hereinafter the "A&C Act"), being OMP No. 267 of 2012 before a Ld. Single Judge of this Court seeking interim relief in the form of a restraining order preventing respondent No. 2 from invoking the bank guarantee furnished by the appellant under the Agreement.

5. By order dated 20.03.2012, the Ld. Single Judge of this Court directed that no coercive steps be taken against the appellant by respondent No. 2 or by any of the respondents pursuant to letter dated 15.03.2012, thereby in effect restraining respondent No. 2 from encashing the bank guarantees furnished by the appellant; and the said restraint order was continued thereafter by the Single Judge by orders dated 17.04.2012 and 15.05.2012.

6. By impugned order dated 02.07.2012 however, the Single Judge vacated the interim order.

7. The present appeal was filed against impugned order dated 02.07.2012 and came-up for hearing on 03.07.2012, on which date counsel for the respondents made a statement that the respondents would not insist upon the bank remitting payment against the bank guarantee ; and this statement has continued and remained binding on the respondents during the pendency of the present appeal.

8. It is the appellant's case that it was unable to perform its obligations under the Agreement by reason of escalation in the price of coal, which resulted from amendments in Indonesian law; and that such price increase amounted to force majeure under the Agreement and entitled the appellant to rescind the contract without attracting any liability. Accordingly, it is the appellant's contention, that respondent No.2 ought not to invoke the bank guarantees furnished under the Agreement.

9. On the other hand, it is the respondents' contention that increase in price of coal does not qualify as a force majeure event within the meaning of the contractual provisions or, even otherwise on the application of law relating to force majeure as we understand it. In support of this contention, the respondents rely upon the recent judgment of the Supreme Court in *Energy Watchdog vs. Central Electricity Regulatory Commission & Ors.* reported as (2017) 14 SCC 80, in which, the respondents contend, it has been held that price escalation and change in law abroad will not amount to force majeure and will

not entitle a party to omit to perform its obligations under a contract. The respondents accordingly contend that increase in the price of coal in Indonesia does not entitle the appellant to omit performance of its obligations under the Agreement. The respondents further point-out that as part of the Agreement, the appellant was allotted of over 2000 acres of land for development of the power plant, which land is still in the appellant's possession.

10. The respondents also contend that in terms of the arbitration provision contained in the Agreement, the appellant ought to have approached the CERC, which body is also competent to pass interim orders under Section 94 (2) of the Electricity Act, 2003.

11. As a matter of fact, even in the course of proceedings before this Court the appellant had sought an opportunity to approach the CERC, with permission to urge all issues inter se between the parties before the CERC. The appellant had submitted that under Section 16 of the A&C Act and Section 79 of the Electricity Act all issues, including those relating to jurisdiction of the CERC, can be raised before the CERC.

12. During the pendency of this appeal the appellant filed Petition No. 283/MP/2012 under Sections 61, 63 and 79 of the Electricity Act before the CERC, inter alia, praying that the events and factors that have occurred subsequent to the award of the project be declared to be force majeure and 'change in law' under the terms of the Agreement and seeking consequential relief arising from such declaration. In the said petition the CERC made an order dated 04.08.2015 in which the CERC observed as follows :

"Therefore, the issue before the Hon'ble High Court and this Commission is the same i.e. whether the change in the coal prices on account of promulgation of Indonesian Regulations is an event of Force Majeure and Change in Law. Moreover, while the petitioner is challenging the jurisdiction of the Commission to deal with the said Force Majeure event before the Hon'ble High Court of Delhi, the petitioner is invoking the jurisdiction of this Commission for a declaration that increase in coal price on account of Indonesian Regulations is covered under Force Majeure or Change in Law. In our view, the petitioner should either pursue the appeal before the Hon'ble High Court or pursue the petition before this Commission. It is pertinent to mention that despite committing before this Commission, the petitioner did not take any effective steps to expedite the hearing before the Hon'ble High Court of Delhi. Since the petitioner is pursuing the appeal before the High Court, we are of the view that no useful purpose will be served by keeping the petition pending in the Commission. Accordingly, we dispose of the petition, with liberty to the petitioner to approach the Commission at the appropriate stage in accordance with law, if so advised."

Evidently the appellant kept the present proceedings pending in this Court while at the same time the appellant had also approached the CERC for the self-same relief. As of now, we are informed, that no proceeding is pending before the

CERC; but the appellant had yet again urged before us that it would approach the CERC again to seek relief in respect of the same subject matter as is pending in this Court.

13. However the appellant had pressed this Court to continue the interim restraint order against invocation of bank guarantees in the interregnum while it was in the process of moving the CERC, until such time that the CERC decides to confirm or vacate such interim order or to refer the matter to arbitration under Sections 79(f) and 94 of the Electricity Act.

14. In support of its contention that interim orders in similar matters have been extended, giving time to an appellant to approach the CERC, the appellant cited Rajasthan Sun Technique Energy Pvt. Ltd. vs. NTPC Vidyut Vyapar Nigam Ltd. OMP (I) (COMM) No. 124/2017; M/s.DLF Industries Ltd. vs. Standard Chartered Bank & Anr. OMP No. 143/1998; Pantaloon Retail (India) Ltd. vs. Amer Sports Malaysia SDN BHD & Anr. 2012 SCC OnLine Del 2677; Kwaliti Caterers vs. Union of India & Anr. 2011 SCC OnLine Del 5005; Indus Mobile Distribution Pvt. Ltd. vs. Datawind Innovations Pvt. Ltd.& Ors. (2017) 7 SCC 678; Hotel Queen Road P. Ltd. & Ors. vs. Ram Parshotam Mittal& Ors. (2014) 13 SCC 646; Capital First Ltd. vs. Foremost International Pvt. Ltd. & Ors. OMP (I) (COMM) No. 372/2016; Municipal Corporation of Greater Mumbai vs. Pratibha Industries Ltd. & Ors. Civil Appeal No. 11822/2018; Satya Pal vs. IVth Additional District and Sessions Judge & Ors. (1997) 1 UPLBEC 106; Devinder Singh & Ors vs. The State of H.P. 1975 SCC OnLine HP 25; and M/s. Pierce Leslie India Ltd. vs. CIT, Karnataka 1988 SCC OnLine Kar 101.

15. Citing the aforesaid decisions the appellant has contended that merely because an interim order is being vacated at the stage of the withdrawal of a petition, that does not mean that the Court becomes functus officio and is not in a position to extend the interim relief for the period that it takes for a party to approach an alternative forum.

16. To distinguish the judgment of the Supreme Court in Energy Watchdog (supra), the appellant contends that the said judgment is not applicable, as in the present case it became impossible for the appellant to set-up the project in the absence of Indonesian coal since upon increase in price of Indonesian coal the appellant's banks expressed concern about the economic viability of the project and did not even permit drawing down of tied-up loans. The appellant contends that debt funding constitutes 75% of the project costs, which became unavailable to the appellant by reason of refusal by the banks to fund it.

17. The appellant further contends that by its order dated 29.10.2018 in MA No. 2705-06/2018 the Supreme Court has clarified that its decision in Energy Watchdog (supra) will not come in the way of private sellers and State Governments mutually settling their disputes.

18. On the other hand, the respondents' contention is that the injunction has remained in operation for over 6-1/2 years without an adjudication of the appeal,

which is unusual in a proceeding arising from Section 9 of the A&C Act, even more so when the Agreement stands terminated as far back as in March 2012. It is also the respondents' contention that the decision of Supreme Court in Energy Watchdog (supra) arises on consideration of various clauses of an identical power purchase agreement, in which the Supreme Court has held that there was no stipulation in the said power purchase agreement that coal was to be imported only from Indonesia and that, in any case, increase in price of coal or fuel does not amount to a force majeure event under the power purchase agreement. The respondents further contend that in the Energy Watchdog case, the Supreme Court has clearly held that the phrase 'change in law' as defined in Article 13 of the Agreement refers only to change in Indian law and not change in foreign law; and as a result, change in Indonesian law does not fall within the purview of 'change in law' as understood in the power purchase agreement. In relation to the jurisdiction of the CERC, the respondents contend that Single Judge has held by order dated 02.07.2012 that the CERC would have jurisdiction to decide the issues raised by the appellant by letter dated 15.03.2012, whereupon the appellant ought to have approached the CERC immediately under Section 79(1) (f) of the Electricity Act, whereupon the CERC would determine which part of the dispute is referable to arbitration and which part is amenable to CERC's own jurisdiction, including the matter of grant of interim relief under Section 94(2) of the Electricity Act.

19. The respondents further contend that even otherwise no ground is made-out for extending the interim restraint order against encashment of bank guarantees since by reason of the appellant's non-fulfillment of its obligations under the Agreement, huge loss has been caused to the exchequer and damage has been suffered by procuring States in relation to their projected power purchase patterns.

20. It is also the respondents' contention that the appellant has not acted bona-fidé inasmuch as while the present appeal was pending before this Court, without informing the Court, the appellant approached the CERC by petition No. 283/MP/2012 seeking similar reliefs as prayed for in this appeal; which petition was however dismissed by the CERC by order dated 04.08.2015, as referred to above, for the reason that the present appeal was not withdrawn.

21. On the point of whether interim relief could be continued after a proceeding is withdrawn and the Court becomes functus officio, the respondents have relied upon judgments in *State of Orissa vs. Madan Gopal Rungta* AIR 1952 SC 12 (CB); *Premier Automobiles Ltd. vs. Kamlekar Shantaram Wadke of Bombay & Ors.* (1976) 1 SCC 496; *GE Power Controls India & Ors. vs. S Lakshmipathy & Ors.* (2005) 11 SCC 509; *Ajay Mohan & Ors. vs. H. N. Rai & Ors.* (2008) 2 SCC 507; *Kalabharti Advertising vs. Hemant Vimalnath Narichania & Ors.* (2010) 9 SCC 437.

22. The respondents have further distinguished the case of *Municipal Corporation of Greater Mumbai & Anr. vs. Pratibha Industries Ltd. & Ors.* (supra) cited by the

appellant on the ground that the said decision proceeded on the power of the Supreme Court under Article 142 of the Constitution and cannot, for that reason, be cited as a precedent.

23. While we have recorded the foregoing contentions and submissions for sake of completeness, the decision of the present appeal, in the facts and in the circumstances of the case, would turn upon the following two aspects:

(a) whether on a prima facie view, increase in the price of coal in Indonesia would amount to force majeure under the Agreement, thereby entitling the appellant to seek relief;

(b) whether it is permissible and appropriate, on the facts and in the circumstances of the case, for this Court to extend the order restraining invocation of bank guarantees while permitting withdrawal of the appeal and disposing of it.

24. On issue (a) above, the matter stands concluded following the mandate of the Supreme Court in *Energy Watchdog (supra)*, where the Supreme Court while interpreting the provisions of an identical power purchase agreement as the one in the present case, has held as under:

"37. In *Alopi Parshad & Sons Ltd. v. Union of India*, this Court, after setting out Section 56 of the Contract Act, held that the Act does not enable a party to a contract to ignore the express covenants thereof and to claim payment of consideration, for performance of the contract at rates different from the stipulated rates, on a vague plea of equity. Parties to an executable contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate, for example, a wholly abnormal rise or fall in prices which is an unexpected obstacle to execution. This does not in itself get rid of the bargain they have made. It is only when a consideration of the terms of the contract, in the light of the circumstances existing when it was made, showed that they never agreed to be bound in a fundamentally different situation which had unexpectedly emerged, that the contract ceases to bind. It was further held that the performance of a contract is never discharged merely because it may become onerous to one of the parties.

X X X X X X

"42. It is clear from the above that the doctrine of frustration cannot apply to these cases as the fundamental basis of the PPAs remains unaltered. Nowhere do the PPAs state that coal is to be procured only from Indonesia at a particular price. In fact, it is clear on a reading of the PPA as a whole that the price payable for the supply of coal is entirely for the person who sets up the power plant to bear. The fact that the fuel supply Agreement has to be appended to the PPA is only to indicate that the raw material for the working of the plant is there and is in order. It is clear that an unexpected rise in the price of coal will not absolve the generating companies from performing their part of the contract for the very

good reason that when they submitted their bids, this was a risk they knowingly took. We are of the view that the mere fact that the bid may be non-escalable does not mean that the respondents are precluded from raising the plea of frustration, if otherwise it is available in law and can be pleaded by them. But the fact that a non-escalable tariff has been paid for, for example, in the Adani case, is a factor which may be taken into account only to show that the risk of supplying electricity at the tariff indicated was upon the generating company.

X X X X X X

"46. As a matter of fact, Clause 12.4 of the PPA, which deals with force majeure exclusions, reads as follows:

"12.4. Force majeure exclusions Force majeure shall not include

(i) any event or circumstance which is within the reasonable control of the parties, and

(ii) the following conditions, except to the extent that they are consequences of an event of force majeure:

(a) Unavailability, late delivery, or changes in cost of the plant, machinery, equipment, materials, spare parts, fuel or consumables for the Project;

(b) Delay in the performance of any contractor, sub-contractors or their agents excluding the conditions as mentioned in Article 12.2;

(c) Non-performance resulting from normal wear and tear typically experienced in power generation materials and equipment;

(d) Strikes or labour disturbance at the facilities of the affected party;

(e) Insufficiency of finances or funds or the Agreement becoming onerous to perform; and

(f) Non-performance caused by, or connected with, the affected party's:

(i) Negligent or intentional acts, errors or omissions;

(ii) Failure to comply with an Indian law; or

(iii) Breach of, or default under this Agreement or any project documents."

This clause makes it clear that changes in the cost of fuel, or the agreement becoming onerous to perform, are not treated as force majeure events under the PPA itself.

"47. We are, therefore, of the view that neither was the fundamental basis of the contract dislodged nor was any frustrating event, except for a rise in the price of coal, excluded by Clause 12.4, pointed out. Alternative modes of performance were available, albeit at a higher price. This does not lead to the contract, as a whole, being frustrated. Consequently, we are of the view that neither Clause

12.3 nor 12.7, referable to Section 32 of the Contract Act, will apply so as to enable the grant of compensatory tariff to the respondents. Dr Singhvi, however, argued that even if Clause 12 is held inapplicable, the law laid down on frustration under Section 56 will apply so as to give the respondents the necessary relief on the ground of force majeure. Having once held that Clause 12.4 applies as a result of which rise in the price of fuel cannot be regarded as a force majeure event contractually, it is difficult to appreciate a submission that in the alternative Section 56 will apply. As has been held in particular, in Satyabrata Ghose case, when a contract contains a force majeure clause which on construction by the Court is held attracted to the facts of the case, Section 56 can have no application. On this short ground, this alternative submission stands disposed of.

X X X X X X

"54. From a reading of the above, it is clear that if otherwise the expression "any law" in Clause 13 when read with the definition of "law" and "electricity laws" leads unequivocally to the conclusion that it refers only to the law of India, it would be unsafe to rely upon the other clauses of the agreement where Indian law is specifically mentioned to negate this conclusion.

X X X X X X

"57. Both the letter dated 31-7-2013 and the revised Tariff Policy are statutory documents being issued under Section 3 of the Act and have the force of law. This being so, it is clear that so far as the procurement of Indian coal is concerned, to the extent that the supply from Coal India and other Indian sources is cut down, the PPA read with these documents provides in Clause 13.2 that while determining the consequences of change in law, parties shall have due regard to the principle that the purpose of compensating the party affected by such change in law is to restore, through monthly tariff payments, the affected party to the economic position as if such change in law has not occurred. Further, for the operation period of the PPA, compensation for any increase/decrease in cost to the seller shall be determined and be effective from such date as decided by the Central Electricity Regulation Commission. This being the case, we are of the view that though change in Indonesian law would not qualify as a change in law under the guidelines read with the PPA, change in Indian law certainly would."

(Emphasis Supplied)

25. Upon a perusal of the foregoing dictum of the Supreme Court, it is clear that change in Indonesian law and consequential increase in price of coal in Indonesia has been specifically held not to amount to change in law or to force majeure within the meaning of the Agreement.

Accordingly, to answer issue (a) above, we are of the view that no prima facie case is made-out by the appellant in this case.

26. On issue (b) above, namely the permissibility of continuing an interim order

when a proceeding is being sought to be disposed of, in this case by permitting it to be withdrawn, the decision of Supreme Court in *Madan Gopal Rungta (supra)*, which has been subsequently followed, is conclusive. In the portion of *Madan Gopal Rungta* extracted below the Constitution Bench holds :

"... The question which we have to determine is whether directions in the nature of interim relief only could be granted under article 226, when the Court expressly stated that it refrained from determining the rights of the parties on which a writ of mandamus or directions of a like nature could be issued. In our opinion, article 226 cannot be used for the purpose of giving interim relief as the only and final relief on the application as the High Court has purported to do. The directions have been given here only to circumvent the provisions of section 80 of the Civil Procedure Code, and in our opinion that is not within the scope of article 226. An interim relief can be granted only in aid of and as ancillary to the main relief which may be available to the party on final determination of his rights in a suit or proceeding. If the Court was of opinion that there was no other convenient or adequate remedy open to the petitioners, it might have proceeded to investigate the case on its merits and come to a decision as to whether the petitioners succeeded in establishing that there was an infringement of any of their legal rights which entitled them to a writ of mandamus or any other directions of a like nature; and pending such determination it might have made a suitable interim order for maintaining the status quo ante. But when the Court declined to decide on the rights of the parties and expressly held that they should be investigated more properly in a civil suit, it could not, for the purpose of facilitating the institution of such suit, issue directions in the nature of temporary injunctions, under article 226 of the Constitution. In our opinion, the language of article 226 does not permit such an action."

(extract from para 6 of AIR report)

(Emphasis Supplied)

In our view the above dictum of the Supreme Court passed in the context of an Article 226 petition would apply equally to an appeal such as the present one. At the same time it does appear that Courts do extend stays/inter orders, mostly by consent, and in some cases by exercising discretion. Even accepting and assuming that interim relief can be extended in certain cases, the facts of the present case would not justify a further extension of interim relief for two reasons. Firstly, the issue on merits is covered against the appellant, as held above while deciding contention (a). Secondly, the appellant had earlier in 2012 approached the CERC during pendency of this appeal vide a petition as referred to above, which petition was dismissed by the CERC on 04.08.2015 as the appellant had elected to press the present appeal and not withdraw it.

27. The question is, would it be appropriate to extend the interim relief in the present case. In our view, considerations of equity and justice do not warrant extension of the stay on invocation of bank guarantees, to enable the appellant

to once again approach the CERC. A prayer for withdrawal with direction to extend the interim stay would not be justified when the appeal had come for final hearing and when the issue on merits is covered against the appellant by the judgment of the Supreme Court in Energy Watchdog (supra). It may be mentioned that the subsequent order dated 29.10.2018 made by the Supreme Court in Energy Watchdog would also not assist the appellant, since in that case the Supreme Court had not granted any stay but mere liberty to approach the Government for settling the disputes.

28. In view of the foregoing position on grant of interim relief and our conclusion ; and also considering the delay that has already attended the matter, we are not inclined to continue any interim order in favour of the appellant.

29. In light of the above discussion we find:

- a. that the appellant has failed to make-out a prima facie case in its favour for grant of any interim relief in relation to the bank guarantees, since change in Indonesian law and consequential increase in price of coal in Indonesia does not prima facie amount to force majeure under the Agreement;
- b. that the remedy for the appellant's disputes lies before the CERC and/or the arbitral tribunal to which the CERC may refer any part of such disputes; and
- c. that the appellant is not entitled in law, and we are not inclined in the facts and circumstances of this case, to extend the interim relief earlier granted to the appellant against invocation of bank guarantees.

30. In view of the above, we find no merit in the present appeal, which is accordingly dismissed, however with no order as to costs.