

**TAMIL NADU ELECTRICITY REGULATORY COMMISSION**

**Order of the Commission dated this the Day of 2<sup>nd</sup> July 2024**

**PRESENT:**

**Thiru M.Chandrasekar** ... **Chairman**

**Thiru K.Venkatesan** ... **Member**

**Thiru B.Mohan** ... **Member (Legal)**

**M.P. No. 41 of 2023**

M/s. Ind Bharath Power Generation Ltd.,  
New No.20 Old No.129,  
Chamiers Road, Nandanam,  
Chennai 600 035.

..... Petitioner  
(M/s.Shree Law Services)

**Versus**

1. Tamil Nadu Generation and Distribution  
Corporation Limited (TANGEDCO)  
10<sup>th</sup> Floor, 144, Anna Salai  
Chennai – 600 002.

2. OPG Power Generation Private Ltd.,  
P.S. Sivaswami Salai, Ebba's Avenue,  
Mylapore, Chennai 600 004.

3. MALCO Energy Ltd.  
(formerly The Madras Aluminium Co. Ltd.)  
Mettur R.S. Mettur Dam  
Salem District 636 402.

... Respondents  
(Adv.Richardson Wilson for R-1 &  
Adv.Rahul Balaji for R-2 & R-3)

The petition having come up for the final hearing on 14.05.2024 in the presence of Thiru T. Ravichandran, Advocate of M/s. Shree Law Services representing the petitioner; Thiru W. Richard Wilson, Advocate for the 1<sup>st</sup> Respondent; Thiru Rahul Balaji, Advocate for the Respondents 2 and 3 and upon hearing the arguments advanced by the respective counsel and on consideration of the materials available on record and the matter having stood over for consideration till date this Commission pass the following

### **ORDER**

1. This is a petition under Sec.142 and Sec. 146 of the Electricity Act, 2003 to initiate proceedings against the 1<sup>st</sup> respondent for non-compliance of the order passed by this Commission in R.A.No.3 of 2020 dated 09.02.2021 and in R.P. No.4 of 2021 dated 06.07.2023.
2. **The case of the petitioner in a nutshell:-**
  - 2.1.) The petitioner having installed a 3 x 63 MW coal based power plant, in the capacity of a Generating Company, was supplying power to the 1<sup>st</sup> respondent. In pursuance of the same the 1<sup>st</sup> respondent filed an application R.A.No.3 of 2020 for fixing of tariff for the period from June 2011 to May

2012. Vide order dated 09.02.2021, this Hon'ble Commission fixed the tariff at Rs.5/- per unit for the electricity supplied by the petitioner and the respondents 2 and 3 for the period from June 2011 to September 2011.

2.2.) Pursuant to the above said order, the petitioner addressed a letter to the 1<sup>st</sup> respondent dated 02.03.2021 calling upon the 1<sup>st</sup> respondent to pay the difference amount of Rs.36,67,09,694/- along with interest. The 1<sup>st</sup> respondent did not respond to the same. Subsequently, the 1<sup>st</sup> respondent filed a Review Petition R.P.No.4 of 2021 before the Hon'ble Commission to review the order dated 09.02.2021. Ultimately, the said Review Petition came to be dismissed by the Hon'ble Commission vide order dated 06.07.2023. Even during the pendency of the Review Petition, the petitioner through letters dated 13.03.2023 and 05.05.2023 called upon the 1<sup>st</sup> respondent to make immediate payment of a sum of Rs.36.67 crores together with interest at the rate of 12% per annum. After the dismissal of the Review Petition, the petitioner addressed a

letter to the 1<sup>st</sup> respondent reiterating its demand for payment. The 1<sup>st</sup> respondent did not respond to none of the correspondences.

2.3.) The 1<sup>st</sup> respondent has not preferred any Appeal against the orders dated 09.02.2021 and 06.07.2023 passed by the Hon'ble Commission. The conduct of the 1<sup>st</sup> respondent exhibit violation of the above explicit orders of the Commission. Hence the petitioner is constrained to file the present petition for initiating proceedings against the 1<sup>st</sup> respondent for the wilful, tenacious and continuous non-compliance of the orders passed by the Hon'ble Commission in R.A.No.3 of 2020 dated 09.02.2021 and in R.P.No.4 of 2021 dated 06.07.2023.

**3. The substratum of the case of the 1<sup>st</sup> respondent:-**

3.1. As per agreement dated 25.01.2011 executed by the 1<sup>st</sup> respondent TANGEDCO and PTC, the petitioner and the respondents 2 and 3 supplied power. In order to fix tariff for the power so supplied, the 1<sup>st</sup> respondent filed a petition being PPAP No.5 of 2011 before the Hon'ble Commission

and vide order dated 11.07.2011 tariff @ Rs.3.79 per unit for the period from July to September 2011 was fixed by the Commission.

3.2. The 2<sup>nd</sup> respondent filed Writ Petition No.18129 of 2011 before the Hon'ble High Court, Madras, challenging the above said order. By order dated 30.08.2019, the Hon'ble High Court remanded the matter to the Hon'ble Commission for fresh disposal. The Remand Application R.A.No.3 of 2020 was disposed of by the Hon'ble Commission vide Order dated 09.02.2021 wherein tariff was fixed at the rate of Rs.5/- per unit for the power injected between June 2011 and September 2011.

3.3. Aggrieved by the Order dated 09.02.2021, the 1<sup>st</sup> respondent filed a Review Petition being R.P.No.4 of 2021 before the Commission but the same came to be dismissed vide order dated 06.07.2023. Thereafter the 1<sup>st</sup> respondent preferred Appeal before the Hon'ble APTEL challenging the orders dated 06.07.2023 and 09.02.2021 passed by the

Commission and the same is pending in DFR No.710 of 2023.

- 3.4. The amount due to the 2<sup>nd</sup> respondent M/s. OPG was settled by the 1<sup>st</sup> respondent as the 2<sup>nd</sup> respondent came with an offer to waive 100% of the Late Payment Surcharge. The 3<sup>rd</sup> respondent vide letter dated 08.10.2023 came with an offer to waive 20% of the Late Payment Surcharge but the offer was not accepted by the 1<sup>st</sup> respondent. But negotiation is still going on in this regard.
- 3.5. An outstanding amount of Rs.172,65,21,717/- was due from M/s. Ind Bharath to the 1<sup>st</sup> respondent TANGEDCO. In this regard, several communications were sent to M/s. Ind Bharath but there was no response. On account of non-payment of the above referred outstanding due, the petitioner has caused huge financial loss to TANGEDCO.
- 3.6. The 1<sup>st</sup> respondent has preferred an application to condone the delay in preferring the appeal against the orders of the Commission dated 09.02.2021 and 06.07.2023 passed in R.A.No.3 of 2020 and R.P.No.4 of 2021 respectively. The

said application I.A.No.2649 of 2023 is pending for service of notice to the 3<sup>rd</sup> respondent M/s. OPG and the matter is posted on 06.05.2024.

3.7. The 1<sup>st</sup> respondent has no intention to disobey the orders passed by the Hon'ble Commission. There is no discrimination on the part of the 1<sup>st</sup> respondent in treating the petitioner and the respondents 2 and 3. The petitioner has deliberately suppressed the fact that a sum of Rs.172,65,717/- is due from the petitioner to the 1<sup>st</sup> respondent TANGEDCO. The 1<sup>st</sup> respondent has every right to pursue the appeal preferred before Hon'ble APTEL. The 1<sup>st</sup> respondent therefore prays for the dismissal of the petition.

**4. Essence of Rejoinder filed by the petitioner dated 07.05.2024:-**

4.1. Appeal has been preferred before the Hon'ble APTEL with an enormous delay of 1007 days and 130 days and the delay caused is yet to be condoned. Further no order of stay was granted by HON'BLE APTEL. It is false to aver that

there is an outstanding due of Rs.172,65,21,717/- from M/s.Ind Bharath to TANGEDCO.

- 4.2. Corporate Insolvency Proceedings were initiated against M/s. Ind Bharath Power Gencom Limited and ultimately the Company has gone on liquidation. The Liquidator had discharged his obligations enunciated under the I & B code and the assets of the Company as a going concern was sold to one Dr. Madala Srinivasa and Ms. Anita Madala, the successful auction purchasers. No claim came to be lodged by TANGEDCO either with the Resolution Professional or Liquidator either during CIRP or in the liquidation process. Hence appropriate orders need to be passed in the petition.

**5. Gist of the reply of the 1<sup>st</sup> respondent to the Rejoinder filed by the petitioner:-**

In respect of EHT SC.No.257, which belonged to the petitioner, as per accounts maintained by TANGEDCO an amount of Rs.57,33,30,674/- is due towards CC charges as on 30.06.2022. The EHT SC No.257 of M/s. Ind Bharath Power GenCom Ltd. came to be disconnected on 02.02.2022 on account of non-payment of outstanding arrears. Through communication dated



27.06.2022 the petitioner was called upon to pay the outstanding dues but the petitioner neither replied nor cared to pay the arrears amount. Without discharging its liability towards TANGEDCO, the petitioner cannot seek payment of amounts due from TANGEDCO more so when the appeal preferred by the 1<sup>st</sup> respondent is pending consideration of the Hon'ble APTEL.

6. Heard the oral arguments advanced on behalf of the petitioner and the 1<sup>st</sup> respondent. Written submissions filed on behalf of the 3<sup>rd</sup> respondent traversed. Records perused.
7. The seminal point that arises for determination in the present case can be enumerated as hereunder:-
  - i) Whether the accusation of the petitioner that the 1<sup>st</sup> respondent has wilfully failed to comply with the orders passed by the Commission dated 09.02.2021 and 06.07.2023 stand substantially established by the petitioner as required under law?
  - ii) Whether the petitioner is entitled to any relief?

## **8. Findings of the Commission:-**

### **8.1. Point No.1:**

The gravamen of the accusation levelled against the 1<sup>st</sup> respondent is that the 1<sup>st</sup> respondent has wilfully failed to comply with the orders dated 09.06.2021 and 06.07.2023 passed by the Commission in favour of the petitioner in R.A.No.3 of 2020 and R.P.No.4 of 2021 which warrant punishment contemplated under Sec.142 and 146 of the Electricity Act, 2003. The said accusation / complaint is being refuted by the 1<sup>st</sup> respondent contending that since appeal has been preferred before the Hon'ble APTEL challenging the impugned orders, the question of non-compliance of the orders does not arise at all and as a corollary the present petition is not maintainable under law being premature.

8.2. To appreciate and evaluate the rival contentions in the proper perspective it is essential to bear in mind the following indisputed facts which are discerned from the pleadings presented by both the parties.

8.2.1.) In pursuance of the agreement dated 25.01.2011 executed between the 1<sup>st</sup> respondent TANGEDCO and PTC, the petitioner and the respondents 2 and 3 supplied power to the 1<sup>st</sup> respondent. To have the appropriate tariff fixed for the power so supplied, the 1<sup>st</sup> respondent filed a petition before the Tamil Nadu Electricity Regulatory Commission (hereinafter referred to as Commission) being PPAP No.5 of 2011. The Commission vide order dated 11.07.2011 fixed tariff at the rate of Rs.3.79 per unit for the power supplied during the period from July 2011 to September 2011. Dissatisfied with the said order, the 2<sup>nd</sup> respondent filed a writ petition before the Hon'ble High Court, Madras in W.P.No.18129 of 2011. Through order dated 30.08.2019, the Hon'ble High Court while setting aside the order dated 17.07.2011 remanded the matter to the Commission for fresh disposal.

8.2.2) The Commission considered the matter afresh as R.A.No.3 of 2020 and passed an order dated 09.02.2021 whereby tariff was fixed at the rate of Rs.5.00 per unit for the power supplied between June 2011 and September 2011.

Aggrieved by the order dated 09.02.2021, the 1<sup>st</sup> respondent preferred a Review Petition being R.P.No.4 of 2021 before the Commission. After full-fledged enquiry the Review Petition was dismissed by the Commission vide order dated 06.07.2023.

8.2.3) Subsequent to the dismissal of the Review Petition, the 1<sup>st</sup> respondent preferred appeal before the Hon'ble APTEL challenging the orders dated 09.02.2021 and 06.07.2023. As delay had occurred in preferring the appeal, the 1<sup>st</sup> respondent has filed a separate interlocutory application to condone the delay. Vide Order dated 09.05.2024 the delay in preferring the appeal was condoned by the Hon'ble APTEL. The application preferred by the Appellant / 1<sup>st</sup> respondent for an order of stay is pending before the Hon'ble APTEL.

9. Records disclose that through letters dated 13.03.2023; 05.05.2023 and 10.07.2023 the petitioner made demand with the 1<sup>st</sup> respondent to make payment in obedience to the order passed by the Commission in R.A.No.3 of 2020 dated 09.02.2021. The factum of issuance of the above referred letters by the petitioner to the 1<sup>st</sup> respondent is not denied in the counter affidavit filed by the 1<sup>st</sup>

respondent. The vital fact that 1<sup>st</sup> respondent had not made any payment to the petitioner in compliance with the order dated 09.02.2021 passed by the Commission in favour of the petitioner in R.A.No.3 of 2020 is not denied by the 1<sup>st</sup> respondent. Hence it is pellucid that the order dated 09.02.2021 passed by the Commission had not been complied with by the 1<sup>st</sup> respondent as averred by the petitioner.

10. A cursory reading of the provisions of Sec.142 and Sec. 146 of the Electricity Act, make it abundantly clear that before exercising the power vested in those provisions of law, a duty is cast upon the Commission to find out as to whether the alleged contravention of any of the provisions of the Electricity Act or direction issued by the Commission or failure to comply with any order or direction given by the Commission under the Electricity Act was committed by a party either willfully or deliberately in utter defiance to the order or provision, as the case may be. In short, every non-compliance per se cannot be presumed by the Commission being willful or deliberate. When a person having had every opportunity to comply with the order passed by a Court or quasi judicial authority fails to

comply with the order, the same can be construed as a willful or deliberate one warranting appropriate action.

11. In the case in hand the undisputed facts that the 1<sup>st</sup> respondent preferred a Review Petition against the order dated 09.02.2021 passed in R.A.No.3 of 2020; that after the dismissal of the Review Petition vide Order dated 06.07.2023 the 1<sup>st</sup> respondent took concrete steps to file an appeal before the APTEL; that the interlocutory application filed by the 1<sup>st</sup> respondent to condone the delay in preferring the appeal came to be allowed by the Hon'ble APTEL; that the 1<sup>st</sup> respondent had preferred an application for stay in the pending appeal and the same is pending consideration before the Hon'ble APTEL unequivocally demonstrate that the 1<sup>st</sup> respondent is pursuing all the legal proceedings in all earnest to have the orders dated 09.02.2021 and 06.07.2023 set aside. This being the existing state of affairs even by any stretch of imagination it cannot be contended that the non-compliance of the orders of the Commission by the 1<sup>st</sup> respondent is willful or deliberate.

12. This Commission is not oblivious of the fact that mere filing of an appeal does not automatically operate as stay of the order or

decree appealed against and the execution court is always at liberty to proceed with the execution of such order or decree de hors of the pendency of appeal. A proceedings initiated u/s 142 and 146 of the Electricity Act is not analogous to an execution proceedings. For all practical purposes, the above referred provisions are penal in nature. Hence merely because the 1<sup>st</sup> respondent could not obtain an order of stay of the impugned orders in the pending appeal proceedings, it does not mean that the non-compliance of the orders by the 1<sup>st</sup> respondent is willful or deliberate or contumacious.

13. The fact that the respondent had settled the amounts due to the 2<sup>nd</sup> respondent OPG since the 2<sup>nd</sup> respondent agreed to waive the Late Payment Surcharge amount in entirety is not disputed by the 1<sup>st</sup> respondent. According to the petitioner, the delaying tactics is being adopted by the 1<sup>st</sup> respondent to pressurize the petitioner to concede to the unlawful demand of waiver of the entire Late Payment Surcharge made by the 1<sup>st</sup> respondent and deprive the petitioner the amounts that are lawfully due as per the order dated 09.02.2021. This Commission had already concluded that the 1<sup>st</sup>

respondent is prosecuting the appeal proceedings in all earnest. Hence no inference can be legally drawn that the settlement of dues to one of the parties covered under the order dated 09.02.2021 by the 1<sup>st</sup> respondent tantamount to willful non-compliance of the said order in regard to the petitioner and the 3<sup>rd</sup> respondent. Therefore it is patent that there is no substance in the contention raised by the petitioner in this regard.

14. On a conspectus evaluation of evidence emanating from the materials available on record, this Commission decides that the accusation of the petitioner that the 1<sup>st</sup> respondent has willfully failed to comply with the orders dated 09.02.2021 and 06.07.2023 passed by the Commission do not stand substantially established by the petitioner as required under law.

Accordingly this point is answered.

15. **Point No.2:**

In view of the conclusion arrived at by this Commission on Point No.1 that there is a colossal failure on the part of the petitioner to establish that non-compliance of the orders dated 09.02.2021 and 06.07.2023 passed by this Commission in R.A.No.3 of 2020 and



R.P.No.4 of 2021 by the 1<sup>st</sup> respondent is willful or deliberate or contumacious, the conclusion that the petitioner is not entitled to any relief is imperative.

16. In the course of advancing arguments the learned counsel appearing for the 3<sup>rd</sup> respondent argued with aplomb that even though the 3<sup>rd</sup> respondent MALCO Energy Ltd., one of the beneficiaries of the order dated 09.02.2021, had not filed a separate application seeking relief in regard to non-compliance of the above said order by the 1<sup>st</sup> respondent, the Commission which has all the attributes of a Civil Court is vested with power to pass appropriate orders in the instant petition directing the 1<sup>st</sup> respondent to make payment due to the 3<sup>rd</sup> respondent in terms of the order dated 09.02.2021.

17. To buttress above arguments the learned counsel placed reliance on the following citations:

- (a) **Rahul S. Shah**  
**Vs.**  
**Jinendra Kumar Gandhi and Others**  
**(2021) 6 Sec 418**
- (b) **Maharashtra State Electricity Distribution Company Ltd.**

**Vs.**

**Maharashtra Electricity Regulatory  
Commission and others  
(2022) 4 Sec 657.**

18. A thorough reading of the above judgements disclose that nowhere in the judgement the Hon'ble Supreme Court had held that execution of an order or decree can be carried out without an application being preferred by the decree-holder or holder of the decree. The principle propounded in those cases is that the Commission, apart from exercising the power to punish for non-compliance under Sec. 142, can execute its orders. There can be no cavil with regard to the principle of law laid down by the Hon'ble Supreme Court. But the said principle is not applicable to the present case as the petitioner Ind Bharath Gen Com., one of the beneficiaries of the order dated 09.02.2021 has filed the instant petition, upon payment of necessary court fees, to initiate proceedings against the 1<sup>st</sup> respondent alleging wilful, tenacious and continuing non-compliance of the impugned orders. Situated thus, the 3<sup>rd</sup> respondent, who is arrayed as one of the respondents, eventhough hold an order in its favour, in the consideration opinion of this Commission, cannot seek any relief based on the impugned

order much less payment of due aggregating a sum of Rs.26,71,98,775/- detailed in the written submission without preferring appropriate application.

19. Apposite to point out that the 3<sup>rd</sup> respondent has not filed any counter affidavit setting out its stand or claim. Without presenting a pleading which could be countered by the opposite party, a relief cannot be granted flouting the principles of natural justice. Further more since this Commission has rendered a finding that the non-compliance of the order in question by the 1<sup>st</sup> respondent is neither wilful nor deliberate and as such the petitioner is not entitled to relief, the 3<sup>rd</sup> respondent also cannot be granted any relief in this petition.

Accordingly this point is answered.

In the result the petition is dismissed. No order as to costs.

(Sd.....)  
Member (Legal)

(Sd.....)  
Member

(Sd.....)  
Chairman

/True Copy /

**Secretary  
Tamil Nadu Electricity  
Regulatory Commission**