

No.N/173/2016

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION

No.16, C-1, Millers Tank Bed Area, Vasanth Nagar, Bengaluru-560 052.

Dated: 29.12.2020

Present

Shri Shambhu Dayal Meena	: Chairman
Shri H.M. Manjunatha	: Member
Shri M.D. Ravi	: Member

Complaint No.07/2016

BETWEEN:

Messrs Soham Phalguni Renewable Energy Private Limited,
RMJ Mandoth Towers,
37, 7th Cross,
Vasanthanagar,
Bengaluru-560 052.

.... **Complainant**

(Represented by M/s Pragati Law Chambers)

AND:

1) Karnataka Power Transmission Corporation Limited (KPTCL)
Kaveri Bhavan (IV Floor),
K.G. Road,
Bengaluru-560 009.
(Represented by its Managing Director)

2) Energy Department,
Government of Karnataka,
2nd Floor, Vikas Soudha,
Bengalluru-560 001.
(Represented by its Principal Secretary)

3) Mangalore Electric Supply Company Limited (MESCOM)

Corporate Office,
Paradigm Plaza,
AB Shetty Circle,
Mangalore-575 001.

(Represented by its Managing Director)

....**RESPONDENTS**

(Represented by M/s Just Law, Advocates)

ORDERS

1. The Complainant has filed the present complaint under Section 142 of the Electricity Act, 2003 praying for the following reliefs to:

(a) Initiate suitable action against the Respondent No.3 for having failed to pay the Complainant Company as per the directions in the order passed by this Commission dated 05.12.2014 vide Annexure-A;

(b) Direct the Respondent No.3 to comply with the order of this Hon'ble Commission dated 05.12.2014 and accordingly pay at the rate of Rs.3.40 (Rupees three and Paise Forty only) per KWhr for the energy generated and delivered to the 3rd Respondent MESCOM since June 2015 till October 2016;

(c) Grant such other and further reliefs as this Hon'ble Commission deems fit in the facts and circumstances of the case, in the interest of justice.

Annexure-A is the order passed in OP No.48/2012 dated 05.12.2014 in which it was held that the Complainant would be entitled to the tariff of Rs.3.40 per KWhr without any escalation for the energy delivered at

the metering point for the first ten (10) years of the Commercial Operation Date (COD), instead of the tariff indicated in Article 5.1 of the PPA dated 26.11.2004 marked as Annexure-A in that case. It was also directed that the parties shall effect the necessary amendments to the PPA dated 26.11.2004 terms of KERC Order in OP No.48/2012.

2. The relevant facts of the case required for the purpose of disposing the controversy involved in this case may be stated as follows:

- a) The present complaint is filed before this Commission on 05.12.2016. The Complainant has stated in the complaint that in July 2015, the Mini Hydel Project of 10.5 MW capacity was commissioned and thereafter, the Complainant has been supplying the energy pursuant to the PPA dated 26.11.2004 for which the 3rd Respondent (MESCOM) was liable to pay the energy charges as per the monthly invoices raised.
- b) The 3rd Respondent without any reasons failed to pay the energy charges for the period from July 2016 onwards till the filing of the present complaint, at the rate of Rs.3.40 per unit as ordered in OP No.48/2012 dated 05.12.2014, but only made the part payment at the rate of Rs.2.90 per KWhr as was originally agreed in the PPA dated 26.11.2004. The Complainant has shown the details of the energy injected and the amount required to be paid at Rs.3.40 per KWhr and the amount realized and also the amount outstanding in Annexure-D to the complaint.

- c) The Complainant issued letter dated 15.09.2015 (Annexure-E) to the 3rd Respondent stating that the part payment made towards the energy bills on the ground that the 3rd Respondent had preferred the appeal against the order dated 05.12.2014 in OP No.48/2012 was not appropriate without there being a stay order by the Hon'ble APTEL of the impugned order of the Commission.
- d) Therefore, the Complainant contended that the non-payment of the energy charges @ Rs.3.40 per KWhr as directed by this Commission in OP No.48/2012 amounted to contravening of the directions issued by this Commission which would attract the punishment under Section 142 of the Electricity Act, 2003.
3. The Respondents appeared through their Counsel and the 3rd Respondent (MESCOM) filed the Statement of Objections. The 1st Respondent (KPTCL) was originally the purchaser of energy under the PPA dated 26.11.2004. Subsequent to unbundling of the KPTCL, the distribution of energy was assigned to different Distribution Licensees. Therefore, the PPA dated 26.11.2004 was assigned to the 3rd Respondent (MESCOM). The 2nd Respondent (GoK) is not a necessary or formal party. Therefore, the 3rd Respondent being the contesting party has filed the Statement of Objections. The material grounds of defence urged by the 3rd Respondent may be stated as follows:

- (a) That the 3rd Respondent preferred an Appeal No.271/2015 before the Hon'ble APTEL against the order dated 05.12.2014 passed in OP No.48/2012 of this Commission.
- (b) That it is settled position of law that proceedings under Section 142 of the Electricity Act, 2003, are akin to contempt proceedings and that during the pendency of an appeal against an order, the contempt proceedings seeking enforcement of the said order is not maintainable. It would also be of relevance to note that the Hon'ble Supreme Court of India has clarified that when an application for stay of an order passed by lower forum, in an appeal proceeding is pending adjudication, the lower forum is precluded from proceeding with enforcement/contempt proceedings. That the interim application filed by the 3rd Respondent seeking stay of the order dated 05.12.2014 was pending before the Hon'ble APTEL.
- (c) That the Complainant had earlier filed Complaint No.1/2016 before this Commission for violation of the order dated 05.12.2014 passed in OP No.48/2012 and the said complaint was disposed of on 18.02.2016, as not fit for admission at that stage, as the matter was pending before the APTEL and keeping the liberty to the parties to come back after the matter was disposed of in appeal. Therefore, it is contended that the present complaint filed is premature.

4. Subsequent to the filing of the Statement of Objections on 09.01.2018 by the 3rd Respondent, certain events have taken place which are relevant for consideration. They are as follows:

a) The Appeal No.271/2015 filed before the Hon'ble APTEL was dismissed on 20.11.2018 confirming the impugned order dated 05.12.2014.

b) The 3rd Respondent again preferred Civil Appeal Nos.4467-4468/2019 before the Hon'ble Supreme Court of India against the order dated 20.11.2018 passed in Appeal No.271/2015. The said Civil Appeals were also dismissed on 01.07.2019, thereby the order dated 05.12.2014 passed in OP No.48/2012 has become final.

c) Soon after the disposal of the case before the Hon'ble Supreme Court of India, the 3rd Respondent remitted Rs.2,64,07,901 on 17.07.2019 crediting the same to State Bank of India account of the Complainant, being the differential amount for the energy supplied from July 2015 to May 2019. The same was intimated to the Complainant as per letter dated 02.08.2019 produced under Memo dated 12.09.2019. In the said letter, the 3rd Respondent stated that the differential amount was fully paid for the said period and there was no liability to pay the interest on its part. Further in the said letter, the 3rd Respondent has asserted, as per order dated 05.12.2014 passed in OP No.48/2012, the parties had to effect the necessary amendments to the PPA dated 26.11.2004 for inserting the tariff of Rs.3.40 per KWhr, thereby called upon the Complainant to execute the Supplementary PPA.

- d) The Petitioner filed objections dated 15.10.2019 to the Memo dated 12.09.2019 filed by the 3rd Respondent, stating that the amount paid was only towards principal amount due and the interest on the delayed payments of the monthly tariff invoices was not paid and it was still due. The Petitioner further contended that the Respondent was liable to pay the interest amount of Rs.74,50,608 due as per the terms of the PPA which amounted to non-compliance of the order dated 05.12.2014 passed in OP No.48/2012.
- e) In reply to the objection dated 15.10.2019, the 1st and 2nd Respondents filed its response on 28.11.2019 stating that the non-payment of interest would not amount to contravention of the directions issued in the order dated 05.12.2014 in OP No.48/2012, attracting a proceeding under Section 142 of the Electricity Act, 2003 against this Respondent. That the scope of proceedings under Section 142 of the Electricity Act, 2003 is limited to enforcing the order passed in original proceedings and thereby the present prayer seeking for payment of interest deserves to be rejected. There was no prayer for payment of interest made by the Complainant in the original proceedings and the question of granting such relief in a proceeding seeking for enforcement of an order would not arise. Such claim for interest was also barred under Order II Rule 2 of the Civil Procedure Code. It is contended that in a proceeding for enforcement of an order, the authority cannot go beyond the scope of the order to be enforced for granting any extra relief.

5. We have heard the learned counsel for the parties. Written arguments were also filed on behalf of the Petitioner.
6. From the rival contentions and pleadings of record, the following Points arise for our consideration:

Point No.1: Whether the non-payment of the amount claimed in monthly tariff invoices or the interest payable on the overdue amounts on monthly tariff invoices would amount to contravention of any of the directions issued in the order dated 05.12.2014 passed in OP No.48/2012?

Point No.2: Whether the claim for arrears of interest is barred under Order II Rule 2 of the Civil Procedure Code?

Point No.3: What Order?

7. After considering the rival contentions and the material on record, our findings on the above points are as follows:
8. Point No.1: Whether the non-payment of the amount claimed in monthly tariff invoices or the interest payable on the overdue amounts on monthly tariff invoices would amount to contravention of any of the directions issued in the order dated 05.12.2014 passed in OP No.48/2012?

a) The perusal of the contents of the order dated 05.12.2014 in OP No.48/2012 would disclose the following facts:

- (i) The said OP No.48/2012 was filed by the Complainant against the 3rd Respondent praying for upward revision of the tariff for its Mini Hydel Power Project from Rs.2.90 per KWhr for the

energy delivered (with an escalation at a rate of 2% per annum on the base tariff for every year, as agreed in the PPA dated 26.11.2004 executed between the parties) to Rs.3.97 per KWhr and for consequential direction to amend the relevant Article of the said PPA. It can also be noted that at the fag-end of the proceedings in OP No.48/2012, the Petitioner had filed an interim application praying for the revision of tariff from Rs.4.34 per unit instead of Rs.3.97 per unit as sought earlier in the petition.

- (ii) The petition was filed under Section 62 of the Electricity Act, 2003 for fixing the project specific tariff for its Mini Hydel Power Project. The Petitioner estimated a total cost of the project as on 12.12.2012 i.e., the date of the filing of the petition, at Rs.56.58 crores and claimed a tariff of Rs.3.97 per unit. On 29.05.2014 i.e., the date of the filing of the amendment application, the Petitioner projected the total expected cost for completion of the project at Rs.65.34 crores and claimed a tariff of Rs.4.34 per unit.
- (iii) After contest by the 3rd Respondent, this Commission fixed the tariff of Rs.3.40 per unit, without any escalation. The operative portion of the order in OP No.48/2012 reads as follows:

“O R D E R

(1) The Petitioner shall be entitled to the tariff of Rs.3.40 (Rupees Three and Paise Forty only) per KWhr, without any escalation for the energy delivered at the Meeting Point, for the first ten years from the Commercial Operation Date, instead of the tariff indicated in Article 5.1 of the PPA dated 26.11.2004 (ANNEXURE-A); and

(2) The parties shall effect the necessary amendment to the PPA dated 26.11.2004 (ANNEXURE-A), in the above terms.”

- b) According to the Petitioner, the fixation of tariff of Rs.3.40 per unit and directing the parties to effect the necessary amendments in the relevant Article of the PPA dated 26.11.2004 obliges the 3rd Respondent to pay the amount for the energy supplied at the tariff of Rs.3.40 per unit with interest for the delayed payment in terms of the PPA. The Petitioner further contended that the non-payment of the amount due towards monthly tariff invoices or the interest payable for the overdue amounts would amount to contravention of the direction issued in the order dated 05.12.2014 passed in OP No.48/2012. Therefore, the Petitioner contends that a complaint under Section 142 of the Electricity Act, 2003, is maintainable, as the 3rd Respondent has failed to pay the tariff for the energy supplied as well as the interest that became due.
- c) The 3rd Respondent came up with the defence that the non-payment of the amount due under the tariff invoices or the interest payable for the

overdue amounts does not amount to contravention of any direction issued in the order dated 05.12.2014 passed in OP No.48/2012. Further that the said order does not contain a direction for payment of the energy charges or the interest for belated payments.

d) After considering the respective contentions of the parties, we are of the considered view that the defence urged by the 3rd Respondent is to be accepted for the following reasons:

- (i) The reading of the Order dated 05.12.2014 passed in OP No.48/2012 does not contain a direction against the 3rd Respondent for payment of the amount towards supply of energy from the project of the Petitioner. It merely declares the tariff per unit that would be payable for the energy supplied from the Mini Hydel Power Project of the Petitioner. This order only directs the parties to effect the necessary amendment to the PPA dated 26.11.2004 in terms of the tariff fixed in the said order. Therefore, if any of the parties has not come forward to facilitate to effect the amendment to the PPA, then only the aggrieved party may file a petition under Section 142 of the Electricity Act, 2003 for proper remedy. It is not the case of the Petitioner that the 3rd Respondent has not responded its call for effecting the amendment to the relevant Article of the PPA.

- (ii) The Order dated 05.12.2014 in question does not impliedly direct the 3rd Respondent for payment of the amount due towards the supply of energy under the terms of the PPA. The original petition of the Petitioner itself was only for fixation of the project specific tariff by revising the Generic Tariff fixed at the relevant time for the Mini Hydel Power Project. Therefore, that petition could not have contained averments of non-payment of amounts towards supply of energy. Therefore, we are of the considered opinion that the order in question does not even impliedly direct for payment of the amount towards supply of energy or the interest payable for the delayed payments.
- (iii) The fixation of the project specific tariff or a Generic Tariff does not imply any direction for the payment of energy charges by the person who purchases the energy. In any case, the person purchasing the energy fails to pay the energy charges, the re-course available for the Generator is to file a petition for recovery of the amount due towards energy supplied or to take such re-course, as may be provided in terms of the PPA for non-payment of energy charges. The order fixing the tariff payable for the energy supplied merely declares the right of the Generator to receive such tariff and the liability of the purchaser to pay at

such rate for the energy supplied, but does not in terms direct the purchaser to do or refrain from doing or in a particular Act or thing. Since the order dated 05.12.2014 does not direct the 3rd Respondent for payment of energy charges for the energy purchased, there cannot be a complaint under Section 142 of the Electricity Act, 2003 against the 3rd Respondent, as that would be going outside or beyond the terms of the order in question.

(iv) The learned counsel for the 3rd Respondent submitted that the proceedings under Section 142 of the Electricity Act, 2003 is akin to the contempt proceedings and further relied upon the decision cited in: (a) [2014] 3 Supreme Court Cases 373 between *Sudhir Vasudeva, Chairman and Managing Director, Oil and Natural Gas Corporation Limited and Others Vs M. George Ravishankaran and Others*; & (b) [2008] 5 Supreme Court Cases 339 between *Bihar Finance Service House Construction Cooperative Society Limited Vs. Gautam Goswami and Others* to contend that the Court exercising contempt jurisdiction cannot go beyond the terms of the order alleged to be contravened. These decisions support the said principles. Further, he relied upon the decision cited in: (a) [2011] 11 Supreme Court Cases 212 between *State of Punjab and Others Vs. Krishan Dayal Sharma*; and (b) [1996] 4 Supreme Court Cases 533 between

Bai Shakriben (Dead) by Natwar Melsingh and Others Vs. Special Land Acquisition Officer and Another to contend that the Court executing the decree cannot go beyond the terms of the decree. These decisions support the said principle. Further he submitted that the proceedings under Section 142 of the Electricity Act, 2003 is in the nature of execution proceedings. Therefore, he submitted that the terms of the directions issued in the Order dated 05.12.2014 passed in OP No.48/2012 is to be strictly construed and one cannot go beyond it to say that the said order also directs for payment towards the energy supplied or for the interest that would become on such arrears.

- (v) The learned counsel for the Petitioner relied upon judgement cited in: (a) [1997] 5 SCC 772 between *M/s Kanoria Chemicals & Industries Limited Vs. Uttar Pradesh Electricity Board*; and (b) Order dated 02.11.2020 in an Appeal No.10.2020 between *PCKL & Another Vs. Udupi Power Corporation Limited & Others* in support of its contention that the 3rd Respondent to pay the interest of Rs.74,50,608 to the Petitioner that became due. As already noted above, in the present proceedings under Section 142 of the Electricity Act, this Commission cannot issue a supplemental order directing the 3rd Respondent to pay the interest due to the Petitioner,

when such direction is not given in the Order dated 05.12.2014 passed in OP No.48/2012. It may be true that as per the terms of the PPA, the 3rd Respondent is liable to pay the interest for the overdue amount. It may also be true that even if an appeal is filed against the order of enhancement of the tariff, the payment of energy charges at the enhanced rate or the interest that would become payable on it, cannot be withheld unless there is an order staying the operation of the order enhancing the tariff. It is also true that ultimately if the enhancement of tariff is upheld and in the meanwhile, during the pendency of appeal there was an order of stay, the party is liable to pay the tariff at the enhanced rate and the interest that might become due on it. However, if a party does not pay the arrears at the enhanced rate or the interest that might become due on it, the recourse available to the person who supplied energy is to file a proper proceeding for recovery of the amounts due including interest. The judgments relied upon by the learned counsel for the Petitioner do not support the view that the order determining the tariff itself would be sufficient for enforcing the recovery of the arrears for the energy supplied along with the interest by filing a complaint under Section 142 of the Electricity Act, 2003.

(vi) For the above reasons, we hold Point No.1 in negative.

9. Point No.2: Whether the claim for arrears of interest is barred under Order II Rule 2 of the Civil Procedure Code?

As Point No.1 is held in negative, the recording of a finding on Point No.2 is not called for. Therefore, the said Point is kept open as and when it arises for determination in a proceeding that might be filed by any of the parties. Therefore, this Point is held accordingly.

10. Point No.3: What Order?

For the foregoing reasons, we proceed to pass the following:

ORDER

The Complaint is dismissed. The Complainant is not entitled to any of the reliefs sought for in the complaint.

sd/-
(SHAMBHU DAYAL MEENA)
Chairman

sd/-
(H.M. MANJUNATHA)
Member

sd/-
(M.D. RAVI)
Member