

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Review Petition No. 20/RP/2021
in
IA No. 64/IA/2020 in Petition No.614/MP/2020
along with
IA No. 63/IA/2021 in IA No. 64/IA/2020 in Petition No. 614/MP/2020**

**Coram:
Shri P.K.Pujari, Chairperson
Shri I.S.Jha, Member
Shri P.K.Singh, Member**

Date of order: 13th December, 2021

In the matter of

Petition under Section 94(1)(f) read with Order 47 Rule 1 of the Code of Civil Procedure, 1908 and Regulation 103(1) of the CERC (Conduct of Business) Regulations, 1999 for Review of Order dated 28.6.2021 of the Central Electricity Regulatory Commission in IA No. 64/IA/2020 in Petition No. 614/MP/2020 filed by Adani Power (Mundra) Limited.

**And
In the matter of**

Gujarat Urja Vikas Nigam Limited,
Sardar Patel Vidyut Bhawan,
Race Course Circle,
Vadodara-390 007

....ReviewPetitioner

Vs.

Adani Power (Mundra) Limited,
Adani House, Near Mithakhali Six Roads,
Navarangpura,
Ahmedabad-380 009

...Respondent

Parties Present:

Shri M. G. Ramachandran, Senior Advocate, GUVNL
Ms. Ranjitha Ramachandran, Advocate, GUVNL
Ms. Anushree Bardhan, Advocate, GUVNL
Shri Shubham Arya, Advocate, GUVNL
Ms. Srishti Khindaria, Advocate, GUVNL
Ms. Shikha Sood, Advocate, GUVNL
Shri Amit Kapur, Advocate, APMuL
Ms. Poonam Verma, Advocate, APMuL



Shri Saunak Rajguru, Advocate, APMuL
Shri Ankitesh Ojha, Advocate, APMuL
Shri K. P. Jangid, GUVNL
Shri Sanjay Mathur, GUVNL
Shri V. L. Lathia, GUVNL
Shri M. R. Krishan Rao, APMuL
Shri Mehul Rupera, APMuL
Shri Sameer Ganju, APMuL
Shri Malav Deliwala, APMuL
Shri Kumar Gaurav, APMuL
Shri Tanmay Vyas, APMuL
Shri Rahul Panwar, APMuL

ORDER

The Petitioner, Gujarat Urja Vikas Nigam Limited ('GUVNL') has filed the present Review Petition under Section 94(1)(f) of the Electricity Act, 2003 (hereinafter referred to as 'the Act') read with Order 47 Rule 1 of the Code of Civil Procedure, 1908 and Regulation 103(1) of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 (hereinafter referred to as 'the Conduct of Business Regulations'), for review of the order dated 28.6.2021 in Interlocutory Application No. 64/2020 in Petition No.614/MP/2020 (hereinafter referred to as "the Impugned order") on the following grounds:

- (a) Misconstruing the provisions of Article 11.6.9 of the PPA as if it provides for the Commission to pass a prohibitory order on deduction for payment of disputed bills to extent of 85% of the disputed bills, ignoring the specific stipulation '*higher or lesser payment of the disputed amount*';
- (b) Misconstruing the application of Article 11.6.9 of the PPA even when the bills are raised by the Respondent, Adani Power (Mundra) Limited ('APMuL') in a unilateral and arbitrary manner and not in accordance with the basic stipulation provided in SPPA;
- (c) Considering that GUVNL had not raised any issue of supporting documents in letter dated 15.4.2020 ignoring the earlier letters issued by GUVNL from the time of raising the invoices by APMuL (first letter was issued

on 25.4.2019 immediately after first invoice was raised on 15.4.2019) and which were produced by GUVNL in Petition;

(d) Not taking into consideration the background in which SPPA dated 5.12.2018 was entered into;

(e) Not considering the sufficient evidence placed on record by GUVNL to establish that APMuL claimed excessive price for coal and ocean freight etc. in comparison to the indices giving the market trend of actual cost prevalent at that time;

(f) Not considering that the intention of the parties in entering into SPPA could not be considered as whatever price that may be demanded by APMuL in monthly bill merely by referring to HBA price of coal with GCV of 6322 kCal/kg is required to be paid by GUNVL irrespective of actual FoB price;

(g) Not considering that in order to avoid sharing of entitled mining profit as envisaged under SPPA with GUVNL, APMuL stopped procuring from its own mines and started to procure coal from certain selected parties without undertaking prudent and transparent competitive bid process;

(h) Not considering that GUVNL has filed Petition No. 250/MP/2019 for recall of the order dated 12.4.2019 according approval to SPPA dated 5.12.2018 and that Government of Gujarat has taken a considered view and revoked GR dated 1.12.2018 based on which the Commission approved the SPPA for all intent and purpose.

(i) Not considering that APMuL is consistently procuring coal from few selected parties at rate higher than the market trend without following transparent and prudent competitive bid process and inspite of repeated demands by GUVNL, has not furnished the supporting documents as required under the SPPA;

(j) Not considering that delay in deciding recall Petition is putting financial implication on GUVNL and causing grave injury to consumers of the State. As per direction of Government of Gujarat, pending the outcome in recall Petition and in the interest of consumers, GUVNL is making payment to the extent of prudent cost which would have been incurred by APMuL if coal would have been procured in transparent manner.

Brief background of the case

2. The Respondent, Adani Power (Mundra) Limited ("APMuL") filed Petition No. 614/MP/2020, *inter alia*, seeking emergent restraintment orders against GUVNL for making unilateral and indiscriminate deductions from the monthly invoices for power supplied by APMuL contrary to the provisions of the Power Purchase Agreement ('PPA') dated 6.2.2007 and Supplementary PPA ('SPPA') dated 5.12.2018 approved by this Commission on 12.4.2019 in Petition No. 374/MP/2018. In Petition No. 614/MP/2020, APMuL had also filed IA No. 64/2020 with the following prayers:

"25 ...(b) Grant injunction restraining GUVNL from unilaterally deducting energy charges contrary to SPPA and refund INR 150 crores to APMuL in a time bound manner along with Late Payment Surcharge;

(c) Direct GUVNL to pay to APMuL the entire energy charges owed for actual cost of coal incurred on account of spot procurement of coal without any deduction or adjustments, along with Late Payment Surcharge as per Bid-01 PPA, while the Petition is pending.

(d) In the alternative to prayer (c), direct GUVNL that during the pendency of present petition, to pay full undisputed energy charges and 85% of the disputed energy charges amount in terms of Article 11.6.8 of the PPA including for the past period, along with Late Payment Surcharge as per the Bid-01 PPA subject to final outcome of this Petition.

(e) Direct GUVNL to consider the per unit energy charges paid in the previous month by GUVNL to APMuL for Merit Order to the extent of payment being made by it, during the pendency of the Petition."

3. The Commission after hearing the parties on the IA No. 64/2020 and based upon submissions made thereon, vide order dated 28.6.2021, had directed GUVNL to pay 100% of the undisputed amount and 85% of the amount as disputed for all the invoices raised by APMuL since signing of the Supplementary Power Purchase Agreement till the pendency of the main Petition No. 614/MP/2020, within thirty days of the order. Relevant portion of the impugned order dated 28.6.2021 is extracted as under:

"19. We observe that deductions made by GUVNL vide its letter dated 15.4.2020 germinates from a dispute raised by GUVNL. Similarly, the deductions made by GUVNL on account of implementation of GoG directives have been disputed by

APMuL as illegal. Both these issues involve adjudication on merit in the proceedings of Petition No. 614/MP/2020. For the present IA, it is sufficient to note that the issue involves dispute as regards bills being raised by APMuL.

20. We note that as regards raising bills and disputes regarding bills, relevant extract from Article 11 of the Bid-01 PPA dated 6.2.2007 provides as under:

.....

Article 11.6.9: -

Till the time a dispute is resolved as per Article 11.6 or Article 17, the Procurer shall be liable to pay 100% of the undisputed amount plus 85% of the disputed amount within the due date provided either party shall have the right to approach the GERC to effect a higher or lesser payment on the disputed amount.”

21. In terms of Article 11.6.2, either party may dispute the amount payable under monthly or supplementary bills. Article 11.6.9 provides that till the time the dispute is resolved, the procurer shall be liable to pay 100% of the undisputed amount plus 85% of the disputed amount within the due date.

.....

23. As power is being procured by GUVNL and is being supplied by APMuL as per the provisions of the Bid-01 PPA and SPPA, we are of the view that the parties are bound by terms of the Bid-01 PPA and SPPA and, therefore, raising of bill or any dispute thereon has to be in accordance with the terms and conditions as provided in the Bid-01 PPA and SPPA.

.....

25. We are of the view that whatever the reasons of dispute may be, the provisions of Article 11.6.9 of the Bid-01 PPA are clear in this regard that provides that “Till the time a dispute is resolved as per Article 11.6 or Article 17, the Procurer shall be liable to pay 100% of the undisputed amount plus 85% of the disputed amount within the due date ----”. APMuL has already approached the Commission for adjudication of the dispute by filing Petition No. 614/MP/2020, which the Commission shall adjudicate in due course. However, in the interim till the dispute is adjudicated, as we have already held, both the parties, namely GUVNL and APMuL are bound by the provisions of the Bid-01 PPA and SPPA.

26. In view of the above discussions, we are of considered opinion that the Petitioner has a very strong prima facie case for getting a prohibitive order. The balance of convenience is in favour of the Petitioner, as it has been put to a recurring loss and the ingredient of irreparable loss is also in favour of the Petitioner. We have observed that the parties are bound to respect the contractual obligations, otherwise, it may lead to chaos in sector as the financial implications involved are huge. Accordingly it is ordered.

ORDER

27. GUVNL is directed to pay 100% of the undisputed amount and 85% of the amount as disputed for all the invoices raised since signing of the SPPA till the pendency of the main Petition No. 614/MP/2020. Payment must be made within thirty days of this order.”

Submissions by Review Petitioner and the Respondent

4. The Review Petitioner in this Review Petition has submitted that misconstruing the provisions of Article 11.6.9 of the PPA as if it provides for the



Commission to pass a prohibitory order on deduction on payment of disputed bills to extent of 85% of the disputed bills, ignoring the specific stipulation '*higher or lesser payment of the disputed amount*' is error apparent on the face of the record. According to the Review Petitioner, the Commission is required to consider *prima facie* the merits of the case including conduct of APMuL to decide on the nature and extent of the interim directions to be given and that the provision in Article 11.6.9 of the PPA regarding payment of 85% of disputed bill cannot by itself be considered as strong prima facie case for the issue of prohibitory orders against deduction from the bill amounts.

5. The matter was heard on 18.10.2021 and 22.11.2021. During the course of hearing held on 22.11.2021, the learned counsel for the Respondent, APMuL, while opposing the present Review Petitioner, made the following submissions.

(a) The Review Petition is not maintainable as it fails to satisfy the tests in terms of Section 94(1)(f) of Act, Order 47 Rule 1 of the Code of Civil Procedure, 1908 and Regulation 103(1) of the Conduct of Business Regulations.

(b) GUVNL has not raised any new ground necessitating this Commission to exercise its review jurisdiction. All the contentions raised by GUVNL in the Review Petition were already raised before the Commission in GUVNL's reply dated 4.6.2021 in IA No. 64/IA/2020 in Petition No. 614/MP/2020.

(c) The Review Petitioner is seeking re-argue the case on merits, contrary to the law as settled by the Hon'ble Supreme Court in *Lily Thomas vs. Union of India* (2000) 6 SCC 224, *Kerala State Electricity Board vs. Hitech Electrothermics and Hydropower Ltd.* [(2005) 6 SCC 651] and *Nabha Power v. PSPCL* in Contempt Petition Nos. 1174-1177 of 2019 in Civil Appeal No. 179 of 2017.

(d) Article 11.6.9 of the PPA gives a right to the parties to approach the Commission for higher/lesser payment of the disputed amount. It is APMuL

which had approached the Commission seeking reliefs. Neither did GUVNL approach the Commission nor did GUVNL request the Commission to give effect to a lesser payment on the disputed amount. As such, there is no question for the proviso to Article 11.6.9 of the PPA to trigger in.

(e) In the impugned order, the Commission has consciously not given any finding qua the issues raised by GUVNL on merits and has confined itself to the dispute as regards invoice amounts being withheld by GUVNL.

(f) The general scope of power of a Court to review is limited to an 'error apparent on the face of the record'. Reliance is placed on *Kamlesh Verma vs. Mayawati*, {(2013) 8 SCC 320 [3J]} wherein it was held that an error apparent on the face of the record should not be an error that has to be fished out and searched.

Analysis and Decision

6. We have considered the submissions of the learned senior counsel for the Review Petitioner and the learned counsel for the Respondent and perused the documents on record. We proceed to consider whether any case for review has been made out by the Review Petitioner in terms of Order 47 Rule 1 of the CPC read with Regulation 103 of the Conduct of Business Regulations. Under Regulation 103 of the Conduct of Business Regulations, the Review Petition seeking review of any order of the Commission shall be filed within 45 days from the date of issue of the order. The impugned order was passed on 28.6.2021 and the Review Petition has been filed on 20.7.2020. Hence, the Review Petition has been filed within the period of limitation. Section 94(1)(f) of the Act provides that the Commission has the same power as that of a civil court to review its decisions, directions or orders. Under Order 47 Rule 1 of CPC, a person aggrieved by order of a Court can file review on the following grounds, if no appeal against the said order has been filed:

(a) Discovery of new and important matter of evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made.

(b) On account of some mistake or error apparent on the face of record; and

(c) For any other sufficient reason.

In light of the above provisions, we consider the grounds raised in the Review Petition for review of order dated 28.6.2021 in IA No. 64/2020 in Petition No. 614/MP/2020.

7. In the order dated 28.6.2021, the Commission had confined itself to only issues of deduction made by GUVNL on alleged non-compliance by GUVNL of provisions of PPA read with SPPA. The Commission had consciously not dealt with the issues to be considered on merit in the main Petition No. 614/MP/2020. The relevant extract the order dated 28.6.2021 is as under:

"8. We have considered the submissions made by the parties. At the outset, we note that both the parties have made submissions, which touches upon the merits/core issues involved in the matter as well. However, it is settled position that at the stage of considering the interim reliefs, it is not necessary to go into the merits of the case in detail. Accordingly, while considering the instant application for grant of interim relief, we confine ourselves to only the issues of deduction made by GUVNL on alleged non-compliance of SPPA by APMuL. Legality and other factual aspects of the case and the deduction made by GUVNL shall be dealt with in detail at the time when the matter will be heard on merits."

8. We observe that the Review Petitioner has again raised the following issues which were raised in IA No. 64/2020 and involve adjudication on merit in Petition No. 614/MP/2020.

(a) That invoices raised by APMuL were not in terms of the provisions of the SPPA read with PPA. Supporting documents have not been provided by APMuL with the invoices.

(b) That the Commission has not considered (i) the background in which the SPPA dated 5.12.2018 was entered into; (ii) GUVNL has filed Petition 250/MP/2019 to recall the order dated 12.4.2019; and (iii) Government of Gujarat's Resolution dated 1.12.2018 has been revoked.

(c) That the Commission has not considered the evidence placed by GUVNL to establish that APMuL had claimed excessive price for coal.

(d) That the Commission has not considered that APMuL had procured coal without undertaking prudent and transparent bidding process.

9. The Review Petitioner had made these contentions during the proceedings of IA No. 64/IA/2020 and the Commission had reserved them for adjudication on merit in the proceedings of the main Petition No.614/MP/2020. The relevant extract of the order is as under:

“19. We observe that deductions made by GUVNL vide its letter dated 15.4.2020 germinates from a dispute raised by GUVNL. Similarly, the deductions made by GUVNL on account of implementation of GoG directives have been disputed by APMuL as illegal. Both these issues involve adjudication on merit in the proceedings of Petition No. 614/MP/2020. For the present IA, it is sufficient to note that the issue involves dispute as regards bills being raised by APMuL.”

10. The above being a well analysed and considered view of the Commission after considering all aspects, we do not find any error in the impugned order under the stated grounds. The Review Petitioner is seeking a fresh decision in respect of grounds to be adjudicated on merit which is not permissible in review. Therefore, Review Petition on the above grounds is rejected.

11. Further, the Review Petitioner has contended that it was not mandatory for the Commission to allow payment of 85% of the disputed bills in terms of Article 11.6.9 of the PPA as the said provision itself stipulates for the Commission *“to effect a higher or lesser payment of the disputed amount”*. The Review Petitioner has submitted that the provision in Article 11.6.9 of the PPA of payment of 85% of the

disputed bill cannot by itself be considered as a strong *prima facie* case for issue of prohibitory orders against deductions from the amount for which the bills have been raised by APMuL.

12. *Per Contra*, the Respondent has submitted that Article 11.6.9 of the PPA gives a right to parties to approach the Commission for higher/lesser payment of the disputed amount. Therefore, there is no question for the proviso to Article 11.6.9 to trigger as neither did GUVNL approach the Commission nor did GUVNL request the Commission to give effect to a lesser payment on the disputed amount.

13. We have considered the submissions made by the Review Petitioner and the Respondent. Article 11.6.9 of the PPA dated 6.2.2007 is extracted as under:

“Till the time a dispute is resolved as per Article 11.6 or Article 17, the Procurer shall be liable to pay 100% of the undisputed amount plus 85% of the disputed amount within the due date provided either party shall have the right to approach the GERC to effect a higher or lesser payment on the disputed amount.”

14. It is evident from the reading of Article 11.6.9 of the PPA that till the time a dispute is resolved as per Article 11.6 or Article 11.7 of the PPA, the Procurer is liable to pay 100% of the undisputed amount and 85% of the disputed amount. The Commission had relied on the said provisions to give appropriate directions in the impugned order.

15. We find merit in the submissions of the Respondent that the proviso triggers only when a party, aggrieved by the main provision, approaches the Commission seeking higher or lesser payment on the disputed amount. It is apparent from the pleadings of the IA No. 64/IA/2020 that GUVNL had not made any plea in this regard. Neither did GUVNL approach the Commission with any such prayer later by filing a separate Petition. The Review Petitioner cannot raise a fresh plea in a review

petition. Therefore, there is no error apparent on the face of the record. The Review Petitioner's submission would amount to exercise of power of review by the Commission to substitute the view taken in the impugned order which is not permissible under the review jurisdiction. In this connection, reference can be made to the following judgments:

(a) In **Lily Thomas & Ors. vs. Union of India & Ors. [(2000) 6 SCC 224]**

Judgment, the Hon'ble Supreme Court has held as under:

"56. It follows, therefore, that the power of review can be exercised for correction of a mistake and not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not a ground for review...."

(b) In **Union of India vs. Sandur Manganese and Iron Ores Limited & others {(2013) 8 SCC 337}**, the Hon'ble Supreme Court has held as under:

"23. It has been time and again held that the power of review jurisdiction can be exercised for the correction of a mistake and not to substitute a view. In Parsion Devi & Others Vs. Sumitri Devi & Others, this Court held as under:

"9. Under Order 47 Rule 1 of CPC, a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47 Rule 1 CPC. In exercise of the jurisdiction under Order 47 Rule 1 of CPC, it is not permissible for an erroneous decision to be "reheard and corrected". A review petition, it must be remembered has limited purpose and cannot be allowed to be "an appeal in disguise."

(c) In **M/S Goel Ganga Developers India Pvt. Ltd. vs. Union of India 2018 SCC Online SC 930**, the Hon'ble Supreme Court has held as under:

"In this behalf, we must remind ourselves that the power of review is a power to be sparingly used. As pithily put by Justice V.R. Krishna Iyer, J., "A plea for review, unless the first judicial view is manifestly distorted, is like asking for the moon"

2. The power of review is not like appellate power. It is to be exercised only when there is an error apparent on the face of the record. Therefore, judicial discipline requires that a review application should be heard by the same Bench. Otherwise, it will become an intra-court appeal to another Bench before the same court or tribunal. This would totally undermine judicial discipline and judicial consistency"

16. In the light of the principles of law enunciated in the above judgments, we are of the view that the power of review can be exercised for an apparent mistake and not to substitute a view. Therefore, the contention of the Review Petitioner with regard to misconstruing of Article 11.6.9 of the PPA cannot be considered as a ground for review in terms of Order 47 Rule 1 of the CPC. Accordingly, the Review Petition is not sustainable.

IA No. 63/IA/2021 in IA No. 64/IA/2020 in Petition No. 614/MP/2020

17. The Respondent, APMuL has also filed IA No. 63/IA/2021 in IA No. 64/2020 in Petition No. 614/MP/2020 under Section 142 of the Act read with Regulation 111 and Regulation 119 of the Conduct of Business Regulations and Section 151 of the CPC seeking enforcement and compliance of the Commission's directions in the impugned order i.e. order dated 28.6.2021 passed in IA No. 64/IA/2020 in Petition No. 614/MP/2020. In the IA No. 63/IA/2021, APMuL has, *inter-alia*, submitted that despite there being a prohibitory order from the Commission, GUVNL has been continuing with unilateral deductions.

18. The matter was heard along with the Review Petition No. 20/RP/2021 on 22.11.2021. During the hearing, APMuL informed (as also in its note for hearing) that, in view of its precarious financial condition, it was forced to shut down the plant (Unit Nos. 1 to 4) from 31.8.2021 onwards. However, considering the fact that State of Gujarat is in power shortage and there is an urgent need for electricity in the State, APMuL and GUVNL made an interim arrangement. As per the said arrangement, GUVNL has agreed to make an ad hoc payment of Rs.538 crore (85% of the disputed amount out of Rs.633 crore claimed by APMuL) in two equal instalments for the period up to July 2021. Out of Rs.538 crore, GUVNL has paid

Rs.269 crore on 18.11.2021. In this regard, APMuL has given an undertaking to supply power without prejudice to the rights and contentions raised before the Commission. The learned senior counsel for the Review Petitioner confirmed the same.

19. Since the parties have agreed for an interim arrangement for supply of power and payment thereof, we do not feel the need to intervene in the matter at this stage.

20. Accordingly, the Review Petition No. 20/RP/2021 and IA No. 63/IA/2021 in IA No. 64/IA/2020 in Petition No. 614/MP/2020 are disposed of in terms of the above discussions and findings.

21. Petition No. 614/MP/2020 shall be listed for hearing on merits in due course for which notice will be issued separately.

**Sd/-
(P.K.Singh)
Member**

**sd/-
(I.S.Jha)
Member**

**sd/-
(P.K. Pujari)
Chairperson**