

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Petition No.250/MP/2019
alongwith IA No.60/2021**

Subject : Petition under Section 79(1)(b) and 79(1)(f) of the Electricity Act, 2003, for recall of the order dated 12.4.2019 passed in Petition No.374/MP/2018, granting approval to the Supplementary Agreements (two) dated 5.12.2018.

Petitioner : Gujarat Urja Vikas Nigam Limited

Respondents : Adani Power (Mundra) Limited & anr.

Petition No.614/MP/2020

Subject : Petition under Section 79(1)(f) of the Electricity Act, 2003 read with Article 3.2.4 of the Supplementary Power Purchase Agreement dated 5.12.2018 and Article 17.3 of the Power Purchase Agreement dated 6.2.2007 seeking adjudication of disputes qua unilateral amendment of the approved PPA/SPPA provisions and non-payment of actual cost incurred by Adani Power (Mundra) Limited to supply to Gujarat Urja Vikas Nigam Limited.

Petitioner : Adani Power (Mundra) Limited

Respondents : Gujarat Urja Vikas Nigam Limited

Date of Hearing : **18.10.2021**

Coram : Shri P.K. Pujari, Chairperson
Shri I.S. Jha, Member
Shri Arun Goyal, Member
Shri Pravas Kumar Singh, Member

Parties Present:

Shri M.G. Ramachandran, Senior Advocate, GUVNL
Ms. Ranjita Ramachandran, Advocate, GUVNL
Ms. Anushree Bardhan, Advocate, GUVNL
Shri Shubham Arya, Advocate, GUVNL
Ms. Srishti Khindaria, Advocate, GUVNL
Shri K.P. Jangid, GUVNL
Shri Sanjay Mathur, GUVNL
Shri V.L. Lathia, GUVNL
Shri Amit Kapur, Advocate, AP(M)L
Ms. Poonam Verma, Advocate, AP(M)L
Shri Saunak Rajguru, Advocate, AP(M)L
Shri Ankitesh Ojha, Advocate, AP(M)L



Shri M.R. Krishna Rao, AP(M)L
Shri Mehul Rupera, AP(M)L
Shri Sameer Ganju, AP(M)L
Shri Malav Deliwala, AP(M)L
Shri Kumar Gaurav, AP(M)L
Shri Tanmay Vyas, AP(M)L
Shri Rahul Panwar, AP(M)L

Shri Basava P. Patil, Senior Advocate, Govt. of Gujarat
Shri Anand K. Ganesan, Advocate, Govt. of Gujarat
Ms. Harsha Manav, Advocate, Govt. of Gujarat

Record of Proceedings

Petition No. 250/MP/2019 was called out for virtual hearing.

2. During the hearing, the learned Senior counsel for the Petitioner, GUVNL gave a brief background of the case and circulated note of arguments and made oral submissions as under:

- (i) The reliefs sought by the Petitioner is for recall of the order dated 12.4.2019 in Petition No. 374/MP/2018 granting approval of the Supplementary PPAs (SPPAs) dated 5.12.2018 and to declare the SPPAs as void, primarily on the basis of misrepresentation by the Respondent AP (M)L, mistake and/or absence of consensus ad idem between the parties, in terms of the principles under the Indian Contract Act, 1872.
- (ii) The Hon'ble Supreme Court in *Energy Watchdog* case has held that the Respondent AP (M)L is not entitled to any increase in tariff sought by it over and above the quoted tariff for imported coal, either on grounds of force majeure or change in law or under general exercise of regulatory powers. The claim of the Respondent for such increase alleging financial difficulties was rejected in the said judgment and, therefore, the Respondent was not entitled to claim increase in tariff. This was taken note of by the High Powered Committee (HPC) constituted under the Chairmanship of Hon'ble Justice R.K.Agarwal.
- (iii) The recommendations of HPC, after consultation with all stakeholders and working out a package, was specifically based on certain aspects namely (i) financial support to mitigate hardship only from 15.10.2018 (ii) sacrifices to be made by all stakeholders viz., APL (Rs 9473 crore), CGPL and EGPL including lenders, (iii) extending the period of PPA after its expiry of 25 years, by further 10 years and (iv) target availability to be increased from 80% to 90%. In line with the recommendations of HPC, the Government of Gujarat issued policy decision vide GR dated 1.12.2018 and SPPAs were executed by the parties, which was approved by order dated 12.4.2019 in Petition No. 374/MP/2019, in public interest.
- (iv) On 20.5.2019, the Respondent, AP (M)L filed application/ affidavit before the Hon'ble Supreme Court (in CA.No.11133/2011) wherein, it had taken a stand, amongst others, that SPPA takes care of the prospective period from October



2018, whereas, no relief or compensation has been considered from the commencement date of power supply under PPA from 2.2.2012 till 15.10.2018 and that the Respondent had suffered loss of Rs.13320 crore during the aforesaid period, for the entire project.

- (v) It is evident that the entire representation made by the Respondent AP(M)L before the Government of Gujarat, HPC, the Petitioner and in proceedings before this Commission that hardship will be mitigated in terms of the SPPA, was a positive assertion, which the Respondent did not believe it to be true and did not intend to perform. With the revocation of earlier GR dated 1.12.2018 by GR dated 12.6.2020 by the Government of Gujarat, on public interest, the claim of the Respondent AP(M)L for additional tariff, over and above the tariff as per the PPAs, is otherwise inadmissible in law.
- (vi) The act of the Respondent AP(M)L constitutes misrepresentation in terms of Section 18 of the Indian Contract Act, 1872 (Sections 17 to 19 of the Act was referred to). There is also a clear mistake as to the matter of fact since the Petitioner had proceeded on the basis that the PPA dated 2.2.2007 will be valid for 35 years from commencement of supply of power to the extent of 2000 MW, along with PPA dated 6.2.2007, without termination for any past claims and no further increase in tariff for the period till 15.10.2018. There was also no consensus ad idem, within the meaning of sections 13 and 14 of the Indian Contract Act, 1872.
- (vii) It is settled principle of law that a consent order passed, based on a compromise entered into by parties, can be set aside by the Courts/ Tribunals, if the same is vitiated by any of the aspects given under the Indian Contract Act, 1872, thereby rendering the contract/ agreement as void, due to reasons of fraud, misrepresentation, mistake as well as absence of consensus ad idem (*Judgment in Ruby Sales and Services (P) Ltd. v State of Maharashtra, (1994) 1 SCC 531, Banwari Lal v Chando Devi, (1993) 1 SCC 581 was referred to*).
- (viii) The positive assertion of Respondent AP(M)L that it will not claim for the past losses is implied from the terms contained in the SPPA, which states that the same is prospectively effective from 15.10.2018 onwards. This, by necessary implication, excludes the past period, and is fundamental to the entire settlement (*judgments of the Hon'ble SC in Century Spg. and Mfg. Co. Ltd v Municipal Council, (1970) 1 SCC 582, Ganga Retreat & Towers Ltd. v State of Rajasthan, (2003) 12 SCC 91, M.P. Power Generation Co. Ltd. v ANSALDO Energia SPA, (2018) 16 SCC 661 and judgment of the Hon'ble High Court, Seth Srenikbhai Kasturbhai v Seth Chandulal Kasturchand, AIR 1997 Pat 179 were relied upon*).
- (ix) If the Respondent AP(M)L had represented that it will claim the past losses in respect of at least one of the PPA (units 5 & 6), irrespective of the settlement agreement or otherwise to pursue the termination of the PPA dated 2.2.2007, then the Govt. of Gujarat, the Petitioner and the HPC would not have recommended the Settlement Agreement. The mutual mistake in the present case is in regard to the implied terms contained in the Settlement Agreement.



3. The learned Senior counsel for the Petitioner, GUVNL prayed that the note of arguments may be taken on record and the Petitioner may be permitted to file the compilation of the judgments relied upon in the matter. The request of the learned Senior Counsel was accepted by the Commission.

4. On a specific query by the Commission as to whether SPPAs executed by the parties contain a provision that the Respondent, AP(M)L would not be entitled for any claim for the period prior to 15.10.2018, the learned Senior counsel reiterated that a positive assertion was made by the Respondent AP(M)L that it will not claim past losses and the same is implied from the terms contained in the SPPA, which is effective from 15.10.2018.

5. Due to paucity of time, the matter could not be heard further. The learned Senior counsel appearing for the Government of Gujarat prayed that it may be permitted to make additional submissions in the matter. This was accepted by the Commission.

6. Accordingly, the Commission adjourned the hearing. Matter is part-heard and shall be listed for submissions by the Government of Gujarat and the Respondent AP(M)L, during the next date of hearing.

Petition No. 614/MP/2020

Due to paucity of time, this petition could not be taken up for hearing.

2. The learned counsel for the Respondent AP(M)L, however, prayed that this petition may be listed for hearing along with Petition 250/MP/2019. This was accepted by the Commission.

3. Petition No. 614/MP/2020 shall be listed along with Petition No.250/MP/2019, in due course, for which notice will be issued to the parties.

By order of the Commission

Sd/-
B. Sreekumar
Joint Chief (Law)

