

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

R.P. No.6 OF 2011 IN
APPEAL No.184 of 2010

Dated: 13th February, 2012

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. V.J. Talwar, Technical Member,

Adani Power Limited Petitioner/Appellant

Versus

Gujarat Electricity Regulatory Commission Respondent

Counsel for the Petitioner : Mr.C.S. Vaidyanathan, Sr Adv
Mr. Amit Kapur
Ms. Poonam Verma
Ms. Sugandha Somani
Mr. Malav Deliwala

Counsel for the Respondent : Mr. M. G Ramachandran
Ms. Swapna Seshadri

ORDER

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON

1. Adani Power Limited, the Petitioner/Appellant has filed this Petition seeking review of the judgement of this Tribunal rendered on 7.9.2011.
2. We have heard the Learned Counsel for the parties.
3. Gujarat State Commission, in the Petition filed by the Gujarat Urja Vikas Nigam Limited passed the impugned order dated 31.8.2010 setting aside the termination notice sent by Adani Power Limited to Gujarat Urja Vikas Nigam Limited and

directing the Adani Power Limited to supply power to the Gujarat Urja Vikas Nigam Limited as per the PPA.

4. Aggrieved by this order, the Adani Power Limited, has filed Appeal before this Tribunal in Appeal No.184 of 2010.
5. After hearing the parties, this Tribunal rendered judgement on 7.9.2011 confirming the impugned order passed by the Gujarat State Commission and directing the Review Petitioner to perform its obligation of supplying power to Gujarat Holding Company under the Power Purchase Agreement.
6. This Review Petition has been filed seeking the review of the above judgement on the ground that there is an error apparent on the face of the law in as much as the State Commission as well as this Tribunal do not have powers to grant Specific Performance Relief under the Electricity Act, 2003. It is further contended by the Appellant that the State Commission does not have the jurisdiction to deal with the present dispute, since the same has to be governed by Article 17 of the PPA providing for arbitration for resolving the dispute arising out of the Power Purchase Agreement.
7. According to the Respondent, the State Commission being the Regulator as well as the Adjudicator, has got the powers to adjudicate and enforce the due performance of the sale and purchase of the electricity under the PPA especially when it

affects the consumers at large and this aspect of specific performance in the context of Specific Relief Act has been dealt with by this Tribunal in the judgement and therefore, there is no apparent error on the face of the record or on the face of the law. It is also further contended by the Respondent that as held by the Hon'ble Supreme Court, all disputes and differences between the Generating Company and the licensee have to be decided by the State Commission and need not be decided by the Arbitral Tribunal constituted under the Power Purchase Agreement and therefore, the objection to jurisdiction of State Commission is without any merit.

8. We have carefully considered the submissions made on behalf of both the Petitioner and the Respondent.
9. At the outset, it shall be stated that the aspect with regard to direction to perform the obligation of the Petitioner for supplying power to Gujarat Holding Company under the PPA has been dealt with by this Tribunal in detail from the paragraph 113 onwards in the judgement. In fact, The specific question has been framed as to whether the State Commission is correct in directing the Adani Power Limited to supply power to the Gujarat Holding Company under the PPA when the PPA provided for liquidity damages only and not the specific performance of the PPA.

10. In the paragraphs from 113 to 128 of the judgement, we have discussed this aspect in detail and referred to various authorities of the Hon'ble Supreme Court cited by both the parties and held that the provision for liquidity damages in the PPA does not imply that there can not be any specific enforcement of the performance. We have also considered relevant sections of the Specific Relief Act namely Section 10, 14 and 23 of the Specific Relief Act and held that the specific performance in the present case is an appropriate remedy as the said relief is fully consistent with the provisions of the Electricity Act. The above finding was rendered by this Tribunal on the strength of the principles laid down by the Hon'ble Supreme Court in various decisions quoted in the above judgement.
11. The Learned Senior Counsel appearing for the Review Petitioner has contended that this Tribunal being a statutory body established under the Act are bound by the provisions of the statutes and they cannot act beyond the statute. He has cited the following authorities laying down the said principle:
- (a) N.C. Dhoundial v. Union of India (2004) 2 SCC 579
 - (b) Bhavnagar University v. Palitana Sugar Mill Pvt. Ltd and Ors (2003) 2 SCC 111
 - (c) Morgan Stanley Mutual Fund v. Kartick Das (1994) 4 SCC 225.

12. Per contra the learned Counsel for the Respondent has submitted that the State Commission has got the powers to grant relief directing Adani to implement the terms of the Power Purchase Agreement as the State Commission exercises regulatory powers under the provisions of Electricity Act, 2003. He has cited the following decisions:

- (a) V.S. Rice and Oil Mills v. State of A.P (1964) 7 SCR 456
- (b) K Ramanathan v. State of Tamil Nadu (1985) 2 SCC 116
- (c) Deepak Theatre v. State of Punjab, 1992 Supp (1) SCC 684
- (d) State of U.P. v. Maharaja Dharmander Prasad Singh (1989) 2 SCC 505
- (e) Hotel & Restaurant Association v. Star India (P) Ltd (2006) 13 SCC 753

13. In the above judgements the following principles have been laid down:

- (a) The word “regulate” is wide enough to confer power on the authority to regulate either by increasing the rate, or decreasing the rate and to arrange for its equitable distribution and its availability at fair prices.
- (b) The power to regulate does not necessarily mean the power to prohibit only. The power to regulate carries with it full powers over the things, subject to regulation and in the absence of restrictive words, the powers

must be regarded as plenary over the entire subject. It implies the power to rule or guiding principle to be followed and involves adoption of rule and guiding principle to be followed.

- (c) The Power to regulate a particular business implies the power to prescribe and enforce all the proper rules and regulations as may be deemed necessary to conduct the business.
- (d) The party in which the discretion is vested to regulate, can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, a discretion must be exercised only by the authority to which it is committed.
- (e) The Power to regulate with the obligations and functions that go with and are incidental to it, are not spent or exhausted with the grant of permission. The power of regulation which stretches beyond the mere grant of permission, takes within its sweep the power, in appropriate cases, to revoke or cancel the permission as incidental or supplemental to the power to grant.

These principles laid down by the Hon'ble Supreme Court would indicate that the State Commission not only adjudicates but also regulates for ensuring the implementation of the provisions. In this regard, it would be worthwhile to refer to the relevant observations made by the Hon'ble Supreme Court in the judgement reported in (2009) 16) SCC 659 in the case of Tata Power Co. Ltd v Reliance Energy Limited and Ors with regard to the powers of the State

Commission to ensure proper implementation of the provisions of the agreement as well as the provisions of the Act. The relevant observations are as follows:

Interpretation of Section 86

*“111. Section 86 (1) (b) provides for regulation of electricity purchase and procurement process of distribution licensees. In respect of generation its function is to determine the tariff for generation as also in regulation to supply, transmission and wheeling of electricity. Clause (b) of sub-section (1) of Section 86 provides to regulate electricity purchase and procurement process of distribution licensees including the price at which the electricity shall be procured from the generating companies or licensees or from other sources through agreements. **As a part of the regulation, it can also adjudicate upon disputes between the licensees and generating companies in regard to the implementation, application or interpretation of the provisions of the said agreement”.***

The above ratio laid down by the Hon’ble Supreme Court while interpreting Section 86, would reveal that the State Commission has every authority to give direction in regard to the implementation of the Power Purchase Agreement. It is also specifically laid down that under Section 86 (1) (b) of 2003 Act, the State Commission exercises the powers to adjudicate the dispute between the parties and to regulate by giving the appropriate directions for implementation of PPA..

14. The Electricity Act being a complete code provides that the State Commission is not only an Adjudicator but also a

Regulator who has got the powers to enforce the due performance of the sale and purchase of electricity under the PPA. Therefore, the State Commission, while holding that termination notice is not valid in law, has validly exercised the powers to direct the specific performance of the PPA entered into between the parties for generation and supply of electricity by Adani Power Limited to Gujarat Holding Company, through its consequential order.

15. This Tribunal is empowered to exercise the said power as the First Appellate Authority both on the facts and law while endorsing the decision of the State Commission. In this judgement, this Tribunal had referred to the need for granting specific performance in the context of Power Purchase Agreement entered into between the parties and particularly when the gestation period required for establishment of the Generating Station before effecting supply is around 4-5 years.
16. It is contended by the Learned Senior Counsel for the Review Petitioner that this Tribunal has not considered the effect of the statutory presumption contained in Explanation of Section 10 of the Specific Relief Act, 1963. This contention has no basis.
17. As a matter of fact, the entire gambit of the implication of the Specific Relief Act has been considered in this judgement while taking note of the fact that the electricity is a special

commodity particularly in view of the gestation period in setting up of the power project. Therefore, it is not correct on the part of the Appellant to contend that there is an error apparent on the face of the law.

18. It is further contended by the Appellant that the State Commission has no jurisdiction to go into the dispute in question when there is an arbitral clause under the Power Purchase Agreement. This contention is also misconceived in view of the dictum laid down by the Hon'ble Supreme Court in the case of Gujarat Urja Vikas Nigam Limited Vs Essar Power (2008) 4 SCC 755 stating that all the disputes and differences between the generating Company and the licensees have to be decided only by the State Commission and not by an Arbitral Tribunal constituted under the PPA.
19. It is also now brought to our notice that the judgement of this Tribunal dated 7.9.2011 has already been challenged in the Hon'ble Supreme Court in Civil Appeal No.11133 of 2011 and the same is pending. It is noticed, after the judgement that was pronounced by this Tribunal on 7.9.2011, the Review Petitioner has chosen to file the Review Petition on 7.10.2011. The same was heard and admitted on 15.12.2011. In the meantime, the Review Petitioner has also filed an Appeal before the Hon'ble Supreme Court on 7.11.2011. As such the entire judgement rendered by this Tribunal is subject to the

Review of the Hon'ble Supreme Court in the above Civil Appeal.

20. However, we would like to modify the sentence found in Para-118 as the sentence has not been properly framed. The first sentence of Para-118 is modified to this effect that "So, the above provisions would make it clear that the specific performance is an appropriate remedy and such a relief is fully consistent with the provisions of Section 23 of the Specific Relief Act, 1963".
21. Except this modification, we do not find any ground to hold that there is an apparent error on the face of the record or in the face of the law especially when the grounds of Appeal against our judgement cannot be dealt with in this Review Petition as its scope is very limited.
22. In view of the above, the Review Petition is dismissed. However, there is no order as to costs.

(V.J Talwar)
Technical Member
Dated: 13th Feb, 2012

(Justice M. Karpaga Vinayagam)
Chairperson

Reportable/Not Reportable