



## ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION

4<sup>th</sup> Floor, Singareni Bhavan, Red Hills, Hyderabad 500 004

SATURDAY, THE SEVENTH DAY OF DECEMBER  
TWO THOUSAND AND NINETEEN

:Present:

**Sri Justice C.V. Nagarjuna Reddy, Chairman**  
**Dr. P. Raghunath, Member**  
**Sri P. Rama Mohan, Member**

O.P.No. 9 of 2018

**Between:**

1. M/s. Manihamsa Power Projects Limited
2. M/s. Knowledge Infrastructure Systems Private Limited ... **Petitioners**

**A N D**

1. Andhra Pradesh Power Co-ordination Committee
2. Eastern Power Distribution Company of Andhra Pradesh Ltd.
3. Southern Power Distribution Company of Andhra Pradesh Ltd. ... **Respondents**

This Original Petition has come up for hearing finally on 03-12-2019 in the presence of Sri Challa Gunaranjan, learned counsel for the petitioners and Sri P. Shiva Rao, learned Standing Counsel for the respondents. After carefully considering the material available on record and after hearing the arguments of the learned counsel for both parties, the Commission passed the following:

**ORDER**

This Original Petition under Section 86 (1) (f) of the Electricity Act, 2003 read with Conduct of Business Regulation 2 of 1999 has been filed by a company running a Mini Hydel power plant and a power trader, purchasing power from the former and supplying the same to the respondents, for recovery of a sum of Rs.1,45,37,521.47 ps from the respondents.

2. The substance of the averments in the petition is briefly summarized hereunder:

After obtaining permission from the erstwhile APSEB and NEDCAP, petitioner No.1 has set up a 3 MW (2 x 1.5 MW) hydel project. Petitioner No.1

commissioned the project on 17-01-2001. Petitioner No.1 was later accorded permission for enhancement of station capacity from 3 MW to 4.5 MW (2 x 1.5 MW + 1 x 1.5 MW). The 4.5 MW power has to be produced by 3 units of a capacity of 1.5 MW each. While a capacity of 3 MW lay on the left vent as Stage-I, a capacity of 1.5 MW lay on the right vent as Stage-II. A Power Purchase Agreement ("PPA") was entered into between petitioner No.1 and APTRANSCO on 28-07-2004 for a period of 20 years for a total capacity of 4.5 MW at the rate of Rs.1.91/kWh upto the target PLF of 35% and Rs.0.25/kWh thereafter. Vide G.O.Ms.No.98 (Irrigation and CAD:PW-Reforms) dated 25-05-2006, the Department of Irrigation accorded permission to the petitioner No.1 to use 600 cusecs of water with the installation of measuring device subject to the payment of water rate at the rate of Rs.5.50 per gallon. As Stage-II was under construction at the time of signing the long term PPA dated 28-07-2004, petitioner No.1 had approached this Commission and later the Hon'ble APTEL for deletion of 1.5 MW (Stage-II) from the purview of the said PPA. As the said request was rejected by this Commission, the Hon'ble APTEL however allowed Appeal No.97/2007 by its order dated 01-04-2008, whereby Stage-II was deleted from the scope of the PPA. With the result, the PPA was confined only to Stage-I of 3 MW capacity. Subsequently Stage-II was commissioned on 06-04-2011 and energy was being supplied to respondent No.2 under Short Term PPAs from April, 2011 onwards. Petitioner No.2 which is a power trader approached petitioner No.1 with an offer to purchase 1.48 MW of power at the rate of Rs.4.97 per unit for the period from 01-07-2012 to 30-05-2013. Petitioner No.1 consented to the request of petitioner No.2 for supply of 1.48 MW from June, 2012 to February,

2013 and 1.20 MW from March, 2013 to May, 2013. In view of the consent of petitioner No.1, petitioner No.2 approached respondent No.1 for supply of power and respondent No.1 has issued purchase order dated 04-06-2012 in favour of petitioner No.2 for supply of 1.48 MW from petitioner No.1's Stage-II hydel plant for the period from 01-07-2012 to 30-05-2013 at a price of Rs.5.00 per unit including trading margin. From 01-07-2012, petitioner No.1 started supply of power as per the purchase order dated 04-06-2012 and petitioner No.2 consequently raised weekly invoices as per the "Billing Cycle" clause of the purchase order from 08-07-2012 onwards. Until 30-09-2012, petitioner No.2 has raised bills aggregating to Rs.1,23,03,924/-. Respondent No.1 paid an amount of Rs.33,47,264/- on an adhoc basis without specifying the period for the payments made. Thus, an amount of Rs.89,56,660/- was outstanding by 01-09-2012. Respondent No.1 vide letter dated 06-10-2012 alleged that petitioner No.1 allocated water resources to the hydel units under Stage-II disproportionately and willfully diverted water resources to Stage-II units, so as to benefit from the higher tariffs fixed by the said units. Respondent No.1 had also alleged that out of the total of 33 MU produced by the project during the period from April, 2011 to April, 2012, 15 MU were produced from Stage-II and only 18 MU were produced from Stage-I and alleged an estimated loss of Rs.1,40,00,000 /- on account of the same. Petitioner No.1 vide its letter dated 08-10-2012 denied the said allegation and informed that Stage-I was designed to run at the reservoir level between 76-84 meters, while Stage-II was designed to run at 68-84 meters level and that further, Stage-I was a medium head power plant, operative at 34 meters height and Stage-II was a low head power plant, operative at 24 meters height of the reservoir and that

the alleged discrepancy was only due to the water levels available in the reservoir and that the release of water depends entirely on the Irrigation Department. Petitioner No.1 sent further letters dated 16-11-2012 and 22-11-2012 reiterating the contents of its previous letter dated 08-10-2012. Petitioner No.1 also addressed letters dated 10-12-2012, 22-11-2012, 04-12-2012, 18-12-2012, 14-02-2013, 01-03-2013 and 11-03-2013 to the CMD of APTRANSCO stating that due to withholding of amounts of Rs.1.40 crores, they were not able to even meet the O & M expenses and facing criminal cases registered against them by their creditor, M/s. IREDA for dishonouring of cheques. Respondent No.2 appointed a committee to examine the alleged discrepancies regarding the generation of power and allocation of water, pursuant to which, the committee inspected the site of the petitioner No.1 on 23-09-2014. The committee addressed letter dated 24-09-2014 requesting petitioner No.1 to furnish certain documents and information, which was complied with by the latter and a report was prepared by the committee after perusing the documents and that copy of the same was not furnished to the petitioners. The petitioners understand that the committee did not find any irregularity or illegality in either allocation/drawals of water or the consequent generation of power from Stages-I & II. While petitioner No.1 continued to pursue with the respondents for payment, respondent No.1 issued letter dated 06-07-2017 to petitioner No.1 requesting to approach this Commission to resolve the dispute on the billing. Petitioner No.1 filed an application dated 07-07-2017 to the State Public Information Officer, APTRANSCO requesting for furnishing certain reports. The State Public Information Officer, APTRANSCO vide letter dated 04-09-2017 denied

the said request. Petitioner No.1 has filed an appeal before the First Appellate Authority, APTRANSCO which vide letter dated 09-10-2017 rejected the request of the petitioner No.1. In fact the petitioners understand that various committees after physical inspection and evaluation of the relevant documents have categorically found that there is no disproportionate allocation/drawal of water by the petitioners among Stages-I & II.

**3.** On behalf of respondent Nos.1 to 3, a counter affidavit has been filed by CGM of respondent No.3 wherein the allegations made in the petition except those were admitted have been denied. Respondents pleaded that there are two penstocks from the reservoir, one from the right vent chamber and the other from left vent chamber, that out of the two penstocks, one is used for Stage-I (two units) and the other is used for Stage-II, that the Irrigation authorities decided the quantity of water to be discharged daily and instructed the generator to utilize the same, that the generator has to utilize 460 cusecs of water for Stage-I and the balance, if any, for Stage-II, that therefore, upto 460 cusecs discharge of water, only Stage-I is to be operated and Stage-II is to be operated when discharge is over and above 460 cusecs, that service gates of the left and right vents are to be regulated by the irrigation authorities for required discharge from the reservoir and that if not the generator can regulate the water to the Stages-I & II individually by regulating the main inlet valves (butterfly valves) of the individual turbines. Hence, regulation of water to individual Stages of the project is very much possible. Thus, instead of utilizing water allocated to Stage-I, petitioner No.1 has diverted the water meant for Stage-I to Stage-II project and derived undue financial benefit as higher rate was prescribed for Stage-II power. The counter affidavit while denying the height of the heads of Stages-I & II, as the reason for Stage-II generating more power, further averred that petitioner

No.1 could generate 77,550 units from Stage-I during June, 2012 even at a head of 72.28 meters and that after commissioning of Stage-II, petitioner No.1 allowed more water through Stage-II turbine on priority, that PLFs during 2011 and 2012 are 91.1% and 68.22% respectively for Stage-II and 71.54% and 45.35% for Stage-I. That if water was allowed through Stage-I upto 460 cusecs of discharge during 2011, Stage-I would have achieved more than 71.54% PLF.

**4.** We have heard Sri Challa Gunaranjan, learned counsel for the petitioners and Sri P. Shiva Rao, learned Standing Counsel for the respondents/utilities.

**5.** Learned counsel for the petitioners submitted that the respondents have unjustly deprived the petitioners of the amount legitimately due to them towards the value of the power received by them from the petitioners on totally non-existent grounds. He further submitted that committees constituted by respondent No.1 have not found any irregularities as alleged by the respondent No.1 in utilizing water. The learned counsel further submitted that in spite of petitioner No.1 approaching the respondents for furnishing reports, the same were not furnished. The learned counsel also submitted that allocation of water is not in the hands of petitioner No.1 as the same is regulated by the officials of the Irrigation Department and that therefore the allegation made by the respondents was without any semblance of truth.

**6.** While denying the submissions of the learned counsel for the petitioners, learned Standing Counsel for the utilities submitted that the claim of the petitioners is barred by limitation. While fairly conceding that the counter affidavit did not raise the averment of limitation, the learned counsel relied upon Section 3 of the Limitation Act, 1963 and submitted that even in the absence of an averment, the application is liable to be dismissed although limitation is not set up as a defence. The learned

counsel submitted that under clause 5 of Annexure-I to the PPA dated 28-07-2004 between the parties, the final bill shall have to be raised by MPPL as per MRI energy certificate issued by EBC wing or JMR readings or as per contracted quantum whichever is less as per energy settlement clause and reconciliation of bills will be done on monthly basis after receipt of JMR/MRI and that under clause 6, due date for payment of energy bills would be eighth day after the date of receipt of fax/email bill subject to receipt of original invoice within due date. The learned counsel accordingly submitted that as the power was supplied by the petitioners between 08-07-2012 and 30-09-2012 and invoices/bills were raised, therefore as per the aforementioned agreement clauses, the due date for payment of the bills occurred latest by 2<sup>nd</sup> fortnight of October, 2012 and that as per Article 58 of Schedule I to the Limitation Act, the limitation commences when the right to sue first accrues. Learned counsel accordingly submitted that the right to sue accrued on the failure of respondent No.1 to make payment on due dates, the limitation of 3 years prescribed in the said Article expired latest in 2015 and that therefore the claim of the petitioners is clearly barred by limitation.

7. The learned counsel for the petitioners submitted that limitation would not start running till the claim is denied and that a lot of correspondence went between petitioner No.1 on one side and the respondents on the other side commencing from 06-10-2012 till 06-07-2017 regarding payments to be made to the petitioners and that as respondent No.1 itself vide its letter dated 06-07-2017 requested petitioner No.1 to approach this Commission, without specifically denying their liability, limitation has not commenced either till or after filing of the O.P. The learned counsel accordingly submitted that objection raised as to the limitation by the learned counsel has no merit and the same is liable to be rejected.

8. Having regard to the pleadings of the parties and submissions of the counsel representing them, the points that arise for determination are:

1. Whether the O.P. is barred by limitation? and
2. Whether the petitioners are entitled to recovery of the money claimed in the petition from the respondents?

9. The necessity of considering claim of the petitioners on merits would arise only if they succeed on point No.1 viz., limitation. In other words, if the claim is found barred by limitation, the need to consider the merits of the case is obviated. We shall therefore deal with point No.1 first. Before discussing this point on merits, it needs to be noted that the controversy as to whether Limitation Act applies to a Tribunal like this Commission has been set at rest by the Hon'ble Apex Court in A.P. Power Coordination Committee Vs Lanco Kondapalli Power Limited (**Judgment dated 16-10-2015 in Civil Appeal No.6036/2012**). After considering the judgments of the Hon'ble Apex Court in Tamil Nadu Generation & Distribution Corporation Limited Vs PPN Power Generating Company (P) Limited (**2014**) 11 SCC 53 and Consolidated Engineering Enterprises Vs Irrigation Department (**2008**) 7 SCC 169, the Hon'ble Supreme Court held that the claim coming before the Commission cannot be entertained or allowed if it is barred by limitation prescribed for Original Suit before a Civil Court. That in any case, a specified period may be excluded on account of principles underlying statutory provisions like Section 5 or Section 14. Such limitation upon the Commission would be only in respect of judicial power under clause (f) of sub-clause (1) of Section 86 and not in respect of other powers and functions which may be administrative or regulatory. That in the absence of any provision in the Electricity Act, 2003 creating a new right upon a claimant to claim even monies barred by law of limitation or taking away the right of the other side to take lawful



defence of limitation and in the light of the nature of judicial power conferred on the Commission, claims coming before it cannot be entertained or allowed if they are found legally not recoverable in a regular suit or other regular proceedings such as arbitration on account of law of limitation. With this position in law in mind we shall now deal with point No.1.

**10.** There is no gainsaying the fact that the respondents have not raised limitation as defence in their counter affidavit. However, Section 3 (1) of the Limitation Act, 1963 mandates that subject to the provisions contained in Sections 4 to 24 (inclusive) every suit instituted, appeal preferred and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence. This is evidently for the reason that Limitation Act is founded on public policy [See Basavaraj and another Vs Special Land Acquisition Officer AIR 2014 SC 746]. In Binod Bihari Singh Vs Union of India 1993 (1) SCC 572, the Hon'ble Apex Court held that bar of limitation can be considered even if it is not specifically raised and that limitation Act is a statute of repose and bar of a cause of action in a court of law, which is otherwise lawful and valid, because of undesirable lapse of time as continued in the limitation Act, has been made on a well accepted principle of jurisprudence and public policy. Hence, an obligation is cast on this forum to examine whether the petitioners filed O.P. within the prescribed period of limitation, though the respondents have not raised the said plea as a defence in the counter affidavit, but pressed into service during hearing orally. We shall therefore examine whether the claim is barred by limitation.

**11.** The petitioners *inter alia* sought for a declaratory relief to declare the action of the respondents in holding of the sum of Rs.1,45,37,521.47 ps by the respondents

as illegal and arbitrary and for a consequential relief of direction to the respondents to pay the said outstanding amount was also sought.

**12.** Part III of Schedule to Limitation Act prescribed limitation for declaratory reliefs. Article 58 deals with residuary reliefs of declaration. As neither of the reliefs claimed in the instant petition falls under Articles 56 and 57 preceding Article 58 under Part III, the reliefs claimed in this petition fall under Article 58. Under this Article, the limitation prescribed for obtaining the reliefs is three years which commences when “the right to sue accrues”. The question therefore that arises for consideration under point No.1 is when did the right to sue first accrue? In the O.P. in Para 8 of the petition, the petitioners averred that from 01-07-2012 the supply of power was commenced, that petitioner No.2 consequently raised weekly invoices as per the “Billing Cycle” clause of the purchase order from 08-07-2012 onwards and that until 30-09-2012, petitioner No.2 had raised the bills vide appendix 1, 2, 3 and 24. That out of the said amount, Rs.33,47,264/- was paid by respondent No.1 and from 01-09-2012 onwards an amount of Rs.89,56,660/- was outstanding. It is therefore evident from the petitioners’ own averment, the amounts fell due for payment by 01-09-2012. This averment was evidently made based on clauses 5 and 6 of Annexure-I to the PPA. It is instructive to reproduce the said clauses hereunder:

“5. Billing Cycle: Weekly bills may be raised provisionally by MPPL on the basis of SLDC schedules and reconciliation of energy will be made at the end of the month. For the purpose of raising of weekly bills the month shall be divided into four parts i.e., from 00.00 hrs of 1<sup>st</sup> of the month to 24:00 hrs of 8<sup>th</sup>, from 00:00 hrs of 9<sup>th</sup> to 24:00 hrs of 15<sup>th</sup>, from 00:00 hrs of 16<sup>th</sup> to 24:00 hrs of 23<sup>rd</sup> and 00:00 hrs of 24<sup>th</sup> to 24:00 hrs of last day of the month. The final

bill shall have to be raised by MPPL as per MRI energy certificate issued by EBC wing or JMR readings or as per contracted quantum whichever is less as per energy settlement clause and reconciliation of bills will be done. Settlement/reconciliation of energy (energy true up) will be done on monthly basis after receipt of JMR/MRI.

6. Payment: The due date for payment (both energy bills and open access bills) would be eighth 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 Hyderabad/Delhi, the immediate next working day would be treated as due date. Please note that the bill received by KISPL before 02.00 P.M. on a working day 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”.

From the above reproduced clauses, it is evident that after raising of weekly bills on provisional basis, final bills shall have to be raised and the due date for payment would be eighth day after receipt of the fax/email bill subject to receipt of original bill within the due date. If the due date is a Bank holiday in Hyderabad/Delhi the immediately next working day would be treated as due date. It is therefore clear without any pale of doubt, as averred by the petitioners themselves that the amounts fell due by 01-09-2012. If the respondents have not made payment on the due dates, the right to sue accrued to the petitioners on or around 01-09-2012. Instead of approaching this Commission, the petitioners engaged themselves in rather needless correspondence with the respondents for about five years and on the

purported advice of respondent No.1 vide its letter dated 06-07-2012, the petitioners finally approached this Commission by filing a petition in January, 2018. Thus, the petitioners availed their remedy before this Commission more than 1½ years after the expiry of limitation of 3 years from the time, the right to sue accrued.

**13.** The submission of the learned counsel for the petitioners that as the respondents have not denied their liability but were only disputing their liability, limitation has not started running, is without any merit. As observed hereinbefore, the petitioners' right to sue accrued within the meaning of Article 58 when the respondents have failed to make payment by the due dates. The law is well settled that the correspondence between a debtor and a creditor will not extend the limitation unless by such correspondence debtor has acknowledged his liability within the meaning of Section 18 of the Limitation Act (See ONGC Vs Essar Oil Limited (**vide Judgment dated 17-01-2016**)). Far from such acknowledgment, the respondents kept on disputing their liability. We are therefore of the opinion that the petitioners cannot derive benefit from prolonged litigation or from the purported advice of respondent No.1 to the petitioners to approach this Commission for redressal of their grievance. Needless to observe that the issue of limitation does not depend upon the concession by a party unless such concession amounts to acknowledgment of debt. As observed hereinabove, from none of the correspondence emanating from the respondents, any such acknowledgment could be culled out. In the light of the discussion undertaken above, this Commission has no hesitation to hold that the declaratory claim by the petitioners is clearly barred by limitation. Point No.1 is accordingly answered.

**Point No.2:** In the light of the findings on point No.1, there is no necessity to deal with the merits under this point.

**14.** In the result, the Original Petition is dismissed. No costs.

This order is corrected and signed on this the **7<sup>th</sup> day of December, 2019**

**Sd/-**  
**P. Rama Mohan**  
**Member**

**Sd/-**  
**Justice C.V. Nagarjuna Reddy**  
**Chairman**

**Sd/-**  
**Dr. P. Raghu**  
**Member**