

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Miscellaneous Application No. 3 of 2021 in Case No.226 of 2020

Miscellaneous Application of M/s Kreate Energy (I) Pvt. Ltd seeking impleadment of Tata Power Co. Ltd. (Distribution Business) in the matter of Petition filed by Lloyds Metals & Energy Ltd. against Kreate Energy (I) Pvt. Ltd. for adjudication of a dispute arising from a Power Purchase Agreement.

M/s Kreate Energy (I) Pvt. Ltd. (KEIPL) : Applicant
M/s Lloyds Metals & Energy Ltd. (LMEL) : Respondent No.1
M/s The Tata Power Co. Ltd (TPCL) : Respondent No.2

Coram

Sanjay Kumar, Chairperson
I.M. Bohari, Member
Mukesh Khullar, Member

Appearance:

For the
Applicant : Shri. Adarsh Tripathi (Adv)
Respondent No.1 : Shri. Abhishek Khare (Adv.)
Respondent No.2 : Shri. Venkatesh (Adv)

ORDER

Date: 06 August 2021

1. Lloyds Metals & Energy Ltd (LMEL) filed Petition on 28 November 2020 under Section 86(1)(f) of the Electricity Act, 2003 read with other applicable provisions of the Electricity Act-2003 (EA-2003), seeking adjudication of a dispute arising from a Power Purchase Agreement (PPA) with M/s Kreate Energy (I) Pvt. Ltd. (KEIPL).

2. KEIPL has filed application dated 13 January 2021, which is registered as Miscellaneous Application (MA) No. 03 of 2021 seeking impleadment of Tata Power Co. Ltd (TPC) in the proceedings of Case No.226 of 2020.

3. **KEIPL'S main prayers are as under:**

(a) *Allow the present application and implead TATA POWER CO. LTD. as a necessary and proper party in the present proceedings;*

(b) *Grant an extension of time for filing the reply to the main petition until the present application is decided;*

4. **KEIPL in its MA No.3 of 2021 has stated as follows:**

4.1. The present application is being filed by KEIPL under the principles of Order I Rules 10 of the Code of Civil Procedure, 1908, *inter alia*, for the impleadment of TPC as a necessary and proper party for adjudication of the present dispute and for extension of time for filing the reply to the main petition till the disposal of the present application.

4.2. KEIPL is in the business of power trading and is an inter-state Power Trading Licensee merely working for meagre trading margin.

4.3. TPC is a necessary and proper party and no effective Order can be passed in its absence, *inter alia*, for the following reasons:

a. LMEL had issued authorization in favour of KEIPL specifically for the purpose of participating in the tender issued by TPC and thus the entire transaction between LMEL and KEIPL was based on the premise that power would be supplied to TPC through KEIPL acting as intermediary/facilitator.

b. In furtherance of the LoI dated 12 March 2020, KEIPL took the consent of LMEL and applied to Maharashtra State Load Dispatch Centre for grant of Open Access for supply of 15MW to TPC for the period 01 April 2020 to 30 April 2020 on "Round the clock" RTC basis.

c. On 26 March 2020, TPC sent a notice to KEIPL invoking Force Majeure and showed its inability to avail power and claimed that neither party was to pay any penalties or compensation. Consequently, KEIPL also issued notice dated 26 March 2020 to LMEL also invoking Force Majeure.

- d. It has to be further appreciated that any compensation in case awarded by the Commission would have to be ultimately paid by TPC being the alleged defaulting party, and hence, it would be prudent that TPC is duly heard before passing of any Order.
 - e. From the facts elaborated in the Petition in Case No.226 of 2020, it is clearly evident that allegations of non-performance are against the TPC and not against KEIPL.
- 4.4. Therefore, the entire dispute is between LMEL and TPC and not with KEIPL. KEIPL was just an intermediary for power supply. Therefore, TPC is a necessary and proper party in the present proceedings and without whose presence, no effective and proper order can be passed and therefore the present dispute cannot be adjudicated.
- 4.5. Also, in the event of the present application being allowed, the Petition would necessarily have to be amended and consequently, the Reply would also have to be amended. Hence, the time period for filing Reply to the main Petition may also be extended until the disposal of the present Application.

5. TPC in its reply dated 4 February 2021 has submitted as follows:

- 5.1. The Petition in Case No.226 of 2020 has been filed by LMEL under Section 86(1) (f) of the Electricity Act, 2003. By way of the said Petition, LMEL is seeking adjudication of a dispute arising from a PPA dated 05 February 2020 read with Addendum to the PPA dated 09 March 2020 executed between the LMEL and KEIPL.
- 5.2. Instant MA has been filed by KEIPL seeking to implead TPC in the present petition before the Commission on the alleged ground that TPC is a necessary and proper party for adjudication of the present dispute.
- 5.3. KEIPL has incorrectly contended that TPC is a proper and necessary party for the adjudication of the present dispute. In this regard, TPC cites judgment of the Hon'ble Supreme Court in *Kasturi v. Iyyamperumal & Ors.*, (2005) 6 SCC 733; wherein it has opined that two tests are required to be satisfied to determine the question as to whether a party is a necessary party or not. The relevant extracts from the said Judgment is reproduced below:

6. In our view, a bare reading of this provision namely, second part of Order 1 Rule 10 sub-rule (2) of the CPC would clearly show that the necessary parties in a suit for specific performance of a contract for sale are the parties to the contract or if they are dead their legal representatives as also a person who had purchased the contracted property from

*the vendor. In equity as well as in law, the contract constitutes rights and also regulates the liabilities of the parties. A purchaser is a necessary party as he would be affected if he had purchased with notice of the contract, but a person who claims adversely to the claim of a vendor is, however, not a necessary party. **From the above, it is now clear that two tests are to be satisfied for determining the question who is a necessary party. Tests are - (1) there must be a right to some relief against such party in respect of the controversies involved in the proceedings (2) no effective decree can be passed in the absence of such party...*** [Emphasis supplied]

- 5.4. In view of the above judgment, the following questions have to be decided while determining whether a party is a necessary party or not:
 - Can Commission pass an effective order in the absence of the said party; and
 - if any relief has been sought against the party in question.
- 5.5. From a perusal of the Petition in Case No.226 of 2020, it is clear that there is no relief being sought from TPC. In fact, a perusal of the prayer clause clearly demonstrates that LMEL is seeking relief against KEIPL. Even though the factual matrix has multiple reference to TPC, however, none of the letters/notices issued by TPC has been brought under challenge before the Commission by LMEL.
- 5.6. As such, there is no privity between TPC and the PPA executed between LMEL and KEIPL. Hence, TPC is neither a proper nor necessary party for the adjudication of the dispute sought by LMEL herein.
- 5.7. For supporting its claim TPCL refers to the Order dated 15 October 2019 passed by the Punjab State Electricity Regulatory Commission in Petition No. 55 of 2017.
- 5.8. It is trite in law that a court cannot travel beyond the prayer sought by a party. Therefore, even if TPC is made a party to the present proceedings, the nature of the Petition is such that no relief can be granted to LMEL as the prayers made in the present Petition are restricted to KEIPL.
- 5.9. KEIPL has incorrectly contended that the entire dispute is between LMEL and TPC. There is no provision under the PPA or the Addendum which can link any obligations or right of LMEL or KEIPL over TPC.
- 5.10. TPCL cannot be made liable to pay for compensation/damages arising out of contract to which neither it is party nor is privy to the terms and conditions therein. In fact, the only relationship KEIPL could establish between LMEL and TPC is the “ *LoI for supply of*

power to KEIPL for inward sale of Power to Tata Power Co. Ltd. Under Open Access” mentioned in the LoI dated 12 March 2020 issued by LMEL.

5.11. However, apart from the above, there is nothing on record to establish a contractual relationship between the LMEL and TPC. Further, the Petition has been filed by LMEL seeking compensation from KEIPL in terms of Clause 16 of the PPA executed between them. LMEL, in the entire Petition, has not made a single averment that the obligation to pay compensation can be traced back to TPC.

6. LMEL in its reply dated 22 March 2021 has submitted as under:

6.1. TPC is a necessary and proper party and no effective Order can be passed in its absence. The LMEL has issued authorization in favour of KEIPL specifically for the purpose of participating in the tender issued by TPC and thus the entire transaction between the LMEL and KEIPL was based on the premise that power would be supplied to TPC through KEIPL acting as intermediary/facilitator.

6.2. On 26 March 2020, TPC sent a notice to the KEIPL invoking Force Majeure and showed its inability to avail power and claimed that neither party was to pay any penalties or compensation. Consequently, the KEIPL also issued notice dated 26 March 2020 to the LMEL invoking Force Majeure.

6.3. It is an admitted fact that the contract between the LMEL and the KEIPL was a back-to-back contract of the KEIPL with TPC. In fact, both the contracts are identical save and except *mutatis mutandis* changes qua name of parties, address and such & similar aspects. Document dated 03 March 2020 from TPC to the KEIPL which categorically, expressly, sets out that the source of the power which is to be provided is from the LMEL. In April 2020 and thereafter, the LMEL has addressed letters to the KEIPL and the TPC on the issue at hand.

6.4. The LMEL's claims and the instant dispute cannot be adjudicated without delving into the issue of invocation of Force Majeure by TPC to the KEIPL. In the event any such adjudication does take place, TPC must be impleaded and given an opportunity to be heard by the Commission.

6.5. It has to be further appreciated that any compensation/reliefs/damages, in case awarded by the Commission may have to be ultimately paid by TPC being the alleged defaulting party, and hence, it would be prudent that TPC is duly heard before passing of any Order/Judgement/Decree.

6.6. Impleading TPC in the instant proceedings would prevent the multiplicity of proceedings that would arise in the event the instant Application is not allowed.

7. **KEIPL in its Rejoinder dated 22 March 2021 submitted as under:**

7.1. From the bare perusal of the Petition along with the documents as filed by the LMEL, it can be clearly deciphered that version of TPC is imperative for the adjudication of the present dispute in hand. The LOI clearly mentioned that supply of power to KEIPL for onwards sale of power to TPC. KEIPL was only acting as intermediary/trader to facilitate the transaction in which the end consumer/buyer is TPC while seller is LMEL.

7.2. In no manner, the transaction could have existed without the presence of TPC being the end buyer, as the power purchased was for TPC and the KEIPL cannot consume the power for its own use. It is clearly spelt out in the LoI dated 03 March 2020 of TPC that KEIPL was to supply power only from a single source, i.e. LMEL. Power supply from any other source/alternate source was not allowed by TPC. Similarly, LMEL's authorization was also in favour of supply of power only to TPC.

7.3. It is apparent that the TPCL did not accept or consume the power, which may or may not be on account of force majeure. It is apparent from the Petition that all the allegations of default are raised against TPC by the LMEL. It is further submitted that the entire issue for adjudication in the present petition is based on the validity of force majeure invoked by TPC as a reason for not consuming the power generated by LMEL. The validity of the force majeure event cannot be adjudicated without hearing the party that invoked force majeure.

7.4. In fact, the Petition has gone to the extent of mentioning that the invocation of Force Majeure by TPC at the first instance was illegal. Therefore, it is clear that presence of TPC is necessary for adjudication of the present petition.

7.5. To support its claim, KEIPL cited Order of CERC in Petition No. 319/MP/2013 titled as TPC-D Power Delhi Distribution Ltd. v. Jhajjar Power Ltd. and Anr., dated 18 April 2016.

7.6. Present issue deals with a composite transaction between three parties and the argument of TPC that there is no privity of contract between TPC and LMEL is meritless, and hence, it is imperative that TPC is impleaded as a party to the present proceedings.

7.7. In view of above, it is clear that the twin requirements as laid down by the Hon'ble Supreme Court in *Kasturi v. Iyyamperumal & Ors.*, (2005) 6 SCC 733 are duly satisfied. It is submitted that the principles of law are in favor of the Applicant and it is clearly proved that TPC is required to be impleaded.

8. At the E-hearing held on 29 June 2021, both parties reiterated their submission made in Petition/Reply.
9. **LMEL in its additional submission dated 9 July 2021 submitted as under:**
 - 9.1. TPC is the ultimate buyer. KEIPL is only an intermediary. TPC is a necessary party to this dispute. By impleading TPC, the Commission would have a chance to comprehensively look into the matter.
 - 9.2. If impleadment is not allowed, one matter will have to be heard twice. Orders of similar, *pari materia* nature, will have to be passed in 2 matters.
 - 9.3. Apart from above, LMEL reiterated its submission dated 22 March 2021.

Commission's Analysis and Rulings

7. The Commission notes that KEIPL has filed this application requesting impleadment of TPC in the Case filed by LMEL (in Case No.226 of 2020) seeking relief against KEIPL. TPC has opposed impleadment in the present matter.
8. KEIPL has contended that it is trader of electricity and the contract based on which LMEL has filed Petition in Case No.226 of 2020 was back-to-back contract for supply of power generated by LMEL to TPC. LMEL in its Petition in Case No. 226 of 2020 has prayed for the damages arising out of the invocation of Force Majeure clause and denial to procure contacted power. Force majeure invoked by KEIPL is a subsequent act after force majeure invoked by TPC. LMEL in its Petition has tried to establish that invocation of Force Majeure event was illegal based on subsequent acts of TPC. The validity of the force majeure event cannot be adjudicated without hearing the party who firstly invoked force majeure i.e.TPC. KEIPL has also contended that the claim of damages made by LMEL will have to be ultimately passed on to TPC as in this transaction role of KEIPL is limited to that of a trader.
9. While opposing its impleadment in Case No.226 of 2020, TPC has contended that prayer clauses of Petition in Case No.226 of 2020 clearly demonstrate that LMEL is seeking relief against KEIPL and not against TPC. Further such compensation has been sought on the basis of Clause 16 of the PPA executed between LMEL and KEIPL to which TPC was not even a signatory. Therefore, TPC is neither a proper nor necessary party for the adjudication of the dispute sought by LMEL herein.

10. Contrary to submission of TPC, LMEL has supported the claim of KEIPL and mentioned that TPC is a necessary and proper party. Further, no effective Order can be passed in its absence. The LMEL has issued authorization in favour of KEIPL specifically for the purpose of participating in the tender issued by TPC and thus the entire transaction between the LMEL and KEIPL was based on the premise that power would be supplied to TPC through KEIPL acting as an intermediary/facilitator.

11. Having heard arguments of all parties and after going through the submission filed, the Commission notes that KEIPL's present application is for impleading TPC in Case No.226 of 2020 filed by LMEL. In Case No.226 of 2020, LMEL has made following prayers:

“

(a) the instant petition be admitted and allowed; and

(b) the Respondent's invocation of Force Majeure be declared void and illegal; and

(c) the Respondent be directed to pay to the Petitioner an amount of 3,79,06,120.94/- (Rupees Three Crores Seventy Nine Lakhs Six Thousand One Hundred and Twenty and Ninety Four Paise Only) as calculated under clause 16 of the PPA; and

(d) pass any other orders as may be appropriate under the facts and circumstances.”

Prayer clause (b) refer to invocation of Force Majeure and seeks declaration of it being void and illegal. Further, prayer clause (c) seeks compensation in terms of article 16 of the PPA.

12. The Commission notes that the Hon'ble Supreme Court through various Judgement have settled the issue that impleadment of party can be allowed if such party is proper and necessary party and whose presence is necessary for effective and complete adjudication of the issues involved.

13. Although it is correct that impleadment application need not be decided based on possible final Judgement on the relief sought in main matter, but the same needs to be scrutinized to see whether such impleadment is necessary for effective adjudication of relief sought in the main matter. The Commission notes that a necessary party is a person who ought to have joined as a party and in whose absence no effective Order could be passed. The Hon'ble Supreme Court in the matter of *Kasturi v. Iyyamperumal & Ors.*, (2005) 6 SCC 733, has set out two (2) tests. Test are- (1) there must be a right to some relief against such party in respect of the controversies involved in the proceedings (2) no effective decree can be passed in the absence of such party. Both TPC and KEIPL has relied upon the said Supreme Court Judgement.

14. KEIPL's argument is based on the premise that it is having back-to-back contract with TPC and LMEL for sale of power. Contract becomes inexecutable if any party retracts from its stand. The Commission notes that KEIPL is a trader, facilitating energy transaction between

Generator LMEL and buyer TPC. From the submissions on records the sequence of events/actions can be observed. The sequence is that (a) TPC issued LoI dated 03 March 2020 in favour of KEIPL for purchase of power during period 1 April 2020 to 30 June 2020, wherein LMEL is identified as Generator. (b) Corridor identified is LMEL-MSETCL-TPC. (c) Subsequently, LMEL issued LoI to KEIPL dated 12 March 2020 which identifies TPC as a buyer. (d) On 26 March 2020 TPC issued Force Majeure notice to KEIPL and showed its inability to avail contracted power. (e) KEIPL in turn has issued Force Majeure notice dated 26 March 2020 to LMEL. (f) Now, LMEL in its Petition in Case No. 226 of 2020 has contended that Force Majeure invoked by TPC was illegal.

15. In view of above, although there is no relief/ prayer sought against TPC in Case No.226 of 2020, the main ground of seeking relief is alleged illegal invocation of Force Majeure by TPC to KEIPL which in turn issued force majeure notice which is under challenge in the main case. Further, it is also an agreed position that TPC has been referred with respect to various factual background in Case No. 226 of 2020. Asking KEIPL to file similar case against TPC would result in multiplicity of proceedings on the same cause of action between same set of parties. Therefore, the Commission in the interest of justice and for expediently settling the matter is of the considered opinion that no effective order can be passed in absence of submissions of TPC on these factual aspects/ contentions. Hence, TPC needs to be impleaded in the Case No. 226 of 2020.

16. Hence, the following Order:

ORDER

1. **Miscellaneous Application No.3 of 2021 is allowed. Tata Power Co. Ltd. is impleaded as a party Respondent in Case No.226 of 2020.**
2. **Lloyds Metals & Energy Ltd to serve copy of its Petition in Case No.226 of 2020 to Tata Power Co. Ltd within a week.**
3. **Tata Power Co. Ltd and Kreate Energy (I) Pvt. Ltd to file its submission on merits in Case No.226 of 2020 within 2 weeks from receipt of above submission with copy served on all parties which they can respond, if required, within a week thereafter.**
4. **Post receipt of above submission, Secretariat of the Commission to fix next date of hearing in Case No. 226 of 2020.**

Sd/-
(Mukesh Khullar)
Member

Sd/-
(I.M. Bohari)
Member

Sd/-
(Sanjay Kumar)
Chairperson

