

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

E.P.NO.2 OF 2013

IN

APPEAL NOs.171 & 187 of 2010

Dated: 02nd Dec, 2013

**Present: HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM,
CHAIRPERSON
HON'BLE MR. V.J TALWAR, TECHNICAL MEMBER**

In the Matter of:

**Western Electricity Supply Company Limited.,
Burla, Sambalpur,
Odisha
Pin-768 017**

.....Execution Petitioner/Appellant(s)

Versus

**OCL Iron & Steel Limited.,
Village-Lamloi, PO-Garvana,
Rajgangpur,
Odhisha-77017**

**Counsel for the Appellant(s) : Mr. Buddy A Ranganadhan
Mr. Hasan Murtaza
Mr. Aditya Panda**

**Counsel for the Respondent(s): Mr. Ranvir Singh,
Mr. Ravi Nanda
Ms. Shruti Singh**

ORDER

**PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,
CHAIRPERSON**

1. This is the Execution Petition filed by the Petitioner Western Electricity Supply Co. Ltd., (WESCO) arising out of the Judgment dated 5.8.2011 rendered by this Tribunal in the Appeal filed by the Petitioner.
2. In this Petition, the Petitioner has prayed for a direction to the OCL Iron & Steel Limited to pay Rs.1,07,34,421/- which it is liable to pay, failing which the directions to be issued that the amount be realized by way of attachment/sale of the movable property and pass any such order as may be deemed fit and proper.
3. The short facts are as under:
 - (a) The Petitioner, WESCO is a Distribution Licensee. The OCL Iron and Steel Limited, the Respondent (Steel Company) has a Captive Generation Plant of 14 MW installed capacity. Its surplus power of 4 MW was being supplied to the OCT and Steel Limited through an independent 11 KV feeder.
 - (b) The said Steel Company is a consumer of the Petitioner having a contract demand of 43.5 MVA.

(c) The said Steel Company is availing power supply at 132 KV.

(d) The said Steel Company filed a Petition before the State Commission praying for a declaration that the said Company being a captive consumer, would not be liable to pay any Cross Subsidy Surcharge while availing Open Access. However, this plea was rejected by the State Commission holding that the Cross Subsidy was liable to be paid by the Steel Company.

(e) As against this order, the Appeal had been filed in Appeal No.20 of 2008 before this Tribunal by the Steel Company.

(f) By the judgment dated 3.9.2009, this Tribunal dismissed the said Appeal confirming the order passed by the State Commission.

(g) Thereupon, the GRIDCO signed an Agreement with the Steel Company whereby it was agreed by the Steel Company to sell power at 11 KV to GRIDCO which in turn, shall sell the power to the WESCO, the Petitioner Distribution Licensee, WESCO in turn would supply the same to the Cement Company.

(h) Questioning the said Agreement, the Petitioner filed a Petition before the State Commission.

(i) However, the plea in regard to agreement raised by the Petitioner was rejected by the State Commission through the order dated 26.8.2010. But, with reference to payment of wheeling charges, the State Commission held that 11 KV line along with associated system is a part of the distribution system of the Petitioner and as such, it is entitled to the wheeling charges for evacuation of surplus power from the Respondent Generation Plant of the Steel Company to the State Grid.

(j) As against this order, both the Petitioner as well as the Respondent filed the Appeal in Appeal 171 of 2010 and 187 of 2010 respectively before this Tribunal.

(k) Both these Appeals were disposed of by the judgment dated 5.8.2011 giving various findings and directions.

(l) In these Appeals, a specific issue was framed as to whether the WESCO is entitled for any wheeling charges from 2nd Respondent for wheeling its power over 11 KV line. This question had been answered by this Tribunal by the judgment dated 5.8.2011 holding that the Respondent Company is liable to pay

wheeling charges to the WESCO for usage of this line for export of its power to GRIDCO as per the order of the State Commission dated 26.8.2010..

(m) As against the said judgment dated 5.8.2011, the Respondent filed an Appeal before the Hon'ble Supreme Court. The same was admitted by the order dated 3.2.2012. However, there was no stay of the operation of the judgment delivered by this Tribunal.

(n) Hence in terms of the judgment of this Tribunal, the Petitioner raised the bill on 27.12.2012 upon the Respondent by sending a bill of the amount namely Rs.77,69,183/- towards payment of wheeling charges as per the findings rendered by this Tribunal. However, there was no response.

(o) Therefore, this Execution Petition has been filed on 2.5.2013 before this Tribunal u/s 120 (3) of the Electricity Act, 2003 praying for allowing execution petition and for giving a consequential direction to the Respondent Company to pay the amount to the Petitioner failing which it may be directed that the said amount be realised by way of attachment/sale of movable property.

4. This petition was filed on 2.5.2013. The same was entertained by this Tribunal on 13.5.2013 and issued notice to the Respondent.
5. On 13.8.2013, Mr. Ranvir Singh, the learned Counsel for the Respondent, took time for filing reply. Accordingly, he was given time to file the reply.
6. Ultimately, in this Execution Petition, the reply has been filed on 19.9.2013. In the reply, the Respondent mainly contended that the Respondent filed an Appeal as against the Judgment dated 5.8.2011 and the same was admitted by the Hon'ble Supreme Court and the Respondent also filed an Application seeking for stay of the operation of the judgment of this Tribunal in Appeal No.171 and 187 of 2010 and this Petition is still pending and hence, this Execution Petition may be adjourned. Accordingly, the matter was adjourned.
7. Now the matter came up on 13.11.2013. On that day, it was reported by the learned Counsel for the Respondent that the stay application had been dismissed by the Hon'ble Supreme court. However, the learned Counsel for the Respondent wants further time for filing the additional reply raising the question with regard to maintainability of the Petition for Execution.

8. Even though the Respondent failed in getting the order of the stay from the Hon'ble Supreme Court, this Tribunal gave further time to file the reply on or before 18.11.2013 since the question of maintainability of the Petition was proposed to be raised.
9. Accordingly, the reply has been filed raising the question of maintainability.
10. We have heard the learned Counsel for both the parties with regard to maintainability of the Petition as well as on the merits of the issues.
11. After hearing them, both the parties were directed to file the Written Submissions. Accordingly, the Written Submissions have been filed by both the parties.
12. We have carefully examined the submissions made by the parties. This Execution Petition has been filed by the Petitioner only in respect of a demand of Wheeling Charges liable to be paid by the Respondent to the Petitioner as held by this Tribunal. The said amount has been quantified in the present Petition at Rs.77,69,183/-. The said quantification is for the period from December, 2009 to October, 2010 in terms of the bill dated 27.12.2012 sent to the Respondent.
13. The Respondent raised three primary objections to the maintainability of the present execution petition. They are as follows:

(a) The Tribunal judgement is only declaratory order and there is no direction to pay and as such it is not executable. Further, the claim by the Petitioner with regard to the amount which had been quantified by the Execution Petitioner in the Execution Petition, has not been determined either by the State Commission or by this Tribunal. Hence, this Petition for Execution is not maintainable.

(b) Since the Execution Petitioner has not entered into a fresh quadripartite agreement which is a condition precedent for fixing the wheeling charges as directed by this Tribunal, the Petitioner would not be entitled to file this Petition to seek for the execution of decree in respect of Wheeling Charges till the quadripartite agreement was executed.

(c) Since the Respondent has not been paid by the GRIDCO its dues for supply of electricity to GRIDCO, the petitioner is disentitled to claim for payment of Wheeling Charges.

14. On these three grounds, elaborate arguments were advanced by both the parties.

15. Before dealing with the maintainability question, it would be proper to refer to the preliminary objection raised by the

Petitioner regarding the right of the Respondent to question the maintainability of this Petition.

- 16.** According to the Petitioner, the Respondent having approached the Hon'ble Supreme Court for the stay of the impugned judgment and having failed to obtain the same is estopped from claiming that the judgment is not executable. If that was the stand of the Respondent that the judgment was not executable, there was no necessity for the Respondent to seek for stay of the same before the Hon'ble Supreme Court.
- 17.** The learned Counsel for the Petitioner further pointed out that even in the said application for stay filed before the Supreme Court, the Respondent categorically admitted that the effect of the impugned judgment was that the Appellant was liable to pay wheeling charges to the WESCO and this would show that the Respondent has actually admitted that it is liable to pay wheeling charges to the Petitioner and having taken the said stand before the Hon'ble Supreme Court, the Respondent is estopped from taking a different stand before this Tribunal that decree is not executable and therefore, the Petition is not maintainable.
- 18.** At the outset, we have to observe that this preliminary objection raised by the learned Counsel for the Petitioner with regard to issue of estoppel has no basis.

19. Merely because the stay application has been filed and the same has been dismissed by the Hon'ble Supreme Court, it would not disentitle the Respondent from raising the question of maintainability of the Execution Petition before this Tribunal on the ground that the judgment itself was not executable. Therefore, we reject the said objection. Consequently, we have allowed both the parties to argue on the maintainability question and the issues incidental thereto.

20. Accordingly, the parties argued at length, we have carefully examined their submissions as well as the records.

21. Let us discuss the relevant issues now.

22. With regard to the 1st issue with reference to the nature of the judgment passed by this Tribunal, the learned Counsel for the Respondent has made the following submissions:

“No doubt, it is true that under section 120(3) of the 2003 Act, the order passed by the Appellate Tribunal shall be executable by the Appellate Tribunal as a decree of the Civil Court. Under Section 120(3) of the 2003 Act, the Appellate Tribunal executes its orders as Civil Court executes its decree. For that purpose, the Tribunal has got all the powers of a Civil Court. But, in the present case, the order passed by the Appellate Tribunal cannot be treated as a decree of

the Civil Court. In this matter, the Tribunal, after hearing the parties in both the Appeals, laid down a mere principle to the effect that even though transmission line is owned by the captive generation plant, it will be deemed to be a part of the network of a Distribution Licensee and that therefore, wheeling charges were payable. After giving finding with the regard to the above liability, the Tribunal did not direct the Respondent company to pay the wheeling charges to the Petitioner. Therefore, the issue in regard to the liability for payment of wheeling charges alone was raised before the Commission as well as before the Tribunal and the same was decided. Hence, Tribunal's order could be the utmost considered as a declaratory order without any directions to the Respondent company to make a payment of wheeling charges after determining the quantum to the Petitioner. Therefore, the judgment of the Tribunal is not executable. Consequently, this Petition for execution is liable to be dismissed as not maintainable".

23. In support of his plea, the Respondent has cited the following decisions:

(a) State of M.P. Vs Mangilal Sharma (1998) 2 SCC 510;

- (b) Prakash Chand v S.S Gerewal (1975) Cr LJ 679
- (c) Bhavan Vaja and Ors Vs Solanki Hanuji (1973) 2 SCC 40;
- (d) Rameshwar Dass Gupta vs State of UP & Anr (1996) 5 SCC 728

24. On the other hand, the learned Counsel for the Petitioner has made the following submissions:

“The judgment of this Tribunal is a decree in the nature of mandatory injunction directing the Respondent to pay wheeling charges to the Execution Petitioner. The Tribunal, having granted a decree in the nature of mandatory injunction, the Respondent is liable to pay the Petitioner, the wheeling charges. Even if the decree of this Tribunal was deemed to be a declaratory decree since this Tribunal not only declared the status of the party but also declared and decided the liability of the respondent to pay wheeling charges, the judgment of this Tribunal must be construed to be a decree in the nature of mandatory injunction. Even when the quantum has not been decided by this Tribunal, this Tribunal has got the powers as a Executing Court u/s 47 of the Civil Procedure Code to decide all the questions relating to the execution, discharge or satisfaction of the decree and to determine the quantum. The decree holder can not be driven to file a fresh suit.

25. With regard to the above point, the learned Counsel for the Petitioner has cited the following:

- (a) AIR 1951 All 817-Saltanat Begam Vs Syed Mohd. Saadat Ali Khan;
- (b) AIR 1950 AP 48Bapurao Vs Hanumanthrao and Ors;
- (c) AIR 2004 Gauhati 169 State of Tripura and Others Vs Sri Tarun Chandra Dey and Others
- (d) AIR 2005 Rajasthan 77 Babu Puri and Others vs Kalu and Others
- (e) (2009) 13 SCC 354-Haryana Vidyut Prasaran Nigam Limited and Another Vs Gulshan Lal and Others;

26. In order to decide the above issue, it would be appropriate to refer to the relevant observation made with reference to the status of the parties and the liability of the Respondent company as decided by the State Commission as well as this Tribunal.

27. The relevant issue with reference to the question has been framed as Issue No.5 by the State Commission. The issue is as follows:

“Issue 5: What is the status of the 11KV line between Cement Company (a consumer of DISCOM) and Steel Company a separate industrial unit, having its own generating company but not a

consumer of DISCOM whether wheeling charge to DISCOM is payable or not?

28. On this question, the State Commission has given the following findings:

“Findings: The State Commission held that the subject 11 KV line along with associated system is a part of the distribution system of WESCO and it is entitled for wheeling charge for evacuation of surplus power from the CGP of Steel Company to the State Grid”.

29. Thus, for the question as to whether wheeling charges are payable or not the State Commission has held that the Distribution Licensee is entitled for wheeling charges for evacuation of surplus power from the Captive Generation Plant of the Steel Company to the GRIDCO.

30. Now let us refer to the relevant issue framed by this Tribunal in the judgment In Appeal No.171 & 187 of 2010:

“VIII. Whether the Appellant is entitled for any wheeling charges from 2nd Respondent for wheeling its power over 11 KV line in question here”.

31. This question is with reference to the entitlement of the Appellant to claim the wheeling charges.

32. Let us now refer to the findings given by this Tribunal in the above judgment:

“85. Next issue to be decided is whether distribution licensee is entitled for wheeling charges for utilization of its distribution system.

86. Wheeling has been defined in Section 2(76) of the Electricity Act 2003 and is quoted below:

“(76) “wheeling” means the operation whereby the distribution system and associated facilities of a transmission licensee or distribution licensee , as the case may be, are used by another person for the conveyance of electricity on payment of charges to be determined under Section 62”.

87. From the above definition, it is clear that wheeling would involve three ingredients viz.,

- I. Usage of distribution system of distribution licensee,**
- II. Such usage has to be by another person**
- III. Usage can be only on payment of charges.**

88. The line is question is distribution system of the Appellant WESCO. As per impugned order of the State Commission, the Respondent Steel Company would be selling its surplus power to GRIDCO and metering would be done at receiving end i.e. at Cement Company. Thus transfer of power from Steel Company to GRIDCO would take place at Cement Company’s installations. Till power is transferred to GRIDCO, it remains with the 2nd Respondent Steel Company and therefore another person in terms of Section 2 (76) of the Act would be the Steel Company. Steel Company would be liable to pay wheeling charges for usage of the Appellant WESCO’s distribution network in line with the State Commission’s Order dated 26.8.2010

89. Therefore, we are of the view that the 2nd Respondent Steel Company is liable to pay the wheeling charges for usage of this line for export of its power to GRIDCO”

33. It is manifestly clear from the above answer that the Steel Company is liable to pay the wheeling charges for usage of the line for export of its power to GRIDCO.

34. The summary of our Findings also says as follow:

“90. Summary of Our Findings

I to VI:

VII. The 2nd Respondent Steel Company is liable to pay the wheeling charges for usage of this line for export of its power to GRIDCO”.

35. So, these observations and the findings of the Tribunal would show that this Tribunal has not only gone into the question whether the Appellant/Petitioner was entitled to get the Wheeling Charges but also further held that the Respondent is liable to pay the Wheeling Charges to the Appellant Petitioner.

36. Therefore, it cannot be held that the order passed by this Tribunal is merely a declaratory decree but it is to be held that it is a decree in the nature of mandatory injunction holding the Respondent was liable to pay the Wheeling Charges to the Petitioner meaning thereby directing the Respondent to pay the Wheeling Charges.

37. In view of the above, the Tribunal, having granted a decree in the nature of mandatory injunction, the Respondent is liable to pay the Petitioner, the wheeling charges.

38. Let us now come to the subsidiary issue **as to whether the quantum has been determined by this Tribunal and if not, what is the effect of it?**

39. Accordingly to the learned Counsel for the Petitioner even though the quantum has not been determined in the judgment of this Tribunal which is a decree. The same can be determined by the Executing Court under Section 47 of Civil Procedure Code. It is pointed out that Section 47 of the Civil Procedure Code mandates that all the questions arising between the parties relating execution, discharge or satisfaction of the decree shall be determined by the Executing Court and not by the separate suits and therefore this Tribunal in this Petition for execution is empowered to determine the same. In order to substantiate this plea he has cited the following judgements:-

- (a) AIR 1951 All 817-Saltanat Begam Vs Syed Mohd. Saadat Ali Khan;
- (b) AIR 1950 AP 48Bapurao Vs Hanumanthrao and Ors;
- (c) AIR 2004 Gauhati 169 State of Tripura and Others Vs Sri Tarun Chandra Dey and Others
- (d) AIR 2005 Rajasthan 77 Babu Puri and Others vs Kalu and Others
- (e) (2009) 13 SCC 354-Haryana Vidyut Prasaran Nigam Limited and Another Vs Gulshan Lal and Others;

40. We have gone through the said judgments. The ratio decided by the High Court and by Hon'ble Supreme Court in those decisions are as follows:-

- i) It is the duty of an Appellate Court to make the declaration and then the form in which that declaration is conceived and the words in which the order is framed which would amount to a direction to the Court below to clothe that declaration in the proper form of a mandatory order and to give effect to the mandatory order so expressed.
- ii) It is not necessary that the decree passed should specifically state that the judgement-debtor shall pay such and such amount regularly. It is enough, if the terms of the decree make it clear that it is intended that the judgement-debtor should pay.
- iii) The relief must be a relief, flowing directly and necessarily from the declaration sought and a relief appropriate to and necessarily consequent upon the right. It does not mean “every kind of relief that may be prayed for”, but only “a relief arising from the cause of action on which the plaintiff’s suit is based. Thus, the relief which is consequent upon the cause of action, can be enforced by the executing Court.
- iv) The expression “further relief” would mean the relief which would complete the claim of the plaintiff and not lead to multiplicity of suits. The relief must flow necessarily from the relief of declaration and a relief

appropriate to and necessarily consequent on the right of claim asserted. It is such relief as flows necessarily from the relief ancillary to the main relief and not one in the alternative.

- v) An Executing Court, of course, can not go behind the decree, but if a fair interpretation of the judgement, order and decree passed by a Court having appropriate jurisdiction in that behalf, the relief sought for by the plaintiff appear to have been granted, there is no reason as to why the Executing Court shall deprive him from obtaining the fruits of the decree.

41. The above ratio which has been laid down by the various High Courts as well as Hon'ble Supreme Court will make it evident that not only was the decree of this Tribunal not a bare declaration to execute but also the quantum with reference to the said decree can also be computed by executing courts. In other words, the direct and consequential relief flowing from the decree can be granted in the present execution proceedings.

42. The learned Counsel for the Respondent cited the following judgments in support of his plea.

- (a) State of M.P. Vs Mangilal Sharma (1998) 2 SCC 510;
- (b) Prakash Chand v S.S Gerewal (1975) Cr LJ 679

(c) Bhavan Vaja and Ors Vs Solanki Hanuji (1973) 2 SCC 40;

(d) Rameshwar Dass Gupta vs State of UP & Anr (1996) 5 SCC 728

- 43.** The proposition laid down in the above judgements to the effect that a mere declaration simpliciter is not capable of being executed is settled law which can not be disputed. But those judgments would not be applicable to the present case as we have held that the judgement of the Tribunal would indicate the nature of mandatory injection.
- 44.** Therefore, the judgements cited by the Respondents would be no use.
- 45.** Accordingly, the contention of the Petitioner is upheld and objections raised by the Respondent are rejected.
- 46.** Let us now come to the next question. This is with reference to the failure of the party to enter into the quadripartite agreement.
- 47.** According to the learned Counsel for the Respondent, the directions given in the judgement to enter into the quadripartite agreement is a pre-condition for the payment of wheeling charges and since the said agreement was not executed, the claim for wheeling charges is not permissible.
- 48.** On the other hand it is contented by the Petitioner that the claim for wheeling charges is not linked to agreement to be

executed and as such, the execution of the agreement was not necessary pre-condition for the discharge of obligation of the Respondent.

49. In the light of the above contentions, we have gone through the judgement of this Tribunal. As pointed out by the learned Counsel for the Petitioner, the objection of the Respondent on this point could be raised only in a situation where a decree enjoy reciprocal obligations upon the parties in which the performance of one obligation by a party is necessarily the condition precedent for the discharge of obligation of the other. In the present case, the judgement of this Tribunal dose not predicate the payment of wheeling charges on the execution of the quadripartite agreement. The liability to pay wheeling charges, in terms of the Judgement and Decree, under the statute is not linked to quadripartite agreement to be executed between the parties. Therefore, this contention urged by the learned Counsel for the Respondent does not merit consideration.

50. The next objection of the Respondent is that GRIDCO has not made payment to the Respondent for the power purchased and that therefore, the Petitioner would not be entitled to claim for wheeling charges. This contention is untenable for the following reasons:-

- i) Merely because GRIDCO has not made payment to the Respondent, it would not absolve the Respondent from its liability to pay wheeling charges to the Execution Petitioner as per the findings of this Tribunal.
- ii) As held by the State Commission and the Tribunal if the lines forming part of the distribution system of the Petitioner, has been used for the conveyance of electricity by the Respondent, the Respondent is liable to make payment of wheeling charges to the Petitioner, as directed by the Tribunal.
- iii) Payment of wheeling charges could not be a contingent upon payment made by the purchaser to the seller for the electricity sold by the seller.

51. In view of the above, the objection which has been raised by the Respondent can not be held to be valid. Consequently we reiterate that the Respondent is liable to pay the wheeling charges as contained in the bill in relation to the period from Dec.2009 to October,2010 namely Rs.77,69,183/- and consequently we direct the Respondent Company to pay the said amount to the Petitioner failing which, the Petitioner is entitled to take action for the amount be realised by way of attachment/sale of the movable property . However, we do not propose to give any direction with reference to the charges towards the delayed payment.

52. Summary of our findings:-

- (a) The observations and the findings of the Tribunal would show that this Tribunal has not only gone into the question whether the Appellant/Petitioner was entitled to get the Wheeling Charges but also further held that the Respondent is liable to pay the Wheeling Charges to the Appellant Petitioner. Therefore, it cannot be held that the order passed by this Tribunal is merely a declaratory decree but it has to be held that it is a decree in the nature of mandatory injunction holding the Respondent was liable to pay the Wheeling Charges to the Petitioner meaning thereby directing the Respondent to pay the Wheeling Charges. In view of the above, the Tribunal, having granted a decree in the nature of mandatory injunction, the Respondent is liable to pay the Petitioner, the wheeling charges.
- (b) The ratio laid down by the various High Courts as well as Hon'ble Supreme Court will make it evident that not only was the decree of this Tribunal not a bare declaration to execute but also the quantum as per the directions contained in the decree can also be computed by executing courts. In other words, the direct and consequential relief flowing

from the decree can be granted in the present execution proceedings.

- (c) We have gone through the judgement of this Tribunal. As pointed out by the learned Counsel for the Petitioner, the objection of the Respondent on this point could be raised only in a situation where a decree enjoy reciprocal obligations upon the parties in which the performance of one obligation by a party is necessarily the condition precedent for the discharge of obligation of the other. In the present case, the judgement of this Tribunal does not predicate the payment of wheeling charges on the execution of the quadripartite agreement. The liability to pay wheeling charges is, in terms of the Judgement and Decree, under the statute and not linked to quadripartite agreement to be executed between the parties. Therefore, this contention urged by the Counsel for the Respondent does not merit consideration. Consequently, we direct the Respondent Company to pay the bill amount of Rs.77,69, 183/- to the Petitioner failing which the Petitioner is entitled to take action for the amount be realised by way of attachment/sale of the

movable property. However, we do not direct the payment towards the delayed payment charge.

53. In view of our above findings, the Petition is allowed as prayed for. However, there is no order as to costs.

**(V.J Talwar)
Technical Member**

**(Justice M. Karpaga Vinayagam)
Chairperson**

Dated: 2nd December, 2013

~~√REPORTABLE/NON REPORTABLE~~