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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on: 09th February, 2021

+ W.P.(C) 1380/2021 & CM APPLN. 3897/2021

KSK MAHANADI POWER COMPANY LTD. Petitioner

versus

SOUTHERN POWER DISTRIBUTION COMPANY OF
ANDHRA PRADESH LIMITED &ORS.. Respondents

Advocates who appeared in this case:

For the Petitioner: Mr. Ramji Srinivasan, Senior Advocate with Mr. Anand Ganesan, Mr. Ashwin Ramanathan, Mr. Rajshree Chaudhary, Mr. Shivkrit Rai, Advocates

For the Respondents: Mr. Basava Prabhu S. Patil, Senior Advocate with Mr. Ardhendumauli Kumar Prasad, Mr. Nishant Kumar, Mr. Geet Ahuja, Mr. Kushagra Raj, Mr. Ashish Madaan and Ms. Utkarsha Sharma, Advocates for R-1 & R-2

Mr. Sidhant Kumar, Advocate for R-3

Mr. Chetan Sharma, ASG with Mr. Rajesh Gogna, CGSC, Mr. Amit Gupta, GP, Mr. Sahaj Garg, Mr. Akshay Gadeock, Mr. R. Venkat Prabhat and Mr. Karan Chhibber, Advocate for R-4

CORAM:-

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J.

1. The hearing was conducted through video conferencing.

2. Petitioner impugns notice dated 19.12.2020 (sic) issued by AP Discoms seeking termination of the Power Purchase Agreement (PPA for short) and further seeks a direction to respondent no. 3 to grant consent for open access to enable the petitioner to make available the power to AP Discoms in terms of the Power Purchase Agreement.

3. Learned Senior Counsel for the respondent objects to the maintainability of the present petition. It is contended that the petition has been filed by one Mr. Anand Tiwari, the Executive-Corporate Affairs of the petitioner company. It is submitted that as the petitioner company is undergoing Corporate Insolvency Resolution Process and a Resolution Professional has already been appointed, there is no authority of said Mr. Anand Tiwari to file the present petition and the petition should have been filed by the Resolution Professional.

4. An affidavit of the Resolution Professional has been filed by the petitioner, copy of which has been forwarded over e-mail of the Court Master. The Resolution Professional has stated that the petition was filed with his knowledge and with his consent by Mr. Anand Tiwari, who was authorised to do so.

5. Further, it is contended by learned counsel for the respondent that this court would not have the territorial jurisdiction to entertain the petition.

6. It is contended by learned Senior Counsel for the petitioner that the Central Electricity Regulatory Commission (CERC for short) is

situated in Delhi and the Petitioner was to approach the CERC but as the CERC is not functional, petitioner has been constrained to approach this court. It is further submitted that Power Purchase Agreement was also amended with the approval of the CERC and as such part of the cause of action has accrued in Delhi. Further, it is submitted that the Supreme Court by its order dated 29.01.2021 in Civil Appeal No. 226-227 of 2021 has relegated the petitioner to the Central Commission and also directed that the Central Commission will decide the dispute before it in accordance with law including the question as to its jurisdiction.

7. The present petition has been filed solely on the ground that the Central Commission is not functional, in as much as, it does not have a Member (law). It is noticed that by order dated 20.01.2021 in CONT. CAS. (C) 429/2020 in Civil Appeal No. 14697/2015 the Supreme Court had opined that it would be in the interest of justice, if the Member (law) joins at the earliest.

8. Learned ASG was requested to ascertain from the Commission as to when the Member (law) is likely to join.

9. Learned ASG assisted by Mr. Rajesh Gogna, Standing Counsel appearing for UOI submits that Member (law) is likely to assume charge within the next two weeks, however, no fixed date has yet been finalised.

10. One of the issues arising is with regard to the invocation of the

Bank Guarantee consequent to the alleged termination of the PPA.

11. On 05.02.2021, learned Senior Counsel for the respondent had stated that though respondent had issued a letter invoking the subject bank guarantee, but in view of the directions issued by the Supreme Court a communication had been issued to the Bank on 30.01.2021 deferring the invocation till 05.02.2021. On 05.02.2021, respondent had agreed to issue another letter to the Bank deferring invocation till 08.02.2021. It is an admitted position that the said position is still continuing.

12. Learned Senior Counsel for the respondent submits that the short term open access, which was granted to the petitioner in terms of orders dated 28.04.2020 passed by the Appellate Tribunal as continued by order dated 29.01.2021 of the Supreme Court in Civil Appeal Nos. 226-227 of 2021, was continued only till 05.02.2021 and thereafter has been discontinued. It is stated that as on date, the short term open access is not being granted to the petitioner.

13. The Supreme Court by its order dated 29.01.2021 in Civil Appeal No. 226-227 of 2021 has relegated the petitioner to the CERC and also directed that the CERC would decide the dispute before it in accordance with law including the question as to its jurisdiction. In view of the said order of the Supreme Court, Respondents had deferred its invocation of the Bank Guarantee.

14. Since CERC is not functional and is likely to commence its

operation within the next two weeks, it would be in the interest of justice that the status as obtaining today be maintained by the parties till the CERC becomes operational and the Petition of the Petitioner is taken up for consideration.

15. Accordingly, this petition is disposed of with a direction that parties shall maintain status quo with regard to the invocation and encashment of the bank guarantee as obtaining today and further shall also maintain status quo with regard to the supply of power as obtaining today. Parties shall maintain status quo for a period of 30 days from today or till the time the petition and the application for interim orders of the petitioner is taken up for consideration by CERC, whichever is earlier.

16. It is clarified that thereafter, the interim protection would be subject to orders of the CERC.

17. It is clarified that CERC shall decide the petition and the application for interim orders of the petitioner without being influenced by anything stated in this order.

18. It is further clarified that this Court has neither considered nor commented upon merits of the contention of either party as also with regard to the issue of jurisdiction of the CERC to entertain the dispute. All rights and contentions of the parties are reserved.

19. In case CERC does not resume functioning within a period of

30 days from today, petitioner is given liberty to approach this Court for appropriate orders.

20. Petition is disposed of in the above terms.

21. Copy of the order be uploaded on the High Court website and be also forwarded to learned counsels through email by the Court Master.

FEBRUARY 9, 2021
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SANJEEV SACHDEVA, J



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