



ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION

4th Floor, Singareni Bhavan, Red Hills, Hyderabad 500 004

O.P.No.12 of 2010 & I.A.No.38 of 2013
Date: 23-05-2015

Present

Sri Justice G. Bhavani Prasad, Chairman
Dr. P. Raghu, Member
Sri P. Rama Mohan, Member

Between:

A.P. State Load Despatch Centre
through AP Transco

... Petitioner
(Petitioner in O.P.No.12 of 2010)

A N D

GVK Power & Infrastructure Limited
"Paigah" House, 156-159, Sardar Patel Road
Secunderabad – 500 003 Andhra Pradesh
Rep. by its Director-Technical Mr. John Fernandes

... Respondent
(Respondent in O.P.No.12 of 2010)

Between:

A.P. State Load Despatch Centre
Through AP Transco
Chief Engineer, SLDC, AP Transco

... Petitioner
(Petitioner in I.A.No.38 of 2013 in O.P.No.12 of 2010)

A N D

1. M/s. GVK Power & Infrastructure Ltd.
(GVK Stage-I), Jegurupadu, Kadiyam Mandal
Near Rajahmundry, E.G. District

2. M/s. GVK Industries Ltd
(GVK Stage-I), Jegurupadu, Kadiyam Mandal
Near Rajahmundry, E.G. District

... Respondents
(Respondents in I.A.No.38 of 2013 in O.P.No.12 of 2010)

The petition and the interlocutory application have come up for hearing on 08-05-2015 in the presence of Sri M. Sodekar, AGM (Law) of the respondent(s) and Sri P. Shiva Rao, learned Standing Counsel for the petitioner. After carefully considering the material available on record and after hearing the arguments of the representative of the respondent(s) and the

learned Standing Counsel for the petitioner, the Commission passed the following:

ORDER

1. The petition is filed under Section 33 read with Sections 143 and 144 of the Electricity Act, 2003 in the matter of non-compliance of the backing down instructions of the petitioner by the respondent, an Independent Power Producer from June 2007 to May, 2010. It was pleaded that the State Load Despatch Centre ensures grid discipline, among other things through backing down instructions to reduce the quantity of generation for frequency control for safe and secure grid operations. The generating companies, Independent Power Producers and generating stations shall promptly comply with the despatch instructions issued by the State Load Despatch Centre unless such instructions affect the safety of the plant or the personnel. Any such unforeseen difficulties should be promptly informed to the State Load Despatch Centre and any wrong declaration of capacity or non-compliance with backing down instructions without adequate valid reasons, non-furnishing of data etc., constitute non-compliance with the Grid Code and shall be subject to financial penalty as may be decided by this Commission. The backing down instructions issued by the petitioner on several instances were not complied with by the respondent on the pretext of untruthful and untenable reasons. The inaction by the respondent and other generators resulted in violation of the Grid Code resulting in threat to the system security and consequently resulted in higher power purchase cost to the licensees due to reduction of the lower cost power by other generators. The grid indiscipline of the respondent and others caused enormous disturbance in grid operation and resulted in unjust burden to the end consumers. The violation of the Grid Code resulted in disproportionate gain or unfair advantage to the respondent, which cannot be exactly quantified and hence, the

request for appointment of an Adjudicating Officer to inquire into the matter and pass orders directing the respondent to pay Rs.5,00,000/- for each non-compliance and costs of the litigation.

2. The respondent contested the request claiming that GVK Industries Limited and AP Transco entered into Power Purchase Agreement on 19-04-1996 and the respondent is only the O & M contractor under the agreement obliged to perform its obligations under the agreement. The petition without GVK Industries Limited is vitiated by mis-joinder of proper parties. The respondent complied with the instructions of the petitioner except those, which have a cascading effect on the men and machinery of the company and the backing down instructions were in violation of the contract between the licensee and the generating company and hence of Section 32 (2) (a) of the Electricity Act, 2003. The respondent detailed as to why the acts of the petitioner are *ipso facto ultra vires* and reserved its right to file a counter claim to make good the damages incurred by it due to the violation of the relevant laws by the petitioner. There is no need to appoint any Adjudicating Officer and he cannot impose any penalty and in fact, the petition is liable to be dismissed with exemplary costs and imposition of penalty on the petitioner.

3. The petitioner in its rejoinder claimed the O & M contract between the respondent and GVK Industries Limited to be without prior approval in writing from AP Transco, which is against clause 16.3 of the Power Purchase Agreement. The petitioner is complying with all codes and it narrated in detail the manner in which backing down instructions were validly issued only according to merit order despatch sequence.

4. In reply to the rejoinder, the respondent stated that the petition is not maintainable due to mis-joinder/non-joinder of necessary parties and the flawed instructions, without following the Statutes, Codes, Power Purchase Agreement and parameters laid down by them, are not obliged to be followed. While again explaining the arbitrariness of the instructions, the respondent stated that the grid safety and the cost of the energy generated are not interrelated and the respondent complied with all duly and properly informed instructions given under emergency.

5. After hearing the learned counsel for both parties, the Commission considered the entitlement of the petitioner for appointment of an Adjudicating Officer and passed orders on 15-04-2013 referring to the contentions of the parties and the statutory provisions under which the petition was filed. The Commission opined that Section 33 does not speak of instructions having to be issued only in an emergency and that the Electricity Act, 2003 prevails over any Power Purchase Agreement or conditions therein. The Commission also opined that these questions have to be decided by the Adjudicating Officer and that the Adjudicating Officer is empowered to conduct an inquiry for violation of the grid operations as instructed by the State Load Despatch Centre and decide the quantum of penalty etc. The Commission felt that it is its duty to appoint a Member of the Commission as an Adjudicating Officer for the purpose. Therefore, Sri R. Ashoka Chari, the then Member of the then Commission was appointed as such.

6. The Adjudicating Officer held hearings and while the matter was in progress before him, the petitioner filed I.A.No.38 of 2013 under Order I Rule 10 of the Code of Civil Procedure, 1908 read with Section 94 (2) of the Electricity Act, 2003 contending that though the original respondent is obliged to perform duties under

the Power Purchase Agreement entered into by GVK Industries Limited with AP Transco and is an absolutely necessary party, by way of abundant caution, the petitioner proposed to implead GVK Industries Limited as 2nd respondent. The petitioner claimed that the Commission/Adjudicating Officer has wide power to add a party. The respondents in the interlocutory application contended that the Adjudicating Officer has no jurisdiction to join any new party to the dispute referred to him by the State Commission. The petition to implead the 2nd respondent filed more than three years after the non-compliance with the backing down instructions is barred by law of limitation. Order I Rule 10 of the Code of Civil Procedure, 1908 and Section 21 of the Limitation Act, 1963 stand against the petitioner. There is no privity of contract between the petitioner and the 1st respondent and the 1st respondent cannot be made liable to any damages/claims and no relief is claimed against the 2nd respondent. All the obligations arising out of the Power Purchase Agreement, the Electricity Act and the Grid Code are to be performed by the petitioner and the 2nd respondent and the 1st respondent is responsible only to perform its obligations under the O & M contract. The 2nd respondent reserved its right to file a detailed counter against the allegations, averments and claims of the petitioner in the main petition and hence requested for dismissal of the petition for want of jurisdiction for the Adjudicating Officer.

7. The original respondent filed a Memo on 22-11-2013 narrating the events making it evident that the petitioner is aware of the respondent being the O & M operator of the proposed respondent and that the respondent is authorized to issue despatch instructions on behalf of GVK Industries Limited.

8. The Adjudicating Officer passed orders on 27-12-2013 referring to the pleadings and contentions of both parties and opined that delay in filing the implead petition by itself is not an incurable defect. He also opined that power to implead the parties to the proceedings is not given to the Adjudicating Officer under Section 143 of the Electricity Act, 2003 and the Commission alone is competent to take a decision with regard to the said petition. It would be appropriate to the Commission to examine the judgments cited and hence the Adjudicating Officer referred the petition for impleadment of the 2nd respondent to the Commission for taking suitable necessary action.

9. The learned counsel for both parties are heard in extenso.

10. The point for consideration is whether the proposed 2nd respondent has to be ordered to be impleaded and whether an Adjudicating Officer should be appointed afresh for holding an inquiry into the matter?

11. Both parties referred to various precedents in support of their respective contentions, the principles laid down by which need to be referred to for their application to the facts of the present case.

12. In *M/s. C. Doctor And Company Ltd., Vs M/s. Belwal Spinning Mills Limited AIR 1995 Allahabad 19*, the order of the Trial Court rejecting an application for impleadment was upheld firstly due to the proposed party being not a necessary or a proper party and the learned Judge also observed the reasoning to be correct that the claim against the proposed defendant already became barred by limitation. Thus, it is clear that the failure of the request for impleadment was more due to the proposed party being not a proper and necessary party and the bar of limitation was only a secondary aspect.

13. Similarly, in *Shiv Dayal Kapoor and others Vs. Union of India AIR 1963 Punjab & Haryana 538*, rule of privity of contract that no one but the parties to a contract can be bound by it or entitled under it was reiterated, but in so far as the proposed respondent is concerned, it is the contention of the respondents themselves that the Power Purchase Agreement was between the AP Transco and the 2nd respondent between whom a privity thus undoubtedly exists. In so far as the 1st respondent is concerned, in the order dated 15-04-2013, the Commission not only observed that the Electricity Act, 2003 prevails over the Power Purchase Agreement, but also appointed an Adjudicating Officer between the petitioner and the 1st respondent to inquire into the claim for imposition of the specified penalty for each non-compliance, notwithstanding the contention of the 1st respondent about the mis-joinder/non-joinder of necessary and proper party and absence of any obligation for the 1st respondent to follow any instructions of the petitioner. This order of the Commission dated 15-04-2013 remained unchallenged by either party so far and has become final. In obedience to the said order, the Adjudicating Officer commenced and continued the proceedings in which the petitioner and the 1st respondent participated without any protest and it may be too late in the day for the 1st respondent to contend that it is not liable for any of the reliefs claimed by the petitioner due to the absence of privity of contract. The 1st respondent cannot hence contend at this stage that it is not a necessary and proper party to the inquiry before the Adjudicating Officer due to absence of any privity of contract, while however it is open to the 1st respondent to establish before the Adjudicating Officer the absence of any liability for it for the reliefs claimed due to the absence of any privity of contract with the petitioner.

14. In Chhattisgarh State Electricity Board Vs. Central Electricity Regulatory Commission, the Apex Court in C.A.No.37598/2007 dated 15-04-2010 held that Section 5 of the Limitation Act cannot be invoked for entertaining an appeal filed beyond the period of limitation prescribed by the Electricity Act, 2003 which special limitation was prescribed by a special legislation. Incidentally, the Supreme Court analyzing the provisions of the Electricity Act, 2003 referred to the exclusion of jurisdiction of the Civil Courts qua an order made by an Adjudicating Officer. The decision attempted to be relied on by the respondent as laying down that the limitation prescribed by the Limitation Act is applicable when the special Act does not prescribe any period of limitation, has in fact laid down that the Electricity Act, 2003 is a self contained comprehensive legislation.

15. Director of Enforcement Vs. MCTM Corporation *AIR 1996 SC 1100* is a case where the concept of penalty was discussed in depth and penalty imposed for tax delinquency was held to be a civil obligation, remedial and coercive in its nature. How the principle helps the respondent to be relied on is unintelligible, when the Electricity Act, 2003 was held by the Apex Court to be a self contained comprehensive legislation.

16. In T.N. Generation and Distribution Corporation Limited Vs. PPN Power Generating Company Private Limited *2014 (11) SCC 53*, the Apex Court was considering the question of limitation and held that in any event, the Limitation Act is inapplicable to proceedings before the State Commission. That was also a case where a money claim was made in 2009 for the alleged dues starting from 2001.

17. The petitioner also relied on Tribhuban Parkash Nayyar Vs. The Union of India *AIR 1970 SC 540*, Dhannalal Vs. Kalawatibai *AIR 2002 SC 2572*, A.P. Gas

Power Corporation Vs. A.P. State Regulatory Commission & another *AIR 2004 SC 3090* and Amar Chandra Chakraborty Vs. The Collector of Excise *AIR 1972 SC 1863* to emphasize that there cannot be a right without a remedy and also to indicate that the words in Section 33 of the Electricity Act, 2003 in sub-section (2) including any other person connected with the operation of the power system as being obligated to comply with the directions issued by the State Load Despatch Centre under sub-section (1) thereof will make the 1st respondent also liable to comply with the directions of the petitioner notwithstanding any claims about the nature of the relationship of the 1st respondent in law with the 2nd respondent or the petitioner.

18. The written and oral arguments on behalf of the respondents were primarily directed against the delay and laches on the part of the petitioner in taking any steps for impleading the 2nd respondent and if the petition for impleadment of the 2nd respondent is not barred by any law of limitation with the Limitation Act being inapplicable to the proceedings before the State Electricity Regulatory Commission, as held by the Apex Court, such delay or laches may not be capable of being the solitary ground for rejection of the request of the petitioner. If according to the respondents, the Adjudicating Officer has no jurisdiction to accept or reject impleadment, then the petitioner should have a remedy to enforce its rights against the 2nd respondent before some other appropriate Forum and there could not have been any other Forum except this Commission to have a reference made by the Adjudicating Officer. Reference to adjudication being made by a statutory act of this Commission, any consequential steps that have to be taken to protect the rights of the parties have to be before the Commission. If the Adjudicating Officer was construed to be having no role except to inquire into what has been referred to him,

the reference by the Adjudicating Officer to the Commission on the interlocutory application for impleadment itself cannot be considered impermissible or illegal though there is no specific provision for the same. Such a question has to be considered as incidental, consequential and an inherent part of the jurisdiction conferred on the Commission and the Adjudicating Officer under Sections 33, 143 and 144 together.

19. The objections of the respondents about the format of the application are too technical and they deserve no in-depth reference and similar are the claims about seeking to implead the 2nd respondent only by way of abundant caution. Even if there is any inartistic or inadequate drafting, the question whether the 2nd respondent is a necessary and proper party or not cannot be lost sight of and once the 2nd respondent were to be impleaded, the 2nd respondent would also be subject to inquiry into the liability for any penalty against it.

20. Even otherwise what all Section 55 of the Electricity Act, 2003 covers is the liability for payment of any compensation for breach of any contract and the liability herein under Section 142 to be inquired into and adjudicated under Section 143 or taking into account the factors prescribed by Section 144 over which jurisdiction of the Civil Court is excluded by Section 145 is for payment of any penalty or additional penalty by way of punishment. The respondents hence cannot take shelter under Order I Rule 10 sub-Rule (5) of the Code of Civil Procedure, 1908 or Section 21 or Article 55 of the Limitation Act, 1963, even if the inquiry before the Adjudicating Officer were to be considered to be within the scope of Section 29 (2) of the Limitation Act, 1963. In considering the contentions of the parties about the jurisdiction of the Adjudicating Officer to make a reference of the impleadment

petition to this Commission or the jurisdiction of this Commission to decide any such interlocutory application on such reference, this Commission did not have the benefit of any rules framed by appropriate Government governing the procedure for holding an inquiry by the Adjudicating Officer, though Section 143 of the Electricity Act, 2003 prescribed that the inquiry shall be held in such manner as may be prescribed by the appropriate Government. No rules appear to have been made by the State Government under Section 143 (1) read with Section 180 (2) (I) under which the State Government is empowered to make rules by notification about the manner of holding an inquiry by an Adjudicating Officer like the rules made by the Central Government under the Procedure for Holding Inquiry by Adjudicating Officer Rules, 2004.

21. The other contentions of the respondents about the merits of the dispute are for the Adjudicating Officer to inquire into and suffice it to say that the contentions about the bar of limitation or privity of contract to exonerate either respondent on merits cannot non-suit the petitioner in the interlocutory application for impleadment of the 2nd respondent. While the 2nd respondent has to be hence impleaded, as already stated, the appointment of the Adjudicating Officer by the erstwhile Andhra Pradesh Electricity Regulatory Commission has become final and as the then Member of the then Commission had to leave the inquiry half way through due to the subsequent circumstances leading to constitution of the present Commission, a fresh Adjudicating Officer, who is a Member of the Commission as of now has to be appointed as such to continue and complete the process of inquiry against both the respondents.

22. Before parting, it has to be made clear that this order is confined to consideration of the request for impleadment of the 2nd respondent and the necessity of appointing another Adjudicating Officer though on the rival contentions of the parties, the point that received consideration included the maintainability of the petition as originally framed, invalidity of the backing down instructions, the jurisdiction to implead the 2nd respondent and various other issues, which rightly form the subject matter of the inquiry before the Adjudicating Officer. The discussion herein should be specifically and unambiguously understood as being confined to the impleadment of the 2nd respondent and the appointment of a fresh Adjudicating Officer without ever intending to express any final opinion on merits on the subject matter of the inquiry before the Adjudicating Officer. All such questions falling within the scope of the inquiry and within the jurisdiction of the Adjudicating Officer must be considered to have been left open to be decided on merits by the Adjudicating Officer.

23. Therefore, I.A.No.38 of 2013 is allowed without costs and the 2nd respondent is impleaded in O.P.No.12 of 2010 and the 1st respondent is at liberty to file any additional reply and the 2nd respondent is at liberty to file its reply in O.P.No.12 of 2010 before the Adjudicating Officer and the petitioner is at liberty to file its rejoinders to any such replies before the Adjudicating Officer, before the Adjudicating Officer proceeds further with the inquiry.

24. Therefore, Sri P. Rama Mohan, Hon'ble Member of this Commission is appointed as Adjudicating Officer under Section 143 of the Electricity Act, 2003 to conduct an inquiry into the matter, as contemplated under Sections 33, 143 and 144 of the said Act and in conducting such inquiry, he shall also be guided by the orders

of the Commission dated 15-04-2013 and any rules framed by the State Government under Section 143 (1) read with Section 180 (2) (I) of the Electricity Act, 2003. This petition is closed with the above directions.

This order is corrected and signed on this **23rd day of May, 2015.**

Sd/-
P. Rama Mohan
Member

Sd/-
Dr. P. Raghu
Member

Sd/-
Justice G. Bhavani Prasad
Chairman