



ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION
4th Floor, Singareni Bhavan, Red Hills, Hyderabad 500 004

FRIDAY, THE SIXTH DAY OF MARCH
TWO THOUSAND AND TWENTY

:Present:
Sri Justice C.V. Nagarjuna Reddy, Chairman

O.P.No. 34 of 2019

Between:

JSW Power Trading Company Limited
having its registered office at JSW Centre
Bandra Kurla Complex, Bandra (East)
Mumbai 400 051

And branch office at:
4th Floor, NTH Complex
A-2, Shaheed Jeet Singh Marg
Qutab Institutional Area
New Delhi 110 067

Represented by its Authorised Signatory
Sri. B. Ravindra Pai

... **Petitioner**

A N D

Southern Power Distribution Company of Andhra Pradesh Limited
Tiruchanoor Road, Behind Srinivasa Kalyana Mandapam
Kesavayana Gunta, Tirupathi 517 501, Andhra Pradesh
Represented by its Director

... **Respondent**

This Original Petition has come up for hearing finally on 14-02-2020 in the presence of Sri Suraj Das Guru, Authorised Representative of the petitioner and Sri P. Shiva Rao, learned Standing Counsel for the respondent. After carefully considering the material available on record and after hearing the arguments of the learned counsel, the Commission passed the following:

ORDER

This Original Petition is filed for the following reliefs:

- i) Admit the petition and direct the respondent to pay to the Petitioner, the sum of Rs.52.74 Crores (Rupees Fifty Two Crores and Seventy Four Lakh only) towards surcharge.
- ii) Direct the respondent to pay interest on aforesaid surcharge of Rs.52.74 Crores (Rupees Fifty Two Crores and Seventy Four Lakh only) at the rate of 15% per annum from its due date till the date of payment.
- iii) Direct the respondent to pay costs of the petition; and
- iv) Grant such other and further reliefs as are just.

2. The summary of the petition is set out hereunder:

That the petitioner is a company incorporated under the provisions of the Companies Act, 1956, having its registered office at JSW Centre, Bandra-Kurla Complex (BKC), Bandra (East), Mumbai 400 051 with one of its Branch Office being situated at 4th Floor, NTH Complex, A-2, Shaheed Jeet Singh Marg, Qutab Institutional Area, New Delhi 110 067. The respondent is a company incorporated under the Companies Act, 1956 and having a distribution license for distribution of power in few districts of the State of Andhra Pradesh. Bids were called by the Andhra Pradesh Power Coordination Committee (APPCC), an authorized representative of A.P. Discoms, vide Tender No.182/14, short term/power buy/import/2015-16, dated 17-07-2014 followed by its corrigendum dated 02-08-2014 for procurement of power for the period 29-05-2015 to 26-05-2016. The petitioner, among others participated in the bids and was awarded a contract for supply of power from its plant in Karnataka to the respondent as under:

Period	Quantum (MW) firm
29.05.2015 to 31.07.2015	200
01.08.2015 to 30.09.2015	300
01.10.2015 to 31.12.2015	300
01.01.2016 to 26.05.2016	300

A Purchase Order was issued on 21-08-2014 and the same was amended on 24-04-2015 and 28-05-2015. The petitioner has fulfilled all the conditions including providing of Bank Guarantee of Rs.1,95,00,000/- in favour of APPCC from Punjab National Bank, New Delhi. Subsequently, a Power Purchase Agreement (PPA) dated 29-09-2014 was entered between the petitioner and the respondent, which is the lead procurer on behalf of itself and Eastern Power Distribution Company of A.P. Limited for the above mentioned quantum of power. The petitioner has supplied power *inter-alia* to the respondent for the contractual period in terms of the contract.

That the respondent has failed and neglected to clear the outstanding dues on or before the due dates and thereby, it has become liable to pay surcharge of 1.25% per month for the payment remaining unpaid for more than 30 days from the date of receipt of the bill in terms of Article 3.9 of the PPA. Accordingly, the petitioner has issued letters dated 04-04-2018, 24-04-2018, 19-06-2018 etc., along with surcharge calculation calling upon the respondent to pay to the petitioner a sum of Rs.52.74 crores towards surcharge in terms of the PPA. As the respondent failed and neglected to pay the surcharge, the petitioner caused a legal notice dated 24-09-2018 issued to the respondent herein sent by Registered Post Acknowledgment Due / Speed Post and was duly served on the respondent. As the respondent failed

and neglected to pay the surcharge amount despite the legal notice, the petitioner is constrained to file the present petition before this Commission.

3. On behalf of the respondent, its Chief General Manager P&MM&IPC filed a counter affidavit. He has *inter-alia* averred that as cause of action arose as and when bills were paid excluding surcharge, payment made from items 1 to 30 of Annexure-I and from items 1 to 8 of Annexure-II are barred by law of limitation and that in respect of the rest of claims, as the petitioner has received the amounts under the bills without demur, it is estopped from claiming surcharge. That when the payments were made from October, 2015 to March, 2017 in respect of the bill amounts for the period from May, 2015 to December, 2016 without any surcharge, the petitioner has not raised any protest and that it was only for the first time on 17-01-2017, that the petitioner made its claim for surcharge and accordingly the petitioner's claim for surcharge is barred by acquiescence and laches. That as regards the claim of surcharge in Annexure-II, as it relates to reimbursement of open access charges, no surcharge is payable in the absence of any clause in the letter of intent providing for payment of interest, in the event of delay in reimbursement. The respondent alternatively pleaded that its financial position is very bad and is unable to pay power tariff from August, 2018 till date which runs into several thousands of crores of rupees and as such it is not in a position to pay surcharge for the delayed payment of bills. The respondent, therefore, sought for indulgence of this Commission to waive its liability to pay surcharge.

4. A detailed rejoinder is filed on behalf of the petitioner denying the plea of the respondent regarding waiver or acquiescence, while asserting that the liability of the respondent to pay late payment surcharge automatically accrued under Article 3.9

of the PPA dated 29-09-2014 and therefore, the question of waiver or acquiescence does not arise. The petitioner averred that the liability of the respondent for payment of surcharge for delayed payment is absolute both in respect of the cost of the power received by it and also reimbursement of open access charges.

5. Initially the case was heard by the three Member Commission and order was reserved on 31-12-2019. As the Commission was busy with preparation of Tariff Order for FY 2020-21, it could not dispose of the case before 10-02-2020, the date on which the Tariff Order was released. On the same day, the two Members of this Commission have completed their term and demitted their office. The case was therefore reopened and again re-heard on 14-02-2020 by me and on the same day, the order has been reserved.

6. Mr. Suraj Das Guru, Authorised Representative of the petitioner submitted that the respondent has unequivocally undertaken to pay late payment surcharge under Article 3.9 of the PPA and that therefore the respondent's liability is absolute. He further submitted that *doctrine of acquiescence* has no application to the present case as the liability of the respondent to pay surcharge is independent of the right of the petitioner to receive the principal amount after due dates. He further submitted that as per Section 19 of the Limitation Act, 1963, the fresh period of limitation shall be computed where payment on account of debt or interest on legacy is made before expiration of the prescribed period by the person liable to pay debt on legacy and that in view of the said provisions, the respondent is liable to pay surcharge as claimed by the petitioner. Learned AR alternatively pleaded that items 1 to 9 of Annexure-I are beyond the period of three years, preceding the date of filing the O.P. and that the claims from item No.10 of Annexure-I and the claims from item No.4 of Annexure-II are within the period of limitation.

7. Sri P. Shiva Rao, learned Standing Counsel for the respondent made his submissions in line with the averments made in the counter affidavit both on the aspect of limitation and that of waiver or acquiescence.

8. I have carefully considered the respective submissions of the learned counsel for the parties with reference to the material on record. Having regard to the respective pleadings of the parties, the following points arise for determination:

1. Whether the claim of late payment surcharge is barred by waiver or acquiescence by the petitioner ?
2. Whether the respondent is not liable to pay surcharge on delayed reimbursement of open access charges ?
3. Whether any part of the claims made under Annexures-I and II enclosed to the Annexures J, K and L of the O.P. is barred by the law of limitation ?
4. To what relief the petitioner is entitled ?

9. **Re Point No.1:** For deciding this point, it is necessary to refer to the relevant terms in the PPA dated 29-09-2014. Clauses 3.7 and 3.9 relevant for the present purpose read as under:

“3.7 Payment:

The due date for payment would be the 9th day after the date of receipt of fax / email bill subject to receipt of original invoice within due date. In case the due date is a Bank holiday in A.P. the next working day would be treated as due date.

The bill received before 02.00 P.M. on a working day at APSPDCL/APDISCOMS will only be considered as date of receipt,

otherwise the next day will be considered as date of receipt. If the bill is not in full shape and needs to be corrected, the date of receipt of corrected bill will be treated as date of receipt. Bills are to be raised in favour of DY. CCA (PP & S) / APPCC, Fax No.040-23395370 and email id: dyccaappcc@gmail.com duly mentioning the Purchase Order No. on invoice.

The amount would be deposited through RTGS in JSWPTC's Current Account No.000405029195, IFSC Code. ICIC0000004 maintained with ICICI Bank Limited, Free Press House, 215 Nariman Point, Mumbai by APSPDCL towards payment(s) within the "due date" for payments. APSPDCL shall ensure timely payments to JSWPTC within Due dates.

3.9 Surcharge for late Payment:

A delayed payment surcharge of 1.25% (one and quarter percent) per month shall be applicable on all payments remaining unpaid for more than 30 days from the date of receipt of the bill. If the due date for payment is a Bank holiday in AP, the immediate next working day will be treated as due date of payment. This surcharge would be calculated on a day-to-day basis for each day of the delay.

In case of open access charges, a surcharge of 15% per annum shall be applicable on all payments outstanding after 07 days from the date of issue of the bill by fax calculated on day to day basis from the date of each bill."

10. The primordium of the respondent's case is that the petitioner has received the payment dues for the energy supplied by it without any demur, though such

payments were made much beyond the due dates and thereby the petitioner has waived its rights to claim late payment surcharge. A conjoint reading of clauses 3.7 to 3.9 would reveal that they are independent of each other. While under clause 3.7, the due date for payment is stipulated, under clause 3.9 surcharge for late payment i.e., payment made after 30 days from the date of receipt of the bill is liable to be paid by the respondent. It is relevant to note in this context that clause 3.9 is not hedged in by any condition other than delay in making payment beyond 30 days from the date of receipt of the bill by the respondent. In other words, once payment is delayed by more than 30 days from the date of receipt of the bill, clause 3.9 would come into effect automatically, irrespective of whether the petitioner has received payment with or without any protest.

11. It is trite law that a contract is required to be interpreted based on the plain language of its terms, coupled with extrinsic evidence reflecting the intention of the parties and their conduct. There may be some situations where notwithstanding the written terms of the contract, the parties may intend to act in deviation thereof. In such cases, it is for the parties to plead and prove by adducing cogent evidence in support of their plea that the parties have deviated from the written terms of the contract. The burden of proof, however is on the party who pleads such deviations, under Section 101 of the Indian Evidence Act, 1872. In the instant case, the respondent has not produced any evidence in support of its plea that the petitioner consciously waived its right to claim late payment surcharge. The only fact which is asserted by the respondent to plead waiver or acquiescence is the petitioner receiving delayed payments without any protest or reserving its right to claim late payment surcharge. As observed hereinbefore, operation of clause 3.9 is not dependent upon the petitioner receiving payment under protest as it is a term which

stands on its own legs. In order to prove waiver, the respondent must not only show that there was no protest, but also show that such lack of protest was on account of the petitioner consciously waiving its right to claim late payment surcharge. The APTEL in its order dated 18-05-2010 in Appeal No.176 of 2009 explained the *doctrine of waiver*, after analyzing the legal position culled out of various judgments of the Hon'ble Supreme Court as under:

“37. (1) Waiver is a matter of intention and can be either expressed or implied. Whether it is one or the other, it must be deliberate in the sense that the party waiving the right should after applying its mind to the matter decide to abandon the right. In order to hand over a waiver some positive act on the part of the party which is supposed to have waived his right.

(2) Waiver is an intentional relinquishment of known right or advantage, abandoning claim or privilege, which except for such waiver, the party would have enjoyed. The waiver is a voluntary surrender of right. It implies the meeting of the minds. It is a matter of mutual intention. The essential element of waiver is that there must be a voluntary and intentional relinquishment of right.

(3) Whenever waiver is pleaded, it is for the parties claiming the same to show that an agreement waiving the right in consideration of some compromise came into being.

(4) Waiver actually requires two parties; one party waiving and the other party receiving the benefit of waiver. There can be waiver so intended by one party and was sought by the other. The essential element of waiver is that there must be a voluntary and intentional relinquishment of a right. The voluntary choice is the essence of waiver. The waiver is voluntary and conscious act which must be an affirmative act on its part. A mere omission to assert its right or insist upon its right cannot amount to a waiver or dispensation within the meaning of Section 63 of the Indian Contract Act.

(5) A person cannot be said to have waived its right unless it is established that his conduct was such so as to enable the Court to arrive at a conclusion that he did so with knowledge that he had a right but despite the same acted in such a manner which would imply that he has waived his right.” (Emphasis added)

12. While relying on the aforementioned order, the APTEL in *Salasar Steel & Power Ltd., Chhattisgarh Vs Chhattisgarh State Power Trading Company Limited and The Chhattisgarh State Electricity Regulatory Commission, Chhattisgarh 2015 ELR (APTEL) 0571* conclusively rejected an identical plea. The following observation of the APTEL is apt in this context:

“55. Admittedly, in this case, the Appellants sent letters to the Trading Company claiming delayed payment surcharge. Admittedly, there was no response to the letters nor denied having received the letters. Only under such situation, the Appellant had to approach the State Commission seeking for the appropriate directions.”

13. In the present case also the petitioner addressed letters dated 04-04-2018 (Annexure-J), 24-04-2018 (Annexure-K) and 19-06-2018 (Annexure-L) claiming late payment surcharge, besides causing a legal notice issued vide Annexure-M dated 24-09-2018. No replies appear to have been sent by the respondent to any of this correspondence either denying the liability or taking the plea that the petitioner has waived or acquiesced in its right to claim late payment surcharge. In the light of the above, I am of the considered opinion that the plea of the respondent that the petitioner has waived or acquiesced in its right to claim late payment surcharge has no merit and the same is accordingly rejected.

14. **Re Point No.2:** Initially, the Chief General Manager, P&MM&IPC of the respondent company issued a Purchase Order for purchasing power from the petitioner. One of the clauses pertains to open access charges under which the

petitioner shall pay PoC injection charges and other charges both upto and beyond the delivery point and that the latter charges will be reimbursed by the respondent on submission of OA bill by the petitioner. It is the plea of the respondent that this Purchase Order does not contain any clause for late payment surcharge in respect of delayed reimbursement of open access charges. The petitioner, however, relied upon the following clause in the Purchase Order:

“Surcharge for Late Payment	A delayed payment surcharge of 1.25% (one and quarter percent) per month shall be leviable <u>on all dues remaining unpaid</u> for more than 30 days from the date of receipt of the bill. If the due date for payment is a Bank holiday in AP, the immediate next working day will be treated as due date of payment. Surcharge will be liable for payment for the period beyond 30 days till date of payment”. (Emphasis added)
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15. The clause reproduced from the Purchase Order hereinbefore is in generic terms, which does not specifically refer to surcharge for delayed reimbursement of open access charges. This ambiguity, if any, is cleared by the second part of clause 3.9 of the PPA, which reads as follows:

“In case of open access charges, a surcharge of 15% per annum shall be applicable on all payments outstanding after 07 days from the date of issue of the bill by fax calculated on day to day basis from the date of each bill.”

It is thus abundantly clear that respondent has undertaken to pay surcharge for the delayed reimbursement of open access charges beyond seven days from the date of issue of the bill. Therefore, the petitioner is entitled to payment of late payment surcharge even on delayed reimbursement of open access charges. This point is accordingly answered in favour of the petitioner.

16. Re Point No.3: In the Original Petition, the petitioner has claimed late payment surcharge on two counts. One, @ 1.25% per month towards delayed

payment surcharge and two, surcharge @ 15% per annum in respect of open access charges. In Annexures J, K and L, the letters addressed by the petitioner, the petitioner has claimed Rs.45.22 crores towards surcharge for late payment of energy bills and Rs.7.52 crores towards surcharge for late payment of open access bills, totaling Rs.52.74 crores. The respondent pleaded that items 1 to 30 of Annexure-I are barred by limitation. Before adverting to this aspect, it is relevant to note the jurisdiction of this Commission as regards time barred claims. In *A.P. Power Co-ordination Committee Vs Lanco Kondapalli Power Limited (2016) 3 SCC 468*, the Hon'ble Supreme Court held that while exercising its judicial power for adjudicating disputes under Section 86 (1) (f) of the Electricity Act, 2003, the Commission shall not entertain time barred claims. Undoubtedly this Original Petition is filed by the petitioner and this Commission has also entertained the same under the said provision. Therefore, this Commission can allow only such claims which are not barred by law of limitation.

17. Let me now examine whether any part of the petitioner's claim for late payment surcharge is barred by limitation ?

18. As could be seen from the material produced by the petitioner itself, the supplies were made between 29-05-2015 and 04-05-2016. The due dates of payment varied depending upon the period when supplies were made. Article 25 of the Schedule to the Limitation Act prescribes limitation of three years for recovery of interest upon money due from the defendant to the plaintiff. Under this provision, limitation commences when interest becomes due. As could be seen from clause 3.9 of the PPA, the surcharge would be calculated on a day-to-day basis for each day of the delay. Applying these provisions to examine the surcharge claimed by the petitioner in Annexure I to Annexures J, K and L, in respect of Sl.Nos.1 to 9 i.e., late

payment surcharge on energy bills, the due dates fell beyond a period of three years preceding the date of filing of the Original Petition. It is only from SI.No.10 upto SI.No.50 that the claim is within the period of three years from the dates they fell due till the time of the filing of the Original Petition. The total amount in this regard comes to Rs.34 crores. As regards surcharge on delayed reimbursement of Open Access charges vide Annexure II, SI.Nos.1 to 3 are barred by limitation and the amount within the period of limitation comes to Rs.6.48 crores. The petitioner, however, raised a plea based on Section 19 of the Limitation Act, 1963 to plead that no part of the claims is barred by limitation. This provision to the extent it is relevant reads as under:

“19. Effect of payment on account of debt or of interest on legacy:-

Where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy or by his agent duly authorized in this behalf, a fresh period of limitation shall be computed from the time when the payment was made”.

19. In my opinion, Section 19 applies only if any part payment is made in respect of a specific item such as debt or interest where a fresh period of limitation shall be computed from the time when the payment was made. The instant case relates only to interest and not to the principal debt which was already paid. In order to attract Section 19, the respondent should have made part payment of interest on account so that a fresh period of limitation would have accrued to the petitioner in respect of the balance amount of interest. Admittedly the respondent has not paid any part of the interest. Hence, no fresh period of limitation has accrued to the petitioner. Evidently sensing this, the petitioner filed Annexures A and B along with rejoinder, re-computing the interest only by including the claims that have fallen due within three years preceding the date of filing of the Original Petition. As per these

statements, a sum of Rs.37.34 crores is payable towards late payment surcharge in respect of energy bills and Rs.6.48 crores is payable relating to open access bills. Having regard to the discussion made above, I find that this revised computation is reflecting correct position under the law of limitation and accordingly I hold that only the above mentioned sum of Rs.43.82 crores falls within the law of limitation. This point is accordingly answered.

20. Re Point No.4: Under clause 3.9 of the PPA, delayed payment surcharge is stipulated as 1.25% per month. This works out to 15% per annum. Similarly, in case of Open Access charges, a surcharge of 15% per annum has been stipulated. As noted earlier, the alternative defence of the respondent is that its financial position is very bad and is unable to pay power tariff from August, 2018, which runs into several thousands of crores. It has therefore pleaded that it is not in a position to pay surcharge for delayed payment of bills and accordingly requested this Commission to waive the surcharge completely.

21. Ordinarily, parties to an executory contract are bound by the terms thereof. However, when one of the parties to the contract pleads inability to pay, the Courts having regard to the facts and circumstances of the case, exercise their equitable jurisdiction to advance the cause of justice by appropriately reducing the interest liability. Indeed there are instances where the legislature stepped in to relieve the debtors from the undue burden of interest by enacting statutes such as The Usurious Loans Act, 1918, The Madras Debtors' Protection Act (VII of 1935), The Madras Debt Conciliation Act, 1936 and Money-Lenders' Act, to name a few. The main purpose of these enactments is to reduce the interest burden on the debtors, thereby extending some relief to them. This Commission is however conscious of the fact that these enactments have no application to the present case on hand.

However, Regulation 55 (1) of the Business Rules of Andhra Pradesh Electricity Regulatory Commission (Regulation 2 of 1999) empowers the Commission to make such orders as may be necessary for meeting the ends of justice. Evidently exercising this power, this Commission in the past scaled down the rate of interest albeit with the consent of the creditors. In **Orange Uravakonda Power Limited Vs APSPDCL & batch** (O.P.Nos.21 to 27 and 35 of 2017 and O.P.Nos.1 and 7 of 2018 dated 14-06-2018), this Commission persuaded the various Power Producers / creditors to accept the dues with interest only at 25% of what was stipulated under Article 5.2 of the respective PPAs, having regard to the precarious financial position of the DISCOMs in the State. Similar indulgence is being shown by this Commission in several other cases, scaling down the interest component in varied percentages depending upon the quantum of interest due and payable by the DISCOMs.

22. Though the terms of a bilatory contract have to be respected and regarded by the parties, when a dispute over payment of money is brought before the authority such as this Commission, a duty is cast on the latter to render even handed justice, instead of steadfastly holding to the terms of the agreement, more so, in a dispute pertaining to payment of interest. Justice, equity and good conscience are inseparable aspects of dispute adjudication even if the adjudicatory forum is not a full-fledged court, but only a quasi judicial forum. Indubitably, the respondent is a public utility undertaking, whose main object is not profit making, unlike the private distribution licensees. For various reasons which are not germane for discussion in the present context, the distribution utilities in the State of Andhra Pradesh including the respondent are in huge debts. As per the material available with this Commission, the respondent is in arrears of Rs.16,000 crores (approximately)

payable to the power suppliers. Year after year revenue gap is increasing. The respondent is struggling for bear survival and hardly in a position to service its debts. In this situation, payment of interest at the agreed rate to the petitioner and similarly situated power suppliers does not appear to be possible at all. Keeping this precarious position of the respondent in mind, I have allowed both parties to reconcile and settle their dispute amicably. However, they failed to arrive at a negotiated settlement. In these facts and circumstances of the case, though this Commission is of the opinion that in normal course, the respondent is strictly bound by the stipulations in the PPA regarding late payment surcharge, in the circumstances explained above and in public interest, I am constrained to exercise the Commission's inherent power to reduce the respondent's liability to a reasonable extent. Accordingly, the late payment surcharge and also the surcharge on delayed payment of Open Access charges are reduced by 50% of the respondent's liability as shown in Annexures A and B filed along with rejoinder of the petitioner. On such reduction, the amounts payable by the respondent to the petitioner come to Rs.18.67 crores towards surcharge for late payment of energy bills and Rs.3.24 crores towards surcharge for late payment of Open Access bills. The respondent is directed to pay the aforementioned amounts within one month from the date of receipt of this order.

23. In the result, the Original Petition is allowed in part to the extent indicated above.

This order is corrected and signed on this the **6th day of March, 2020**

Sd/-
Justice C.V. Nagarjuna Reddy
Chairman