IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APL No. 231 OF 2024 & IA No. 1513 OF 2024 & IA No. 697 OF 2024 & IA No. 1405 OF 2024

Dated: 10th September, 2024

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

In the matter of:

Renew Naveen Urja Private Limited .... Appellant(s)

Versus

Central Electricity Regulatory Commission & Anr. .... Respondent(s)

Counsel on record for the Appellant(s) : Mannat Waraich
Mohd Munis Siddique
Ananya Goswami
Mridul Gupta for App. 1

Counsel on record for the Respondent(s) : Anushree Bardhan
Srishti Khindaria
Surbhi Kapoor
Aneesh Bajaj
Shirsa Saraswati for Res. 2

ORDER

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

IA NO. 697 OF 2024
(for interim relief)

The Appellant -Renew Naveen Urja Private Limited has filed IA No. 697 of 2024 in Appeal No. 231 of 2024 seeking stay of operation of the impugned order passed by the Central Electricity Regulatory Commission (**"**CERC**"** for short**),** in Petition No 353/AT/2022 dated 09.03.2024, on the ground that the CERC had proceeded to adopt the tariff for the bidding process which was fraught with legal infirmities; and the 2nd Respondent

should be restrained from taking any coercive action against them pending disposal of the appeal.

The Appellant is a generating company and a Special Purpose Vehicle ("SPV") of M/s ReNew Solar Power Private Limited incorporated for the development, generation and supply of electricity. The 1st Respondent is the Central Electricity Regulatory Commission. The 2nd Respondent- Solar Energy Corporation of India Limited **("**SECI**"** for short**)** is a Government of India enterprise, under the administrative control of the Ministry of New and Renewable Energy ("MNRE"), which has been designated as the nodal agency for implementation of MNRE schemes for developing grid connected renewable power project in India.

Pursuant to the RfS floated on 25.05.2021 by SECI, for the procurement of an aggregate capacity of 1200 MW of Wind Power, the Appellant submitted its bid on 15.07.2021 and, on 21.10.2021, SECI issued a Letter of Award to them. The Appellant and SECI entered into a Power Purchase Agreement ("PPA") on 29.08.2022 for a term of 25 years for development of 297.5 MW (AC) capacity of Wind Power Project anywhere in India at a Tariff of INR 2.69/Unit, and the consequent supply of power to SECI, with the scheduled commissioning date (SCOD) of the project as 30.12.2023. The said PPA was amended on 08.12.2022 increasing the capacity of the Project to 300 MW (AC).

SECI filed a petition bearing No. 353/AT/2022 on 16.11.2022 before the CERC, seeking adoption of the tariff, with a delay of 139 days from the effective date (tariff was required to be adopted within 120 days from the effective date). Vide its letter dated 24.01.2023, the Appellant informed SECI that the Effective Date of the PPA had been agreed upon as 30.06.2022, and the tariff adoption should have been completed by 28.10.2022. They requested for extension of time with respect to the

effective date, financial closure as well as SCOD. SECI, vide letter dated 30.01.2023, informed the Appellant and other successful bidders of the status of the tariff adoption Petition and PSAs, and regarding the delay in adoption of tariff beyond the timelines mentioned in Article 2.1.3 and 2.1.4 of the PPA, and that the timelines to achieve SCOD and FC would stand extended in line with the date when the tariff is adopted.

The Appellant, vide its additional affidavit filed before the CERC on 16.10.2023, raised objections to the tariff adoption process, and also highlighted the infirmities in the procedure followed by SECI during the entire bidding process, and the proceedings before the Central Commission.

CERC vide its order, in Petition No 353/AT/2022 dated 09.03.2024 (impugned order), adopted the individual tariff for the projects holding that the tariff had been discovered as per the provisions of the bidding guidelines in a transparent manner. As far as the objections raised by the developers, regarding the delay in signing the PPA and the unviability of the tariff were concerned, the CERC held that the developers were at liberty to approach the Commission for adjudication of the said issues through separate Petitions. In the impugned order, the CERC also held that, in terms of Article 2.1.3 and 2.1.4, the developers were entitled for the extension of the scheduled financial closure and scheduled commissioning date for an equal number of days for which the order for adoption of tariff had been delayed beyond 120 days.

The Appellant's grievance, in the present appeal, is mainly that SECI did not carry out competitive bidding in conformity with the Standard bidding guidelines, but made certain changes especially with regard to the Change in Law claim; as required, no prior approval was taken; instead, after enquiry by CERC, they obtained post-facto approval of MNRE on

19.09.2023 for the changes in respect of certain provisions vis-à-vis the Standard Bidding Guidelines; MNRE, though provided post facto approval, but advised SECI that, in future, it should strictly abide with the procedural and legal requirements and Standard Bidding Guidelines issued by the Government, in letter and spirit, and in case any deviation(s) were required from the Guidelines issued by the Central Government under Section 63 of the Electricity Act, they should take timely steps for getting requisite approval in respect of such deviation(s), well before the last date of bid submission for such bid(s); though CERC acknowledged that SECI had not taken prior approval as required, for the deviations in the Standard Bidding Guidelines and had also advised SECI that it must invariably always comply with the procedural and legal requirement in letter and spirit, yet it adopted the tariff so arrived under the competitive bidding process which is fraught with legal infirmities such as deviation from the Standard bidding guidelines without prior approval of the appropriate commission, and other procedural lapses; and the impugned order should therefore be set aside.

I. RIVAL SUBMISSIONS:

Sri. Sujit Ghosh, Learned Senior Counsel appearing on behalf of the Appellant, would submit that, since the procedure prescribed under the Central Government guidelines has not been adhered to in selecting bidders, the Respondent Commission ought to have refused adoption of tariff under Section 63 of the Electricity Act, 2003; the appellant cannot be said to have waived its right to question the bidding process, merely because it had entered into a PPA with the respondent-SECI; the respondent- Commission should have refused to approve the PPA, entered into between the Appellant and the Respondent SECI, as the entire bidding process, in terms of which the appellant was selected as

the successful bidder, is vitiated as it fell foul of the Central Government guidelines; since the entire process of bid adoption under Section 63 is vitiated by illegalities, the Appellant must be held to have suffered undue hardship; the Appellant has made out a strong prima facie case for grant of interim stay of the impugned order; when a strong prima facie case is made out, this Tribunal should proceed on the premise that undue hardship would be caused to the Appellant if an interim order is not passed in their favour; the Appellant has, subsequent to the passing of the impugned order, requested the Commission to discharge it from its obligations under the PPA; the distinction between the discharge sought for by the Appellant and termination of the PPA by the respondent-SECI, must be borne in mind; their being discharged from compliance of the PPA would result in the Appellant being freed of its obligations thereunder, termination of the PPA by the Respondent SECI would result in grave and serious consequences to them; and the Appellant cannot be faulted for their having sought to be discharged from their obligations under the PPA as they were permitted to seek such a relief by the Respondent Commission. Learned Senior Counsel would rely on **ITC Ltd. Vs Commissioner (Appeals) Customs and Central Excise 2003 SCC Online All 2224** and **Banaras Valves Ltd. Vs CCE: (2016) 13 SSC 347** In this regard.

On being asked as what consequences would ensue, if interim stay of the impugned order is not granted in their favour, Sri Sujith Ghosh, Learned Senior Counsel, would submit that, as the Appellant would not able to achieve financial closure and timely commissioning of the project, they may be held to have violated the terms and conditions of the PPA; such failure may entail termination of the PPA by the Respondent SECI; and termination of the PPA may not only result in encashment of the Bank

Guarantee, but may also result in their being blacklisted from participating in any fresh tender process subsequent to the PPA being terminated.

On the other hand Ms. Anushree Bardhan, Learned Counsel appearing on behalf of the second Respondent-SECI, would submit that the Appellant has itself filed an application before the Commission to put an end to the PPA; having themselves sought such a relief, which request is still pending consideration before the Commission, it matters little that the PPA entered into with the Appellant can be terminated for their failure to abide by its terms and conditions, as termination of the PPA is what the appellant also seeks; the Appellant has failed to make out a prima facie case, much less a strong prima facie case; the present IA is just a ruse to avoid encashment of the Bank Guarantee, as the appellant is aware that they would soon be violating the terms and conditions of the PPA; such a disguised relief, which in effect is for stay of invocation of the bank guarantee, would not be granted by this Tribunal; and, as the utilities are necessary parties to these proceedings, they have filed an application to implead them as respondents to this Appeal.

II. PRINCIPLES APPLICABLE FOR GRANT OF INTERIM RELIEF:

The grant or refusal of interlocutory relief is covered by three well established principles viz., (1) whether the Appellant has made out a prima facie case, (2) whether the balance of convenience is in their favour i.e., whether it would cause greater inconvenience to them if interim relief is not granted than the inconvenience which the opposite party would be put to if it is granted, and (3) whether the Appellant would suffer irreparable injury. With the first condition as a sine quo non, at least two conditions should be satisfied by the Appellant conjunctively, and a mere proof of fulfilment of one of the three conditions does not entitle them

to the grant of interlocutory relief in their favour. (***Nawab Mir Barkat Ali Khan* v. *Nawab Zulfiquar Jah Bahadur*, AIR 1975 AP 187; *Gone Rajamma* v. *Chennamaneni Mohan Rao*, (2010) 3 ALD 175; *Kishoresinh Ratansinh Jadeja* v. *Maruti Corpn*, (2009) 11 SCC 229; *Best Sellers Retail (India) Private Ltd.* v. *Aditya Birla Nuvo Ltd.*, (2012) 6 SCC 792; *State of Mizoram* v. *Pooja Fortune Private Limited*, 2019 SCC OnLine SC 1741)**.

III. PRIMA FACIE CASE:

The first of the three tests, to be satisfied for the grant of interlocutory relief, is whether the Appellant has made out a prima facie case. A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the case were to be believed. While determining whether a prima facie case had been made out or not the relevant consideration is whether, on the evidence led, it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence. Prima facie case means that the assertions on these aspects are bona fide (***Nirmala J. Jhala* v. *State of Gujarat*, (2013) 4 SCC 301; *Vidya Drolia* v. *Durga Trading Corporation* - (2021) 2 SCC 1).** Prima facie case is a substantial question raised, bona fide, which needs investigation and a decision on merits. (***Dalpat Kumar* v. *Prahlad Singh*, (1992) 1 SCC 719 : AIR 1993 SC 276; *Mahadeo Savlaram Shelke* v. *Puna Municipal Corporation*, (1995) 3 SCC 33).**

For the purpose of determining whether or not a prima facie case has been made out, all that this Tribunal should do, at this stage, is to satisfy itself that the averments in the interlocutory application, if taken to be true, is a possible view, and that it raises substantial questions which

needs investigation at the trial, and a decision on merits. While determining whether a prima facie case had been made out the relevant consideration is whether, on the evidence led, it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could The probability of the plaintiff's success must be comparatively higher (***Gujarat Electricity Board*** **v.** ***Maheshkumar & Co.*****, 1982 SCC OnLine Guj 29).**

An appeal lies to this Tribunal, under Section 111(1) of the Electricity Act, 2003, against the order passed by the CERC. Section 111(3) confer powers on this tribunal, after giving the parties to the appeal an opportunity of being heard, to pass such orders thereon as it thinks fit, confirming, modifying, or setting aside the order appealed against. An appeal lies to this Tribunal both on question of fact and law, and is akin to a first appeal under Section 96 of the Civil Procedure Code. Save in exceptional circumstances, an appeal to this Tribunal would be entertained, against the orders of the Appropriate Commission, as a matter of course as the underlying premise is that a prima facie case is made out necessitating the appeal to be entertained.

Among the main contentions urged in this appeal is that the Request for proposal (Rfp) was issued, and the bidding process was finalised, despite its being contrary to the Central Government guidelines. The twin tests stipulated in Section 63 of the Electricity Act for adoption of the tariff by the Appropriate Commission, is that (a) such a tariff has been determined through a transparent process of bidding; and (b) such a bidding process is in accordance with the guidelines issued by the Central Government.

As noted hereinabove, a prima facie case does not mean a case proved to the hilt, but a case which, if the contentions raised in the appeal

were to be accepted as valid, would require detailed examination when the main appeal is finally heard. We are of the view that the Appellant has made out a prima facie case. It is, however, contended on behalf of the appellant that as they have made out a strong prima facie case, this Tribunal should proceed on the basis that they would suffer undue hardship if an interim order, of stay of the impugned order, is not passed in their favour.

IV. JUDGEMENTS RELIED ON BEHALF OF THE APPELLANTS:

Since reliance is placed in this regard, on **ITC Limited Vs Commissioner (Appeals) Customs and Central Excise: 2003 SCC Online All 2224** and **Benara Valves Ltd. Vs. CCE: (2006) 13 SCC 347**, it is useful to take note of the facts of both these cases, and law declared therein.

In **I.T.C. Ltd. v. Commissioner (Appeals), Cus. & C. Ex., 2003 SCC OnLine All 2224,** the writ petition was filed to quash the order passed by the Commissioner (Appeals), Customs & Central Excise, rejecting the application of the petitioner for stay/waiver of pre-deposit, of the amount demanded by the Assessing Authority during the pendency of the appeal, on the ground that the petitioner did not plead financial hardship, and there was no strong *prima facie case* made out for waiver.

It is in this context that the Allahabad High Court held that an appeal is a statutory creation and if the Legislature in its wisdom has imposed certain conditions, like pre-deposit for the purpose of hearing the appeal, the Courts cannot interfere; in **Income-tax Officer v. M.K. Mohammad Kunhi, AIR 1969 SC 430,** the Supreme Court held that stay should be granted if a strong *prima facie case* has been made out, and in the most deserving and appropriate cases where the entire purpose of the appeal

will be frustrated or rendered nugatory by allowing the recovery proceedings to continue, during the pendency of the appeal; and, in **Andhra Civil Construction Co. v. CEGAT, 1992 (58) E.L.T. 184,** the Madras High Court emphasised that, unless a very strong *prima facie case* is made out, stay should not be granted.

The Allahabad High Court then took note of the observations of the Supreme Court, in **Siliguri Municipality v. Amlendu Das, (1984) 2 SCC 436,** that interlocutory orders should not be granted for the *mere asking*; normally, the High Courts should not *as a rule,* in proceedings under Article 226 of the Constitution, grant any stay of recovery of tax save under very exceptional circumstances; grant of stay in such matters should be an exception and not a rule; the only consideration at that juncture is to ensure that no prejudice is occasioned to the rate payers in case they ultimately succeed at the conclusion of the proceedings; this object can be attained by requiring the body or authority levying the impost to give an undertaking to refund or adjust against future dues; and a similar view was reiterated in **Assistant Collector of Central Excise, Chandan Nagar v. Dunlop India Ltd.: (1985) 1 SCC 260, State of Madhya Pradesh v. M.V. Vyavsaya Co., (1997) 1 SCC 156, and Upadhyay & Co. v. State of U.P., (1999) 1 SCC 81,** deprecating the tendency of Courts granting stay of recovery by mere filing of the case as it exposed the "impairment of the public interest."

The Allahabad High Court further observed that Court should not grant interim relief/stay of the recovery merely by the asking of a party; it has to maintain a balance between the rights of an individual and the State so far as recovery of sovereign dues is concerned; while considering the application for stay/waiver of a pre-deposit, as required under the law, the Court must apply its mind as to whether the appellant has a strong *prima facie case* on merits; if an appellant, having strong *prima facie case*, is

asked to deposit the amount of assessment so made or penalty so levied, it would cause undue hardship to him, though there may be no financial restraint on the appellant running in a good financial condition; the arguments that the appellant is in a position to deposit, or if he succeeds in the appeal he will be entitled to get the refund, are not the considerations for deciding the application; the expression "undue hardship" has a wider connotation as it takes within its ambit cases where the assessee is asked to deposit the amount even if he is likely to be exonerated from the total liability on disposal of his appeal; dispensation of deposit should also be allowed where two views are possible; while considering the application for interim relief, the Court must examine all pros and cons involved in the case and further examine whether, in case recovery is not stayed, the right of appeal conferred by the legislature and refusal to exercise the discretionary power by the authority to stay/waive the pre-deposit condition, would be rendered nugatory/illusory; undoubtedly, the interest of the Revenue cannot be jeopardized, but that does not mean that, in order to protect the interest of the Revenue, the Court or authority should not exercise its duty under the law to take into consideration the rights and interests of an individual.

In **Benara Valves Ltd. v. CCE, (2006) 13 SCC 347,** the challenge in the appeals before the Supreme Court was to the order passed by the Allahabad High Court dismissing the writ petitions filed by the appellants who had filed the Writ Petitions questioning the correctness of the order passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi (in short "the Tribunal") dealing with the applications filed for staying recovery of duty and penalty imposed pending disposal of the appeals before the Tribunal.

Against the order passed by the Commissioner of Central Excise, the appellant filed appeals before the Tribunal. They sought stay of realisation of the demands raised, till disposal of the appeals, in terms of Section 35-F of the Central Excise Act. The Tribunal directed them to pre-deposit twenty-five per cent of the duty demanded from them, and directed the other applicants to pre-deposit twenty-five per cent of the penalties imposed on them. Questioning the correctness of the order passed by the Tribunal, writ petitions were filed. By the impugned orders, the High Court directed extension of time to comply with the Tribunal's order. However, the prayer for dispensation of deposit was rejected.

Section 35-F of the Central Excise Act related to Deposit, pending appeal, of duty demanded or penalty levied. The said provision stipulated that where, in any appeal, the decision or order appealed against relates to any duty demanded in respect of goods which were not under the control of Central Excise Authorities or any penalty levied under the Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the adjudicating authority the duty demanded or the penalty levied. Under the proviso thereto, where in any particular case, the Commissioner (Appeals) or the Appellate Tribunal is of opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person, the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal, may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of the Revenue.

It is in this context that the Supreme Court observed that, in matters relating to grant of stay, though discretion is available, the same has to be exercised judicially; the applicable principles have been set out succinctly in **Siliguri Municipality v. Amalendu Das [(1984) 2 SCC 436,**

and Samarias Trading Co. (P) Ltd. v. S. Samuel: (1984) 4 SCC 666; on merely establishing a prima facie case, interim order of protection should not be passed; but if on a cursory glance it appears that the demand raised has no legs to stand on, it would be undesirable to require the assessee to pay full or substantive part of the demand; petitions for stay should not be disposed of in a routine manner unmindful of the consequences flowing from the order requiring the assessee to deposit full or part of the demand; there can be no rule of universal application in such matters, and the order has to be passed keeping in view the factual scenario involved; where denial of interim relief may lead to public mischief, grave irreparable private injury or shake a citizen's faith in the impartiality of public administration, interim relief can be given; two significant expressions used in Section 35-F are "undue hardship to such person" and "safeguard the interests of the Revenue"; "undue hardship" is a matter within the special knowledge of the applicant for waiver and has to be established by him; a mere assertion about undue hardship would not be sufficient; in **S. Vasudeva v. State of Karnataka: (1993) 3 SCC 467,** it was held that the expression "undue hardship" is normally related to economic hardship; "Undue" which means something which is not merited by the conduct of the claimant, or is very much disproportionate to it; and undue hardship is caused when the hardship is not warranted by the circumstances.

Both the aforesaid judgments arose under Section 35-F of the Central Excise Act which relates to deposit of the duty demanded or penalty levied, pending the appeal. While the main Section requires the Appellants to deposit, with the adjudicatory authority the duty demanded or the penalty levied, the proviso confers power both on the Commissioner of the Appeals and on Appellate Tribunal to dispense with such deposit subject to such condition as it may deem fit to impose as to safeguard the

interest of the revenue, if it is of the opinion that such deposit would cause undue hardship to the Appellant. A balance is required to be maintained between undue hardship caused to the Appellant on making such deposit, and the statutory obligation of the appellate authority to safeguard the interests of revenue. The law declared in the aforesaid judgments is that, where a strong prima facie case is made out, failure to grant interim stay would cause undue hardship to the appellant. The observations made in the context of Section 35-F of the then Central Excise Act, cannot be extrapolated and made applicable to all cases, including those under the Electricity Act, wherever interim relief is sought. It is relevant to note that both the aforesaid judgements placed reliance on the judgment of the Supreme Court in **Siliguri Municipality Vs Amalendu Das: (1984) 2 SCC 436**, wherein it was held that, normally, stay of recovery of tax should not be granted save under exceptional circumstances; grant of stay is an exception, and not a rule; and the test is to ensure that no prejudice is occasioned to the assessee if they were to ultimately succeed at the conclusion of the proceedings.

V. HAS THE APPELLANT MADE OUT A STRONG PRIMA FACIE CASE?

On the question whether the Appellant has made out not just a prima facie case, but a very strong prima facie case, it must be borne in mind that the Appellant herein had participated in the bidding process and, on its being found to be the successful bidder, was issued a letter of award by the Respondent-SECI. As noted hereinabove, the request for proposal (Rfp) was issued on 25.05.2021, the Appellant submitted its bid on 15.07.2021, and a letter of award was issued to them on 21.10.2021. Both the Appellant and SECI entered into a Power Purchase Agreement on 29.08.2022 for a term of 25 years. After the PPA was executed on

29.08.2022, SECI filed a petition before the CERC on 16.11.2022 seeking adoption of tariff, and for approval of the PPA. Soon after the petition was filed by SECI, an amended PPA was executed between the Appellant and SECI on 08.12.2022. Even during the pendency of proceedings before the CERC the Appellant, vide letter dated 24.01.2023, merely sought extension of time with respect to the effective date, financial closure as well as SCOD, on the ground that the tariff adoption had not been completed before 28.10.2022. No question was raised by the Appellant, even till then, regarding the Request for proposal having been issued and the bidding process having been conducted contrary to the Central Government guidelines. It is more than a year thereafter, and for the first time on 16.10.2023, that the Appellant filed an additional affidavit raising objections to the tariff adoption process on the ground that the Central Government guidelines had not been adhered to. The question which would necessitate examination, when the main appeal is finally heard, is whether the Appellant having participated in the bidding process, having accepted the letter of award and having signed the PPA thereafter without demur or protest, and later having executed an amended PPA, could then turn around and contend that the bidding process was contrary to the Central Government guidelines. The effect of the post facto approval granted by MNRE on 19.09.2022 also necessitates examination. While Mr. Sujit Ghosh, Learned Senior Counsel for the Appellant, would submit that the principles of acquiescence or waiver would not apply, this again is a question which must be examined when the main appeal is finally heard, and not at the interlocutory stage of the proceedings. We must, therefore, express our inability to agree with the submission that the appellant has made out a very strong prima facie case, requiring this Tribunal to proceed on the basis that failure to grant interim relief would cause the appellant undue hardship.

Of the three tests required to be fulfilled for grant of interim order we shall proceed on the basis that the Appellant has made out a prima facie case. As noted hereinabove, with the first test of a prima case being the sine qua non, one of the other two tests of balance of convenience or irreparable injury must be satisfied for grant of interim relief.

VI. BALANCE OF CONVENIENCE:

The "balance of convenience" must be in favour of granting interim relief. The Court/Tribunal, while granting or refusing to grant interlocutory relief, should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if interim relief is refused, and compare it with that which is likely to be caused to the other side if the interim relief is granted. If, on weighing competing possibilities or probabilities of likelihood of injury and if the Court considers that pending the Appeal, status quo should be maintained, interim relief would be granted. (***Dalpat Kumar*** **v.** ***Prahlad Singh*****, (1992) 1 SCC 719 : AIR 1993 SC 276).** The Court/Tribunal must satisfy itself that the comparative hardship or mischief or inconvenience which is likely to occur from withholding grant of interim relief will be greater than that would be likely to arise from granting it (***Dalpat Kumar*** **v.** ***Prahlad Singh*****, (1992) 1 SCC 719 : AIR 1993 SC 276).**

The prayer for grant of interlocutory relief is at a stage when the existence of the legal right asserted by the Appellant, and its alleged violation, are both contested and uncertain and remains uncertain till they are examined during the final hearing of the main appeal. The court/tribunal, at this stage, acts on certain well-settled principles of administration of this form of interlocutory remedy which is both temporary and discretionary. (***Colgate Palmolive (India) Ltd.*** **v.** ***Hindustan Lever***

***Ltd.*, (1999) 7 SCC 1; *Gujarat Bottling Co. Ltd.* v. *Coca Cola Co*, (1995) 5 SCC 545).**

The basic principle for the grant of an interlocutory order is to assess the right and need of the Appellant, as against that of the Respondent, and it is a duty incumbent on to the law courts/tribunals to determine as to where the balance lies. (***Colgate Palmolive (India) Ltd.* v. *Hindustan Lever Ltd.*, (1999) 7 SCC 1).** The court/tribunal also, in restraining the Respondent from exercising what it considers to be its legal right but what the Appellant would like to be prevented, puts into the scales, as a relevant consideration, where the balance of convenience lies. (***Colgate Palmolive (India) Ltd.* v. *Hindustan Lever Ltd.*, (1999) 7 SCC 1).**

The Appellant admits that he would not be able to achieve financial closure or commission the project within the stipulated time, and apprehends that their failure to do so may result in SECI terminating the Power Purchase Agreement. In the impugned order passed by it on 09.03.2024 the CERC considered the Appellant's objections regarding execution of the PPA beyond its validity and its being unviable on account of the delay in execution of the PPA. The Commission observed that the petition (in which the impugned order was passed) had been filed by SECI seeking adoption of the tariff discovered in the tariff based competitive bid process of wind power projects, and approval of trading margins; they had already decided that the tariff had been discovered as per the provisions of the bidding guidelines in a transparent manner; and, as regards the objections of the Appellant regarding delay in signing of the PPA and the unviability of the tariff, they were at liberty to approach the Commission for adjudication of these issues in separate petitions. Mr. Sujit Ghosh, Learned Senior Counsel, would submit that, in the light of the aforesaid liberty granted by the Commission, the Appellant has filed a

petition before the Commission seeking discharge of its obligations under the PPA.

As the Appellant had also sought that the PPA executed by them with SECI be put an end to, we asked Mr. Sujit Ghosh, Learned Senior Counsel, as to what consequences would ensue if SECI were to terminate the PPA, since the Appellant had themselves sought for the PPA to put an end to. Learned Senior Counsel would submit that, if the petition filed by them before the CERC were to be allowed, they would be discharged of their obligations under the PPA; however, termination of the PPA by SECI may, firstly, result in their imposing liquidated damages and encashing the Bank Guarantee furnished by the Appellant, and secondly the Appellant may also be blacklisted.

As these two possible consequences form the basis of the Appellant's submission that the balance of convenience lies in their favour, it is necessary for us to examine each one of them separately.

The PPA, executed between the Appellant and SECI on 29.08.2022, was later amended on 08.12.2022. Article 1.1. of the said PPA is the definition clause. "Performance Bank Guarantee" is defined, thereunder, to mean the irrevocable unconditional Bank Guarantee submitted by the Appellant to SECI in the form attached to the PPA as Schedule I. Article 13.3.5 of the PPA relates to liquidated damages, and contemplates compliance of the detailed procedure specified therein, before the PPA can be terminated. It provides, among others, that SECI shall have the right to recover the said damages by encashment of the Bank Guarantee. It is not even the Appellant's case that the said procedure has even commenced as on date. It is also not known, as on date, whether SECI would terminate the PPA. In the event it were to do so, the two fold

consequences, even according to the Appellant, are that the Bank Guarantee may be encashed and the Appellant may be blacklisted.

Schedule-I of the PPA in the format of the Performance Bank Guarantee. A bare reading thereof goes to show that the Bank Guarantee is unconditional, as the Bank agreed thereby to unequivocally, irrevocably and unconditionally to pay SECI on demand, in writing from SECI or any other officer authorised by it in this behalf, the amount specified in the Bank Guarantee.

Though carefully couched as an I.A. seeking stay of the impugned order passed by the CERC, it is evident that what the Appellant seeks is mainly for SECI to be restrained from invoking the Bank Guarantee. In this context, it is useful to take note of the law regarding interference by Courts/Tribunals in matters relating to invocation of Bank Guarantees.

VII. CONDITIONS TO BE SATISFIED BEFORE COURTS/TRIBUNALS WOULD INTERFERE WITH INVOCATION OF BANK GUARANTEES:

A bank guarantee is an independent and distinct contract, between the bank and the beneficiary, and is not qualified by the underlying transaction, and the validity of the primary contract between the person at whose instance the bank guarantee was given and the beneficiary. Subject to limited exceptions, the beneficiary cannot be restrained from encashing the bank guarantee even if the dispute, between the beneficiary and the person at whose instance the bank guarantee was given by the bank, had arisen in the performance of the contract. **(*Ansal Engg. Projects Ltd.* v. *Tehri Hydro Development Corpn. Ltd.*, (1996) 5 SCC 450; *Standard Chartered Bank* v. *Heavy Engineering Corporation Limited*, (2020) 13 SCC 574).** Both the bank and the

beneficiary are bound by, and its invocation should only be in accordance with, the terms of the bank guarantee. **(*Standard Chartered Bank* v. *Heavy Engg. Corpn. Ltd.*, (2020) 13 SCC 574; *Hindustan Construction Co. Ltd.* v. *State of Bihar*, (1999) 8 SCC 436).**

The dispute, between the beneficiary and the party at whose instance the bank has given the guarantee, is immaterial and is of no consequence. Ordinarily, the Court should not interfere with the invocation or encashment of the bank guarantee so long as the invocation is in terms of the bank guarantee. **(*Standard Chartered Bank* v. *Heavy Engg. Corpn. Ltd.*, (2020) 13 SCC 574).** Since a bank guarantee is an independent and separate contract, and is absolute in nature, existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of the bank guarantee. **(*Himadri Chemicals Industries Ltd.* v. *Coal Tar Refining Co.*, (2007) 8 SCC 110; *Adani Agri Fresh* v. *Mehboob Sharif*, (2016) 14 SCC 517).**

Invocation of a bank guarantee does not depend on termination of the underlying contract. The bank guarantee is a separate contract, and is not qualified by the contract on performance of obligations. **(*Gujarat Maritime Board* v. *L&T Infrastructure Development Projects Ltd.*, (2016) 10 SCC 46).** Whether the action of the beneficiary is legal and proper, and whether on the basis of such a decision, the bank guarantee could have been invoked, are not matters of inquiry. Between the Bank and the beneficiary, the moment there is a written demand for invoking the bank guarantee, the Bank is bound to honour the payment under the guarantee. **(*Gujarat Maritime Board* v. *L&T Infrastructure Development Projects Ltd.*, (2016) 10 SCC 46).**

If the bank guarantee furnished is unconditional and irrevocable, it is not open to the bank to raise any objection for payment of the amounts under the guarantee. The person in whose favour the guarantee is furnished by the bank cannot be prevented by way of an injunction from enforcing the guarantee on the pretext that the condition for enforcing the bank guarantee, in terms of the agreement entered into between the parties, has not been fulfilled. The appellant cannot, merely because a dispute exists in terms of the underlying contract, prevent the respondents-beneficiaries from enforcing the bank guarantee by way of injunction save in exceptional circumstances **(*Mahatma Gandhi Sahakra Sakkare Karkhane* v. *National Heavy Engg. Coop. Ltd.*, (2007) 6 SCC 470; *Adani Agri Fresh* v. *Mehboob Sharif*, (2016) 14 SCC 517; *U.P. State Sugar Corpn.* v. *Sumac International Ltd.*, (1997) 1 SCC 568; *Ansal Engineering Projects Ltd.* v. *Tehri Hydro Development Corpn. Ltd.*, (1996) 5 SCC 450).** Encashment of the amount specified in the bank guarantee does not depend upon the result of the decision in the dispute between the parties, in case of a breach.

The two exceptions, for the refusal to grant an order of injunction to restrain the enforcement of a bank guarantee, are (i) fraud committed in the notice of the bank which would vitiate the very foundation of the guarantee; and (ii) injustice of the kind which would make it impossible for the guarantor to reimburse himself. (***Himadri Chemicals Industries Limited* v. *Coal Tar Refining Company* (2007) 8 SCC 110).** Interference by Courts, with the enforcement of a bank guarantee, is only in cases where fraud or special equities are, prima facie, made out as a triable issue by strong evidence so as to prevent irretrievable injustice to the parties. **(*Ansal Engg. Projects Ltd.* v. *Tehri Hydro Development Corpn. Ltd.*, (1996) 5 SCC 450; *Standard Chartered Bank* v. *Heavy***

***Engineering Corporation Limited*, (2020) 13 SCC 574).** Otherwise, the very purpose of bank guarantees would be negated.

As no contention of "fraud" has been raised, let us examine whether the second exception to the general rule of non-intervention is attracted. This exception arises when there are "special equities" in favour of injunction, such as when "irretrievable injury" or "irretrievable injustice" would occur if such an injunction were not granted **(*Vinitec Electronics (P) Ltd.* v. *HCL Infosystems Ltd.*, (2008) 1 SCC 544; *Adani Agri Fresh* v. *Mehboob Sharif*, (2016) 14 SCC 517; *U.P. State Sugar Corpn.* v. *Sumac International Ltd.*, (1997) 1 SCC 568; *Himadri Chemicals Industries Limited* v. *Coal Tar Refining Company* (2007) 8 SCC 110).** Cases, under this category, arise where allowing encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties. Since, in most cases, payment of money under such a bank guarantee would adversely affect the bank, and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee, and the adverse effect of such an injunction on commercial dealings in the country. **(*Vinitec Electronics (P) Ltd.* v. *HCL Infosystems Ltd.*, (2008) 1 SCC 544; *Adani Agri Fresh* v. *Mehboob Sharif*, (2016) 14 SCC 517; *U.P. State Sugar Corpn.* v. *Sumac International Ltd.*, (1997) 1 SCC 568).**

To attract the ground of irretrievable injury, it must be decisively established and proved, to the satisfaction of the Court, that there would be no possibility whatsoever of recovery of the amount by the beneficiary. The irretrievable injury must be of the kind which was the subject-matter of the decision in ***Itek Corporation* v. *First National Bank of Boston*,**

(566 Fed Supp 1210). In that case an exporter in the U.S.A. entered into an agreement with the Imperial Government of Iran and sought an order terminating its liability on stand-by letters of credit issued by an American bank in favour of an Iranian Bank as part of the contract. The relief was sought on account of the situation created after the Iranian revolution when the American Government cancelled the export licences in relation to Iran, and the Iranian Government had forcibly taken 52 American citizens as hostages. The U.S. Government had blocked all Iranian assets under the jurisdiction of the United States, and had cancelled the export contract. The Court upheld the contention of the exporter that any claim for damages against the purchaser, if decreed by the American Courts, would not be executable in Iran under these circumstances, and realization of the bank guarantee/Letters of credit would cause irreparable harm to the plaintiff.

To avail of this exception, therefore, exceptional circumstances which make it impossible for the guarantor to reimburse himself if they ultimately succeed, will have to be decisively established. Clearly, a mere apprehension that the other party will not be able to pay, is not enough. In ***Itek Corporation.* v. *First National Bank of Boston,* (566 Fed Supp 1210),** there was certainty on this issue. **(*Dwarikesh Sugar Industries Ltd.* v. *Prem Heavy Engineerings Works (P) Ltd.*; *U.P. State Sugar Corpn.* v. *Sumac International Ltd.*, (1997) 1 SCC 568; *ITD Cementation India Ltd.* v. *Reliance Infrastructure Limited* 2014 SCC OnLine Bom 198).** Proof of loss or damage being suffered by the Respondents, in terms of the underlying contract, is not necessary for invocation and encashment of a Bank Guarantee. **(*Shahpoorji Pallonji Energy (Gujarat) Private Limited* v. *Gujarat Electricity Regulatory Commission*, (decision in I.A. No. 384 of 2017 in Appeal No. 161 of 2017 dated 29.05.2017).**

After relying on the judgments of the Supreme Court in ***Ansal Engineering Project Ltd.*** **v.** ***Tehri Hydro Development Corporation Ltd.***, ***U.P. State Sugar Corporation, Mahatma Gandhi Sahakara Sakkare Karkhane*** **v.** ***National Heavy Engineering Cooperative Limited***, **and** ***Vinitec Electronic Private Limited*** **v.** ***HCL Infosystem Ltd.***, ***Adani Agri Fresh*** **v.** ***Mehboob Shariff***, this Tribunal, in ***Shahpoorji Pallonji Energy (Gujarat) Private Limited*** **v.** ***Gujarat Electricity Regulatory Commission***, **(decision in I.A. No. 384 of 2017 in Appeal No. 161 of 2017 dated 29.05.2017),** held that to avail of the exception of irretrievable injury or special equity, exceptional circumstances which make it impossible for the Guarantor to reimburse himself, if he ultimately succeeds, will have to be decisively established, which the Applicants have not done in this case.

The merits of the dispute between the parties in terms of the underlying contract, even if it relates to a claim for liquidated damages, does not constitute a third exception to the general rule against interference with the invocation of the bank guarantee.

In ***Ansal Engg. Projects Ltd.*** **v.** ***Tehri Hydro Development Corpn. Ltd.***, **(1996) 5 SCC 450**, a three-Judge Bench of the Supreme Court held that, absent a case of fraud, irretrievable injustice and special equities, the Court should not interfere with the invocation or encashment of a bank guarantee so long as the invocation was in terms of the bank guarantee.

Another three judge bench of the Supreme Court, in ***Dwarikesh Sugar Industries Ltd.*** **v.** ***Prem Heavy Engineering Works (P) Ltd.***, **(1997) 6 SCC 450,** held that the general principles had been summarised in **U.P. State Sugar Corpn: (1997) 1 SCC 568,** wherein it was held that courts should be slow in granting an injunction to restrain

realization of a bank guarantee; courts have carved out only two exceptions ie a fraud in connection with such a bank guarantee which would vitiate the very foundation of such a bank guarantee; the second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned; and since, in most cases, payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country.

In ***Shapoorji Pallonji Energy (Gujarat) Private Limited* v. *Gujarat Electricity Regulatory Commission*, 2017 SCC OnLine APTEL 35,** this Tribunal. after referring to ***Ansal Engineering Projects Ltd.* v. *Tehri Hydro Development Corporation Ltd.* : (1996) 5 SCC 450; *Hindustan Steel Workers Construction Ltd.* v. *G.S. Atwal Co. (Engineers) (P) Ltd.* : (2009) 5 SCC 313; *Hindustan Steelworks Construction Ltd.* v. *Tarapore & Co.* : (2009) 5 SCC 313; *U.P. Coop. Federation Ltd.* v. *Singh Consultants and Engineers (P) Ltd.* : (2009) 5 SCC 313; *Mahatma Gandhi Sahakara Sakkare Karkhane* v. *National Heavy Engineering Cooperative Limited* : (2007) 6 SCC 470; *Vinitec Electronic Private Limited* v. *HCL Infosystem Ltd.* : (2008) 1 SCC 544; *U.P. State Sugar Corpn.* v. *Sumac International Ltd.* : (2015) 4 SCC 136; *BSES Ltd.* v. *Fenner India Ltd.* : (2009) 5 SCC 313; *Adani Agri Fresh* v. *Mehboob Shariff* : (2016) 14 SCC 517 : AIR 2016 SC 92; and *Himadri Chemicals Industries Ltd.* v. *Coal Tar Refining Company* : (2007) 8 SCC 110,** held that there was no question of making out any prima facie case, much less strong evidence or special equity for

interference by way of injunction by the court in preventing encashment of Bank Guarantee; there should be glaring circumstances of deception or fraud warranting interference; and final adjudication is not a pre-condition to invoke the Bank Guarantee, and that is not a ground to issue injunction restraining the beneficiary from enforcing the Bank Guarantee.

As the position in law is well settled as a result of the afore-said judicial pronouncements of the Supreme Court, it would amount to judicial impropriety for the subordinate courts, as also this tribunal, to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position. Such judicial adventurism is wholly impermissible. (***DWARIKESH SUGAR INDUSTRIES Ltd.* v. *PREM HEAVY ENGINEEING WORK*, 1997 6 SCC 450).**

Since the exception of "special equities" in favour of grant of injunction, restraining invocation of the bank guarantee, must be such as to make it impossible for the Appellant to reimburse themselves if they were to ultimately succeed in the main appeal, the mere apprehension (no such apprehension has even been expressed) that the Respondent-SECI will not be able to pay, is not enough. The possibility of payment of the amounts, under the bank guarantee, adversely affecting either the bank, or the Appellant at whose instance the guarantee was given, does not also justify a restraint order being passed against its invocation. The appellant has neither been able to show that the harm or injustice caused to them, on invocation of the bank guarantee, is of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country, nor have they decisively established and proved, to the satisfaction of this Tribunal, that there would be no possibility whatsoever of recovery of the amount, by them from the Respondent-SECI, even if

they were to succeed in the main appeal later. As the twin exceptions, to the rule, have neither been pleaded nor proved, we will not be justified in granting the appellant the relief of stay of its invocation.

In ***BSES Ltd. (Now Reliance Energy Ltd.)*** **v.** ***Fenner India Ltd.*****, (2006) 2 SCC 728,** the Supreme Court held that there was no case of irretrievable injustice, if the Bank Guarantee was allowed to be encashed because justice could always be rendered to the first Respondent therein, if it succeeded. In **Shapoorji Pallonji Energy (Gujarat) Private Limited**, this Tribunal held that equities could be adjusted and relief, of refund of the amount along with interest, could also be considered if the Appellant were to succeed in the main Appeal, but encashment of Bank Guarantees could not be stayed on the mere possibility of their success in the main Appeal.

Since the Appellant has not made out a case of fraud or special equities, justifying the Respondents being restrained from encashing the Bank Guarantees, the relief sought by them in this I.A. cannot be granted. Suffice it to make it clear that invocation of the Bank Guarantees, if the Respondents so choose to do, shall be subject to the result of the main appeal and, in case the Appellant were to succeed therein, equities can always be suitably adjusted in their favour.

The question of examining whether a prima facie case is made out, and in whose favour the balance of convenience lies, does not arise as the Court cannot interfere with the unconditional commitment made by the bank in its guarantees. **(*Adani Agri Fresh* v. *Mehboob Sharif*, (2016) 14 SCC 517; *U.P. Coop. Federation Ltd.* v. *Singh Consultants and Engineers (P) Ltd.*, (1988) 1 SCC 174).** It is wholly unnecessary for us therefore, in order to decide this Interlocutory Application, to examine the merits of the Order under Appeal, since its validity would be subjected to

examination when the main appeal is finally heard, and is of no consequence in considering the relief sought in this IA which, in effect, is for grant of stay of invocation of the bank guarantee.

As the contract of Bank Guarantee is between the bank and SECI, termination of the underlying contract, even if it were to be resorted to by SECI, will not justify this Tribunal restraining them from encashing the Bank Guarantee, since it is not even the Appellant's case that the said Bank Guarantee is either vitiated by fraud or that specially equities lie in their favour. As referred to hereinabove, in case the Appellant were to succeed in the main appeal later, equities can always be suitably adjusted and this Tribunal can then consider whether the amount encashed should be returned to the Appellant along with suitable interest. That does not, however, justify an order being passed restraining SECI from encashing the Bank Guarantee. We make it clear that the order now passed by us shall not be understood by SECI as an order requiring them to encash the Bank Guarantee. All that we have held is that, if SECI were to choose to do so, the order now passed by us shall not come in the way of their exercising their right to invoke the bank guarantee.

VIII. PRE-REQUISITES FOR BLACK LISTING:

The other consequence of termination of the PPA, as urged on behalf of the Appellant, is that they may also be blacklisted. A blacklisting order involves civil consequences. It casts a slur. It creates a barrier between the persons blacklisted and the Government in the matter of transactions. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person

concerned should be given an opportunity to represent his case before he is put on the blacklist. **(Erusian Equipment & Chemicals Ltd. v. State of W.B., (1975) 1 SCC 70; Raghunath Thakur v. State of Bihar, (1989) 1 SCC 229; Gorkha Security Services v. State (NCT of Delhi), (2014) 9 SCC 105; UMC Technologies (P) Ltd. v. Food Corpn. of India, (2021) 2 SCC 551).**

A prior show-cause notice, granting a reasonable opportunity of being heard, is an essential element particularly in decisions pertaining to blacklisting which entail grave consequences for the entity being blacklisted. Such a notice must spell out clearly, or its contents must be such that it can be clearly inferred therefrom, that there is intention on the part of the issuer of the notice to blacklist the noticee. Such a clear notice is essential for ensuring that the person against whom the penalty of blacklisting is intended to be imposed, has an adequate, informed and meaningful opportunity to show cause against his possible blacklisting. Failure to do so would be fatal to any order of blacklisting passed pursuant thereto. (**UMC Technologies (P) Ltd. v. Food Corpn. of India, (2021) 2 SCC 551).**

It is not even known, in the present case, whether SECI has the power to blacklist the Appellant and, even if they have, whether they intend exercising such a drastic power. In the light of the law declared by the Supreme Court in the aforesaid judgments, SECI would be obligated to issue a show cause notice to the Appellant before doing so. Needless to state that, in case proceedings for blacklisting are initiated against the Appellant during the pendency of this appeal, the Appellant would undoubtedly be entitled to avail its remedies, by questioning such action initiated by SECI, in appropriate proceedings before the CERC.

For the reasons afore-mentioned, we are satisfied that the balance of convenience does not lie in favour of the Appellant for grant of interim relief in their favour.

IX. IRREPAIRABLE INJURY:

The other test is that of *"irreparable injury"*. Besides satisfying itself that a prima facie case, for the grant interim relief, is made out, the Court/Tribunal has, further, to satisfy itself that non-interference would result in "irreparable injury" to the party seeking relief, and that he needs protection from the consequences of apprehended injury. **(*Dalpat Kumar* v. *Prahlad Singh*, (1992) 1 SCC 719 : AIR 1993 SC 276; *Mahadeo Savlaram Shelke* v. *Puna Municipal Corporation*, (1995) 3 SCC 33).** As the grant of interim relief is discretionary, exercise thereof is subject to the court/tribunal satisfying itself that its interference is necessary to protect the party from the species of injury. In other words, irreparable injury would ensue before the legal right would be established at the trial **(*Dalpat Kumar* v. *Prahlad Singh*, (1992) 1 SCC 719 : AIR 1993 SC 276).** Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages. **(*Dalpat Kumar* v. *Prahlad Singh*, (1992) 1 SCC 719 : AIR 1993 SC 276; *Mahadeo Savlaram Shelke* v. *Puna Municipal Corporation*, (1995) 3 SCC 33).**

It is not even contended before us by Mr. Sujit Ghosh, Learned Senior Counsel for the Appellant, that, in case the Bank Guarantee were to be encashed, the Appellant would not be able to recover the said amount from SECI on their success in the main appeal later. It is evident,

therefore, that the test of irreparable injury is also not satisfied in the present case.

X. CONCLUSION:

As neither the test of balance of convenience nor that of irreparable injury are satisfied, the Appellant is not entitled to the grant of the interim relief sought for by them in this I.A. Suffice it to make it clear that the order, impugned in this appeal, shall be subject to the result of main appeal. Subject to the above observations, the IA is dismissed.

Pronounced in the open court on this the **10th day of September, 2024**.

(Seema Gupta) Technical Member (Electricity)	(Justice Ramesh Ranganathan) Chairperson

tpd