

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 154/MP/2015**

**Coram:**

**Shri Gireesh B. Pradhan, Chairperson  
Shri A.K. Singhal, Member  
Shri A. S. Bakshi, Member**

**Date of Order : 16.6.2016**

**In the matter of**

Petition under Section 79(1)(f) of Electricity Act, 2003 seeking adjudication of dispute between Adani Power Ltd. and Gujarat Urja Vikas Nigam Ltd. regarding the payment for electricity supplied by Adani Power Ltd. prior to scheduled Commercial Operation Date.

**And in the matter of**

Adani Power Ltd  
"Shikhar", Near Mithakhali Circle  
Navrangpura, Ahmednagar 380 009

**Petitioner**

**Vs**

Gujarat Urja Vikas Nigam Ltd  
Sardar Patel Vidyut Bhawan  
Race Course Circle, Vadodra – 390 007

**Respondent**

**Parties Present:**

Shri Amit Kapur, Advocate, APL  
Ms. Poonam Verma, Advocate, APL  
Shri Gaurav Dudiya, Advocate, APL  
Shri M. G. Ramachandran, Advocate, GUVNL  
Ms. Anushree Bardhan, Advocate, GUVNL  
Ms. Poorva Saigal, Advocate, GUVNL  
Shri S.K. Nair, GUVNL

**ORDER**

The petitioner seeks direction to Gujarat Urja Vikas Nigam Ltd, the Respondent, for payment of a sum of ₹227.01 crore along with the interest of ₹200.00 crore up to 31.5.2015 and further interest *pendente lite* at the rates specified under this Commission's tariff regulations.

2. The petitioner, Adani Power Ltd, is a generating company which has established Mundra Power Project in the State of Gujarat. The petitioner is supplying power to the States of Gujarat and Haryana under the separate Power Purchase Agreements; the PPA for supply of power to the State of Gujarat with the respondent, Gujarat Urja Vikas Nigam Ltd, generated at Units 5 and 6 of Mundra Power Project at tariff discovered through competitive bidding process was signed on 2.2.2007. The Scheduled Commercial Operation Date (**SCOD**) of Mundra Power Project, as agreed under the PPA, was 60 months from the date of signing, that is, 2.2.2012. Unit 5 and Unit 6 of Mundra Power Project were commissioned on 26.12.2010 and 20.07.2011 respectively.

3. The claim raised in the petition pertains to electricity generated from Mundra Power Project and supplied to the respondent before the SCOD of the Mundra Power Project.

4. The respondent demanded supply of power from Unit 5 which was scheduled to be synchronized and commissioned on 25.12.2010. The petitioner countered that it was not liable to supply power to the respondent prior to the SCOD of the Mundra Power Project. This gave rise to dispute between the parties.

5. The petitioner has referred to the minutes of the meeting held on 31.12.2010 whereat it was agreed between the parties that the petitioner could sell electricity to third party in consultation with the respondent to ensure fair price discovery, and in the event dispute is decided in favour of the petitioner, the respondent would return the excess amount, realized over and above the tariff agreed under the PPA.

6. In view of the differences, the petitioner filed Petition No 1093/2011 (**Adani Power Ltd Vs Gujarat Urja Vikas Nigam Ltd**) before the Gujarat Electricity

Regulatory Commission (**Gujarat Commission**). The petition was disposed of by the Gujarat Commission by order dated 21.10.2011. It was held by the Gujarat Commission that the respondent was not entitled to claim supply of power prior to the SCOD and accordingly the petitioner had no obligation to supply to the respondent prior to the SCOD, which was, as already noticed, 2.2.2012. The appeal filed by the respondent, Gujarat Urja Vikas Nigam Ltd before the Appellate Tribunal, being Appeal No 185/2011 was dismissed by the Appellate Tribunal vide its judgment dated 4.10.2012, thereby upholding the order of the Gujarat Commission. The Appellate Tribunal, *inter alia*, held as under:

*“If meanwhile, the API chose to effect sale to any third party during the intervening period, it cannot be said that the terms and conditions of the contract are violated. It is only when SCOD commences, it is only then supply of the contracted capacity to the APL commences on commercial basis in terms of Clauses 6.2.6 and 6.4 of the Power Purchase Agreement, then, suspension to third party sale would become a mandate for the APL.”*

7. The respondent filed an appeal, Civil Appeal No.2567 of 2013 before the Supreme Court against the judgment dated 4.10.2012 of the Appellate Tribunal along with the application for stay of operation of the judgment. Though the appeal is stated to be pending before the Supreme Court, the application for stay has been dismissed by an order dated 2.5.2013.

8. It has been alleged by the petitioner that the respondent refused to grant approval for sale of electricity to third parties and thereby the electricity generated was absorbed by the respondent. After the judgment of the Appellate Tribunal and order of the Supreme Court declining the stay on the Appellate Tribunal's judgment, the petitioner vide letter dated 10.10.2012 sent a claim to the respondent for the principal amount of ₹371.45 crore. The petitioner has submitted that the claim included the amount of ₹9.24 crore payable to UPPCL as a contractual penalty for short supply of short-term power because of non-approval by the respondent for sale

of electricity outside the State of Gujarat. However, the petitioner has not presently claimed penalty payable to UPPCL as no demand has so far been raised by UPPCL. It has been stated that the respondent paid only the sum of ₹135.20 crore on 1.2.2014.

9. The petitioner filed the Execution Petition No. I of 2014 (**Adani Power Ltd. Vs. Gujarat Urja Vikas Nigam Ltd.**) before the Appellate Tribunal who vide its order dated 12.3.2015, dismissed the Execution Petition, observing that -

*"We find that neither in the State Commission's order impugned before this Tribunal nor in the judgment of this Tribunal dated 04.10.2012, no decision on the monetary claim of Petitioner was made. The monetary claim of Petitioner is disputed both on the admissibility of the claim as well as on the quantum claimed by the Respondent. We are not in a position to pass any order in this execution petition as no finding has been made by this Tribunal regarding monetary claim of Petitioner in the judgment dated 04.10.2012.*

*In view of above, we dismiss the Execution Petition. However, Petitioner is at liberty to seek remedy at the Appropriate Forum".*

10. In the above circumstances, the petitioner has approached this Commission by filing the present petition raising the claim of ₹227.01 crore as the principal amount and also the interest.

11. The petition was listed for preliminary hearing on 6.11.2015. At the hearing it was pointed out on behalf of the respondent that the Appellate Tribunal in its judgment dated 12.3.2015 had granted liberty to the petitioner to approach "appropriate forum" for redressal of its grievance. Learned counsel appearing for the respondent submitted that in the present case this Commission was not the appropriate forum. Learned counsel pointed out that in terms of clause (b) of subsection (1) of Section 79 of the Electricity Act this Commission could exercise jurisdiction only when the composite scheme for generation and sale of electricity in more than one State existed in the beginning. Learned counsel argued that in the present case the composite scheme emerged after the petitioner entered into an agreement with Haryana for supply of

power.

12. After hearing the learned counsel for the parties, this Commission directed notice to the respondent who was also directed to file reply. The petitioner was granted opportunity to file its rejoinder, if any. The petition was to be listed for hearing on admissibility on 10.12.2015.

13. The petition was heard on maintainability on 10.12.2015 as scheduled, though the respondent had not filed its reply.

14. Opposing the petition, the learned counsel for the respondent argued before this Commission that the petitioner could not seek the implementation of the order dated 21.10.2011 passed by the Gujarat Commission which has been upheld by the Appellate Tribunal. It was urged that in view of the findings of this Commission in the order dated 16.10.2012 in Petition No. 155/MP/2012, the Gujarat Commission had no jurisdiction over the petitioner and as such the order passed by the Gujarat Commission was nullity and *non est*. In the circumstances the question of execution of the order of the Gujarat Commission or the Appellate Tribunal by this Commission did not arise. Learned counsel urged that the petitioner has to file petition before any appropriate forum having jurisdiction for adjudication of the claims, independent of any order of the superior court.

15. Learned counsel for the petitioner disputed the correctness of the proposition that the Gujarat Commission's order dated 21.10.2011 was *non est*. He argued that the petitioner could not be left without a remedy, after the Gujarat Commission upheld the petitioner's plea that it did not have any legal obligation to supply power to the respondent before the SCOD, which finding has been upheld by the Appellate Tribunal. Learned counsel urged that acceptance of the respondent's plea would amount to nullifying the judgment of the Appellate Tribunal. Learned counsel

submitted that the petitioner had approached this Commission pursuant to the order dated 16.10.2012 in Petition No 155/2012.

16. It was argued by the learned counsel for the petitioner that the petitioner was not seeking execution of the order the Gujarat Commission but had filed its claim afresh for adjudication by this Commission, after quantifying the amounts of claim. Learned counsel clarified that pendency of the appeal before the Supreme Court is not an impediment to the adjudication of the claim by this Commission since there was no stay against the judgment of the Appellate Tribunal dated 4.12.2012. Learned counsel for the respondent did not controvert this submission of the learned counsel for the petitioner.

17. We have considered the rival contentions and submissions on the question of maintainability.

18. This Commission in its order dated 16.10.2012 in Petition No.155/2012, wherein the respondent was impleaded, held that the petitioner had composite scheme for generation and sale of electricity in more than one State and, therefore, regulation of tariff of the petitioner was within the jurisdiction of this Commission in terms of clause (b) of subsection (1) of Section 79 of the Electricity Act. As a corollary of this finding, this Commission held that the jurisdiction of adjudication of disputes involving the petitioner also falls within the purview of this Commission by virtue of clause (f) of subsection (1) of Section 79.

19. The Full Bench of the Appellate Tribunal for Electricity in its recent judgment dated 7.4.2016 in Appeal No 100/2013 (Uttar Haryana Bijli Vitran Nigam Ltd and another Vs Central Electricity Regulatory Commission and others) and connected appeals has upheld the above decision of this Commission. The Full Bench of the Appellate Tribunal held that the petitioner is having the composite scheme for

generation and sale of electricity in more than one State and hence amenable to the jurisdiction of this Commission. The extracts from the judgment are placed below:

*“118. In view of the above discussion, we hold that the supply of power to more than one State from the same generating station of a generating company, ipso facto, qualifies as ‘Composite Scheme’ to attract the jurisdiction of the Central Commission under Section 79 of the said Act. **Accordingly, Issue No.3 is answered in the affirmative.**”*

*“120. We have already answered Issue No.3 in the affirmative and held that supply of power to more than one State from the same generating station of a generating company ipso facto, qualifies as a ‘Composite Scheme’ to attract the jurisdiction of the Central Commission under Section 79 of the said Act. It is an admitted position that both GMR Energy and Adani Power are selling electricity in more than one State from their respective generating stations. Hence, we hold that so far as Adani Power and GMR Energy are concerned, there exists a ‘Composite Scheme’ for generation and sale of electricity in more than one State by a generating station of a generating company within the meaning of Section 79(1)(b) of the said Act for the Central Commission to exercise jurisdiction. **Issue No.4 is accordingly answered in the affirmative.**”*

20. At the preliminary hearing on 6.11.2015 it was urged on behalf of the respondent that the Appellate Tribunal in the judgment dated 12.3.2015 in the execution petition had granted liberty to the petitioner to seek remedy at the “appropriate Forum.” It was argued that this Commission was not the “appropriate Forum” contemplated in the Appellate Tribunal’s judgment. The submission of the learned counsel for the respondent was based on the plea that the petitioner did not have the composite scheme of generation and sale of electricity in more than one State. In view the Full Bench judgment of the Appellate Tribunal referred to above, the respondent’s objection does not survive.

21. The other question raised by the respondent on the question of maintainability is based on the plea of lack of jurisdiction for execution of the order of the Gujarat Commission and the judgment of the Appellate Tribunal. Learned counsel for the respondent made two-fold submissions in this regard.

22. Firstly it was submitted that this Commission does not exercise power of execution of the orders of the Gujarat Commission and the Appellate Tribunal. We are in complete agreement with the submission of the learned counsel for the respondent that this Commission does not exercise power of the executing authority to ensure implementation of the orders of the Gujarat Commission, which is an authority independent of this Commission and the two Commissions do not falls within the hierarchical chain. Similarly, this Commission does not exercise power of execution of the orders of the Appellate Tribunal who has been conferred power of a Civil Court for execution of decree, by virtue of subsection (3) of Section 120 of the Electricity Act.

23. The second submission of learned counsel for the respondent was that order of the Gujarat Commission was *non est* since the order passed by the Gujarat Commission, as it now emerges, was without jurisdiction. It is settled law under the Doctrine of Merger that the order of the subordinate court merges with the order of the superior court. The principle behind this proposition of law is that at one time there cannot be more than one order in the same matter, capable of execution. In that view of this legal position, the order of the Gujarat Commission dated 21.10.2011 in Petition No 1093/2011 has merged with the Appellate Tribunal's judgment dated 4.10.2012 in Appeal No 185/2012. This Commission as an authority subordinate to the Appellate Tribunal cannot hold the order of the Appellate Tribunal as *non est*. In that view of the matter we are unable to persuade ourselves to accept the second submission of the learned counsel for the respondent.

24. It is, however, to be seen whether the present petition can at all be said to the petition for execution of the order of the Gujarat Commission. Learned counsel for the petitioner during the course of hearing on 10.12.2015 clarified that the petitioner



was not seeking execution of orders of the Gujarat Commission or the Appellate Tribunal. It was stated that the petitioner had filed the fresh claim giving all the necessary details in support thereof.

25. Apart from the submission made by the learned counsel for the petitioner, the judgment dated 12.3.2015 in Execution Petition No 1/2014 (**Adani Power Ltd. Vs. Gujarat Urja Vikas Nigam Ltd**) unambiguously supports the petitioner's submission on the matter. The relevant part of the Appellate Tribunal's judgment has already been extracted above. While dismissing the Execution Petition, the Appellate Tribunal observed that the monetary claim of the petitioner is disputed both on admissibility of the claim and quantum of the claim. Accordingly, the Appellate Tribunal in the judgment dated 4.10.2012 declined to pass any order regarding monetary claim of petitioner. It is pointed out that the Appellate Tribunal's judgment dated 4.10.2012 is an authority for the decision that the petitioner did not have the liability to supply power to the respondent before the SCOD. Further, neither the Gujarat Commission nor the Appellate Tribunal for Electricity have adjudicated the monetary claims regarding the power supplied before SCOD. In view of this, there is no force in the respondent's contention that adjudication of the petitioner's claim in the present petition would tantamount to execution of orders of the Gujarat Commission or the Appellate Tribunal. The proceedings in the present petition are independent proceedings before this Commission.

26. In the light of above discussion, we hold that the present petition is maintainable before this Commission. The parties shall have liberty to raise any issue, including the admissibility of the claim and quantification of amount, except the issues already decided by the Appellate Tribunal or any other superior court.

27. Accordingly, the respondent is directed to file its reply on merits of the petitioner's claim latest by 20.7.2016 with advance copy to the petitioner who may file its rejoinder, if any, by 10.8.2016.

18. The petition shall be listed for hearing on 18.8.2016.

**Sd/-**  
**(A. S. Bakshi)**  
**Member**

**sd/-**  
**(A.K. Singhal)**  
**Member**

**sd/-**  
**(Gireesh B. Pradhan)**  
**Chairperson**