

NON REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

I.A. NO.4 OF 2015

IN

CIVIL APPEAL NO. 11133 OF 2011

M/S. ADANI POWER LTD. ... APPLICANT/APELLANT

Versus

GUJARAT ELECTRICITY REGULATORY
COMMISSION & OTHERS ... RESPONDENTS

ORDER

Chelameswar, J.

1. This application is filed by the appellant in Civil Appeal No.11133/2011. The prayer in the application is as follows:

“a) to stay the operation of the impugned Judgment dated 7.9.2011 and suspend further supply of electricity in terms of the PPA during the pendency of this Appeal.

b) in the alternative to prayer (a) above, during the pendency of the accompanying Civil Appeal the Hon’ble Court may direct the Respondent(s) to pay the tariff as per CERC norms for tariff on cost plus basis; and also make the payment from the date of the supply of power under the PPA of the differential amount between the PPA tariff and the tariff as per CERC norms for tariff on cost

plus basis on the such terms and condition as this Hon'ble court deems fit as just and proper;”

However, prayer (a) was not pressed when the matter was taken up for hearing. A brief background of the appeal and the application is as follows.

2. The appellant company is a power generating company. The 2nd respondent herein is a company owned by the State of Gujarat carrying on business of purchasing power in bulk from power generating companies such as the appellant herein and supplying to various distributing companies in the State of Gujarat.

3. The appellant and the 2nd respondent entered into a Power Purchase Agreement (hereinafter PPA, for short). Under the said agreement, the appellant is obliged to sell 1000 megawatt of power from the appellant's power project. For various reasons, the details of which are not necessary at this stage, the appellant issued a notice of termination dated 28.12.2009 of the above mentioned PPA w.e.f. 4.1.2010.

4. After some correspondence, the 2nd respondent filed a petition before the Gujarat Electricity Regulatory Commission (the 1st respondent herein) seeking adjudication of the dispute arising out of termination of the PPA by the appellant.

5. The 1st respondent, by its order dated 31.8.2010, set aside the termination notice sent by the appellant and directed the appellant to supply power to the 2nd respondent as per the terms of the PPA.

6. Aggrieved by the said order, the appellant carried the matter in appeal before the Appellate Tribunal for Electricity unsuccessfully. Hence, the appeal No.11133/2011. The appeal was admitted by an order dated 13.8.2012 and since pending. Hence the instant application with averments as follows:

“7. If the relief sought for by the Appellant is not granted, there is a serious risk of Mundra Power Project becoming a Non Performing Asset causing an irreparable harm to the consumers as well as the lenders of the Mundra Power Project. Since the main Civil Appeal is pending adjudication for final hearing and the Appellant is supplying the power to the Respondent No.2 – GUVNL, the present application is being filed to compensate the

Appellant upto the actual cost of generation as per CERC norms for determination of tariff. The same is in order to sustain the generation and supply of power pending the hearing of the main Civil Appeal.

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9. It is submitted that whereas the pendency of the present appeal is piling huge losses upon the Appellant no prejudice would be occasioned to the Respondents if the present Application is allowed on an undertaking by the Appellant to refund the amount over and above the PPA tariff that will be paid, to the Respondent No.2 or such other condition as this Hon'ble Court may deem fit. Alternatively, in view of the recurring losses, the Appellant be permitted to suspend further supply of electricity in terms of the PPA during the pendency of this Appeal. This shall meet the ends of justice.”

7. On behalf of the 2nd respondent, an affidavit dated 23.11.2015 is filed. The said affidavit, while contesting the various assertions made by the appellant and its rights, stated:

15. I submit that, without prejudice to the rights of the Respondent No.2 to contest the present appeal, the answering Respondent with the approval of Government of Gujarat has already shown its willingness to pay compensatory tariff prospectively (from next month of CERC order i.e. March 2014) subject to paras 12 and 13 above to resolve the issue by making suitable adjustments in tariff which till date is not implemented because of non acceptance by Appellant and other stakeholders.

16. I say that without prejudice to its rights in the present appeals the Respondent No.2 is willing to implement the decisions of State Govt. for paying compensatory tariff prospectively (from next month of CERC order i.e. March 2014) to resolve the issue by making suitable adjustment in tariff on the directions of the Hon'ble Court. xxxxxx”

8. Shri Prashant Bhushan, learned counsel appearing for respondent No.4 opposed the prayers of the applicant alleging that the 2nd respondent is colluding with the appellant as there is no occasion for the respondent to make any concession such as the one made in the affidavit filed by the 2nd respondent (the relevant portion of which are already extracted above). More particularly, when the 2nd respondent succeeded before two fora below, the concession of the 2nd respondent to pay compensatory tariff to the appellant though said to be subject to the contentions of the respondent in the appeal is nothing but largesse of the State to the appellant and not consistent with public interest. He further submitted that this Court may not affix a stamp of approval for such a decision of the 2nd respondent by passing any order accepting the concession made by the respondent. He also submitted that the payment of compensatory tariff to the appellant would

ultimately result in compelling the consumers to pay higher price.

9. On the other hand, Shri Harish Salve, learned senior counsel for the appellant denied the allegations of collusion between the appellant and the 2nd respondent. He argued that the decision of the 2nd respondent is supported by a decision of the State of Gujarat on an assessment of the subsequent developments. He submitted that compelling the appellant to supply energy in terms of the PPA is bound to financially destroy the appellant company and therefore prayed that the 2nd respondent be permitted to make the payment in terms of his concession.

10. A PPA is a contract between the parties and the terms of any contract are nothing but the agreed terms of the contracting parties. It is also a settled principle of the law of contracts that parties to a contract can alter the terms of the contract subsequent to the formation of the contract by mutual consent.

11. However, the rights of the State and its agencies and instrumentalities in the realm of contracts are circumscribed by the considerations of public interest. Apart from such general principle, the rights and obligations of the parties to the PPA in question are also subject to certain statutory prescriptions.

12. The questions (i) whether the appellant is entitled to terminate the PPA and (ii) if so, on what terms and conditions are to be examined in the appeal.

13. Independent of such right, if any, of the appellant, if the parties to the PPA are agreeable to alter the terms of the PPA (as indicated in the counter) for whatever reasons, whether such a variation is consistent with the requirements of the statutes applicable to the contract is a separate question. Whether such a variation is consistent with the larger public

interest is altogether a different question. An ancillary question arises whether such an issue can be properly the subject matter of the instant appeal. All these matters require a detailed examination as and when the appeal is taken up for hearing.

14. Coming to the question whether the 2nd respondent be directed to pay the appellant compensatory tariff as indicated in its counter, we are of the opinion no direction can be given at this stage during the pendency of the appeal as the right of the appellant for such compensatory tariff appears to be one of the issues in the appeal.

15. In so far as the question of permitting the 2nd respondent to pay the compensatory tariff as indicated in its counter, we are of the opinion that it requires no permission from this Court. It is upto the 2nd respondent to take a decision in accordance with law to the best of its understanding. We may make it clear that if the 2nd respondent chooses to make such payment, the same shall be subject to the result of the appeal.

16. The I.A. is disposed of as indicated above.

.....J.
(J. Chelameswar)

.....J.
(Abhay Manohar Sapre)

New Delhi;
December 3, 2015



JUDGMENT