



ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION
4th & 5th Floors, Singareni Bhavan, Red Hills, Hyderabad 500 004

R.P. (SR) No.41 of 2011 & I.A. No.11 of 2011
in
O.P. No.26 of 2009

Dated 27.02.2013

Present

Sri A.Raghotham Rao, Chairman
Sri C.R.Sekhar Reddy, Member
Sri R.Ashoka Chari, Member

Between:

1. Transmission Corporation of Andhra Pradesh Limited
2. Andhra Pradesh Central Power Distribution Company Limited
3. Andhra Pradesh Southern Power Distribution Company Limited
4. Andhra Pradesh Eastern Power Distribution Company Limited
5. Andhra Pradesh Northern Power Distribution Company LimitedPetitioners

AND

M/s GVK Industries

....Respondent

This petition coming up for hearing on 04.08.2012 in the presence of Sri P.Shiva Rao, Advocate for the petitioners and Sri Sodekar, Manager-Legal, Advocate for the respondent, the Commission passed the following:

O R D E R

The petitioners filed the above Review Petition under section 94(f) of Electricity Act, 2003 (for short EA, 2003) r/w Order 47 Rule 1 of CPC. The case of the petitioners is briefly as follows:

- (i) The petitioners filed the above said petition seeking review of orders dated 29.03.2011 of the Commission passed in OP No.26/2009, on the ground that the Commission ought to have considered the petitioners request for adoption of norms specified in the CERC Regulation 2004 (and also improved operating parameters) in respect of the PPA, subsisting with the respondent, at least from the year 2004 onwards (prospectively from the date of filing of Original Petition OP No.64/2004), which would

have been in accordance with the guiding principles stipulated in Section 61 of EA 2003 (ACT). Secondly, the Commission ought to have taken into consideration the specific observations/findings made by the Apex Court in its order dated 08.07.2010 (passed in CA No.2926/2006) as to the jurisdiction of this Commission and also the order of the Apex Court dated 15.03.2010 (PTC India Ltd vs CERC), wherein (at para 59 of order) the Apex Court held that a regulation issued under section 178 of EA 2003 intervenes & even overrides the existing contracts, in as much as it casts a statutory obligation on the regulated entities to align their existing & future contracts with the said regulations. The same analogy can be applied for Regulations issued under section 181 by the State Commission, which would enable this Commission to revise PPA norms/parameters as sought for. The Commission is vested with review powers as per section 94(f) of the EA 2003.

- (ii) As per Section 61(a), the principles & methodologies specified by CERC would act as guidance for State Electricity Regulatory Commissions for determination of tariff. Section 61(d) emphasizes the function of the State Regulatory Commission in safeguarding the consumers' interest besides ensuring the recovery of cost of electricity in a reasonable manner. *This Commission also issued Regulation No.1 of 2008 (Determination of tariff for supply of electricity by a generating company to Discoms) in line with CERC guidelines.*
- (iii) Pursuant to the CERC Regulations, the OP No.26/2009 (Originally OP(SR) No.64/2004) had been preferred seeking downward revision of norms/parameters specified in the PPA subsisting with the respondent company, as the relaxed norms in the PPA have been causing substantial financial burden on the APDISCOMS.
- (iv) Since this Commission has observed in the order dated 10.03.2011 that the CERC Regulations 2004 would apply prospectively, APDISCOMS seek to reconsider the downward revision of PPA norms in line with CERC norms atleast from the year 2004 onwards for mitigating the financial burden to the extent possible.

- (v) The Original Petition, OP (SR) No.64/2004 had been filed based on the directions given by this Commission in the tariff order 2003-04 calling for initiating negotiations with the generating companies where PPAs were concluded prior to the coming into force of the A.P. Electricity Reforms Act, 1998 & Constitution of this Commission, to explore the areas for cost reduction within the existing PPA provisions, which also provided at Article 16.8 to make amendments as & when statute required. This provision may need to be invoked for downward revision of tariff norms in the PPA.
- (vi) As per Section 86(1)(b), the Commission is vested with powers to regulate the Power Purchase Agreements, including the price at which power shall be procured. The word 'regulate' means to adjust the existing PPAs and the prices.
- (vii) Even in the judgment of Hon'ble Supreme Court in case of Power Trading Corporation (PTC) vs Central Electricity Authority (CEA) in the Civil Appeal No.3902 / 2006, in para 51 of judgement it was mentioned that "*Section 178 is, therefore, a legislative power and the Notification issued under that section amounts to a piece of subordinate legislation which has a general application in the sense that even existing contracts are required to be modified in terms of the impugned Regulations*".
- (viii) This Commission may be pleased to appreciate the intention of the petitioners in seeking revision of PPA norms for ensuring competition, efficiency & economical usage of the resources as stipulated in the ACT, which ultimately would result in lessening the financial burden at the end of consumers.
- (ix) In view of the above facts, it is prayed to accept & take up the review petition for downward revision of norms/improved operating parameters in the subsisting PPA with the Respondent company as prayed in the OP No.26/2009 and pass appropriate orders on the same.

2. The respondents filed their counter and the material averments of the counter are briefly as follows:

- (i) The present petition has been purportedly filed against the judgement dt.10.03.2011 passed by the Commission, wherein, the Commission had emphatically rejected all the prayers made by the petitioners. While this being so, the petitioners have raised certain new issues which were not there in the scope of the original petition. It is a well settled law that no new issue can be entertained in a Review Petition. For this reason alone, the present petition is liable to be dismissed at the threshold.
- (ii) The present petition was filed with an unreasonable delay. The reasons shown by the petitioners for condoning the delay are non-maintainable in the eye of law, as the said reasons for delay were very much manageable and purely internal to the petitioners and they failed to show any reasonable cause in filing the present petition with the delay. As such, the present petition is liable to be dismissed due to lapse of limitation prescribed by law.
- (iii) All other contentions and averments in the present petition are already dealt with and conclusively decided by the Commission and thus, there are no circumstances that warrant the indulgence of the Commission in entertaining the present petition.
- (iv) The Commission has already stated in its order dated 10.03.2011 that the Regulations dt.26.03.2004 of Central Electricity Regulatory Commission (CERC Regulations/Regulations) does not have any retrospective effect and that the same are not applicable for the PPAs' concluded prior to the enactment of the EA 2003. Thus, the petitioners bid to make the said regulations applicable at least from the year 2004 are a mere after thought and thus the same is non-tenable. Further, the averment of the petitioners that the Commission is empowered to revise PPAs as envisaged by Section 181 of the Act; and review powers as envisaged under section 94(f) of the Act, are baseless in as much as the revision of norms of a concluded PPA are concerned, the Commission has no *suo moto* powers to revise the PPA; and that the same can be done only with the consent of parties to the PPA; and so long as the revision powers

given under section 94 of the Act are concerned, they are limited to revise the issues already raised before the Commission, but not, to entertain any new issues in the review jurisdiction. As such, the plea for applicability of the Regulations prospectively after 2004 is liable to be dismissed in limine.

- (v) Section 61 of the Act empowers SERCs' to regulate the tariff, the same cannot be done either unilaterally by only one party to the PPA or *suo moto* by the Commission. The same can only be done with the consent of the parties. Further, the Regulation no.1 of 2008 (Determination of Tariff for Supply of Electricity by a Generating Company to Discoms) passed by the Commission also do not have any impact / effect on the existing PPA entered into between the petitioners and respondent, way back in 1996, as such the said Regulation does not have any retrospective effect as well, and as such, the claim of the petitioners is not maintainable even under this pretense.
- (vi) The petitioners never followed the procedure envisaged for seeking revision of tariff. Thus, the claim is *ab initio* void.
- (vii) The Commission is empowered to regulate the PPAs', it cannot do so under the given circumstances. The norms of a concluded PPA can only be revised in compliance with the relevant laws, but not, otherwise. As such, the powers given under section 178 of the Act can only be exercised if the parties approaches the Commission with *consensus ad idem*, but not otherwise. The plea of ensuring competition, efficiency and economical usage of the resources as stipulated in the Act and would lessen the burden on the consumers raised in para 9 was already dealt with by the Commission so they cannot raise the same.
- (viii) For the reasons explained above and based on the *ratio decidendy and obitor dicata* of the Commissions judgement dated 10.03.2011, the petitioners are not entitled for any reliefs prayed and the Commission may please to dismiss the petition.

4. The learned advocate for the petitioner submitted his arguments as hereunder:

- (i) The petitioner filed the said petition seeking revision of PPA norms for ensuring competition, efficiency and economical usage of resources as stipulated in the Act with a view to lessen the financial burden to the consumers.
- (ii) The Commission has observed in its order that CERC Regulations, 2004 would apply prospectively and Discoms to reconsider the downward revision of PPA norms in line with CERC norms at least from the year 2004.
- (iii) The Commission has got absolute power to revise the norms / parameters and also powers u/s 86(1) (b) to regulate PPAs including price at which power shall be procured in the interest of all the consumers at large.
- (iv) The petitioners pray to take up the review petition for downward revision of norms / improved operating parameters in the subsisting PPAs as prayed for.

5. The learned advocate for the respondents submitted his arguments as hereunder:

- (i) The Commission has no power to review / revise PPA without consensus ad idem as it cannot be done unilaterally or with the consent of one party.
- (ii) The Commission has already expressed in its order dated 10.03.2012 that CERC Regulations does not have any retrospective effect; and that the same are not applicable for the PPAs' concluded prior to the enactment of EA 2003
- (iii) The revision/review can only be done with the consent of both the parties.
- (iv) Hence, the petitioners are not entitled for any reliefs as prayed and the petition is liable to be dismissed.

6. Now, the point for consideration is, “Whether the petition is entitled for seeking admission of review petition for downward revision of norms as prayed for?”

7. While addressing the above issue, we need to cognize order 47 Rule 1 of CPC and for that purpose the same is extracted as hereunder:

Order 47 Rule 1 of CPC reads as follows:

“1. Application for review of judgment:- (1) Any person considering himself aggrieved,—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.

Explanation: The fact that the decision on a question of law on which the judgment of the court is based has been reversed or modified by the subsequent decision of a superior court in any other case, shall not be a ground for the review of such judgment.”

8. So, it is the duty of the petitioner to establish at least one of the 3 main grounds mentioned in the above said provision of order 47 Rule 1 of CPC. Under order 47 Rule 1 of CPC, the petitioner has to establish

(1) The discovery of new and important matter or evidence which after exercise of due diligence, was not within his knowledge or could not be produced at the time of hearing of the main case.

(2) On account of some mistake or error apparent on the face of record.

(3) For any other sufficient reason.

9. However, the petitioner has nowhere established any one of the three main grounds mentioned in above said Order 47 Rule 1 of CPC, to be entitled for the review of the impugned order dated 10-03-2011 in O.P. No.26 of 2009 and infact has raised a new prayer in the review petition, which is not acceptable. In the circumstances of the matter, the review petition filed by the petitioner cannot be numbered and the same is liable to be rejected. In the result the petition is herewith rejected.

This order is corrected and signed on this 27th day of February, 2013.

Sd/-
(R.ASHOKA CHARI)
MEMBER

Sd/
(C.R.SEKHAR REDDY)
MEMBER

Sd/-
(A.RAGHOTHAM RAO)
CHAIRMAN