ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION

4th Floor, Singareni Bhavan, Red Hills, Hyderabad 500004

TUESDAY, THE TENTH DAY OF AUGUST
TWO THOUSAND AND TWENTY ONE

:Present:
Justice C.V. Nagarjuna Reddy, Chairman
Sri Thakur Rama Singh, Member
Sri P. Rajagopal Reddy, Member

IA No.19 of 2019 in OP No.35 of 2019

Between :

M/s. Vayu Urja Bharat Private Limited,
202, Okhla Industrial Estate Phase-III,
New Delhi. .. Applicant/Petitioner

And

Southern Power Distribution Company of
Andhra Pradesh Ltd., D.No.19-13-65/A,
Srinivasapuram, Tiruchanoor Road,
Tirupati .. Respondent/Respondent

This I.A. has come up for hearing finally on 04-08-2021 in the presence of Sri Sajan Poovayya, learned Senior Counsel for the applicant and Sri P. Shiva Rao, learned Standing Counsel for the respondent, and upon hearing the arguments of the learned Counsel for both the parties, the Commission passed the following :

ORDER:

M/s. Vayu Urja Bharat Pvt. Ltd., the petitioner in OP No.35 of 2019 filed this I.A. under Section 142 of the Electricity Act (for short “the Act”)

r/w. Clause 55 of the APERC (Conduct of Business) Regulation 1999 to declare that the respondent is in violation of this Commission's order dated 31-08-2019 in OP No.35 of 2019. The applicant also sought for certain directions including that the respondent shall comply with order dated 31-08-2019 directing payment of arrears of charges for supply of electricity in monthly instalments of not less than Rs.16.40 crores by 15th of every month.

The brief facts leading to the filing of this I.A. are stated hereunder:

The applicant is a generating company owning and operating 120 MW wind power project at Guruvepalli/Marrimakula, Anantapuram District. The applicant entered into a Power Purchase Agreement (PPA) with the respondent on 28-07-2016 for the sale of entire electricity generated from its project for a period of 25 years. The tariff shall be firm at Rs.4.84 ps. per kwh without Accelerated Depreciation (ACD) from the date of operation as per the order dated 26-0-2018 in OP No.30 of 2016 of this Commission. The project was commissioned in phases on 31-03-2017, 29-11-2017 and 29-12-2017. The applicant was raising monthly invoices/bills and the respondent was making only part payments after deducting Generation Based Incentive (GBI) and HT

services. As no response was forthcoming from the respondent to the applicant's requests for prompt payments, it has filed OP No.35 of 2019 for a direction to the respondent to pay Rs.9,57,75,159/- towards partly paid monthly invoices from March 2017 to May 2018 and Rs.113,49,11,720/- towards unpaid monthly invoices from June 2018 till 6-3-2019 (date of filing of the OP) and Rs.6,47,00,015/- towards LPS/DPC within 7 days from the date of the order and also to further direct the respondent to pay carrying cost @ 15% per annum etc.

The respondent filed a counter wherein it has stated that the only issue surviving in the Petition was whether or not the respondent is liable to pay interest for the payments made after 30 days of receipt of bills. The respondent conceded that it will pay monthly bills to the applicant during the course of time as and when funds were available but at the earliest; that the Discoms are unable to pay the bill amounts on time as their financial condition is very bad and that in the near future also they will be unable to pay the bill amount within time even though they were trying to make payments without any default; that though the applicant is provided with the option under Articles 10.2 and 10.3 of the PPA to terminate the agreement in the event of default, it had not chosen to

terminate the PPA and that therefore the respondent may not be burdened with the payment of interest for delayed payments.

During the hearing of the O.P.No.35 of 2019, an attempt was made by the respondent to dissuade this Commission from disposing of the O.P. on merits in view of the pendency of W.P.Nos.9876 of 2019 and 11688 of 2019 on the file of the Hon'ble High Court of A.P. This Commission, however held that the issues raised in those Writ Petitions had no bearing on the Points raised in the O.P. After hearing both the sides, the Commission has disposed of the O.P. by its order dated 31-08-2019. While leaving the issues such as LPS/DPC/interest/carrying cost open to be determined on a future application, the Commission directed the respondent to pay all the amounts due to the applicant towards tariff/price payable under the PPA dated 28-07-2016 towards electricity generated and supplied by the applicant to the respondent from March 2017 to 31-08-2019 i.e., the date on which the O.P. was disposed of, in instalments of not less than Rs.16.40 crores p.m. by 15th of every month commencing from 15-09-2019 till the entire liability for the principal sum is discharged.

The petitioner in the O.P. filed the present I.A. on the ground that the respondent failed to abide by the order of this Commission by not paying the first instalment by the due date i.e., 15-09-2019.

The respondent filed a counter terming the same as a reply. It has inter alia relied upon the common order dated 24-09-2019 in W.P.No.9876 of 2019 whereby the Hon'ble High Court directed the respondent to pay Rs.2.43 ps. per unit in respect of the pending and future bills as an interim measure until disposal of OP No.17 of 2019. It was further pleaded that the respondent is making all out efforts to pay the pending bills as per the said direction; that in view of the above mentioned direction of the Hon'ble High Court in W.P.No.9844 of 2019 & Batch as well as in W.P.No.9876 of 2019 filed by the applicant, there is no non-compliance of any of the directions of this Commission.

The applicant filed a rejoinder. It is inter alia stated therein that the attempt of the respondent is to take shelter under the interim rate directed to be paid by the respondent. The applicant relied upon order dated 19-12-2019 in I.A.No.9 of 2019 in W.P.No.9876 of 2019 seeking review of the Judgment dated 24-09-2019 of the Hon'ble High Court and

averred that it was clearly mentioned in the said order that the order dated 24-09-2019 in W.P.No.9844 of 2019 contained a mistake and error apparent on the face of record and that the said order will not alter/modify the order under review passed after considering the facts, evidence and law by the Commission in O.P.No.35 of 2019.

The I.A. was heard from time to time and as per the interim orders passed at different times, payments were being made by the respondent progressively. On 16-06-2021, Sri P. Shiva Rao, the learned Standing Counsel for the respondent reported that entire arrears as per the order in OP No.35 of 2019 were cleared with the payment of Rs.55.64 crores made in pursuance of the undertaking given on 6-4-2021. However, Sri Aniket Prasoon, learned Counsel for the applicant has made detailed submissions in support of his contention that the respondent is due in a further sum of Rs.70.55 crores. With reference to the Memo of clarification filed by the applicant, the learned Counsel explained that the respondent has unjustly withheld Rs.70.54 croes towards GBI and Capacity Utilization Factor (CUF). At the request of Sri P. Shiva Rao, the application was adjourned to 4-8-2021 for making his submissions on

these aspects. Accordingly, the application was again heard on 4-8-2021.

Sri P. Shiva Rao, submitted that as per Clause 21 of Regulation No.1 of 2015, this Commission has declared CUF at 23.5 as one of the normatives to arrive at the tariff payable per unit; that if the power generated is in excess of the CUF and the same is liable to be purchased by the Discoms, the corresponding pass-on of such surplus generation would be an additional benefit to the generator but the same results in unjust burden on the Discoms. Therefore, submitted the learned Counsel, the Discoms have admitted the bills by placing a ceiling on CUF at 23.5. As regards GBI, he has submitted that the applicant has been receiving subsidy from the Government of India in the form of GBI @ Rs.0.50 ps. per unit with a ceiling of Rs.1 crore per MW; that although the component of subsidy i.e., ACD was considered by this Commission and issued orders for reduced tariff, the Commission has not given such reduced tariff in respect of GBI and that therefore the respondent was constrained to file OP No.1 of 2017 and this Commission vide its order dated 28-07-2018 directed the generators to pass on the benefit of GBI to the Discoms and that even during the

pendency of the said O.P., the respondents were continuing to reduce GBI amount from the bills of the generators who availed the said benefit. That the applicant and others have filed a Writ Petition wherein the Hon'ble High Court of A.P. has granted interim stay of the order of the Commission, but no further direction was given to the respondent to not deduct the GBI amount from the tariff and that since the respondent had been deducting the GBI amount even prior to the filing of OP No.1 of 2017, it continued the same after passing of the orders in OP No.1 of 2017. Sri Shiva Rao also relied upon the order dated 3-5-2018 of the Hon'ble APTEL in **Surat Municipal Corporation Vs. GERC**[1] and submitted that in that case the Hon'ble APTEL also held that the benefit of GBI amount has to be passed on to the Discoms. Finally, he has submitted that as the very order in OP No.35 of 2019 of this Commission and order dated 19-12-2019 of the Hon'ble High Court are subject matters of Civil Appeal and S.L.P. respectively, the present proceedings are not maintainable. In support of his submission, he has relied upon the decisions of the Hon'ble Supreme Court in **Union of India Vs. West**

[1] Appeal No.268 of 2015

Coast Paper Mills[2], Dharam Dutt Vs. Union of India[3] and **Omprakash Verma Vs. State of A.P.[4].**

Sri Sajan Poovayya, the learned Senior Counsel opposed the above submissions and argued that the respondent cannot be permitted to go behind the order in OP No.35 of 2019; that having not raised all those issues in the said O.P., the respondent cannot raise the same in the present I.A. which is in the nature of execution proceedings. As regards CUF, he pointed out that under Clause 2.1 of the PPA, the respondent is liable to pay for "all the units generated" as per the tariff agreed under the PPA and that therefore the respondent cannot limit payment by placing a ceiling on the CUF. With regard to the GBI, the learned Senior Counsel submitted that the Judgment in **Surat Municipal Corporation Vs. GERC (1-supra),** instead of helping the respondent will help the applicant, in that, the Hon'ble APTEL, while dealing with the issue whether Capital Financial Assistance (CFA) received by the power developer shall be deducted from the tariff, answered the same in the affirmative, but however it has made a distinction between CFA and GBI

[2] 2004(2) SCC 747
[3] 2004(1) SCC 712
[4] 2010(13) SCC 158

and held that unlike in the case of GBI, CFA shall be deducted while fixing the tariff. He has also submitted that in fact out of the total capacity of 120 MW, GBI is being allowed only for 70 MW as only the said capacity was commissioned by 31-12-2017 for being eligible for GBI.

Having regard to the respective pleadings and submissions of the parties and the respective learned Counsel, the short Point for consideration is whether the respondent has failed to comply with the order dated 31-08-2019 in OP No.35 of 2019 ?

Though the respondent has raised certain technical pleas such as non-maintainability of the I.A. in the absence of identifying the person who allegedly violated the Commission's order, during the hearing the said aspect has not been pressed into service by the learned Standing Counsel for the respondents. While the respondent has not disputed that certain arrears were due and payable towards the power purchased from the applicant, it has however claimed that after the case was adjourned on 6-4-2021, the entire outstanding amount was paid.

However, it is the case of the applicant that a sum of Rs.70.54 croes payable to it has been withheld in the name of GBI and CFA.

We shall first deal with the submissions of the learned Standing Counsel on the question of maintainability of the present I.A. in view of pendency of the Civil Appeal and the S.L.P. before the Hon'ble Supreme Court.

Sri P. Shiva Rao, contended that as the order in OP No.35 of 2019 of this Commission and the clarificatory order dated 19-12-2019 in I.A.No.9 of 2019 in W.P.No.9876 of 2019 have not attained finality as they have been questioned before the Hon'ble Supreme Court by way of Civil Appeal and the S.L.P. respectively, the present application is not maintainable. As noted above, to buttress these submissions, he has relied upon certain Judgments of the Hon'ble Supreme Court. We shall therefore discuss these Judgments.

In **Union of India Vs. West Coast Paper Mills Ltd., (2-supra),** a question arose as to whether for the purpose of limitation, the period during which the Civil Appeal was pending before the Hon'ble Supreme Court needs to be excluded or not ? The Apex Court held that once an

appeal is filed before it and the same is entertained, the Judgment of a High Court or a Tribunal is in jeopardy and that the subject matter of the lis, unless determined by the last Court, cannot be said to have attained finality; and that grant of stay of operation of the Judgment may not be of much relevance, once the Supreme Court grants Special Leave and decides to hear the matter on merits.

In **Dharam Dutt Vs. Union of India (3-supra)** the question was whether the Supreme Court could go into the validity or otherwise of a fresh ordinance in the light of certain observations made by the learned Single Judge in a High Court into which the Division Bench did not dwell with reference to the expired ordinance ? The Hon'ble Supreme Court observed that the decision of the learned Single Judge was not left unchallenged; that in fact the correctness of the Judgment of the learned Single Judge was put in issue by the Union of India by filing an intra-court appeal; that the filing of an appeal destroys the finality of the Judgment under appeal; that the issues determined by the learned Single Judge were open for consideration before the Division Bench and that as the Division Bench refused to dwell upon the correctness of the Judgment of the learned Single Judge and upon the lapsing of the

earlier ordinance pending appeal before the Division Bench, the Judgment of the learned Single Judge about the illegality of the earlier ordinance cannot any longer bar the Apex Court from deciding the validity of the fresh law on its own merits even if the fresh law contained similar provisions.

In **Omprakash Verma Vs. State of A.P., (4-supra),** the question was whether the earlier Judgments of the Andhra Pradesh High Court remained operative after the Hon'ble Apex Court allowed the appeals filed by the State Government and whether any observations made in those Judgments could be relied upon in a fresh round of litigation ? The Hon'ble Apex Court held that once the S.L.Ps. were filed against the Judgments of the High Court, finality of the said Judgments and all findings therein stood destroyed.

From the brief facts of the cases covered by the three Judgments of the Hon'ble Supreme Court referred to above, it is clear that none of them dealt with the plea as raised by the learned Standing Counsel in the instant case, namely, whether the order of the inferior Court becomes non-executable once the S.L.P/Appeal is filed and pending. In

all the cases dealt with by the Hon'ble Supreme Court, the question was one of 'finality' and not 'executability'. The said Judgments having been rendered while deciding different issues as explained above, cannot be of any help to the respondent. Once a Court or a Forum passes an order it is enforceable/executable unless the appellate Court/Forum intervenes and stays or suspends its operation. It is therefore preposterous to contend that once appeal is filed, the order appealed against would automatically become unenforceable. If that were to be so, there is no need for a provision for interim relief by the Appellate Fora. We therefore conclusively reject this plea of Sri P. Shiva Rao and hold that the present I.A. is maintainable.

With respect to the other submissions of the learned Counsel for the respondent, to recapitulate, the respondent has not raised these issues in defence in OP No.35 of 2019. The limited issues that were raised by it in the OP were regarding its liability to pay interest and the financial distress in which it was placed, disabling it to make payments on time. Indeed, the Commission has gone on record in para-10 of its order dated 31-08-2019 in OP No.35 of 2019 that insofar as the principal amount of the value of energy supplied is concerned, the

liability is not disputed and cannot be disputed. While directing payment of the principal amount due to the respondent in instalments of not less than Rs.16.40 crores per month by 15th of every month commencing from 15-09-2019 till the entire liability for the principal sum is discharged, the Commission observed as under :

> "The issues / claims relating to Generation Based Incentive and/or any other amounts, which are under adjudication before the Hon'ble High Court or the Hon'ble Appellate Tribunal for Electricity or the Hon'ble Supreme Court shall abide by the orders of the Hon'ble High Court or the Hon'ble Appellate Tribunal for Electricity or the Hon'ble Supreme Court, as the case may be, which orders are either in force or may be passed further or finally. The respondent is further directed to comply with all the terms and conditions of the Power Purchase Agreement dated 28-07-2016 with the respondent in respect of the electricity generated and supplied to it by the petitioner from today so long as the Power Purchase Agreement is in force including the obligation to make due payment for the delivered energy regularly hereafter....".

The above order of this Commission has attained finality. When the order in unequivocal terms directed compliance with the terms and conditions of the PPA in respect of the electricity generated and supplied, subject however to the final orders of the Courts/appellate Tribunal, the respondent is bound to comply with the same. As rightly

submitted by the learned Senior Counsel for the applicant, the respondent cannot expand the scope of this I.A. filed seeking effectuation of the order in OP No.35 of 2019 by raising issues for the first time. Admittedly, the order of this Commission directing refund of the GBI by the power developers to the respondent has been stayed by the Hon'ble High Court. Whatever be the effect of the said order, this Commission itself has clearly envisaged in its order in the O.P. that all the issues including GBI pending before the Hon'ble High Court and other Fora shall abide by the orders of the said Courts/Fora. This clearly implies that the Commission being conscious of the existence of a dispute regarding GBI, was not inclined to allow the respondent to withhold any amount under that head. Instead, it has unequivocally directed the respondent to pay *"all the amounts due to the petitioner towards tariff/price payable under the Power Purchase Agreement dated 28-07-2016 towards the electricity generated and supplied by the petitioner and supplied to the respondent from March 2017 to 31-08-2019...."*. We are therefore unable to accept the submission of the learned Standing Counsel that the respondent is entitled to withhold the

GBI component from the amount payable to the applicant, pending adjudication of the dispute thereon by the Hon'ble High Court.

As regards the CUF, while we do not intend to express any opinion on the justification or otherwise of the claim for payment for the units generated in excess of 23.5 CUF and instead leave it to be adjudicated in appropriate proceedings if and when raised by the aggrieved parties, we do not feel persuaded to approve the respondent's action in withholding any amount towards the same in the present case. It is not as if the issue of CUF has arisen after the disposal of the O.P.No.35 of 2019. The respondent has not raised this issue at all in the said O.P. On the contrary, the only issue that was raised was its liability to pay interest. Having not raised the said issue, the respondent cannot be permitted to raise the same in the proceeding initiated under Section 142 of the Act, for, the law is well settled that ordinarily in a proceeding instituted for execution of an order, the forum cannot go behind the order sought to be executed. The issue relating to CUF is however left open for the respondent to agitate in appropriate proceedings, if it so chooses.

As for the order in **Surat Municipal Corporation Vs. GERC (1-supra),** we are in agreement with the learned Senior Counsel for the applicant. The Hon'ble APTEL drew a distinction between GBI and capital subsidy in the form of CFA being granted by MNRE and held that while GBI stands on a different footing in view of Clause 4.6 of the scheme for continuation of GBI, CFA benefit must be passed on to the end consumers. This Judgment is therefore of no avail to the respondent. We however hasten to add that the above observations of ours shall not be understood as our expressing an opinion contrary to the Commission's earlier order on the issue of GBI, which is subjudice before the Hon'ble High Court. As observed in the order under execution, the parties shall abide by the Judgment of the Hon'ble High Court in the pending Writ Petition.

In the light of the above discussion, this Commission has no hesitation to hold that the respondent has only complied with the order of this Commission in part. Ordinarily, the respondent is liable for penalty for non-compliance of the order of this Commission in full. However, considering the fact that it has been progressively complying with the

order in part and its bad financial position, we are inclined to take a somewhat lenient view. The respondent is granted six weeks' time for payment of the withheld amount of Rs.70.54 crores towards GBI and CUF components. If such payment is not made within six weeks from today, the respondent shall be liable to pay Rs.1 lakh towards penalty apart from Rs.6000/- per day from the expiry of six weeks from today for all the period during which the violation continues.

The I.A. is accordingly allowed to the extent indicated above.

Sd/-	**Sd/-**	**Sd/-**
Thakur Rama Singh	**Justice C.V. Nagarjuna Reddy**	**P. Rajagopal Reddy**
Member	**Chairman**	**Member**