

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No.179/MP/2022**

**Coram:**

**Shri I. S.Jha, Member**

**Shri Arun Goyal, Member**

**Shri P. K. Singh, Member**

**Date of Order: 19<sup>th</sup> September, 2022**

**In the matter of:**

Petition under Section 79(1)(b) and Section 79(1)(f) of the Electricity Act, 2003 for recall of the order dated 21<sup>st</sup> February, 2022 passed by the Commission in Petition No. 250/MP/2019 along with IA No.3/2022.

**And**

**In the matter of:**

Ravi Shanker Kapoor  
R/o 189, Akash Darshan Apartments,  
Mayur Vihar, Phase -I,  
New Delhi – 110091

**..... Petitioner**

**Versus**

1. Gujarat Urja Vikas Nigam Ltd.  
Sardar Patel Vidyut Bhavan,  
Race Course Circle,  
Vadodara – 390 007

2. Adani Power (Mundra) Limited  
Shikhar, Near Mithakhali Circle,  
Navrangpura  
Ahmedabad - 380 009

3. Government of Gujarat,  
Through the Principal Secretary,  
Energy and Petrochemicals Department,  
Block No. 5, 5<sup>th</sup> Floor, Sachhivalaya,  
Gandhinagar- 382 010

**.....Respondents**

**And**

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..Respondents

**Parties Present:**

Shri Sameer Chaudhary, Advocate for Petitioner  
Shri Siddharth Tandon, Advocate for Petitioner

**ORDER**

The Petitioner, Mr. Ravi Shanker Kapoor, has filed the present Petition in his individual capacity purported to be in the consumer interest under Section 79(1)(b) and Section 79(1)(f) of the Electricity Act, 2003 (hereinafter referred to as 'the Act') seeking recall of order dated 21.2.2022 passed by the Commission in Petition No. 250/MP/2019 filed by Gujarat Urja Vikas Nigam Limited ("GUVNL") seeking recall of order dated 12.4.2019 of the Commission in Petition No.374/MP/2018 amongst the other reliefs. The Petitioner has made the following prayers:

*“(a) Recall Order dated 21.02.2022 passed by this Hon’ble Commission in Petition No. 250/MP/2019 along with IA No. 3/2022:*

*(b) Afford any opportunity to all stakeholders including consumer groups of being heard and decide the matter on merits.”*

**Background of the case**

2. The following is the background of the Petition filed by the Petitioner.

a) GUVNL signed two Power Purchase Agreements (“PPAs”) dated 2.2.2007 and 6.2.2007 for purchase of 2000 MW (1000 MW each) electricity from Adani Power Limited (hereinafter referred to as “Adani Power”) to cater to the demand of consumers of the State of Gujarat through two competitive bids conducted under Case I guidelines issued by Ministry of Power, Government of India.

b) Vide order dated 20.12.2007, both PPAs were approved by the Gujarat Electricity Regulatory Commission (“GERC”) in Petition No. 4 of 2007. However, since 2007, Adani Power intended and sought to terminate the two PPAs on one pretext or the other. In its first two attempts to revise/ increase the tariff already determined through a competitive bidding process as mandated under applicable laws, Adani Power was unsuccessful. On the first occasion, this issue (termination of PPA) was pursued before the GERC on the ground of non-availability of domestic coal, which was disallowed by GERC. The said order of GERC was also upheld by the Appellate Tribunal for Electricity (“APTEL”) vide judgment dated 7.7.2011 in Appeal No. 184 of 2010. Adani Power filed a Civil Appeal No. 11133 of 2011 before the Hon’ble Supreme Court challenging the judgment of the APTEL. In the second instance, Adani Power approached the Commission on the ground of ‘Change in Law’ and ‘Force Majeure’ on account of promulgation of Indonesian Regulation No. 17 of 2010 issued by the Indonesian Government on 23.9.2010 titled as “Procedure to Determine the Benchmark Price for Mineral and Coal Sales” (Indonesian Regulations) mandating export of coal on benchmark prices. The Commission granted Adani Power relief by way of compensatory tariff. The same was however later set aside by the Hon’ble Supreme Court vide its judgment dated 11.4.2017 titled *Energy Watchdog v. CERC & Ors* (in short Energy Watchdog judgment’).

c) Subsequent to relief denied by Hon’ble Supreme Court in Energy Watchdog judgment, faced with high cost of generation from its imported coal based Mundra Power Plant, Adani Power (Mundra) Limited (earlier known as Adani Power Ltd) made representations to Government of Gujarat to take over

51% of equity of Mundra Power Project (Unit 1 to Unit 6) at a value of Rs 1 and purchase power from the said project on cost plus basis.

d) Based on the representations made by Adani Power, the Government of Gujarat, on 20.4.2017, wrote a letter to Ministry of Power, Government of India to call for a meeting of all stakeholders. Ministry of Power, Government of India convened a meeting on 20.6.2017 of stakeholders including the representatives from the State Governments of Gujarat, Maharashtra, Punjab, Haryana, Rajasthan, representatives from various Banks and Financial Institutions (Power Finance Corporation & Rural Electrification Corporation) and representatives from generating companies and pursuant to the said meeting, a Working Group was constituted of members of all procurers States, and banks represented by Punjab National Bank and Canara Bank with the State Bank of India acting as a convener to find a solution through a consultative process.

e) The Working Group submitted its report on 10.1.2018 recommending two options, i.e. (a) State Government to takeover projects through majority stake and subsequently PPAs be amended to address viability issues by allowing fuel cost pass through or (b) Amending PPAs without change in ownership- wherein Procurers may agree for pass through of fuel cost.

f) Subsequent to the submission of report by the Working Group, the State Bank of India on 17.1.2018 wrote to Government of India that Government of Gujarat may constitute a High Power Committee comprising of individuals with proven expertise drawn from the judiciary, banking and power sectors (with regulatory knowledge) to review the report of the Working Group and suggest means for early resolution of issues relating to these projects.

g) On 3.7.2018, the Government of Gujarat passed Resolution No. CGP-12-2018-166-K constituting a High Power Committee upon receiving directions from the Central Government, with a view to provide relief to the imported coal based power projects of Adani Power, Tata Power Limited and Essar Power.

h) On 8.10.2018, the Government of Gujarat and GUVNL filed an application before the Hon'ble Supreme Court vide M.A. No. 2705 -2706 of

2018 in Civil Appeal No. 5399-5400 of 2016 seeking clarification in respect of the judgment dated 11.4.2017 of Hon'ble Supreme Court in Energy Watchdog case.

i) The Petitioner herein approached the Hon'ble Supreme Court by filing Contempt Petition along with application for permission to file Contempt Petition being Diary No. 39296 of 2018.

j) On 29.10.2018, the Hon'ble Supreme Court remanded the aforesaid matter back to the Commission with a direction to hear all the Consumer Groups at the time of hearing before the Hon'ble Supreme Court on all the objections that they may make to the proposal to amend the PPAs and after which, it would be open to the Commission to decide the matter in accordance with the law.

k) On 1.12.2018, Government of Gujarat, vide its Policy Directive accepted the recommendations of High Power Committee with modifications and decided to implement the same and consequently directed GUVNL to amend the PPAs and approach the Commission in light of the decision of the Hon'ble Supreme Court dated 29.10.2018.

l) On 7.12.2018, GUVNL vide its Petition No. 374/MP/2018 approached the Commission under Section 79(1)(b) of the Act read with Article 18.1 of PPAs dated 6.2.2007 (Bid No. 01/LTPP/2006: 1000 MW) and 2.2.2007 (Bid No. 02/LTPP/2006: 1000 MW) executed between GUVNL and Adani Power for approval of amendments to the PPAs by way of Supplementary Power Purchase Agreements ("SPPA"). GUVNL impleaded only Adani Power, Prayas Energy Group and Energy Watchdog but did not implead the Petitioner herein as a party.

m) On 29.12.2018, the Commission issued notice to all the Respondents in the above Petition and directed all the parties to file objections/reply thereto and fixed the case for further hearing on 23.1.2019. However, the Petitioner herein was not made the respondent party to the petition.

- n) On 8.1.2019, the Petitioner herein approached the Commission and sought permission to be impleaded as party to the said Petition and to be permitted to file objections in view of the order passed by the Hon'ble Supreme Court. After hearing the learned counsel for Petitioner herein, the Commission granted the permission to the Petitioner to file objections in the present Petition.
- o) In pursuance of permission granted by this Commission vide order dated 23.1.2019, the Petitioner herein filed objections/ suggestions in the Petition No. 374/MP/2018 and the same were taken on record.
- p) Vide order dated 12.4.2019, the Commission allowed the amendments to PPAs through SPPAs as sought by Adani Power. The order dated 12.4.2019 passed by this Commission in Petition No. 374/MP/2018 was challenged by the Petitioner before the APTEL, by way of an appeal registered as DFR No. 2203/2019 along with an application seeking leave to file appeal. APTEL vide Order dated 4.12.2020 rejected the application of the Petitioner seeking leave to file appeal and accordingly dismissed DFR No. 2203/2019.
- q) On 20.5.2019 Adani Power filed an application before the Hon'ble Supreme Court in Civil Appeal No. 11133 of 2011 (titled *M/s Adani Power (Mundra) Limited v. GERC & Ors*) seeking early hearing of the Appeal.
- r) Civil Appeal No. 11133 of 2011 was thereafter heard and allowed by the Hon'ble Supreme Court vide order dated 2.7.2019. While allowing the Appeal by order dated 2.7.2019, the Hon'ble Supreme Court, *inter-alia*, held that the PPA stood validly termination with effect from 4.1.2010. Further, the Hon'ble Supreme Court directed the Commission to determine compensatory tariff payable to the generator.
- s) Pursuant to the aforesaid Order dated 2.7.2019 in Civil Appeal No. 11133 of 2011, it became apparent that Adani Power had in fact falsely represented the fact of foregoing compensatory tariff for the period prior to 15.10.2018 before the Commission during the pendency of Petition No. 374/MP/2018 and by claiming compensatory tariff prior to 15.10.2018 is in breach of the supplementary PPA dated 5.12.2018.

- t) In view of the aforesaid facts, GUVNL approached this Commission by way of Petition No. 250/MP/2019 seeking recall of order dated 12.4.2019 passed by it in Petition No.374/MP/2018 as well a declaration of the Supplemental PPAs dated 5.12.2018 as void and a direction to Adani Power to refund the amount paid by GUVNL to Adani Power in terms of Supplemental PPAs dated 5.12.2018.
- u) The Petitioner filed his written submissions in the Petition No. 250/MP/2019 in terms of order dated 14.1.2020 passed by this Commission in Petition No. 250/MP/2019.
- v) Aggrieved by the acts of Adani Power, GUVNL also filed a Petition seeking review of order dated 2.7.2019 passed in Civil Appeal No. 11133 of 2011, being Curative Petition No. 34 of 2020 before the Hon'ble Supreme Court.
- w) The Petition No. 250/MP/2019 was heard at length on 22.11.2021 by this Commission and after hearing the learned counsels for the parties, the matter was reserved for final order.
- x) Subsequently, perusal of the order dated 21.2.2022 discloses that an application being IA No. 3/IA/2022, was filed jointly by Adani Power and GUVNL before this Commission during the pendency of the aforesaid Petition to apprise this Commission that they have arrived at a settlement in regard to the subject matter of the Curative Petition No. 34 of 2020 pending before the Hon`ble Supreme Court and that they have agreed on disposal of the proceedings pending before the Hon`ble Supreme Court, the APTEL and the Commission, in terms of Settlement Deed dated 3.1.2022.
- y) Vide separate orders dated 21.2.2022, this Commission disposed of the Petition No. 250/MP/2019 and Petition No. 275/MP/2019 in terms of a Settlement deed dated 3.1.2022, which was placed on record by the parties.
- z) Aggrieved by the aforesaid order dated 21.2.2022, the Petitioner has filed the present Petition seeking recall of the said order.

**Petitioner's Submissions:**

3. The Petitioner has sought recall of the order dated 21.2.2022 passed by the Commission in Petition No. 250/MP/2019 on the following grounds:

(a) The terms of the Settlement Deed have neither been disclosed to the consumers nor was any consumer group part of the discussions that led to execution of the Settlement Deed dated 3.1.2022.

(b) The Settlement Deed dated 3.1.2022 is without the regulatory approval warranted as per the provisions of the Act.

(c) The settlement deed dated 3.1.2022 seeks to amend and alter the PPAs without following due procedure of law and under the guise of a settlement thereby seeks to do indirectly that cannot be done directly.

(d) As per the provisions of the Act, the purchase of power is regulated by Appropriate Commission in terms of provisions of the Act and the Guidelines framed thereunder. A perusal of order dated 12.4.2019 passed by the Commission in Petition No. 374/MP/2018, makes it crystal clear that the primary basis of approval of the supplementary PPAs was the interest of the consumers at large. However, both GUVNL and Adani Power have settled their disputes vide Settlement Deed dated 3.1.2022 without any regard to the interests of the consumers.

(e) In the present case, the parties have altered/ amended the PPA terms mutually without any Regulatory Approval and same is in gross violation of the provisions of the Act.

(f) It is apparent that GUVNL and Adani Power have acted in collusion and settled the matter vide Settlement Deed dated 3.1.2022 for disposal of the Curative Petition No. 34/2020 in order to avoid getting the matter decided on merits and therefore, caused grave injustice to consumer groups.

(g) The Commission cannot allow direct/ indirect amendment to any PPA without following due process and inviting comments/ suggestions /objects as contemplated under law.



(h) IA No. 3/2022 was jointly filed by GUVNL and Adani Power only in February 2022, i.e. over 10 months after the arguments in Petition No. 250/MP/2019 were concluded and reserved for order. The Petition No. 250/MP/2019 was taken up by the Commission on 21.2.2022 by way of circulation and thus, neither any comments/suggestions were invited from stakeholders nor were they given any opportunity of any hearing.

(i) The Commission ought not to have disposed of Petition No. 250/MP/2019 without assessing the impact of such a Settlement Agreement on consumers at large merely because the Hon'ble Supreme Court vide its Order dated 8.2.2022 disposed of the Curative Petition only with the observation that the *inter se* relationship between the parties shall now be governed by the Settlement Deed dated 3.1.2022.

(j) The contents of Order dated 8.2.2022 passed by the Hon'ble Supreme Court in Curative Petition No. 34 of 2020 in Civil Appeal No. 11133 of 2011 cannot be misconstrued to mean that the Hon'ble Supreme Court has approved the Settlement Deed dated 3.1.2022 or directed the Commission to approve the settlement deed in complete ignorance of the provisions of law/ Policies/ Bidding Guidelines as well as the Hon'ble Supreme Court's order dated 11.4.2017 in Civil Appeal Nos.5399-5400 of 2016.

(k) The Petitioner has submitted that the order dated 21.2.2022 has been passed by the Commission without hearing the Petitioner or any consumer groups and without considering the larger public interest and thereby ought to be recalled. That grave injustice would be caused to the consumers if the present Petition is not allowed.

4. The matter was heard on 9.9.2022. After hearing the learned counsel for the Petitioner, the Commission directed the Petitioner to file brief written submission on the maintainability of the Petition. The Petitioner vide its affidavit dated 12.9.2022 has filed the written submissions and reiterated the submissions made in the Petition.

## **Analysis and Decision**

5. We have considered the submissions made by the Petitioner. The Petitioner has filed the present Petition under Section 79(1)(b) and Section 79(1)(f) of the Act seeking recall of order dated 21.2.2022 passed by the Commission in Petition No.250/MP/2019.

6. GUVNL had filed Petition No 250/MP/2019 seeking recall of order dated 12.4.2019 in Petition No. 374/MP/2018 by which the Commission had granted approval of the Supplementary PPAs dated 5.12.2018 executed between GUVNL and Adani Power. GUVNL had sought the SPPAs to be declared as void alleging misrepresentation by Adani Power, mistake/or absence of consensus ad-idem between the parties in terms of the principles under the Indian Contract Act, 1972.

7. However, pending disposal of the Petition No. 250/MP/2019, GUVNL and Adani Power jointly filed Interlocutory Application (IA) No. 3/IA/2022 in Petition No. 250/MP/2019 informing the Commission about the following development:

(a) Both the parties have arrived at a settlement in regard to the subject matter of the Curative Petition No. 34 of 2020 pending before the Hon`ble Supreme Court filed by GUVNL, challenging the order dated 2.7.2019 passed in Civil Appeal No. 11133 of 2011. The terms of the settlement have been reduced in writing and duly signed by the parties.

(b) The parties have also agreed on the disposal of the proceedings pending before the Hon`ble Supreme Court, the APTEL and the Commission, as set out in the Settlement Deed dated 3.1.2022.

(c) The Hon`ble Supreme Court vide its order 8.2.2022 in Curative Petition No. 34 of 2020 has taken on record the Settlement Deed dated 3.1.2022 holding as under:

*“During the pendency of the Curative Petition, the parties have settled the dispute.*

*The Petitioner and respondent No. 1 have filed a joint application, IA No. 1421/2022, to place on record the deed of settlement dated 03.01.2022 entered between them, regarding the subject matter of the present Petition. The Settlement Deed dated 3.1.2022 is taken on record.*

*In view of the above, we dispose of the present Curative Petition with the observation that the inter se relationship between the parties shall now be governed by the settlement deed dated 3.1.2022.*

*I.A.No. 1421/2022 and Curative Petition (C) No. 34 of 2020 are disposed of in the above terms.”*

(d) Accordingly, GUVNL and Adani Power vide the aforesaid IA, made the following prayers:

*“(a) Permit the Petitioner and Respondent No. 1 to place on record the Settlement Deed dated 03.01.2022 entered in to between the parties as contained in Annexure A to the present Application;*

*(b) Dispose of Petition No. 250/MP/2019 in terms of the Settlement Deed holding that the parties shall be governed and bound by the terms of the Settlement Deed; and*

*(c) Pass such further orders as this Commission may deem fit and appropriate.”*

8. In view of the submissions of the parties that the present Petition may be disposed of in view of the Settlement Deed dated 3.1.2022, Petition No 250/MP/2019 was disposed of without going into the merits vide order dated 21.2.2022 in following terms:

*“7.....In view of the submissions of the parties that the present Petition may be disposed in view of the Settlement Deed dated 3.1.2022 entered into between the parties and order of the Hon’ble Supreme Court dated 8.2.2022 in Curative Petition No. 34/2020, the Petition is being disposed without going in the merits.*

*8. Accordingly, the Petition No. 250/MP/2019 and I.A No. 3/2022 are disposed in terms of the above. The settlement deed dated 3.1.2022 forms part of the order.”*

9. As to the *locus standi* of the Petitioner, it is noted that the Petitioner has stated himself to be a Senior Journalist and an Author and has filed the present Petition in

his individual capacity in the consumer interest. It is pertinent to note that during the proceedings of Petition No. 374/MP/2019, Mr Kapoor had approached the Commission in his individual capacity and sought permission to be impleaded as party to the said Petition and to be permitted to file objections in view of the order passed by the Hon'ble Supreme Court. After hearing the counsel for Mr Kapoor on 23.1.2019, the Commission rejected the prayer made by Mr Kapoor to be impleaded as a Respondent. However, the Commission had allowed Mr Kapoor to file objections/suggestions. Pursuant to the permission granted by the Commission vide Record of Proceedings for the hearing dated 23.1.2019, the Petitioner herein filed objections/ suggestions in the Petition No. 374/MP/2018 and the same were taken on record. The relevant extract of the said Record of Proceedings of hearing held on 23.1.2019 in Petition No.374/MP/2019 is extracted as under:

*“The Commission observed that in the light of the Hon’ble Supreme Court’s order dated 29.10.2018, Shri Kapoor cannot be impleaded as Respondent in this case. However, the Commission directed that keeping in view of the past precedents, Shri Kapoor can make submission on the issues raised in the Petition. Accordingly, the Commission directed that the submissions already made by Shri Kapoor be taken on record. The Commission also permitted Shri Kapoor to make further submission, if any, within a period of two days.”*

10. Thereafter, Mr Kapoor had challenged the order dated 12.4.2019 of the Commission in 374/MP/2018 before APTEL with an IA for 'leave to file appeal'. However, the APTEL vide order dated 4.12.2020, dismissed the aforesaid IA holding, *inter-alia*, that Mr Kapoor is neither a necessary party nor a proper party in light of the direction of the Hon'ble Supreme Court in the order dated 29.10.2018. It was also held by the APTEL that if a party is not impleaded as either necessary party or proper party in terms of legal procedure, such party cannot place anything on record, and even if it is placed, it is *non-est* in the eyes of law. The relevant extract of the above order of APTEL 4.12.2020 is reproduced as under:

*“Heard Ms. Suparna Srivastava, learned counsel appearing for the Appellant and Mr. Amit Kapur, learned counsel appearing for Respondent No.3, who also appeared in similar other appeals filed by consumer groups.*

*It is brought to our notice that the Hon’ble Supreme Court in MA Nos. 2705-2706 of 2018 in Civil Appeal No. 5399-5400 of 2016 dated 29.10.2018 has passed the following order:*

*“Having heard learned counsel for the parties, including the learned Attorney General appearing for the State of Gujarat, we allow the application for impleadment of the State of Gujarat. We are of the view that, having perused the High Power Committee’s report, which was given after our judgment dated 11th April, 2017, it will be open to the applicants to approach the Central Electricity Regulatory Commission (C.E.R.C.) for approval of the proposed amendments to be made to the Power Purchase Agreements (PPAs) in question.*

*We make it clear that our judgment will not stand in the way of maintaining such applications. We also make it clear that each of the consumer groups, who had appeared before us and who have appeared before us today, will be heard on all objections that they may make to the proposed amendments to the PPA, after which, it will be open to the C.E.R.C. to decide the matter in accordance with law. Given the conclusions in the High Power Committee report, we are of the view that the C.E.R.C. should decide this matter as expeditiously as possible, and definitely within a period of eight weeks from today.*

*The miscellaneous applications are disposed of accordingly.*

*Pending applications, if any, stand disposed of.”*

*In terms of the said directions, only consumer groups were permitted to participate in the matter. In that view of the matter, we cannot appreciate the stand of the Appellant. Though such direction was granted, CERC permitted them to file written submission.*

*If a party is not impleaded as either necessary party or proper party in terms of legal procedure, such party cannot place anything on record, and even if it is placed, it is non-est in the eyes of law. In that view of the matter, we are of the opinion, the Appellant cannot be granted leave to file the above appeal. Accordingly, the application is rejected. Consequently, the Appeal is dismissed. All the pending IAs, if any, shall stand disposed of. No order as to costs.”*

11. At the time of arguments, the Petitioner had submitted that this Petition has been filed in a representative capacity. It is apparent from plain perusal of the Petition that there is no mention in the pleadings regarding representative capacity of the Petitioner within the meaning of Order I Rule 8 of the Code of Civil Procedure, 1908. While the Regulation 18(1) of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 provides “*it shall be open to the Commission to permit any association/ forum or other bodies corporate or any group of consumers to*

*participate in any proceedings before the Commission*”, it is, however, not the case of the Petitioner that it comes under any of these categories. Another aspect being that the Petition No. 250/MP/2019 has been decided on the basis of agreed Settlement Deed as accepted by the Supreme Court and this Commission has formed it part of the order. Order XXIII Rule 3 of CPC deals with Compromise of Suit and a compromise decree or order. Rule 3A provides “No suit shall lie to set aside a decree on the ground that the compromise on which decree is based was not lawful”. Furthermore, the Petitioner has also completely failed to demonstrate as to how it is an affected/aggrieved party by the order of the Commission dated 21.2.2022. Thus, on all the above stated counts, the Petition is not at all maintainable and the Petitioner has no locus to bring the Petition. Further, the Commission has restrained itself by not imposing exemplary cost upon the Petitioner for bringing this frivolous Petition and the Petitioner is cautioned for not bringing such frivolous Petitions in future.

12. The Petition No. 179/MP/2022 is disposed of in terms of the above.

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

sd/-  
**(Arun Goyal)**  
**Member**

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