

No. N/127/2020

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,

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

Dated: 05.03.2021

Present

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

OP No.55/2020

BETWEEN:

Bangalore Electricity Supply Company Ltd,
K.R. Circle,
Bangalore – 560009.
[Represented by Shri S. Sriranga, Advocate]

...Petitioner

AND:

Walwhan Renewable Energy Ltd,
C/o Tata Power Company Limited,
Center, B, 344, Sant Tukaram Road,
Carnac Bunder, Mumbai – 400009.

...Respondent

ORDERS

1. The Petitioner Bengaluru Electricity Supply Company Limited filed this petition under Section 62, 86 (1) (b) 86 (1) (f) of the Electricity Act 2003, seeking the following reliefs:
 - a. Redetermine the tariff for purchase of additional energy from Respondent at Rs. 2.36 per unit; orIn the alternative

- b. Relieve the Petitioner from its obligation to purchase additional energy beyond the contracted capacity specified in the PPA's dated 14.01.2015 for reasons stated herein.
2. The relevant facts of the case required for the purpose of disposing the controversy involved in this case may be stated as follows:
 3. The Petitioner is a Government Company incorporated under the provisions of the Company's Act 1956, who is a Distributing Licensee under the provisions of Electricity Act 2003. The Respondent Walwhan Renewable Energy Limited previously known as Welspun Solar Kannada Private Limited is a company engaged in the business of generating electricity.
 4. The Respondent entered into a Power Purchase Agreements (PPA) dated 14.01.2015 with the Petitioner a Distributing Licensee for the sale of solar energy from its Solar Photo Voltic (PV plants) of 50 MW each established at Kushtagi Taluk in Koppal District. As per Article 5.6 of PPA maximum energy to be purchased by the Petitioner was 91.980 MU with a maximum of 21%. The Respondent generated power over and above the said CUF and injected the same into the grid, sought for payment for such power injected by him to the grid. The Petitioner did not accede to the request of the Respondent for such a payment as the PPAs entered into between the Respondent and the Petitioner did not contemplate such an agreement.
 5. The Respondent SPD being aggrieved, filed OP 78/2016 before this commission seeking a direction to the Petitioner to purchase additional energy produced in the initial years of the PPA at the rate of Rs. 6.51 per

unit as per the tariff order passed by the commission dated 30.07.2016 with other reliefs. The Commission partly allowed the petition and directed the Respondent BESCO in the said petition to purchase the additional energy injected at a tariff of Rs. 4.11 per unit. The commission directed the parties to execute SPPAs incorporating a terms regarding purchase of additional energy injected into the grid. However, the Respondent generating company did not approach the Petitioner BESCO for execution of the supplemental PPA pertaining to the purchase of additional energy. Instead of approaching the Petitioner for execution of the SPPAs, the Respondent generating company filed a complaint CP No. 5/2019 before the commission alleging that the petitioner failed to execute the supplemental PPA in respect of purchase of additional energy, wilfully disobeyed the order passed by the Commission in OP 78/2016. The Petitioner on appearance filed objections to the complaint and the Commission by its order dated 29.05.2020 directed the Petitioner to pay for the additional energy if any injected by the Petitioner's project from 07.08.2019 and also directed the Respondent BESCO in the said case to make payment at Rs. 4.11 per unit as directed in OP 78.2016 dated 02.02.2017. It was also ordered to execute SPPAs between the parties within 4 weeks from the date of the order passed in Complaint No. 5/2019 in respect of purchase of additional power injected into the grid from 07.08.2019.

6. It is contended by the Petitioner that after passing the order by the Commission on 29.05.2020 several developments have taken place in the

energy sector which necessitated for filing the present petition. When the Respondent generating company came forward for execution of the SPPA in the month of August 2019 there was tremendous change in the power requirement of the Petitioner company. There was a drastic decline in the tariff of solar power in the State, at the time of passing the order dated 02.02.2017 in OP 78/2016 by the Commission that the Petitioner was facing the power shortage was willing to sign the SPPAs. However, the Respondent come forward to execute SPPA after a lapse of 2 years and during this intervening period the Petitioner already entered into long terms contracts from the other power generating companies to purchase the solar power at the rate of Rs. 2.85 and Rs. 2.90 etc., Therefore, signing of Supplemental PPA with the Respondent at Rs. 4.11 per unit in respect of additional energy injected by the Respondent is not viable. The solar energy is presently available in the open market at the rate of Rs. 2.36 per unit, the procurement of additional energy at the tariff of Rs. 4.11 per unit will burden the Petitioner company which will affect on the tariff being sold to the consumer.

7. In view of the changed scenario and developments referred above the Petitioner addressed a letter to the Respondent dated 19.08.2020, informed the Respondent that the lowest tariff discovered by SECI in recent bids called in respect of solar PPA projects is Rs. 2.36 per unit and called upon the Respondent to communicate as to whether it is willing to sell the additional power at Rs. 2.36 per unit. However, the Respondent by its letter dated 31.08.2020 shown its disagreement for the proposal of the

Petitioner. At present there is no need for the Petitioner to procure additional infirm power at Rs. 4.11 per unit, as the Petitioner is unable to sell the power available from already tide up contracts, since most of the high paid HT consumers are opting for open access since the rate in open market is comparatively less than that of the Petitioner's tariff. The Commission being the repository of consumer interest and the regulator is required to relieve the obligation of purchasing power at cost which is higher than the one prevailing in the market. The redetermination of tariff would be in the interest of the consumers and distribution company prayed for allowing the petition.

8. On 02.02.2021 we heard the Learned Counsel appearing for the Petitioner regarding the maintainability of the petition.
9. Perused the petition, the documents produced by the Petitioner.
10. On the above contentions, the point that arise for the consideration of this Commission is:
 - a) Whether the Petition filed seeking redetermination of the tariff for purchase of additional energy from the Respondent at Rs. 2.36 per unit due to availability of the cheaper solar energy presently in the open market is maintainable when the orders passed by the commission in OP 78/2016 and Complaint No. 5/2019 attains finality?
 - b) Whether the Petition in the present form is maintainable?

11. Both issues are interlinking each other and we propose to answer the same by a common discussion and our answer to the above points are in the:
- a) Negative.
 - b) Negative.
12. Before advertizing with the contentions raised by the Petitioner we would like to refer some of the undisputed facts in this case.
13. The Respondent Walwhan Renewable Energy filed OP 78/2016 against the Petitioner BESCO to issue directions for purchasing additional energy produced in the initial years of the PPA at the rate of Rs. 6.51 per unit as per the tariff order passed by the Commission dated 30.07.2016. After hearing the parties to the petition, the Commission passed the order which reads as under:
- 1) The above Petition is partly allowed;**
 - 2) The 1st Respondent (BESCO) is directed to purchase the additional energy, if any, injected from the Petitioner's Projects at Rs. 4.11 (Rupees Four and Paisa Eleven) only per unit during the term of the PPAs; and**
 - 3) Accordingly, Supplemental Agreements incorporating the additional term in the two Power Purchase Agreements dated 14.1.2015, regarding the purchase of additional energy, be entered into by the parties.**
14. The Respondent filed Complaint No. 5/2019 under Section 142 of the electricity act 2003, before the Commission praying to initiate appropriate proceedings against the BESCO for contravention and wilful disobedience of the directions issued by the Commission in OP 78/2016 dated 02.02.2017 and to issue direction for execution of the SPPA in

respect of purchasing additional energy as directed in the order of the commission. On hearing of the both parties the Commission passed the following order:

- 1) For the additional energy, if any, injected from the petitioner's project from 07.08.2019 the Respondent shall make payment at Rs. 4.11 per unit as directed in the Order dated 02.02.2017 in OP No. 78/2016.**
- 2) The SPPAs shall be executed by the parties within four weeks from the date of this Order, to incorporate a term regarding purchase of additional energy, injected into the grid from 07.08.2019, at Rs. 4.11 per unit, for the term of the PPA and sent to the Commission for approval.**
- 3) The complaint petition is disposed of with the above directions.**

15. It is not in dispute that none of the parties to this petition challenged the orders passed in OP 78/2016 and orders passed in complaint No. 5/2019 before the competent authority, the orders passed by the Commission remained unchallenged and reached its finality. Instead of complying with the directions issued in the complaint No. 5/2019, the Petitioner filed this petition for redetermination of the tariff at Rs. 2.36 per unit for the additional energy injected by the Respondent to the grid due to the availability of solar energy presently in the market at the rate of Rs. 2.36 per unit, the Petitioner sought for relieving from its obligation to purchase additional energy from the Respondent at Rs. 4.11 per unit. The Petitioner is seeking negotiation of tariff which was already decided by the Commission and those two orders have achieved its finality.
16. Instead of executing SPPA as directed by the Commission in complaint No. 5/2019, the Petitioner sent a communication to the Respondent

seeking its consent for a reduced tariff of Rs. 2.36 per unit for taking forward and execution of SPPA as per the direction of its Board. The very communication issued by the Petitioner is in violation of the order passed by the Commission, which is nothing but showing disregard and disrespect to the orders passed by the Commission. When the Commission passed an order directing the Petitioner BESCO to purchase additional energy injected to the grid by the Respondent at Rs. 4.11 per unit from 07.08.2019 and to enter into a SPPA incorporating necessary recitals in respect of additional power injected, the Petitioner is duty bound to honour and implement orders/directions issued by the Commission in letter and spirit.

17. It is contended by the Petitioner that there has been a tremendous change in the power requirement of the Petitioner company and submitted that there has been a drastic decline in the tariff of solar power in the State. In view of the changed scenario the Petitioner in this petition sought for redetermination of the tariff at Rs. 2.36 per unit and alternatively to relieve the petitioner from its obligations to purchase the additional energy from the Respondent.
18. On plain reading of the petition averments including the documents produced in the case, though this petition is styled as a petition for redetermination of the tariff, actually the Petitioner is seeking review of the order passed by the Commission in Complaint Petition No. 5/2019 dated 29.05.2020.
19. Section 94 Sub Clause 1 (f) of the Electricity Act empowers the Commission for reviewing its decisions, directions and orders equivalent to that of the

Civil Court. The proceedings before the Commission are deemed to be Judicial proceedings as stated under Section 95. The power of review is a creature of the statute and no court, quasi-judicial body or administrative authority review judgement, order or decision unless the authority is legally empowered to do so. The Hon'ble Supreme Court in a reported decision 2012 SCC 200-208 observed that court or tribunal had no inherent power of review, such a power must be conferred by law either specifically or by implication (AIR 1917 SC 1273).

20. The Hon'ble Supreme Court in a reported decision 2013 SCC 3301 (Kamlesh Verma V/s. Mayavati) enumerated the broader principles of review of a decision or order. The following grounds of review are maintainable as stipulated by the statute:

(A) When the review will be maintainable: -

- (i) Discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the petitioner or could not be produced by him:**
- (ii) Mistake or error apparent on the fact of the record;**
- (iii) Any other sufficient reason;**

The words 'any other sufficient reason has been interpreted in Chaajju Ram V Neki AIR 1922 SC 112 and approved by Apex Court in Moran Mar Basselios Catholicos V, Most Rev, Mar Poulouse Athanasius & Ors., (1955) 1 SCR 520; (AIR 1954 SC 526), to mean 'a reason sufficient on grounds at least analogous to those specified in the rule.'

The same principles have been re-iterated in a decision Union of India V Sandur manganese & Iron Ores Ltd & Ors., JT 2013 (8) SC 275: (2013) AIR SCW 2905).

(B) When the review will not be maintainable: -

- (i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.**
- (ii) Minor mistakes of inconsequential import.**
- (iii) Review proceeding cannot be equated with the original hearing of the case.**
- (iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.**
- (v) A review is by no means an appeal in disguise whereby an erroneous decision is re heard and corrected by lies only for patent error.**
- (vi) The mere possibility of two views on the subject cannot be a ground for review.**
- (vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.**
- (viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.**
- (ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived.**

21. Broadly the Petitioner has to seek review of the judgment or order on the following grounds:

- (i) Discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the petitioner or could not be produced by him;
- (ii) Mistake or error apparent on the fact of the record;
- (iii) Any other sufficient reason;

The words 'any other sufficient reason has been interpreted in Chaajju Ram V Neki AIR 1922 SC 112 and approved by Apex Court in Moran Mar Basselios Catholicos V, Most Rev, Mar Poulouse Athanasius & Ors., (1955) 1 SCR 520; (AIR 1954 SC 526), to mean 'a reason sufficient on grounds at least analogous to those specified in the rule.' The same principles have been reiterated in Union of India V Sandur manganese & Iron Ores Ltd & Ors., JT 2013 (8) SC 275: (2013) AIR SCW 2905).

22. Keeping in mind the principles rendered in the above said decisions of the Apex Court, on examination of the petition and the records produced makes it clear that the Petitioner has failed to produce any material regarding the discovery of new and important matter or evidence which was brought on record. No mistake or error apparent on the face of the record or any other sufficient reasons for review was brought before the Commission. The effect of allowing this petition is to nullifying the earlier two orders passed by this Commission. Therefore, the petition filed by the Petitioner styled as a redetermination of the tariff for purchase of additional energy and in the alternative relieving the petitioner from its obligations to purchase additional energy from the Respondent is held to be not maintainable.
23. The Respondent filed complaint No. 7/2020 under section 142 of Electricity Act 2003, for initiating appropriate proceedings for contravention and wilful disobedience of the direction issued by the Commission which is pending consideration. During the pendency of the said complaint the Petitioner to avoid punitive action being taken against it, filed this frivolous petition for redetermination of the tariff already fixed and in the alternative to relieve the petitioner from its obligation to purchase additional energy

beyond contracted capacity specified in the PPA is nothing short of contemptuous and amounts to over reaching the orders passed by the Commission. This type of short cut method adopted by the Petitioner is highly condemnable, accordingly the petition filed by the petitioner is not maintainable.

24. It is not in dispute that the Petitioner (BESCOM) in this case, who was arrayed as the first Respondent in OP 78/2016 itself offered to purchase the additional energy from the generating company (Respondent in this case) at the power purchase cost of Rs. 4.11 per unit, the same was approved by the Commission through its order dated 02.02.2017. When the offer of the Petitioner was accepted by the Commission in the previous proceedings, now the Petitioner is estopped from seeking either redetermination of the Tariff or relieving the Petitioner from its obligation to purchase additional energy beyond the contracted capacity specified in the PPA.

25. Looking from any angle the petition filed by the Petitioner is liable to be dismissed as not maintainable. The Learned counsel appearing for the Petitioner placed his reliance on the decisions rendered in:

1. *Appeal No. 87 of 2015 – Gulbarga Electricity Supply Company Limited v. Karnataka Electricity Regulation Commission & Anr.*
2. *Appeal No. 271 of 2015 – Karnataka Power Transmission Corporation Ltd & Anr v. Soham Phalguni Renewable Energy Pvt Ltd.*
3. *Bangalore Electricity Supply Company Limited v. Konark Power Projects Limited and Another (2016) 13 SCC 515.*

We have gone through the principles rendered in the said decisions. The judgement of the Appellate tribunal for electricity in Appeal No. 87/2015 and Appeal No. 271/2015 which are dealt by the Appellate Tribunal in respect of the revision of tariff. The Hon'ble Supreme Court in a reported decision 2016 13 SCC 515 BESCO V/s Konark Power Projects Limited and Another rendered the ratio as under: -

“Infrastructure Laws – Energy and Power – Electricity – KERC (Power Procurement from Renewable Sources by Distribution Licensee) Regulations, 2004 – Regns. 5.1, 5.2, 5.3 and 5.4 – Power of State Commission to vary tariff agreed to in power purchase agreement (PPA) under 2004 Regulations – Availability of

_ Held, State Commission under Regns. 5.1, 5.2, 5.3 and 5.4 of 2004 Regulations has power to vary tariff only prior to fixing of tariff – Once PPAs are concluded and agreement are entered into between parties, Regn. 5.1 of 2004 Regulations alone will apply i.e. that the power purchase agreement, once approved by the Commission, such agreement should continue to remain for the period mentioned in the said agreement – Further held, proviso to Regn. 9 of 2011 Regulations creates an embargo on altering tariff with respect to PPAs covered under previous Regulations.”

The principles rendered in the above said decisions relied on by the Advocate for the Petitioner are not squarely applicable to the case of the Petitioner, the principles rendered in those decisions are not applicable to the facts and circumstances of this case.

26. In view of the discussion made above, we are of the considered opinion that the petition filed by the Petitioner is not maintainable. Accordingly, Point No. 1 and 2 are answered in the negative.

27. In the result, we proceed to pass the following:

ORDER

The petition is dismissed as not maintainable.

sd/-

(SHAMBHU DAYAL MEENA)
Chairman

sd/-

(H.M. MANJUNATHA)
Member

sd/-

(M.D. RAVI)
Member