

TAMIL NADU ELECTRICITY REGULATORY COMMISSION
(Constituted under section 82 (1) of the Electricity Act, 2003)
(Central Act 36 of 2003)

PRESENT:

Thiru S.Akshayakumar

.... Chairman

and

Dr.T.Prabhakara Rao

.... Member

D.R.P.No.20 of 2013

M/s. KEC Industries Limited
No.56, Industrial Estate
Post Box No.51
Yamuna Nagar
Haryana – 135 001.

... Petitioner
(Thiru Rahul Balaji
Counsel for the Petitioner)

Vs.

1. TANGEDCO
Rep. by its Chairman & Managing Director
No.144, Anna Salai
Chennai – 600 002.
2. The Chief Financial Controller (Revenue)
TANGEDCO
144, Anna Salai
Chennai – 600 002.

... Respondents
(Thiru M.Gopinathan
Standing Counsel for TANGEDCO)

**Dates of hearing : 13-09-2013; 04-03-2014; 17-04-2014
21-04-2014 and 22-02-2019**

Date of Order : 25-03-2019

The D.R.P.No.20 of 2013 came up for final hearing on 22-02-2019. After hearing the learned Counsels for both the parties and after perusing the records, the Commission passes the following:-

ORDER

1. Prayer of the Petitioner in D.R.P.No.20 of 2013:-

The prayer of the Petitioner in the above D.R.P.No.20 of 2013 is to pass an order directing the Respondents to make payment of a sum of Rs.21,34,127/- being the interest due and payable to the petitioner against delayed payments made till February 2012 for the power supplied from its Wind Power Generation Projects forthwith to the petitioner and direct the respondents to bear the costs of the instant petition including court fees.

2. Facts of the Case:-

The petition has been filed to direct the respondents to forthwith make payment of a sum of Rs.21,34,127/- being the interest due and payable to the petitioner against delayed payments made by TANGEDCO for power supplied till February 2012 from wind generation units of the petitioner.

3. Contentions of the Petitioner:-

3.1. The petition is being filed seeking to claim interest on delayed payment against invoices raised by the petitioner for which payment has already been made by TANGEDCO. The petitioner submits that in addition to the payments which have been made belatedly, there are substantial sums of money due under invoices raised which are as yet outstanding. The payment of the invoice amounts together with the interest thereon is also due and payable. However, the petitioner is currently preferring the claim only in respect of interest portion of invoices already made as the cause of action for making a claim on interest for payments against

unpaid invoices would arise only when payments in that regard are received and when such payments are made without interest which the Respondents are in contract and under law bound to pay.

3.2. The petitioner company is having wind power generating projects to the tune of 1250 KW in the State of Tamil Nadu.

3.3. The petitioner has established Wind Power Generation project in Tirunelveli district in the State of Tamil Nadu and the power generated by this unit is being sold to the 1st respondent under the terms of Agreement dated 29-03-2005 executed by the petitioner with the TANGEDCO.

3.4. The Wind Energy Generators (WEGs) are covered by the date of agreements by the respective applicable Tariff Orders and older category of energy purchase agreements have a billing clause which allows for deduction of 5% gross energy towards wheeling charge and 5% gross energy towards banking charge. The sale of power is on a monthly basis at Rs.2.70 per unit after calculating the net export. The invoices are raised on a monthly basis. The respondent has not even passed any revised tariff rate of Rs.2.75 instead of Rs.2.70 till date. So, it is also requested to direct the respondent to pay it as per applicable Commission's Tariff Order. As such, this Tariff Order is under litigation before the Hon'ble Supreme Court for the claim of tariff at the rate of Rs.2.90 instead of Rs.2.75.

3.5. Payment against invoices raised by the petitioner and other Wind Power Producers in the State of Tamil Nadu for power sold to TANGEDCO was being delayed inordinately by TANGEDCO. Further, even when the payments were being made, no interest on delayed payment was paid.

3.6. The Hon'ble APTEL in order in Chairman, TNEB & Anr. v. Indian Wind Power Association and Ors in Appeal No.11 of 2012 dated 17.04.2012 has decided the issue of interest on delayed payments. The relevant paragraphs are extracted hereunder:

“13. It is settled law, when a certain time limit has been prescribed within which payments have to be made, it would mean that any payments made after the said time period would be subject to payment of interest as indicated above.

17. In any power project, one of the important aspects is the promptitude in payment since the delays would seriously affect the viability of the project. All these projects are substantially funded through finances obtained from various funding organizations require regular repayment of principal loan amount with interest by the generators. Only if regular payments are made for the power generated and supplied the loans can be serviced along with the promised return of investment.”

21. Hence our conclusion is as follows:

“The wind power generators are entitled for payment of interest on delayed payment made by the appellant for the purchase of the power from the generators.”

3.7. The petitioner has raised invoices for power supplied from its WEGs on a monthly basis as per the terms of the EPA and the petitioner has received payments against invoices for the period upto February 2012. However, these payments have been delayed by as much as one year or more. Despite the substantial delay, TANGEDCO has not made any payment of interest on delayed payments contrary to the order of the Hon'ble APTEL.

3.8. TANGEDCO is due and liable to pay to the petitioner a sum of Rs.21,34,127/- towards interest on delayed payments alone.

3.9. The substantial delays in making payments by the respondent have caused severe difficulties for the petitioner in meeting the financial obligations towards banks and financial institutions. The petitioner also submits that the interest on delayed payments is much lower than the payments, the petitioner has to make to its banks/financial institutions under the term loans. The petitioner further submits that the delay in payments by TANGEDCO has also hampered the petitioner's capacity to proceed with its expansion plans.

3.10. Failure of TANGEDCO to make payments promptly as per terms of the energy purchase agreements has adversely affected the petitioner's financial position and strained its finances. The petitioner submits that current attitude of TANGEDCO not only affects the petitioner but would also have long term negative impact on the viability of the State of Tamil Nadu as most favoured destination for investment in Renewable Energy, particularly Wind Energy Projects.

3.11. The petitioner submits that it is paying a substantial court fee of Rs.21,350/- to file the instant petition for recovery of interest of delayed payments despite being entitled to the same as per the terms of the EPA, order of APTEL in Appeal No.11 of 2012 and Tariff Order No.1 of 2009 issued by the Commission. The petitioner submits that the actions of TANGEDCO in not paying the interest on delayed payment which is legally entitled to, is contrary to the terms of the contract / EPA and binding judgments and the petitioner submits that it ought to be awarded the costs of the petition including court fees and legal expenses incurred.

4. Contentions of the Respondent:-

4.1. The petition has been filed by the petitioner for a direction to the respondents to make interest dues of Rs.21,34,127/- for the delayed payments made for the supply of electricity effected by the petitioner to the respondent. The petitioner has entered into a Energy Purchase Agreement (EPA) with TANGEDCO on 29-03-2005. That out of the total claim made by the petitioner towards sale of power, TANGEDCO has released the payment towards the energy purchased by TANGEDCO upto March 2013.

4.2. Due to financial constraints underwent by the Respondent/TANGEDCO during the last few years, the TANGEDCO was unable to meet its financial commitments. It is submitted that due to the losses incurred by the Respondent Corporation, over a period of many years, the Respondents credit rating had deteriorated resulting in difficulty over raising of funds by way of loans also. It is submitted that, the delay in making payments by the Respondent was due to

financial constraint in the recent years and the said non-payment of dues is not intentional. It is submitted that the Respondent TANGEDCO is functioning under the purview of the State Government and thereby discharging its duties in the larger interest of public..

4.3. TANGEDCO has huge outstanding payments to the tune of Rs.10,000 crores to several generators and coal companies also. It is submitted that even the loan repayments and interest payments could not be made on the due dates due to the financial crisis faced by the TANGEDCO.

4.4. In spite of the above circumstances, TANGEDCO managed to make payments upto March 2013 bills to Wind Energy Generators. It is submitted that the above payments made clearly indicates the bona-fide intention of the TANGEDCO to make the outstanding dues to the Wind Energy Generators.

4.5. The Respondent had been putting all its best efforts to implement Financial Restructuring Plan announced by Government of India. Tamil Nadu has been the first State to implement FRP. Funds have been mobilized under Financial Restructuring Plan. Government of Tamil Nadu will be taking over 50% of the loans liability to banks, as on 30.09.2012. This situation would definitely prove beneficial to the TANGEDCO to clear its outstanding bills in the forthcoming months.

4.6. TANGEDCO is committed to meet its payment obligations and is taking appropriate steps to revive its financial strength and thereby the question of violation or non-payment of dues on the part of the TANGEDCO does not arise.

4.7. The Commission was pleased to pass Tariff Order No.1 of 2009 dated 20.03.2009 in the matter of Wind Energy. Under clause 4 of the Tariff Order No.1 of 2009 dated 20.03.2009, the Commission holds that "all the Wind Energy Generators commissioned on or after 19.09.2008 shall become eligible for the benefits of the present order, subject to the condition that the monetary benefits shall accrue from the date of this order". It is submitted that the Wind Mill service of the Petitioner company was commissioned before 19.09.2008. The Power Purchase Agreement entered between the company and the erstwhile TNEB does not provide for payment of interest for delayed payments.

4.8. As far as the order of the Commission in M.P.No. 36 of 2010 directing TANGEDCO to pay interest on delayed settlement of bills as per the provision of Code of Civil Procedure 1908 at the rate of 1 % per month, it is submitted that this would involve huge interest commitments, and as such TANGEDCO had filed an appeal (Appeal No.11 of 2012) before the Hon'ble Appellate Tribunal for Electricity. The Appellate Tribunal for Electricity was pleased to dismiss the appeal filed by TANGEDCO. However, an appeal has been filed before the Hon'ble Supreme Court.

5. Findings of the Commission:-

5.1. We have heard the submissions of learned Counsel appearing for the petitioner and the respondents. The petitioner has filed the petition seeking direction to the respondents to make payment of a sum of Rs.21,34,127/- being the interest due and payable to the petitioner against the delayed payments in respect of the invoices made till 2012 for the power supply from its Wind Power Generation

Projects to the respondents. On perusal of the petition, it is seen that the period of invoices for which interest is now claimed relates to the period from April 2005 to November 2012 as detailed in Annexure "A" to the petition. The respondent in their counter affidavit filed on 30-09-2013 has stated that the petitioner has entered into EPA with TANGEDCO on 29-03-2005 and that out of total claim made by the petitioner towards the sale of power, TANGEDCO has released payment towards the energy purchased by TANGEDCO upto March 2013. A close reading of the counter reveals that the respondent did not seek to dispute the claim made by the petitioner. The energy supplied by the petitioner to the respondent is not at all disputed. The respondent has only submitted that due to loss incurred by the respondent over a period of many years, the respondent credit reading had deteriorated resulting in difficulty over raising of funds by way of loans also and that the delay in making payment by the respondent was due to financial constraint in the recent years and the said non-payment of dues is not intentional. The respondent has also submitted that it is committed to meet its payment obligation and is taking appropriate steps to revive its financial strength. In view of the above submissions of the respondents, it is clear that the respondent admitted its liability to make payment for the energy supplied by the petitioner and also has accepted that there was a delay in making payment due to financial constraints.

5.2. However, the two crucial questions which arise for consideration of the Commission is (1) whether the question of limitation can be taken up by the Commission on its own and (2) whether the law of limitation is applicable to the proceedings before the Commission.

5.3. In order to answer the first issue, it is necessary to refer to the judgment dated 05-10-1994 of the Hon'ble High Court of Madras in C.Selvaraj (died) and others Vs. The Corporation of Madras wherein the High Court has rendered a finding to the effect that even when a plea of limitation was not raised, it is the duty of the court to examine the same in view of section 3 of Limitation Act. The relevant portions of the said judgments are reproduced below:-

“20. Learned Counsel for the appellants contends that the plea of limitation was not raised in the trial court and it was not open to the appellate court to consider the question of limitation. There is no merit in this contention. Section 3 of the Limitation Act provides that it is the duty of the court to dismiss any suit instituted, appeal preferred and application made after the prescribed period although the limitation has not been set up as a defence. (See also the decision in Ittavira v. Varkey Varkey.”

5.4. It may be seen from the above that the Commission is duty bound to dismiss any petition filed after the period of limitation. Hence, we are of the well-construed view that the Commission cannot allow the claim without examining the question of limitation.

5.5. The second question that arises for consideration is whether the law of limitation is applicable to State Electricity Regulatory Commission. Here again, we have to observe that the law on the said question is well settled.

5.6. In this connection, we deemed it fit to refer the decision of the Hon'ble Supreme Court in A.P. Power Co-ordination Committee and others Vs. M/s.Lanco Kondapalli Power Ltd. and others in Civil Appeal No.6036 of 2012. The following observation of the Hon'ble Supreme Court would be relevant:-

“In such a situation on account of provisions in section 175 of the Electricity Act or even otherwise the power of adjudication and

determination or even the power of deciding whether a case requires reference to arbitration must be exercised in a fair manner and in accordance with law. In the absence of any provision in the Electricity Act creating a new right upon a claimant to claim even monies barred by law of limitation, or taking away a right of the other side to take a lawful defence of limitation, we are persuaded to hold that in the light of nature of judicial power conferred on the Commission, claims coming for adjudication before it cannot be entertained or allowed if it is found legally not recoverable in a regular suit or any other regular proceeding such as arbitration, on account of law of limitation.

xxxx

Hence, we hold that a claim coming before the Commission cannot be entertained or allowed if it is barred by limitation prescribed for an ordinary suit before the civil court.”

5.7. Further, the Hon'ble High Court of Madras in its order dated 06-06-2011 in Writ Petition Nos. 20820 of 2000 and etc. (batch cases) has held as follows:-

“The Hon'ble Supreme Court has held that ordinarily the period fixed by the Limitation Act should be taken to be a true measure of the time within which a person can be allowed to raise a plea successfully either by way of writ petition under Article 226 or by way of petition under Article 32 of the constitution. Here, in the instant case, the petitioners have filed the writ petitions only for mandamus to implement the G.O.Ms.No.230, but, in effect the relief sought for in these writ petitions are only for recovery of the price for the electricity supplied in terms of G.O.Ms.No.230. As per Article 14 of the Limitation Act, 1963 a period of 3 years has been prescribed for filing a suit for recovery of the price of goods sold from the date of delivery of goods. It is the contention of the learned Advocate General that since these writ petitions are in effect for recovery of the amount due from the TNEB and since they have been filed beyond the period of 3 years, the petitioners are guilty of laches. I find every force in the said argument. The contention of the petitioners is that there were number of correspondences between the petitioners and the TNEB and in this regard even at one stage, there was also a proposal on the part of the Government to amend G.O.Ms.No.230. Therefore, according to the petitioners, they are not guilty of laches. In my considered opinion, mere correspondences between the parties, discussions and the meetings will not save the limitation. All these writ petitions have been filed much beyond the period of limitation prescribed in Article 14 of the Limitation Act. Thus, I have no hesitation to hold that the petitioners are guilty of laches and on that ground the writ petitions are liable to be dismissed.”

5.8. The petitioner has filed the present D.R.P.No.20 of 2013 on 16-04-2013. The claim period has already started from April 2005 onwards. Hence, it is clear that the Limitation Act applies to the proceedings before this Commission. Further, for claiming any monetary relief, the limitation period as specified in the Limitation Act is 3 years from the date on which cause of action arose. In this case, the cause of action arises on the date when the payment for the invoice was made (belatedly). Therefore, all the above claims which were made prior to 3 years from the date of filing of this petition on 16-04-2013 is barred by limitation.

5.9. As regards the question of rate of interest, the following observation of the Hon'ble APTEL in Appeal No.23 of 2010 dated 09-07-2010, which has been relied on by the Hon'ble APTEL in the Appeal No.11 of 2012 would be relevant:-

“x x x

.... Admittedly the findings referred by the Commission is that Appellant is entitled to the return of the principal amount, then it may not be proper on the part of the Commission to hold that the claim for the interest has been belatedly made. It is settled law that the party is entitled to interest for the said amount. In the light of the said decision of law, we are of the view that the findings referred to by the Commission with regard to the rejection of claim for interest is liable to set aside. However, in the facts and circumstances of the case, we are of the view that the Appellant is entitled to interest @ 10% instead of 18%, as claimed by the Appellant.”

5.10. In view of the above, we are of the view that the eligible rate of interest for the belated payment of invoices would be 10%.

5.11. In view of the above findings, we direct the respondents to re-work the eligible interest in terms of the orders of the Hon'ble APTEL in Appeal No.11 of 2012 dated 17-04-2012 in Chairman, TNEB and another Vs. Indian Wind Power Association

after deducting the claim which is barred by limitation. The respondents should make the above exercise within a period of 3 months from the date of issue of this order and make payment to the petitioner accordingly. The petition is disposed of in the above lines.

6. Appeal: -

An appeal against this order shall lie before the Appellate Tribunal for Electricity under section 111 of the Electricity Act, 2003, within a period of 45 days from the date of receipt of the copy of this order by the aggrieved person.

(Sd.....)
(Dr.T.Prabhakara Rao)
Member

(Sd.....)
(S.Akshayakumar)
Chairman

//True copy//

Secretary
Tamil Nadu Electricity
Regulatory Commission