IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI

(APPELLATE JURISDICTION)

REVIEW PETITION NO. 1 OF 2014
IN
APPEAL NO. 54 OF 2013

Dated: 4th March, 2014

Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice Surendra Kumar, Judicial Member

IN THE MATTER OF:

Gujarat Urja Vikas Nigam Limited
Sardar Patel, Vidyut Bhavan,
Race Course, Vadodara-390007
Gujarat .... Review Petitioner/ Appellant

Versus

1. Gujarat Electricity Regulatory Commission
   1st Floor, Neptune Tower, Ashram Road,
   Ahmedabad -380009

2. M/s ACME Solar Technologies (Gujarat) Pvt. Ltd.
   At Plot No. 48, Sector 5, IMT Manesar,
   Gurgaon-122050

3. Gujarat Energy Trasnmission Corporation Ltd.
   Sardar Patel Vidhyut Bhavan,
   Race Course Circle, Vadodara-390007

4. Gujarat Energy Development Agency (GEDA),
   4th Floor, Block No. 114/2, Udyog Bhawan,
   Sector-11, Gandhi Nagar-382017

5. The Principal Secretary,
   Energy and Petrochemicals Department,
   Government of Gujarat,
   Gandinagar-382 010 .... Respondents

Counsel for the Appellant(s) ... Mr. M.G. Ramachandran
Mr. Anand K. Ganesan
Ms. Swapna Seshadri

Counsel for the Respondent(s) ... Mr. Buddy A. Ranganadhan

JUDGMENT

PER HON'BLE MR. JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

1. An Application under Section 94 of the Electricity Act, 2003 seeking review of the Judgment and Order dated 11.11.2013 passed by this Tribunal in Appeal No. 54 of 2013 has been filed by the Review Petitioner/Appellant on the ground that the Review Petitioner/Appellant had placed on record a document namely; PPA dated 31.05.2012 to show that the **commercial operation date** of the said plant shall mean the date on which Solar Photovoltaic Grid Interactive power plant is available for commercial operation (certified by GEDA) and such date as specified in a written notice given at least ten days in advance by the Power Producer to the Review Petitioner/Appellant (GUVNL). As per the certificate dated 17.03.2012 issued by Gujarat Energy Development Agency (GEDA), the plant was ready for generation as on 31.12.2011, but for 66 KV transmission line.

2. During the hearing of the main Appeal before this Tribunal, the Appellant raised the point whether solar power plant of ACME Solar Technologies (Gujarat) Pvt. Ltd. (ACME Solar/Respondent No.2 herein) could be said commercially operational in Sept., 2011 when the certificate issued by GEDA states that the plant was ready for generation on 31.12.2011. The main grievance of the Review Petitioner in the instant Review Petition is that the State Commission had based its findings of the plant of ACME Solar being ready in Sept., 2011 itself on certain unilateral letters written by ACME Solar without the same being certified by a statutory authority contemplated in the PPA.

3. This Tribunal while deciding the aforesaid Appeal No. 54 of 2013 by judgment dated 11.11.2013 held in para 7 of the judgment as follows:

> *"7. It is admitted fact as made clear by learned counsel for both the sides that the respondent no.2 ACME Solar (petitioner before the State Commission) has not challenged the findings recorded in the impugned order dated 31.12.2012. Thus, the findings of the State Commission given in the impugned order are admitted to the respondent no.2 ACME Solar. The Power Purchase Agreement (PPA) dated 31.05.2010 had in clause 4.3 a very important provision to the effect that the power producer shall pay to the GUVNL (appellant) , liquidated damages for the delay at the rate mentioned therein if the project is not commissioned by its scheduled commercial operation date except when the delay is due to the three reasons, namely, force majeure event or power producer is prevented from performing its obligation because of material default on the part of GUVNL or the power producer is unable to achieve the commercial operation of plant on scheduled commercial operation date (SCOD) because of delay in transmission facilities/evacuation system for reason solely attributable to the GETCO. Thus, according to the original PPA dated 31.05.2010, there was a specific provision by virtue of clause 4.3 that if power producer remains unable to achieve commercial operation on scheduled commercial operation date because of delay in transmission facilities etc. for the reasons solely attributable to the GETCO, the producer shall not pay the liquidated damages for the delay caused in commissioning the project. This very important clause was deleted or done away with in the supplemental PPA dated 24.03.2011, by virtue of clause 2.3 of which the power developer was made liable to pay liquidated damages for the delay caused in commissioning of the project on the scheduled commercial operation date even if the GETCO failed to construct the transmission system or the evacuation system. Thus, the very important clause which was existing in original PPA was removed merely because the power developer respondent no.-2 had to change the original location of the project, because of certain governmental actions regarding change in Janti/Katha rates, non-registration of sale deeds as well as agitation by farmers, land owners etc., the factors which were beyond the control of the power generator/developer-(respondent no.2 herein). Since there was agitation of the farmers etc., and there was change in the Katha rates of the land to be acquired and due to certain impediments in the land acquisition, the project developer had no option but to change the site of the project and hence he ultimately changed the site. Since the site had to be changed by the project developer, he was bound to enter into supplemental PPA on 24.03.2011 whereby he had no option but to sign the said supplemental PPA in which there was specific clause 2.3 making the generator liable to pay liquidated damages even in case of non-availability of transmission system for evacuation of power by scheduled commercial operation date by GETCO. Since the respondent no. 2 has not challenged the impugned order in this Tribunal, he appears to be satisfied. Hence this is not the occasion for this Tribunal to go into the legality, reasonableness or validity of clause 2.3 of supplemental PPA dated 24.03.2011. Respondent no.2 has accepted all the findings recorded in the impugned order passed by the learned State Commission. The learned counsel for the appellant has not pointed out or shown any evidence to establish that Solar Power Plant was not ready in September, 2011 and it could be ready only by March, 2012 or alternatively as pleaded by the*

learned counsel for the appellant in December, 2011. The evidence on record makes it clearly evident that the plant was ready for commissioning by September, 2011, namely, on 30.09.2011. The finding in this regard made by the learned State Commission is based on correct and proper analysis and appreciation of the material on record to which we fully agree and there is no cogent and sufficient reason to deviate from the finding recorded by the learned State Commission in the impugned order. So far as issue regarding implication of supplemental PPA dated 24.02.2011 in regard to liability of the developer –respondent no. 2 to pay liquidated damages vis-à-vis the availability of transmission of GETCO is concerned, we also agree to the finding recorded by the learned State Commission in the impugned order because respondent no.2 - developer did whatever he could do within his control and ran from pillar to post requesting the highest authorities of the Energy Department of the State to direct GETCO to construct transmission facility without any further delay and if GETO could not perform its obligation, the generator respondent no.2 cannot be held liable for that after September, 2011."

4. We have heard Sh. Anand K. Ganesan, the learned counsel appearing for the Review Petitioner/Appellant and Sh. Buddy A. Ranganadhan, the learned counsel on behalf of ACME Solar, Respondent No.2 and gone through the grounds taken in Review Petition.

5. The main arguments of the learned counsel for the Review Petitioner are as follows:

(a) That the Appellant/Review Petitioner had placed the PPA dated 31.05.2010 entered into between the parties and certificate of GEDA dated 17.03.2012 as documentary evidence, according to which, the commercial operation date of the plant was 31.12.2011 and this Tribunal has erred in recording the finding that the said plant was ready for generation in Sept., 2011 is contrary to the documentary evidence namely; PPA dated 31.05.2010 and GEDA certificate dated 17.03.2012.

(b) That this Tribunal ignored the aforesaid documentary evidence and wrongly recorded a finding in conformity with the finding of the learned State Commission that the Solar Power Plant of the ACME Solar was ready for commissioning since Sept., 2011.

(c) That during the hearing of the Review Petition, the learned counsel for the Review Petitioner emphasized upon the fact that as per

GEDA's certificate dated 17.03.2012, the plant was ready for generation on 31.12.2011. In the impugned judgment passed by this Tribunal, we had cautiously gone through the whole documentary evidence and then agreed with the finding recorded by the State Commission in the Commission's impugned order dated 31.12.2012.

(d) That the learned counsel for the Review Petitioner, along with the Review Petition, filed a copy of the certificate of the Chief Electrical Inspector, Gandhinagar dated 31.12.2011 as Annexure-B addressed to General Manager of ACME Solar, according to which, the initial inspection of the electrical installation of 2x8/10 MVA 11/66 KV Transformer with associated equipments at Switchyard of ACME Solar was carried out by Dy. Chief Electrical Inspector, Central Zone, Gandhinagar on 30.12.2011. As provided in the Rule 63 of Indian Electricity Rules, 1956, permission was granted by Chief Electrical Inspector to energize the above electrical installations along with the associated equipments. According to the learned counsel for the Review Petitioner, the certificate of the Electrical Inspector dated 31.12.2011 clearly establishes that the said plant of ACME Solar was ready only on 31.12.2011 and not prior thereto. On the strength of the aforesaid document, the learned counsel for the Review Petitioner says that the said plant was ready only in Dec., 2011 and not prior thereto. This alleged error in the judgment of this Tribunal is said to be an error apparent on the face of record which required to be rectified.

6. Per contra, the learned counsel for the Respondent No.2 (ACME Solar) strongly opposing the maintainability and merits of the instant Review Petition has stated as under:

(a) that the present Review Petition is not maintainable as it does not come within the limits of Review Jurisdiction in terms of Section 120 of the Electricity Act read with Order 47 of the Civil Procedure Code and further submitted that the Review Petitioner is seeking to re-

argue the Appeal and even better its case by means of the present Review Petition.

(b) that the Review Petitioner has not been able to make out any error apparent on the face of the record and in fact is seeking to re-agitate the issues which have been held against the Review Petitioner in the impugned judgment dated 11.11.2013 in Appeal no. 54 of 2013 of this Tribunal.

(c) that the Annexure-B filed along with the Review Petition was not filed by the Appellant in the Appeal and the said document was in fact sought to be handed up across the Bar during the course of arguments in the Appeal by the learned counsel for the Review Petitioner. When faced with the argument that by relying upon the said document (and that too without any application), the Review Petitioner would first have to accept that the levy/deduction of liquidated damages beyond 31.12.2011 was wrong, the learned counsel for the Review Petitioner withdrew the proposed reliance on the said document and did not press any contention on the same. The Review Petitioner's attempt to rely upon the said document (Annexure-B) for the first time in the Review Petition ought to, in such circumstances, be deprecated.

(d) that the Respondent No.2 had placed voluminous documents showing the test certificate of the plant in Sept., 2011 before the State Commission and relying upon the same, the State Commission had returned the finding of fact that the Generating Unit was ready in September 2011. The Review Petitioner had not raised a single ground in the Appeal or in the arguments, whether oral or written, to even contend that any such evidence was either wrong or could not have been relied upon. The only reliance by the Review Petitioner throughout has been on the certificate issued by the GEDA dated 17.03.2012 which nowhere belies the evidence led by the Respondent No.2 that the Plant was ready in September 2011.

(e) that this Tribunal in the impugned judgment dated 11.11.2013, fully considered the certificate of GEDA dated 17.03.2012 which certified that the plant was ready for generation as on 31.12.2011. Hence, the GEDA has, by a post-dated certificate, certified that the plant was ready as on an anterior date. In the circumstances the Respondent No.2 was entitled to and did in fact lead evidence to prove that the plant was ready for generation in September, 2011. At no point of time has the Review Petitioner disputed such evidence.

(f) that the Respondent No.2 had completed the erection work, carried out testing and compiled and filed the entire set of test reports, as per the guidelines and checklist for commissioning of the project to the GEDA on 12.10.2011. The voluminous record was filed before the State Commission which scrutinized the test results, records and formats and accepted the same in order to establish readiness and availability of plant for delivery/generation of power. Later, in December, 2011, the same test results were apparently made use of by GOG, for declaring readiness of the plant.

(g) that the contention of the learned counsel for the Review Petitioner that this Tribunal has missed requirement of GEDA's commissioning certificate from COD's definition of PPA, while determining/arriving at COD, which was the date when solar photovoltaic plant was available for commercial operation is incorrect and contrary to the record. This fact was deliberated in detail and authenticity of the Respondent No.2's claim for completion of commissioning test was verified/ examined based on the strength of documents on record. These facts and records established beyond doubt that the plant was ready for delivery of power by end September, 2011.

(h) that in reference to GEDA certificate, it has been submitted that the GEDA's commissioning certificate is dated 17.03.2012 and has confirmed that the plant was ready for generation on 31.12.2011. (Any proposition that the plant of 15 MW capacity was made ready only on 31.12.2011 is beyond comprehension). The commissioning

certificate has not specified as to the precise date when the plant was ready but acknowledged that the plant was ready prior to 31.12.2011.

(i) that the Respondent No.2 has, by independent evidence proved to the satisfaction of the State Commission that the plant was ready in September, 2011 i.e. before or on 31.12.2011.

(j) that the findings of the State Commission were not based on any unilateral letters, as alleged, by the Review Petitioner but the State Commission in the impugned order dated 31.12.2012 after considering documentary evidence available on record and other material, recorded the finding that the plant was ready for generation in September, 2011 and the same finding has been confirmed by this Tribunal in the impugned judgment which is sought to be reviewed.

By making aforementioned submissions, the learned counsel for the Respondent No.2 prays for dismissal of Review Petition with exemplary costs.

7. Thus, the main points for our consideration in the Review Petition are:

(i) whether the findings recorded by this Tribunal in judgment dated 11.11.2013 in Appeal no. 54 of 2013 can be reviewed on reconsideration of the commercial operation date clause incorporated in PPA dated 31.05.2012 and certificate of GEDA dated 17.03.2012 which have been cautiously and carefully considered by us in the impugned judgment?

(ii) whether the impugned judgment of this Tribunal can be subjected to review on the filing of a new document namely; report of Chief Electrical Inspector dated 31.12.2011 which was issued and sent to the Respondent No.2 informing that initial inspection of the electrical installation was carried out on 30.12.2011 and permission granted to energize the above electrical installation along with associated equipments?

8. Our finding in para 7 of the impugned judgment that the learned counsel for the Appellant has not pointed out or shown any evidence to establish that solar power plant was not ready in September, 2011 and it could be ready only by March, 2012 or alternatively as pleaded by the learned counsel for the Appellant in December, 2011 and the evidence on record makes it clearly evident that the plant was ready for commissioning by September, 2011 namely; on 30.09.2011 does not require any interference in the instant Review Petition as the same finding was recorded by us after scrutinizing and carefully perusing the whole documentary evidence led by the parties.

9. It may be mentioned here that the Review Petitioner/Appellant in the written submission in the original appeal had relied on certificate of the Chief Electrical Inspector but the certificate of Electrical Inspector was not filed during the hearing of the Appeal and till the judgment of the Appeal, the reasons best known to the Review Petitioner/Appellant. The learned counsel for the Review Petitioner/Appellant wants to emphasis on the said certificate of the Chief Electrical Inspector that the plant was not ready for commercial operation till 31.12.2011 and the plant cannot be commissioned till the statutory clearance from the Chief Electrical Inspector is obtained. It has also been argued on behalf of the Review Petitioner/Appellant that it was the duty of the generator to obtain the clearance from the Chief Electrical Inspector before commissioning of the plant.

10. **Per contra**, the learned counsel for the Respondent No.2/Generator, submitted that the findings recorded in the Order dated 31.12.2012 passed by the State Commission have been confirmed and reaffirmed in the appeal by this Tribunal in its judgment dated 11.11.2013 in Appeal No. 54 of 2013. If the said certificate of the Electrical Inspector was so vital and important, then the Appellant had knowingly and deliberately not filed the same during the pendency of the appeal, for the reasons best known to the Appellant. There is a clear finding of the State Commission as well as this

Tribunal that the plant of Respondent No.2 was ready for commissioning by Sept., 2011 namely; on 30.09.2011. When the Appellant took the plea of the report of the Electrical Inspector in the written submission, as alleged, the Said certificate of the Electrical Inspector was not filed and the same cannot be allowed to be filed at this stage particularly, when the Review Petitioner/Appellant in para 10 of the instant Review Petition has merely stated that

> *"the Appellant/Review Petitioner is also filing herewith as Annexure B, a copy of the Certificate of the Chief Electrical Inspector dated 31.12.2011 which also states that the plant of ACME Solar Was ready only on 31.12.2011 and not prior thereto. This certificate is with respect to protection and supply purpose as readiness of the project, which is required even before project put to use."*

11. The Hon'ble Supreme Court in Rajendra Kumar v. Rambhai, AIR 2003 SC 2095 held that the first and foremost requirement of entertaining a review petition is that the order, review of which is sought, suffers from any error apparent on the face of the order and permitting the order to stand will lead to failure of justice. In the absence of any such error, finality attached to the judgment/order cannot be disturbed.

12. Order XLVII, Rule 4 of The Code of Civil Procedure, 1908 provides as under:

> ***"4. Application where rejected*** *– (1) Where it appears to the Court that there is not sufficient ground for a review, it shall reject the application.*
> *(2)* ***Application where granted –*** *Where the Court is of opinion that the application for review should be granted, it shall grant the same:*
> *Provided that--*
> *(a) no such application shall be granted without previous notice to the opposite party, to enable him to appear and be heard in support of the decree or order, a review of which is applied for; and*
> *(b) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made, without strict proof of such allegation."*

Thus, the requirement of sub-rule (2) of Rule 4 of Order XLVII C.P.C. is that review application shall not be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the

decree or order was passed or made, without strict proof of such allegation

13. Admittedly, in this case, the Review Petitioner/Appellant had a full and complete knowledge of the certificate of the Chief Electrical Inspector dated 31.12.2011, which has now been annexed at Annexure-B to the Review Petition. Thus, the Review Petitioner/Appellant, inspite of having a complete knowledge of the aforesaid certificate of Chief Electrical Inspector, did not prefer to file the same during the arguments of the appeal and even after taking the said plea in the written submission filed by the Appellant during the original appeal. Thus, the said proviso requires strict proof of the allegation that the said document was not within the knowledge of the applicant, or could not be adduced by him at the time when the decree or order was passed or made.

14. Thus, the said certificate of the Chief Electrical Inspector was concealed or suppressed by the Review Petitioner/Appellant till the disposal of the appeal and as per law laid down by the Hon'ble Supreme Court in Union of India v Paul Manickam, AIR 2003 SC 4622 (4629) held that the court would not entertain a review petition with an entirely new substratum of issues or where there is suppression of facts. Further, as per law laid down in Bdya Devi v. I.T. Commr., Allahabad, AIR 2004 Cal 63 (67) (DB), in review, the court cannot enter into a process of taking evidence to establish same thing which is not on record in order to create records for the purpose.

15. The Hon'ble Karnataka High Court in Naresh Thaper v. Naryana Rao Patalay, AIR 2003 NOC 548 : 2003 AIHC 2998 (AP): AIR 2003 Kant 444 held that 'A plea which was not taken at hearing of the case would not be allowed to be taken in review.' In the matter before us, the said document was not knowingly and deliberately filed by the Appellant during the hearing of appeal, which apparently was not considered vital or important.

16. The Hon'ble Supreme Court in Meera Bhanja v. Nirmala Kumar Choudhary, AIR 1995 SC 455, 457 had observed that an error apparent on the face of the record must be such an error which must strike one on mere looking at the record and would not require any long drawn process of reasoning on points where there may conceivably be two opinions.

17. Another case law cited by the learned counsel for the Review Petitioner is Rajender Singh v/s Lt. Governor, Andaman & Nicobar Islands and Others reported in (2005) 13 Supreme Court Cases 289. On appraisal of the same, we find that the Hon'ble Supreme Court observed that High Court's power of review of its own order inheres in every court of plenary jurisdiction to prevent miscarriage of justice. The Hon'ble Supreme Court after careful perusal found that High Court judgment does not deal with and decide many important issues, as could be seen from the grounds of review and raised in the grounds of special leave petition/appeal. The Hon'ble Supreme Court also observed that the High Court was not justified in ignoring the materials on record which on proper consideration may justify the claim of the appellant. The Hon'ble Supreme Court found that since the impugned judgment of the High Court was a clear case of an error apparent on the face of record and non-consideration of relevant documents, then Hon'ble Supreme Court found that matter fit for review jurisdiction of the High Court. The case of review before us is not covered by the said reported judgment of the Apex Court. In the matter before us, we had considered all the documentary evidence led by the parties and after giving complete consideration to the points raised before us, we decided impugned appeal and now after considering the submissions raised by the rival parties we are deciding the instant review petition.

18. The third case law cited by the learned counsel for Review Petitioner is Green View Tea & Industries v/s Collector, Golaghat, Assam and Another reported in (2004) 4 Supreme Court Cases 122 in which the Hon'ble Apex Court dealing with the case of land acquisition and

considering the provision of Section 114 and order 47 Rule 1 of the Civil Procedure Code, 1908 held that if the material evidence on record is not taken into account in judgment sought to be reviewed, the same constituted error apparent on face of record. This case law is also of no help to the Review Petitioner since we have taken into consideration the whole material evidence available on record. We do not find any error apparent on the face of record in our impugned judgment.

19. After considering the aforesaid facts and the rival contentions made by the contesting parties and the observations and findings recorded by us in para 7 of the impugned judgment of this Tribunal, we do not find any sufficient or cogent ground having being made out to review our findings recorded on merits in our impugned judgment in Appeal No. 54 of 2013. There appears to be no error to entitle us to review our impugned judgment, passed on merit, after analysis of the whole material and evidence on record. In the main judgment, we had given due consideration to the contents of the concerned clause of PPA and also to the GEDA certificate.

20. **Summary of Findings**

(A) The present Review Petition does not make out any sufficient cause or does not reflect any error apparent on the face of record so as to warrant us to allow the review petition and to review our impugned judgment in Appeal No. 54 of 2013.

(B) The Review Petitioner/Appellant has not been able to point out any error apparent on the face of record and in fact wants to re-agitate the issues which we had already decided by giving findings in the impugned judgment in appeal and those findings cannot be allowed to be assailed on merits in the name of the aforesaid documents namely; PPA and GEDA certificate. Since, the certificate of Chief Electrical Inspector dated 31.12.2011, which is annexed at Annexure-B in the Review Petition, cannot be considered in the light of the aforesaid observations made by us. This is not a case that

the said certificate was not in the knowledge of the Review Petitioner/Appellant and could not be filed at the relevant time when the appeal was being heard and decided. This is a case of consistent and concrete findings recorded by the learned State Commission and confirmed by this Tribunal in the aforesaid Appeal No. 54 of 2013.

(C) Consequently, the instant Review Petition does not hold water and is liable to be dismissed and the same is accordingly dismissed. No order as to costs.

Pronounced in open Court on this Fourth day of February, 2014.

(Justice Surendra Kumar)
Judicial Member

(Rakesh Nath)
Technical Member

√ **REPORTABLE/~~NON-REPORTABLE~~**

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