

APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 232 of 2014 &

IA NO. 369 OF 2014

Dated : 04th September, 2018

**PRESENT:HON'BLE MR. JUSTICE N.K. PATIL, JUDICIAL MEMBER
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER**

IN THE MATTER OF :-

PUNE POWER DEVELOPMENT PRIVATE LIMITED

H 1. 'Heera', Heera-Moti Society

Pune – Mumbai Highway

Wakademadi, Shivajinagar

Pune – 411003, Maharashtra

...APPELLANT

AND

1. KARNATAKA ELECTRICITY REGULATORY COMMISSION

9/2, 6th and 7th Floor

Mahalaxmi Chambers, M. G. Road,

Bengaluru – 560001, Karnataka

2. Mangalore Electricity Supply Company Ltd.,

Paradigm Plaza, 4th Floor,

9/2, 6th and 7th Floor

Mahalaxmi Chambers, M.G. Road,

Mangalore-575101, Karnataka

3. Power Company of Karnataka Ltd.

KPTCL Building

Cauvery Bhavan

Bengaluru – 560009, Karnataka

...RESPONDENTS

Counsel for the Appellant(s) : Ms. Deepa Chawan,
Mr. Hardik Luthra
Mr. Ravindra Chile
Mr. Alok Shukla

Counsel for the Respondent(s) : Mr. Sriranga S.
Mr. Balaji Srinivasan
Ms. Srishti Govil
Ms. Pallavi Sengupta
Ms. Pratiksha Mishra
Mr. Mayank Kshirsagar for R2 & R-3

J U D G M E N T

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

Pune Power Development Private Limited, Appellant herein, assailing the validity, legality and propriety to quash the Impugned Order dated 10.07.2014 passed in Original Petition No. 20 of 2009 by Karnataka Electricity Regulatory Commission, Bengaluru, presented this Appeal under Section 111 of the Electricity Act, 2003 seeking the following reliefs as under :-

- (i) That this Hon'ble Tribunal be pleased to call for the records and proceedings of the O.P. No. 20 of 2009 filed before the Respondent No. 1 Commission and after going through the legality and propriety thereof, be pleased to quash and set aside and modify to the limited

extent of awarding compensation for inconvenience caused to the Respondent Nos. 2 & 3 quantified at Rs. 1,14,62,724.90 (Rupees One Crore Fourteen lacs Sixty Two Thousand Seven Hundred Forty Two and Paise Ninety only) and alter the impugned Order dated 10.7.2014 in so far as it relates to --

- (a) Erroneous consideration and improper appreciation of the nature of transaction in the impugned order;
- (b) The Petition filed by the Respondent Nos. 2 and 3 was rendered infructuous in view of the receipt of electricity by the said respondents without demur or protest;
- (c) No case for compensation or damages pursuant to purported delay in views of the transaction being voidable at the instance of the Appellant;
- (d) Factual errors to the extent of the transactions prescribing a quantum of energy;
- (e) Non-appreciation of the nature of trading under the Electricity Act, 2003 and the role of a Trader;
- (f) Erroneous application of Section 34 of the Code of Civil Procedure to award interest to the Respondent Nos. 2 and 3;

- (ii) For any other order and/or direction as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case.

2. In the instant Appeal, the Appellant has challenged the Impugned Order dated 10.7.2014 so far it relates to the following issues:-

- (a) The entire transaction being a barter transaction in respect of electricity;
- (b) The original proceedings filed by the respondent Nos. 2 & 3 being O.P. No. 20 of 2009 had become infructuous upon receipt of the electricity by the said respondents in accordance with the communication dated 01.04.2010;
- (c) The electricity had been received back by the respondent Nos. 2 & 3 as per their own request dated 01.04.2010 without any demur or protest;
- (d) The respondent No. 1 Commission has erred in factually coming to the conclusion that the transaction entailed only supply of surplus energy by the respondent Nos. 2 & 3;

- (e) The respondent No. 1 has erred in factually holding that this Commission had come to the conclusion that there is a bilateral agreement between the appellant and the respondents alone; and

has raised the following questions of law for reconsideration :

- (i) The impugned order ignores the statutory provisions relating to reciprocal promises / transactions;
- (ii) The ambit and scope of Sections 51 to 54 of the Indian Contract Act have not been appreciated;
- (iii) Interest could not have been awarded to an entity which has infringed / breached its own first promise in a transaction involving reciprocal promises;
- (iv) Voidability of the transaction would be at the instance of the appellant; and
- (v) Subsequent events of promise by the respondent Nos. 2 & 3 ought not to have been ignored.

BRIEF FACTS FOR THE CASE, IN NUT-SHELL :

3. Mangalore Electricity Supply Company Limited and Power Company of Karnataka Ltd, Respondent Nos. 2 & 3 herein respectively, filed an Original Petition praying for recovery of the price of electricity not returned by the

Appellant as per the agreement between the parties with interest, cost etc., seeking following reliefs as under :-

- (a) To declare that the Respondent is in breach of terms of 'Letter of Intent' and the subsequent assurance and failed to return the energy;
- (b) To direct the Respondent to pay a sum of Rs. 39.32 Crores being the maximum UI charges fixed by CERC at Rs. 10.29 per Unit for the energy of 38.209142 Million Units (MUs);
- (c) To direct the Respondent to pay interest @ 18% from 01.03.2009 on the amount due till date of payment;
- (d) To grant cost of the proceedings; and
- (e) To pass such orders as the Commission may deem fit on the facts and in the circumstances of the case.

4. Wherein the State Commission has been pleased to allow the Petition filed by the Respondent Nos. 2 & 3 herein before the State Commission and also allowing the counter-claim filed by the Appellant and directing the Appellant to pay a sum of Rs. 1,14,62,742.90 (Rupees One Crore Fourteen Lakhs Sixty Two Thousand Seven Hundred & Forty Two and Paise Ninety only) to the second Respondent by way of compensation and also directed the second Respondent herein to pay to the Appellant a sum of Rs. 1.07 Crores towards open access charges and trading margin. Not being satisfied with the Impugned Order

passed by the first Respondent herein, the Appellant, questioning the correctness of the Impugned Order of the first Respondent to the extent it allows the claim of the Appellant qua open access charges and trading margin, which has been allowed, has not challenged. It needs to be pointed out that the Respondent Nos. 2 & 3 have made part-payment under the said Order dated 10.07.2014 qua the Order allowing the counter-claim (Additional Affidavit dated 09.04.2018). Thus, the Respondent Nos. 2 & 3 have partly complied with the Impugned Order of 10.07.2014 vehemently precipitated to present the instant Appeal by the Appellant seeking directions on the relief as stated supra.

5. The principal submission canvassed by Ms. Deepa Chawan, learned counsel appearing for the Appellant, contending that, the Impugned Order dated 10.07.2014, which has been partly challenged in the present Appeal, does not take into consideration the various issues raised and argued by the Appellant before the State Commission. From the detailed written submissions filed by the Appellant what has emerged is that the Appellant has indeed argued the issue of the transactions being a reciprocal promise and relied on Sections 51 to 54 of the Indian Contract Act, 1872. It was a specific contention of the Appellant's Counsel before the State Commission that the barter transactions being a reciprocal promise, once the first part of the transaction has not been performed by the Respondent Nos. 2 & 3 herein, the question of the Appellant performing any

obligations under the transaction does not arise. The Appellant had pointed out and relied upon the law relating to reciprocal promises.

6. Secondly, learned counsel for the Appellant contended that, the Respondent Nos. 2 & 3 had suppressed the communication dated 01.04.2010 and failed to bring on record the same which was a subsequent event and that the Respondent Nos. 2 & 3 had received the energy without any demur or protest or demand. The Respondent Nos. 2 & 3 were stopped from contending otherwise the claim of the Respondent Nos. 2 & 3 in the Original Petition which was, therefore, to be seen in terms of the unequivocal representation in the communication dated 01.04.2010. The prayers of the Petition as filed on 20.07.2009 had to be therefore seen in the light of the subsequent letter dated 01.04.2010.

7. Learned counsel for the Appellant vehemently submitted that, these aspects have not been considered in the partly Impugned Order dated 10.07.2014. The order to that extent is not a speaking order on the above issues and legal consequences arising from the said issues. Therefore, she submitted that the Impugned Order passed by the first Respondent, State Commission dated 10.07.2014 is liable to be set aside to the extent challenged in the present Appeal at threshold in the interest of justice and equity, without going into other aspects of the Appeal and matter may be remitted back for reconsideration afresh, directing the State Commission to reconsider and pass an appropriate

order after affording reasonable opportunity of hearing to the Respondent Nos. 2 & 3 and dispose of the matter as expeditiously as possible.

8. *Per contra*, the learned counsel, Mr. S. Sriranga, appearing for Respondent Nos. 2 & 3, inter alia, contended that, the equitable Impugned Order was passed by the first Respondent/State Commission strictly in consonance with the material on record and the case made out by the Appellant and the Respondents and after assigning cogent reasons. There is no error or irregularity in the Impugned Order and taking into consideration the status of both the parties and the dispute involved in the matter, the State Commission has rightly justified by passing equitable order. Therefore, interference by this Appellate Tribunal does not call for.

9. The first Respondent/State Commission, taking into consideration the reply filed by the Appellant on counter claim in the Rejoinder praying for a compensation of Rs. 1.07 crores from the Respondent Nos. 2 & 3 for open access charges, trading margin along with damages for non-supply of electricity in the entire period. The State Commission, after detailed consideration of the submissions advanced by the learned counsel appearing for both the parties and considering the documents available on record, has rightly justified in directing the Appellant herein to pay the sum of Rs. 1.14 crores to the second Respondent by way of compensation and also directed second Respondent herein to pay the Appellant a sum of Rs. 1.07 crores towards open access charges, trading margin

vide order dated 10.07.2014. Therefore, he submitted that, the State Commission has passed the Impugned Order after detailed consideration of all the aspects involved. The State Commission, while dealing with issues raised, was pleased to record a finding that the non performance of the obligations of the Respondent Nos. 2 & 3 under the contract was due to impossibility of performance and therefore non supply of electricity would not constitute breach of the contract.

10. The learned counsel appearing for the Respondent Nos. 2 & 3 submitted that, the State Commission after duly considering all the relevant materials, pleadings and judgments of the Hon'ble Supreme Court, has rightly come to the conclusion that the contract was void and stood discharged. However, the State Commission held that any benefit received under the contract by any party must be restored to the other party. The State Commission agreed with the Petitioners therein that the contract was voidable. However, the State Commission found that the Appellant herein had not disputed the reasons based on which the contract was terminated. In fact, the Appellant herein by a letter dated 21.07.2008, intimated the reasons to BSES Rajdhani Power Ltd and raised no objection to the reasons stated for the discontinuance of power supply. Therefore, the interference by the Tribunal may not be justiciable as the State Commission has justified in passing an equitable order.

11. Further, the learned counsel appearing for the Respondent Nos. 2 & 3 vehemently submitted that, the State Commission while considering whether this was a case of breach of contract or impossibility of performance, relied on *Satyabrata v. Magneeram*, AIR 1954 SC 44 while analyzing Section 56 of the Indian Contract Act, 1872 and held that the word 'impossible' has not been used in the sense of physical or literal impossibility but used to mean that the performance of the terms of the contract had become impracticable and useless from the point of views of the object and purposes which the parties had in views.

12. It emerges from para 1 of the contract entered into between the Appellant herein and BSES Rajdhani Power Ltd dated 19.03.2008 that the purpose was to evacuate excess power generated during monsoons and Bank it with the intention of receiving 105% of the Banked power during the summer months. It is, therefore, evident that the State Commission has duly applied its mind and reached at a sound conclusion that this was not a case of breach of contract but was a case of impossibility of performance of the terms of the contract. It is submitted that the arrival of a maximum quantum is for the purpose of scheduling and is in no way binding on the Respondent Nos. 2 & 3. These aspects clearly demonstrate that the agreement was restricted to surplus power.

13. The learned counsel appearing for the Respondent Nos. 2 & 3 contended that the State Commission has further held that the agreement entered into between the Appellant and the Respondents was only a bilateral agreement and,

therefore, it was the obligation of the Appellant to ensure that the power being supplied to BSES Rajdhani Power Ltd through the Appellant was returned at 105%. It is submitted that this finding is in accordance with the well settled principles of privity of contract. The Appellant's contention that the agreement was actually between BSES Rajdhani Power Ltd and the Respondents was rightly rejected as lacking any merit. It is submitted that if this argument of the Appellant was accepted by the State Commission, then it would amount to the Respondents being made parties to an agreement which they are not signatories to. The State Commission on consideration of the same was pleased to rightly reject the said contention of the Appellant.

14. The Counsel appearing for the Respondents submitted that it is significant to note that the energy was received after delay of more than one year. The State Commission has held that the Appellant has been granted interest on the late payments due under the Agreement and simultaneously, the Respondents are due to be paid interest by the Appellant for any default on its obligations under the contract. Therefore, the Respondent Nos. 2 & 3 herein has a legal right to seek for damages / charges which has to be prayed for. It is a settled law that parties cannot blow hot and cold at the same time and the doctrine of approbation and reprobation will apply squarely to the contentions taken by the Appellant which are inconsistent and contrary to each other.

15. The learned counsel for the Respondents, to substantiate his submissions placed reliance on the Judgments of the Supreme Court in the case of 'Sathish Chandra Makhan & Ors vs. Govardhan Das Byas & Ors (1984) 1 SCC 369 and Hindalco Industries Limited vs UOI and Ors (1994) 2 SCC 594.

16. In the instant case, the State Commission, first Respondent herein, has taken into reckoning various developments which have taken place between the date of filing of the petition and the date of disposal of the petition and has rightly considered the claim of the Respondent Nos. 2 & 3 as well as the counter claims made by the Appellant herein. The Appellant cannot take exception to the equitable order passed by the State Commission by moulding the relief. Therefore, he submitted that the Appellant has failed to make out a case on merits nor have they pointed out any legal infirmity in the Impugned Order passed by the first Respondent State Commission. Therefore, interference by this Tribunal does not call for and the Appeal filed by the Appellant may be dismissed with exemplary costs.

17. After careful consideration of the submissions made by the learned counsel appearing for the Appellant and the learned counsel appearing for the Respondent Nos. 2 & 3, the first Respondent served unrepresented, and after careful consideration of the stand taken by the Appellant and the Respondents and the written submissions and after perusal of the Impugned Order passed by the first Respondent State Commission, other relevant material and pleadings

available on record, the points that arose for consideration in the instant Appeal are as follows :-

- (i) Whether the issue of transaction being reciprocal promise and relied on Sections 51 to 54 of the Indian Contract Act, 1872, that the bilateral transactions being a reciprocal promise has been considered by the State Commission/
- (ii) Whether the Respondent No. 1 herein considered communication dated 1.4.2010 and Respondent Nos. 2 & 3 had received the energy without any protest, demur or demand and were estopped from contending the claim of the Respondent Nos. 2 & 3 in Original Petition.
- (iii) Whether the Impugned Order passed by the first Respondent State Commission is sustainable in law.

RE : POINT NO. 1 :

18. It is the specific case of the learned counsel appearing for the Appellant that the Appellant has raised various issues argued before the State Commission. A detailed written submission has been filed by the Appellant and indeed argued issue of transaction being a reciprocal promise and relied on Sections 51 to 54 of the Indian Contract Act, 1872 and, further, contention of the Appellant before the State Commission that the power transaction being a

reciprocal promise, once the first part of the transaction has not been performed by the Respondent Nos. 2 & 3, the question of Appellant performing any obligation under the contract does not arise. The Counsel appearing for the Appellant had specifically pointed out and relied upon the law relating to the reciprocal promise.

The Respondent Nos. 2 & 3 failed to comply with promise by addressing a letter dated 19.07.2008 almost within 2 weeks of the LOI informing the appellant that they had withdrawn from the obligation to supply power from July to September 2008 on the purported ground of inadequate inflow of water to major Hydel reservoirs.

Thus, admittedly, the Respondent Nos. 2 & 3 did not perform their part of the transaction and the question of performance of the latter part and that too as per a unilaterally decided schedule sent by the Respondent Nos. 2 & 3 did not arise.

These relevant aspects have not at all been considered by the first Respondent State Commission in the Impugned Order dated 10.07.2014. Therefore, learned counsel appearing for the Appellant vehemently submitted that Order to that extent is not a speaking order on the above issues and the legal consequence arising from the said Impugned Order passed by the first Respondent is liable to be quashed and remitted back before the first

Respondent State Commission for reconsidering afresh in the interest of justice and equity.

19. Whereas, it is the case of the learned counsel appearing for the Respondent Nos. 2 & 3 that this aspect of the matter has been considered taking into consideration the totality of the case. The first Respondent/State Commission has passed a well considered Order on merits which brooks no interference from this Tribunal and the present Appeal is misconceived and liable to be rejected. The Respondent Nos. 2 & 3 on the ground that the questions of law raised in para 8(b) are misconceived, the State Commission has passed a well-reasoned and detailed Order which does not brook any interference by this Tribunal. The contention of the learned counsel appearing for the Appellant that the Impugned Order ignores the statutory provisions relating to reciprocal promise is erroneous and misconceived. It is submitted that the entire premise of the Order of the State Commission is based on appreciating this aspect that both the parties fulfill the promise as made in the agreement. The contention of the ambit of Sections 51 to 54 of the Indian Contract Act, 1872 have not been appreciated is again misconceived. The State Commission has examined the provisions of the Indian Contract Act, 1872 and found that the case falls under Section 56 of the Contract Act and therefore, does not demonstrate any error in the reasoning of the State Commission. It is submitted that merely because the State Commission disagreed with the contention that Sections 51 to 54 would

apply does not mean that it has not applied its mind to the provisions of the Contract Act. The said contention is bereft of merits and is wholly misconceived. Therefore the interference by this Tribunal regarding point no. 1 does not call for.

20. After thoughtful consideration of the submissions made by the learned counsel appearing for the Appellant and the learned counsel appearing for the Respondent Nos. 2 & 3 and after careful perusal of the Impugned Order passed by the first Respondent State Commission it manifests on the fact of the order that there is no discussion nor any reasoning nor any finding on this aspect coming forth in the Impugned Order, nor do we find the consideration regarding Sections 51 to 54 of the Indian Contract Act, 1872, nor any specific issues have been framed in this aspect by the first Respondent State Commission, nor the Impugned Order does contain any valid reasons or discussions regarding this aspect of the matter. Therefore, we do not find any justification or the substance in the submissions made by the learned counsel appearing for the Respondent Nos. 2 & 3 except contending that the Commission has held that the case falls under Section 56 of the Contract Act. That will not be the grounds for consideration by the first Respondent State Commission. Therefore, we are of the considered view that the Impugned Order passed by the first Respondent State Commission cannot be sustainable in law and it is liable to be set aside.

RE : POINT NO. 2 :

21. The learned counsel appearing for the Appellant vehemently contended that the Respondent Nos. 2 & 3 had suppressed the communication dated 01.04.2010 and failed to bring on record the same which was a subsequent event that Respondent Nos. 2 & 3 have received the energy without any demur or protest or demand. The Respondent Nos. 2 & 3 were estopped from contending otherwise claim in the Original Petition and it was therefore to be seen in terms of unequivocal representation in the communication dated 01.04.2010.

22. Whereas the counsel appearing for the Respondent Nos. 2 & 3 inter alia contended that the Commission has considered the material on record and has assigned valid and cogent reasons, this fact has not been suppressed by the Respondent Nos. 2 & 3. This aspect of the matter has also been taken into consideration by the State Commission and they have not specifically denied this specific contention taken by the learned counsel appearing for the Appellant in their written submissions before the State Commission and also before this Tribunal except that the contention is untenable and contrary to the law. The State Commission after taking into consideration the totality of the case in hand and moulded relief having regard to the facts and circumstances of the case, has granted the equitable relief to the Appellant and the Respondents. Therefore, interference by this Tribunal does not call for.

23. After careful consideration of the submissions made by the learned Counsel appearing for the Appellant and the learned Counsel appearing for the Respondent Nos. 2 & 3 and perusal of the Impugned Order, it is manifest that the Respondent No. 1 has committed a grave error, much less irregularity, and has failed to consider the specific stand taken by the Appellant regarding suppression of the communication dated 01.04.2010 and failed to bring the same on record by the Respondent Nos. 2 & 3, which has been a subsequent event, ought to have considered before passing the Impugned Order by the Respondent No. 1 because it is the specific case of the Appellant in the written statement that the Respondent Nos. 2 & 3 have suppressed the communication dated 01.04.2010, the stand taken by the Respondent Nos. 2 & 3 in their written statement and the submission of the Counsel not at all considered and this aspect has been overlooked by the Respondent No. 1 Commission. Therefore, the Impugned Order passed by the Respondent No. 1 cannot be sustainable and is liable to be set aside on this ground also.

RE : POINT NO. 3 :

24. After careful perusal and critical evaluation of entire material on record and after thoughtful consideration of the submissions made by the learned counsel appearing for both the parties, and after careful perusal of the impugned order, it is manifest on the face of the Order that we do not find any consideration by the State Commission in respect of specific stand taken by the learned counsel appearing for the Appellant and also the stand taken in written submissions

regarding the issue of transaction being reciprocal promise and they relied on the Sections 51 to 54 of the Indian Contracts Act, 1872 and specific contention of the Appellant that the barter transaction being reciprocal promise, once the first part of the transaction has not been performed by the Respondent Nos. 2 & 3, the question of the Appellant performing any obligation under the transaction does not arise and also specifically pointed out by the learned counsel appearing for the Appellant that the Respondent Nos. 2 & 3 has suppressed the communication dated 01.04.2010 and in fact the Respondent Nos. 2 & 3 received the energy without any demur or protest or demand. Hence, they have been estopped from contending the claim of the Respondent Nos. 2 & 3 in Original Petition. This aspect of the matter has not been looked into nor considered nor appreciated nor is there any valid and cogent reason in the Impugned Order. In short, the Impugned Order passed by the State Commission is not a speaking order. Therefore, we are of the considered view that the Order impugned passed by the first Respondent/State Commission is liable to be quashed and further we are of the considered view that the matter requires reconsideration afresh and the same shall be decided in accordance with the law after affording reasonable opportunity of hearing to the Appellants and the Respondents.

All the contentions of the Appellant and the Respondent Nos. 1 to 3 are kept open.

ORDER

25. Having regard to the facts and circumstances of the case as stated above, the Appeal filed by the Appellant is allowed, the Impugned Order dated 10.07.2014 passed in the Original Petition No. 20 of 2009 on the file of Karnataka Electricity Regulatory Commission, Bengaluru is hereby set aside.

The matter stands remitted back to the first Respondent/State Commission for reconsidering afresh and pass an appropriate order in accordance with the law after affording reasonable opportunity of hearing to the Appellant and the Respondent Nos. 2 & 3 herein and dispose of the matter as expeditiously as possible at any rate within a period of six months from the date of appearance of the Appellant and the Respondent Nos. 2 & 3, personally or through their counsel.

The Appellant and Respondent Nos. 2 & 3 herein are directed to appear before the State Commission personally or through their counsel on 08.10.2018 at 11 a.m. to collect necessary date of hearing.

In view of the Appeal No. 232 of 2014 being disposed of, the relief sought In the **IA NO. 369 OF 2014** does not survive for consideration and hence stands disposed of.

(S.D. Dubey)
Technical Member

(Justice N.K. Patil)
Judicial Member

√ **REPORTABLE / ~~NON-REPORTABLE~~**

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