COURT-1

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

IA No. 241 OF 2024 IN APL No. 64 OF 2024 &
IA No. 240 OF 2024

Dated: 4th March, 2024

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

In the matter of:
Tamil Nadu Generation and Distribution
Corporation Ltd. (TANGEDCO)
Through authorized representative,
Mrs. T. Nirmala Mary
(Chief Engineer/Private Projects)
NPKRR Maaligai, No. 144, Anna Salai,
Chennai - 60 002.

Versus

1. PTC India Limited,
(through its chairman)
2nd Floor, NBCC Tower,
15, Bhikaji Cama Place,
New Delhi- 110066 … Respondent No.1

2. IL&FS Tamil Nadu Power Company Limited,
(through its chairman)
4th Floor, KPR Tower,
Old No. 21 , New No.2,
1st Street, Subba Rao Avenue,
College Road- 600 006, Chennai … Respondent No.2

Counsel on record for the Appellant(s) : Kumar Shashwat Singh Sawno
Swekcha
Tanmay Joshi
Rahul K Kanoujia for App. 1

Counsel on record for the Respondent(s) : Ravi Kishore
Niraj Singh
Prerna Singh
Keshav Singh for Res. 1

ORDER

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

From the facts giving rise to the present appeal, details of which shall be referred to hereinafter, it does appear, prima facie, that the appellant, in order to avoid payment of its admitted dues to the first Respondent of Rs. 458 Crores, has raised a claim for Rs.271 Crores on them under Clause 10.2.3 of the Pilot Power Supply Agreement (PPSA), besides an additional claim for damages of Rs. 428 Crores after terminating the said PPSA on 29.03.2022 (just three days before the PPSA was to expire on 31.03.2022). Before considering the rival submissions on its merits, it is useful to note the relevant facts.

A Pilot Power Supply Agreement (PPSA) was entered into between the Appellant and the first Respondent on 27.10.2018. Pursuant thereto, electricity was supplied by the generators to the Appellant, through the first Respondent, from 01.04.2019 onwards. In terms of the PPSA, the Appellant was required to furnish an unconditional Letter of Credit to the first Respondent. Instead, they furnished a conditional Letter of Credit on 29.07.2019 which disabled the first respondent from putting it to use. Procurement of electricity by the Appellant, under the said PPSA, was approved by the Tamilnadu Electricity Regulatory Commission ("TNERC" for short) by its order dated 15.10.2019. The PPSA provided that the months of June, July and August each year would be non-obligation months during which neither were the generators required to supply electricity to the appellant nor was the Appellant required to procure electricity from them.

Though payment of the invoices, raised for a substantial part of the more than the two year period from April, 2019 to May, 2021, was outstanding, the Appellant chose only to pay Rs.259.71 Crores on 30.09.2021 towards the invoices raised for the period from April, 2019 to January, 2021. As payment, for the supplies effected by them for the months of February, March, April, May and September, 2021 of around Rs. 458 Crores still remained outstanding, the first Respondent informed the appellant on 03.10.2021 that, henceforth, there would be zero scheduling of power for two reasons, firstly because the Appellant had not furnished an unconditional Letter of Credit in terms of the PPSA, and secondly the Appellant had chosen not to settle the outstanding dues.

The Appellant, in turn, sought compensation, in terms of Clause 10.2.3 of the PPSA, by raising periodic bills for approximately Rs. 271 Crores. Later, on the ground that the first Respondent had stopped supply of electricity to them, the Appellant formally conveyed its intention to terminate the PPSA vide letter dated 07.03.2022. The first Respondent furnished its reply thereto vide letter dated 19.03.2022. However, just three days before its expiry on 31.03.2022, the Appellant terminated the PPSA, in terms of Article 17.1.2 thereof, on 29.03.2022 and claimed further damages of approximately Rs.428 Crores.

On the first Respondent invoking its jurisdiction, the CERC, by its order in Petition No. 234/MP/2022 dated 05.01.2024, directed the Appellant herein to make payment of the invoices, raised by the first Respondent for the months of February 2021 to May, 2021 and September, 2021, along with Late Payment Surcharge to be calculated in terms of the PPSA, within two months. Aggrieved thereby the present appeal.

I.RIVAL SUBMISSIONS:

Mr. Shaswat Singh, Learned Counsel for the Appellant, would rely on the Supreme Court, in **Haryana Power Purchase Center Vs. Sasan Power Ltd. (2024) I SCC 247**, and the interim order of this Tribunal **in IA No. 732 of 2023** in **Appeal No. 369 of 2023** dated **13.07.2023,** to contend that, since the parties are bound by the terms and conditions of the PPSA, it is only the relevant clauses of the PPSA which can be looked into to determine (1) whether or not the first Respondent was justified in stopping supply of electricity from 03.10.2021 onwards, and (2) whether the Appellant was justified in claiming compensation in terms of Clause 10.2.3 of the PPSA, besides claiming damages consequent upon termination of the PPSA on 29.03.2022; and, since the tests stipulated by this Tribunal regarding a prima facie case has been fulfilled, the impugned order should be stayed pending disposal of the main appeal.

Learned Counsel would further submit that the CERC has exceeded its jurisdiction, and has travelled beyond the terms and conditions of the PPSA, in directing the Appellant to pay the first Respondent the amounts due towards the invoices raised for supply of electricity, from February to May, 2021 and September, 2021, without considering the appellant's claim for compensation in terms of Clause 10.2.3 of the PPSA, and for damages consequent on its termination on 29.03.2022; by the order, impugned in this Appeal, the CERC has sought to re-write the agreement voluntarily executed by the parties (ie the PPSA entered into between the Appellant and the first respondent); in order to grant interim relief, this Tribunal is only required to consider whether a prima facie case has been made out; and, in order to satisfy this test, it would suffice for the Appellant to show that a plausible case, which would require detailed examination at the stage of hearing of the main Appeal, has been made out by them.

While fairly stating that no details have been furnished in the appeal to show that the balance of convenience lies in their favour, Sri Shaswath

Singh, Learned Counsel for the Appellant, would submit that, if interim relief as sought for by them is not granted, the appellant would have to pay a sum of Rs.458 Crores to the first Respondent, which would cause them extreme financial hardship resulting in irreparable injury.

On the other hand, Mr. Ravi Kishore, Learned Counsel for the first Respondent, would submit that the relevant Articles of the PPSA must be read together, and Article10.2.3 thereof cannot be read in isolation; in the reply submitted by them on 19.03.2022, to the notice issued by the Appellant on 07.03.2022, the first Respondent had pointed out that the Appellant had not furnished an unconditional LC as required under the PPSA, and IL&FS (the generators) had informed them, by their letter dated 01.10.2021, that non-scheduling of power from 03.10.2021 was because of the long outstanding dues; the Appellant chose not to comply with their contractual obligations to make payment of the amounts admittedly due to the first Respondent; instead, they resorted to illegally terminating the agreement on 29.03.2022, just three days before its expiry on 31.03.2022, only to raise a bogus claim for damages, and thereby avoid making payment of the amounts admittedly due; Article 10.2.3 of the PPSA should be read in conjunction with the other Articles of the agreement including Article 12.3.1 thereof; when so read, it is evident that, in cases where there is non-scheduling of electricity because of non-payment of the invoices raised, Article 10.2.3 has no application; the appellant has failed to make out a prima-facie case; they have not even contended that the balance of convenience lies in their favour; and payment of Rs.458 Crores, admittedly due towards the invoices raised on them by the 1st Respondent for the period February to May, 2021 and September,2021, cannot be said to cause the appellant irreparable injury, more so as the appellant must have received payment of the aforesaid

amounts from their consumers to whom the electricity, received by them from the generators, would have been supplied.

II.TESTS TO BE FULFILLED FOR BEING GRANTED INTERIM RELIEF:

In determining whether or not an interim order should be passed in the Appellant's favour, it must be borne in mind that 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 lies 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 the 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; Tata Power Co. Ltd. v. Maharashtra ERC, 2023 SCC OnLine APTEL 23).**

III.HAS A PRIMA-FACIE CASE BEEN MADE OUT?

In its order in IA No. 732 of 2023 in Appeal No. 369 of 2023 dated 13.07.2023, on which reliance is placed on behalf of the Appellant, this Tribunal observed that 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 has 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; a prima facie case means that the assertions on these aspects are bona fide (**Nirmala J. Jhala v. State of Gujarat and Another: (2013) 4 SCC 301; Vidya Drolia vs Durga Trading Corporation - (2021) 2 SCC 1)**; the burden is on the plaintiff by evidence aliunde, by affidavit or otherwise, to show that there is “a prima facie case” in his favour which needs adjudication; a prima facie case is a substantial question, raised bona fide, which needs investigation and a decision on merits. (**Dalpat Kumar v/s Prahlad Singh: AIR 1993 SC 276; Mahadeo Savlaram Shelke and Ors. Vs. Puna Municipal Corporation and Ors.: MANU/SC/0673/1995)**; for the purpose of determining whether or not a prima facie case has been made out, this Tribunal would not substitute its own judgement for that of the appellant or weigh the material placed by them on record to arrive at a definite conclusion whether or not the averments made in the interlocutory application are true; the interlocutory remedy is intended to preserve in status quo, the rights of parties which may appear on a prima facie case (**Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd., (1999) 7 SCC 1);** a finding on “prima facie case” would be a finding of fact (**M. Gurudas v. Rasaranjan, (2006) 8 SCC 367)**; and the probability of the plaintiff's success must be comparatively higher (**Gujarat Electricity Board v. Maheshkumar & Co., 1982 SCC OnLine Guj 29).**

In **Haryana Power Purchase Centre v. Sasan Power Ltd., (2024) 1 SCC 247,** the petition filed before the CERC was under Section 79 of the Electricity Act read with the statutory framework governing procurement of power through competitive bidding, and Articles 13 and

17 of the PPA between the parties for compensation due to change in law "during the construction period".

It is in this context that the Supreme Court observed that, in cases where the rates are approved under Section 63 and a PPA is entered into, the questions would arise are whether there was a plenary and omnibus power under Section 79 to disregard the express words of the contract to discover a new change in law which the parties did not contemplate, and whether the Tribunal can rewrite the contract and create a new bargain; making of a regulation is not a pre-condition for levying a regulatory fee under Section 79(1)(g); the Commission exercises adjudicatory functions, and is also empowered to give opinions; the power to frame regulations indicates that it also has legislative powers; the adjudicatory function of the Commission is subject to the express terms of the contract; and, in cases where the matter is governed by the express terms of the contract, it may not be open to the Commission, even donning the garb of a regulatory body, to go beyond the express terms of the contract.

Bearing in mind the afore-said tests to determine a prima facie case, and that the present dispute must be adjudicated strictly in terms of the PPSA ie the agreement executed between the appellant and the 1st Respondent, let us examine whether the appellant's claim to have made out a prima-facie case is justified.

A.COMPENSATION CLAIMED BY THE APPELLANT FOR RS. 271 CRORES IN TERMS OF CLAUSE 10.2.3 OF THE PPSA:

Article 10 of the PPSA, on which reliance has been placed on behalf of the appellant, relates to allocation of capacity and Article 10.2 relates to dispatch of unutilised Contracted Capacity. Article 10.2.3 reads thus:

"In case of deviation in declared Availability from the Aggregator side is more than 15% of the Contracted Capacity for which open access has been approved, then the Aggregator shall pay to Utility a compensation on monthly basis at the rate, which shall be the difference between the Tariff payable by the Utility and the daily Average (RTC) MCP Prices at the Power Exchange (IEX) for such date, for the quantum of shortfall in excess of permitted deviation of l5%. Further, the Aggregator shall also pay the applicable transmission charges to the extent not supplied to the Utility, for quantum of shortfall in excess of permitted deviation of 15% of the approved MTOA."

Article 10.2.3 of the PPSA is attracted where the deviation, in the capacity declared by the Aggregator, is more than 15% of the contracted capacity for which open access has been approved. In such an event, the Aggregator (1st Respondent) is required to pay the Utility (Appellant) compensation on a monthly basis at the rate stipulated in the said Article, besides the applicable transmission charges to the extent of non-supply for the quantum beyond the permitted deviation of 15%. The Appellant's contention is that, since there was non-scheduling of power by the 1st Respondent from 3.10.2021, they were entitled to claim compensation in terms of Article 10.2.3 of the PPSA.

While Sri Shaswath Singh, Learned Counsel for the appellant, would ask us to read Clause 10.2.3 of the PPSA in isolation, we are of the view that this clause should be read along with other clauses of the PPSA.

Article 11 of the PPSA relates to tariff, and Article 11.5 thereunder to billing and payment. Articles 11.5.3 and 11.5.4 of the PPSA read thus:

11.5.3: The Utility shall, within 30 (thirty) days of receipt of a Monthly invoice in accordance with Clause 11.5.1 (the "Payment Due Date"), make payment of the amount claimed directly, through electronic transfer, to the nominated bank account of the

Aggregator, save and except any amounts which it determines as not payable or disputed (the "Disputed Amounts").

11.5.4: All Damages and any other amounts due and payable by the Aggregator in accordance with the provisions of this Agreement may be deducted from the Tariff due and payable to the Aggregator and in the event the deductions hereunder exceed the Tariff in that month, the balance remaining shall be deducted from the Tariff due and payable to the Aggregator for the immediately following month."

Article 12 of the PPSA relates to payment security and Article 12.1 thereunder to the Letter of Credit. Article 12.3 relates to recovery from sale of contracted capacity. Articles 12.3.1 to 12.3.3, thereunder, read thus:-

"12.3.1: In the event the Aggregator is unable to recover its Tariff through the Letter of Credit, and if the Tariff or part thereof remains unpaid for a period of 1 (one) month from the Payment Due Date, then notwithstanding anything to the contrary contained in this Agreement, the Aggregator shall have the right to sell the whole or part of the Contracted Capacity to any Buyer for recovery of its payment dues from the Utility. For the avoidance of doubt, the Parties expressly agree that the Aggregator shall be entitled to appropriate the revenues from sale hereunder for recovering the Tariff due and payable to it for sale of such Contracted Capacity to the Utility and the surplus remaining, if any, shall be appropriated for recovery of its dues from the Utility.

12.3.2: The sale of Contracted Capacity pursuant to Clause 12.3.1 shall not extinguish any liability of the Utility or any claim that the Aggregator may have against the Utility, save and except to the extent of amounts recovered under the provisions of Clause 12.3.1.
12.3.3: Supply of electricity to the Utility in accordance with the provisions of this Agreement shall be restored no later than 7 (seven) days from the day on which the Utility pays, or is deemed to have paid, the arrears due to the Aggregator in accordance with the provisions of this Agreement, renews the Letter of Credit."

Article 11.5.3 of the PPSA required the Appellant, within 30 days of receipt of the monthly invoice from the 1st Respondent, to make payment,

of the amount claimed, directly to their bank account, save and except any amount in dispute. The Appellant does not dispute its liability to make payment of the monthly invoices raised by the 1st Respondent for the months of February to May and September 2021. It is also not in dispute that, despite the 1st Respondent having raised invoices for the afore-said months, the Appellant has not paid them the amounts due till date. Consequent upon non-payment, Article 12.3.1 of the PPSA would apply conferring on the 1st Respondent the right to sell the whole or part of the contracted capacity to any buyer for recovery of the payment due to them from the Appellant.

Exercise of their right, under Article 12.3.1 of the PPSA, by the 1st Respondent would have resulted in their violating the conditions stipulated in Article 10.2.3 thereof for, on their selling the entire contracted capacity in terms of Article 12.3.1 of the PPSA to any other buyer for recovery of its payment due from the Appellant, there would undoubtedly have been a deviation in the declared availability of more than 15% of the contracted capacity. Accepting the submission of Sri Shaswath Singh, Learned Counsel for the Appellant, would mean that, even though the Appellant has failed to make payment of the monthly invoices raised by them, the 1st Respondent would be disentitled from exercising its right in terms of Article 12.3.1 of the PPSA, for that would result in their acting contrary to Article 10.2.3 thereof. It goes without saying, that no Article of the PPSA should be read in isolation, and all the Articles thereof should be read together, with one clause throwing light on the other. Article 10.2.3 should therefore be read along with Article 12.3.1 of the PPSA. If so read, it is clear that Article 10.2.3 is inapplicable in cases falling within the ambit of Article 12.3.1 which confers on the Aggregator the right to sell the whole of the contracted capacity to any buyer for recovery of its payment due from the Utility. It is only after the Appellant pays the arrears, due to the

1st Respondent, does Article 12.3.2 of the PPSA obligate the 1st Respondent, within seven days thereafter, to restore supply of electricity to the Appellant.

Admittedly, in the present case, the Appellant has chosen not to make payment of the arrears, of around Rs.458 Crores, to the 1st Respondent till date. The Appellant cannot take advantage of its own failure, to make payment of the amounts due of Rs.458 crores, to claim damages for non-scheduling of electricity by the 1st Respondent which was only because of non-payment of the amounts admittedly due from the appellant to them. The appellant's claim for payment of compensation, in terms of Article 10.2.3 of the PPSA, shorn of all legalese, is that the 1st Respondent should continue to keep supplying electricity to them, for the entire duration of the PPSA, despite not being paid for such supplies. Such a far-fetched and convoluted construction of Article 10.2.3 of the PPSA does not merit acceptance.

B.CLAIM FOR DAMAGES OF AROUND RS. 428 CRORES CONSEQUENT ON TERMINATION OF THE PPSA BY THE APPELLANT:

Article 17 of the PPSA relates to termination and 17.1 thereunder to termination for aggregator default. Article 17.1.1 stipulates that:

> "*subject to Applicable Laws and save as otherwise provided in this Agreement, in the event that any of the defaults specified below shall have occurred, and the Aggregator fails to cure the default within the Cure Period set forth below, or where no Cure Period is specified, then within a Cure Period of 90 (ninety) days, the Aggregator shall be deemed to be in default of this Agreement (the "Aggregator Default"), unless the default has occurred as a result of any breach of this Agreement by the Utility or due to Force Majeure. The defaults referred to herein shall include the following:*
> "(a)….
> (b)….

(c)….
(d)….
(e)….

(f)….
(g)….
(h)….
(i) the Aggregator fails to achieve a monthly Availability of 70% (seventy per cent) for a period of 4 (four) consecutive months or for a cumulative period of 4 (four) months within any continuous period of 12 (twelve) months, save and except to the extent of Non-Availability caused by (i) a Force Majeure Event, (ii) an act or omission of the Utility, not occurring due to any default of the Aggregator or (iii) shortage of Fuel occurring for reasons not attributable to the Aggregator."

Article 17.1.2 of the PPSA reads thus:-

"17.1.2 Without prejudice to any other rights or remedies which the Utility may have under this Agreement, upon occurrence of a Aggregator Default, the Utility shall be entitled to terminate this Agreement by issuing a Termination Notice to the Aggregator; provided that before issuing the Termination Notice, the Utility shall by a notice inform the Aggregator of its intention to issue such Termination Notice and grant 15 (fifteen) days to the Aggregator to make a representation, and may after the expiry of such 15 (fifteen) days, whether or not it is in receipt of such representation, issue the Termination Notice.

In their letter dated 19.03.2022, submitted in reply to the notice issued by the Appellant on 07.03.2022, the 1st Respondent had stated as under:-

3. As per Article 12 of PPSA, TANGEDCO has to provide the Letter of Credit (LC) in the format as per the Schedule B not later than 30 days prior to the likely appointed date. Appointed date for this transaction was 01.04.2019. However, TANGEDCO had provided LC on 29.07.2019 which was not as per the PPSA.

4. PTC had taken up the matter regarding deficiencies and shortcomings in the L/C with TANGEDCO through various

communications and visits and had requested for amending the LC in line with provisions of PPSA. However, LC has not been amended by TANGEDCO as per PPSA.

5. First Monthly bill or power supplied during April 2019 was raised on 06.05.2021 the due date for payment was 04.06.2021. However, the payment from TANGEDCO against this transaction was received on 27.09.2021. Since from commencement of power, TANGEDCO delayed payments of monthly bills and continuously defaulted in making payments as per PPSA. PTC had been continuously following with TANGEDCO for payment.

6. PTC vide email dated 03.10.2021, forwarded the IL&FS letter dated 01.10.2021 informing non-scheduling of power citing the reasons of long outstanding payment from TANGEDCO. And it was mentioned by PTC that any liability arising out of non-scheduling of power to TANGEDCO will be on account of TANGEDCO only. However, no response was received from TANGEDCO."

Article 17 of the PPSA relates to termination of the PPSA for the Aggregator's (1st Respondent's) default. In terms of Article 17.1.1(i), in the event the 1st Respondent fails to achieve a monthly availability of 70% for a period of four consecutive months or for a cumulative period of four months within any continuous period of 12 months, the 1st Respondent shall be deemed to be in default, if it fails to cure the defaults within 90 days. Consequent thereto, the Appellant would be entitled, in terms of Article 17.1.2 of the PPSA, to terminate the agreement. Clause (i) of Article 17.1.1 would not apply in certain cases of non-availability. If non-availability of supply is caused either (i) on account of a force majeure event, or (ii) an act or omission of the Utility (Appellant), or (iii) shortage of fuel occurring for reasons not attributable to the aggregator (1st Respondent), then Clause (i) of Article 17.1.1 would not apply.

It is clear, from a bare reading of the letter dated 19.03.2022, that non-scheduling of power by the 1st Respondent was because of the

Appellant's default in not providing an unconditional Letter of Credit, and in not making payment of the invoice amounts on a monthly basis. The 1st Respondent was constrained to resort to non-scheduling of power from 03.10.2021 on account of the omission of the Appellant in making payment of the monthly bills from February to May 2021 and September 2021. Such failure on the part of the Appellant to make payment is not because of any default on the part of the 1st Respondent. On the other hand, non-scheduling of power from 03.10.2021 onwards, is as a consequence of the Appellant's failure to make payment of the amounts due in terms of the monthly invoices raised by the 1st Respondent.

Prima facie, termination of the PPSA by the Appellant on 29.03.2022, (that too just three days prior to expiry of the PPSA on 31.03.2022) is not in accordance with Articles 17.1.1 and 17.1.2 of the PPSA and the Appellant would, prima-facie, not be entitled for the damages claimed by them as a consequence of termination of the PPSA.

The submissions of Mr. Shashwat Singh, Learned Counsel for the Appellant, is that,nothing prevented the 1st Respondent from terminating the agreement for non-payment of dues; and, while it may have been open to the first Respondent to avail its remedy under Article 17.2.2 of the PPSA, their failure to do so, obligated them to continue supplying electricity, notwithstanding the Appellant's failure to make payment of the monthly bills. We find no merit in this submission.

Article 17.2 of the PPSA, which relates to termination for Utility default (Appellant), reads thus:

"17.2 Termination for Utility Default

17.2.1 In the event that any of the defaults specified below shall have occurred, and the Utility fails to cure such

default within a Cure Period of 120 (one hundred and twenty) days or such longer period as has been expressly provided in this Agreement, the Utility shall be deemed to be in default of this Agreement (the "Utility Default") unless the default has occurred as a result of any breach of this Agreement by the Aggregator or due to Force Majeure. The defaults referred to herein shall include the following:

(a) The Utility commits a material default in complying with any of the provisions of this Agreement and such default has a Material Adverse Effect on the Aggregator;

(b) the Utility has failed to make any payment to the Aggregator, and the Aggregator is unable to recover any unpaid amounts through the Letter of Credit, within the period specified in this Agreement; or

(c) the Utility repudiates this Agreement or otherwise takes any action that amounts to or manifests an irrevocable intention not to be bound by this Agreement.

17.2.2 Without prejudice to any other right or remedy which the Aggregator may have under this Agreement, upon occurrence of a Utility Default, the Aggregator shall be entitled to terminate this Agreement by issuing a Termination Notice to the Utility; provided that before issuing the Termination Notice, the Aggregator shall

by a notice inform the Utility of its intension to issue the Termination Notice and grant 15 (fifteen) days to this utility to make a representation, and may after the expiry of such 15 (fifteen) days, whether or not it is in receipt of such representation, issue the Termination Notice."

Article 17.2 of the PPSA relates to termination for utility's default, and under Article 17.2.1, on failure of the utility to cure the default within 120 days, the utility shall be deemed to be in default of the agreement. In terms of Clause 17.2.2, the aggregator would then be entitled, without prejudice to any other right or remedy which they may have, to terminate the Agreement by issuing a termination notice to the utility. It is clear from Article 17.2.2 of the PPSA that the right of the Aggregator (1st Respondent) to terminate the Agreement, upon occurrence of a default by the Utility (the Appellant), is without prejudice to any other right or remedy which the 1st Respondent may have under the Agreement. As noted hereinabove among the rights which the 1st Respondent had, in terms of Article 12.3.1 of the PPSA, was to sell electricity to others for non-payment of their monthly invoices by the Appellant. The mere fact that the 1st Respondent did not exercise its right under Article 12.3.1 of the PPSA does not mean that they were obligated to keep supplying electricity to the Appellant, though the latter continued to act contrary to Article 11.5.3 of the PPSA which obligated them, within 30 days of receipt of the monthly invoice from the 1st Respondent, to make payment, of the amount claimed, directly to their bank account.

In any event, having chosen not to make payment of around Rs.458 Crores for the electricity supplied to them for the months of February to May and September 2021, the Appellant cannot be heard to contend that,

notwithstanding their failure to make payment, the 1st Respondent was nonetheless obligated to continue supplying electricity to them, for the entire duration of the PPSA, without expecting any payment for such supplies.

While it is true that a prima facie case can be said to have been established if the evidence led in support of the case were to be believed, we are satisfied that the appellant has not made out a prima facie case for grant of stay of payment of the amount which the Commission has directed to be paid, ie of around Rs.458 Crores along with Late payment Surcharge, as the said amounts are admittedly due and payable by the Appellant to the 1st Respondent for the electricity supplied to them in the months of February to May and September 2021.

IV.BESIDES A PRIMA FACIE CASE, ONE OF THE OTHER TWO TESTS MUST ALSO BE SATISFIED:

With the first condition, of a prima facie case being made out as the sine quo non, at least two of the three conditions should be satisfied by the Appellant conjunctively, (ie either the balance of convenience should be held to be in their favour or they must be held to suffer irreparable injury if interim relief is not granted), and a mere proof of fulfilment of one of the three conditions, of a prima-facie case being made out, would not entitle them to the grant of interlocutory relief.

V.BALANCE OF CONVENIENCE: IN WHOSE FAVOUR DOES IT LIE?

Besides making out a prima-facie case, the “balance of convenience” must also 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 which 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 interlocutory remedy is intended to protect the Appellant, being the initiator of the action, against incursion of its rights. 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).** Interlocutory relief is granted to mitigate the risk of injustice to the Appellant during the period before the uncertainty is resolved. (***Colgate***

***Palmolive (India) Ltd.* v. *Hindustan Lever Ltd.*, (1999) 7 SCC 1; *Gujarat Bottling Co. Ltd.* v. *Coca Cola Co*, (1995) 5 SCC 545; *Wander Ltd.* v. *Antox India (P) Ltd*, 1990 Supp SCC 727).**

As the Appellant's claim for compensation under Article 10.2.3, and for damages consequent upon termination of the Agreement in terms of Clause 17.1.1 and 17.1.2 of the PPSA, does not appear, prima facie, to be valid, it is clear that the balance of convenience, with respect to payment of Rs.458 crores as directed by the TNERC, (representing the amounts admittedly due and payable to them by the Appellant), also lies in favour of the 1st Respondent, and not the Appellant herein. In any event, the Appellant has not even stated as to how balance of convenience would lie in their favour and against the 1st Respondent.

VI.TEST OF IRREPARABLE INJURY: IS IT SATISFIED?

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 conclusively established. (***Dalpat Kumar* v. *Prahlad Singh*, (1992) 1 SCC 719). T**he Court/Tribunal should 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. 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).**

The Appellant's claim to suffer irreparable injury is that payment of this sum of Rs.458 Crores would cause them financial hardship. It does not stand to reason that the payment due for supply of electricity, which the Appellant had received and had in turn sold to its consumers from whom payment must also have been received by them, would cause them irreparable injury.

VII.CONCLUSION:

We are satisfied, therefore, that none of the three tests, to be fulfilled for grant of interim relief, are satisfied in the present case. The I.A. seeking interim relief fails and is accordingly dismissed. Suffice it to make clear that the payment made by the Appellant to the 1st Respondent, in compliance with the impugned order, shall be subject to the result of the main appeal. The IA stands disposed of accordingly.

Six weeks' time is granted for the respondents to file their reply in the main appeal, and four weeks' time is granted thereafter for the Appellant to file its rejoinder. After pleadings are complete, registry to verify and then include the appeal in the List of Finals, to be taken up from there in its turn.

Pronounced in the open court on this ***4th day of March, 2024.***

Seema Gupta Technical Member	Justice Ramesh Ranganathan Chairperson

mk/ts