

COURT-1

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

IA No. 1724 OF 2023 IN APL No. 168 OF 2023,
IA No. 1722 OF 2023 IN APL No. 171 OF 2023 &
APL No. 92 OF 2023

Dated: 28th May, 2024

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

In the matter of:

IA No. 1724 OF 2023 IN APL No. 168 OF 2023 &

Punjab State Power Corporation Limited Appellant(s)

Versus

Central Electricity Regulatory Commission & Respondent(s)
Ors.

Counsel on record for the Appellant(s) : Poorva Saigal
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Pallavi Saigal
Ravi Nair
Reeha Singh
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Counsel on record for the Respondent(s) : for Res. 1

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Deepak Thakur
Shubham Singh

Varnika Tyagi
Kamya Sharma
Divyansh Kasana
Adarsh Kumar Bhardwaj
Samprati Singh for Res. 2

Samir Malik
Nikita Choukse
Rahul Sinha
Akash Lamba
Eksha Kashyap for Res. 4

IA No. 1722 OF 2023 in APL No. 171 OF 2023

Uttar Haryana Bijli Vitran Nigam Ltd. & Anr. Appellant(s)

Versus

Central Electricity Regulatory Commission & Ors. Respondent(s)

Counsel on record for the Appellant(s) : Poorva Saigal
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Adarsh Kumar Bhardwaj
Samprati Singh for Res. 2

Samir Malik
Nikita Choukse
Rahul Sinha
Akash Lamba
Ekssha Kashyap for Res. 4

APL No. 92 OF 2023

Gujarat Urja Vikas Nigam Limited Appellant(s)

Versus

Central Electricity Regulatory Commission & Respondent(s)
Ors.

Counsel on record for the Appellant(s) : Anand K. Ganesan
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ORDER

IA No. 1724 of 2023 and 1722 of 2023 are filed by the second Respondent in Appeal Nos. 168 and 171 of 2023, seeking modification of the earlier interim order passed by this Tribunal on 18.04.2023 to the extent the Applicant-Second Respondent seeks a direction to the Appellant to pay them the outstanding 50% dues. While the IA filed by the applicant-second Respondent is silent in this regard, Mr. P. Chidambaram, Learned Senior Counsel appearing on their behalf, would submit that the Appellant be directed to pay the balance 50% of the outstanding dues to the applicant-second respondent on their furnishing an unconditional bank guarantee for a like sum; and for the said bank guarantee to be kept alive during the pendency of the appeal.

I. RELEVANT FACTS:

Before taking note of the rival submissions, it is necessary to refer to the facts, of the present case, to the extent relevant. A Power Purchase Agreement was entered into between PSPCL and the applicant-2nd Respondent on 22.04.2017. The applicant started declaring less availability of power to PSPCL, on account of financial distress, from April 2021 onwards. On 05.05.2022, the Ministry of Power, Government of India issued an order under Section 11(1) of the Electricity Act. Less than a week thereafter, the applicant filed Petition No. 128/MP/2022 before the CERC, under Section 11(2) of the Electricity Act, seeking interim and final relief with respect to the alleged adverse financial consequences they had suffered as a result of the Section 11(1) Order. In this Petition, the applicant-second respondent contended that the circumstances relied upon by the Ministry of Power, to be of extraordinary nature, did not qualify as a circumstance within the meaning of Section 11(1).

In continuation of the direction issued on 05.05.2022, the Ministry of Power issued further directions on 13.05.2022 informing that the Committee constituted by them had made recommendations in respect of the tariff payable to the imported coal block based Power Plants. On 13.09.2022, the CERC passed an interim order in IA No. 50 2022 in Petition No. 128/MP/2022 holding that the procurers, such as PSPCL and HPPC, were liable to pay deemed fixed charges even if they were not availing power under the Section 11 dispensation.

Aggrieved thereby, PSPCL filed Appeal No. 387 of 2022 and HPPC filed Appeal Nos. 388 of 2022 before this Tribunal. In its order in IA No. 1603 of 2022 in Appeal No. 387 of 2022, and IA No. 1582 of 2022 in Appeal No. 388 of 2022 dated 28.10.2022, this Tribunal noted that, against the very same order passed by the CERC dated 13.09.2022, MSEDCL had filed an Appeal in DFR No. 390 of 2022 and had sought a similar relief in IA No. 1520 of 2022, and this Tribunal had, by its order dated 20.09.2022, declined to grant interim stay of the order of the CERC; the order under challenge in this Appeal was only an interim arrangement; prima facie, the responsibility of the generator to remain available could not be ignored; and non-availing of power by the Appellant could not, by itself, be a good reason to rid them of the responsibility to pay fixed charges. The interim applications were, accordingly, dismissed.

Aggrieved thereby, PSPCL filed Civil Appeal No. 8175 of 2022 and, by its order in CA No. 8175 of 2022 and CA No. 8136 of 2022 dated 14.11.2022, the Supreme Court, while issuing notice, found it appropriate, with a view to balance equities, to grant stay of the interim order passed by this Tribunal, subject to the condition that the Appellant deposited 50% of the fixed charges before the Commission; the said amount was directed to be kept in an interest bearing deposit in a nationalized bank for a period

of six months to be renewed from time to time until further orders; and the interest, accrued on the amount, would enure to the benefit of the succeeding parties. The Supreme Court further observed that pendency of the petition shall not be an impediment for the Commission to either dispose of the matter which had been heard and reserved on the same subject matter, or for this Tribunal to consider the appeal on its merits and in accordance with law. The Appellant was granted liberty to withdraw a portion of the amount deposited by them before the Punjab and Haryana High Court at Chandigarh, and deposit the same before the Commission in compliance with the order of the Supreme Court.

PSPCL, HPPC and Gujarat Urja Vikas Nigam Limited were all respondents in Petition No. 128/MP/2022 filed by the applicant–2nd Respondent before the CERC. In its order in Petition No. 128/MP/2022 dated 03.01.2023, the CERC summarized its decision in Para 123 as under:-

“(a) The rates decided by the MoP read with the clarification of the Commission thereon vide order dated 13.9.2022 are interim in nature and are subject to determination of adverse financial impact by the Commission under Section 11(2) of the Act

(b) In order to ensure that the Petitioner maintains and operate its plant to generate power for supply to the Procurers in compliance with the directions of the MoP under Section 11(1) of the Act, the Commission under Section 11(2) of the Act is required to compensate the Petitioner to cover the cost plus a reasonable margin of profit.

(c) The decision in order dated 13.9.2022 in IA No.50/2022 regarding fixed charge that GUVNL and MSEDCL cannot unilaterally deduct INR 0.20/kWh from the fixed charges is reiterated. Consequently, I.A. No.64/2022 filed by GUVNL for modification of said order is rejected.

(d) Since TPCL is compensated for full fixed cost on declaring 80% availability, there is no need to provide additional fixed charges above 80% availability or to provide incentive above 85% availability.

(e) The rates of rebate decided by the Commission in para 41 of the order dated 13.9.2022 by extrapolating the PPA provisions in case of weekly billing adequately address the adverse financial impact on the Petitioner for generation and supply of power in compliance with the directions under Section 11(1) of the Act and accordingly, the said principle is reiterated.

(f) The procurers who are not scheduling the power from the Petitioner under Section 11 Directions shall be required to maintain LC commensurate with the fixed charges for one week for their contracted power.

(h) FOB cost of Indonesian coal for the purpose of offsetting of the adverse financial impact under Section 11(2) should be taken as lower of the actual cost of coal or the HPB based on the HBA index. Based on the said cost and the transportation charges as per the PPA, the CIF cost in USD/MT shall be worked out.

(i) In case of coal received from sources other than Indonesia, CIF cost of coal shall be considered. Ocean freight shall not be admissible separately where the ocean freight is included in CFR/DAP. Where the ocean freight is not included in CFR/DAP, ocean freight charges on actual basis shall be considered to work out the CIF cost.

(j) Thereafter, CIF cost as worked out in sub-paras (h) and (i) above shall be converted into INR as per the applicable foreign exchange rate as per the provisions of Clause 1.2.3 of Schedule 7 of the PPA. Landed cost of coal (LPPF) shall be worked out by considering Port Handling Charges as per the PPA and applicable taxes and duties.

(j) In case of coal sourced from countries other than Indonesia, the CIF price of coal plus the mining profit per tonne (decided during the month in respect of Indonesian coal per tonne) shall not be more than the CIF price of Indonesian coal received during the said month.

(k) TPCL shall not be entitled for Other Charges as claimed in the petition.

(l) The operational parameters as worked out on monthly basis shall be lower of the actual or as specified in the Tariff Regulations, 2009 during the operation of the Section 11 Directions.

(m) ECR shall be worked out as a per the following formula: $ECR [Rs/kWh] = (Heat Rate [kCal/kWh] / (1 - Auxiliary Consumption [\%]) / GCV of coal consumed [kal/kg]) \times Coal cost [Rs/MT] / 1000$

(n) After adjusting the energy charges and other charges such as open access charges and transmission charges, TPCL shall share the profits earned through sale at the Power Exchanges in proportion to the un-requisitioned capacity of the procurers during the relevant month.

(o) The mining profit to be shared by TPCL shall be determined as per the formula given in para 120 of this order and adjusted against the ECR on monthly basis.”

Aggrieved thereby, the present Appeal Nos. 168 and 171 of 2023 have been filed, before this Tribunal, by PSPCL and HPPC respectively. Even before the CERC passed the final order in Petition No. 128/MP/2022 on 03.01.2023, the period, for which the Section 11 directions were issued, expired on 31.12.2022. After Appeal No, 168 of 2023 was filed by PSPCL before this Tribunal on 01.02.2023, the Central Government issued a fresh Section 11(1) order on 20.02.2023 to come into force on 15.03.2023.

II.CONTENTS OF THE EARLIER INTERIM ORDER DATED 18.04.2023:

An interim order was passed by this Tribunal, in IA No. 591 of 2023 in Appeal No. 168 of 2023 dated 18.04.2023, modification of which is sought in the present IA. The said interim order dated 18.04.2023 reads as under:-

“After extensive submissions were put forth on the nature of the interim order to be passed, Mr. M.G. Ramachandran, learned Senior Counsel, appearing on behalf of the Appellant, Mr. Sanjay Sen and Mr. Sajan Poovayya, learned Senior Counsel appearing on behalf of the 2nd Respondent would agree that an order similar to the one passed by the Supreme Court, in Civil Appeal Nos. 8175/2022 & 8136/2022 dated 14.11.2022, be passed in the present Appeal also.

After the aforesaid interim order was passed by the Supreme Court, the Central Electricity Regulatory Commission (CERC) has, by the

order under appeal, disposed of the main petition itself, directing that the Appellant herein pay the fixed charges to the 2nd Respondent in this Appeal.

Ends of justice would be met if, pending disposal of the main appeal, the Appellant is directed to pay 50% of the fixed charges for the period subsequent to the order of the Supreme Court till 31.12.2022, ie for the period during Section 11 order was in operation. We also record the submission of Mr. M.G. Ramachandran, learned Senior Counsel appearing on behalf of the Appellant, that the Appellant would not claim 50% of the profits, if any, made by the 2nd Respondent on the sale of power in the power exchange, since they did not procure power from them in terms of the Section 11 order.

It is made clear that the order now passed is only in the context of the earlier Section 11 Order which remained in force till 31. 12.2022, and shall have no bearing on the subsequent Section 11 order passed on 20.02.2023 which came into force on 15.03.2023. Subject to the aforesaid directions, the order of the CERC, now under appeal before us, shall remain stayed during the pendency of this Appeal. Payment shall be made within three weeks from today, and such payment shall also be subject to the result of the main Appeal. IA is disposed of accordingly.”

III.SUBMISSIONS URGED ON BEHALF OF THE APPLICANT-SECOND RESPONDENT:

Shri P. Chidambaram, learned Senior Counsel appearing on behalf of the applicant – 2nd Respondent, would submit that modification is sought, by way of these two I.As, to the earlier interim order passed by this Tribunal in IA No. 1722 of 2023 in Appeal No. 1724 of 2023 and in IA No. 1724 of 2023 in Appeal No. 168 of 2023 dated 18.04.2023, and this Tribunal is being requested to direct the Appellant to pay the balance 50%, due in terms of the impugned order passed by the CERC on 03.01.2023, in view of the developments which took place subsequent to the interim order passed by this Tribunal on 18.04.2023 ie (i) despite the CERC's

order dated 03.01.2023 declaring that capacity charges must be paid by the Appellants for the period covered by the 2022 Directions, since the applicant – 2nd Respondent’s Mundra plant was available, the applicant is yet to receive 50% of the amounts even after 17 months from the date of the said Order, and 13 months from when this Tribunal passed the interim order; while the applicant was hopeful that the captioned Appeals, filed by PSPCL and HPPC, would be adjudicated early, owing to various reasons, the said Appeals are still pending; (ii) despite determination in favour of the applicant, regarding payment of capacity charges, both the Appellants have been enjoying the use of 50% of the amounts payable ie for Rs. 76 crores and Rs.61 crores by PSPCL and HPPC respectively; the applicant has been suffering on account of deprivation of such amounts; PSPCL and HPPC do not even have a prima facie case in respect of payment of capacity charges, and the law laid down by CERC, in Paragraphs 84 to 87 of the impugned order, is unexceptionable; (iii) deprivation of Rs.76 Crores and Rs.61 Crores respectively has caused enormous financial hardship to the applicant–2nd Respondent, which has consistently generated and supplied power or offered to supply power to the procurers including PSPCL and HPPC; the applicant’s financial distress has been aggravated by the fact that, for the subsequent period from 16.04.2023 (when generation resumed pursuant to a fresh Section 11(1) direction by the Ministry of power dated 20.02.2023 (“Directions 2023”) till date, PSPCL is paying only the rate notified under Section 11(1), and the applicant-2nd Respondent has a claim for the difference between the actual cost and the Section 11(1) rate; Petition No. 179/MP/2023 filed by the applicant, under Section 11(2), is pending adjudication before the CERC for over 11 months; it was incorrectly submitted by the Counsel for PSPCL and HPPC, during the hearing before this Tribunal on 20.05.2022,

that interim relief, in respect of the 2023 Directions sought by the applicant in Petition No. 179/MP/2023, has been disallowed by the CERC; the Record of Proceedings dated 08.05.2024, issued by CERC, would show that it has reserved orders on the grant of interim relief sought by the applicant; the applicant is hopeful that the CERC will, following its earlier order, also pass an order under Section 11(2) of the Act giving the applicant a rate higher than the Section 11(1) rate applying the same principles adopted by the CERC in the Final Order dated 03.01.2023; in such a scenario, the difference between the applicant's entitlement, under Section 11(2) and the Section 11(1) rate, will run into hundreds of crores; (iv) additionally, in so far as HPPC is concerned, it has refused to take power from the applicant's Mundra Plant during the currency of the 2023 Directions, and has deprived the applicant of its legitimate dues towards capacity charge until 07.07.2023.

Shri P. Chidambaram, learned Senior Counsel, would further submit that the balance of convenience struck by this Tribunal, in its interim order dated 18.04.2023, has radically altered due to the passage of time; the new balance of convenience has tilted in favour of the applicant; significant time has elapsed since the interim order was passed by this Tribunal, and the applicant is suffering immense financial hardship on account of deprivation of amounts due to it under the terms of the CERC's Order dated 03.01.2023; such financial hardship, aggravated by the passage of time (13 months), should be taken into account by this Tribunal for revisiting its earlier interim order; the applicant has been facing liquidity and cash flow constraints; the liquidity gap, on account of deprivation of one half of the amounts due under the CERC's Final Order dated 03.01.2023, coupled with the pendency of Petition No. 179/MP/2023, has

to be met by additional borrowing or infusion of working capital by the applicant, of which the Mundra Plant, i.e., the generating unit, is a division.

Shri P. Chidambaram, Learned Senior Counsel, would also submit that no irreparable harm would be caused to PSPCL and HPPC should this Tribunal direct them to pay the withheld amount of Rs. 76 Crores and Rs. 61 Crores respectively; the applicant would secure the said amount with an unconditional bank guarantee; the interests of both parties would, therefore, be balanced and secured by directing payment of the remaining 50% amounts, i.e., Rs. 76 Crores by PSPCL and Rs. 61 Crores by HPPC, to the applicant against the unconditional bank guarantees.

IV.SUBMISSIONS URGED ON BEHALF OF THE RESPONDENT-APPELLANT:

On the other hand, Ms. Poorva Saigal, learned Counsel appearing on behalf of both PSPCL and HPPC (Appellants in Appeal No. 168 of 2023 and Appeal No. 171 of 2023 respectively), would submit that this Tribunal had, by its earlier interim order dated 18.04.2023, directed stay of the impugned order, passed by the CERC on 03.01.2023, during the pendency of the Appeals, subject to the following: (a) after extensive submissions on the nature of the Interim Order, it was agreed by the parties that an order similar to the one passed by the Supreme Court in Civil Appeal No. 8175 of 2022 dated 14.11.2022 be passed in the present case as well; (b) ends of justice would be met if, pending disposal of the main appeals, PSPCL and HPPC are directed to pay 50% of the fixed charges for the period subsequent to the Order of the Supreme Court till 31.12.2022; (c) PSPCL would not claim 50% of the profits (if any) made by the 2nd Respondent-Tata Power for sale of power in the Exchange; (d) and the Interim Order was only in the context of the Section 11 Order

which remained in force till 31.12.2022, and would have no bearing on the subsequent Section 11 Order which came into force on 15.03.2023.

Ms. Poorva Saigal, learned Counsel, would further submit that PSPCL has paid Rs.76.09 Crores and HPPC has paid Rs. 61.37 crores to the applicant; there is no subsequent development, and no ground has been made out for any modification/ variation of the interim order dated 18.04.2023; in terms of Order 39 Rule 4 CPC, an interim order passed, after hearing the parties, can be discharged/ set aside/ modified only if necessitated on account of a change in circumstances or if any undue hardship has been caused to the party—(i) even as on 18.04.2023 when the interim order was passed, the new Section 11 Order had come into force, and had been taken note of in the said order; and (ii) in any event, the hardship, if any, on account of the new Section 11 order is an independent cause of action and the subject matter of the pending Petition No. 179/MP/2023 before the CERC, and cannot be a ground for modification of the Interim Order passed in regard to the earlier Section 11 order; and as laid down by the Allahabad High Court, in **Sri Kishan v The Div Commr, Agra (2002 All LJ836)**, any modification, after hearing the parties, would also be contrary to public policy.

Ms. Poorva Saigal, learned Counsel, would also submit that, as regards cash flow issues, the same are purportedly on account of the subsequent Section 11 Directions, and cannot be extrapolated into the present Appeals; with effect from 01.04.2022, Coastal Gujarat Power Limited (CGPL) stands amalgamated with its parent company - Tata Power; as per the latest Quarterly Report issued on 08.05.2024, Tata Power has made a net profit of Rs. 2229.86 crore for the Financial year 2023-24; in the light of the law laid down by the Supreme Court, in **Gupta**

Steel Industries vs. Jolly Steel Industries Pvt. Ltd. (1996 11 SCC 678, para 6), a consent order can be modified only with the consent of the parties; PSPCL and HPPC have refused to accept the Bank Guarantees in lieu of the balance 50% fixed charges, and the Interim Order dated 18.04.2023 ought not to be modified; payment of the balance 50% fixed charges to Tata Power would, in the light of the judgment of the Supreme Court in **State of U.P vs. Ram Sukhi Devi (2005 9 SCC 733, para 8)**, tantamount to the final relief being granted to Tata Power in an appeal filed by PSPCL; even on equitable grounds, no relief can be granted to Tata Power considering the deliberate and wilful default on its part in complying with the provisions of the PPA dated 22.04.2007 with effect from September, 2021 (barring the Section 11 period); all these aspects have been considered by this Tribunal in its Order in IA No. 1726 of 2023 filed by Tata Power in Appeal No. 92 of 2023 filed by GUVNL (Order dated 05.04.2024); there is no material difference regarding payment of energy charges and/or fixed charges, as contended by the applicant; the issue for consideration is only whether a ground for modification, in terms of Order 39 Rule 4 CPC, has been made out by the applicant; the attempt made, to point out a difference between fixed charges and energy charges, has no bearing on the Interim Order already passed by this Tribunal; and, in any event, the order of the Supreme Court dated 14.11.2022 (as referred in the Interim Order of this Tribunal dated 18.04.2023) is only on the consideration of the fixed charges as, at that time, PSPCL had not agreed to take power under the first Section 11 Order.

V.ANALYSIS:

It is evident, from the afore-extracted portion of the interim order passed by this Tribunal on 18.04.2023, that the learned Senior Counsel appearing on behalf of PSPCL and HPPC, and both the Learned Senior Counsel appearing on behalf of the applicant-2nd Respondent, had agreed that an order similar to the one passed by the Supreme Court, in Civil Appeal Nos. 8175 of 2022 & 8136 of 2022 dated 14.11.2022, be passed in the present Appeals also. The interim order passed by this Tribunal on 18.04.2023 is, in fact, a consent order.

In the said interim order dated 18.04.2023, this Tribunal also noted that, after the interim order was passed by the Supreme Court on 14.11.2022, the CERC had disposed of the main petition itself directing the Appellants herein to pay fixed charges to the applicant-2nd Respondent, instead of directing deposit of 50% of the fixed charges as directed by the Supreme Court in its order in Civil Appeal Nos. 8175 of 2022 & 8136 of 2022 dated 14.11.2022. This Tribunal directed the Appellant to pay 50% of the fixed charges for the period subsequent to the order of the Supreme Court (ie 14.11.2022) till 31.12.2022 (i.e. for the period upto which the Section 11 order dated 05.05.2022 remained in operation). While recording the submission, urged on behalf of the Appellants herein, that they would not claim 50% of the profits, if any, made by the applicant-2nd Respondent on the sale of power in the power exchange, since they did not procure power from them in terms of the Section 11 Order, this Tribunal made it clear that the interim order passed by it was only in the context of the earlier Section 11 order which remained in force till 31.12.2022, and had no bearing on the subsequent Section 11 order passed on 20.02.2023 which came into force on 15.03.2023. Subject to the aforesaid directions, the order of the CERC was directed to

remain stayed during the pendency of the Appeals, and the IAs was disposed of accordingly.

Order 39 Rule 4 CPC provides that an order of injunction may be discharged, or varied, or set aside by the Court on an application made thereto by any party dissatisfied with such order. The second proviso to Order 39 Rule 4 CPC provides that, where an order of injunction has been passed after giving to a party an opportunity of being heard, the order shall not be discharged, varied or set aside on the application of that party except where such discharge, variation or setting aside has been necessitated by a change in the circumstances, or unless the Court is satisfied that the order has caused undue hardship to that party.

The present IAs were filed by the applicant–2nd Respondent on the grounds of change in circumstances, and that the earlier interim order dated 18.04.2023 has caused them undue hardship. Order 39 Rule 4 CPC enables a party, if dissatisfied with the earlier order, to file an application to have the said order discharged/varied or set aside. In the present case, the interim order passed by this Tribunal on 18.04.2023 is a consent order. Having consented for such an order to be passed, it defies reason that the applicant-second respondent should now express dissatisfaction to an order to which they had expressly consented to.

As has been noted, in the earlier interim order dated 18.04.2023 itself, the said interim order was to remain in operation till the main Appeal was heard and decided. Both the appellants and the applicant-second respondent were conscious that this interim arrangement was being made not until further orders, but till the main Appeals were heard and finally decided. As the said order dated 18.04.2023 was passed only because the parties on either side had expressly consented that an order similar to that passed by the Supreme Court be passed in the present Appeal also,

it is difficult for us to accept the submission, urged by Shri P.Chidambaram, Learned Senior Counsel, that the said order should now be varied.

A.CHANGE IN CIRCUMSTANCES:

Even otherwise, the change in circumstances referred to by Shri P. Chidambaram, learned Senior Counsel appearing on behalf of the applicant–2nd Respondent, are (1) Appeal Nos. 168 and 171 of 2023 are still pending on the file of this Tribunal for more than 13 months after the interim order was passed by this Tribunal on 18.04.2023, (2) Pendency of these Appeals has deprived the applicant-second respondent of the balance 50% amount payable in terms of the impugned order passed by the CERC, (3) Petition No. 179/MP/2023 filed by the applicant – 2nd Respondent, under Section 11(2), against the Section 11(1) order dated 20.02.2023, is pending before the CERC, and the Applicant-Second Respondent has been deprived thereby of its legitimate dues, towards capacity charges, until 07.07.2023.

In so far as their complaint regarding pendency of both Appeal Nos. 168 and 171 of 2023 before this Tribunal for the past more than 13 months is concerned, it is not as if the applicant–2nd Respondent is unaware that an Appeal can be preferred, before this Tribunal under Section 111 of the Electricity Act, both on facts and law, nor were they ignorant, when they consented to the interim order being passed by this Tribunal on 18.04.2023, of the fact that hearing of Appeals before this Tribunal take considerable time. It is also not as if the applicant–2nd Respondent was oblivious, when the interim order was passed earlier on 18.04.2023, that several Appeals of earlier years, including some preferred by the applicant–2nd Respondent and some appeals in which they are Respondents, are still pending adjudication before this Tribunal.

In so far as the applicant–2nd Respondent's pending claim under Section 11(2) of the Electricity Act before the CERC, with respect to Section 11(1) order passed on 20.02.2023, is concerned, this Tribunal was conscious, when it passed the interim order dated 18.04.2023, that such a Section 11(1) order had been passed. It is for this reason that this Tribunal made it clear that the interim order passed by it on 18.04.2023 related only to the Section 11(1) order passed on 05.05.2022 which remained in operation till 31.12.2022, and that it had no application to the subsequent Section 11(1) order passed by the Government of India on 20.02.2023 which came into operation from 15.03.2023. As the claims raised by the applicant – 2nd Respondent under Section 11(2) of the Electricity Act, with respect to the Section 11(1) order dated 20.02.2023, is still pending on the file of the CERC, any difficulty they may have with respect to the said Section 11(1) order can only be addressed by the CERC, and cannot be held or understood to be a change in circumstances warranting modification/ variation/ setting aside of the interim order passed by this Tribunal on 18.04.2023, which order was explicitly made applicable only to the Section 11(1) order passed on 05.05.2022 which remained in force only till 31.12.2022.

With respect to the submission, urged on behalf of the applicant-second respondent, that PSPCL and HPPC do not even have a prima facie case in respect of payment of capacity charges is concerned, Ms. Poorva Saigal, Learned Counsel for the appellants, would submit (in our opinion rightly) that the attempt made, to point out a difference between fixed charges and energy charges, has no bearing on the Interim Order already passed by this Tribunal on 18.04.2023 and, in any event, the order of the Supreme Court, in Civil Appeal No. 8175 of 2022 dated 14.11.2022 (as referred in the Interim Order of this Tribunal dated 18.04.2023), is only

on the consideration of fixed charges as, at that time, PSPCL had not agreed to take power under the first Section 11 Order.

B.UNDUE HARDSHIP:

With respect to the applicant-second respondent's claim of undue hardship, Shri P. Chidambaram, Learned Senior Counsel, would submit that, even though they do not have a prima facie case, both PSPCL and HPPC have been enjoying the use of 50% of the balance amount payable in terms of the impugned Order passed by the CERC, ie Rs.76 crores and 61 crores respectively, and deprivation of such amount has caused the applicant-second respondent enormous financial hardship; and their financial distress has been aggravated by the subsequent Section 11(1) order dated 20.02.2023.

In this context, it is relevant to note that, in its order in IA No. 1726 of 2023 in Appeal No. 92 of 2023 dated 06.04.2023, this Tribunal had noted the submission, urged on behalf of the Appellant therein, that the financial statements of the applicant-2nd Respondent, for the Financial year 2022-23, showed that they had made a net profit of Rs.3809.67 Crores for the said Financial Year, and a net profit of Rs.3234.51 Crores for the 9 month period ending 31.12.2023. This Tribunal, however, refrained from delving on this aspect, as it was satisfied, for other reasons, that the interim order passed in the said appeal did not necessitate modification.

Ms. Poorva Saigal, learned Counsel for the Respondents-Appellants herein, would state that, as per the latest quarterly report of the applicant – 2nd Respondent dated 08.05.2024, they had made a net profit of Rs.2229.86 crores for the Financial Year 2023-24. These facts, as

noted in the interim order passed by this Tribunal in IA No. 1726 of 2023 in Appeal No. 92 of 2023 dated 06.04.2023 and as now submitted by Ms. Poorva Saigal, learned Counsel for the Respondent-Appellant, if true, do not reflect the applicant–2nd Respondent suffering from the huge financial distress as claimed by them in the present I.A. It is relevant to note that the applicant–2nd Respondent has also not placed their audited Financial Accounts to establish their claim of financial distress.

In so far as the applicant – 2nd Respondent’s claim regarding their cash flow being affected because of non-receipt of the balance 50%, the same would also hold good for the Respondent- Appellant as their cash flow would also be affected if they are directed to pay the said amount pending adjudication of their contentions in the main appeal. More importantly, the applicant – 2nd Respondent would not have been unaware earlier of such cash flow issues, despite which they consented to the interim order being passed by this Tribunal on 18.04.2023.

VI.CONCLUSION:

Viewed from any angle, we are satisfied that no case for modification, of the interim order passed by this Tribunal on 18.04.2023, has been made out by the applicant – 2nd Respondent. Both the IAs fail and are, accordingly, dismissed.

Pronounced in the open court on this **28th day of May, 2024.**

Seema Gupta
Technical Member
mk/dk/skj

Justice Ramesh Ranganathan
Chairperson

COURT-1

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APL No. 168 OF 2023,
APL No. 171 OF 2023 &
APL No. 92 OF 2023

Dated: 28th May, 2024

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

In the matter of:

APL No. 168 OF 2023

Punjab State Power Corporation Limited Appellant(s)

Versus

Central Electricity Regulatory Commission & Respondent(s)
Ors.

Counsel on record for the Appellant(s) : Poorva Saigal
Shubham Arya
Pallavi Saigal
Ravi Nair
Reeha Singh
Shikha Sood
Anumeha Smiti for App. 1

Counsel on record for the Respondent(s) : for Res. 1

Hemant Sahai
Nitish Gupta
Molshree Bhatnagar
Shubhi Sharma
Nipun Sharma
Parichita Chowdhury
Rishabh Sehgal
Nimesh Jha
Deepak Thakur
Shubham Singh

Varnika Tyagi
Kamya Sharma
Divyansh Kasana
Adarsh Kumar Bhardwaj
Samprati Singh for Res. 2

Samir Malik
Nikita Choukse
Rahul Sinha
Akash Lamba
Eksha Kashyap for Res. 4

APL No. 171 OF 2023

Uttar Haryana Bijli Vitran Nigam Ltd. & Anr. Appellant(s)

Versus

Central Electricity Regulatory Commission & Ors. Respondent(s)

Counsel on record for the Appellant(s) : Poorva Saigal
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Pallavi Saigal
Ravi Nair
Shikha Sood
Reeha Singh
Anumeha Smiti for App. 1
Poorva Saigal
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Rishabh Sehgal
Nimesh Jha
Deepak Thakur
Shubham Singh
Varnika Tyagi

Kamya Sharma
Divyansh Kasana
Adarsh Kumar Bhardwaj
Samprati Singh for Res. 2

Samir Malik
Nikita Choukse
Rahul Sinha
Akash Lamba
Ekssha Kashyap for Res. 4

APL No. 92 OF 2023

Gujarat Urja Vikas Nigam Limited Appellant(s)

Versus

Central Electricity Regulatory Commission & Respondent(s)
Ors.

Counsel on record for the Appellant(s) : Anand K. Ganesan
Swapna Seshadri
Srishti Khindaria
Ashabari Basu Thakur for App. 1

Counsel on record for the Respondent(s) : for Res. 1

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Rishabh Sehgal
Nimesh Jha
Deepak Thakur
Shubham Singh
Varnika Tyagi
Kamya Sharma
Divyansh Kasana
Adarsh Kumar Bhardwaj for Res. 2

Samir Malik
Nikita Choukse
Rahul Sinha
Akash Lamba
Ekssha Kashyap for Res. 4

ORDER

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

Seema Gupta
Technical Member

Justice Ramesh Ranganathan
Chairperson