IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO. 25 OF 2024 & IA NO. 835 OF 2024 & IA NO. 836 OF 2024

Dated: 22nd August, 2024

Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Smt. Seema Gupta, Technical Member (Electricity)

In the matter of:

Baitarani Power Project Private Limited … Appellant(s)
VERSUS
Odisha Electricity Regulatory Commission & Ors. .... Respondent(s)

Counsel on record for the Appellant(s) : Anand K. Ganesan
Swapna Seshadri
Amal Nair
Kritika Khanna
Shivani Verma

Counsel on record for the Respondent(s) : Rutwik Panda
Nikhar Berry
Anshu Malik for Res.1

Raj Kumar Mehta
Himanshi Andley for Res.2

Shashank Bajpai for Res.3

ORDER

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

IA NO. 835 OF 2024
(for directions)

IA No. 835 of 2024, in Appeal No. 25 of 2024, was filed by the Appellant on 14.05.2024 seeking the following reliefs: (1) to set aside the letter dated 15.11.2023 issued by GRIDCO; (b) direct that no adjustment be made by GRIDCO towards the amount already paid by it towards the tariff from COD till 30.09.2023; (c) reiterate that the applicant be paid a tariff at

Rs.5.65 per unit in terms of the order dated 05.02.2024 till the disposal of the Appeal without adjustment; and (d) grant interest as per Annexure G and till the date of payment.

Prayer (b) in IA No. 835 of 2024 is identical to prayer (b) in IA No. 2343 of 2023 except that the word *"till date",* in the former IA No. 2343 of 2023, is now substituted by the words *"from COD till 30.09.2023"* in IA No. 835 of 2024. The relief sought, "*that no adjustment be made towards the amounts already paid to the applicant towards the tariff*". in IA No. 2343 of 2023 is the very same relief sought in IA No. 835 of 2024.

In IA No. 835 of 2024, the Appellant stated that, on 08.02.2024, it had addressed a letter to GRIDCO informing them that they were entitled to receive payment of Rs.23,95,57,422 for the invoices from September 2023 to January 2024; all subsequent monthly invoices, till final disposal of the appeal, shall be raised at a tariff of Rs.5.65 per unit subject to adjustment as necessary after final disposal; and since they were not paying any amount against the monthly invoices from September, 2023 to January, 2024, GRIDCO should immediately release payment including the withheld amount of Rs.23,95,57,422/-.

I. FACTUAL BACKGROUND:

This case has had the checkered history. The Appellant had constructed a Small Hydro Electric Project of 24 MW capacity on Baitarani River under the 2003 policy of the Government of Odisha. The said project received clearance from the State Technical Committee on 18.11.2013, Techno Economic Clearance was issued on 26.02.2014, and the project was commissioned in August 2020. GRIDCO had signed a PPA with the Appellant in 2014 which was subsequently revised and approved by the Orissa Electricity Regulatory Commission ("OERC" for short) by its order in

Case No 06 of 2016 dated 05.07.2016. The Appellant filed Case No. 88 of 2022 before the OERC seeking approval of the project specific tariff for their 24 MW Small Hydro Electric Project based on Clause 10 of the Order of the OERC in Case No. 46 of 2018 dated 16.02.2019 for finalization of tariff of renewable energy sources including co-generation for the third control period commencing from 2018-19 till 2020-21.

By its order, in Case No. 88 of 2020 dated 15.01.2022, the OERC approved the Appellant's project cost at Rs.314.80 crores with an Annual Generation of 84.36 MU at CUF of 40.33% for 35 years. It also fixed the project specific tariff at Rs.5.99/ kWh. Since the STC had recommended an upper cap of Rs.5.71/kWH in their meeting held on 13.08.2021, and the generic tariff determined by the CERC for SHEP was Rs.5.71 /kWh, the OERC approved a Project Specific Tariff for the Appellant's project at Rs.5.71 /kWh w.e.f. 01.02.2022. Aggrieved thereby, both the Appellant and GRIDCO filed two separate Appeals i.e. Appeal Nos. 73 and 392 of 2022 before this Tribunal challenging the afore-said order passed by the OERC. By its order dated 17.10.2022, this Tribunal, while setting aside the impugned order and remanding the matter to the OERC for fresh adjudication, held that, while revisiting the question of tariff, the OERC should consider the report submitted by the consultant appointed by it, take an appropriate view thereupon, and give proper reasons in case they were not in agreement with the recommendation. This Tribunal further observed that the provisional tariff, as had been put in position earlier (i.e. Rs.5.71 /kWh), shall be subject to adjustment after the Commission has rendered its final decision afresh.

Thereafter the OERC passed an order afresh on 06.01.2023 holding 100 MUs as the total annual gross generation with saleable energy of 99.00 MUs from the project for 75% dependable year; and the CUF, considered for

calculation of tariff, would come to 47.55%. Aggrieved thereby, the Appellant again carried the matter in appeal to this Tribunal. In its order dated 30.05.2023, this Tribunal observed that the OERC had ignored its own report i.e. the TC Report, and had passed the impugned order on the basis of a fresh report submitted by IIT Bhuvaneshwar, without assigning or giving any justification for ignoring the report, and disregarding the remand directions whereby the Commission was directed to consider the TC Report; and the Appellant's contention that, on the basis of prudent practice, the guaranteed parameters given by the equipment supplier, and applying the appropriate formulae, the weighted average efficiency of the plant had been arrived at 86.68%; the plant availability had been taken as 95%, which was the widely accepted norm since no plant can be available at 100%, was required to be accepted as no generating plant can be available for 100%.

While setting aside the order passed by the OERC, this Tribunal directed that the CUF be re-determined considering the submission of the Appellant and GRIDCO and the observations made by this Tribunal in the said order. This Tribunal, however, observed that, since the Appellant was a Small Hydro Electric Project and had already suffered a substantial reduction in tariff of Rs.5.71 per unit as against the tariff of Rs.5.99/ Rs.6.0 per unit as determined by the State Commission in the original order, and as the said payment of Rs.5.71 per unit was being made from the date of commissioning and as per the remand order of this Tribunal dated 17.10.2022; and considering that further reduction to Rs.5.03 per unit would cause irreparable injury to the generator, GRIDCO should, during the pendency of the petition before the Commission, pay the Appellant at Rs.5.71/- per unit; and this was an interim arrangement and was subject to final adjustment upon determination of tariff for the Appellant's small hydro plant.

In the impugned order dated 30.09.2023, the OERC held that the CUF, determined by it in its order dated 06.01.2023 at 47.55%, was justified; however, the Appellant was at liberty to approach the State Government for revision of the TEC with regard to the annual gross generation/ design energy of its SHEP, if it was so advised; and, in case the TEC was revised by the State Government, the consequential changes may be incorporated in the PPA and placed before the Commission for its approval. Aggrieved thereby, the Appellant invoked the jurisdiction of this Tribunal by filing Appeal No. 25 of 2024.

IA No. 2343 of 2023 was filed by the Appellant, in Appeal No. 25 of 2024, on 30.10.2023 seeking the following reliefs: (1) to stay the impugned orders dated 06.01.2023 and 30.09.2023 passed by the State Commission in Case No. 88 of 2020; (2) to direct that no adjustments be made by GRIDCO towards the amounts already paid by it to the Applicant towards tariff till date; (c) to direct that the applicant be paid the tariff at Rs.5.71 per unit till the disposal of the Appeal; and (d) direct that, as an interim measure, all computations of tariff will be done at a CUF of 40.33%, In Para 17 to 19 of the said IA, the Appellant stated as under:

> *"17. It is submitted that the Applicant is entitled to recover at the very least the tariff of Rs. 5.71 per unit which was determined by the State Commission in the first round and had been made applicable even by this Hon'ble Tribunal pending the consideration in remand by the State Commission on two occasions.*
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> *18. In the above facts and circumstances, the Applicant is filing the present Application seeking directions for (i) a stay of the impugned Order to the extent that there is an arbitrary downward revision in tariff,* ***(ii) directions that there ought not be any***

adjustment in tariff, during the pendency of the Appeal, and (iii) tariff at Rs. 5.71 per unit, for the interim.

19. It is stated that the Applicant has a very good prima facie case to succeed. The balance of convenience also lies in favour of the Applicant and against the Respondents inasmuch as the Appellant is only seeking tariff which was fixed by the State Commission in the first round, which is even lower than the project specific tariff as determined by the State Commission based on the project cost of the Appellant. It is submitted that grave prejudice and irreparable financial harm would be caused to the Applicant if the present Application is not allowed and the Applicant is not granted atleast the tariff of Rs. 5.71 per unit which has already been determined by the State Commission. ***The Appellant presumes that GRIDCO would seek adjustment of the tariff paid in the past at Rs. 5.71 per unit in the bills which would be issued after the passing of the remand order dated 30/09/2023. This amount would approximately work out to Rs. 9.45 Cr. Any adjustment of the said amount by GRIDCO would gravely affect the debt servicing obligation of the Appellant. It needs no reiteration that small hydro projects such as the Appellant' end up servicing the debt obligation during the initial years of the operation. A statement of what the Applicant has billed and received as tariff since COD of the plant is attached as Appendix A"***

(emphasis supplied).

It is evident, from the afore-extracted paragraphs of the IA, that the Appellant not only sought stay of the impugned order to the extent there was a downward revision in tariff, but it also sought a direction that there should

not be any adjustment, of the tariff paid in the past, during the pendency of the appeal; and the tariff of Rs.5.71 per unit should be paid to them at the interim. The appellant had also stated that it presumed that GRIDCO would seek adjustment of the tariff, paid in the past at Rs.5.71 per unit, in the bills which would be issued after passing of the order dated 30.09.2023; this amount would approximately work out to Rs.9.45 Crores; and any adjustment of the said amount by GRIDCO would gravely affect the debt servicing obligation of the Appellant.

The Appellant filed its rejoinder on 26.12.2023 to the reply filed by the 2nd Respondent-GRIDCO to the IA. In Paras 46 and 47 of the said rejoinder, it is stated that the Appellant had been given a tariff of Rs.5.03 inclusive of evaluation cost; at every stage since its commissioning, the Appellant had been paid at the rate of Rs.5.71 per unit except for January, February, March, and April 2023; however, after the impugned order dated 30.09.2023, GRIDCO had adjusted the entire difference between Rs.5.03 and Rs.5.71 by not paying their monthly bills for September, October, and November 2023; as on date, a total of Rs.21,54,59,758 already stood adjusted and the Appellant was on the verge of defaulting on its loan repayment; and a Statement showing the receivables and payables, for the period October 2023 to March 2024, was attached. This specific averment, in Para 46 and 47 of the rejoinder filed by the Appellant to the reply filed by GRIDCO, is evidently based on the e-mail sent by GRIDCO to the Appellant on 16.11.2023 attaching therewith the letter dated 15.12.2023.

By their letter dated 15.11.2023, GRIDCO informed the Appellant that, as the tariff had been revised by OERC, the excess amount paid by GRIDCO from COD till date was liable to be recovered with the applicable interest as per the OERC Terms and Conditions (for Determination of Generation Tariff) Regulations, 2020 dated 15.07.2020; and, accordingly, a

sum of Rs.20,07,88,131/- shall be recovered which included Rs.18,08,42,447/- towards differential energy charges for revision in tariff, and interest amount of Rs.1,99,45,684/- with base date 06.10.2023 and interest calculated up to 06.11.2023 . The Appellant was informed that the balance amount payable, considering the interest calculated up to 06.11.2023, was Rs.3,65,74,176/-.

In its order, in IA No. 2343 of 2023 in Appeal No. 25 of 2024 dated 05.02.2024, this Tribunal observed that the OERC was bound by the remand order passed by this Tribunal on 30.05.2023; the said order obligated the OERC to take into account the following factors: (1) overall plant efficiency as 91% / 86.68%, (2) plant availability as 95% and (3) dependability at 75%; in the impugned order dated 30.09.2023, the OERC had noted that the IIT Report had coned hydrological data provided by CWC, from its gauge in Baitarani River at Anandpur, for a period of 43 years starting from FY 1972-73 to 2014-15; this data was undisputedly sacrosanct, and could be safely utilized for determination of design energy as well as CUF; the afore-mentioned three criteria, stipulated by this Tribunal in its remand order dated 30.05.2023, should have been taken into consideration, along with the 43 year hydrological data, in determining the CUF and, consequently, the applicable tariff; the figures, furnished on behalf of the Appellant, had not been seriously disputed by the Learned Senior Counsel appearing on behalf of the OERC; taking the said criteria into account, it did appear, prima facie, that the CUF was 42.2%, and not 47.55% as determined in the impugned order; and, consequently, such CUF would translate to a tariff of Rs.5.65 per unit, as against the tariff of Rs.5.03 per unit as determined by the OERC in the impugned order. After noting that the 35 year PPA, entered into between the Appellant and GRIDCO, obligated the Appellant to continue to supply power to GRIDCO till the year 2055, and the Appellant had the benefit of an interim order, both during the pendency of

proceedings before the OERC and earlier before this Tribunal, in terms of which they were being paid a tariff of Rs.5.71 per unit, this Tribunal observed that it was evident that the balance of convenience lay in favour of the Appellant, and GRIDCO could not be said to suffer irreparable injury if the Appellant were to be paid Rs.5.65 per unit during the pendency of the appeal, as against the tariff of Rs.5.71 per unit which they were paying till the impugned order was passed. An interim order was passed directing the 2nd Respondent-GRIDCO to pay tariff of Rs.5.65 per unit to the Appellant from the date of the impugned order, and during the pendency of the Appeal. This Tribunal made it clear that the payment so made would be subject to the result of the main appeal, and the answer to the questions, whether the Appellant was justified in its claim that it was entitled to a tariff of Rs.5.99 per unit or whether the OERC was justified in determining the tariff at Rs.5.03 per unit, must await the final hearing of the main appeal. While disposing of the IA, this Tribunal made it clear that the observations made in its order dated 05.02.2024 were only for the purpose of grant of interim relief, and the main Appeal, when taken up for final hearing, shall be considered on its own merits.

While it is true that neither a copy of the e-mail dated 16.11.2023 nor the letter dated 15.11.2023, addressed by GRIDCO to the Appellant, was placed before this Tribunal prior to passing the interim order dated 05.02.2024, the fact remains that the Appellant had, in its rejoinder filed on 26.12.2023, acknowledged that GRIDCO had adjusted the entire difference between Rs.5.03 and Rs.5.71 per unit, from COD till the date of the impugned order, by not paying the monthly bills of the Appellant for September, October, and November 2023; and, as on date, a total amount of Rs.21,54,59,758 already stood adjusted.

Prayer (c) in IA No. 2343 of 2023 in Appeal No. 25 of 2024, i.e. to be paid the tariff of Rs.5.71 per unit till the disposal of the appeal, was granted by this Tribunal, by its order dated 05.02.2024, in part and GRIDCO was directed to pay the Appellant Rs.5.65 per unit till the main appeal was heard and decided. However relief (b), ie for a direction to be issued to GRIDCO that no adjustment be made by GRIDCO, towards the amounts already paid by it to the Appellant towards tariff till date, was not granted, evidently because neither were any arguments advanced in this regard nor did the Appellant press for grant of such a relief for reasons best known to them, though the adjustment had already taken place, to the knowledge of the Appellant, more than two and half months prior to 05.02.2024 when the interim order was passed by this Tribunal.

E.P. No.6 of 2024 was filed by the Appellant, under Section 120(3) of the Electricity Act, 2003, seeking execution/implementation of this Tribunal's interim order dated 05.02.2024 passed in IA No. 2343 of 2023 in Appeal No. 25 of 2024. In the said EP, the Appellant stated that, by the said Interim Order dated 05.02.2024, this Tribunal had directed Respondent No. 2 – GRIDCO to pay tariff of Rs. 5.65 per unit to the Appellant from the date of the Impugned Order ie 30.09.2023 and till the pendency of Appeal No. 25 of 2024; GRIDCO was frustrating the Interim Order, having stopped payment of the monthly tariff bills from September, 2023 onwards on the pretext of adjusting the difference between the tariff holding the field earlier is Rs. 5.71 per unit and the tariff determined i.e., Rs. 5.03 per unit; GRIDCO was obligated to pay a tariff at Rs. 5.65 per unit from the date of the Impugned Order i.e., for the period from September 2023 onwards; however, GRIDCO had not been paying any tariff to the Appellant from September, 2023 onwards on the pretext that it was adjusting the tariff from September, 2023 onwards towards differential amount against payment for the period August, 2020 to August, 2023; in terms of the interim directions given by this

Tribunal, *vide* order dated 05.02.2024, the Appellant was entitled to receive payment of Rs. 23,95,57,422 (for the invoices from September, 2023 till January, 2024); and due to non-payment of the just tariff, determined as an interim measure by this Tribunal, by GRIDCO, the Appellant was facing serious financial constraints and was on the verge of becoming an NPA which could lead to irreparable damage to them. The Appellant sought the following reliefs from this Tribunal: (a) direct execution/implementation of the interim order dated 05.02.2024; (b) direct GRIDCO to pay the balance amount of Rs. 22,49,95,734/- as a one-time payment; (c) direct GRIDCO to pay penal interest @ 21% per annum on the amount short paid by GRIDCO towards the bills raised by the Petitioner for September 2023 onwards; and (d) to pass an order to attach the bank account of GRIDCO, as well as any other bank accounts that it may have.

In its order in E.P.NO.6 of 2024 dated 13.05.2024, this Tribunal noted the submission of Ms. Swapna Seshadri, learned Counsel for the Petitioner, that the order of this Tribunal, execution of which was sought in the present proceedings, disabled the 2nd Respondent from recovering the differential amount (difference between Rs.5.71 per unit paid in terms of the earlier order and Rs.5.03 per unit as determined by the Commission in the order impugned in the Appeal), and of Mr. R. K. Mehta, learned Counsel for the 2nd Respondent, that these amounts were recovered by the 2nd Respondent even before the order dated 05.02.2024 was passed by this Tribunal, this was evident from the letter addressed by the 2nd Respondent to the Appellant on 15.11.2023, and, in as much as this Tribunal had not even considered these aspects while passing the order dated 05.02.2024, the Appellant could not seek recovery of the said amount in the present Execution Petition.

This Tribunal then held that it was settled law that, in execution

proceedings, the Court/Tribunal cannot go behind or alter the decree; there was nothing in the decretal portion of the interim order dated 05.02.2024 which could be understood as disabling the 2nd Respondent from recovering the amount, more so since the contents of the letter dated 15.11.2023 had not even been considered in the said order dated 05.02.2024.

While holding that this Tribunal may not be understood to have expressed any opinion on the submissions of both Ms. Swapna Seshadri, learned Counsel for the Petitioner and Mr. R. K. Mehta, learned Counsel for the 2nd Respondent, with respect to the Appellant's claim that they were entitled to be paid even the amounts which were recovered/ adjusted by the 2nd Respondent, this Tribunal observed that, since the scope of an execution petition was confined to the decree passed earlier and could not travel beyond the decree, the relief now sought, for payment of the differential amount, could not be agitated in the present execution proceedings. After noting the submission of Ms. Swapna Seshadri, learned Counsel for the Petitioner, that the Appellant would file a separate IA in the main Appeal, and leaving it open for them to do so, this Tribunal dismissed the EP. It is pursuant thereto, that IA No. 835 of 2024 was filed by the Appellant in Appeal No. 25 of 2024.

II. RIVAL SUBMISSIONS:

Elaborate submissions were put forth by Mrs. Swapna Seshadri, Learned Counsel for the Applicant-Appellant, and Mr. R. K. Mehta, Learned Counsel for the Respondent GRIDCO. It is convenient to examine the rival submissions under different heads.

III. CAN ADMISSIONS IN THE REJOINDER BE RELIED UPON?

Mrs. Swapna Seshadri, Learned Counsel, would submit that the Appellant is seeking directions *qua* R2 - GRIDCO that no adjustment is to be

made from their bills, from the date of COD i.e., 24.08.2020 till 30.09.2023, during which period GRIDCO had mostly paid Rs. 5.71 (except January to May, 2023); in I.A. No. 2343 of 23 filed with the Appeal, the Appellant had sought several prayers including "*no adjustments be made by GRIDCO towards the amounts already paid by it to the Appellant towards tariff till date";* as on the date of filing of the Appeal (30.10.2023), the prayer was superfluous as no adjustment had been made; the Appellant had also prayed to be paid Rs. 5.71 per unit till the disposal of the Appeal, and that the tariff be computed at 40.33% CUF; while no prayers can be made in the Rejoinder (**Sambhaji Wagholi Asole and Anr. 2006 (1) Mh.L.J. @Para 11)**, paras 46-47 of the Rejoinder adverted to GRIDCO having adjusted the difference between Rs. 5.03 and Rs. 5.71 per unit by not paying bills for September-October-November 2023; vide interim Order dated 05.02.2024, this Tribunal directed GRIDCO to pay the appellant Rs. 5.65 per unit from the date of the impugned Order, and during the pendency of the Appeal; while the issue of adjustment pending the IA was not specifically gone into, it was decided that "*the answer to the questions whether the Appellant is justified in its claim that it is entitled to a tariff of Rs. 5.99 per unit or whether the OERC was justified in determining the tariff at Rs. 5.03 per unit, must await the final hearing of the main appeal";* in the 3rd last para, it was noted that GRIDCO had all through been paying Rs. 5.71 per unit; GRIDCO did not bring up the issue, that it would be paying Rs. 5.65 per unit, after making adjustments, while the IA was pending; on 08.02.2024, the Appellant raised fresh invoices from September 2023 onwards, and issued reminders on 12.02.2024, 23.02.2024, and 02.03.2024; however, GRIDCO only paid Rs. 86,26,526/- and Rs. 1,45,61,688/-.

In **Sambhaji Waghoji Asole v. State of Maharashtra, 2005 SCC OnLine Bom 785,** the Bombay High Court held that the rejoinder does not form part of the pleadings in the petition; if a ground is

taken for the first time in the rejoinder, there is no opportunity to the respondents to meet such a case of the petitioners; the petitioners are not entitled to enlarge the scope of the petition by adding certain grounds in the rejoinder; and the petitioners could not be allowed to raise a ground on the basis of the submissions made in the rejoinder.

As held in ***Sambhaji Wagholi Asole***, it may not have been open to the Appellant, which had filed the petition before the OERC, to raise any additional grounds, not raised earlier, on the basis of what they had stated for the first time in their rejoinder. That does not mean that their admission, on a factual aspect, made in the rejoinder should be ignored. What the Appellant had stated in its rejoinder is that the Respondent-GRIDCO had, after the impugned order was passed on 30.09.2023, adjusted the entire difference between Rs.5.03 and Rs.5.71 per unit from the Appellant's monthly bills for the months of September, October and November 2023; and, as on date, a total sum of Rs.21,54,59,758 already stood adjusted.

While it is true that the rejoinder was filed by the Appellant on 26.12.2023, after they had filed the IA No. 2343 of 2023 in Appeal No. 25 of 2024 on 30.10.2023, the fact remains that the said rejoinder was filed by the Appellant on 26.12.2023 long prior to the order passed by this Tribunal in IA No. 2343 of 2023 on 05.02.2024. This admission of the Appellant in the rejoinder is of significance, when examined in the light of their prayer in IA No. 2343 of 2023 to direct that no adjustment be made by GRIDCO towards the amount already paid by it to the applicant towards tariff till date. Reliance placed by the applicant, on ***Sambhaji Wagholi Asole,*** is therefore of no avail.

IV. WOULD PRINCIPLES OF LIS PENDENS APPLY?

Mrs. Swapna Seshadri, Learned Counsel for the Appellant, would submit that, since the Appellant had prayed for full relief at Rs. 5.71 per unit till disposal of the Appeal, and was granted the relief of being paid Rs. 5.65 per unit, any adjustment made, during the pendency of the IA, would be subject to the relief granted in the IA; the relief of being paid at Rs. 5.65 per unit was granted and GRIDCO was obliged to honour the bills from September 2023 onwards @ Rs. 5.65 per unit without any adjustment since principles of *lis pendens* would apply; however, GRIDCO, on a hyper-technicality and a pedantic reading of the interim Order, contended that the adjustment made during the pendency of the IA had not been specifically dealt with; the spirit of the interim Order was for the Appellant to receive tariff at Rs. 5.65 per unit from 30.09.2023 onwards; and, If the adjustment is allowed, then the words quoted @ Para 2 would become meaningless.

The words “Lis Pendens” mean a pending Suit, and the doctrine is defined as the jurisdiction, power or control which a court acquires over property involved in a suit pending the continuance of the action, and until final judgement. The doctrine of lis pendens stipulates that, during the pendency of a bonafide Suit, in a court of competent jurisdiction, where the rights over immoveable property are directly and substantially involved, such property, if transferred without the leave of the Court, would bind the purchaser to the decree to be passed by the Court.

Mere pendency of IA No. 2343 of 2023 in Appeal No. 25 of 2024 on the file of this Tribunal from 30.10.2023, cannot, in the absence of any interim order being passed therein injuncting GRIDCO from recovering the past arrears, be held to disable GRDICO from adjusting the amounts payable to the Appellant for the months of September, October and November, 2023 with the arrears due to them in terms of the impugned order passed by the OERC on 30.09.2023. As noted hereinabove, no

interim order was passed till 05.02.2024 long before which GRIDCO had not only adjusted the amount from the monthly bills raised by the Appellant, but had also informed them by letter dated 15.11.2023 that the excess amount along with applicable interest was being recovered from their bills. While it is debatable whether the doctrine of lis pendens, in terms of Section 52 of the Transfer of Property Act, would apply in the facts and circumstances of the present case, even if we were to proceed on the premise that principles analogous thereto would apply, all that it would mean is that the amount recovered by GRIDCO from the monthly bills of the Appellant would be subject to the result of the main appeal. That by itself, and without anything more, would not justify this Tribunal now being called upon to pass an interim order directing GRIDCO to repay the amount adjusted by them from the bills of the Appellant, and as communicated by them to the Appellant by their letter dated 15.11.2023.

V. DO PRINCIPLES OF RES JUDICATA APPLY?

Sri R.K. Mehta, Learned Counsel for the 2nd Respondent-Gridco, would submit that the interlocutory application for 'directions', as filed by the appellant, is not maintainable since the very same prayer was made in I.A. No. 2343 of 2023 but was not pressed; admittedly, in the Application for Interim Relief (I.A. No. 2343 of 2023), the Appellant had stated that GRIDCO would seek adjustment of the tariff paid in the past @ Rs. 5.71/- per Unit, and had prayed for very same relief i.e. non-adjustment of the amount paid by GRIDCO to the Appellant pursuant to the remand orders dated 17.10.2022 and 30.05.2023 passed by this Tribunal**;** in the Rejoinder filed on 26.12.2023, to the IA for Interim Relief, the Appellant had stated that GRIDCO had already adjusted a sum of Rs. 21,54,59,758/- towards the entire difference between Rs. 5.03 per Unit and Rs. 5.71 per Unit**;** in **S. Ramachandra Rao** (**2022 SCC Online SC 1460**) and **Arjun Singh Versus**

Mohinder Kumar (1963) SCC Online SC 43, it has been held that (i) the doctrine of res-judicata is attracted not only in subsequent proceedings but even at the subsequent stage of the same proceeding; and (ii) Section 11 CPC is not exhaustive and the principle of Section 11 CPC can be extended to cases which do not fall strictly within the four corners of Section 11; and the present application is also barred by virtue of Order II Rule 2 (2) read with Section 141 CPC.

Mrs. Swapna Seshadri, Learned Counsel for the Appellant, would submit that GRIDCO has contended that the present interlocutory application is barred by the principles of *Res Judicata* (Section 11 Exp 5, O2 R2 read with S. 141 of the CPC); there is no such bar since the principles of *Res Judicata* are inapplicable to interim applications (**Arjun Singh: 1963 SCC OnLine SC 43, Mahadeo Mahto: 1991 SCC OnLine Pat 78, Erach Boman Khavar: (2013) 15 SCC 655, Committee of Management, Anjuman Intezamia Masajid Varanasi: 2024 SCC OnLine All 441, and Uma Shankar: (Order of the Madras High Court in C.R.P. No. 1856 of 2019 dt. 06.02.2023);** further, **Vikrambhai Punjabhai Palkiwala v. 1999 SCC OnLine Guj 562,** holds that principles of O2 R2 are not applicable to IAs; in **Madhukar 1995 (2) Mh.L.J,** it was held that Section 141 CPC does not apply to a proceeding which is not an original proceeding; an interim application cannot be equated to an original proceeding mentioned in the CPC; and it would be illogical to read the provisions of Section 141 CPC, which apply to suit or such other proceeding, to interlocutory applications.

A. PROVISIONS OF THE CIVIL PROCEDURE CODE RELIED ON BEHALF OF RESPONDENT-GRIDCO:

Section 11 of the Civil Procedure Code relates to Res judicata, and stipulates that no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a

former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court. Explanation V thereto stipulates that any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Section 141 of the Civil Procedure Code stipulates that the procedure provided in this Code in regard to suit shall be followed as far as it can be made applicable, in all proceedings in any Court of Civil Jurisdiction. Under the explanation thereto, in this Section, the expression “proceedings” includes proceedings under Order IX, but does not include any proceeding under Article 226 of the Constitution of India.

Order II of the CPC relates to framing of suit. Order II Rule 2 (2), which relates to relinquishment of a part of the claim, stipulates that, where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim he shall not afterwards sue in respect of the portion so omitted or relinquished.

B. JUDGEMENTS RELIED UPON BY EITHER SIDE:

In **S. Ramachandra Rao v. S. Nagabhushana Rao, 2022 SCC OnLine SC 1460,** the Supreme Court held that Section 11 CPC is not the foundation of the doctrine of *res judicata*; it is merely the statutory recognition of the principle; and is not exhaustive of the general principles of law; this doctrine, is conceived in larger public interest and is founded on equity, justice and good conscience; and the doctrine of *res judicata* is attracted not only in separate subsequent proceedings but also at subsequent stage of the same proceedings.

If the issues involved in the two proceedings are identical, those issues arise as between the same parties, and the issue now sought to be raised was decided finally by a competent quasi-judicial tribunal, the principle of res judicata would apply. This principle, founded on equity, justice and good conscience, requires that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue. (**S. Ramachandra Rao v. S. Nagabhushana Rao, 2022 SCC OnLine SC 1460; Lal Chand (dead) by L.Rs. v. Radha Krishan, (1977) 2 SCC 88).**

Where the principle of *res judicata* is invoked in the case of different stages of proceedings in the same suit, the nature of the proceedings, scope of the enquiry which the adjectival law provides for the decision being reached, as well as the specific provisions made on matters touching such decision are some of the material and relevant factors to be considered before the principle is held applicable. **(*Arjun Singh v. Mohindra Kumar*, 1963 SCC OnLine SC 43).**

On the question whether the principles of res judicata would apply to interlocutory applications, it must be borne in mind that Interlocutory orders, like orders of stay, injunction or receiver, are designed to preserve the status quo pending the litigation and to ensure that the parties may not be prejudiced by the normal delay which the proceedings before the court, usually take. They do not, in that sense, decide in any manner the merits of the controversy in issue in the suit, and do not put an end to it even in part. As they do not impinge upon the legal rights of parties to the litigation the principle of *res judicata* does not apply to the findings on which these orders are based. **(*Arjun Singh v. Mohindra Kumar*, 1963 SCC OnLine SC 43).**

In **Mahadeo Mahto v. Hiralal Verma, 1991 SCC OnLine Pat 78,** the Patna High Court, relying on **United Provinces Electric Supply Co. Ltd. v. T.N. Chatterjee, AIR 1972 SC 1201** and **Anirudha Adhikari v. Amarendra Adhikari, AIR 1988 Orissa 42,** held that interlocutory orders do not operate as res judicata; in a given case, the Court may not entertain a subsequent application for passing interlocutory orders filed by a party, if such a prayer has earlier been rejected but the same is not done by invoking the principles of res judicata.

In ***Erach Boman Khavar v. Tukaram Shridhar Bhat*, (2013) 15 SCC 655,** the Supreme Court held that to attract the doctrine of res judicata it must be manifest that there has been a conscious adjudication of an issue; a plea of res judicata cannot be taken aid of unless there is an expression of an opinion on the merits; and the principle of res judicata is applicable between two stages of the same litigation but the question or issue involved, must have been decided at earlier stage of the same litigation.

In **Anjuman Intezamia Masajid v. Shailendra Kumar Pathak Vyas, 2024 SCC OnLine All 441**, the Patna High Court, relying on **Mahadeo Mahto v. Hira Lal Verma, AIR 1991 Pat 235**, **Arjun Singh v. Mohindra Kumar, AIR 1964 SC 993,** and **S. Labbai v. Hanifa, (1976) 4 SCC 780**, held that, to constitute a matter *res judicata,* the following conditions must concur: (i) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue either actually (explanation III) or constructively (explanation IV) in the former suit; (ii) The former suit must have been a suit between the same parties or between parties under whom they or any of them claim. Explanation VI is to be read with this condition; (iii) The parties as aforesaid must have litigated under the same title in the former suit; (iv) The court which decided the former suit must have been a court competent to try the

subsequent suit or the suit in which such issue has been subsequently raised. Explanation II is to be read with this condition; and (v) the matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the first suit. Explanation V is to be read with this condition.

On the question whether, because at an earlier stage of the litigation a court had decided an interlocutory matter in one way and no appeal had been taken therefrom or no appeal did lie, a higher court cannot at a later stage of the same litigation consider the matter again, the Madras High Court, in **Uma Shankar Vs. Oriental Bank of Commerce and Another (Judgement of the Madras High Court in CRP.No.1856 of 2019 dated 06.02.2023),** held that principles of res judicata do not apply to interlocutory applications; in **Mathura Prasad Bajoo Jaiswal and others Vs. Dossibai N.B.Jeejeebhoy: AIR 1971 2355,** the Supreme Court held that a question relating to the jurisdiction of a Court cannot be deemed to have been finally determined by an erroneous decision of the Court; if, by an erroneous interpretation of the statute, the court holds that it has no jurisdiction, the decision will not operate as res judicata; similarly by an erroneous decision if the Court assumes jurisdiction which it does not possess under the statute, the decision will not operate as res judicata between the same parties, whether the cause of action in the subsequent litigation is the same or otherwise; therefore, in the case on hand, the issue of jurisdiction had been questioned by the first respondent, and the suit had been filed for bare injunction; therefore, the issue of jurisdiction had to be decided as a preliminary issue; and the court below had rightly allowed the application.

In **Vikrambhai Punjabhai Palkhiwala v. Navrang Textiles Mills Pvt. Ltd., 1999 SCC OnLine Guj 562,** the Gujarat High Court held that it was not necessary to decide the question whether at different stages of the

proceedings the principles of *res judicata* is applicable or not, and similarly whether the provisions of the Order 2 Rule 2 of the Code of Civil Procedure are applicable or not, as the applications filed by the defendant petitioner were interlocutory in character; where an interlocutory application is dismissed for non-prosecution it is difficult to hold that it is a case where the matter is heard and finally decided; so, to such order the provisions of *res judicata* may not apply; so far as the provisions of Order 2 Rule 2 of the Code of Civil Procedure is concerned, it may not apply to interlocutory applications; it was open to the defendant No. 2-petitioner to file a fresh application on the subject matter on which his previous three interlocutory applications filed and which had been dismissed for non-prosecution; and in case such applications are being filed by him, the trial court should decide the same on merits and in accordance with law; in case the Trial Court decides those applications against defendant No. 2 petitioner on the ground that it is barred by *res judicata* or under Order 2 Rule 2 of Code of Civil Procedure, liberty was granted to the petitioner for the revival of this civil revision application.

On the question, whether Order 22 of the Code of Civil Procedure can be made applicable to a proceeding under Section 115 of the Code of Civil Procedure with the aid of Section 141 of the Code of Civil Procedure, the Bombay High Court, in ***Madhukar v. Laxmanrao*, 1995 SCC OnLine Bom 235 : (1995) 2 Mah LJ 608,** referred to its earlier decision in **Manohar Govindrao Siras v. Ramchandra Govindrao Siras, 1975 Mah LJ 373** wherein it was held that in a matter under Section 115 of the Code of Civil Procedure, Order 22 will not apply, the Revision is not governed by Section 141 of the Code of Civil Procedure, and the legal representatives in such a case can be impleaded by invoking Section 151 of the Code of Civil Procedure; all that has been done by the amendment carried out to Section 141 of the Civil Procedure Code was only to incorporate an explanation

thereto making the proceedings under Order IX of the Civil Procedure Code also a proceeding within the meaning of Section 141 of the Civil Procedure Code and excluding proceeding under Article 226 of the Constitution; and Section 141 of the Civil Procedure Code cannot apply to any proceeding other than those which is in the nature of original proceeding mentioned in the Code; which a proceeding under Section 115 CPC is not.

C. ANALYSIS:

It is no doubt true that the Appellant had in IA No. 2343 of 2023, among others, sought a direction to GRIDCO not to adjust the amounts already paid by it to the Appellant towards tariff till date. Besides this prayer, the Appellant had also sought a direction that they be paid the tariff of Rs.5.71 per unit till the disposal of Appeal No.25 of 2024. As against their claim to be paid a tariff of Rs.5.71 per unit, this Tribunal had, by its order in IA No. 2343 of 2023 dated 05.02.2024, directed GRIDCO to pay them tariff of Rs.5.65 per unit from 30.09.2023 when the impugned order was passed by OERC till the disposal of the main appeal. This Tribunal did not pass any order with respect to the relief claimed by the Appellant that no adjustment should be made by GRIDCO.

The question which necessitates examination is whether Explanation V to Section 11 CPC would apply barring the Appellant from seeking a similar relief in IA No. 835 of 2024, on the ground that they did not press for grant of a similar relief in IA No.2343 of 2023.

As noted hereinabove, IA No. 2343 of 2023 was an interlocutory application, filed by the Appellant in Appeal No. 25 of 2024, in which this Tribunal passed an order on 05.02.2024. An interlocutory order has no finality attached to it, and interim orders passed by Courts on certain conditions are not precedents. (**Empire Industries Limited v. Union of India : (1985) 3 SCC 314; M. Vijaya Kumar v. General Manager, Milk**

Products Factory, Andhra Pradesh Dairy Development Cooperative Federation Ltd. : (1990) 3 ALT 382; North Karanpura Transmission Co. Ltd. v. CERC, 2023 SCC OnLine APTEL 7).

Relying on **Satyadhyan Ghosal v. Smt Deorajin Debi: (1960) 3 SCR 590,** the Supreme Court, in **United Provinces Electric Supply Co. Ltd. v. Workmen, (1972) 2 SCC 54,** held that a party is not bound to appeal against an interlocutory order which is a step in the procedure that leads up to a final decision in the dispute between parties by way of a decree or a final order; and the rule of res judicata cannot be invoked in such a case. The judgement of the Supreme Court, in **United Provinces Electric Supply Co. Ltd. v. T.N. Chatterjee, AIR 1972 SC 1201,** was followed by the Orissa High Court in **Anirudha Adhikari v. Amarendra Adhikari: AIR 1988 Ori 42.**

In **Mahadeo Mahto and Ors. V. Hiralal Verma and Ors. (1991) SCC OnLine Pat 78**, the Patna High Court, relying on **United Provinces Electric Supply Co. Ltd. v. T. N. Chatterjee, AIR 1972 SC 1201,** and **Anirudha Adhikari v. Amarendra Adhikari, AIR 1988 Orissa 42,** held that, while the principles of res judicata apply at different stages of the suit, it is also well known that interlocutory orders do not operate as res judicata; in a given case, the Court may not entertain a subsequent application for passing interlocutory orders filed by a party, if such a prayer has earlier been rejected but the same is not done by invoking the principles of res judicata.

On the question whether, because at an earlier stage of the litigation a court had decided an interlocutory matter in one way, the court could not, at a later stage of the same litigation consider the matter again, the Madras High Court, in **Uma Shankar v. Oriental Bank of Commerce & Anr. (judgment in CRP No. 1856 of 2019 & CMP No. 12263 of 2019 dated**

06.02.2023), held that the principles of res judicata do not apply to interlocutory applications.

As no finality is attached to an interlocutory order, we are of the view that the principles of res judicata, under Explanation V to Section 11 CPC, would not bar a fresh IA being filed seeking a similar relief as was sought in the earlier IA. In the light of the law declared by the Bombay High Court, in ***Madhukar v. Laxmanrao*, 1995 SCC OnLine Bom 235 : (1995) 2 Mah LJ 608,** Section 141 of the Civil Procedure Code would not apply to any proceeding other than those which is in the nature of original proceeding mentioned in the Code, which an interlocutory application is not. Likewise, as held in **Vikrambhai Punjabhai Palkhiwala v. Navrang Textiles Mills Pvt. Ltd., 1999 SCC OnLine Guj 562,** the provisions of Order 2 Rule 2 of the Code of Civil Procedure would also not apply to interlocutory applications.

VI. IS THIS IA AN ABUSE OF PROCESS OF COURT?

Sri R.K. Mehta, Learned Counsel for the 2nd Respondent-Gridco, would submit that it has also been held, in **Arjun Singh Versus Mohinder Kumar (1963) SCC Online SC 43,** that (i) interlocutory Orders like Stay or Injunction are capable of being altered by subsequent applications, but normally on proof of new facts or new situation which subsequently emerges; (ii) even in case of Interlocutory Orders, if the Application for Interim Relief is made on the same basis, after the same has been disposed of, the Court would be justified in rejecting it as an abuse of the process of Court; even if res-judicata does not apply, the present application, filed by the Appellant with the very same prayer which was made in the I.A for Interim Relief on the very same facts, amounts to an abuse of the process of this Tribunal; in case the present application is entertained, it will set a wrong precedent since (i) a party can make several prayers in the application, but

press only one or some of them and later file an application once again making the same prayer; (ii) parties may make several prayers, press one and subsequently file application renewing the other prayer resulting in an unending exercise; (iii) in practice, when several prayers are made and this Tribunal grants only one or some of them, such a party cannot file another application once again making the same prayer which was not granted, if it had not taken liberty to file a fresh application; and (iv) such an interpretation will result in misuse by the parties; on the principles laid down by the Supreme Court, in **Arjun Singh [(1964) 5 SCR 946**, even if the principles of res-judicata do not apply, the application, being for the very same relief and on the same facts, is liable to be rejected as being an abuse of the process of this Tribunal.

On the question, whether allowing the IA at this stage amounts to an abuse of process, Mrs. Swapna Seshadri, Learned Counsel for the Appellant, would submit that one of the tests is whether new facts have been adduced; in the present case, there is no abuse of process as the Appellant *bona fide* believed that the interim Order directing payment at Rs. 5.65 per unit would be obeyed; this is also clear from the fact that the Appellant had earlier moved E.P. No. 06 of 2024 seeking execution of the interim Order; at this stage, GRIDCO brought on record the letter dated 15.11.2023 claiming that adjustment was correctly done when there was no interim order; this submission would render the line quoted @ Para 2 above *otiose*; however, the order dated 13.05.2024 in the EP permitted the Appellant to move the present IA, since the issue of adjustment had not been specifically dealt with in the interim order; therefore, any technical pleas to defeat the spirit of the interim Order ought not to be permitted; and technical pleas, especially when the Appellant succeeded on its entitlement to Rs. 5.71/5.65 per unit in all the three proceedings before this Tribunal, ought to be rejected.

A. ANALYSIS:

While the present IA may not be barred by the principles of res judicata, the next question which necessitates examination is whether applications, such as the present, would amount to an abuse of process of court requiring this Tribunal to refrain from granting the relief sought in the said IA.

Interlocutory orders, of stay, injunction or receiver, are capable of being altered or varied by subsequent applications for the same relief, though normally only on proof of new facts or new situation which subsequently emerge. If applications are made for relief on the same basis, after the same has once been disposed of, the court would be justified in rejecting the same as an abuse of the process of court. **(*Arjun Singh v. Mohindra Kumar*, 1963 SCC OnLine SC 43).** *Black*'s Law Dictionary *7th Edn., 1999* defines *"Abuse of process"* as the improper and tortuous use of a legitimately issued Court process to obtain a result that is either unlawful or beyond the process's scope. V. Ramanatha Aiyer: Advanced Law Laxicon states that *"Abuse of process of Court."* generally applies to proceeding wanting in bonafides and is frivolous; Improper use of a regular legal process by which an unfair advantage is obtained by a party to the proceeding over an opponent.

In this context, it is useful to note that, while the Appellant may have apprehended adjustment when it filed the IA No. 2343 of 2023 on 30.10.2023, their apprehension became a reality in less than a fortnight thereafter when the appellant was informed, by letter dated 15.11.2023, that the invoices raised by them for the months of September, October and November 2023 were adjusted by GRIDCO towards the differential amount due from the COD till the date of the order passed by the CERC. That the Appellant was made aware of this fact by GRIDCO, is evident from their

letter dated 15.11.2023 as also the Appellant's own admission in their rejoinder dated 26.12.2023. The fact that the Appellant chose not to press for grant of such a relief thereafter, when IA No. 2343 of 2023 was heard and in which an order was subsequently passed on 05.02.2024, despite being fully aware that by then the amounts had already been adjusted, does seem to indicate that the Appellant only desired for an interim order to be passed by this Tribunal for payment of Rs.5.65 per unit during the pendency of the appeal i.e. from when the OERC passed the impugned order on 30.09.2023 till the disposal of the present appeal.

While the relief sought in IA No. 2343 of 2023 was to direct GRIDCO not to adjust the amounts due from the tariff, the relief sought in the present IA is to set aside the letter dated 15.11.2023 issued by GRIDCO and direct that no adjustment be made by GRIDCO towards the amount already paid by it towards tariff from COD till 30.09.2023. As prayer (b) in IA No. 835 of 2024 is more or less identical to prayer (b) in IA No. 2343 of 2023 which relief was neither pressed by the appellant nor granted by this Tribunal, the subsequent IA No. 835 of 2024 can be held to be a proceeding wanting in bonafides, an improper use of a legitimately issued Court process to obtain a result that is beyond the process's scope, and as amounting to an abuse of process of court.

VII. IS THE PRESENT IA BASED ON A SUBSEQUENT EVENT?

Mrs. Swapna Seshadri, Learned Counsel for the Appellant, would submit, in the alternative, that raising of bills @ Rs. 5.65 per unit on 08.02.2024, and non-honouring of the bills on the basis of adjustment having been made by GRIDCO during the pendency of the IA, is a subsequent event which can be considered by this Tribunal while deciding the present application; any legal bar, for seeking a further interim order, would arise only if the Appellant could have, as a matter of right, been entitled to an

order on the date of institution of the suit/appeal (**Ram Dayal 21 A. 425 (F.B.), Mukunda Pradhan and Anr. 1954 SCC OnLine Ori 12);** as all interim orders are discretionary, the Appellant could not have, as a matter of right, been granted a direction with regard to the adjusted amounts; neither was such an order granted nor was it refused; and, on the contrary, a reading of the penultimate para of the interim Order necessitates an interpretation of the words "*whether the appellant should receive Rs. 5.03 or 5.99 per unit, should await a final hearing".*

Sri R.K. Mehta, Learned Counsel for the 2nd Respondent-Gridco, would submit that the letter dated 15.11.2023 does not give rise to a fresh cause of action since (i) the letter dated 15.11.2023 was duly communicated to the Appellant vide E-mail dated 16.11.2023; (ii) in the Rejoinder dated 26.12.2023, to the IA for Interim Relief, the Appellant had clearly stated that (a) GRIDCO had adjusted the entire difference between Rs. 5.03 and Rs. 5.71 per unit by not paying the monthly bills for September, October and November 2023; (b) the sum of Rs. 21,54,59,758/-, representing the difference between Rs. 5.03 per Unit and Rs. 5.71 per unit already stood adjusted**;** in case any submission, with regard to adjustment was made on behalf of the Appellant, this Tribunal would have specifically dealt with the said submission in its Order dated 05.02.2024, and would have given clear directions in this regard; and the fact that there is no mention whatsoever, of any adjustment in the Order dated 05.02.2024, clearly proves that no such submission was made on behalf of the Appellant during the hearing on 05.02.2024, and the submission now made to the contrary is clearly an afterthought.

A. JUDGEMENTS CITED UNDER THIS HEAD:

In **RAM DAYAL VS MADAN MOHAN LAL: 21 ALL 425 (FB),** the question which arose for consideration was, when in a suit for recovery of

immovable property the plaintiff has claimed future mesne profits, ie mesne profits subsequent to the date of institution of the suit, and if his claim has either been refused or has not been expressly granted, whether a subsequent suit for mesne profits is barred by the principles of res judicata.

It is in this context that the Full Bench of the Allahabad High Court held that it could not be said that, in the present case, the issue as to the plaintiff's right to the mesne profits now claimed was ever heard and finally decided; the answer to the question whether, on failure to grant the mesne profits claimed, it must be deemed to have been refused, would depend upon whether the plaintiff could, in such a suit, ask the court, as of right, to adjudicate on his claim for future mesne profits; a discretionary power is conferred on the Court of providing in its decree for the payment of mesne profits which had not accrued or became due at the date of the suit; if it has refused to exercise this discretion, there is nothing to bar a subsequent suit; and the Legislature did not intend to bar a subsequent suit in cases where a Court had not seen it fit to exercise the discretion conferred upon it in this regard.

In **Mukunda Pradhan v. Krupasindhu Panda, 1954 SCC OnLine Ori 12,** the Orissa High Court held that the mesne profits that accrue subsequent to the institution of the suit formed no part of the cause of action on which the plaintiff comes to court and, therefore, the plaintiff cannot as a matter of right claim any decree for such mesne profits, except by filing another suit for that purpose; the expression “relief claimed”, used in Explanation 5 to S. 11, refers to a relief which the Court is bound to grant and not to one which it is discretionary for the Court either to grant or not to grant; in other words, it must form part of the relief claimed in the plaint, ie something which the plaintiffs can claim as of right and something included

in his cause of action; and, if the cause of action is established, then the Court has no discretion to refuse.

B. ANALYSIS:

Unlike in the afore-cited judgements, where the issue related to a claim of mesne profits in a Suit, in the present case the question is whether, having filed IA No. 2343 of 2023 seeking a particular relief and having chosen not to press the same, the Appellant-Applicant is entitled to file a fresh IA seeking the very same relief which they had chosen not to press earlier.

Having chosen not to press for the interim relief, which they had sought in IA No. 2343 of 2023, the Appellant would have been justified in seeking a similar relief, by way of a subsequent IA, only on fulfilment of the tests stipulated in the second proviso to Order 39 Rule 4 of the CPC. In this context, it is useful to note that IA No. 2343 of 2023 was disposed of by this Tribunal by its order dated 05.02.2024 confining grant of relief only to prayer (c) in the said IA. Consequently, it is only if there are changes in circumstances or the court is satisfied that its earlier order had posed undue hardship, can the present IA be entertained. The very fact that the Appellant, despite being aware that GRIDCO had already adjusted the arrears from their monthly bills, did not choose to press for grant of interim relief in IA No. 2343 of 2023, would belie their present claim of suffering undue hardship if the relief sought for in the present IA is not granted.

The other ground on which a second IA can be entertained for grant of a similar relief, under the second proviso to Order 39 Rule 4 CPC, is that a variation in the earlier interim order is necessitated by a change in circumstances or, in other words, by a subsequent event. While a feeble attempt is made by the Appellant to feign ignorance of the email sent by GRIDCO on 16.11.2023, enclosing therewith their letter dated 15.11.2023,

the admission of the Appellant in its rejoinder filed on 26.12.2023 would belie their claim of being unaware of the adjustment of the amounts from their monthly bills. Both the letter sent by GRIDCO on 15.11.2023, and the admission in the rejoinder filed by the Appellant on 26.12.2023, are prior to 05.02.2024 when an order was passed by this Tribunal in IA No. 2343 of 2023, and the said IA was disposed of. Adjustment of the past arrears is not an event which has arisen after the order passed by this Tribunal on 05.02.2024, and does not constitute a subsequent event or a change in circumstances justifying grant of interim relief in terms of the second proviso to Order 39 Rule 4 CPC.

VIII. SHOULD THIS TRIBUNAL EXERCISE ITS DISCRETION TO GRANT THE INTERIM RELIEF SOUGHT IN THE PRESENT IA?

Mrs. Swapna Seshadri, Learned Counsel for the Appellant, would submit that an Appellant may seek multiple interim orders in the alternative or concurrently; a few may be granted while the balance may not be considered; the court may all together grant a different interim order than what was sought for; all this would go to show that interim orders are wholly discretionary; and, if it becomes clear to the court that one of the parties is seeking to curtail the spirit of the interim order by a hyper-technical interpretation, there is no bar on the court to entertain a subsequent interim application since the only purpose of an interim order is to find an appropriate arrangement till the final decision in the appeal.

A. ANALYSIS:

Grant of interim relief is a matter of discretion, and such discretion should be exercised judiciously and with due regard to the relevant factors. Being essentially an equitable relief, the grant or refusal of interlocutory relief shall ultimately rest in the sound judicial discretion of the court to be exercised in the light of the facts and circumstances in each case. **(Union of**

India v. Raj Grow Impex LLP, (2021) 18 SCC 60; Mohd. Mehtab Khan v. Khushnuma Ibrahim Khan, (2013) 9 SCC 221).

As the Appellant chose not to press for this relief in IA No. 2343 of 2023, despite being aware that the Respondent-GRIDCO had already adjusted the amounts, the present IA filed seeking the same relief would amount to an abuse of process of court. Repeated applications for grant of the same relief, save in circumstances covered by the second proviso to Order 39 Rule 4 CPC, is impermissible. This Tribunal would, therefore, not be justified in exercising its discretionary jurisdiction to grant the Applicant-Appellant the relief they seek in the present IA.

IX. CONCLUSION:

In the light of the aforesaid observations, we see no reason to the exercise discretion to grant the Appellant the relief sought for in the present IA. Making it clear that the amounts adjusted by the Respondent-GRIDCO, from the monthly bills payable to the Appellant for the months of September, October and November, 2023, shall be subject to the result of the main appeal, the present IA is dismissed.

Pronounced in the open court on this the **22nd day of August, 2024**.

(Seema Gupta)
Technical Member (Electricity)

(Justice Ramesh Ranganathan)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

tpd

COURT-1

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APL No. 25 OF 2024 & IA No. 836 OF 2024

Dated: 22nd August, 2024

Present : Hon`ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon`ble Ms. Seema Gupta, Technical Member (Electricity)

In the matter of:

Baitarani Power Project Private Limited	....	Appellant(s)
Versus		
Odisha Electricity Regulatory Commission & Ors.	....	Respondent(s)

Counsel on record for the Appellant(s)	:	Anand K. Ganesan Swapna Seshadri Amal Nair Kritika Khanna Shivani Verma for App. 1
Counsel on record for the Respondent(s)	:	Rutwik Panda Nikhar Berry Anshu Malik for Res. 1 Raj Kumar Mehta Himanshi Andley for Res. 2 Shashank Bajpai for Res. 3

ORDER

IA-836/2024
(For Urgent Listing)

The matter having been listed before us, served its purpose, stands disposed of as having become infructuous.

APL No. 25 OF 2024

Let the appeals be re-included in the ‘List of Finals, to be taken up from there in its turn.

(Seema Gupta)
Technical Member (Electricity)

(Justice Ramesh Ranganathan)
Chairperson

mk/sk/skj