

ITEM NO.25

COURT NO.9

SECTION XVII

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal No. 4295/2022

GUJARAT URJA VIKAS NIGAM LIMITED

Appellant(s)

VERSUS

GUJARAT ELECTRICITY REGULATORY COMMISSION & ANR. Respondent(s)

([PART HEARD BY: HON. DINESH MAHESHWARI AND HON. J.B. PARDIWALA].....FOR ADMISSION and IA No.80822/2022-STAY APPLICATION and IA No.80825/2022-PERMISSION TO FILE ADDITIONAL DOCUMENTS/FACTS/ANNEXURES and IA No.82439/2022-PERMISSION TO FILE ADDITIONAL DOCUMENTS/FACTS/ANNEXURES)

Date : 13-10-2022 This appeal was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE DINESH MAHESHWARI

HON'BLE MR. JUSTICE J.B. PARDIWALA

For Appellant(s) Mr. C A Sundaram, Sr. Adv.
 Mr. M G Ramachandran, Sr. Adv.
 Mrs. Hemantika Wahi, AOR
 Mr. Anand Ganesan, Adv.
 Ms. Jesal Wahi, Adv.
 Ms. Srishti Khindaria, Adv.

For Respondent(s) Mr. Mukul Rohtagi, Sr. Adv.
 Mr. Sajjan Poovayya, Sr. Adv.
 Mr. Mahesh Agarwal, Adv.
 Mr. Nishant Rao, Adv.
 Mr. Alok Shankar, Adv.
 Ms. Sukriti Bhatnagar, Adv.
 Mr. Nisarg Desai, Adv.
 Mr. E. C. Agrawala, AOR

UPON hearing the counsel the Court made the following
O R D E R

The appellant-Gujarat Urja Vikas Nigam Limited has preferred this appeal under Section 125 of the Electricity Act, 2003 ('the Act of 2003') against the judgment and order dated 07.04.2022, as passed by the Appellate Tribunal for Electricity at New Delhi ('the

Appellate Tribunal') in Appeal No. 2 of 2015, whereby the Appellate Tribunal has upheld the order dated 22.10.2014, as made by the Gujarat Electricity Regulatory Commission at Gandhi Nagar ('the State Commission') in Petition No. 1002 of 2010 filed by the respondent No. 2 - Essar Power Limited under Section 86(1)(f) of the Act of 2003 for adjudication of the disputes with respect to monetary claims under a Power Purchase Agreement ('the PPA') for sale and supply of the electricity generated by the respondent No. 2.

We have heard learned senior counsel appearing for the appellant and the learned senior counsel appearing for the respondent No. 2 at length on admission.

Learned senior counsel for the appellant has, in the first place, raised a question that the claim made by the respondent No. 2 was clearly barred by limitation and the State Commission as also the Appellate Tribunal have erred in applying the principles of Section 14 of the Limitation Act, 1963 ('the Limitation Act'), and in excluding the time purportedly spent in the earlier proceedings, where the respondent No. 2 attempted to invoke the arbitration clause of the agreement. In this regard, it has been argued, particularly with reference to the pleadings taken in the application under Section 11 of the Arbitration and Conciliation Act, 1996 ('the Act of 1996') that the respondent No. 2 limited its claim to the items of dispute, as stated in Paragraph '7' thereof.

The said pleadings read as under: -

"7. The Petitioner submits that disputes between

the Petitioner and GEB, despite the best efforts of the Petitioner for amicable settlement because more apparent by passage of time and further exchange of correspondence. In fact, certain nother disputes pertaining to (a) creating 'Sinking Fund' for payment of External Commercial Borrowings and GEB's alleged entitlement to claim benefit of notional interest had such fund been created; (b) Deduction on account of Deemed Generation charges; (c) Non payment of running monthly bills of the Petitioner and illegal deductions therefrom etc, which were being discussed between the Petitioner and the Respondent, became unreasovable with the Petitioner and the Respondent, became unreslovable with time. The recent correspondence regarding the issue relating to declaration of power in the ratio of 300:215 and the other aforesaid disputes is annexed hereto and marked Annexure-D colly."

Learned counsel for the appellant has also referred to the observations occurring in paragraphs '7.6' and '7.7' of the order passed by the State Commission, which read as under: -

"7.6 From the above it is clear that the following issues which are raised by the petitioner in the present petition are not part of the Arbitration Petition No. 8 of 2005 filed by the petitioner before Hon'ble High Court of Gujarat.

- i. Delayed Payment Charges, (Issue of Non Payment of running Bills)
- ii. Depreciation,
- iii. Interest on UTI - Non-Convertible Debentures,
- iv. Bills Discounting Charges,
- v. Wrongful deduction of Rebate by GUVNL, and
- vi. Interest on Working Capital.

7.7 Thus, the above issues are raised first time in this petition by the petitioner and the period for limitation applicable required consideration based on the petition filed by the petitioner before the Commission."

It has been argued that when the subject-matter of the

application under Section 11 of the Act of 1996 was expressly limited to three or four issues raised therein, and the dispute as now raised by respondent No. 2 had not been pertaining to most of those issues but entirely new issues were sought to be taken up, the ingredients of Section 14 of the Limitation Act, 1963 were not satisfied.

Section 14 of the Act of 1963 reads as under: -

"14. Exclusion of time of proceeding bona fide in court without jurisdiction. -

1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature."

Learned senior counsel for the respondent No. 2, while supporting the findings of the State Commission and the Appellate Tribunal in this regard, has particularly referred to the fact that in the said Paragraph '7', the disputes were specifically stated

with reference to 'Annexure-D colly' attached to the said application. The collective documents filed as 'Annexure-D' with the Section 11 application have been placed before us for consideration, and the notice dated 06.08.2005 and then the notice dated 14.11.2005 have been referred to. It is submitted that the claim, as now made by the respondent No. 2, had been specified in necessary details therein. Learned counsel has further submitted that until the decision of this Court on 13.03.2008, the matter always remained in dispute as to whether the claim in question was arbitrable in terms of the agreement or not; and that being the position, the respondent No. 2 cannot be faulted in taking up the proceedings for appointment of arbitrator.

The learned counsel has also argued, particularly with reference to Section 43 and Section 21 of the Act of 1996 that the arbitration proceeding in respect of any particular dispute commence on the date on which the request for reference to arbitration is received by the respondent. It is submitted that for the purpose of the present case, such date of commencement of arbitration proceedings would be 14.11.2005, being the date when the notice for reference was served by the respondent No. 2.

Learned counsel for the respondent No. 2 has particularly referred to the decision in *Andhra Pradesh Power Coordination Committee and Others Vs. Lanco Kondapalli Power Limited and others*: (2016) 3 SCC 468 wherein this Court held, in relation to the issue of a similar nature, that when the dispute is required to be taken up before the State Commission in terms of the Act of 2003, the period spent in arbitration proceedings, that is,

starting from the date of notice for arbitration and ultimate culmination of the proceedings under Section 11 of the Act of 1996, deserves to be excluded. The learned counsel would submit that same treatment having been provided in this matter, no question of law in that regard arises for consideration.

We find force in the submissions made on behalf of respondent No. 2 in regard to the question of limitation.

The submissions by the learned counsel for the appellant that in view of the limited and specific averments taken in the application under Section 11 of the Act of 1996, it has to be accepted that the subject-matter of claim was confined to those disputes alone, cannot be accepted with reference to one of the expressions, '*aforesaid*' occurring in the said paragraph. The said expression is not decisive of the matter and the pleadings can never be construed by picking up one word or sentence away from context and substance. As noticed, in the same paragraph, it was indicated that the nature of dispute was referable to the documents collectively placed on record as '*Annexure D*'.

Similarly, the observation in a couple of paragraphs in the order dated 22.10.2014 is also not decisive of the matter in view of the detailed discussion in the later part of the same order by the State Commission.

In any case, what has been sought to be referred to and relied upon by the appellant are the contents of the application under Section 11 of the Act of 1996, which was not a claim petition as such. Therein, the applicant (i.e., the respondent No. 2 herein) was only to indicate the existence of dispute and not to frame the

application with elaborate pleadings as required in the claim petition.

Learned senior counsel for the appellant has also submitted that in the pending application of the appellant bearing No. 873 of 2006, the respondent No. 2 indeed presented its counter-claim and even in that counter-claim, all the disputes as now sought to be raised were not projected. That being the position, according to the learned counsel, the respondent No. 2 cannot take the benefit of Section 14 of the Limitation Act.

In our view, even this contention does not take the case of the appellant as regards the question of limitation any further. This is for the simple reason that in the said petition of the appellant, the counter-claim, even if made by the respondent No. 2, was not adjudicated at all and no observation adverse to the respondent No. 2 was made therein. It had not been the case of any person before the State Commission or the Appellate Tribunal that the claim as made by the respondent No. 2 could not have been entertained for the reason that it had earlier been raised by way of the said undecided counter-claim. The precise contention was with reference to the limitation and for not extending the benefit of Section 14 of the Limitation Act to the respondent No. 2. As noticed, such a contention had been devoid of merit and has rightly been rejected.

Learned senior counsel for the appellant has even attempted to refer to an expression occurring in paragraph '56' of the order impugned, giving an impression as if the Appellate Tribunal had examined the matter with reference to the principles applicable for

condonation of delay in terms of Section 5 of the Limitation Act.

True it is that such an expression has occurred in paragraph '56' of the order impugned but, reading the relevant part of the order as a whole, the Appellate Tribunal's view is evident that the claim made by the respondent No. 2 could not have been rejected on the question of limitation. Yet, the Appellate Tribunal has cautiously provided for exclusion only of the period between 14.11.2005 to 13.03.2008 and hence, the starting point for consideration of the claim has been fixed at 29.09.2004. The approach of the State Commission and the Appellate Tribunal in this regard appears to be in accordance with law and in our view, no substantial question of law arises on this issue. This contention stands rejected.

The points for dispute taken into consideration by the State Commission have been put in the tabular format as follows:

1. Depreciation
2. Rebate
3. Bill Discounting
4. Foreign Exchange Rate Variation
5. UTI- Non Convertible Debentures
6. Interest on working capital on Depreciation; and
7. Delayed payment charges.

So far the aforesaid heads of claim are concerned, learned senior counsel for the appellant has essentially addressed the arguments in relation to the major heads of Depreciation, Rebate, and Foreign Exchange Rate Variation. The submissions have been duly

countered by the learned senior counsel for the respondent No. 2 but, for the purpose of the present order, we are not elaborating on the respective stand in relation to these three heads of claim as, in our view, the questions raised in this regard do require consideration.

In our view, the following substantial questions of law do arise for consideration in this appeal: -

I. (a) Whether depreciation has been allowed over 90% of the project cost allocated to appellant's share and hence, is contrary to the statutory Notification dated 30.03.1993?

(b) Whether the Supplementary Agreement dated 18.12.2003 altered the approved project cost under the PPA dated 30.05.1996 and in any event, whether the Supplementary Agreement with regard to depreciation was not novated by the subsequent agreement contained in the letter of respondent No. 2 dated 22.09.2004 and acceptance by appellant by its letter dated 08.10.2004?

II. Whether the creation of the sinking fund was not the prior reciprocal promise to perform before demanding compensation through Foreign Exchange Rate Variation from the appellant?

III. (a) Whether the consideration of the Appellate Tribunal in relation to the question of rebate suffers from an error apparent on the face of the record, where the Appellate Tribunal observed that the claim of the appellant disputing previous invoices was an afterthought or that the appellant did not deny that the procedure prescribed in Article 5.4 of PPA for disputing invoices was not complied with?

(b) Whether the Appellate Tribunal has erred in applying only clause 5.3.2 of PPA to enable adjustment by the respondent No. 2 despite the dispute raised by the appellant?

As regards the other heads of claim, when the impugned decisions essentially pertain to the determination of questions of fact, we do not find any substantial question of law worth consideration and therefore, the scope of this appeal shall be confined to the questions of law formulated hereinabove.

It is noticed that in the impugned order dated 07.04.2022, after dismissing the appeal filed by the appellant, the Appellate Tribunal has issued directions to the State Commission to carry out the necessary quantification and evaluation of the amount received, in the following terms:

"150. In view of the foregoing conclusions, the challenge to the impugned order by the appeal at hand must fail. The appellant will be obliged in law to pay the amounts in terms of the principles that have been decided.

151. As noted earlier, the Commission had called upon the parties to "evaluate the amount receivable" by the second respondent Essar (petitioner before the Commission) from the appellant GUVNL (respondent before the Commission) "as per the principles decided by the Commission" and "inform the Commission within one month's time from the receipt of the Order". Ideally, the Commission should have quantified the amount payable in terms of the principles decided rather than leaving it to another round of proceedings. Be that as it may, it appears some calculations were submitted before GERC in terms of the said directions. It is clear from the submissions made before us that the parties are not ad idem on the amount payable by the appellant to the second respondent under this dispensation. In order that the exercise is complete, we direct that the State Commission shall now pass the necessary orders on this score, after hearing both parties, expeditiously and at an early date, not later than

two months from the date of this judgment. Needless to add the amount already paid in terms of interlocutory order will be adjusted. The Commission shall also ensure by taking appropriate measures that the claims are duly satisfied in a time-bound manner."

It has been pointed out in the course of submissions that by an interim direction dated 06.07.2022, a demand has been raised to the tune of Rs. 111.63 crores. No specific interim relief application in that regard having been placed before us, as at present, we are not passing any interim order in this matter. We would expect the State Commission to continue with the evaluation as expected by the order impugned and pendency of this appeal shall not be of any impediment in the State Commission carrying out the task of evaluation, inclusive of even the heads of claim which are forming the subject-matter of this appeal.

In the interest of justice, we also leave it open for the parties to apply for interim relief as and when advised.

Appeal admitted in relation to the questions formulated hereinabove.

Issue notice to the unrepresented respondent.

(SNEHA DAS)
SENIOR PERSONAL ASSISTANT

(RANJANA SHAILEY)
COURT MASTER (NSH)