



नई दिल्ली
NEW DELHI

याचिका संख्या./ Petition No. 13/MP/2019

कोरम/ Coram:

श्री जिष्णु बरुआ, अध्यक्ष/Shri Jishnu Barua, Chairperson
श्री आई. एस. झा, सदस्य/ Shri I. S. Jha, Member
श्री अरुण गोयल, सदस्य/ Shri Arun Goyal, Member
श्री पी. के. सिंह, सदस्य / Shri P. K. Singh, Member

आदेश दिनांक/ Date of Order: 20th of November, 2023

IN THE MATTER OF:

Petition under Section 79 of the Electricity Act, 2003 read with Article 12 of the Power Purchase Agreement executed between the Petitioners and Respondents for seeking declaration of and relief for 'Change in Law' and seeking an appropriate mechanism for grant of an appropriate adjustment/ compensation to offset commercial impact of change in law events on account of imposition of safeguard duty on the import of solar cells and modules.

AND IN THE MATTER OF:

Mahoba Solar (UP) Private Limited

Adani House, Near Mithakhali,
Six Roads, Navrangpura,
Ahmedabad-380009

...Petitioner

VERSUS

1. Solar Energy Corporation of India Limited

D-3, 1st Floor, A-Wing,
Prius Platinum Building,
District Centre - Saket,
New Delhi-110017

2. BSES Yamuna Power Limited

Shakti Kiran Building,
Karkardooma,
New Delhi-110032

...Respondents

Parties Present: Shri Sourav Roy, Advocate, MSUPPL
Shri Prabudh Singh, Advocate, MSUPPL
Shri Kaushal Sharma, Advocate, MSUPPL
Shri Vishal Malik, Advocate, MSUPPL
Shri Ravi Sinha, MSUPPL
Ms. Tanya Sareen, Advocate, SECI
Ms. Anushree Bardhan, Advocate, SECI
Ms. Surbhi Kapoor, Advocate, SECI

आदेश/ ORDER

The Petitioner, M/s. Mahoba Solar (UP) Private Limited (MSUPL) is a generating company engaged in the business of development, building, owning, operating and maintaining utility scale grid connected solar power projects for the generation of solar power. Further, MSUPL has formed a project company namely M/s Kilaj Solar (Maharashtra) Pvt. Ltd within the provisions of the Request for Selection for development of Solar Power Project, generation and sale of solar power

2. Respondent No.1, Solar Energy Corporation of India Limited (SECI) is a Government of India enterprise under the administrative control of the Ministry of New and Renewable Energy (MNRE). SECI has been designated as the nodal agency for implementation of MNRE schemes for developing grid connected solar power capacity through Viability Gap Funding (VGF) mode in India.
3. Respondent No. 2, BSES Yamuna Power Limited (BYPL) is the distribution utility created with the principal object of engaging in the business of distribution and supply of electricity.
4. The Petitioner has made the following prayers:
 - a) *Admit the Petition;*
 - b) *Hold and declare that the imposition of Safeguard Duty on import of solar cells vide Notification No. 01/2018-Customs (SG) dated 30.07.2018, is an event under Change in Law;*
 - c) *Restore the Petitioner to the same economic condition prior to occurrence of the Changes in Law by increasing the tariff and allowing the carrying cost as prayed for in the present Petition.*

ALTERNATIVELY

 - d) *Direct the Respondent to pay the Petitioners an additional amount as one time compensation for the additional burden incurred by the Petitioners on establishing the said Solar Power Generating Systems, due to promulgation of levy of Safeguard Duty on the import of Solar Cells, whether or not assembled in modules or panels, subject to furnishing invoices by the Petitioner backed by statutory auditor certificate*

and also providing the carrying cost incurred by the Petitioner and to restore him to the same economic condition.

- e) Direct Respondent to pay within sixty days from the date of raising such claim by the Petitioner, post Commercial Operation Date of the Petitioner's Solar Power Generating Systems, failing which it will attract late payment surcharge as provided under PPA.
- f) To pass such other order(s) and / or direction(s) as it may deem fit and proper in the facts and circumstances of the case.

Brief Background:

5. The brief details of the Petition are set out as under:

Location of the project	Bhadla Phase IV Solar Park, Rajasthan
Scheme	Setting up of 2000 MW (250 MWx8) ISTS connected Solar Power Projects under Global Competitive Bidding
Capacity	50 MW
Tariff	Rs. 2.54/kWh
Request for Selection (RfS) was floated on	30.01.2018
Bid submitted on	15.06.2018
E-reverse auction was conducted on	02.07.2018
Letter of Award was issued on	27.07.2018
Safeguard Duty was notified vide <i>Notification No. 01/2018-Customs (SG) (2018 SGD Notification)</i>	30.07.2018
Power Sale Agreement (PSA) was executed on	02.08.2018
Power Purchase Agreement (PPA) was executed on	30.11.2018
Order in Petition No. 13/MP/2019 (<i>Impugned Order</i>) was published on	04.10.2019
Scheduled Commercial Operation Date (SCoD) of the project	25.07.2020
APTEL judgement in A.No. 256 of 2019, A. No. 256 of 2019 & Batch in the matter of Parampujya Solar Energy Pvt. Ltd. v. CERC and Ors. (<i>Parampujya judgement</i>)	15.09.2022

6. The Commission qua the *impugned order* dated 04.10.2019 allowed the claims of MSUPL for compensation on account of imposition of safeguard duty vide *2018 SGD Notification*, and it disallowed the claims for carrying cost/interest on working capital. Relevant excerpts of the order dated 04.10.2019 are as follows:

“85. The decisions in this Order are summed up as under:

- a. Issue No. 1: **The imposition of the “Safeguard Duty” vide Notification No. 1/2018 (SG) dated 30.07.2018 is squarely covered as the event classified as “Change in Law” under first, second and last bullet of Article 12 of the PPAs.** The Commission directs the Petitioners to make available to the Respondent No.1 all relevant documents exhibiting clear and one to one correlation between the projects and the supply of imported goods till Scheduled Commissioning date duly supported by

relevant invoices and Auditor's Certificate. The Claim based on discussions in paragraph 76 above of this Order shall be paid within sixty days of the date of this Order or from the date of submission of claims by the Petitioners whichever is later failing which it will attract late payment surcharge as provided under PPAs. To ensure time bound compliance within sixty days of the Order, it is directed that the Respondent No.1 shall reconcile the claim related documents within 15 days of submission of claim by Petitioners. Alternatively, the Petitioners and the Respondent No. 1 may mutually agree to a mechanism for the payment of such compensation on annuity basis spread over the period not exceeding the duration of the PPAs as a percentage of the tariff agreed in the PPAs.

b. Issue No. 2: **The claim regarding separate Interest on Working Capital/Carrying Cost is not admissible.**"

7. Aggrieved by the orders passed by the Commission, MSUPL preferred an appeal no. 427 of 2019 before the Appellate Tribunal for Electricity (APTEL) which was clubbed with A. No. 256 of 2019 & Batch.
8. APTEL, vide judgement dated 15.09.2022 in A. No. 256 of 2019 & Batch in case title *Parampujya Solar Energy Pvt. Limited & Ors. vs. CERC & Ors.*, remanded the Batch Petitions to the Commission with the following directions (in paragraph 109):

30. The order impugned by this appeal was passed by the Central Commission on 04.10.2019 commonly on four petitions including Petition no. 13/MP/2019, preferred by the appellant, Mahoba Solar (UP) Private Limited (hereinafter referred to variously as, "Mahoba" or "MSPL"). Mahoba is a generating company similarly placed as Parampujya and Wardha. It has formed a project company namely M/s Kilaj Solar (Maharashtra) Pvt. Ltd. for development of SPP.

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109. The other captioned appeals – Appeal no. 256 of 2019 (*Parampujya Solar Energy Pvt. Limited & Anr. v. CERC & Ors.*), Appeal no. 299 of 2019 (*Parampujya Solar Energy Pvt. Limited v. CERC & Ors.*), Appeal no. 427 of 2019 (*Mahoba Solar (UP) Private Limited v. CERC & Ors.*), Appeal no. 23 of 2022 (*Prayatna Developers Pvt. Limited v. CERC & Ors.*) Appeal no. 131 of 2022 (*Wardha Solar (Maharashtra) Private Limited & Anr. v. CERC & Ors.*) and Appeal no. 275 of 2022 (*Parampujya Solar Energy Pvt. Limited & Anr. v. CERC & Ors.*) - deserve to be allowed. **We order accordingly directing the Central Electricity Regulatory Commission to take up the claim cases of the Solar Power Project Developers herein for further proceedings and for passing necessary orders consequent to the findings recorded by us in the preceding parts of this judgment, allowing Change in Law (CIL) compensation (on account of GST laws and Safeguard Duty on Imports, as the case may be) from the date(s) of enforcement of the new taxes for the entire period of its impact, including the period post Commercial Operation Date of the projects in question, as indeed towards Operation & Maintenance (O&M) expenses, along with carrying cost subject, however, to necessary prudence check.**"

9. **Hearing dated 02.05.2023:** The case was called for hearing on 02.05.2023. The Record of Proceedings (RoP) are as under:

Learned counsel for the Petitioner submitted that the present matter has been remanded by the Appellate Tribunal for Electricity vide judgment dated 15.9.2022 in Appeal Nos. 256 of 2019 and Ors. for passing the necessary order consequent to the findings rendered by the APTEL in the said judgment. The learned counsel submitted that similarly placed remand matters were already taken up by the Commission on 14.2.2023 and reserved for order. The learned counsel submitted that present matter may also be reserved for order. The learned counsel also added that the aforesaid judgment of APTEL has been challenged before the Hon'ble Supreme Court in Civil Appeal No. 8880 of 2022 wherein the Hon'ble Supreme Court vide order dated 12.12.2022 has observed that while the Commission shall comply with the directions issued vide the APTEL judgment, such order of the Commission shall not be enforced pending further order.

*2. Learned counsel for the Respondent, SECI sought liberty to place on record the aforesaid order of the Hon'ble Supreme Court in the present proceedings. **The Commission, however, indicated that the Commission has already taken note of the aforesaid order in its various order and as such filing of the said order by way of an additional affidavit would not require.***

3. Considering the submissions made by the learned counsel for the parties, the Commission reserved the matter for order.

Analysis and decision:

10. We have heard the learned counsels for the Petitioner and Respondents and have carefully perused the records and considered the submissions of the parties.
11. In this regard, it is pertinent to mention that the Commission has already passed well-reasoned Orders in similar matters in petitions (as mentioned below) wherein similar reliefs were sought by the parties with respect to compensation qua O&M/additional expenses, Carrying Cost etc. The Commission had allowed the claims for O&M/additional expenses and Carrying Costs etc. in similar petitions viz. 164/MP/2018 & Batch vide order dated 30.05.2023; 219/MP/2022 vide Order dated 21.04.2023; 722/MP/2020 & 723/MP/2020 vide Order dated 20.01.2023 etc. In the above Orders, the Commission has, *inter-alia*, held that the Petitioners should be entitled to compensation towards additional expenditure on account of Change in Law event in terms of Article 12.2 of the PPA along with carrying cost on account of Change in Law event up to the date of reimbursement by the Respondents. However, the directions related to compensation for the period post COD shall not be enforced and shall be subject to further orders of the Hon'ble Supreme Court in Civil Appeal No. 8880/2022 in *Telangana Northern Power Distribution Company Limited & Anr. V. Parampujya Solar Energy Pvt. Limited & Ors*, and connected matters.

12. In the instant petition, the bid was submitted by MSUPL on 15.06.2018, the PPA was executed between the parties on 30.11.2018, and the SCoD of the project was 25.07.2020 whereas the SGD Laws were applicable from 01.08.2018. As such, the Petitioner's projects were impacted by the 2018 SGD Notification dated 30.07.2018. Therefore, MSUPL is entitled to relief as per the terms of Article 12 of the PPA.
13. APTEL, vide *Parampujya judgement* dated 15.09.2022 remanded the instant Petition to the Commission with the following directions (in paragraph 109):

“.....

*109. The other captioned appeals – Appeal no. 256 of 2019 (Parampujya Solar Energy Pvt. Limited & Anr. v. CERC & Ors.), Appeal no. 299 of 2019 (Parampujya Solar Energy Pvt. Limited v. CERC & Ors.), **Appeal no. 427 of 2019 (Mahoba Solar (UP) Private Limited v. CERC & Ors.)**, Appeal no. 23 of 2022 (Prayatna Developers Pvt. Limited v. CERC & Ors.) Appeal no. 131 of 2022 (Wardha Solar (Maharashtra) Private Limited & Anr. v. CERC & Ors.) and Appeal no. 275 of 2022 (Parampujya Solar Energy Pvt. Limited & Anr. v. CERC & Ors.) - deserve to be allowed. **We order accordingly directing the Central Electricity Regulatory Commission to take up the claim cases of the Solar Power Project Developers herein for further proceedings and for passing necessary orders consequent to the findings recorded by us in the preceding parts of this judgment, allowing Change in Law (CIL) compensation (on account of GST laws and Safeguard Duty on Imports, as the case may be) from the date(s) of enforcement of the new taxes for the entire period of its impact, including the period post Commercial Operation Date of the projects in question, as indeed towards Operation & Maintenance (O&M) expenses, along with carrying cost subject, however, to necessary prudence check.**”*

14. In view of the above, this Commission holds that MSUPL shall be entitled to compensation (pre-COD & post-COD) towards additional expenditure on account of the Change in Law event in terms of Article 12 of the PPAs up to the date of reimbursement by the Respondents. MSUPL shall also be eligible for carrying cost starting from the date when the actual payments were made to the Authorities till the date of issuance of this Order, at the actual rate of interest paid by the Petitioners for arranging funds (supported by Auditor's Certificate) or the rate of interest on working capital as per applicable RE Tariff Regulations prevailing at that time or the late payment surcharge rate as per the PPA, whichever is the lowest. Once a supplementary bill is raised by MSUPL in terms of this order, the provision of Late Payment Surcharge in the PPA would kick in if the payment is not made by the Respondents within the due date.
15. Accordingly, the Commission hereby directs the contracting parties to carry out reconciliation of additional expenditure along with carrying cost by exhibiting clear and one to one correlation with the projects and the invoices raised supported with auditor certificate.

The Commission further directs that the responding Discom i.e. BYPL, is liable to pay SECI all the above reconciled claims that SECI has to pay to MSUPL. However, payment to MSUPL by SECI is not conditional upon the payment to be made by BYPL to SECI.

16. The Hon'ble Supreme Court in its Order dated 12.12.2022, in Civil Appeal no. 8880/2022 in the case of *"Telangana Northern Power Distribution Co. Limited & Anr. Vs. Parampujya Solar Energy Pvt. Limited & Ors."* (and in similar Orders dated 03.01.2023 and 23.01.2023) has held as under:

"Pending further orders, the Central Electricity Regulatory Commission (CERC) shall comply with the directions issued in paragraph 109 of the impugned order dated 15 September 2022 of the Appellate Tribunal for Electricity. However, the final order of the CERC shall not be enforced pending further orders."

17. Therefore, the directions issued in this Order so far as they relate to compensation for the period post Commercial Operation Date of the project in question as also towards carrying cost shall not be enforced and shall be subject to further orders of the Hon'ble Supreme Court in Civil Appeal No. 8880/2022 in *Telangana Northern Power Distribution Company Limited & Anr. V. Parampujya Solar Energy Pvt. Limited & Ors*, and connected matters.
18. The Petition No. 13/MP/2019 is disposed of in terms of the above.

Sd/-
पी. के. सिंह
सदस्य

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आई. एस. झा
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