

**In the Appellate Tribunal for Electricity,**  
**New Delhi**  
**(Appellate Jurisdiction)**

**Appeal No. 75 of 2017**

**Dated: 24<sup>th</sup> April, 2018**

**Present: Hon'ble Mr. I. J. Kapoor, Technical Member**  
**Hon'ble Mr. N.K. Patil, Judicial Member**

**In the matter of :-**

**Maharashtra State Electricity  
Distribution Co. Ltd. (MSEDCL)  
5<sup>th</sup> Floor, Prakashgad  
Bandra (East)  
Mumbai – 400 051**

**...Appellant**

**Versus**

**1. Maharashtra Electricity Regulatory  
Commission (MERC)  
World Trade Centre No. 1, 13<sup>th</sup> Floor  
Cuffe Parade, Colaba  
Mumbai – 400 001**

**...Respondent No.1**

**2. Hindustan Zinc Limited (HZL)  
Yashad Bhawan  
Udaipur – 313 004**

**...Respondent No.2**

**Counsel for the Appellant(s) : Mr. G. Saikumar  
Ms. Nikita Choukse  
Ms. Soumya Saikumar  
Mr. Varun Agarwal  
Ms. Himangini Mehta**

**Counsel for the Respondent(s) : Mr. Anand K. Ganesan  
Ms. Swapna Seshadri  
Ms. Neha Garg  
Ms. Parichita Chowdhary  
Ms. Rhia Luthra  
Mr. Ashwin Ramanathan for R-2**

## JUDGMENT

### PER HON'BLE MR. I.J. KAPOOR, TECHNICAL MEMBER

1. The present appeal is being filed by Maharashtra State Electricity Distribution Co. Ltd. (hereinafter referred to as the “**Appellant**”) under Section 111 of the Electricity Act, 2003 (hereinafter referred to as the “**Act**”) against the order dated 10.08.2016 (“**Impugned Order**”) passed by Maharashtra Electricity Regulatory Commission (hereinafter referred to as the “**State Commission**”) in Case No. 150 of 2015 regarding directing the Appellant to pay late payment surcharge @1.25% per month to the Respondent No. 2 as per Section 11.02 of the Energy Purchase Agreement.
2. The Appellant i.e. MSEDCL is the distribution licensee in the State of Maharashtra.
3. The Respondent No. 1 is the State Electricity Regulatory Commission in the State of Maharashtra discharging functions under the provisions of the Electricity Act, 2003.
4. The Respondent No. 2 i.e. Hindustan Zinc Limited is a generating company as per Section 2 (28) of the Act.
5. **Facts of the present Appeal:**
  - a) The Respondent No. 2 have established 25.5 MW (17 x 1.5 MW) Wind Generating Station (WGS) in District Nandurbar, Maharashtra. The Appellant and Respondent No. 2 entered into

Energy Purchase Agreement (EPA) dated 7.10.2011 for supply of power to the Appellant from WGS.

- b) During the period 2011 to 2015 the Respondent No. 2 has supplied power to the Appellant and has raised bills as per the approved tariff by the State Commission under the EPA. As per the EPA, the due date for payments to the Respondent No. 2 is in 60 days from the date of receipt of the bills by the Appellant. There has been delays in payment of the bills by the Appellant.
- c) The Respondent No. 2 has been following up for payments to be made by the Appellant to the Respondent No. 2 but the Appellant persistently delayed the payments.
- d) Aggrieved by non-payment of its dues in time by the Appellant, the Respondent No. 2 filed a petition being Case No. 150 of 2015 before the State Commission under Section 86 (1) (f) seeking directions for payment of late payment surcharge, payment of carrying cost, timely payments by the Appellant etc.
- e) The State Commission vide Impugned Order dated 10.8.2016 directed the Appellant for payment of late payment surcharge as per Section 11.04 of the EPA.
- f) Aggrieved by the Impugned Order the Appellant has preferred the present Appeal before this Tribunal.

**6. Questions of Law:**

The Appellant has raised the following questions of law in the present appeal:

- a) Whether the Impugned Order is bad in law?
- b) Whether the Impugned Order is not a reasoned order?
- c) Whether the State Commission has not considered the cash flow difficulties being faced by the Appellant and has passed the Impugned Order without assigning any reasons?
- d) Whether the Impugned Order does not consider the regulatory issues raised by the Appellant?
- e) Whether the Appellant being a regulated entity and not being able to raise additional funds with external circumstances affecting the cash flow of the Appellant, the same being within the domain of Vis Major and as such payments under EPA and timely payments to other generators being onerous and impossible, whether such regulatory conditions should have been duly considered by the State Commission in the Impugned Order?
- f) With the Limitation Act, 1963 is not applicable to proceedings before the State Commission in light of judgement of the Hon'ble Supreme Court of India in 2014 (11) SCC 53, TANGEDCO v. PPN Power Generating Co. Pvt. Ltd. and as such the principle of delay and laches would being applicable, whether the State Commission

has correctly ignored the fact that the Respondent No. 2 has not enforced its legal rights in a timely manner?

7. We have heard learned counsel for the Appellant and the Respondent No.2 at considerable length of time and we have carefully perused their respective written submissions. Gist of the same is discussed hereunder.
8. The submissions on issues raised for our consideration in the instant appeal by the learned counsel for the Appellant are as follows:-
  - a) The Respondent No. 2 had not filed the petition before the State Commission within the limitation period and accordingly its claims are time barred. The Respondent No. 2 has made claim before the State Commission only in December 2015 hence its claim for the period three years prior to the date of submission of petition before the State Commission was time barred.
  - b) The reasons for delay in payments to the Respondent No. 2 were beyond the control of the Appellant. The reason for delay in payments was due to delay in recovery by the Appellant from the consumers due to severe drought conditions in the State of Maharashtra that affected the cash flows and ability of the Appellant to make timely payments.
  - c) The total revenue of the Appellant from all sources in FY 2009-10 was Rs. 29,684 Cr. and shortfall at the end of the year was Rs. 2,555 Cr. The working capital requirement for the Appellant was

limited only to Rs. 1,200 Cr. in the form of short-term loan from banks during the relevant period.

- d) The State Commission has failed to appreciate the submissions of the Appellant while passing the Impugned Order. The regulatory process of true-up gets completed only after about 18 months from approval of Annual Performance Review (APR). This also results in inability of the Appellant in making timely payments as there are no sources of revenue due to inadequate collections. The shortfall has also not been adequately provided for in the Annual Revenue Requirements (ARR) of the Appellant. The revenue gap has also increased over the years.
- e) The State Commission has not considered the regulatory issues while passing the Impugned Order and hence it is bad in law. The Appellant being a revenue neutral regulated entity cannot raise additional funds and the external circumstances affecting the cash flow are in the domain of Vis Major and as such payments under EPA and timely payments to other generators is onerous and impossible. The State Commission while passing the Impugned Order should have considered the same.
- f) The State Commission has also not considered the fact that the Limitation Act, 1963 was not applicable to the proceedings before the State Commission in light of judgement of the Hon'ble Supreme Court in 2014 (11) SCC 53, TANGEDCO v. PPN Power Generating Co. Pvt. Ltd. and as such the principle of delay and laches would be applicable.

- g) The State Commission also ignored the fact that the Respondent No. 2 has not enforced its legal rights in a timely manner and accordingly the Impugned Order is liable to be set aside on this ground too.
- h) The State Commission has erred in holding that the expenditure incurred by the Appellant on late payment surcharge cannot be passed on to the consumers under ARR as it is the Appellant who has delayed the payments. This is a skewed analysis as the Appellant has defaulted due to default by the consumers in making the payment to the Appellant. The State Commission could have allowed the same to be passed into ARR by utilising its regulatory/ adjudicatory powers in the said petition filed by the Respondent No. 2 and prayer made by the Appellant. The State Commission has also not been allowing the interest paid by the Appellant to the Financial Institutions to be passed onto the consumers through ARR. This is also hampering the capacity of the Appellant to raise short-term borrowings from the banks and to meet the payment obligations.
- i) The State Commission has not dealt with the issue of imposition of 1.25% per month late payment surcharge in view of the Regulation 20 of the MERC (Terms and Conditions for determination of RE Tariff), Regulations, 2010 ("**MERC RE Regulations 2010**"). The State Commission has merely noted that the EPA has been approved by it. The State Commission could have exercised its power under Regulation 75 of the said Regulations to relax such terms and conditions keeping in view of the difficulty expressed by the Appellant.

- j) Based on the Impugned Order the State Commission vide common order dated 16.3.2017 has directed the Appellant to make payment of late payment surcharge to nine other generators. This is having huge financial burden on the Appellant.
  - k) The Appellant has prayed for setting aside the Impugned Order, direct the State Commission for passing on the cost of late payment surcharge to be passed on to the consumers in ARR or remand the matter to the State Commission for consideration of relaxation under Regulation 75 of the MERC RE Regulations 2010.
9. The submissions of the learned counsel appearing for the Respondent No.2 on issues raised for our consideration in the instant Appeal are as follows:-
- a) The Appellant had failed to adhere to the contractual obligations as per the EPA in making timely payments. The Respondent No. 2 has taken up the issue many times persistently with the Appellant for payment of late payment surcharge due to default by the Appellant in making timely payments. A meeting was held on 9.5.2014 in this regard. However, due to failure on part of the Appellant for making the requisite payments, the Respondent No. 2 was forced to approach the State Commission to enforce the provisions of the EPA.
  - b) The Appellant has not disputed the liability of payment of late payment surcharge by it to the Respondent No. 2 either before the

State Commission or before this Tribunal. The only issue raised by the Appellant is regarding inadequate cash flow due to difficulties being faced by it in terms of raising additional funds and external circumstances.

- c) The source of funding of the Appellant is not relevant to the payments to be made by the Appellant to the Respondent No. 2 under the contract i.e. EPA. The contractual rights of the parties are not dependent on the manner how the Appellant raises finances.
- d) The State Commission has rightly held that the issue of allowing cost of late payment surcharge raised by the Appellant in the petition filed by the Respondent No. 2 is not relevant as the issue is related to the tariff orders of the Appellant and the matter was not relevant to the subject petition.
- e) The provisions of the Limitations Act, 1963 applies to the proceedings under Section 86 (1) (f) of the Act and has been settled by the Hon'ble Supreme Court in case of A.P. Power Coordination Committee v. Lanco Kondapalli Power Ltd. (2016) 3 SCC468. The claims of the Respondent No. 2 are not barred by the limitation as the bills are running bills, the payments are adjusted against previous dues, the dues are subsisting on every monthly bill and the contract is subsisting. Further, the Appellant time and again has acknowledged the liability to pay interest and the same is also recorded in minutes of meeting dated 9.5.2014.

- f) The State Commission has passed a reasoned order after considering submission of the parties and law laid down by Hon'ble Supreme Court. Further, the regulatory issues raised by the Appellant are baseless and irrelevant and are not related to present case.
- g) The Respondent No. 2 is a small renewable power generator and its claim constitutes very small part of the revenue requirements of the Appellant. Accordingly, there is no legal or factual ground for avoiding timely payment and late payment surcharge by the Appellant. The Appellant has also not raised any specific grounds for the contentions raised in the Appeal. There is no merit in the present Appeal and is liable to be dismissed.
10. After careful consideration of the submissions of the learned counsel appearing for the Appellant and the Respondent No. 2 on various issues raised in the present Appeal, our observations are as follows:-
- a) The main issue raised by the Appellant in the present Appeal is regarding direction of the State Commission to the Appellant in the Impugned Order to pay late payment surcharge @1.25% per month to the Respondent No. 2 as per Section 11.02 of the Energy Purchase Agreement in view of the difficulties in terms of regulatory/ external circumstances being faced by it.
- b) First, we take the Questions of Law 6. c) to 6. e) raised by the Appellant. On Question No. 6. c) i.e. Whether the State Commission has not considered the cash flow difficulties being

faced by the Appellant and has passed the Impugned Order without assigning any reasons?, on Question No. 6. d) Whether the Impugned Order does not consider the regulatory issues raised by the Appellant? and on Question No. 6. e) i.e. Whether the Appellant being a regulated entity and not being able to raise additional funds with external circumstances affecting the cash flow of the Appellant, the same being within the domain of Vis Major and as such payments under EPA and timely payments to other generators being onerous and impossible, whether such regulatory conditions should have been duly considered by the State Commission in the Impugned Order?, we observe as below:

- i. Let us first examine the findings of the State Commission in the Impugned Order on these issues. The relevant extract from the Impugned Order is reproduced below:

*“9. In its belated Reply dated 5 May, 2016 also, MSEDCL has, in effect, not disputed its liability to pay late payment surcharge under the terms of the EPA, having submitted its own computations of the surcharge due. MSEDCL has differed only as to the amount payable, which it has computed up to June, 2015. However, it has not paid to HZL even that amount, citing its difficult financial position due to shortfalls in recovery and certain decisions of the Commission in its Tariff Orders. MSEDCL has also sought that, if the late payment surcharge is to be paid, it may be allowed to recover it through its consumer*

tariff. The Commission notes that the rationale for its dispensations is set out in its Tariff Orders. Moreover, by its very nature as a charge for default in making timely payments, the expenditure incurred on late payment surcharge cannot be passed on to consumers. Hence, while such delay in making due payments obviously impacts the concerned Generators like HZL, it also affects MSEDCL itself adversely. In any event, these issues are not relevant to the fact that payment of the accumulated amount of late payment surcharge is due to HZL.”

From the above it can be seen that the State Commission on the issue of passing of the late payment surcharge in the ARR of the Appellant has held that the rationale for its dispensations is set out in the Tariff Orders of the Appellant. The State Commission also held that by nature the late payment surcharge being default by the Appellant could not be passed on to the consumers. The State Commission has also observed that these issues are not relevant to the fact that payment of the accumulated amount of late payment surcharge is due to the Respondent No. 2. The State Commission has also observed that non-payment of dues in time are adversely affecting both the Appellant and the Respondent No. 2.

- ii. We observe that the petition was filed by the Respondent No. 2 before the State Commission praying the State Commission to direct the Appellant to make late payment

surcharge to the Respondent No. 2 on delayed payments apart from other prayers. The Appellant in delayed response to the petition before the State Commission raised regulatory issues, cash flow issue and other issues due to external circumstances (draught conditions) affecting the cash flow of the Appellant.

- iii. The State Commission in the Impugned Order has observed that the issues raised by the Appellant were related to Tariff Orders/ARR of the Appellant and were not relevant to the subject petition. We are also of the opinion that the issues raised by the Appellant before the State Commission do not pertain to the issue at hand and could be taken up during the Tariff Order /ARR proceedings before the State Commission or through a difficulty removal/norms relaxation petition as per the relevant regulations of the State Commission.
- iv. The Appellant has used the term 'Vis Major' in the Question of Law, which signifies inevitable accident. This term have meaning similar to the words 'Act of God'. Generally, no one is responsible for accident arises from Vis Major. This term may have been used by the Appellant with reference to its difficult cash flow situation due to drought situations. We also observe that the contentions raised by the Appellant before the State Commission and even before this Tribunal are in general and have not linked the same to any specific period regarding the draught conditions. It has generally stated the financial position of it during 2009-10 and some other period. In absence of any specific details it becomes difficult for the

courts to appreciate the issue particularly in the present case where the liability of late payment surcharge to the Respondent No. 2 was about Rs. 1 Cr. only and total revenue of the Appellant was more than 29,000 Cr. which might have increased every year.

- v. The EPA signed between the parties and approved by the State Commission provides for the terms and conditions of billing & payments, applicable tariff, payment due date and other consequences including delay in payment by the Appellant. The relevant extract from the EPA based on which surcharge has been levied is reproduced below:

*“Section 11.04: Payments*

*The due date of payment shall be 60 days from receipt of the Seller’s monthly energy bills by the MSEDCL and will be paid by account payee’s cheque in the name of Seller or authorized representative, in whose name power of attorney is given by the Seller. In case of delay in payment beyond the due date, the Seller shall be entitled to a late payment surcharge at the rate of 1.25% per month shall be levied by the generating company.....”*

From the above it is clear that in case there is delay in payment beyond the due date, the Respondent No. 2 is entitled to late payment surcharge at the rate of 1.25% per month.

- vi. The Appellant has also prayed for passing on the cost incurred by it for late payment surcharge to the consumers under ARR and remanding the matter to the State Commission by directing it to consider the matter as per the power to relax regulation under the MERC RE Regulations 2010. These prayers do not form the part of the original Appeal. These prayers have been added by the Appellant vide its written submissions dated 2.4.2018 after the judgement was reserved in the subject Appeal and also without amending the original Appeal through IA. Accordingly these prayers of the Appellant cannot be entertained.
- vii. In view of our discussions as above, we are of the considered opinion that the Appellant has not disputed the liability of payment of surcharge to the Respondent No.2 and the issues raised by the Appellant related to late payments due to difficult cash flow situation arising out of regulatory issues in its ARR are not related to the subject matter of the petition. These issues can only be dealt in the proceedings on its petition on ARR/APR or difficulty removal/norms relaxation petition before the State Commission. It is the responsibility of the Appellant to arrange funds and to make timely payments to the generators based on contracts /regulations. In any case, the Appellant is free to raise the said issues before the State Commission in its ARR/APR petition and seek suitable remedy.

viii. Accordingly, these issues are decided against the Appellant.

c) On Question No. 6. f) i.e. With the Limitation Act, 1963 is not applicable to proceedings before the State Commission in light of judgement of the Hon'ble Supreme Court of India in 2014 (11) SCC 53, TANGEDCO v. PPN Power Generating Co. Pvt. Ltd. and as such the principle of delay and laches would being applicable, whether the State Commission has correctly ignored the fact that the Respondent No. 2 has not enforced its legal rights in a timely manner?, we observe as below:

i. Let us examine the findings of the State Commission in the Impugned Order on this issue. The relevant extract from the Impugned Order is reproduced below:

*"8. From a plain reading of Section 11.04 of the EPA (quoted above), there can be no two views regarding the liability of MSEDCL to a surcharge for delays in payment. The Commission notes that HZL has been writing a series of letters (acknowledged by MSEDCL) with its claims and computations of late payment surcharge, the first such letter ('claim note') annexed with the Petition being dated 21 October, 2013. Moreover, the minutes (signed by representatives of both Parties, and submitted by HZL) of the meeting held on 9 May, 2014 record MSEDCL's acknowledgement of late payment surcharge being due, though the precise amount was to be finally resolved and the liability for MSEDCL's banker's delay*

was raised. As such, in view of the provisions of Section 18 of the Limitation Act, 1963, MSEDCL's contention that at least a part of the claim is negated by the limitation period of 3 years is not tenable. The Supreme Court, in its Judgment dated 26 October, 2004 in Civil Appeal 2259 of 1999 (Food Corporation of India vs. Assam State Cooperative Marketing and Consumer Federation), has also held that

*"According to Section 18 of the Limitation Act, an acknowledgement of liability made in writing in respect of any right claimed by the opposite party and signed by the party against whom such right is claimed made before the expiration of the prescribed period for a suit in respect of such right has the effect of commencing a fresh period of limitation from the date on which the acknowledgement was so signed. It is well settled that to amount to an acknowledgement of liability within the meaning of Section 18 of the Limitation Act, it need not be accompanied by a promise to pay either expressly or even by implication."*

The State Commission has noted that there was a series of letters beginning from October 2013 written by the Respondent No. 2 which were duly acknowledged by the Appellant regarding its claim of late payment surcharge. The State Commission also noticed the minutes of meeting dated

9.5.2014 wherein the late payment surcharge was agreed to be payable by the Appellant but the final amount was yet to be resolved on account of delayed payment by Banker after receiving instructions from the Appellant. The State Commission relying on the Hon'ble Supreme Court, Judgment dated 26.10.2004 in Civil Appeal 2259 of 1999 (Food Corporation of India vs. Assam State Cooperative Marketing and Consumer Federation) has held that as per the provisions of Section 18 of the Limitation Act, 1963 the limitation of liability of payment of late payment surcharge shall accrue from the date (in this case 9.5.2014) on which the acknowledgement of such liability was signed by the Appellant.

- ii. The Appellant has relied on the judgement dated 4.4.2014 of the Hon'ble Supreme Court in case of TANGEDCO v. PPN Power Generating Co. Pvt. Ltd. 2014 (11) SCC 53, on the issue that Limitation Act, 1963 is not applicable in the present case. The Respondent No. 2 on the issue of the applicability of the Limitation Act, 1963 has relied on the judgement dated 16.10.2015 of the Hon'ble Supreme Court which is at a later date in case of A.P. Power Coordination Committee v. Lanco Kondapalli Power Ltd. (2016) 3 SCC468 and stated that the provisions of the Limitations Act, 1963 applies to the proceedings under Section 86 (1) (f) of the Act and the same has been settled by the Hon'ble Supreme Court vide the said judgement. We have gone through the said judgement of the Hon'ble Supreme Court. We find that the Hon'ble Supreme Court while dealing the case has also

discussed the PPN case (relied by the Appellant) and other cases. While referring to the PPN case the Hon'ble Court has observed that this Court has examined the issue of limitation in a summary manner and without referring to the relevant provisions of the Act, at the end of para 64 it was observed in a single sentence that the Limitation Act is inapplicable to proceeding before the State Commission. The Hon'ble Supreme Court in Lanco case (relied by the Respondent No. 2) has held that the provisions of the Act will be additional provisions without adversely affecting or subtracting anything from any other law including Limitations Act, 1963 which may be in force. Accordingly, the reliance of the State Commission on the Limitations Act, 1963 is not out of context.

iii. In view of our discussions as above, this issue is decided against the Appellant.

d) On Question No. 6. a) i.e. Whether the Impugned Order is bad in law? and on Question No. 6. b) i.e. Whether the Impugned Order is not a reasoned order?, we observe as below:

i. In view of our decisions and observations at 10. b) and 10. c) above, we are of the considered opinion that the above contentions of the Appellant under Question No. 6 a) & 6 b) do not survive for our consideration.

- ii. We are of the considered opinion that the Appellant has failed to make out any case. Therefore, we hold that instant issue is also decided against the Appellant.

**ORDER**

Having regard to the legal and factual aspects of the matter as stated above, we are of the considered view that the issues raised in the instant appeal have no merit. The appeal is hereby dismissed devoid of merits.

The Impugned Order dated 10.8.2016 passed by the State Commission is hereby upheld.

No order as to costs.

Pronounced in the Open Court on this **24<sup>th</sup> day of April, 2018.**

**(Justice N. K. Patil)**  
**Judicial Member**

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**REPORTABLE/NON-REPORTABLE**

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**(I.J. Kapoor)**  
**Technical Member**