

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY  
AT NEW DELHI  
(APPELLATE JURISDICTION)**

**I.A. NO.510 OF 2017 IN APPEAL NO.32 OF 2015**  
**AND**  
**I.A. NO.512 OF 2017 IN APPEAL NO.47 OF 2015**

**Dated : 7<sup>TH</sup> JULY, 2017.**

**Present: Hon'ble Smt. Justice Ranjana P. Desai, Chairperson  
Hon'ble Shri I.J. Kapoor, Technical Member.**

**I.A. NO.510 OF 2017 IN APPEAL NO.32 OF 2015**

**In the matter of:**

**Talwandi Sabo Power Limited ... Appellants/  
Applicants**

**And**

**Punjab State Electricity  
Regulatory Commission & Ors. ... Respondents**

Counsel for the Appellant(s) : Mr. Sujit Ghosh

Counsel for the Respondent(s) : Mr. M.G. Ramachandran  
Ms. Ranjitha Ramachandran  
Ms. Poorva Saigal  
Ms. Anushree Bardahn  
Mr. Shubham Arya for R-2

**I.A. NO.512 2017 IN APPEAL NO. 47 OF 2015**

**In the matter of:**

**Nabha Power Limited & Anr. ... Applicants/  
Applicants**

**And**

**Punjab State Power Corporation  
Limited & Anr. ... Respondents**

Counsel for the Appellant(s) : Mr. S. Ganesh, Sr. Adv.  
Mr. Aniket Prasoon  
Mr. Abhishek Kumar

Counsel for the Respondent(s) : Mr. M.G. Ramachandran  
Ms. Ranjitha Ramachandran  
Ms. Poorva Saigal  
Ms. Anushree Bardahn  
Mr. Shubham Arya for R-1

### **ORDER**

1. Appeal No.32 of 2015 is filed by M/s. Talwandi Sabo Power Limited ("**TSPL**") against Order dated 02/12/2014 passed by the Punjab State Electricity Regulatory Commission ("**the State Commission**"). Appeal No.47 of 2015 is filed by Nabha Power Limited ("**NPL**") and L & T Power Development Ltd. ("**L&T**") challenging Order dated 16/12/2014 passed by the State Commission. By the orders impugned in these appeals, the State Commission has held that the Appellants are not entitled to deemed export benefits under Foreign Trade Policy on the relevant cut-off date and, resultantly, they are liable to pass on the benefits availed by them under Mega Power Policy, 2009 to Punjab State Power Corporation Limited ("**PSPCL**"). Both these appeals were heard together as they involve common issues. They were dismissed by us by a

common judgment and order dated 04/07/2017. The Appellants are also referred to as “TSPL” and “NPL” for convenience.

2. IA No.510 of 2017 is filed by TSPL in Appeal No.32 of 2015 praying for suspension of operation of Judgment dated 04/07/2017 for a period of four weeks. IA No.512 of 2017 is filed by NPL and L&T praying that operation of Interim Order dated 03/03/2017 be extended for four weeks. Needless to say that the Appellants want to challenge Order dated 04/07/2017 in the Supreme Court.

3. For disposal of these applications, the factual background needs to be stated.

4. Admittedly, TSPL had filed an application in this Tribunal praying for stay of the State Commission’s Order dated 02/12/2014. The said application was dismissed by this Tribunal. Against the said order, TSPL filed a civil appeal in the Supreme Court. On 24/04/2015, the Supreme Court

granted limited interim relief which was extended on two occasions. On 06/02/2017, the Supreme Court dismissed the application for extension of the stay order. Thus, the stay order stood vacated.

5. While the instant appeals were being heard, TSPL filed an application for stay of the impugned Order dated 02/12/2014 alleging that PSPCL had deducted an amount of Rs.215 crores from the monthly running bills of TSPL. Upon hearing learned counsel, we dismissed the application because the Supreme Court had vacated the stay granted by it. TSPL, therefore, approached the Supreme Court. The Supreme Court by Order dated 19/03/2017 granted partial relief to TSPL by directing PSPCL to refund an amount of Rs.50 crores to TSPL to enable it to pay the salaries of its employees.

6. During the hearing of the said appeals, TSPL preferred IA No.248 of 2017 *inter alia* for stay of further deduction. On 06/04/2017, the said application was disposed of by us by granting limited relief to TSPL after recording statement of the

counsel for PSPCL. Following are the relevant paragraphs of the said order:

*“We have heard learned counsel for the parties. Learned Counsel for Punjab State Power Corporation Limited (PSPCL) R-2 herein on instructions from PSPCL states that there shall be no adjustment in the bill payment to be made in April 2017 for the quantum of Mega Power Status Benefits which Talwandi Sabo Power Ltd.(TSPL) is required to pass on to PSPCL in terms of the impugned order of Punjab State Electricity Regulatory Commission provided that TSPL furnishes a Bank Guarantee for the said amount. Counsel for the PSPCL further states that the quantum related to the Mega Power Status Benefits shall be released by PSPCL to TSPL against the Bank Guarantee from a nationalized bank/scheduled bank. The counsel further states that the above accommodation shall be restricted to the bill payment to be made in the month of April, 2017 for the billing month of February, 2017 and further only to the quantum of Mega Power Status Benefits, the same shall not in any manner affect the other rights of PSPCL for adjustment on account of other aspects, if any.*

*We accept this statement. In view of this statement, PSPCL shall not make any adjustment in the bill payment to be made in April, 2017 for the billing month of February, 2017 on account of Mega Power Status Benefits.*

*We direct the Appellant to furnish the bank guarantee within a period of two weeks from today. Counsel for the Appellant states that Appellant undertakes to furnish the bank guarantee within two weeks. We direct PSPCL to make payment for the*

*billing period of February, 2017 payable in April, 2017. Payment will be released on due date in the month of April, 2017. This order is passed without prejudice to rights and contentions of the parties. Needless to say that this order will abide by the final order which will be passed in the main appeal.”*

7. On 24/04/2017, the hearing of both the appeals was concluded and the judgment was reserved. Since the judgment was reserved, we continued the interim order with appropriate changes in the time-lines till the pronouncement of the final judgment. Following is the relevant paragraph of the said order:

*“In view of the fact that hearing in these matters is closed and judgment is reserved, we are of the opinion that the order dated 06.04.2017 passed in IA No. 248 of 2017 in Appeal No.32 of 2015 should continue to operate with appropriate changes in the timelines, till the judgment is pronounced. Learned counsel appearing for the Respondent - Punjab State Power Corporation Ltd. (“PSPCL”) has opposed continuation of the interim arrangement. However, in the circumstances of the case, we are of the opinion that in the interest of justice order dated 06.04.2015 passed in IA No. 248 of 2017 in Appeal No.32 of 2015 should continue to operate with appropriate changes in the timelines till the pronouncement of final judgment. Order accordingly.”*

Thus the interim protection granted to TSPL was continued, till pronouncement of the judgment.

8. As already stated in the present application, TSPL has prayed that operation of the Judgment dated 04/07/2017 be suspended for four weeks.

9. So far as NPL is concerned, we granted limited protection to NPL by Order dated 03/03/2017 passed in IA No.128 of 2017. Following are the relevant paragraphs of the said order:

*“Having heard counsel for the parties, having considered the fact that the prayer for stay made by the Appellant has not been rejected by this Tribunal so far and also having considered the fact that the appeal is set down for final hearing and is in fact being heard by this Tribunal we deem it appropriate to pass the following interim order which shall be in place during the pendency of the instant appeal.*

*Respondent No.1 can effect deduction in future monthly running bills of the Appellant. However, so far as arrears concerning subject disputed issue are concerned the Appellant shall furnish Bank Guarantee in favour of Respondent No.1 of any scheduled bank/nationalised bank covering the said amount of arrears within two weeks from today. On such Bank Guarantee being furnished, Respondent No.1 shall not deduct any amount from the running*

*bills of the Appellant towards the arrears. The said Bank Guarantee shall be kept alive till the hearing of final disposal of the appeal. Needless to say that the said Bank Guarantee shall abide by the final order that may be passed by this Tribunal.”*

10. As already stated, NPL has in its application prayed that operation of the above quoted Order dated 03/03/2017 be extended for four weeks. Thus, in the instant applications TSPL and NPL are, in effect, seeking stay of encashment of the bank guarantee. Needless to say that they want this Tribunal to grant interim protection to them so that in the meantime they can approach Supreme Court and obtain appropriate orders.

11. We have heard Mr. Ganesh, learned senior counsel appearing for NPL and Mr. Ghosh learned counsel appearing for TSPL. We have also heard Mr. Ramachandran learned counsel appearing for PSPCL. Mr. Ganesh and Mr. Ghosh have highlighted the aspect of alleged hardship which is likely to be caused in case the bank guarantees are encashed. Our attention is drawn to certain letters written by PSPCL to NPL

asking NPL to take steps to ensure 100% availability of its plant by building up coal stocks to meet the peak demand. It is submitted that if the bank guarantees are encashed, power generation plants will be in jeopardy and that will affect agriculturists, who are dependent on power supply.

12. In support of their submission that we can grant interim protection to the Appellants, counsel have relied on Order XLI Rule 5(2) of the Code of Civil Procedure (“**CPC**”) and Section 120(3) of the Electricity Act 2003 (“**the said Act**”). Mr. Ganesh learned senior counsel for NPL has relied on the judgments of the Supreme Court in **Hotel Queen Road Private Limited & Ors. v. Ram Parshotam Mittal & Ors.**<sup>1</sup> and **Mukund Swarup Mishra v. Union of India & Ors.**<sup>2</sup> Counsel has also relied on the judgment of the Himachal Pradesh High Court in **Devinder Singh & Ors. v. The State of HP**<sup>3</sup>. Reliance is also placed on the judgment of the Calcutta High Court in **Manmal Kothari & Ors. v. Shree Sree Radha Rawan Jew & Ors. in**

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<sup>1</sup> (2014) 13 SCC 646

<sup>2</sup> (2007) 2 SCC 536

<sup>3</sup> AIR 1976 HP 19

**Appeal No.209 of 1994 decided on 20/04/1998.** Counsel appearing for TSPL has adopted the submissions of Mr. Ganesh. Counsel added that the present applications could also be treated as review petitions and relief can be granted to the Applicants.

13. Mr. Ramachandran, learned counsel appearing for PSPCL has contended that Section 120 of the said Act delineates the powers which the Appropriate Commission can exercise while discharging its functions. It does not include power conferred by Order XLI Rule 5(2) of the CPC, upon the court which passed the decree to stay it. Counsel submitted that Section 120(3) of the said Act states that order passed by this Tribunal shall be executable as a decree of civil court. Here, we are not concerned with execution of decree. Unless a specific power is conferred on this Tribunal, it cannot stay its order, which will have effect of nullifying it. Counsel submitted that wherever the legislature wanted such a power to be conferred on court, it has specifically done so such as Section 28 of the Specific Relief Act or Section 389(3) of the Code of Criminal

Procedure. In support of his submissions, counsel relied on the judgment of this Tribunal in **Indian Oil Corporation Ltd. v. Gujarat State Petroleum Corporation Ltd. & Ors. decided on 10/02/2014 (Appeals Nos. 1, 2 & 5 of 2015), State of UP & Ors. v. Mukthar Singh & Ors. in Misc Application No. 2274 of 1956 decided on 08/03/1957, Durga Mohan Joshi v. International Metal Industries & Ors.**<sup>4</sup> and **LML Ltd. v. Collector of Central Excise, Kanpur**<sup>5</sup>.

Counsel submitted that, in effect, the Appellants are seeking stay on execution of bank guarantees which cannot be granted as per the settled law.

14. In rejoinder submission, Mr. Ganesh, learned senior counsel for NPL submitted that Allahabad High Court's judgment in **Mukthar Singh** is not applicable because, there Section 14(ee) of the UP Consolidation of Holdings Act, 1953 was held to be unconstitutional and order of consolidation authorities was quashed. Facts are, therefore, completely different. Moreover, the Allahabad High Court did not

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<sup>4</sup> AIR 1984 Bom 314

<sup>5</sup> 1992(4) ECR 563

consider Order XLI Rule 5(2) of the CPC which confers power on the court which passed the decree to stay it. So far as the Bombay High Court's judgment in **Durga Mohan** is concerned, counsel urged that it pertains to Order XX Rule 11(2) of the CPC. There, the decree had become final. Such is not the case here. Counsel submitted that if this Tribunal has powers of a civil court to execute a decree, it can also stay it. So far as the judgment of this Tribunal in **Indian Oil Corporation Ltd.** is concerned, counsel submitted that it is not applicable to the present case because there the grant of stay would have undone the final order of this Tribunal and that weighed with this Tribunal. Counsel, relying on **N. Bhargavan Pillai & Anr. v. State of Kerala**<sup>6</sup>, submitted that in **Indian Oil Corporation Ltd.**, this Tribunal has not considered the relevant provisions of law and, hence, it is *per incuriam*.

15. It may be that encashment of bank guarantees may cause some hardship to the Appellants but the question is

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<sup>6</sup> (2004) 13 SCC 217

whether after dismissing the appeals and disposing of the pending applications, we could grant any interim relief to the Appellants.

16. We shall first have a look at the relevant provisions of the CPC. Section 152 of the CPC says when judgments, decrees and orders could be amended. It reads thus:

**SECTION 152**

***“Amendment of judgments, decrees or orders—***

*Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties.”*

Thus, a court cannot change or re-write any judgment. It can only amend it if there is a clerical or arithmetical error. Therefore, the court becomes *functus officio* the moment it declares a judgment. It loses its control over the judgment. It can be changed, varied, confirmed or set aside by the superior court only, if it is appealable.

17. Undoubtedly, we are not concerned here with arithmetical or clerical error. What the Appellants want is, stay

of the order passed by this Tribunal to enable them to approach the Supreme Court. We must, therefore, go to Order XLI, Rule 5(2) of the CPC on which reliance is placed by the Appellants. It reads thus:

**“APPEALS FROM ORIGINAL DECREES**

- |    |     |     |     |
|----|-----|-----|-----|
| 1. | xxx | xxx | xxx |
| 2. | xxx | xxx | xxx |
| 3. | xxx | xxx | xxx |
| 4. | xxx | xxx | xxx |

**5. STAY OF PROCEEDINGS AND OF EXECUTION**

***Stay by Appellate Court—***

*(1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree.*

*[Explanation—An order by the Appellate Court for the stay of execution of the decree shall be effective from the date of the communication of such order to the Court of first instance but an affidavit sworn by the appellant, based on his personal knowledge, stating that an order for the stay of execution of the decree has been made by the Appellate Court shall, pending the receipt from the Appellate Court of the order for the stay of execution or any order to the contrary, be acted upon by the Court of first instance.]*

**(2) Stay by Court which passed the decree—**

*Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed.”*

**(3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the court making it is satisfied—**

*(a) that substantial loss may result to the party applying for stay of execution unless the order is made;*

*(b) that the application has been made without unreasonable delay; and*

*(c) that security has been given by the applicant for the due performance of such decree of or as may ultimately be binding upon him.”*

18. Undoubtedly, this provision permits the Court which has passed an appealable decree to stay it on sufficient cause being shown, before expiration of the appeal period. For this purpose, the court has to be satisfied about the fulfilment of requirements stated in sub-rule (3) of Rule 5 of Order XLI of the CPC.

19. It would be appropriate now to turn to Section 120 of the said Act. So far as it is relevant, it reads thus:

**“120. Procedure and Powers of Appellate Tribunal – (1) The Appellate Tribunal shall not be**

*bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of this Act, the Appellate Tribunal shall have powers to regulate its own procedure.*

*(2) The Appellate Tribunal shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely :-*

- (a) Summoning and enforcing the attendance of any person and examining him on oath;*
- (b) requiring the discovery and production of documents;*
- (c) receiving evidence on affidavits;*
- (d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872),requisitioning any public record or document or copy of such record or document from any office;*
- (e) issuing commissions for the examination of witnesses or documents;*
- (f) reviewing its decisions;*
- (g) dismissing a representation of default or deciding it ex parte;*
- (h) setting aside any order of dismissal or any representation for default or any order passed by it ex parte;*
- (i) any other matter which may be prescribed by the Central Government.*

*(3) An order made by the Appellate Tribunal under this Act shall be executable by the Appellate Tribunal as a decree of civil court and, for the purpose, the Appellate Tribunal shall have all the powers of a civil court.”*

20. As per sub-section (3) of Section 120 of the said Act, an order made by this Tribunal under the said Act shall be executable by this Tribunal as a decree of Civil Court and for this purpose it shall have the same powers as are vested in a civil court. These powers are for the purpose of execution of the decree. In our opinion, this power does not include power to stay the order passed by this Tribunal. It is pertinent to note that sub-section (2) of Section 120 states the matters in respect of which this Tribunal has same powers as are vested in a civil court, for discharging its functions under the said Act. The power to stay this Tribunal's order is absent in this section. Section 28 of the Specific Relief Act and Section 389 of the Criminal Procedure Code can be advantageously referred to, where such a provision is specifically made. We are, therefore, unable to read such a power in the said Act. We have no hesitation in holding that the power to stay

judgment of this Tribunal, which is appealable, does not vest in this Tribunal.

21. Reliance placed on the judgment of the Supreme Court in **Hotel Queen** is misplaced. In that case, the High Court had substantially heard the matter and then the appeal was permitted to be withdrawn so as to enable the Appellants therein to avail of the alternative remedy available to them. It is against this background that the High Court continued the interim relief. After quoting its judgment in **State of Orissa v. Madan Gopal Rungta**<sup>7</sup>, the Supreme Court observed that if a petition is not maintainable and is ultimately withdrawn, the court should not continue interim relief. But where the matter is heard on merits and withdrawal is permitted, the court can grant interim relief for a limited time. It is pertinent to note that in **Madan Gopal**, the Supreme Court had considered the powers of the High Court under Article 226 of the Constitution of India. The High Court's powers under Article 226 are very wide and cannot be compared to powers of this Tribunal under

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<sup>7</sup> AIR 1952 SC12

Sections 120 and 121 of the said Act. This judgment is, therefore, not applicable to this case.

22. In **Mukund Swarup Mishra**, the Supreme Court had, after cancelling allotment orders, continued its interim orders for three months. The facts of this case are not at all comparable to the facts of the present case. Besides, Article 141 of the Constitution of India vests extremely wide powers in the Supreme Court which can never be equated with the powers of this Tribunal.

23. At this stage, we may usefully refer to the judgment of the coordinate bench of this Tribunal in **Indian Oil Corporation**, where similar prayer for stay of the judgment of this Tribunal was made. This Tribunal rejected the prayer, after observing that it is a settled principle of law that the court or the Tribunal becomes *functus officio* after rendering final judgment and it cannot change, alter or vary its own judgment except to the extent of correction of typographical mistake. We are not inclined to accept Mr. Ganesh's argument

that this Tribunal declined interim relief because the stay order would have undone the final order. That was one of the reasons given by the Tribunal. The primary reason for not granting relief was inability of this Tribunal to change, alter or vary its judgment except to the extent of correction of typographical mistakes which is reflected in Section 152 of the CPC. Though the said section is not quoted, undoubtedly the reliance was on that section. We are unable to hold that this judgment is *per incuriam*, because, in our opinion, power under Order XLI, Rule 5(2) of the CPC to stay order passed by this Tribunal is not vested in this Tribunal. **Indian Oil Corporation**, therefore, does not become *per incuriam* because it does not make reference to Order XLI Rule 5(2) of the CPC. We are bound by the decision rendered by the coordinate Bench of this Tribunal.

24. We must now refer to the judgment of the Madhya Pradesh High Court in **Devinder Singh**. In that case, the High Court was considering the question whether the court which has passed the judgment is competent to entertain and

hear the stay application against its own order. It is pointed out that while dealing with this question, the High Court held the '*functus officio*' implies that the court cannot reopen the case and dispose it of afresh. It is pertinent to note that in **Devinder Singh**, again the court was considering the powers of the High Court under Article 226 of the Constitution of India. We have already noted that the said powers are wide. This case, therefore, has no application to the present case. Besides, once we hold that power to stay judgment contemplated in Order XLI, Rule 5(2) of the CPC does not vest in this Tribunal, it is not necessary to refer to this judgment. Mr. Ramachandran, learned counsel for PSPCL has placed strong reliance on the Allahabad High Court's judgment in **Mukthar Singh**, where the Allahabad High Court held that the court cannot, in exercise of its inherent power, stay an order passed by itself. It was observed that inherent powers are to be exercised by a court in the interest of justice or to prevent an abuse of process of court and not for any other purpose. It was further observed that it is impossible for a court to say that allowing an order passed by itself to operate,

is against the interest of justice or is an abuse of process of court. It was observed that, that is why, such power is specifically conferred in Order XLI, Rules 5 and 6 of the CPC or in the Criminal Procedure Code.

25. We have already held that the power contemplated under Order XLI Rule 5(2) of the CPC does not vest in this Tribunal. In any case, **Mukhtar Singh** again discusses High Court's powers under Article 226 of the Constitution of India and the inherent powers of the Court. Though we are in respectful agreement with the observations made in **Mukhtar Singh**, in view of the aforesaid conclusion reached by us, it is not necessary to dwell on **Mukhtar Singh** also.

26. It was urged by Mr. Ramachandran that the Supreme Court has categorically held that interference with encashment of bank guarantee is limited and, hence, this Tribunal should not stay the impugned order because that would, in effect, stay the encashment of bank guarantees. Mr. Ganesh, on the other hand, urged that in the present case, the bank

guarantees become enforceable on execution of this Tribunal's judgment. This situation cannot be compared with the cases which relate to contractual obligations of two parties.

27. In our opinion, it is not necessary for us to go into this aspect. If power to stay our judgment is not available to us, as held by us, we cannot stay it. Hence, the applications are dismissed.

28. Pronounced in the Open Court on this 07<sup>th</sup> day of July, 2017.

**I.J. Kapoor**  
**[Technical Member]**

**Justice Ranjana P. Desai**  
**[Chairperson]**

✓ **REPORTABLE/NON-REPORTABLE**