

**COURT-I**

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY  
(Appellate Jurisdiction)**

**IA NO. 1511 OF 2018 IN  
APPEAL NO. 241 OF 2018**

**Dated: 5<sup>th</sup> December, 2018**

**Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson  
Hon'ble Mr. S.D. Dubey, Technical Member**

**In the matter of:**

<b>Gujarat Urja Vikas Nigam Limited</b>	....	<b>Appellant(s)</b>
<b>Versus</b>		
<b>M/s. Adani Power (Mundra) Limited &amp; Anr.</b>	....	<b>Respondent(s)</b>

Counsel for the Appellant(s) : Mr. M.G. Ramachandran  
Ms. Ranjitha Ramachandran

Counsel for the Respondent(s) : Mr. Amit Kapur  
Ms. Poonam Verma  
Ms. Abiha Zaidi for R-1

**ORDER**

**PER HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER**

1. The present Application is filed by Adani Power (Mundra) Limited & Anr., the Respondent No.1 herein, seeking interim directions pending final adjudication of the Appeal No. 241 of 2018. The Appellant has sought the following reliefs in the instant IA, being IA No. 1511 of 2018 in Appeal No. 241 of 2018:
  - (a) Direct the Appellant/Gujarat Urja Vikas Nigam Ltd. to make payments to the Applicant/Adani Power (Mundra) Ltd. in terms of the Impugned Order dated 05.07.2018 in Review Petition No. 35/RP/2017 read with Order dated 31.07.2017 in Petition No.

154/MP/2015 passed by the Central Commission; without any further delay;

**2. The facts of the present Application as presented by the Appellant are as under:**

2.1 Adani Power (Mundra) Limited, the Respondent No. 1 in Appeal No. 241 of 2018 has filed the present Application being aggrieved due to non-compliance by Gujarat Urja Vikas Nigam Ltd, the Appellant in Appeal No. 241 of 2018, of orders in (i) Review Petition No. 35/RP/2017 dated 05.07.2018 and (ii) Petition No. 154/MP/2015 dated 31.07.2017 passed by the Central Electricity Regulatory Commission (“**Central Commission**”).

2.2 The Central Commission has held that the Adani is entitled to receive payment (along with interest) for 992.06 MUs of power to GUVNL prior to SCoD under the Power Purchase Agreement dated 06.02.2007. However, GUVNL has not complied with the directions of the Central Commission on the ground that it has preferred an Appeal against the Impugned Orders and the Appeal and the Application for Stay are pending before this Tribunal.

2.3 It is settled position of law that mere preference of an appeal does not operate as a stay on the order which is appealed as held by the Hon’ble Supreme Court of India in the following cases:

- (a) Atma Ram Properties (P) Ltd. v. Federal Motors Pvt. Ltd (2005) 1 SCC 705 (Para 8)

(b) Kamla Devi v. Takhatmal Land Another AIR 1964 SC 859 (Para 6)

2.4 The issues being raised by GUVNL in the Appeal have been determined judicially through serious contest at different Fora and Adani Power has succeeded at all fora i.e. Gujarat State Electricity Regulatory Commission, this Tribunal and Hon'ble Supreme Court, which has specifically rejected the request of GUVNL for stay of this Tribunal's judgment in this matter. Thereafter, GUVNL made futile attempts before Central Commission to delay the payment to Respondent No.1 which has dismissed its Review Petition NO. 35/RP/2017 by order dated 05.07.2018. Having obtained a definitive decision on the aforesaid issue from multiple fora, GUVNL ceaselessly pursues dilatory tactics with a view to unduly retain the money which has to be refunded to Adani Power in terms of the decisions of various fora stated above. Such a conduct on part of GUVNL is mala-fide and ought not be allowed. Such dilatory tactics by GUVNL are also not in the interest of end consumer as GUVNL shall be liable to pay interest for the period of delay as per the Impugned Order.

2.5 Once the Hon'ble Supreme Court has rejected the prayer of GUVNL for stay of the decision of this Tribunal, GUVNL is bound by such decision and ought to refund the money of Adani Power which it has retained without being entitled for it so far. The Appeal and the Application for stay by GUVNL is only to prolong the litigation and to delay the long pending legitimate claim of Adani Power.

- 2.6 To supplement the aforesaid submissions, reliance is placed on the directions of this Tribunal in its order dated 24.09.2018 in IA No. 915 of 2018 in Appeal No. 202 of 2018. The said order of this Tribunal passed direction to the Discoms to make expeditious payments while taking note of the MOP letter dated 27.08.2018 with directions to the Central Commission under Section 107 of the Electricity Act, 2003.
- 4.7 If the payments are not made expeditiously, Adani Power shall be declared a Non-Performing Asset in terms of the circular of the Reserve Bank of India dated 12.02.2018.
- 4.8 In the event payments due are not made or delayed, Adani Power will suffer irreparable loss as it would not be in a position to continue the operations. Adani Power will not be able to meet its debt servicing obligations to the lenders apart from losing the revenue due to non-availability of Power Plant for generation of power.
5. **The learned counsel Mr. M.G. Ramachandran appearing for the Appellant/GUVNL presented the following submissions for our consideration:-**
- 5.1 After the order dated 05.07.2018 was passed by the Central Commission, the Respondent No.1 had approached the Appellant for release of the payment in terms of the order passed by the Central Commission pending the decision of this Tribunal in the above appeal. The Respondent No. 1 had sought for payment on adhoc basis subject to the condition that if this Tribunal's decision in the pending appeal is in favour of the Appellant, the Respondent No.1 shall refund/give adjustment and allow deduction of the said amount of Rs.

150 crores with interest at 10% per annum. In this regard, the Respondent No.1 had executed an undertaking on 27.08.2018.

- 5.2 The above undertaking was executed after the Appellant had filed the above mentioned appeal being Appeal No. 241 of 2018 along with the interim application for stay being IA No. 1196 of 2018 before this Tribunal on 24.07.2018.
- 5.3 By order dated 06.09.2018 this Tribunal was pleased to issue notice on the appeal as well as the IA No. 1196 of 2018 (application for stay) to the Respondents. The Respondent No.1 was on caveat and was present at the time when the notice was issued both in the appeal and IA No. 1196 of 2018.
- 5.4 The appeal and the interim application for stay being IA No. 1196 of 2018 was listed for hearing on 10.10.2018. The Respondent No.1 had not filed any reply to the interim application for stay being IA No. 1196 of 2018 or to Appeal No. 241 of 2018 by the said date. This Tribunal was pleased to pass the following Orders:

*“Learned counsel for Respondent No.1 submits that appeal itself is not maintainable, therefore, appeal cannot be admitted.*

*Accordingly, learned counsel for Respondent No.1 is directed to file reply within three weeks’ time i.e. on or before 31.10.2018 with advance copy to the other side. Thereafter, rejoinder, if any, may be filed on or before 12.11.2018 with advance copy to the other side.*

*List the matter on 12.11.2018”*

- 5.5 The appeal and the interim application for stay were listed for hearing on 12.11.2018 with a direction to the Respondent to file the reply on or before 31.10.2018 and the Appellant to file the rejoinder, if any, on or before 12.11.2018.
- 5.6 In view of the above the present application filed by the Respondent No.1 for direction to the Appellant to pay further amount is misconceived and is liable to be dismissed. This Tribunal has to hear arguments on the interim application being IA No. 1196 of 2018 along with the arguments on the main appeal and pass appropriate orders in the matter. The Respondent No.1 is also required to place on record the grounds on which the Respondent No.1 is purporting to challenge the maintainability of the appeal filed by the Appellant.
- 5.7 In the IA No. 1196 of 2018 for interim orders filed in the matter, the Appellant has placed detailed reasons as to why the order of the Central Commission is patently erroneous. In the Memorandum of Appeal and in the application for interim orders, the Appellant had also placed on record that the Appellant had earlier paid a sum of Rs. 135.20 Crores to Respondent No.1. The Appellant has further paid a sum of Rs. 150 Crores after passing of the Impugned Order by the Central Commission. The principal amount of the claim of the Respondent No.1 after adjusting the amount of Rs. 135.20 Crores paid earlier by the Appellant to the Respondent No.1 as per the decision of the Central Commission works out to Rs. 154.6 Crores and interest of Rs. 212.12 Crores. The Appellant has already paid the principal amount of the claim of Respondent No. 1 as per the undertaking given by Respondent No.1 on 27.08.2018. Respondent

No.1 has failed to disclose the above facts in its application and therefore the application has not been filed bonafide.

5.8 This Tribunal may proceed to hear the appeal filed by the Appellant along with the application for stay filed by the Appellant and dispose of the main appeal. The Appellant has good grounds for challenging the impugned order of the Central Commission and for relief of setting aside the order of the Central Commission as more fully set out in the Memorandum of Appeal and Interim Application.

5.9 The decision of the Central Commission is not only in regard to matters which are subject matter of the proceedings before the Hon'ble Supreme Court in Civil Appeal No. 2567 of 2013 but also determination of other amounts claimed by Respondent No.1 from the Appellant. The claim made by Respondent No.1 against the Appellant which is the subject matter of the proceedings before the Hon'ble Supreme Court is restricted to the quantum of power sold to third parties during the pendency of the proceedings before the Gujarat Electricity Regulatory Commission in Petition No. 1093 of 2011. This amount in fact has already been paid by the Appellant to the Respondent No.1

5.10 The Central Commission has, however, dealt with the various other claims of Respondent No.1 against the Appellant. Therefore, it is not correct on the part of Respondent No.1 to contend that the Appellant is in any manner re-agitating any of the issues. The proceedings before the Hon'ble Supreme court is related only to the basic issue whether the Respondent No.1 as a generator is entitled to sell the capacity contracted by the Appellant to third parties before the

Scheduled Commercial Operation Date. This Tribunal had held that the Respondent No.1 is entitled to sell such capacity to third party. The Appellant has challenged the same before the Hon'ble Supreme Court. Neither the Gujarat Electricity Regulatory Commission nor this Tribunal had decided on the quantum of the amount payable by the Appellant to Respondent No.1, if it is held that the Appellant is not entitled to sell the contracted capacity prior to the Scheduled Commercial Operation Date of the generating units established by Respondent No.1. Accordingly, the Impugned Order is the first order which has determined the amount payable by Respondent No.1 to the Appellant. Therefore, it is incorrect on the part of the Respondent No.1 to contend that these issues have been decided earlier by any of the Forum.

5.11 The Appellant has pointed out the specific errors apparent and inconsistencies in the Impugned Order which demonstrate that the Respondent No.1 is in fact not entitled to any compensation beyond Rs. 135.20 Crores which is related to the power sold by Respondent NO.1 to third parties and has already been paid to the Respondent No.1 in January, 2014.

6. **Our Considerations:**

6.1 The Appellant submitted that in the Appeal it has pointed out specific errors apparent and inconsistencies in the Impugned Order dated 31.07.2017 read with order dated 05.07.2018 which demonstrate that the Respondent No.1 Adani Power is in fact not entitled to any compensation beyond Rs. 135.20 Crores which is related to the power sold by Respondent No.1 to third parties and has already been paid to



Adani Power in January, 2014. The learned counsel for the Appellant further submitted that the proceedings before the Hon'ble Supreme Court is related only to the basic issue whether the Respondent No.1 as a generator is entitled to sell the capacity contracted by the Appellant to the third parties before the Scheduled Commercial Operation Date. Admittedly, this Tribunal has upheld the order of Gujarat Electricity Regulatory Commission in this regard and the Appellant has challenged the same before the Hon'ble Supreme Court against which no stay has been granted.

6.2 The learned counsel for the Appellant further contended that all the principal amount due to the Respondent No.1 has already been paid in line with the affidavit submitted by Adani Power and only interest thereon as applicable is due to be received by the Respondent No.1. The learned counsel for the Appellant vehemently submitted that in the facts and circumstances of the case wherein all the principal amounts stand paid by the Appellant, there does not appear any legal necessity to issue any direction in the matter as prayed by the Respondent No.1 and the parties should seek redressal of the grievances through adjudication of the main Appeal only.

7.0 **Per Contra**, the learned counsel for the Respondent No.1 submitted that once the Hon'ble Supreme Court has rejected the prayer of the Appellant for stay of the decision of this Tribunal, the Appellant is bound by such decision and ought to refund the money due to Adani Power which it has retained for quite long time without being entitled to it. The learned counsel for the Respondent No.1 further submitted that the Appeal and Application for stay filed by the Appellant is only to prolong the litigation and to delay payment of long pending

legitimate claim of the Respondent No.1. The learned counsel further contended that due to non-payment of dues in time Adani Power may be declared NPA in terms of the circular of the RBI dated 12.02.2018. He further submitted that the Adani Power will suffer irreparable loss on account of non-payment or delay in payment whereas the Appellant is not prejudiced in any manner to this account. Accordingly, being a generator and having responsibility for arranging key inputs for the power plant to generate power, the balance of convenience lies in favour of the Respondent No.1. It is accordingly prayed for appropriate direction in the matter so as to release the due payments.

8. Having regard to the contentions of the learned counsel for the Appellant and the learned counsel for the Respondent No.1 it is relevant to note that the judgments and orders at different Fora duly substantiate the contentions of the Respondent No.1. It is not in dispute that Adani Power has supplied power either to the Appellant or to the third party before the Scheduled Commercial Operation Date and it has been upheld at various Fora that Adani Power is entitled to sell their power to any party and is not obligated to supply power only to the Appellant prior to Scheduled Commercial Operation Date. Regarding the quantum of power so scheduled to GUVNL prior to Scheduled Commercial Operation Date, the matter is yet to be adjudicated and the Appellant has already paid the requisite principal amount (Rs. 135.20 Crores + Rs. 150 Crores). Thus, against the claim projected by Adani Power as Rs. 366.48 Crores, the Appellant has already paid Rs. 150 Crores in addition to earlier payment of Rs. 135.20. Accordingly the interest of about Rs. 200 Crores has been computed by the Respondent No.1 to be outstanding.

In view of the aforesaid considerations, we are of the considered opinion that an adhoc payment on account of interest as Rs. 150 Crores may be released by the Appellant to avoid financial hardship to the Respondent No.1 in continuing power generation from its plant.

Needless to mention that above directions are subject to the final outcome of the Appeal No. 241 of 2018 filed by the Appellant.

In view of the IA No. 1511 of 2018 being disposed of in the above terms, the other IA No.1513 of 2018 and IA No. 1196 of 2018 do not survive for further considerations.

List the main appeal for hearing on **08.03.2019.**

No order as to costs.

Pronounced in the Open Court on this **5<sup>th</sup> day of December, 2018.**

**(S. D. Dubey)**  
**Technical Member**

**(Justice Manjula Chellur)**  
**Chairperson**