

IN THE HIGH COURT OF ANDHRA PRADESH: AMARAVATI

WRIT PETITION No.25317 OF 2011

% Dated 31.12.2024

#W.P.No.25317 OF 2011
M/s. Lanco Kondapalli Power Limited,
Plot No.4, Softsol Building,
Software Units Layout,
HITEC City, Madhapur
Hyderabad – 500 081 and another

..... Petitioners

Vs.

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Andhra Pradesh Power Coordination Committee,
Vidyut Soudha, Hyderabad
Rep by its Chief Engineer (Commercial) & 6 others

..... Respondents

JUDGMENT PRONOUNCED ON: 31.12.2024

THE HON'BLE SRI JUSTICE VENKATESWARLU NIMMAGADDA

Whether Reporters of Local newspapers
may be allowed to see the Judgments?

Whether the copies of judgment may be marked to Law
Reporters/Journals

Whether Their Ladyship/Lordship wish to see the fair
copy of the Judgment?

*** THE HON'BLE SRI JUSTICE VENKATESWARLU NIMMAGADDA****+ WRIT PETITION No.25317 OF 2011**

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.....Respondents

! Counsel for the petitioner : Sri D.S. Sivadarshan

^ Counsel for the respondent :
1. Learned Advocate General
2. Sri V.R. Reddy Kovvuri
3. Sri Anup Kowshik Karavadi

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? Cases referred

1. 2008 ELR (SC) 0001
2. CA (AT) (Insol) No.650 of 2020 dated 25.02.2022

THE HON'BLE SRI JUSTICE VENKATESWARLU NIMMAGADDA**WRIT PETITION No.25317 OF 2011****ORDER:-**

1. The writ petition is filed challenging the action of the respondents in limiting the installed capacity of the 1st petitioner company's project to 361.92 MW as against 368.144 MW pending adjudication of the issue by competent forum and making the monthly payment basing on the reduced installed capacity as arbitrary, illegal, in violation of Principles of Natual Justice besides violating the rights guaranteed under Articles 14 and 19(1)(g) of Constitution of India.

2. The 1st Petitioner is a company, initially incorporated as M/s. Lanco Power Limited and later renamed multiple times, engaged in electricity generation. It entered into a Power Purchase Agreement (PPA) with the A.P. State Electricity Board for a power project at Kondapalli Village, Krishna District. The PPA was later reentered and later constituted with various government utilities under the Andhra Pradesh Electricity Reforms Act, 1998.

3. The Petitioner owns and operates a 368.144 MW power project at Kondapalli, which commenced operations in October 2000. Despite initial delays, the respondents began purchasing power from the Petitioner in January 2001. The installed capacity was tested and confirmed to be 368.144 MW, which was accepted by the 2nd Respondent. However, in 2003, the 2nd Respondent sought to reduce the installed capacity, proposing adjustments based on ISO standards and tolerance limits. The Petitioner objected, arguing that the installed capacity had been agreed upon in 2001 and could not be re-examined.

4. The dispute escalated when the 2nd Respondent threatened to revise the capacity and related payments. The Petitioner filed a Civil Court case in 2003 under the Arbitration and Conciliation Act, which resulted in an order in its favor in 2008. The respondents appealed, and the case remains pending.

5. Meanwhile, the 2nd Respondent approached the A.P. Electricity Regulatory Commission (APEREC) in 2004 to resolve the dispute, bypassing the dispute resolution mechanism outlined in the PPA. The

Petitioner subsequently filed a writ petition in 2004 challenging APERC's jurisdiction, and the case is ongoing.

6. The Andhra Pradesh Government constituted a committee in 2008 to resolve the issue, which referred the matter to the Central Electricity Authority (CEA). The CEA's report in 2010 said that an installed capacity of 361.92 MW, for which the Respondents issued subsequent billings. The Petitioner contested this, arguing that the CEA report ignored certain technical aspects, and requested the Government to reconsider the issue of its production capacity

7. Despite the pending disputes, the Respondents unilaterally reduced the installed capacity in 2011, which the Petitioner challenged as illegal and in violation of court orders. The reduction led to short payments, and the Petitioner faced severe financial difficulties. The Petitioner seeks interim relief, including the restoration of the original installed capacity and the payment of the full amounts owed, pending the final resolution of the dispute.

8. The Petitioner requests a writ to declare the Respondents' actions as unlawful and to restrain them from making deductions based on the

disputed CEA report, pending the outcome of the proceedings before the competent authorities.

9. The Respondents deny the Petitioner's claims, asserting that the installed capacity of the Petitioner's project is 351.49 MW, not the claimed 368.144 MW. They explain that in 2001, due to an error, the capacity was mistakenly considered as 368.144 MW, which was later corrected in 2003, and the Petitioner was notified of this mistake. They contend that their actions were neither arbitrary nor illegal and that the Petitioner is estopped from disputing the CEA report dated 12-01-2010. Regarding the Commercial Operation Date (COD), the Respondents argue that the date and capacity determination are disputed, with the capacity initially overstated due to an incorrect calculation in 2001, and the correct capacity should be 351.49 MW.

10. The Respondents further assert that the dispute should be adjudicated by APERC, following the dismissal of the Petitioner's arbitration application, and that the dispute resolution mechanism in the PPA does not apply. Concerning the CEA report, the Respondents clarify that the report dated 12-01-2010, which sets the installed capacity

at 361.92 MW, was issued at the Petitioner's request, and they are willing to adopt this figure temporarily until APERC's final decision. The Respondents argue that the Petitioner cannot contest the CEA report since it was initiated by the Petitioner.

11. The Respondents also defend their action of revising the capacity to 361.92 MW, stating that it was not unilateral or in violation of natural justice. The revision was made after consulting the Petitioner and was necessary to correct the earlier error, which led to the Petitioner receiving excess payments. They emphasize that the revision was in the public interest, as the Petitioner had been overpaid by over Rs. 1 crore per month, and continuing with these payments would cause significant financial burden to public exchequer.

12. Finally, the Respondents request that the Petition should be dismissed, arguing that any interim relief in favor of the Petitioner would burden the consumers, and that the balance of convenience is in favour of the Respondents.

13. During hearing, learned counsel for the petitioner submits that the writ petition is liable to be dismissed as infructuous, in view of the orders passed in C.M.A.No.1284 of 2008 by the Division Bench of Hon'ble High Court of Telangana.

14. On the other hand, learned Advocate General appearing for the respondents opposed the contention of the learned counsel for the petitioner and submits that, the claim of the respondents did not become infructuous, for the reason that, in view of the ratio laid down by the Hon'ble Supreme Court in **Gujarat Urja Vikash Nigam Limited vs. Essar Power Limited**¹, conferring the jurisdiction of Andhra Pradesh Electricity Regulatory Commission (for short hereinafter referred as APERC') in respect of disputes between the state power utilities and licensees/power generating companies, as per the provisions of the Electricity Act, 2003.

15. He submits that, in consonance with the ratio laid down by the Hon'ble Apex Court in **Essar Power Limited** case, the 2nd respondent invoked the jurisdiction of APERC in respect of the installed capacity of

¹ 2008 ELR (SC) 0001

the project of the petitioners by way of O.P (SR) No.10 of 2004 before the Hon'ble APERC. He further submits that, the order in O.P.(SR) No.10 of 2004 have attained finality and the said order was assailed in W.P.No.738 of 2004, challenging the vires of the Electricity Act, 2003, as unconstitutional and sought relief to declare that APERC has no jurisdiction.

16. He submits that, initially, Hon'ble High Court of Telangana granted interim order directing APERC not to proceed with O.P.(SR) No.10 of 2004, as such the same is still pending for further consideration. He further submits that, considering the project installed capacity as 351.49 MW, the excess payment made to the petitioner comes to Rs.145 crores from the year 2001 and by considering 361.92 MW as capacity of project, as per the second report of Central Electricity Authority, the excess payment made is Rs.53.00 crores, thereby the said excess amount needs to be recovered. Therefore, the impugned proceedings in the writ petition did not become infructuous, as contended by the learned counsel for the petitioner, in view of the fact that the petitioner underwent IBC and in view of the orders passed by NCLT, as mentioned above.

17. Heard learned Senior Counsel for the petitioner, learned Advocate General for the respondents and perused the material available on record.

18. The contention of the learned Senior Counsel for the petitioner that once the petitioner company underwent the process of Insolvency and Bankruptcy Code, at any stage of pending proceedings against the Corporate Debtor Company, as an outgoing concern, it cannot enforce against the Corporate Debtor Company is valid and sustainable, in view of the ratio laid down by the Hon'ble National Company Law Appellate Tribunal, Principal Bench, New Delhi in **M/s. Shiv Shakti Inter Globe Exports Pvt. Ltd vs. M/s. KTC Foods Private Limited & another²**, wherein it is held as follows:

21. Adverting to the contention of the Learned Counsel for the Appellant that the Adjudicating Authority has erred in denying the sale of the 'Corporate Debtor' as a 'going concern' to the Appellant without including any contingent liabilities, we hold that it is a settled law that when the sale proceeds of a " 'Corporate Debtor' are duly distributed in the Order of priority and in the manner prescribed under Section

² CA (AT)(Insol) No.650 of 2020 dated 25.02.2022

53 of the Code, claims of any other Creditor cannot be entertained contrary to the provisions entailed under Section 53; subsequent to the distribution of sale proceeds under Section 53 no other entity including any Government entity can claim any past unpaid or outstanding dues against the Appellant who has purchased the 'Corporate Debtor Company' as a 'going concern'. It is significant to mention that the second Respondent/Liquidator has specifically submitted that even these claims by the Uttar Haryana Bijili Vitran Nigam were not submitted in the prescribed form either during the CIRP Process or at the Liquidation stage. We are of the considered view that at this stage subsequent to the sale of the 'Corporate Debtor Company' as a 'going concern', these claims cannot be foisted upon the Appellant. The scope and objective of the Code is to extinguish all claims specifically the ones which were not even made during the CIRP or in the Liquidation stage, to aid the purchaser of the Company as a 'going concern' to start on a 'clean slate'. The Hon'ble Supreme Court in 'Ghanshyam Mishra & Sons Pvt. Ltd.' Vs. 'Edelweiss Asset Reconstruction Company Ltd. & Ors.', Civil Appeal No. 8129 of 2019 and in 'CoC of Essar Steel India Ltd.' Vs. 'Satish Gupta & Ors.' (2020) 8 SCC 531 has laid down the proposition that the purchaser of the Company even in the Liquidation stage cannot be burdened

with past liabilities when it is not mentioned in the 'Sale Notice'."

19. Therefore, the submission of the learned counsel for the petitioner that the claim of the respondents regarding recovery of money which is not finally determined so far and after finalization of proceedings under IBC Code, the respondents are not entitled for any claim, more particularly, the claim under the impugned proceedings became infructuous, as held by the Division Bench of the Hon'ble High Court of Telangana in C.M.A.No.1284 of 2008 is incorrect. The contention of the petitioner that the impugned proceedings have become infructuous is not a merit submission, since the proceedings for determination between the parties is pending by way of O.P on the file of APERC, much before to the proceedings invoked under IBC. Moreover, the said proceedings were allowed at the instance of the petitioner by filing W.P.No.7838 of 2004 on the file of the Hon'ble High Court of Telangana.

20. The contention of the learned Advocate General for the respondents that, the Central Electricity Authority submitted a report, one in the year 2005 at the instance of the respondents holding that the installed capacity of the petitioner is 351.49 MW only and received

money at the rate of the installed capacity of the petitioner 368.144 MW. But, later, at the instance of the petitioner, the Central Electricity Authority finally submitted its another report, wherein it is held that, in the year 2010, the installed capacity of the petitioner is only 361.92 MW.

21. From the above, it is clear and categorical that the petitioner is under liability to the respondents for extra claim amount already received by the petitioner, for which, the respondents invoked the jurisdiction of APERC, which is the competent adjudicating authority for redressal of the disputes between the respondents and the petitioners, as held in **Gujarat Urja Vikash Nigam Limited vs. Essar Power Limited**, is a valid submission and liable to be accepted.

22. Further, the adjudicatory proceedings filed for redressal of the disputes regarding the installed capacity of the project of the petitioner are pending on the file of the APERC did not become infructuous. Since the claimant before the Commission is a public authority and the petitioner received excess amount from the public exchequer. Therefore, the question whether the respondents can recover the amount or not

even after completion of adjudication before the APERC can be decided by invoking appropriate proceedings before the competent authority.

23. Having considered the facts and circumstances of the case and the legal proposition relied upon by both the counsel, liberty is granted to the petitioner and respondents to sort out their claims by themselves, proposing out of these legal principles pending before APERC.

24. With the above, writ petition is disposed of. No costs.

25. Consequently, miscellaneous applications pending if any, shall stand closed.

JUSTICE VENKATESWARLU NIMMAGADDA

Date: 31.12.2024

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THE HON'BLE SRI JUSTICE VENKATESWARLU NIMMAGADDA

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Date: 31.12.2024

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