

No.N/91/2020

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION

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

Dated: 31.03.2021

Present

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

Complaint No.04/2020

BETWEEN:

Messrs Perla Hydro Power Private Limited,
A company registered under Companies
Act, 1956, having its Registered Office at
No.701-7-2, Prestige Meridian-2,
No.30, M.G. Road,
Bengaluru-560 001.

(Represented by its authorized signatory
Mr. Sri Hari Bhagavan)

.... Complainant

(Represented by Sri Aditya Narayan of
M/s Sakshya Law Advocates)

AND:

1) Mangalore Electric Supply Company Limited (MESCOM)
Corporate Office, MESCOM Bhawana,
Kavoor Cross Road, Bejai,
Mangalore-575 004.
(Through its Managing Director)

..... Respondent No.1

2) Mr. Srinivas D.R.
Chief Financial Officer, MESCOM,
Corporate Office, MESCOM Bhawana,
Kavoor Cross Road, Bejai,
Mangalore-575 004.

..... Respondent No.2

- 3) Ms. Padmavathi D.
Director Technical, MESCOM,
Corporate Office, MESCOM Bhawana,
Kavoor Cross Road, Bejai,
Mangalore-575 004. **Respondent No.3**
- 4) Mr. Nagaraja G.P.
Superintending Engineer (Coml),
MESCOM, Corporate Office,
MESCOM Bhawana,
Kavoor Cross Road, Bejai,
Mangalore-575 004. **Respondent No.4**
- 5) Mr. Deepak H.S.
Executive Engineer (EBC), MESCOM
Corporate Office, MESCOM Bhawana,
Kavoor Cross Road, Bejai,
Mangalore-575 004. **Respondent No.5**
- 6) Ms. Seema M.R.
Assistant Executive Engineer (EBC),
MESCOM Corporate Office,
MESCOM Bhawana,
Kavoor Cross Road, Bejai,
Mangalore-575 004. **Respondent No.6**
- 7) Mr. Suresh C.
Assistant Executive Engineer (Ele),
O&M City Sub-Division, MESCOM
Bhadravathi-577 301. **Respondent No.7**

(Respondents No.1 to 7 represented by
Sri Shahbaaz Husain, Advocate
for M/s Precincts Legal)

ORDERS

1. This is a Complainant filed under Section 142 of the Electricity Act, 2003
praying for the following reliefs:
- (a) To exercise its plenary jurisdictions under Section 142 of the
Electricity Act, 2003 and impose penalty/ies on the Respondents,
as this Hon'ble Commission may deem fit, for their persistent
contravention of the Interim Order dated 19.09.2019 passed by this

Hon'ble Commission in OP No.54/2019 and for each day of the contravention;

- (b) To declare the letters dated 02.03.2020 issued by the Respondents (Annexure-G1 to Annexure-G7) as invalid and direct the Respondents to withdraw the demand for arrears towards CSS and Electricity Tax, as shown in the said letters;
- (c) To direct the Respondents to effect appropriate and consequent adjustments and entries in their books of accounts pursuant to the aforesaid directions of this Hon'ble Commission;
- (d) To grant cost of these proceedings; and
- (e) To grant such other and further reliefs as this Hon'ble Commission deems fit in the facts and circumstances of the case, in the interest of justice.

2. The material facts pleaded by the Complainant, relevant for the disposal of this complaint may be stated as follows:

- a) The Complainant owns a Mini-Hydel Project at Shambur village in Bantwal taluk of Dakshina Kannada district in Karnataka. It is wheeling the energy to different Open Access (OA) consumers within its jurisdiction mainly situated within CSD Sub-Division, Bhadravati and another in Karkala Sub-Division. The Wheeling & Banking Agreement (WBA) was executed between the Complainant on one hand and the 1st Respondent (MESCOM) & others. The energy wheeled for the months of June 2018 to December 2018, the OA consumers were treated as captive consumers of the Project, thereby the Cross Subsidy Surcharge (CSS) and additional surcharge were not imposed on them. The said

bills are at Annexure-B1 to B8. However, for the energy wheeled for the month of January 2019 (Annexure-B9) CSS and additional surcharge were imposed on OA Consumers. Thereafter, the Complainant filed OP No.54/2019 against the 1s Respondent (CESC) mainly claiming that the OA consumers of the Complainant were captive consumers, thereby CSS & additional surcharges should not be imposed for the energy wheeled to them. In OP No.54/2019 on 19.09.2019, this Hon'ble Commission passed the interim order, the relevant portion of which is as follows:

"Therefore, considering the facts and circumstances, the learned counsel for the Petitioner also made a submission that, the Petitioner would undertake to file an Affidavit, in detail, requesting the Respondents for issuance of an OM, treating the OA consumers as 'captive consumers', for the months of July, August, September and October, 2019 subject to the final decision of this Commission in the pending matter. Accordingly, the Interim Order is granted.

Call on 22.10.2019, for filing the Statement of Objections to the main Petition."

- b) From the above interim order dated 19.09.2019, it is clear that for the months of July to October, 2019 also the OA consumers of the Complainant were treated as non-captive consumers. In para 9 of the complaint, it is stated that the said OA consumers paid the CSS & additional surcharge as per the demands made for the months of July to October 2019.
- c) Pursuant to the interim order dated 19.09.2019, the OA consumers were treated as captive consumers and revised OMs were issued towards the

wheeling of energy for the months from July to October 2019. They are at Annexure-E1 to E4.

- d) In para 10 of the complaint, it is stated that after issue of revised OMs for July to October 2019, the Respondents treated the excess amount paid by the OA consumers as credit lying to their accounts, for future adjustments. In para 11 of the complaint, it is stated that thereafter the Respondents adjusted the said credits against the subsequent bills issued to the OA consumers for the months of November & December 2019.
- e) In the bills issued to OA consumers towards the wheeling of energy for the month of January 2020, the Respondents treated the amounts earlier taken to the credit of respective accounts of OA consumers on issuance of the revised Oms, were reversed and in the bills issued for the month of January 2020, demand for that month as well as the amounts so reversed were claimed.
- f) The OA consumers objecting the reversal of the credit of the amounts and its demand being included in the bills for the month of January 2020, wrote letters dated 26.02.2020 to the 7th Respondent, the AEE, O&M Sub-Division. The Complainant has produced Annexure-F, the letter dated 26.02.2020 written by one of the OA consumers namely; M/s Pragathi Steel Castings Private Limited to the AEE, O&M Sub-Division, MESCOM, Bhadravati.

- g) Without specifically referring to the letter dated 26.02.2020 (Annexure-F), the 7th Respondent AEE, O&M Sub-Division, MESCOM, Bhadravati has clarified in his letter dated 02.03.2020 (Annexure-G3) addressed to M/s Pragathi Steel Castings (P) Limited, that the arrears claimed would be withdrawn after the approval of the Corporate Office for reversal of the demands on revision of the bills from the non-captive to captive status of OA consumers. Similar letters were issued to other OA consumers (Annexure-G1, G2, G4 to G7).
- h) For the above reasons, the Complainant has stated that the Respondents have willfully disobeyed and contravened the interim order dated 19.09.2019 passed by this Commission and accordingly filed the present complaint on 01.07.2020. In view of prevailing COVID-19 Pandemic/ Lockdown situation, at the relevant time, the KERC was not conducting Court cases in the open Court Hall and subsequently this complaint was taken up for hearing on 22.10.2020 through Video-Conferencing, after notifying parties.
3. The Respondents 1 to 7 appeared through their counsel and the 4th Respondent has filed the Statement of Objections to the Complaint. The relevant portion of Statement of Objections may be stated as follows:
- a) In accordance with the interim order dated 19.09.2019 passed by this Commission, this Respondent has issued revised OMs by treating the OA consumers of the Complainant as captive consumers and the revised OMs are at Annexure-E1 to E4 produced along with the complaint.

- b) For the energy wheeled for the month of January 2020, this Respondent has issued bills on the OA consumers of the Complainant, wherein due to inadvertence the arrears towards the Cross Subsidy Surcharge (CSS) and Electricity Tax had been claimed.
- c) Such inadvertent demands have been withdrawn vide letters dated 04.11.2020 and 06.11.2020 marked at Annexures-R1 & R2 respectively. Thereby the OA consumers of the Complainant were not liable to pay the CSS and additional surcharge and Electricity Tax and the earlier amount paid by those OA consumers towards CSS and additional surcharge and Electricity Tax have been considered as credits in the accounts of OA consumers and have been adjusted towards monthly consumption bills of the OA consumers.
- d) In view of the aforesaid letters and the adjustment of amounts to the respective OA consumers towards the bills payable by them, the instant complaint has become infructuous and does not survive for consideration.
4. The Complainant has alleged in its affidavit dated 15.01.2021 stating that Respondents have violated the interim order dated 19.09.2019 again committing the same mistake by issuing OM for the month of July 2020 by treating the Complainant's OA consumers as non-captive and claimed the CSS etc.,

5. In reply to it, one V. Harish Kumar, working as Superintending Engineer (Ele.) (Commercial), MESCOM, Mangaluru has filed affidavit dated 09.02.2021 stating that the OM for the month of July 2020 was issued treating the OA consumers of the Petitioner as non-captive believing that the interim order dated 19.09.2019 of this Commission was operative only till the month of April 2020 but not for the further period. However, upon being made aware of the Orders of the Hon'ble High Court of Karnataka, extending the interim orders of all the Courts, Tribunals and Commissions under its jurisdiction, this Respondent issued revised OM by treating the OA consumers of the Petitioner as captive consumers from August 2020 onwards. Further it is stated that though for the month of July 2020, the CSS, etc., were claimed, the same were not enforced. Subsequently, the amended OM dated 30.01.2021 (Annexure-A to the Affidavit) for the month of July 2020 was issued clarifying that the OA consumers were treated as captive consumers.
6. In respect of two OA consumers namely; (i) Messrs Shanthala Spherocast Private Limited, Bhadravati; & (ii) Messrs Lamina Foundries Limited, Karkala, the Complainant has expressed the grievances that the OMs of these two OA consumers have not been issued for the month of August 2020. The Respondents have admitted this fact and filed Memo dated 03.03.2021 explaining that such OMs have not been issued as these two OA consumers had pending revenue arrears against them, not connected with the CSS and other charges of the said OA consumers. Advocate for the Complainant submitted that the non-issuance of OMs for the month of

August 2020 in respect of these OA consumers amounts to non-compliance with the interim order. Thereafter, the Respondents have issued amended OMs even in respect of these two OA consumers as per the amended OMs dated 17.03.2021 produced along with Memo dated 18.03.2021. The learned counsel for the Respondents submitted that even in respect of these two OA consumers, the interim order stood complied with.

7. We have heard the learned counsel for the parties. The following points arise for our consideration:

Point No.1: Whether the Complainant has made out that the Respondents have contravened the interim order dated 19.09.2019 passed in OP No.54/2019?

Point No.2: What Order?

8. After considering the relevant provisions of law and the facts of case, our findings on the above Points are as follows:

9. Point No.1: Whether the Complainant has made out that the Respondents have contravened the interim order dated 19.09.2019 passed in OP No.54/2019?

a) Before analyzing the merits of the rival contentions, it is appropriate to know the nature and scope of the proceedings under Section 142 of the Electricity Act, 2003. The said provision makes it clear that the proceedings under it are in the nature of quasi-criminal proceedings. In that event, the burden of proof would be on the Complainant to prove that the person/s complained of has/have intentionally or deliberately contravened the direction/s issued by the Commission. A mere technical contravention of the direction/s of the Commission, is not

sufficient to impose the penalty prescribed under the said Section 142 of the Electricity Act, 2003. In this regard, we may quote the decision of the Hon'ble Supreme Court of India reported in 1969 (2) SCC 627 (M/s Hindustan Steel Limited Vs. State of Orissa) dealing with similar issue, the relevant portion of which is as follows:

“8.....An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances.”

- b) (i) The 1st fact alleged by the Complainant is that for the month of January 2020, the Respondent treated the amounts earlier taken to the credit of respective accounts of OA consumers on issuance of the revised OMs, were reversed and in the bills issued for the month of January 2020, the demand for that month as well as the amounts so reversed were claimed.
- (ii) In reply to it, the 7th Respondent in its letters dated 02.03.2020 addressed to all OA consumers, has stated that for reversing the credit entries in the ledger relating to the recovery of CSS, etc., the approval of the Corporate Office was required and on getting such approval, the credit entries should be reversed. It is told that such a procedure is in vogue in maintaining the books of accounts. It may

be seen that the interim order in question was passed on 19.09.2019 directing to treat the OA consumers as captive consumers for the month of July, August, September and October, 2019. It is a fact that before passing this interim order, the OA consumers were treated as non-captive consumers and CSS etc., were levied for the months of July & August, 2019. Therefore, it was required to make necessary entries in the books of accounts before repayment of the recovered amounts or its adjustments in future bills. Apart from it, the Respondents have stated in the objection that due to inadvertence, the previous claims towards CSS etc., were demanded in the bill for the month of January 2020. Subsequently, though there is some delay in getting the approval from the Corporate Office of MESCOM, the entries were reversed after the approval from the Corporate Office. Such an act or omission cannot be termed as intentional or deliberate.

- c) (i) The 2nd fact alleged by the Complainant is that the Respondents repeated the same mistake by issuing the OM for the month of July 2020 by treating the OA consumers of the Complainant as non-captive and claimed the CSS, etc.,
- (ii) In reply to it, one V. Harish Kumar, working as Superintending Engineer (Ele.) (Commercial), MESCOM, Mangaluru has filed affidavit dated 09.02.2021 stating the OM for the month of July 2020 was issued treating the OA consumers of the Petitioner as non-captive believing that the interim order dated 19.09.2019 of this Commission was

operative only till the month of April 2020 but not for the further period. However, upon being made aware of the Orders of the Hon'ble High Court of Karnataka, extending the interim orders of all the Courts, Tribunals and Commissions under its jurisdiction, this Respondent issued revised OM by treating the OA consumers of the Petitioner as captive consumers from August 2020 onwards. Further it is stated that though for the month of July 2020, the CSS, etc., were claimed, the same were not enforced. Subsequently, the amended OM dated 30.01.2021 (Annexure-A to the Affidavit) for the month of July 2020 was issued clarifying that the OA consumers were treated as captive consumers.

- (iii) It may be noted that OP No.54/2019 was being adjourned on different dates and the last hearing was on 03.03.2020, on which date the case was ordered to be listed on 06.04.2020 for hearing and the interim order was continued till that time. Due to Covid-19 pandemic and lock-down etc., prevailing in the State, the case could not be taken up for hearing on 16.04.2020 and onwards. Subsequently, nearly after eight months, the case is ordered to be listed on 21.01.2021. Therefore, the Respondents believing that the interim order was not in force in July 2020, appears to be not unacceptable. The Respondents have amended the OMs after coming to know that the Hon'ble High Court of Karnataka has extended the operation of the interim orders passed in Sub-Ordinate

Courts, Tribunals, Commission etc., by generic orders from time to time.

iv) From the above facts and circumstances, the 2nd fact relied by the Complainant is not sufficient to impose penalty against the Respondents.

d) The last fact relied on by the Complainant relates to the grievances of OA consumers namely; (i) Messrs Shanthala Spherocast Private Limited, Bhadravati; & (ii) Messrs Lamina Foundries Limited, Karkala. The details of grievances of the two OA consumers and the reply from the Respondents are narrated in para 6 of this Order. The explanation given by the Respondents that they did not issue OMs for the month of August 2020, in respect of these two OA consumers as they were in revenue arrears on some other head, cannot be rejected. In Power Sector, for supply of energy or for allowing the OA etc., the consumer/OA consumer is required to clear the arrears. However, to make the matter abundantly clear the Respondents have issued amended OMs even in respect of these OA consumers.

e) In spite of the above facts, we are constrained to observe that the Respondents could have been more diligent when there is an interim order in force in order to comply the same without giving any room to point the finger against them for non-compliance. The Respondents could have taken the legal advice before proceeding to take any action which would likely to contend the non-compliance of the interim order.

The Commission had issued notices for the personal appearance of the Director (Technical), MESCOM & Superintending Engineer (Commercial), MESCOM, but neither they were personally present on the date of hearing nor filed any affidavit as directed explaining the present status of the compliance report in terms of interim order. However, subsequently they filed the affidavit. We expect the officials to be more cautious in future to comply the directions issued by this Commission.

f) For the above reasons, we hold Point No.1 in negative.

10. Point No.2: What Order?

For the above reasons, we pass the following:

ORDER

The complaint is dismissed.

sd/-
(SHAMBHU DAYAL MEENA)
Chairman

sd/-
(H.M. MANJUNATHA)
Member

sd/-
(M.D. RAVI)
Member