

COURT-II
IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(APPELLATE JURISDICTION)

ORDER IN APPEAL NO. 21 OF 2018
ON THE FILE OF THE
APPELLATE TRIBUNAL FOR ELECTRICITY,
NEW DELHI

Dated: 19th March, 2019

Present: Hon'ble Mr. Justice N.K. Patil, Judicial Member
Hon'ble Mr. Ravindra Kumar Verma, Technical Member

In the matter of:

JK Minerals

Main Road Balaghat 481001
Madhya Pradesh

..... Appellant

VERSUS

- 1. Madhya Pradesh Electricity Regulatory Commission**
Through Secretary
5th Floor, Metro Plaza, Arera Colony, Bittan Market,
Bhopal 462016
- 2. M.P. Transmission Company Limited**
Through Chief Engineer
Block No.2, Shakti Bhawan, Rampur
Jabalpur 482 008
Madhya Pradesh
- 3. M.P. Pashchim Kshetra Vidyut Vitaran Company Limited**
Through Additional Chief Engineer
G.P.H. Compound, Polo Ground, Indore,
Madhya Pradesh
- 4. M/s Indore Treasure Island Pvt Ltd.**
Through Director
Plot No.11, South Tukoganj, Indore,
Madhya Pradesh

..... Respondents

Counsel for the Appellant (s) : Mr. Parinay Deep Shah
Ms. Surabhi Pandey
Ms. Swagatika Sahoo

Counsel for the Respondent(s) : Mr. S. Venkatesh
Ms. Nishtha Kumar for R-1

Mr. Pulkit Agrwal
Ms. Anushree Bardhan for R-2 & 3

The Appellant has sought the following reliefs in Appeal No. 21 of 2018:

- i. Allow the appeal;
- ii. Set aside Respondent No.2' Letter No. 04-02/P9/OA-JK-Minerals/F-194/2900, dated 15.10.2016, rejecting Appellant's application seeking LTOA; and
- iii. Direct Respondents Nos. 2 and 3 to grant LTOA to the Appellant for third party sale of 1 MW solar power generated by Appellant to M/s Indore Treasure Island Pvt. Ltd; and
- iv. direct Respondent No. 3 and Respondent No. 2 to make good the loss of INR 82,50,444 suffered by the Appellant due to refusal of open access along with interest;;
- v. in the alternative, direct the distribution licensee to adjust the units of power already generated by the Appellant and injected into the grid against the future drawl of M/s Indore Treasure Island Pvt. Ltd;
- vi. pass such other Order(s) and this Hon'ble Tribunal may deem just and proper.

The Appellant has presented this Appeal for considering the following Question of Law:

- A. Whether Respondent No. 2 can deny open access in dereliction of its duties as the Nodal Agency?

- B. Whether the State Commission could have excused Respondent No. 2 from entering appearance during adjudication of Petition No. 22 of 2017?
- C. Whether State Commission was correct in not recording that Respondent No. 2 had recommended that LTOA should be granted to the Appellant?
- D. Whether the State Commission was correct in not appreciating and recording the judgments of the Hon'ble Supreme Court that a statutory authority cannot act at the behest of any other authority in fulfilling its duties under the statute?
- E. Whether the State Commission has failed to appreciate that the beneficiary, Respondent No. 4 had intended to consume the LTOA power within its contract demand and therefore will not be exerting any additional burden on the network?
- F. Whether the State Commission has correctly upheld the nodal agency and the transmission licensee's disallowance of LTOA on mere possibility of over loading of feeder?
- G. Whether the State Commission has correctly rejected the undertaking provided by Respondent No. 4 that it will not exceed the contract demand?
- H. Whether the State Commission is bound to direct the transmission licensee to explain its orders and provide basis for the same?
- I. Whether the State Commission can rely upon a Reply filed by a party after the final date of hearing?
- J. Whether the State Commission was correct in not directing the Respondent No. 3 to strengthen the feeder and instead disallowing LTOA due to over-loading of feeder?

J U D G M E N T

PER HON'BLE MR. JUSTICE N.K. PATIL, JUDICIAL MEMBER

BRIEF FACTS OF THE CASE:

1. M/s J.K. Minerals, the Appellant herein, has filed a Petition before Madhya Pradesh Electricity Regulatory Commission, Bhopal, 1st Respondent herein, in the matter of non-clearance of short term open access of power under Regulation 9(1) of the MPERC (Conduct of Business) Regulations, 2004 read with Regulation 8(40) of the MPERC (Terms and conditions for Intra State open access in Madhya Pradesh) Regulations, 2005 and contended that, there will be adjustment of units only in the bills of M/s Indore Treasure Island Pvt. Ltd. and no additional load shall be required to be supplied to it through long term open access. The Appellant herein has taken several grounds in his petition before the first Respondent/MPERC and also filed detailed written submission for consideration and requested to grant reliefs as prayed for in its petition in the interest of justice and equity.

2. The said matter had come up for consideration before the first Respondent/MPERC on 25.07.2017. The first Respondent/MPERC, after hearing both the sides and having regard to the facts and all relevant material available on record and by assigning the reasons in paragraph 7 in its Order dated 15.09.2017, has disposed of the petition.

3. Upon service of notice, the Respondents represented through their counsel and have filed their reply and written submissions contended that the declaration in the form of undertaking of the petitioner has no legal back up of using open access. The respondent no.3 is connected through 33 kV Manoramaganj-I feeder. The connected load of all HT consumers and 33/11 kV s/s is 25330 kVA. The maximum load recorded on the feeder is 375 Amps, which is more than the permissible loading. Also, the M.P. High Court Bench at Indore is connected on this feeder. There is an annual growth of 10% load in the Indore city. Hence, the open access to the petitioner is not technically feasible. Hence, the petition filed by the petitioner may be rejected.

4. Not being satisfied by the impugned Order dated 15.09.2017 passed in Petition No. 22/2017 on the file of the Madhya Pradesh Electricity Regulatory Commission, Bhopal, the Appellant felt necessitated to present this Appeal, being Appeal No. 21 of 2018, before this Tribunal seeking appropriate reliefs, as stated supra.

5. The learned counsel for the Appellant, at the outset, submitted that, Respondent Nos. 2 and 3 has failed to consider the relevant provisions of the Electricity Act, 2003 which clearly state that the transmission licensee and distribution licensee shall provide non-discriminatory open access. The National Electricity Policy also lays

emphasis on promoting open access so as to promote competition amongst the generating companies leading to cheaper power. The first Respondent/MPERC has failed to consider the ground taken in the petition and also failed to consider the relevant regulations and the feasibility report submitted by the 3rd Respondent and proceeded to pass the impugned order without assigning any valid and cogent reasons. Therefore, the impugned Order passed by the first Respondent/MPERC is liable to set aside. Being aggrieved by the impugned Order dated 15.09.2017 passed in Petition No. 22 of 2017 on the file of the Madhya Pradesh Electricity Regulatory Commission presented this appeal.

6. Further, the counsel for the Appellant submitted that, the 1st Respondent/MPERC has failed to consider the feasibility report dated 22.08.2016 submitted by the 3rd Respondent that maximum load recorded on 33 KV MG-1 feeder and later, as per the letter dated 14.08.2017 of the 3rd Respondent, the maximum load recorded in the month of May, 2016 on feeder was 375 Amp. Therefore, the 3rd Respondent, who is responsible for developing and maintaining an efficient network has failed his duties under Section 40 of the Electricity Act, 2003 to strengthen the network as a result the feeders are unduly overloaded. Also, in the instant matter, denial of open access is arbitrary and discriminatory and also against the spirit of Article 14 of Constitution of India on the ground that Respondent Nos. 2 and 3 by

allowing certain similarly placed RE generators LTOA and not allowing it to the Appellant have acted in violation of Right to Equality enshrined under Article 14 of the Constitution of India. During the hearing on 22.08.2017 before the 1st Respondent/MPERC, the Appellant stated that the open access may be allowed on the following grounds:

- (i) An undertaking is given that no additional demand over and above the contract demand shall be drawn and only adjustment of units is required.
- (ii) The clause 3.4 of the M.P. Electricity Supply Code is not related to the open access.
- (iii) The long term open access is already given by the Respondent Nos. 2 & 3.
- (iv) Since last six months, there is no over-drawl of power by the Appellant/petitioner

This aspect of the matter has not been considered. Therefore, impugned order passed by the 1st Respondent/MPERC is liable to be set aside and the matter may kindly be remitted back for reconsideration afresh to pass an appropriate order in accordance with law after affording reasonable opportunity of hearing to the parties.

7. *Per-contra*, the learned counsel, Mr. S. Venkatesh, appearing for the 1st Respondent/MPERC and the learned counsel, Mr. Pulkit Agrwal, appearing for the Respondent Nos. 2 & 3, inter-alia, contended and

substantiated that the impugned Order has been passed by the 1st Respondent/MPERC after due consideration of all relevant material available on record and has rightly justified that the declaration in the form of undertaking of the petitioner has no legal back up of using open access as contended by the Respondent Nos. 2 and 3 and also contended that the Appellant has failed to make out any case for considering the relief sought in the petition. The respondent no.4 is connected through 33 kV Manoramaganj I feeder. The connected load of all HT consumers and 33/11 kV s/s is 25330 kVA. The maximum load recorded on the feeder is 375 Amps, which is more than the permissible loading. Therefore, the 1st Respondent/MPERC, after due deliberation, of the entire relevant material available on record, has rightly opined that there is an annual growth of 10% load in the Indore city. Hence, the open access to the Appellant is not technically feasible in the light of the Report dated 22.08.2016 submitted by the Director (Commercial), M.P. Paschim Kshetra Vidyut Vitran Co. Ltd, Indore (3rd Respondent herein). This aspect of the matter has rightly been considered and by assigning valid and cogent reasons in paragraph 7 of the impugned Order, the 1st Respondent/MPERC has justifiably denied the relief sought by the Appellant on the ground that contract demand does not form a basis for allowing open access on the feeder in case the concerned distribution licensee does not find it technically feasible to allow open access in

existing arrangements. Therefore, interference by this Tribunal does not call for.

8. After careful consideration of the submissions of the learned counsel for the Appellant and the learned counsel for the Respondent Nos. 1, 2 & 3 and after going through the reply filed by the Respondents and rejoinder filed by the Appellant and after careful perusal of the impugned order passed by the 1st Respondent/MPERC the only issue that arises for our consideration in the instant appeal:

Whether the impugned Order dated 15.09.2017 passed in Petition No. 22 of 2017 on the file of the Madhya Pradesh Electricity Regulatory Commission, Bhopal, 1st Respondent herein, is sustainable in law?

9. The 1st Respondent/MPERC, after considering the case made out by the Appellant and the Respondents, has passed the impugned Order. The relevant part of the impugned Order reads as under:

“7. Having heard the petitioner and the respondent and on considering their written submissions, the Commission is of the view that the undertaking for not availing the demand over and above the contract demand will not serve the purpose for allowing the open access because once the open access is allowed the petitioner would be entitled to receive power over and above the contract demand. The clause 3.4 of the M.P. Electricity Supply Code is equally applies to the petitioner whether it is availing power as per sanctioned contract demand or through open access. The precedence of allowing open access to the consumers does not

entitle the petitioner to get permission of open access under the overloading of the system. Also, drawl of power within the contract demand in the past does not form a basis for allowing open access on the feeder in case the concerned distribution licensee does not find it technically feasible to allow open access in existing arrangements. Under the above circumstances, the request of the petitioner cannot be allowed.”

10. After careful perusal of the reasoning assigned in para 7 of the impugned Order dated 15.09.2017, as extracted above, it is manifest on the face of the order that the same is cryptic in nature neither the impugned order does contained any discussion nor any valid reasons while coming to the conclusion for rejecting the claim of the Appellant contrary to the case made out by the Appellant and also contrary to the relevant material available on record.

11. It is significant to note that there is a Report dated 22.08.2016 submitted by the Director (Commercial), M.P. Paschim Kshetra Vidyut Vitran Co Ltd., Indore, 3rd Respondent herein, bearing No. MD/WZ/05/Com-HT/AK/14543, which has not been discussed in the impugned Order dated 15.09.2017 except opined that the precedence of allowing open access to the consumers does not entitle the Appellant/petitioner to get permission of open access under the overloading of the system and also, drawl of power within the contract demand in the past does not form a basis for allowing open access on

the feeder in case the concerned distribution licensee does not find it technically feasible to allow open access in existing arrangements. It is significant to note that the 1st Respondent/MPERC ought to have taken a holistic approach having regards to the facts and circumstances of the case made out by the Appellant and ought to have taken a balanced view on the ground that the long term open access is already given by the Respondent Nos. 2 & 3 and specifically they have pointed out and contended that since last six months, there is no over-drawl of power by the Appellant/petitioner. This aspect of the matter has neither been looked into nor considered nor given any valid and cogent reason for denying the relief sought in the petition filed by the Appellant. Therefore, we are of the considered view that the impugned Order cannot be sustainable and is liable to be vitiated on the ground that the impugned Order passed by the 1st Respondent/ MPERC is not a speaking order and it would suffice this Tribunal to meet the ends of justice, pass an appropriate order without going further into merits or demerits of the case in the interest of justice and equity.

ORDER

For the foregoing reasons, as stated supra, the instant appeal, being Appeal No. 21 of 2018, filed by the Appellant is allowed in part. The impugned Order dated 15.09.2017 passed in Petition No. 22/2017

on the file of the Madhya Pradesh Electricity Regulatory Commission, Bhopal, 1st Respondent herein, is hereby set aside.

The matter stands remitted back to the 1st Respondent/MPERC to reconsider the matter afresh and pass an appropriate order in accordance with law after affording reasonable opportunity of hearing to the Appellant and the Respondent Nos. 2 to 4 and other interested parties and dispose of the same as expeditiously as possible, at any rate, within a period of six months from the date of the appearance of the parties in the interest of justice and equity.

The Appellants and the Respondent Nos. 2 to 4 are directed to appear personally or through their counsel before the first Respondent/MPERC on 22.04.2019 without further notice.

All the contentions of both the parties are left open.

With these observations, the instant Appeal, being Appeal No. 21 of 2018, stands disposed of.

Order accordingly.

(Ravindra Kumar Verma)
Technical Member

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(Justice N.K. Patil)
Judicial Member