

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

Execution Petition No. 2 of 2017
IN
APPEAL NO. 338 OF 2016

Dated: 29th May, 2018

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

In the Matter of:

- 1. M. P. Biomass Energy Developers Association**
7th Floor, Minerva Complex,
94, S.D. Road,
Secunderabad – 500 003. ...Petitioner No.1

- 2. M/s. Orient Green Power Co. Ltd.**
Sigappi Achi Building – 4th Floor,
No. 18/3, Rukmani Lakshmipathi Road
(Marshalls Road) Egmore,
Chennai – 600 008. ...Petitioner No.2

- 3. M/s. Arya Energy Ltd.**
Third Floor, E-14,
Shyam Plaza, Pandri,
Raipur – 492 001 ...Petitioner No.3

- 4. M/s. Shalivahana Green Energy Ltd.**
7th Floor, Minerva Complex,
94, S.D. Road, Secunderabad – 500 003. ...Petitioner No.4

Versus

- 1. Madhya Pradesh Electricity Regulatory**
Commission (MPERC)
5th Floor, Metro Plaza,

E-5, Bittan Market, Bhopal – 462 023. ... Respondent No.1

**2. Madhya Pradesh Power
Management Co. Ltd. (MPPMCL)
Shakti Bhawan, Vidyut Nagar,
Rampur, Jabalpur (M.P.) ...Respondent No. 2**

Counsel for the Petitioner (s) : Mr. M G Ramachandran
Mr. Anand K Ganesan
Ms. SwapnaSeshadri
Ms. PoorvaSaigal
Ms. Ranjitha Ramachandran
Ms. Neha Garg
Ms. Rhea Luthra
Ms. Parichita Chaudhary
Mr. Shubham Arya

Counsel for the Respondent(s) : Mr. S Venkatesh
Mr. Pratuys Singh
Mr. Vikas Maini
Ms. Anuradha Mishra
Mr. Sandeep Rajpurohit for R-1

Mr. G Umapathy
Mr. Aditya Singh
Mr. Sanjeev Khare (Rep.) for R-2

ORDER

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

1. The Petitioners have filed this Execution Petition (EP) under Section 120(3) of the Electricity Act 2003 (“**the Act**”) for execution and implementation of the judgement/order dated 20.3.2017 passed by this Tribunal in Appeal No. 338 of 2016.

2. The Petitioner No.1 i.e. M.P. Biomass Energy Developers Association has been formed by the biomass project developers in the State of Madhya Pradesh (MP). The other Petitioners 2 to 4 are M/s. Orient Green Power Ltd., M/s. Arya Energy Ltd. and M/s. Shalivahana Green Energy Ltd. respectively are the companies incorporated under the Companies Act, 1956. They have installed biomass-based power plants in the State of MP.

3. The brief facts of the Execution Petition are as below:
 - a) MPERC (herein also referred to as the “State Commission”) vide Order dated 02.03.2012 determined the tariff for procurement of power by the distribution licensees from the biomass based projects for the period 2012-14. This Order was challenged before this Tribunal in Appeal No. 93 of 2012 by biomass project developers. This Tribunal in the judgment dated 18.2.2013 directed the State Commission to re-determine the tariff of biomass projects. The State Commission vide Order dated 3.5.2013 re-determined the tariff for biomass projects. Aggrieved by the order dated 3.5.2013 the biomass project developers filed Appeal No. 144 of 2013 before this Tribunal.

 - b) This Tribunal vide Judgment/order dated 29.5.2014, in Appeal No. 144 of 2013 remanded the matter to the State Commission to re-determine the Gross Calorific Value (GCV) of the fuel and the Station Heat Rate (SHR) as the State Commission has not given reasoned findings for considering the same.

- c) The State Commission, after considering the directions of this Tribunal in the judgment dated 29.5.2014, vide order dated 13.8.2015 considered the earlier GCV for the biomass at 3600 kCal/kg and station heat rate of 3800 kCal/kWh. Aggrieved by the Order dated 13.08.2015, biomass project developers, filed Appeal No. 211 of 2015 for fixing of GCV of fuel and SHR.
- d) This Tribunal vide judgment/order dated 4.5.2016, in Appeal No.211 of 2015 fixed the GCV as 3100 kCal/kg and SHR at 4200 kCal/kWh. This Tribunal directed the State commission to re-determine the tariff of biomass generating power plants in the State of MP, considering GCV as 3100 kCal/kg and SHR 4200 kCal/kWh.
- e) After going through legal rounds against the judgement dated 4.5.2016 of this Tribunal finally in compliance to the directions in the said judgment, the State Commission vide order dated 30.11.2016 set the year wise tariff for generation of electricity from new biomass energy projects commissioned on or after 2.3.2012.
- f) Aggrieved by the State Commission's Order dated 30.11.2016, the Petitioners filed Appeal No. 338 of 2016 before this Tribunal. This Tribunal vide the judgement dated 20.3.2017 in the said Appeal set aside the conditions (a) to (d) imposed at para 15 in the said Order of the State Commission.

- g) The judgement/order dated 20.3.2017 of this Tribunal was challenged by MPPMCL before the Hon'ble Supreme Court. The Hon'ble Court vide Order dated 26.4.2018 has set aside the judgment/order of this Tribunal on the issue of granting 'must run' (condition 15 (b) of the order dated 30.11.2016) status to the biomass power plants and has upheld the decision of this Tribunal on other conditions i.e. 15. (a), 15. (c) & 15. (d).
- h) The Petitioners raised the arrear bills on MPPMCL based on the Order dated 30.11.2016 of the State Commission and charged interest as per the provisions of the PPA. The Petitioners have also raised the bills for the period from 17.2.2017 when MOD was applied by MPPMCL. However, MPPMCL has denied the claims of the Petitioners and has returned the said bills. Aggrieved by the same the Petitioners have filed this EP before this Tribunal.
- i) In the instant petition, the Execution Petitioners have pressed upon two issues i.e. arrears and interest for the power supplied by the Petitioners from Commercial Operation Date (COD) till 17.2.2017 and payment of fixed charges and interest thereon from 17.2.2017 when MOD was applied by MPPMCL and stopped scheduling power from the biomass power projects of the Petitioners 2 to 4.
4. The learned Counsel Mr. M G Ramachandran appearing for the Execution Petitioners has made following submissions for our consideration on the issues raised in Execution Petition:

- a) The tariff payable by MPPMCL to the Petitioners 2 to 4 has been decided in the Order dated 30.11.2016 of the State Commission after four rounds of litigation. The conditions imposed by the State Commission in the said order have been vacated by this Tribunal and has been upheld by Hon'ble Supreme Court except on 'must run' condition, which has now been replaced with MOD system.
- b) The issue of non-existence, non-finalisation of the PPA raised by the Respondents has also been rejected by this Tribunal in Review Order dated 2.8.2017. The position related to existence of PPA, tariff payable by the Respondent No. 2 to biomass developers has become clear.
- c) There is complete finality regarding tariff to be paid to the biomass projects as decided in the Order dated 30.11.2016 of the State Commission. There is need to pay difference in tariff as decided in Order dated 30.11.2016 and earlier tariff Orders of the State Commission along with delayed payment surcharge of 1.25% per month in terms of the PPA for the electricity supplied from respective COD of biomass projects until 17.2.2017, the date up to which electricity was supplied by the biomass developers. After this date, MPPMCL has applied Merit Order Dispatch (MOD) on the biomass projects and has not scheduled electricity from the projects of the Petitioners. The projects were ready to generate and are entitled for deemed generation/ fixed charges. Had MPPMCL scheduled power, the projects would have supplied power to it.

- d) The State Commission in the Order dated 30.11.2016 has determined single part tariff keeping in view of renewable energy sources to have must run status. The two-part tariff in such situation was irrelevant. However, the State Commission in its earlier order dated 2.3.2012 has determined two-part tariff. The single-part tariff determined in the order dated 30.11.2016 can be computed in the same manner as determined in the order dated 2.3.2012.
- e) The Petitioners have made monetary claim for quantum of electricity supplied from respective COD of their projects until 17.2.2017, delayed payment surcharge @1.25% per month as per Article 7.6.4 of the PPA on the arrears until the date of payment. These claims are not being pressed upon in case of Petitioner No. 4 i.e. Shalivana Energy Ltd.
- f) The situation for period from 17.2.2017 onwards when MOD was applied and no schedule was given by MPPMCL is not covered in either PPA, Regulations or Tariff Order. To deal with this condition, general situations of electricity industry and provisions of MP Electricity Balancing and Settlement Code, 2015 will have to be seen for the treatment to be given for this period. According to which MPPMCL can avoid variable cost and only fixed costs need to be paid. The single part tariff as in order dated 30.11.2016 is summation of fixed and variable charges and can be bifurcated based on the tariff design (detailed at para 6.1) adopted by the State Commission in Order dated 2.3.2012. The same tariff design

can be continued in subsequent orders including Order dated 30.11.2016.

- g) The fixed charge elements from the order dated 30.11.2016 required to be computed on the basis as provided in the Order dated 2.3.2012. MPPMCL for the period from 17.2.2017 needs to pay fixed charges along with interest as per PPA/Lol and the State Commission can be directed to determine the fixed charges on affidavit before this Tribunal.
- h) In view of the developments during the course of hearings before this Tribunal in the present case, the learned counsel appearing for the Petitioners confined his prayers are as follows:
- i. Direct MPPMCL to pay arrears and give effect to the revised tariff from COD of the respective biomass power plants of the Petitioners 2 & 3.
 - ii. Direct MPPMCL to pay interest on above arrears at the rate of 1.25% per month or 15% per annum.
 - iii. Direct MPPMCL to pay bills of fixed charges raised by the Petitioners for the period from 17.2.2017 onwards whereby despite the interim order passed by this Tribunal, MPPMCL took coercive steps and stopped giving schedule to the plant of the Petitioners.
 - iv. Direct MPPMCL to pay interest on above fixed charges at the rate of 1.25% per month or 15% per annum.

5. The learned counsel Sh. S Venkatesh for the State Commission and the learned counsel Sh. G Umapathy for MPPMCL have made following submissions for our consideration:
- a) The execution proceedings before this Tribunal is limited to executing the decree passed by it. Accordingly, the order dated 30.11.2016 and judgement/order of this Tribunal dated 20.3.2017 are required to be seen to assess the valid decree in this case.
 - b) In terms of the order dated 30.11.2016, the State Commission has not issued any direction to MPPMCL to pay any differential amount between original order dated 2.3.2012 and the order dated 30.11.2016. In Appeal against the said order of the State Commission, the Petitioners have not sought payment of arrears which is evident from the prayers made by them in the said Appeal. Further, this Tribunal in the judgement dated 20.3.2017 has only set aside the conditions imposed at para 15 of the Order dated 30.11.2016. Even if the Order of the State Commission and judgement of this Tribunal are merged then also there is no direction by the State Commission or this Tribunal for payment of any arrears.
 - c) The dispute agitated by the Petitioners in the Appeal was for fixation of tariff and did not entail any prayer for payment of arrears by MPPMCL. The same needs to be adjudicated first by the State Commission before any issuance of direction by this Tribunal.

- d) Even after applying the doctrine of merger, the decree does not entail any payment of arrears/ fixed charges and in no manner can be sought through Execution Proceedings. Further, it is well settled position in law that the doctrine of merger is not doctrine of rigid and universal application, it differs from case to case basis considering facts of the case in hand. On this issue the judgement of Hon'ble Supreme Court in case of State of Madras v. Madurai Mills Co. Ltd, AIR 1967 SC 681 and Kothari Industrial Corporation Ltd. v. The Agricultural Income Tax Officer, ILR 1998 Karnataka 1510 has been relied. The judgement dated 20.3.2017 of this Tribunal was in relation to para 15 of the order dated 30.11.2016 of the State Commission and hence the merger cannot be extended to the entire order of the State Commission.
- e) It is a settled position in law that an Executing Court cannot travel beyond the order or decree under execution. On this issue the learned counsel appearing for the Respondents placed reliance on the judgements of Hon'ble Supreme Court in case of Rameshwar Dass Gupta v. State of U.P. (1996) 5 SCC 728 and Deepa Bhargava v. Mahesh Bhargava (2009) 2 SCC 294.
- f) MPPCL is having PPA only with M/s Orient Green Power Co. Ltd. and Letter of Intent (LoI) with M/s Arya Energy Ltd. and M/s Shalivahana Green Energy Ltd. Biomass developers have installed projects only after when they were satisfied with the generic tariff order of the State Commission otherwise they would have not installed them. Biomass developers have undertaken supply at

generic tariff as per Order dated 3.5.2013 and there is no provision in PPA/ Lol regarding change of tariff.

- g) The prayer of the Petitioners for payment of fixed charges from 17.2.2017 is untenable and beyond the scope of the decision of this Tribunal. Single part tariff was introduced in May 2013 and is in vogue. The claim of the Petitioners for payment of fixed charges for non-supply of power by resorting to unilateral determination of the same is misplaced.
- h) The Petitioners were first required to submit application before the State Commission for execution of the order dated 30.11.2016 as it is the original authority and not this Tribunal, which has passed an order in exercise of its appellate jurisdiction. Further, as per provisions of Clause 52 of the MPERC (Conduct of Business) Revision-I) Regulations, 2016 it is the State Commission which can enforce the orders passed by it. Accordingly, the Execution Petition is not maintainable. MPPCL has requested this Tribunal to direct the Petitioners to approach State Commission for execution of the order.
- i) In view of the judgement dated 26.4.2018 of the Hon'ble Supreme Court, the tariff order dated 3.5.2013; which provides for single part tariff, in the PPA has become final and there is no direction from for grant of revised tariff other than as in order dated 3.5.2013.

- j) The reliance of the Petitioners on the MP Electricity Balancing and Settlement Code, 2016 is misplaced. The Petitioners made extensive submissions before the Supreme Court for payment of fixed cost etc. but the Hon'ble Supreme Court has held that the findings of two-part tariff cannot be sustained. Hence, the prayer on this count is not sustainable on principle of Res Judicata.
6. After having careful consideration of the submissions of the learned counsel appearing for the Petitioners and the learned counsel appearing the Respondents on various issues raised in the present Execution Petition, our observations are as follows:-
- a) The core issues raised by the Petitioners in this Execution Petition are related to payment of arrears (difference in tariff in accordance with tariff order dated 30.11.2016 and earlier tariff order(s)) from the respective COD of the projects till the date of payment and payment of fixed charges with interest from 17.2.2017 onwards (MOD period) till the date payment is made by MPPMCL.
- b) We observe that this Tribunal has passed the judgement/order dated 20.3.2017 on the Order dated 30.11.2016 of the State Commission. The said order of the State Commission was passed based on the directions of this Tribunal in the judgement/order dated 4.5.2016 in Appeal No. 211 of 2015 regarding GCV and SHR. The relevant portion of the order dated 30.11.2016 is reproduced below:

“14. In compliance to the directions of the Hon’ble APTEL passed in its judgment dated 04.05.2016, the Gross Calorific Value (GCV) at 3100 kCal/kg and Station Heat Rate (SHR) at 4200 kCal/kWh are considered. Accordingly, the Commission sets the year wise tariff for generation of electricity from new biomass energy projects commissioned on or after 02.03.2012 as under:

(a) Commissioned on or after 02.03.2012 and during FY 2012-13:

.....

(b) Commissioned during FY 2013-14 and thereafter:

.....

15. In view of the aforesaid judgment dated 04.05.2016 passed by the Hon’ble APTEL and the applicable terms and conditions of the tariff order dated 02.03.2012, the tariff mentioned above in para 14 of this order shall be subject to the following terms and conditions:

(a) This tariff shall be applicable till 31.03.2017 or the new tariff order is issued, whichever is earlier.

(b) The projects for more than 2 MW are subjected to the ‘scheduling’ and ‘merit order dispatch principles’ in terms of the para 8.10 of the tariff order dated 02.03.2012 since date of commissioning.

(c) This tariff order is applicable to the projects using rice husk, wheat husk, mulbury and coal (limited to 15% of the total fuel on annual basis) only as a fuel based on which GCV has been decided by the Hon’ble APTEL in its Judgment dated 04.05.2016.

(d) This tariff shall be applicable for the projects for which Power Purchase Agreement has already been executed at the time of commissioning of the project.

.....

From the above it is manifest that the State Commission based on the judgement/order of this Tribunal has set the tariff for biomass based power projects commissioned on or after 02.03.2012 and during FY 2012-13 and commissioned during FY 2013-14 and thereafter with certain terms and conditions as above.

- c) This Tribunal vide judgement/order dated 20.3.2017 set aside the terms and conditions (a) to (d) as envisaged in para 15 of the Order dated 30.11.2016 of the State Commission. Thereafter on appeal from MPPMCL, Hon'ble Supreme Court has reinstated the condition (b) of para 15 (related to 'must run/MOD') of the said order of the State Commission. Accordingly, the order dated 30.11.2016 has taken final shape minus terms and conditions (a), (c) and (d) at para 15 of the said Order.
- d) It has been contended that the execution order if any has to be restricted to the decree of the judgement and it cannot travel beyond the decree. The Respondents on this issue have relied on the judgements of Hon'ble Supreme Court in case of Rameshwar Dass Gupta v. State of U.P. (1996) 5 SCC 728 and Deepa Bhargava v. Mahesh Bhargava (2009) 2 SCC 294. After perusal of the said judgements, we find that this Tribunal cannot go beyond the decree of the judgement. We agree to this contention of the Respondents that as per the law execution of any order has to be as per the decree. The order of this Tribunal in the judgement dated 20.3.2017 is reproduced below:

“ORDER

We set aside the conditions (a), (b), (c) and (d) specified in para 15 of the Impugned Tariff Order dated 30.11.2016.

Accordingly, the appeal, being No. 338 of 2016, is disposed of along with IA Nos. 732 of 2016, 733 of 2016, & 734 of 2016 and 69 of 2017.

No order as to costs.”

This Tribunal judgement/order has set aside the conditions (a) to (d) of para 15 of the Order dated 30.11.2016.

- e) From perusal of the Appeal No. 338 of 2016 and the judgement of this Tribunal on the same, we find that the Petitioners have not made any specific prayer for payment of arrears or interest thereupon. The issue of payment of arrears/ interest also does not find any mention in the State Commission’s order dated 30.11.2016. The prayer of the Petitioners according to decree before this Tribunal shall lie on issues related to time limitation (until 31.3.2017) of applicability of the tariff, limitation of tariff for projects using biomass rice husk, wheat husk and mulbury only and applicability for the projects for which PPAs were executed at the time of commissioning of the project if not agreed by the State Commission. It is also observed that a new issue related to payment of fixed charges/interest thereupon from 17.2.2017 onwards (MOD period) has been raised by the Petitioners in this EP and emphasised for fixation of fixed charges by the State Commission in the present proceedings. In our opinion the appropriate forum for the same is the State Commission which has

determined the tariff. Accordingly, we find substance in the submissions of the learned counsel for the Respondents that EP travels beyond the decree by way of praying for arrears/interest and fixation of fixed charges from MOD date & interest thereupon.

- f) The Petitioners have submitted that after the issuance of the judgement/order dated 20.3.2017 by this Tribunal the order dated 30.11.2016 is merged with the said judgement and hence the doctrine of merger shall apply. The State Commission has contended that even if the doctrine of merger is applied even then the prayers of the Appellant are beyond the decree of the Appellant and the State Commission put together as the said judgement/ order does not deal with the arrears/ interest/ fixed charges issues as raised by the Petitioners in this Execution Petition. In view of our decision at 6. e) above we do not find any substance in the submissions of the learned counsel for the Petitioners.
- g) The State Commission and MPPMCL have submitted that, since the underline order under which execution is sought is the Order dated 30.11.2016 of the State Commission, so the said petition shall have to be filed before the State Commission which has original jurisdiction and not before this Tribunal which is having Appellate jurisdiction. MPPMCL has also drawn our attention to provisions of Clause 52 of the MPERC (Conduct of Business) Revision-I) Regulations, 2016. The relevant extract is reproduced herein under:

“52. Enforcement of orders passed by the Commission.-

The Commission Secretary shall ensure enforcement and compliance of the orders passed by the Commission, by the persons concerned in accordance with the provisions of the Act and the Regulations and if necessary, may seek the orders of the Commission for directions”

In case of non-compliance of the orders of the State Commission, the Secretary to the State Commission may seek the orders of the State Commission for directions.

Accordingly, the State Commission is empowered for enforcement and compliance of its orders.

h) We considered that the dispute has arisen because of arrear/interest bills and fixed charge/interest bills raised by the Petitioners based on the Order dated 30.11.2016 of the State Commission and non-admissibility of the same by MPPMCL. Fundamentally, the dispute is between the generator and the procurer of the electricity for execution of a particular order of the State Commission.

i) In view of our discussions as above and considering all the relevant aspects of the instant Execution Petition, we are of the considered opinion that the dispute between the Petitioners and MPPMCL is first required to be adjudicated before the State Commission. Accordingly, we direct the Petitioners to take up the matter with the State Commission for adjudication of the said disputes. The State Commission is also directed to adjudicate the disputes between the parties considering the case on merits in

totality and judgements of this Tribunal and Hon'ble Supreme Court.

- j) Having directed as above, we would like to clarify that the observations made by us, which touch on the merits of the case, based on submissions of the parties were to dispose of this EP and it will be open for this Tribunal to deal the same again if required in future.

ORDER

For the foregoing reasons as stated supra, we are of the considered opinion that the issues raised in the present Execution Petition have merits as discussed above which are to be first adjudicated by the State Commission.

Hence, we hereby direct the State Commission to first adjudicate the disputes between the parties as stated supra within a period of three months from the date of receipt of copy of this Order.

The instant Execution Petition stands disposed of as such with directions as above.

No order as to costs.

Pronounced in the Open Court on this **29th day of May, 2018.**

(Justice N. K. Patil)
Judicial Member

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REPORTABLE/NON-REPORTABLE

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(I.J. Kapoor)
Technical Member