

COURT-II
IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

ORDER ON IA NO. 812 OF 2018
IN
APPEAL NO. 127 OF 2018

Dated: 30th July, 2018

Present: Hon'ble Mr. Justice N. K. Patil, Judicial Member
Hon'ble Mr. S. D. Dubey, Technical Member

In the matter of:

Shekhawati Transmission Service Company Ltd.
Through its authorised representative
C-97, Second Floor, Janpath,
Behind New Vidhan Sabha Building
Jaipur – 302 015

..... Appellant(s)

Versus

1. Rajasthan Electricity Regulatory Commission,
Through its Secretary
Vidhyut Viniyamak Bhawan,
Sahakar Marg, Near State Motor Garage,
Jaipur, Rajasthan 302001
2. Jaipur Vidyut Vitran Nigam Limited
Through its Managing Director
Vidhyut Bhavan, Jyotinagar,
Jaipur 302 005
3. Ajmer Vidyut Vitran Nigam Limited
Through its Managing Director
Vidyut Bhavan, Panchsheel Nagar,
Makarwali Road, Ajmer 305 004
4. Jodhpur Vidyut Vitran Nigam Limited
Through its Managing Director
New Power House, Industrial Area,
Jodhpur – 352 001

5. Rajasthan Urja Vikas Nigam Limited
Through its authorized representative
Vidyut Bhawan, Janpath
Jyoti Nagar, Jaipur 302 005

6. Rajasthan Rajya Vidyut Prasaran Nigam Limited
Through its authorized representative
Vidyut Bhawan, Janpath,
Jyoti Nagar, Jaipur 302 005

..... Respondent(s)

Counsel for the Appellant(s) : Mr. Amit Kapur
Ms. Abiha Zaidi
Counsel for the Respondent(s) : Mr. Raj Kumar Mehta
Ms. Himanshi Andley for R-1

Mr. M.G. Ramachandran
Ms. Ranjitha Ramachandran
Ms. Poorva Saigal
Mr. Shubham Arya
Mr. Pulkit Agrawal for-2 to 5

Ms. Swapna Seshadri
Ms. Parichita Chowdhury for R-6

ORDER

PER HON'BLE MR. JUSTICE N.K. PATIL, JUDICIAL MEMBER

The Appellant herein most respectfully prays that this Hon'ble Tribunal may please to –

- (a) pass the appropriate directions restraining the Respondent Long Term Transmission Customers (hereinafter referred to as "LTTCs") from terminating the Transmission Service Agreement (hereinafter referred to as "TSA") or taking any coercive action prejudicial or affecting the

rights of the parties, till final disposal of the present Appeal by this Hon'ble Tribunal; and

- (b) Pass such further and other orders as this Hon'ble Tribunal may deem fit to pass in the facts and circumstances of the case; and

presented the instant Application.

2. It is the case of the Appellant that Appellant is diligently trying to perform its obligations under the TSA and has been regularly updating and informing the LTTCs and seeking their support to ensure progress of the Transmission System. Despite its best efforts, the LTTCs are now seeking to illegally and arbitrarily terminate the TSA and wriggle out of their contractual obligations.

3. He further contended that the Appellant has highlighted the adverse and prejudicial impact of terminating the TSA. That the same would result in fresh bidding of the Transmission System leading to further time and cost overruns. It is submitted that if termination of the TSA is permitted, the same would be highly prejudicial and against the interests of the State of Rajasthan, ultimately adversely affecting the consumers. The only pure legal questions are sought to be raised. It is settled law that a pure question of law can be raised at any stage of the proceedings, including at the appellate stage, as long as there are no disputed questions of fact.

4. Therefore, it would be in the interest of the justice that appropriate directions be issued by this Hon'ble Tribunal staying the Termination Notice and keeping the same in

abeyance till final disposal of the instant Appeal. Further, the Respondent LTTCs may also be restrained from taking any coercive or prejudicial actions which may adversely affect the rights of the parties during the pendency of the instant Appeal.

5. It is also contended that the Appellant has a good case on merits and has good chances of success in the Appeal. The balance of convenience is also in favour of the Appellant since it is diligently attempting to complete the Transmission System and perform its obligations under the TSA, unlike the LTTCs who are now seeking to wriggle out of their contractual obligations. Therefore, in the interest of justice, equity and good conscience, this Hon'ble Tribunal may pass directions restraining the LTTCs from taking any coercive actions against the Appellant and that no prejudice would be caused to the Respondents if stay on termination and against any coercive action is granted by this Hon'ble Tribunal. Therefore, he submitted that the prayer sought in the instant Application may kindly be granted as prayed for till the disposal of the Appeal.

6. The Respondent Nos. 2 to 5 have filed the reply to the Application filed by the Appellant for directions contending that on 25.02.2013, the Appellant entered into a TSA with the Respondents 2 to 4 herein to construct and establish the Transmission Project, which comprises of Transmission Lines, Sub-Station, Feeder bays from RVPN connection and PTCC equipment etc. The Scheduled Commercial Operation Date (hereinafter referred to as "SCOD") of the transmission system was 24 months from the effective date, i.e., to be completed by 24.02.2015. Despite the lapse of a considerable period of time, i.e., 3½ years, the Appellant failed to complete and commission the

Transmission system. The Appellant pleaded Force Majeure events such as approvals of powerline and railway crossings, Right of way (ROW) issues etc. affecting the construction of the transmission project and had sought for extension of time from the Respondents.

7. By its communication dated 6.02.2017, the Rajasthan Urja Vikas Nigam Limited, Respondent No. 5, representing the Rajasthan Utilities, had rejected the claim of the Appellant regarding Force Majeure events. Respondent No. 5 was however willing to agree to the revised SCOD, subject to payment of compensation for the delay and the non-escalation of costs.

8. The Appellant filed a Petition being Petition No. 1252 of 2017 before the State Commission seeking extension of time and release from payment of the Liquidated Damages on the ground that the construction of the transmission project was affected by Force Majeure reasons.

9. The State Commission, after considering the material available on record, has rejected the claim of the Appellant as per the Impugned Order in question.

10. It is the case of the Respondents 2 to 5 that the State Commission has examined the issues raised by the parties in Petition no. 1252 of 2017 in detail and has given reasons for not accepting the claim made by the Appellant for extension of time in completing the Transmission system.

11. The Appellant having committed breach of the TSA and having failed to perform its part of the obligations under the TSA, the Rajasthan Utilities are entitled to terminate the TSA and proceed to encash the Performance Bank Guarantees given by the Appellant in terms of Article 6.4 of the TSA. In terms of the TSA, the Appellant had given three different Bank Guarantees aggregating to Rs. 3.61 crores issued by the Dena Bank on 7.03.2011, 7.03.2011 and 22.12.2016. On account of the default on the part of the Appellant to perform its obligation, the Rajasthan Utilities are entitled to proceed to enforce the Performance Bank Guarantees given by the Dena Bank. The said Bank Guarantees are unconditional Bank Guarantees. Therefore, the Appellant is not entitled to seek any relief at this stage and the Respondents are entitled to enforce the Bank Guarantees. Hence, the Prayer sought in the Application is misconceived in nature and hence it is liable to be rejected at the threshold.

12. The learned counsel appearing for the Appellant, Shri Amit Kapur, vehemently submitted that, the delay caused in achieving the SCOD of the Transmission System is due to certain Force Majeure events in terms of Article 11.3 of the TSA dated 25.02.2013. The RERC has passed the impugned order and wrongly held that the Shekhawati case does not fall within the Force Majeure under Article 11.3 of the TSA and that the actions of the Respondents 2 to 5, i.e., LTTCs, imposing liquidated damages by its communication dated 6.02.2017 are justified. The said reasoning is given contrary to the material on records and it has also failed to take into consideration the total cost of the Project as Rs. 57 Crores as on date. The expenditure incurred till

date is Rs. 17 Crores and physical work of transmission line is 70% completed. Out of 184 Towers, 121 Towers have been erected. Foundation is completed to 132 Towers. Substation land is acquired and layout drawings are ready.

13. Since the execution of the TSA, Shekhawati has been diligently working to complete the Transmission System and for all the permits and consents required under the TSA, Shekhawati applied in a timely manner and has been regularly following up with the concerned authorities to ensure that the same are granted expeditiously and the Transmission System is completed. This is reflected in the Monthly Progress Reports sent regularly by Shekhawati to LTTCs in compliance of Article 5.3 of the TSA and valid and cogent reasons have been given for the delay in completing the Project.

14. Further, he quick to point out and submitted that despite keeping the LTTCs duly informed vide Monthly Progress Reports and letters till date no support or assistance has been provided by them. Instead, LTTCs have responded with notices claiming Liquidated Damages in spite of having detailed correspondence from 27.01.2015 to 06.07.2018 has issued notice levying LD of Rs. 6.28 Crores to be paid within 10 days, i.e., by 16.07.2018 failing which LTTCs shall encash the Contract Performance Guarantee.

15. Further, he submitted that the Contract Performance Guarantee is for Rs. 3.61 Crores valid upto 31.03.2019. Therefore, he submitted that the Appellant will ensure that the Bank Guarantee for Rs. 3.61 Crores valid upto 31.03.2019 be kept intact. The

Respondents 2 to 5 may be restrained from taking coercive action, pending disposal of the instant Appeal because the balance of convenience is in favour of the Appellant. If Respondents 2 to 5 are permitted to encash the bank Guarantees, the Appellant would be put to great hardship and inconvenience and when special equities do arise in favour of the Appellant it is respectfully prayed that the Project not be impaired by permitting recovery of the liquidated damages till the final outcome of the Appeal in the interest of justice and equity.

16. ***Per Contra***, the learned counsel appearing for the Respondents 2 to 5, Shri M. G. Ramachandran, contended that, prima facie, the Appellant has failed to make out any ground for seeking direction sought in the instant Application. The prayer sought is misconceived. To substantiate his submission, he quick to point out and vehemently submitted that the State Commission has rejected the claim of the Appellant of Force Majeure invoking the execution of the contract work, namely, completion of the Transmission Project in time and extension of the time sought for the same. And further the State Commission has held that in terms of Articles 4.1 and 5.1.3 of TSA dated 25.02.2013, it is the responsibility of the Appellant to obtain all consents, clearances and permits etc for the development of the transmission project and the delay on account of the same does not constitute a Force Majeure Event. There is inordinate delay of more than 3 ½ years. In spite of giving the sufficient time he failed to complete the project. In terms of Article 4.1 and 5.1.3 of the TSA governing the rights and obligations between the parties, none of the above constitutes a Force Majeure Event so as to entitle the Appellant to an extension of time.

17. Taking into consideration all the relevant factors, the State Commission has rightly justified in rejecting the claim sought in the Petition. Therefore, considering the prayer sought in the Application, it is not called for.

18. Regarding bank Guarantees in question, these are unconditional Bank Guarantees and our liability hereunder shall not be impaired or discharged by any extension of time or variations or alterations made, given or agreed with or without our knowledge or consent, by or between parties to the respective agreement. The Guarantor Bank hereby expressly agrees that it shall not require any proof in addition to the written demand from the LTTCs etc. This Bank Guarantee shall be a primary obligation of the Guarantor Bank. Therefore, the Guarantor Bank acknowledges that this Bank Guarantee is not personal to the LTTCs and may be assigned, in whole or in part by LTTCs to any entity to whom the Lead Long Term Transmission Customer is entitled to assign its rights and obligations under the TSA.

19. To substantiate his submissions, he vehemently submitted that, it is a well settled principle of law that the bank guarantees are independent contract between the bank and the beneficiary of the Guarantee and are not qualified by the contract on performance of the obligations by the parties under the TSA. The Appellant is not a party to the Bank Guarantee though the Bank Guarantee may have been issued at its instance. The existence of any dispute between the parties to the TSA is not a ground

for issuing an order of injunction to restrain enforcement of the bank guarantee which is in the nature of cash deposits.

20. Further, he placed reliance on the Judgment of this Hon'ble Tribunal in the case of Shapoorji Pallonji Energy (Gujarat) Pvt Ltd v. Gujarat Electricity Regulatory Commission and Another reported in '2017 ELR (APTEL) 0762', wherein this Hon'ble Tribunal has examined the law and refused to stay the encashment of bank guarantee. In the above decision, this Hon'ble Tribunal has referred to and relied on various decisions of the Hon'ble Apex court and the Hon'ble High Courts. The present case is similar to the above case decided by the Hon'ble Tribunal. In that case, the interim application to restrain the encashment of bank guarantee was filed and rejected by the Gujarat Electricity Regulatory Commission. Hence, the prayer sought by the Appellant is not at all justiciable.

21. Therefore, taking into consideration and having regard to the facts and circumstances of the case and also that the Appellant has failed to make out the case that balance of convenience is in favour of the Appellant and, in fact, the balance of convenience is in favour of the Respondents 2 to 5. Therefore, he submitted that the instant Application filed by the Appellant may be dismissed.

22. After thoughtful consideration of the submissions made by the learned counsel appearing for the Appellant and learned counsel appearing for Respondents 2 to 5 and after perusal of the averments made in the Interim Application dated 4.07.2018 and the reply filed by the Respondents 2 to 5 dated 18.07.2018, we find that it is not in dispute

that there is a considerable delay of 3½ years in construction of the Project on account of several factors. Besides, the actual completion period is not yet known. It will not be the ground for considering the interim prayer sought by the Appellant because the Bank Guarantees in question are unconditional Bank Guarantees and in view of the well settled law laid down by this Hon'ble Tribunal in the case of Shapoorji Pallonji Energy (Gujarat) Pvt Ltd v. Gujarat Electricity Regulatory Commission and Another reported in '2017 ELR (APTEL) 0762', this Tribunal has examined the relevant provisions pertaining to the Bank Guarantee and also refused to stay the encashment of Bank Guarantees.

23. After due consideration of the well settled law laid down by the Apex Court and the Hon'ble High Courts what emerged, as stated supra, that the Appellant has failed to complete and commission the Transmission System. The primary reasons for the delay, as contended by the learned counsel appearing for the Appellant are Powerline Corssing Approvals, approvals of railway crossing, Aviation Crossing approval, PTCC approval and Gantry position and, also specifically, Sub-Divisional Magistrate stay order for non-performance of any work till final decision. That subject-matter, considering the delay explained by the Appellant in the Appeal, is taken up for final consideration and that will not be the ground for considering the interim prayer sought in the instant Application and it has further emerged that the instant case is a pure legal question sought to be raised in the case of the Appellant that they are diligently trying to perform the obligation under the TSA and have been regularly updating and informing the LTTCs in the Monthly Progress Reports. These facts are not in dispute and that will not

be the ground for considering the interim prayer at this stage. To meet the ends of justice, we deem it fit to pass the equitable order safeguarding the interest of Appellant and also the Respondents. The encashment of the Performance Bank Guarantees by the Respondents subject to outcome of the result of this Appeal will be just and proper in the interest of justice and equity.

24. Having regard to the facts and circumstances of the case as stated supra, we dispose of the instant Application with the observation that the encashment of the Performance Bank Guarantee by the Respondents will be subject to the outcome of the result of this Appeal.

25. With these observations, the instant IA stands disposed of.

(S.D. Dubey)
Technical Member
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(Justice N. K. Patil)
Judicial Member