

(2012) 07 DEL CK 0193
In the Delhi High Court
Case No : OMP No. 267 of 2012

Coastal Andhra Power Limited

APPELLANT

Vs

Andhra Pradesh Central Power Distribution Company Limited
and Others

RESPONDENT

Date of Decision : 02-07-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9
Electricity Act, 2003 — Section 79(1)(a), 79(1)(f), 86, 86(1)(f)

Citation : (2012) 07 DEL CK 0193

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Mukul Rohtagi, with Mr. Mahesh Agarwal, Mr. Rishi Agarwala, Mr. Akshay Ringe and Ms. Radhika, for the Appellant; Jayant Bhushan with Mr. Rakesh K. Sharma, Advocate for R-1 to 4, Mr. D.B. Ray, Advocate for R-5 to 9, Mr. Sanjay Kumar Dubey and Ms. Shuchi Singh, Advocates for R-10/MSEDCL and Mr. S. Vallinayagam, Advocate for R-11/Tamil Nadu Electricity Board, for the Respondent

Final Decision : Dismissed

Judgement

Justice S. Muralidhar

1. Coastal Andhra Power Limited ("CAPL") has filed this petition u/s 9 of the Arbitration & Conciliation Act, 1996 ("Act") against the Andhra Pradesh Central Power Distribution Company Limited ("APCPDCL"), Andhra Pradesh Southern Power Distribution Company Limited ("APSPDCL"), Andhra Pradesh Eastern Power Distribution Company Limited ("APEPDCL") and Andhra Pradesh Northern Power Distribution Company Limited ("APNPDCL") as well as seven other State Electricity Boards in Karnataka, Maharashtra and Tamil Nadu arising out of a Power Purchase Agreement ("PPA") dated 23rd March 2007 executed between the parties. The background to the present petition is that the Government of India intended to set up nine Ultra Mega Power Projects ("UMPPs") at various places in the country. As per the UMPPs Policy, the Petitioner CAPL was registered

as a 100% subsidiary of the Power Finance Corporation ("PFC"), a Public Sector Undertaking, as a Special Purpose Vehicle ("SPV") for construction, commissioning and operation of the project. The shares in CAPL were to be transferred to a party who quoted the lowest level tariffs for sale of electricity after construction of the project pursuant to a public bidding.

2. While bidding process was in progress, the PPA dated 23rd March 2007 was executed between the Petitioner and all the Respondents. At that stage, CAPL was wholly owned subsidiary of the PFC. The PPA defined fuel to mean primary fuel used to generate electricity and this meant imported coal.

3. Reliance Power Limited ("RPL") bid for the project on the basis of prevailing price of Indonesian coal quotations. RPL was declared as a successful bidder on 30th November 2007. According to CAPL at the relevant time, a party could enter into a long term contract with companies in Indonesia who would supply coal on long term basis at a fixed price and at a fixed escalation.

4. Pursuant to it being declared as a successful bidder, RPL purchased the entire 100% shareholding of CAPL from the PFC on 29th January 2008. On 8th April 2010 CAPL executed a Fuel Supply Agreement ("FSA") with Reliance Coal Resources Private Limited ("RCRPL") which had acquired interests in coal from coal mines in Indonesia for supply of coal to CAPL. Under the said FSA, RCRPL was to supply coal required for project for the entire term of the PPA at a pre-fixed price. In terms of the said PPA, CAPL was to buy coal at the price of US Dollar ("USD") 24 Per Metric Ton ("PMT").

5. On 23rd September 2010 a new regulation came into effect in Indonesia whereby it was made mandatory for the companies in Indonesia to sell coal on the basis of the international benchmark market prices. All existing FSAs were to be brought in line with the new regulations within a period of 12 months. This meant that all long term supply contracts with companies in Indonesia became unenforceable unless amended and brought in conformity with the new regulation.

6. According to CAPL as a result of the above regulation, the price of coal in Indonesia rose from USD 24 PMT to USD 60 PMT. CAPL states that the exponential increase in the price of imported Indonesian coal by 150% rendered the project wholly unviable, non-bankable and impossible to set up. CAPL claimed that the unavailability of fuel or dramatic increase in the cost of fuel was a force majeure event under Article 12.4 of the PPA. The sudden change of the foreign law was according to CAPL not in contemplation of the parties at the time of entering into the PPA. In terms of Article 12.7 neither party would be held to be in breach of its obligation during the subsistence of the force majeure event. CAPL also pleaded that it was impossible to import coal from another source either at the given price or near that price. Further, even though CAPL had entered into arrangements for debt financing from various banks and financial institutions, it was based on the FSA for coal and prior to the change in the

Indonesian regulation. CAPL submitted that after the change of legislation no bank was willing to lend funds to CAPL. CAPL further submitted that the change in Indonesian law was also a change in the law contemplated under Articles 13.2 (a) and (b) of the PPA.

7. On 3rd June 2011 CAPL informed the Andhra Pradesh Power Coordination Committee ("APPC") about the new Indonesian mining law and its impact. On 22nd June 2011, a meeting of the 12th Joint Monitoring Committee ("JMC") was held under the aegis of the Central Electricity Authority ("CEA") to discuss the change in Indonesian law and its impact on the project. On 25th July 2011, CAPL addressed a letter to APSPDCL pointing out that the change in Indonesian law had made the project unviable and that it would be impossible for CAPL to procure coal at the price fixed under the current FSA. Further discussions were held on 28th November 2011 at the 13th JMC meeting. It is pointed out that thereafter despite requests by CAPL to resolve the issue, no meeting involving all the procurers and CAPL was convened. At the meeting on 22nd December 2011 after the CAPL's representative made a presentation he was asked to leave with no decision being communicated.

8. On 28th January 2012 APSPDCL called upon CAPL to forthwith resume the construction works. On 21st February 2012 CAPL replied to the above letter and informed the Respondents about the progress made by the Petitioner fulfilling its obligations under Articles 3.1.2 and 4.1 of the PPA. A request was made to APSPDCL not to take coercive measures on account of the adverse impact of the changed Indonesian law. On 13th March 2012, CAPL issued a dispute notice to Respondents. It was further pointed out that since the dispute had arisen between the parties, the procedure under Article 17.3.2 of the PPA was required to be followed. On 15th March 2012, APSPDCL issued a letter dated 15th March 2012 purporting to terminate the PPA. CAPL was called upon to pay a sum of Rs.400 crores for the default in complying with the terms of the PPA, failing which APSPDCL threatened to invoke the bank guarantee of Rs.300 crores furnished by CAPL under Article 3.2.2 of the PPA.

9. On 19th March 2012 CAPL filed the present petition. On 20th March 2012 a detailed order was passed by this Court directing that notice to be issued to the Respondents and that till the next date no coercive steps be taken against CAPL pursuant to the letter dated 15th March 2012. After pleadings were completed, the case was finally heard on 31st May 2012.

10. Mr. Mukul Rohtagi, learned Senior counsel appearing for CAPL, relied on the decisions in *M/s. Dhanrajamal Gobindram v. M/s. Shamji Kalidas and Co.* (1961) 3 SCR 1020 and *Alopi Parshad and Sons Ltd. Vs. Union of India (UOI)*, to urge that the change in the Indonesian law constituted a force majeure condition which was an exception to the Petitioner having to comply its obligations under the PPA. The performance of the PPA had been rendered impossible in view of the sudden change which was not in the control of the parties. It is submitted that the change in the cost of the fuel for purchase was a consequence of force

majeure event and, therefore, fell within Article 12.4 of the PPA. He further submitted that the word "law" occurring in the PPA included Indonesian law and under Article 13.2 of the PPA, CAPL would be entitled to seek compensation for the increase in the price of the imported coal. He submitted that it was the Respondents who had not fulfilled their obligations, particularly under Article 3.1.2(i) (a). The Fuel Transportation System ("FTS") had still not been made available by the Respondents. It is submitted that the Respondents could not take advantage of their own wrong and could not seek to illegally terminate the PPA by the notice dated 15th March 2012.

11. As regards the arbitrability of the disputes between the parties, Mr. Rohtagi referred to Articles 17.3.1 and 17.3.2 and whether the termination letter dated 15th March 2012 was valid and whether there existed a force majeure situation was to be a dispute which came within the ambit of Article 17.3.2 of the PPA. He submitted that CAPL was not claiming any relief in respect of the determination or fixation of tariff which would be covered under Article 17.3.1. It is submitted that in Gujarat Urja Vikash Nigam Ltd. Vs. Essar Power Ltd., (the "GUVNL case"), the disputes were between a generating company and the dispute concerned the powers of the State Electricity Regulatory Commission ("SERC") u/s 86 of the Electricity Act, 2003 ("EA"). The said provision was held wide enough to cover such disputes. However, in the present case, the supply by CAPL could be to several distribution companies in different states and the CERC did not have the power to determine the issues that arose as a result of the operability of the force majeure clause. It is accordingly prayed that the order passed by this Court on 20th March 2012 should be continued during the arbitral proceedings. Relying on the decision in Hindustan Construction Co. Ltd. and Another Vs. Satluj Jal Vidyut Nigam Ltd., it is submitted that the balance of equities required that CAPL's interests be protected. Reliance is also placed on the decision in Firm Ashok Traders and Another etc. Vs. Gurumukh Das Saluja and Others etc.,

12. On behalf of the Respondents, Mr. Jayant Bhushan, learned Senior counsel, submitted that the present proceedings u/s 9 were not maintainable. The issue concerning increase in the price of coal could result in change in tariff and, therefore, the dispute fell within the ambit of Article 17.3.1 of the PPA. Reliance is placed on the GUVNL case as well as the decision dated 15th May 2012 of this Court in OMP 677 of 2011 (PTC v. Jaiprakash Power Ventures Ltd). It is submitted that without prejudice to the above contention even if the disputes were to be classified as falling under Article 17.3.2 then in terms of the judgment of the Supreme Court in GUVNL case the arbitration clause would stand superseded by Section 79(1)(f) of the EA.

13. It is next submitted that the law relating to staying of the enforcement of a Bank Guarantee ("BG") has been explained in a number of decisions. In Svenska Handelsbanken Vs. M/s. Indian Charge Chrome and others, Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd., and another, U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., and

Hindustan Steel Works Construction Ltd. Vs. Tarapore and Co. and another, it was held that only in exceptional cases where fraud is able to be demonstrated will the Courts interfere with the encashment of a BG. It is submitted that the increase in coal price was specifically excluded from the force majeure clause in the PPA. It is submitted that unconditional bank guarantee can be invoked by the person in whose favour it was executed and only in cases of fraud would the Court interfere. Reliance is also placed on the decision in Ansal Engineering Projects Ltd. Vs. Tehri Hydro Development Corporation Ltd. and Another, . It was submitted that the PPA nowhere contemplated that coal had to be imported only from Indonesia. If CAPL were serious about the project they could have imported coal from anywhere else. It was denied that there was a delay in handing over the FTS land to CAPL. The non-provisioning of the said land was a red herring and did not come in the way of CAPL carrying on with the main power plant construction for which 2500 acres of land had already been handed over to it. It is further submitted that CAPL was yet to express its manifest intention of taking recourse to arbitral proceedings.

14. As regards the maintainability of the present petition, reference should be made first to Article 17.3 of the Agreement 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.

15. Article 17.3 can be split into two parts. The first part i.e. Article 17.3.1, concerns disputes relating to tariff. The disputes could relate to "any change in or determination of the Tariff" or relate partly or wholly to any change in the tariff or where "determination of any of such claims could result in change in the tariff". Such disputes are then referable to the procedure outlined under the EA. Article 17.3.2, on the other hand, covers the disputes not covered by Article 17.3.1 for which a three-Member Arbitral Tribunal is required to be appointed.

16. In the present case, while the issue concerning increase in price of the Indonesian coal and the consequent invocation of the force majeure clause by CAPL may not be strictly construed as a dispute arising from a claim by either party "for any change in or determination of the tariff or any matter related to tariff", it is not as if the change in the price of coal will not affect the tariff at all. It is possible that the determination of such dispute could result in a change in the tariff. Such a dispute can then be said to have arisen within the ambit of Article 17.3.1. Therefore, one way of approaching the problem would be for CAPL to approach the CERC which will, in terms of Section 79(1)(f) of the EA, determine which part of the dispute between the parties is referable to arbitration. The words "and to refer any dispute for arbitration" occurring at the end of Section 79 (1) (f) of the EA contemplates such a course. This power to refer any dispute to arbitration, which is common to both the CERC u/s 79 (1) (f) and the SERC u/s 86 (1) (f), has to be seen in addition to the power of the CERC to decide the disputes arising under Sections 79 (1) (a) to (d). Where the CERC is of the view that the dispute actually relates to the determination of tariff, it will exercise its jurisdiction and decide such dispute. On the other hand, a dispute not involving the tariff can be referred to arbitration. This interpretation harmonises Section 79 (1) (f) of the EA with Article 17.3.1 of the PPA. Although the decision of the Supreme Court in GUVNL case concerned the scope of the powers of the SERC, it would equally apply to the interpretation of Section 79 (1) (f) of the EA insofar as it concerns the power of the CERC to refer disputes to arbitration.

17. Resultantly, CAPL will have to first approach the CERC as regards the dispute arising out of the letter dated 15th March 2012 of the APSPDCL. Therefore, the present petition u/s 9 of the Act is not maintainable at this stage. The preliminary objection of the Respondents as regards maintainability of the petition is accordingly upheld.

18. Nevertheless, since the parties have argued at length on merits, the Court

proceeds to consider those submissions as well. At the outset, it is clarified that the view expressed hereafter is tentative and is not intended to influence any final view that may be taken in proceedings elsewhere between the parties.

19. The question that arises for consideration is whether for the grant of interim relief u/s 9 of the Act, CAPL has made out a prima facie case that the increase in the price of coal due to change in Indonesian law is a force majeure event which has caused it irreversible hardship warranting the stay of encashment of the BG furnished by it.

20. The law in relation to force majeure has been explained by the Supreme Court in *M/s. Dhanrajamal Gobindram v. M/s. Shamji Kalidas and Co.* as under:

An analysis of rulings on the subject into which it is not necessary in this case to go, shows that where reference is made to "force majeure", the intention is to save the performing party from the consequences of anything over which he has no control. This is the widest meaning that can be given to "force majeure", and even if this be the meaning, it is obvious that the condition about "force majeure" in the agreement was not vague. The use of the word "usual" makes all the difference, and the meaning of the condition may be made certain by evidence about a force majeure clause, which was in contemplation of parties.

21. In *Alopi Parshad & Sons Ltd. v. Union of India* it was held as under:-

If, on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point - not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation.

22. The above decisions require the Court, faced with the question as to the existence of force majeure conditions, to first examine the relevant provisions of the contract. The PPA in the present case itself defines force majeure as under:

12.3 Force Majeure

A "Force Majeure" means any event or circumstances or combination of events and circumstances including those stated below that wholly or partly prevents or unavoidably delays an affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices.

23. Further, Articles 12.4 and 12.7 read as under:-

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 consequence 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.

12.7 Available Relief for a Force Majeure Event Subject to this Article 12:

(a) no Party shall be in breach of its obligations pursuant to this Agreement to the extent that the performance of its obligations was prevented, hindered or delayed due to a Force Majeure Event.

24. Prima facie, it is not possible to agree with the submissions made on behalf of CAPL that the increase in fuel costs would, notwithstanding the exception carved out in Clause (a) of Article 12.4, constitute force majeure. There is no doubt about there being a double negative on a collective reading of the above clauses. Still, it does appear prima facie that the parties intended that rise in fuel costs would not be treated as a force majeure event. In a supply contract, particularly where the commodity in question is being imported, parties generally factor in the possibility of sudden fluctuations in international prices. Supply contracts therefore provide for risk purchase and such like clauses. Article 13.2 permits CAPL to seek compensation for any loss it might suffer on account of change in the law. Therefore, that very event, viz., change in the law, could not also have been intended to constitute a force majeure event leading to increase in fuel costs. Change in law and the consequences thereof are treated separately under the PPA.

25. In view of the above conclusion, this Court does not consider it necessary to discuss in detail the case law relating to invocation of the BGs. The Court does not wish to comment on the extent of non-fulfillment of any of the respective obligations of either party under the PPA. It is possible that there are other players in UMPPs which have been adversely affected by the increase in the price of Indonesian coal. However, each such case will have to be examined with reference to its own facts to ascertain whether irretrievable hardship would be caused in the event the BGs furnished are permitted to be encashed. As far as the present case is concerned, CAPL has been unable to persuade this Court to even prima facie hold that the escalation in fuel price is a force majeure event providing it with the defence of non-performance of its obligation under the PPA. CAPL has been unable to show that the encashment of the BG furnished by it to the Respondents will result in irretrievable hardship to it. At the cost of repetition, it is reiterated that this is only a tentative view which will not influence the outcome of other appropriate proceedings between the parties. For the aforementioned reasons, no case is made out by CAPL for continuation of the interim order passed in its favour on 20th March 2012. The petition is accordingly dismissed, and the interim order dated 20th March 2012 is vacated, but in the circumstances with no orders as to costs.