

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No.371 of 2022
AND
APPEAL No.373 of 2022

Dated : 13.08.2024

Present: Hon'ble Mr. Sandesh Kumar Sharma, Technical Member
Hon'ble Mr. Virender Bhat, Judicial Member

In the matter of:

APPEAL No.371 OF 2022

RAMGAD MINERALS AND MINING LIMITED

Through Mr. Amarnath T.S.

A company registered under
Companies Act, 1956 having its
Registered Office at Baldota Bhavan
Abheraj Baldota Road, Hosapete, 583203
Email: amaranath.ts@mspllimited.com

... Appellant

Versus

**1. BANGALORE ELECTRICITY SUPPLY
COMPANY (BESCOM)**

Through Managing Director

A Company incorporate under the
Companies Act, 1956,
Corporate Office, K.R. Circle,
Bangalore – 560 001
Email: md@bescom.co.in

**2. KARNATAKA ELECTRICITY REGULATORY
COMMISSION**

Through its Secretary

Tank Bed Area, 16C-1, Millers Tank Bund Rd,
Kaverappa Layout, Vasanth Nagar,
Bengaluru, Karnataka 560052
Email: kerc-ka@nic.in

... Respondents

Counsel for the Appellant(s) : Bishwajit Dubey
Radhika Dubey
Akanksha V. Ingole for App. 1

Counsel for the Respondent(s) : Sumana Naganand
Garima Jain
Tushar Kanti Mohindroo
Nidhi K
Nidhi Gupta for Res. 1

APPEAL No.373 OF 2022

MSPL LIMITED

Through Mr. Praveen Singhal

(Vice President - Power)

A company registered under
Companies Act, 1956 having its
Registered Office at Baldota Bhavan
117, Maharshi Karve Road,
Mumbai – 400 020

Email: praveen.s@mspllimited.com

... Appellant

Versus

1. BANGALORE ELECTRICITY SUPPLY COMPANY (BESCOM)

Through Managing Director
A Company incorporate under the
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Nidhi K
Nidhi Gupta for Res. 1

J U D G M E N T

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. Two wind power generators of Karnataka namely M/s Ramgad Minerals and Mining Limited (in short "RMML"), (appellant in Appeal No.371/2022) and MSPL Limited, (appellant in appeal No.373/2022), have filed these two separate appeals impugning therein the common order dated 28.06.2022 passed by the 2nd respondent Karnataka Electricity Regulatory Commission (in short "the Commission") in the two separate petitions bearing O.P. No.01/2021 and O.P. No.02/2021 filed by the appellants wherein the claim of appellants for interest on the delayed payment of invoices was rejected by the Commission. The appellants are also aggrieved by the fact that the impugned order does not direct the 1st respondent Bangalore Electricity Supply Company (in short "BESCOM") to pay energy charges to the appellants since December, 2020 onwards.

2. It appears that the Government of Karnataka accorded permission to one Asian Wind Turbine Private Limited [later on name changed to M/s NEG Micon (India) Private Limited and now known as M/s Vestas Wind Technology India Private Limited] to establish 15MW wind power project ("Project 1") and 19.5MW wind power project ("Project 2") at

Guddaranganva Halli village. Accordingly, the State and Karnataka Renewable Energy Development Limited (in short "KREDL") executed a registered lease deed dated 16.08.2002 with regards to the project land leased to KREDL. Vide order dated 18.09.2003, the Government of Karnataka approved transfer of capacity of 1.9 MW out of 19.5 MW capacity to RMML and the remaining capacity was allotted to MSPL Limited. In pursuance thereto, KREDL executed separate lease deeds in respect of two parcels of land admeasuring 1 Acre 22 Guntas and 24 Acres 18 Guntas in the said village Guddaranganva Halli in favour of RMML and MSPL respectively.

3. RMML and MSPL have established and are operating 33 Wind Turbine Generators (in short "WTGs") in the said village. Out of these, 9 WTGs installed and operated by the two appellants RMML and MSPL on the project land are the subject matter of these two appeals.

4. RMML entered into a Power Purchase Agreement (PPA) dated 11.02.2004 with the 1st respondent BESCOM for evacuation of the electricity generated from Project 1 and Project 2 thereby agreeing to sell the power generated from the WTGs to the said company. Similarly, MSPL also entered into three PPAs dated 07.08.2003, 18.03.2004 and 05.03.2005 with the 1st respondent thereby agreeing to sell power generated from its WTGs to the said company. It is not in dispute that both RMML and MSPL have been selling power generated from these WTGs to BESCOM. The PPAs have a life span of 20 years from the date of commercial operation of the power project and further renewable for 10 years on mutually agreed terms and conditions. The 1st respondent

undertook to make payment of the energy charges to the two appellants within 15 days from the date of receipt of tariff invoices and in case of any delay in doing so, it was liable to pay delayed payment surcharge / late payment surcharge at the rate of SBI medium term lending rate from the date when such payment was due until actual payment in full.

5. In the year 2010, an issue was raised by the concerned authorities as to whether the project land whereupon the windmills have been established, was forest land or not. The Forest Department claimed the land to be forest land and accordingly, initiated proceedings before the Principal Civil Judge / JMFC, Chitradurga vide case No. FOC/9/2010 wherein the learned judge passed the order dated 12.05.2011 restraining the operation of windmills upon the project land. The said order was assailed by the appellants before the Hon'ble High Court of Karnataka by way of writ petition Nos.46599-46600 of 2011. Vide order dated 23.12.2011, the Hon'ble High Court permitted recommencing of operations of the wind turbines on the project land and further directed that the issue regarding the status of the land be resolved by mutual negotiations / discussions amongst the appellants and the State within 30 days.

6. Being aggrieved by the said order dated 23.12.2011 of the learned Single Judge of the High Court, the State filed writ appeal bearing No.1359/2012 before the Division Bench. Vide order dated 06.03.2013, the Division Bench allowed the appeal and set aside the order dated 23.12.2011 thereby remanding the matter to Principal Chief Conservator of Forests, Government of Karnataka to adjudicate upon the issue and resolve the same within a period of three months. Meanwhile, the two

appellants RMML and MSPL were permitted to continue operating the wind turbines upon the project land.

7. Subsequent to such remand by the Division Bench of the High Court, the Chief Conservator of Forest, Bellari Circle, directed a joint survey of the project land. Accordingly, survey report dated 23.10.2018 was submitted to Principal Chief Conservator of Forests wherein it was stated that the total area of 24 Acres 18 Guntas of land held by the two appellants RMML and MSPL fall under Section 4 of notified area where non-forestry activities attract the provisions of the Forest Act.

8. On the basis of the said report, the Principal Chief Conservator of Forests issued letter dated 27.11.2018 to the Deputy Conservator of Forests, Chitradurga Division with the directions, *inter alia*, to: -

- (i) Take immediate action to stop the functioning of the windmills in the project land until forest clearance is obtained by the petitioner (appellants herein);
- (ii) Consult authorities including ESCOMS and appraise them of the facts so that revenue to be received by the appellants is withheld.

9. It appears that thereafter the 1st respondent refused to release the monthly payments due to appellants in terms of the respective PPAs executed by them whereas the appellants continued to generate and supply electricity to it. The 1st respondent issued a letter dated 28.05.2020 to the appellants notifying them that it is withholding the appellants of

outstanding amounts due to them under the terms of PPA on account of the directions received from the Principal Chief Conservator of Forests.

10. It is, in these circumstances, that the appellants RMML and MSPL approached the 2nd respondent Commission by way of two separate petitions bearing O.P. No.01/2021 and O.P. No.02/2021 under Section 86(1)(f) of the Electricity Act, 2003, praying for following reliefs: -

“OP No.01/2021

a) Direct Respondent No.1 to release to the petitioner payments due to it under the Power Purchase Agreements dated 07.08.2003, 18.03.2004 and 05.03.2005, amounting to Indian Rupees Nine Crores eight lakhs twenty thousand eight hundred seventy-three only (INR 9,08,20,873) as on date and to make all future payments that become due thereunder;

b) Direct Respondent No.1 to pay interest for late payment of amounts due from the date they became due till the date of realisation as per Clause 5.3 of the PPA dated 07.08.2003 and 6.3 of the PPA dated 18.03.2004 and 05.03.2005;

c) Grant cost of these proceedings as petitioner is before this Commission due to arbitrary decision of the Respondent No.1; and

d) Pass any other orders as it may deem fit and proper, in the interest of justice and equity.

OP No.02/2021

a) Direct Respondent No.1 to release to the petitioner payments due to it under the Power Purchase Agreement dated 11.02.2004, amounting to Indian Rupees Two Crores twenty-eight lakhs seventy-seven thousand two hundred fourteen only (INR 2,28,77,214) as on date and to make all future payments that become due thereunder;

b) Direct Respondent No.1 to pay interest for late payment of monthly bills from the date they became due till the date of realisation as per Clause 6.3 of the PPA;

c) Grant cost of these proceedings; and

d) Pass any other orders as it may deem fit and proper, in the interest of justice and equity.”

11. By an interim order dated 31.01.2022 passed by the Commission separately in the petitions, it directed the 1st respondent to deposit 80% of the principal amount of Rs.1,83,01,771/- payable to RMML and 80% of principal amount of Rs.7,25,84,041/- payable to MSPL subject to the two

appeals furnishing undertaking within 7 days that they would abide by the final outcome of the two petitions. Accordingly, the 1st respondent paid a sum of Rs.1,82,83,469/- to RMML and Rs.7,25,84041 to MSPL on 20.05.2022.

12. As already noted hereinabove, both the petitions were disposed off by the Commission vide common impugned order dated 28.06.2022, directing the 1st respondent BESCO to pay the balance of 20% of the amount due to the appellants respectively within 30 days from the date of the order failing which the amount shall carry interest at the rate of 9% per annum from the date of default. At the same time, the Commission was of the opinion that the BESCO cannot be saddled with liability to pay interest and accordingly denied the claim of the appellants towards interest on the delayed payment. It is also manifest from the perusal of the impugned order that the Commission has not passed any direction to the 1st respondent to continue making payments to the appellants in future also for the energy supplied by them to it.

13. Hence, these appeals before us.

14. The reasoning given by the Commission for rejecting the claim of the appellants for interest on the delayed payment is found in Paragraph 4 c) of the impugned order which is quoted hereinbelow: -

“c) BESCO relied on the request of Forest Department for withholding power purchase cost as narrated above. BESCO had intimated the petitioners regarding

withholding of payments in view of the letter received from the Forest department. It can also be seen that the copy of the letter dated 27.11.2018 stated above was also marked to M/s MSPL. Therefore, it can be assumed that the petitioners were well aware of such instructions given to BESCO for withholding the payments. The petitioners have not taken any action for challenging the legality of the said letter. In the final order passed in writ appeals it was held that principal Chief Conservator of Forests or anybody authorised by him under law shall hear the petitioners in detail and take action in accordance with law and further it is specifically held that thereafter it is open for the petitioners to challenge the same in the manner known to law. It can be said that the letter dated 27.11.2018 was issued pursuant to the Order passed in the writ appeal. It can also be seen that on the request of the petitioners for arranging payments to meet their urgent needs, the BESCO had made representations to the Principal Chief Conservator of Forests, Bengaluru, requesting to clarify as to whether the pending bills could be released or not. Further, BESCO has also taken legal opinion as to whether it should pay the pending bills. It appears the legal opinion was to the effect that payment could be made after clearance from the Forest department. The interest is usually charged against the wrongful withholding of the debt. In the present case, it cannot be concluded that

BESCOM has wrongfully withheld the payment of energy bills. During the pendency of the present proceedings the BESCOM has paid 80% of the arrears as per the interim directions issued by this Commission. For the above reasons we conclude that the BESCOM cannot be saddled with liability to pay interest.

15. We have heard the learned counsels appearing on behalf of the appellants and the 1st respondent BESCOM. We have also gone through the entire record as well as the written submissions filed by the learned counsels.

16. At the outset, we find it pertinent to refer to the clauses 6.2, 6.3 and 6.4 of the PPAs executed between the appellants on the one hand and the BESCOM on the other. The same are quoted hereinbelow: -

*“6.2 **Payment:** Corporation shall make payment of the amounts due in Indian Rupees within fifteen (15) days from the date of receipt of the Tariff Invoice by the designated office of the Corporation.*

*6.3 **Late Payment:** If any payment from Corporation is not paid when due, there shall be due and payable to the Company penal interest at the rate of SBI medium term lending rate per annum for such payment from the date such payment was due until such payment is made in full.*

6.4 Disputes: *In the event of a dispute as to the amount of any Tariff Invoice, Corporation shall notify the Company of the amount in dispute and Corporation shall pay the Company the total Tariff Invoice including the disputed amount. The Parties shall discuss within a week from the date on which Corporation notifies the company of the amount in dispute and try and settle the dispute amicably. If the dispute is not settled during such discussion then the payment made by Corporation shall be considered as a payment under protest. Upon resolution of the dispute, in case the Company is subsequently found to have overcharged, then it shall return the overcharged amount with an interest of SBI medium term lending rate per annum for the period it retained the additional amount. Corporation/Company shall not have the right to challenge any Tariff Invoice, or to bring any court or administrative action of any kind questioning/modifying a Tariff Invoice after a period of one year from the date of the Tariff Invoice is due and payable.”*

17. Perusal of these three relevant clauses of the PPAs clearly indicate that in case, the BESCO does not pay the amount of tariff invoices when due, it shall pay interest at the rate of SBI medium term lending rate per annum on such payment from the date such payment was due until actual payment is made in full. Clause 6.4 further provides that in case the

BESCOM raises any dispute in respect of any tariff invoice, it shall notify the appellants about the same but shall pay the tariff invoices including the disputed amount which shall be considered as payment under protest, and meanwhile, the parties shall commence deliberations for resolution of the dispute amicably. Upon resolution of the dispute, if it is found that the appellants were not entitled for the invoice amount, they shall have to return the amount so received from the BESCOM to it along with interest at the rate of SBI medium term lending rate per annum for the period they retained such amount.

18. Thus, as per the mechanism provided in the PPAs, the BESCOM was not authorised to stop or withhold payment of any tariff invoices in any eventuality and in case of any dispute, the procedure prescribed in clause 6.4 was to be followed.

19. Concededly, in the case at hand, the 1st respondent BESCOM did not follow the procedure prescribed in clause 6.4 of the PPAs. It abruptly stopped making payment of tariff invoices to the appellants upon receipt of directions from the Principal Chief Conservator of Forests issued by him vide letter dated 27.11.2018.

20. It is argued on behalf of the 1st respondent BESCOM that the directive dated 27.11.2018 of the Principal Chief Conservator of Forests was in the nature of a garnishee order and it had no option but to comply with the same. Accordingly, it is argued, the respondent BESCOM has rightly withheld the invoice amount in pursuance to the said directive, and therefore, it is not liable to pay any interest or late payment surcharge.

21. The Commission, in the impugned order, has observed that the interest is usually charged against the wrongful withholding of debts and in the present case it cannot be concluded that BESCO has wrongfully withheld the payment of energy bills to the appellants.

22. We are unable to countenance either the arguments raised on behalf of 1st respondent BESCO or the reasoning given by the Commission in the impugned order for rejection of claim of the appellants for interest on delayed payments.

23. It is firstly for the reason that the respondent BESCO has not adhered to the procedure prescribed in clause 6.4 of the PPAs to notify the appellants about the dispute which had cropped up in view of the directive issued by Principal Chief Conservator of Forests on 27.11.2018. Admittedly, the BESCO did not notify the appellants about such directive and instead proceeded to withhold the payment under the tariff invoices with effect from December, 2018. Even if, the 1st respondent BESCO stopped the payment of amount under the tariff invoices to the appellants under the said directive of the Principal Chief Conservator of Forests, still it was required under clause 6.4 of the PPA to notify the appellants about the said action before actual stoppage of the payment of the tariff invoices. It is an established legal principle that any administrative action / order does not absolve a party to a valid and subsisting PPA from discharging its obligation under the PPA.

24. What further intrigues this Tribunal is that on the one hand, the BESCO proceeded to stop payment of energy invoices to the appellants

in pursuance to the aforesaid directive dated 27.11.2018 of Principal Chief Conservator of Forests but on the other hand continued to receive electricity from the WTGs of the appellant without any demur and utilized the same by selling it to its consumers, thereby enriching itself from the same. Vide directive dated 27.11.2018, the Principal Chief Conservator of Forests had also directed to take immediate action to stop functioning of windmills on the project land until forest clearance is obtained by the appellants. The respondent BESCO has conveniently ignored this part of the directive and chose to stop payment to energy invoices to the appellants which was to its benefit. Therefore, it cannot be said that BESCO has acted bonafidely.

25. Secondly, we may note that “interest” can not be equated to payment of “penalty” or “fine”. “Interest” denotes normal accretion to money when invested lawfully by the person in whose hands it is. In the instant case, it was a commercial transaction between the appellants and the BESCO where under the appellants were selling electricity to the BESCO for which BESCO was making payments as per the invoices raised by the appellants. However, the BESCO stopped making payment of invoices to the appellants with effect from December, 2018 but at the same time continued to receive electricity from the WTGs which it sold to its consumers and earned revenue from it. Considering such nature of transaction, where the BESCO, without any demur, utilised the electricity received from WTGs of the appellants thereby earning revenue from it but refused to pay the invoice amount to the appellants on account of the above noted directive of Principal Chief Conservator of Forests, the BESCO cannot escape liability of payment of interest / late payment surcharge to the appellants.

26. As per the clause 6.2 of the PPAs, already noted hereinabove, the BESCO was obliged to make payment of the invoices to the appellants within 15 days from the date of receipt of the tariff invoices, failing which it was liable to pay penal interest as per clause 6.3 of the PPAs. We do not see any ground to give a go by to these mandatory and mutually agreed provisions of the PPAs. In case, the BESCO wanted to avoid liability of payment of interest / late payment surcharge as per clause 6.3 of the PPAs, it ought not to have continued receiving the electricity from the WTGs of the appellant and ought to have stopped receiving the same before stopping payment of invoice amount to the appellants.

27. In view of the above noted conduct of the respondent BESCO, we find it difficult to say that withholding the payment of energy bills of the appellants by it was bonafide and not wrongful, as stated by the Commission in the impugned order.

28. Hence, the impugned order of the Commission cannot be sustained as the same is found to be erroneous as well as perverse. The same is hereby set aside. Both the appeals stand allowed.

29. The 1st respondent BESCO is directed to pay interest at the rate of SBI medium term lending rate per annum on the delayed payment of invoice amounts to the appellants for the period of delay. The interest amount so payable by the BESCO to the appellants shall be calculated by the Commission within one month from the date of receipt of this order.

30. Further, the respondent BESCO shall make the payments of all the invoices to the appellants, which are still unpaid, along with interest at the rate stated hereinabove and continue to make future payments regularly as per the tariff invoices.

Pronounced in the open court on this the 13th day of August, 2024.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member (Electricity)

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