

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**I.A. No. 90 of 2018
in
Petition No. 235/MP/2015**

**Coram:
Shri P.K. Pujari, Chairperson
Dr. M.K. Iyer, Member**

Date of Order: 18th of January, 2019

In the matter of

Interlocutory Application for recall of order dated 17.9.2018

**And
In the matter of**

Petition under Section 79 of the Electricity Act, 2003 read with Article 13 of the Power Purchase Agreements dated 2.2.2007 and 6.2.2007 executed by Adani Power Ltd. with Gujarat Urja Vikas Nigam Ltd. and the Power Purchase Agreement dated 7.8.2008 executed by Adani Power Ltd. with Uttar Haryana Bijli Vitran Nigam Limited/Dakshin Haryana Bijli Vitran Nigam Limited during the operating period.

**And
In the matter of**

Adani Power (Mundra) Limited
"Adani House", Near Mithakhali Six Roads
Navarangpura
Ahmedabad
Gujarat-380009

.....Petitioner

Vs.

1. Uttar Haryana Bijli Vitran Nigam Limited,
Shakti Bhawan, Sector 6 Panchkula
Haryana- 134 109
2. Dakshin Haryana Bijli Vitran Nigam Limited,
Vidyut Sadan, Vidyut Nagar Hisar
Haryana-125005
3. Gujarat Urja Vikas Nigam Limited,

Sardar Patel Vidyut Bhavan,
Race Course Circle,
Vadodara – 390007

.....Respondents

The following were present:

Ms. Poonam Verma, Advocate for the Petitioner
Shri J.Sharma, Advocate for the Petitioner
Shri Shashank Kumar, APL
Shri Jignesh Langalia, APL

ORDER

The Petitioner, Adani Power (Mundra) Limited, filed Petition No. 235/MP/2015 seeking Change in Law relief during the operating period as per Article 13 of the respective PPAs with GUVNL and Haryana Utilities on account of withdrawal of exemption of all the duties under the Customs Act, 1962, the Customs Tariff Act, 1975, the Central Excise Act, 1944 and/or the Central Excise Tariff Act, 1985 w.e.f. 1.4.2015 pursuant to Notification dated 6.4.2015 and withdrawal of exemption of service tax pursuant to the Notification dated 16.2.2016 issued by Ministry of Commerce and Industry, Government of India.

2. The Commission in its order dated 4.5.2017 in Petition No. 235/MP/2015 held that the Notifications dated 6.4.2015 and 16.2.2016 issued by Ministry of Commerce and Industry would not amount to Change in Law in terms of the provisions of the PPAs. However, the change in rates of custom duty, excise duty, withholding tax and service tax on taxable services which have been imposed pursuant to the Acts passed by the Parliament shall be covered under Change in Law.

3. The Petitioner challenged the above order of the Commission in Appeal No. 210 of 2017 before the Appellate Tribunal for Electricity (Appellate Tribunal). The Appellate Tribunal in its order dated 13.4.2018 upheld the decision of the Commission with regard to matters relating to denial of impact of duties for import / procurement of any other goods/ spares and service tax on the taxable service in respect of Bid 1 PPA of GUVNL and the Gross Station Heat Rate. The Appellate Tribunal allowed the appeal with regard to reimbursement of impact of levy and duties under the Custom Act, 1962, Custom Tariff Act, 1975, Central Excise Act, 1944 and Central Excise Tariff Act, 1955 in respect of all the PPAs and the relief regarding carrying cost in respect of Bid-02 and Haryana PPAs. The Appellate Tribunal in its judgement dated 13.4.2018 partially set aside the order of the Commission and remanded the matter to pass consequential order in terms of its observation at Paragraphs 12 (b) and 12(d) of the judgment.

4. Pursuant to the remand, the matter was listed for hearing 29.5.2018. None was present on behalf of the Respondents. The Commission directed the Petitioner and the Respondents to file their submissions and reserved order in the Petition. The Respondent, Gujarat Urja Vikas Nigam Limited (GUVNL) had filed its submission vide affidavit dated 13.6.2018.

5. Since one of the Members of the Commission who heard the Petition demitted office before issue of the order, the Petition was further listed for hearing on 7.8.2018. None was present on behalf the Respondents. The Commission gave a last opportunity to the Respondents to make their submissions and the matter was further listed for hearing on 6.9.2018. Since, none was present on behalf of the Respondents, the

Commission in its order dated 17.9.2018 granted appropriate relief to the Petitioner in terms of the judgment of the Appellate Tribunal.

6. Uttar Haryana Bijli Vitran Nigam Limited and Dakshin Haryana Bijli Vitran Nigam Limited (hereinafter after referred to as 'the Applicant') have filed the present Interlocutory Application (IA) for recall of order dated 17.9.2018 in Petition No.235/MP/2015 and pass the fresh order after affording an opportunity to them to make submissions.

7. The Applicant has submitted as under:

(a) Pursuant to the judgment of the Appellate Tribunal dated 13.4.2018, the Petitioner filed an affidavit before the Commission seeking appropriate relief. The matter was listed for hearing on 7.8.2018 and the counsel was requested to appear in the matter. However, the counsel did not attend the hearing on the scheduled due to inadvertence of not noting the details of the matter in his diary date. Subsequently, the Registry of the Commission issued a fresh notice for 6.9.2018 which was received by the applicant only on 7.9.2018. Therefore, the counsel for the Applicant could not appear before the Commission on 6.9.2018. Thereafter, the Commission issued order dated 17.9.2018 allowing the claim of carrying cost based on the statement of the Petitioner on the actual interest paid by it during the relevant financial year.

(b) The claim of the Petitioner for considering the interest @10.89% for recovery of varying cost based on the Auditor`s certificate and 2014 Tariff Regulations and

LPS as per the PPA is totally misconceived. The Commission may apply the principles enshrined in Section 34 of the Code of Civil Procedures which provides that court has power to order further interest at such rate not exceeding 4% per annum, as the court deems reasonable on such principal sum from the date of the decree to the date of payment as the court thinks fit.

(c) The Commission in its order dated 28.9.2017 in I.A. No. 57/2017 in Petition No. 97/MP/2017 filed by Adani Power directed the Haryana Discoms to pay 75% of the compensation subject to adjustment after the issue of final order and if the payment received in terms of the interim order exceeds the amount due after issue of final order, the Adani Power shall refund the excess amount to Haryana Discoms with 9% interest. Therefore, interest should not exceed 9% in any case. In any event, the relief granted to the Petitioner pursuant to the remand by APTEL would have to be subject to the outcome of the appeal pending before the Hon`ble Supreme Court.

(d) In the absence of an opportunity of an effective hearing to the Applicant, the present IA has been filed to recall the order dated 17.9.2018 and to pass a fresh order after affording an opportunity to the Applicant so as to comply with the principles of natural justice.

8. During the course of hearing, learned counsel for the Applicant submitted that the notice for hearing scheduled on 6.9.2018 was received only on 7.9.2018 and therefore, the Applicants could not appear before the Commission. When the Commission enquired about the date and mode of receipt of notice, learned counsel for the Applicant

and representative of Haryana Utilities admitted that notice issued by the Commission was in fact received on 4.9.2018. However, learned counsel was not instructed by the Applicant to appear on 6.9.2018.

9. Learned counsel for the Petitioner submitted that the IA has been filed on the baseless grounds and requested the Commission to dismiss the IA.

10. We have considered the submissions of the learned counsels for the Applicant and the Petitioner. Pursuant to the remand of the matter by the Appellate Tribunal, the matter was listed for hearing on 29.5.2018 and notices were issued to all parties, including the Applicant who was the Respondent in the Review Petition. None appeared on behalf of the Respondents during the hearing. The Commission directed the Petitioner to file its written submission by 8.6.2018 with an advance copy to the Respondents. Further, the Respondents, including Haryana Utilities, were directed to file their response by 22.6.2018 and order in the Petition was reserved. In terms of the direction of the Commission, Gujarat Urja Vikas Nigam Limited (GUVNL) submitted its reply dated 13.6.2018. However, the Applicant herein chose not to file any reply or submission in the matter.

11. Since the order in the Petition could not be issued prior to one of the Members of the Commission demitting office, the Petition was further listed for hearing on 7.8.2018 and notices were issued to all the parties, including the Applicant. Since, none was present on behalf of the Respondents, the Commission vide Record of Proceedings for hearing dated 7.8.2018 decided to post the petition for further hearing in order to give a

last opportunity to the Respondents. Relevant portion of the said ROP is extracted as under:

“2. Learned Counsel for the Petitioner submitted that since the Commission has already noted the arguments through a detailed ROP, there is no requirement for further arguments and order may be passed based on the documents available on record and the submissions already made. None were present on behalf of respondents. The Commission directed to post the petition for hearing to give a last opportunity to the respondents.

3. The date of hearing shall be notified in due course”

12. The Petition was listed on 6.9.2018. Since, none was present on behalf of the Respondents, including the Applicant despite last opportunity, the Commission disposed of the Petition vide order dated 17.9.2018.

13. It is noticed that the Applicant was given ample opportunities to make its submissions in this matter. While GUVNL filed its written submission in this petition, the Applicant did not file any reply or written submission and chose not to be represented before the Commission either through counsel or an officer of the Applicant Company. During the course of hearing, learned counsel for the Applicant admitted that the Applicant had directed the counsel in the matter to attend the hearing on 7.8.2018 who inadvertently did not record the details in his diary and hence did not attend the hearing. As regards the hearing scheduled on 6.9.2018, learned counsel submitted that the notice for the hearing was received on 7.9.2018. On our direction to check when was the notice for the hearing scheduled on 6.9.2018 was actually received by the Applicant, learned counsel for the Applicant on instruction submitted that the notice was received on 4.9.2018. Despite receiving the notice prior to the date of hearing, the Applicant went unrepresented on the scheduled date of hearing.

14. We are of the view that the Applicant has failed to take due care to defend its position in the petition which was remanded by the Appellate Tribunal. The reason for non-representation of the Applicant in the subject petition was not due to any factor beyond the control of the Applicant but on account of the casual approach of the Applicant to defend its position in the petition before the Commission. The Applicant has misrepresented the facts before the Commission. We do not find any reason to allow the IA and accordingly, the IA is dismissed.

Sd/-
(Dr. M.K. Iyer)
Member

sd/-
(P.K. Pujari)
Chairperson