IN THE APPELLATE TRIBUNAL FOR ELECTRICITY

(Appellate Jurisdiction)

IA Nos. 2232 of 2022 & 82 of 2024 in
APPEAL NO.69 OF 2023

Dated: 19th April, 2024

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

In the matter of:

1. HARYANA POWER PURCHASE CENTRE
Through its Chief Engineer
2nd Floor, Shakti Bhawan, Sector 4,
Panchkula – 134109 (Haryana) ... Appellant No.1

2. UTTAR HARYANA BIJLI VITRAN NIGAM LTD
Through its Chief Engineer
VidyutSadan, Plot No. C-16,
Sector 6, Panchkula,
Haryana- 134109 ... Appellant No.2

3. DAKSHIN HARYANA BIJLI VITRAN NIGAM LTD.
Through its Chief Engineer,
Vidyut Nagar, Vidyut Sadan,
Hissar, Haryana - 125005 … Appellant No.3

VERSUS

1. PTC INDIA LIMITED
Through its Managing Director,
2nd Floor, NBCC Tower, 15,
Bikaji Cama Place,
New Delhi – 110066 ... Respondent No.1

2. M/S TEESTA URJA LIMITED
Through its General Manager
2nd Floor, Vijaya Building,
17, Barakhamba Road,
New Delhi – 110001 ... Respondent No.2

3. POWER GRID CORPORATION OF INDIA LTD
Through its Chief General Manager (Commercial & RC),
"Saudamini", Plot No.2, Sector – 29,
Gurgaon – 122001 ... Respondent No.3

4. CENTRAL ELECTRICITY REGULATORY COMMISSION
Through its Secretary,
3rd and 4th Floor, Chandralok Building,
36, Janpath, New Delhi – 110001 ... Respondent No.4

Counsel on record for the Appellant(s)	:	Samir Malik Nikita Choukse Akash Lamba Shaida Das Ravi Nair Reeha Singh for App. 1 Samir Malik Nikita Choukse Akash Lamba Shaida Das Ravi Nair Reeha Singh for App. 2 Samir Malik Nikita Choukse Akash Lamba Shaida Das Ravi Nair Reeha Singh for App. 3
Counsel on record for the Respondent(s)	:	Ravi Kishore Niraj Singh

Prerna Singh
Keshav Singh for Res. 1
Vidhan Vyas for Res. 2

ORDER

PER HON'BLE SMT. SEEMA GUPTA, TECHNICAL MEMBER

IA NOs. 2232 of 2022 & 82 of 2024
(for interim relief)

1. The Applicant/Appellant has filed the Interlocutory Applications (in short IAs) IA Nos. 2232 of 2022 & IA No 82 of 2024 in Appeal No 69 of 2023.These applications seek interim stay of the order dated 22.11.2022 (referred to as the "impugned order") issued by the Central Electricity Regulatory Commission (hereafter referred to as "Respondent No. 4/CERC") in Petition No. 110/MP/2019. , whereby the Central Commission has held termination of PPA by Appellant No 1 (HPPC) illegal and HPPC is obligated to schedule 200 MW of contracted power from Teesta Project including payment of tariff to Respondent No 1 (PTC).

2. The Appellant No. 1- Haryana Power Purchase Centre (**'HPPC'**), is a nodal agency, which was formed by the Government of Haryana to co-ordinate the purchase of power on behalf of the State Distribution Licensees i.e., Appellant No. 2 - Uttar Haryana Bijli Vitaran Nigam Limited and Appellant No. 3- Dakshin Haryana Bijli Vitaran Nigam Limited ('**Haryana Utilities**'). The Respondent No. 1- PTC India Limited ("PTC") is an Inter-State Licensee under Section 14 of the Electricity Act, 2003. The Respondent No. 2 ("Teesta Urja

Limited", is a Generating Company within the meaning of Section 2(28) of the Electricity Act and Respondent No 3 and Respondent No 4 are Power Grid Corporation of India Ltd (" POWERGRID") and Central Electricity Regulatory Commission ("CERC") respectively

3. On 28.07.2006, Respondent No 2 entered into a Power Purchase Agreement ("PPA") with Respondent No1, PTC for sale of entire power from the Teesta Generating Station (1200 MW) for a period of 35 years from its Commercial Operation Date (**'COD'**). Subsequently, on 21.09.2006, PTC entered into a Power Sale Agreement ("PSA") with Haryana Utilities for sale and purchase of 200 MW of power from Teesta Generating Station for a period of 35 years from the COD of the Project. On 18.06.2007, the Haryana Electricity Regulatory Commission ("**HERC"**) granted approval to the PSA entered between PTC and Haryana utilities subject to some conditions. The required COD of the Teesta Project was stipulated to be 60 months from the expiry of 12 months from the PPA dated 28.07.2006 i.e., by 27.07.2012. The bulk Power Transmission Agreements dated 27.04.2010 and 04.06.2010 were entered into between Respondent No.3 ("POWERGRID"), Respondent No 1 ("PTC"), HPPC and the Distribution licensees in the state of Punjab, Uttar Pradesh and Rajasthan for a period of 25 years.

4. As against the RCOD of Teesta Generation Station in 2012, the COD of three units was achieved on 23.02.2017 and balance three units by 28.02.2017, with a delay of 64 months. CERC vide its order dated 23.05.2017 determined interim tariff of the project covering the period from 23.02.2017 to 31.03.2019. This interim tariff

was determined pending the finalization of tariff arrangements in response to the petition filed by Respondent No. 2.

5. Considering substantial increase in the project cost and also considering the delay in the implementation of the project, on 27.07.2017, the Appellant-HPPC approached Haryana State Commission vide Petition No. HERC/PRO/59 with regard to procurement of power in terms of PSA entered into between HPPC and PTC. The Haryana commission broadly held that Tariff as approved by the CERC will be applicable for purchase and sale of the purchaser contracted power and purchaser contracted energy and petition was held to be non maintainable and was dismissed vide State commission order dated 28.08.2017.

6. Considering substantially long delay in commissioning of the Teesta Generating station as compared to that agreed under PSA and due to substantial cost over-run, the Appellant HPPC issued a termination letter dated 27.03.2018 to PTC in respect of PSA dated 21.09.2006.

7. Respondent No 3 i.e. POWERGRID vide their letter dated 21.02.2019 to PTC informed that Long term Open Access granted from Teesta Generating Station for transfer of 200 MW of power to HPPC was to be made operational from 23.02.2019.

8. On 27.03.2019, Respondent No1 PTC and Respondent No 2 Teesta Urja Ltd jointly filed a Petition No. 110/MP/2019 before CERC for adjudication of disputes arising out of and in relation to the

power purchase of 200 MW of power by HPPC from Teesta-III Generating station of Teesta through PTC, seeking to set aside the termination notice dated 27.03.2018 issued by HPPC and directing HPPC and Haryana Discoms to commence procurement of their contracted capacity from Teesta III generation Project at the provisional Tariff so determined by CERC vide its order dated 23.05.2017.

9. In the meantime, CERC determined final tariff of the project in Petition no 249/GT/2016 vide its order dated 09.01.2020 inter-alia condoning the delay of 64 months in commissioning of the project. Same is under appeal by Haryana Utilities before this Tribunal.

10. The Respondent No 4, CERC by its order dated 22.11.2022 (**impugned Order**) in Petition No. 110/MP/2019, held that termination of PSA dated 21.09.2006 by HPPC vide letter dated 27.03.2018 is illegal and PTC and Teesta Urja Ltd are entitled to the payment of tariff as determined by CERC since COD of the project and arrear amount payable (after adjusting any revenue earned from sale of power under short term/ through exchange) by Haryana Utilities within two months of the order. Further PTC is liable for payment of transmission charges/relinquishment charges having relinquished the subject LTA, however same is reimbursable by Haryana Utilities.

11. Being aggrieved, Haryana Utilities have filed the Appeal No.69 of 2023 and IA 2232 of 2022 praying to set aside/ interim stay of the Order dated 22.11.2022 passed by the CERC in Petition No.

110/MP/2019. However, in view of the various meetings between Appellants and Respondent No 1 & 2 for amicable settlement of issue, both parties chose not to pursue the underlying Appeal and referred IA and accordingly, sought adjournment from this Hon'ble Tribunal. In the meanwhile, Respondent No 2, Teesta Urja Limited has filed an execution petition before the CERC on 29.08.2023, however parties again affirmed that talks are being undertaken between the parties for settlement. CERC directed the parties to apprise CERC about the outcome of these negotiations by 30.11.2023, however, no affidavit said to have been filed by either party in this regard.

12. The learned counsel for the Appellants submitted that, despite both the parties admittedly seeking to find an amicable solution to the said dispute, PTC on 22.12.2023, uploaded the disputed invoices on the PRAAPTI Portal as per following details:

Ch. No.	**Description**	**Period**	**Bill Amount (Rs.)**	**Due**
1	Bill of supply as per CERC Order dt. 22.11.2022 **UID No:- 12148** **Date of Invoice:- 22-12-2023**	**01.03.2017 to 30.11.2022**	15,99,15,00,158/-	17.02.2024
2	Bill of supply as per CERC Order dt. 22.11.2022 (Credit Note) **UID No:- 12149** **Date of Invoice:- 22-12-2023**	**01.12.2022 to 31.10.2023**	(64,29,57,702/-)	17.02.2024

13. Learned counsel for the Appellants submitted that the PSA can be terminated before the stipulated term in line with Article 3.3 as well as Article 14 of the PSA. Article 3.3 of the PSA can be triggered on non- fulfilment of the conditions precedent as stipulated in Article 3.1.1. The approval contemplated in respect of the PSA from HERC is essential for the effectiveness of Appellants obligation under the said PSA. As the amendments to the PSA, which was directed by Ld. HERC, were admittedly not carried out, the right to terminate arose 12 months subsequent to the execution of the PSA. Accordingly, the termination letter was issued on 27.03.2018 with termination becoming effective 12 months thereafter i.e. on 27.03.2019. In this regard, it was stressed that the said conditions precedent (particularly the one mentioned in Article 3.1.1(iii)) has not been fulfilled. The approval of PSA by HERC was conditional upon certain modifications to Article 6.1, 9.1.4, removal of escrow clause, alignment of rates of auxiliary consumption and transformation losses in terms of CERC regulations, deemed generation payment not to apply if power is sold to other beneficiaries/ third parties and cost identified other than tariff to be incorporated in Article 9.1.1 (ii). Therefore, in terms of Article 3.3, since the letter of termination was issued on 27.03.2018, the said termination, without prejudice to Article 14.3, became effective 12 months thereafter i.e., 27.03.2019.

14. The learned counsel for the Appellants submitted that the termination of the Power Supply Agreement (PSA) between PTC & HPPC, was also justified due to significant and prolonged delays in the commissioning of the Power Project by Teesta Urja Ltd, spanning approximately 64 months. This delay resulted in the unavailability of

power within the stipulated timeframe, accompanied by cost overruns, rendering the procurement of power unfeasible and not in the best interests of the consumers of the State of Haryana.

15. The learned counsel for the Appellants contended that the Impugned Order cannot be implemented due to force majeure events such as damage caused to the project by a flash flood in Sikkim on 03.10.2023. It was also submitted that according to Article 6.7.1.1, any increase in capital cost or interest during construction can only be granted except for force majeure events in terms of Article 10.1.2 (i) or geological surprises. The extension of time due to geological surprises cannot exceed a certain date. Extensions beyond that date must align with the terms of the PPA. Learned counsel also submitted that the CERC decision has been challenged in Appeal No. 58 of 2023 regarding the extension of time and capital cost increase.

16. Learned counsel further submitted that the Central Commission made errors in its order by not considering all conditions imposed by the Ld HERC while approving the Power Sale Agreement (PSA). Specifically, the CERC selectively focused on one condition regarding the determination of provisional tariff, neglecting another condition which states that a deemed generation payment would not apply if power is sold to third parties without spilling water. The respondent has indeed supplied electricity to third parties, thus they are not entitled to compensation for energy charges. The deemed generation is , outlined in Article 7.7 of the PSA, which pertains to the difference between dispatched power and declared capacity, subject

to provisions of the PSA(Article 7.3.4 r/w schedule-E Article 14). The Appellant's obligation to PTC is limited to Rs. 375 Crores in case PTC terminates the PSA due to Appellant's default, including failure to pay monthly bills as stated in Article 14.2(1). A similar provision exists in Article 14.8.2 of the PSA, where the amount is fixed at Rs. 356.5 Crores. So it is implied that their liability could also be in the range of above amounts.

17. Appellants contended that though have disputed the invoices on PRAAPTI portal, however, in terms of the LPS Rules and the modalities framed thereunder, PTC can re-submit the said invoices on the Portal and in the event of non payment by trigger date the short-term power to be purchased by HPPC through exchange will be regulated. Learned counsel of Appellant also raised jurisdiction issue with respect to effectiveness of liabilities of the Appellants to PTC including termination of PSA if such approval is not given by HERC or certain conditions imposed by HERC are not fulfilled then jurisdiction will solely vest with HERC.

18. Thus, there exists a strong prima facie case on merits, and granting interim relief at this stage in the interest of justice is essential and payment of the amount claimed by the Respondents would lead to a substantial tariff shock to consumers and also will have adverse effect on the mutually acceptable settlement. Therefore present IA 82 of 2024 in appeal 69 of 2023 has been preferred *inter alia* seeking a stay on the Impugned Order and/or any coercive measure taken or to be taken by the Respondents against HPPC (including the disputed invoices uploaded on the PRAAPTI Portal).The learned counsel has

cited numerous precedents/judgments of both this Tribunal and the Supreme Court to support their arguments.

19. Per contra, learned counsel for the Respondent No.2 " Teesta Urja Ltd, submitted that the CERC by taking into account the aspects that no force majeure conditions were prevailing as on 27.03.2018, the date on which termination notice was issued, and that the project had already commenced its operation from 28.02.2017 onwards, had correctly held that the termination letter dated 27.03.2018 issued by the Haryana Utilities terminating the PSA dated 21.09.2006 placing reliance on Clause 14.3 of the PSA as invalid, illegal and not sustainable.

20. Learned counsel for the Respondent No.2 submitted that the CERC by considering the principles laid down in Sections 73 and 74 of the Indian Contract Act 1872 had awarded damages being the amount of tariff, which the Respondent No.2 should have received if the Appellant had taken the supply of power as against the amount received from the sale of power in the open market. Further, the CERC had also rightly awarded the interest on the said amount basing on Regulation 8(13) of the 2014 Tariff Regulations and Regulation 10(7) of the 2019 Tariff Regulations. It is further submitted that the amount awarded by the Central Commission would only offset the loss suffered by the 2nd Respondent and would not cause any prejudice to the Appellants.

21. Learned Counsel submits that on account of non-offtake of power by the Appellants in breach of the PSA, and further on account of extensive damage suffered to the Project due to floods in October 2023, Respondent No.2 is in dire need of funds to restore the project and to recommence the supply, since their project is one of the key project of the State and of hydro sector in India at large, and the public interest would be severely affected in the event the claimed amount is not paid.

22. Learned counsel further submits that the Appellants have raised several other contentions which were not mentioned either in the termination letter dated 27.03.2018 or in the reply filed by the them before the Central Commission and were also not urged before the CERC. Therefore, such contentions cannot be taken into account by this Tribunal for considering the prayer for grant of interim relief.

23. In view of the above, the Appellants have neither made a prima facie case in its favour nor demonstrated irreparable harm or balance of convenience in its favour, therefore, the application for stay of the impugned order may be rejected and that the Appellants may be directed to make payment forthwith, which was due in terms of the impugned order dated 22.11.2022 and which has not been paid yet due to the settlement talks, which as such has not yielded any payment.

24. Learned counsel further submitted that Respondent no 2 is willing to give a Bank Guarantee if so directed for the amount claimed

for the purpose to allay any apprehension of the Appellant in the event they were to succeed in appeal, however same may be subject to the condition that in the event appeal fails, the Appellant will be liable to make payment for the cost for furnishing the Bank Guarantee.

Discussion and Analysis

25. We have gone through the submissions made by learned counsel appearing both on behalf of the Appellants and the Respondents. Appellants terming their termination of the PPA justified, have prayed for Interim stay of the impugned order and stay on coercive action by Respondents. In determining whether or not an interim order should be granted in the Appellant's favour, it is imperative to underscore that the decision to grant or refusal of interlocutory relief is governed by three firmly established principles, namely viz.,(1) whether the Appellant has made out a *prima facie* case, (2) whether the balance of convenience is in their favour i.e., whether it would cause greater inconvenience to them if interim relief is not granted, than the inconvenience which the opposite party would be put to if it is granted, and (3) whether the Appellant would suffer irreparable injury. With the first condition as a *sine quo non*, at least two conditions should be satisfied by the Appellant conjunctively, and a mere proof of fulfillment 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 SC1741; Tata Power Co. Ltd. v. Maharashtra ERC, 2023 SCC Online
APTEL 23).

26. Learned counsel appearing on behalf of the Appellants have mainly urged that HERC has not granted approval to the PSA between Appellant and Respondent, as its approval dated 18.06.2007 was subject to certain modifications in the PSA, which did not take place, so it would amount to non-fulfillment of Condition Precedent as per Article 3.1.1 (iii) of PSA. Thus the PSA cannot be specifically enforced against the purchaser (which is the Appellant in this case) as the said PSA is non-est and unenforceable. On enquiry from the counsel for the Appellant, they fairly submitted that this ground is being raised for the first time now i.e. during the hearing of the subject IAs, and were not raised during the proceedings before the CERC or in the referred appeal. The termination letter dated 27.03.2018 is also not based on any such ground. Further the jurisdiction issue is also being raised for the first time during the course of hearing of the present I.As.

27. It is settled law that, for raising any new ground at the Appellate stage, the concerned party needs to move an application with sufficient reasons for their not raising these grounds before the Commission during the hearing of the original petition. In the instant case, no such application has been filed by the Appellant, and it is

only during the hearing of the subject IAs, have such grounds been raised for the first time, contending that it is a pure question of law. These questions, raised for the first time at the appellate stage of the proceedings, necessitate detailed examination, which exercise can only be undertaken when the main appeal is finally heard. We have, therefore, refrained from expressing our opinion on these contentions giving any consideration to the same at the interlocutory stage of this appeal. From the termination notice dated 27.03.2018, it is observed that the reason for termination has been cited mainly because of inordinate delay in commissioning of the project & enhanced cost, and clause 14.3 of the PSA has been cited for termination.

Clause 14.3 of PSA deals with Extended Force Majeure and is reproduced below:

> ***"Clause 14.3 Extended Force Majeure***
>
> *14.3.1 The occurrence of an event of Force Majeure and its continuance for a period of 12 months shall constitute "Extended Force Majeure and either Party shall have the right to terminate this Agreement in such instances.*
>
> *14.3.2 in the event that any event of Force Majeure specified in Section 10.2, singularly or in any combination thereof, lasts for a continuous period of twelve (12) Months, either Party shall be entitled to terminate this Agreement by delivering a seven (7) day written notice of termination to the other Party; and this Agreement shall stand terminated at the end of such seven (7) day period provided that the Force Majeure condition is still operative at such time. Neither Party shall have any liability to the other Party as a result of termination of this Agreement pursuant to this Section"*

28. It is relevant to note that, when the force majeure conditions were in existence during construction of the project leading to delay in commissioning, the Appellants chose not to exercise the option of terminating the PSA based on the applicable clauses in the PSA. It is only after more than a year of commissioning of the project, that the termination notice was sent which was to be effective after 12 months from the date of the termination notice. It is also a fact that, since commissioning of the project, the Appellants have neither requisitioned any power from the project nor have they made any payment.

29. Let us also examine the provision delineated within Clause 3.3 , which has been cited by Appellant regarding their right to terminate when conditions precedent have not been fulfilled, since the conditions imposed at the time of approval of PSA has not been complied with.

> ***"Clause 3.3 Right to terminate***
>
> *3.3.1 If the Conditions Precedent listed in Article 3.1 are not duly satisfied or waived by PTC or the Purchaser, as the case may be, within twelve (12) months of the date of execution of this Agreement, or such extended time as may be mutually agreed between the Parties in writing, either Party may terminate this Agreement by giving a written notice of termination to the other Party not earlier than twelve (12) months from the date of execution of this Agreement; and this Agreement shall stand terminated twelve (12) months from the*

date of such notice unless the Conditions Precedent have been satisfied by such date.

3.3.2 Neither Party shall have any liability whatsoever to the other Party as a result of the termination of this Agreement pursuant to this Section."

30. As this contention has been raised for the first time during the current proceedings, it shall be dealt with at the time of hearing of the main appeal. It must however, be noted that the Appellants have raised this issue now while the approval to PSA, though conditional, was granted in 2007. Suffice it to observe that no effort seems to have been made by the Appellants to get the conditions, so imposed by HERC while approving the PSA vide their letter dated 18.06.2007, complied with by the Respondents by incorporating them in the PSA, or to approach the HERC if the same was not agreed to by the Respondents.

31. Mr. G. Saikumar, learned Senior Counsel appearing on behalf of the Appellant, has filed a compilation of two volumes of the Judgments of the Supreme Court, the Allahabad and Delhi High Courts as also that of this Tribunal. They are (1) **M/s Lanco Budhil Hydro Power Private Ltd. vs. HERC & Others** (APTEL Appeal No. 188 of 2011) dated 09.08.2012, (2) **Ayana Ananthapuramu Solar Private limited vs. APERC** (APTEL Appeal No. 368, 369, 370, 371, 372 & 373 of 2019) dated 27.02.2020, (3) **Parampujya Solar Energy Pvt. Ltd. & Anr. Vs. CERC & Others** (APTEL Appeal No. 256, 299, 427 of 2019 & 23, 35, 131 of 2022) dated 15.09.2022, (4) **Southern Power Distribution Company of the Andhra Pradesh**

Ltd. vs. CERC & Others (APTEL Appeal No. 210, 211, 212, 213 of 2019) dated 09.02.2024, (5) **Union of India and Others vs. Bhim Sen Walaitai Ram** (1969 3 SCC 146) dated 29.09.1969, (6) **Abhilash Singh vs. State of U.P. and Others** (2003 SCC Online All1301) dated 20.10.2023, (6) **Sri Baij Nath vs. M/s Ansal & Saigal Properties Pvt. Ltd.** (1992 SCC Online Del 221) dated 20.04.1992, (7) **TATA Power Co. Ltd. vs. Reliance Energy Ltd.** (2009 16 SCC 659) dated 06.05.2009, and (8) **Rithwik Energy Generation Pvt. Ltd. vs. Karnataka Power Transmission Corp. Ltd. & Others** (APTEL Appeal No. 51 of 2001) dated 21.10.2011.

32. It is possibly because we had indicated that the Judgements, which the Appellant seeks to rely upon are in support of such submissions which are urged for the first time at the appellate stage, and they would be examined later when the main Appeal is finally heard, that these Judgements do not form part of the written submissions filed on behalf of the Appellant.

33. It must also be noted that, subsequent to passing of the impugned order by the CERC on 22.11.2022, and even after almost one and half years thereafter, the attempts made by both the Appellants and the Respondents to reconcile their differences have failed to yield any settlement, with no payment, even ad hoc, having been disbursed by the Appellants to the Respondents. As put forth by Respondent No 2, the generation project has suffered significant damage as a result of flooding, and it is urgently in need of funds to restore the project and resume power supply. In the circumstances, it is pertinent to consider the law declared by the Supreme Court in

Dalpat Kumar v. Prahlad Singh, (1992) 1 SCC 719 (AIR 1993 SC 276) wherein the Supreme Court emphasized the importance of weighing the balance of convenience and assessing the potential for irreparable harm while determining whether to grant interim relief or not. To quote:-

> *"6… The phrases "prima facie case", "balance of convenience" and "irreparable loss" are not rhetoric phrases for incantation, but words of width and elasticity, to meet myriad situations presented by men's ingenuity in given facts and circumstances, but always is hedged with sound exercise of judicial discretion to meet the ends of justice. The facts are eloquent and speak for themselves. It is well nigh impossible to find from facts prima facie case and balance of convenience. The respondents can be adequately compensated on their success."*

34. As the Appellant only seeks to uphold the legality of their termination notice dated 27.03.2018, which would be effective after 12 months i.e. w.e.f 27.03.2019, prima-facie the Appellants payment liability prior to termination becoming effective, i.e. from commissioning of the project on 22.11.2017 till 27.03.2019, is not in dispute. As noted hereinabove, the main contention relates to the termination notice dated 27.03.2018 making termination of the PPA effective from 27.03.2019. As a completely new case is sought to be made out for the first time during the hearing of these I.As, and fresh grounds are now urged at the appellate stage, it is evident that, even according to the appellant, the impugned order passed by the

CERC, on the basis of the contentions urged before it by the Appellants, does not suffer from any infirmity.

35. 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**). In the instant case, the prayer for grant of interlocutory relief is at a stage when the existence of the legal right asserted by the Appellant, is 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

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 Page 20 of 21 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 claims, with respect to termination of the PPA, does not appear, prima facie, to be justified, it is clear that the balance of convenience, with respect to payment to be made by the Appellant as per order impugned in this appeal, also lies in favour of the Respondents, 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 Respondent.

36. 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)**.The 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. We are, prima facie, of the view that the appellant is liable to make payment, from the date of commissioning of project i.e. 23.02.2017/28.02.2017 and upto termination becoming effective i.e. 27.03.2019 as per termination notice dated 27.03.2018. Even otherwise, as no payment has been released by the Appellant to Respondent ever since commissioning of the project, and the legality of the termination letter based on new contentions raised for the first time during the interlocutory stage of the appellate proceedings, need detailed consideration when the main appeal is finally heard, interference at this stage, with the impugned order, may cause irreparable injury to the Respondents.

37. In view of the above deliberations, we are satisfied that none of the three tests, to be fulfilled for grant of interim relief, are satisfied in the present case. We are therefore not inclined to interfere with the CERC order dated 22.11.2022 in Petition No 110/MP/2019 at the interlocutory stage. However, with a view to protect the interest of Appellants in case they were to succeed in the main appeal, and to ensure that they do not suffer irreparable injury for the inability of the Respondents to repay the amounts which the Appellants shall pay to them in terms of the impugned order, we direct that the payment shall be released by the Appellants to the Respondent, in terms of the impugned order, only subsequent to submission of an unconditional

bank Guarantee from a scheduled bank in the Appellant's favour by Respondent No 2. Such a Bank guarantee can either be furnished for the entire amount in one go, or in parts i.e. a maximum of four such parts. The bank guarantees so furnished by the 2nd Respondent shall be kept alive by them during the pendency of the present appeal.

38. Needless to state that payment, so made by the Appellants to Respondent No 2, shall be subject to the result of main appeal. The second Respondent's claim for payment of the cost of furnishing the Bank Guarantee in favour of the Appellant in the event the Appeal fails, shall along with all other issues, be considered at the time of hearing of main Appeal. The IAs are accordingly disposed of.

39. After pleadings are complete Registry to verify the same and then include the appeal in the 'List of finals' to be taken up from there, in its turn.

Pronounced in open court on this 19th Day of April, 2024

(Seema Gupta)
Technical Member(Electricity)

(Justice Ramesh Ranganathan)
Chairperson

ts/ag/dk