

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

APL-174/2021 & IA-1066/2020

Dated: 20th May, 2021

**Present: Hon'ble Mr. Ravindra Kumar Verma, Technical Member
Hon'ble Mr. Justice R.K. Gauba, Judicial Member**

In the matter of:

**Magadh Sugar and Energy Limited
Unit Hasanpur Sugar Mills
Having its registered office at
P.O. Hargaon, Sitapur,
Uttar Praeesh 261 121
and
Sugar Factory at
Hasanpur Road, PO Hasanpur
District Samastipur, Bihar - 848205**

.... Appellant(s)

Versus

**1. Power System Operation Corporation
Limited
C/o National Load Dispatch Centre
B-9, Qutab Institutional Area
Katwaria Sarai,
New Delhi – 110 016**

.... Respondent No.1

**2. Bihar Renewable Energy Development
Agency
3rd Floor, Sone Bhawan
Birchand Patel Marg
Patna, Bihar 800 001**

.... Respondent No.2

3. Central Electricity Regulatory Commission

Counsel on record for the Appellant(s): Mr. Pankaj Bhagat

Counsel on record for the Respondent(s): Mr. Abiha Zaidi for R-1

JUDGMENT (ORAL)

PER HON'BLE MR. JUSTICE R.K. GAUBA, JUDICIAL MEMBER

1. This matter has been taken up by video conference mode on account of pandemic conditions, it being not advisable to hold physical hearing.
2. The appeal at hand brings a challenge to the order dated 09.01.2020 passed in Petition No. 97/MP/2019 by Central Electricity Regulatory Commission (“the Central Commission”) on the petition presented by the Appellant, the operative part whereof reads as under: -

“The Commission is of the view that sub-clause (2) of Regulation 7 of the REC Regulations as well as paragraph 4.1 (h) of the REC Registration Procedure uses the word “shall” which denotes that the provision is imperative in nature and must be strictly complied with. It is apparent from clause 4.1 (h) that in cases where there is a change in legal status, the entity is required to apply afresh for accreditation and registration. It has been already held by the Commission in Issue No. 1 that it is a case of “change of legal status”. Therefore, it is mandatory for the Petitioner to comply with the Regulations and Procedures laid out by the Commission”

in order to take benefit of the Renewable Energy Certificates under REC mechanism. Accordingly, the Issues no. 2 & 3 are answered in favour of Respondent and against the Petitioner. The Petitioner is to get itself a fresh registration subject to fulfilment of eligibility conditions as stipulated in REC Regulations, 2010 as amended from time to time, and without registration, the Petitioner is not entitled to the RECs.”

(emphasis supplied)

3. It appears that the Petitioner felt need to seek a review and thus a Review Petition (No.16/RP/2020) was filed which was disposed of by the Central Commission by order dated 20.07.2020.
4. The present appeal challenges the abovesaid orders praying as under: -
 - (a) *set aside impugned order(s) dated 09.01.2020 passed by the Ld. CERC in Petition No. 97/MP/2019 and impugned order dated 20.07.2020 passed by the Ld. CERC in the connected Review Petition No. 16/RP/2020, and*
 - (b) *Direct the respondent to consider the application of the Appellant and direct the respondent to change the name of the Appellant in its records and in the accreditation certificate and registration certificate from the date when the scheme of amalgamation became effective (i.e. 23.03.2017), and*
 - (c) *In alternative direct the respondent to grant re-accreditation certificate and re-registration certificate in favour of the petitioner from the date when the scheme of amalgamation became effective (i.e. 23.03.2017) and onwards, and*
 - (d) *Direct Respondent to issue 10,379 nos. of RECs to Petitioner for the period December, 2017 to March,*

2018 as verified and approved by the Respondent, SLDC pertaining to co-generation from Petitioner Unit; and

- (e) Direct Respondent to issue RECs to Petitioner for the period subsequent to March, 2018 pertaining to co-generation from Petitioner Unit; and*
- (f) Pass any other order(s) as deemed fit, necessary and appropriate.*

5. It may be noted here that the reliefs sought by the Petitioner which led to the impugned order being passed by the Central Commission were set out as under: -

- “a) Direct the Respondent to consider the application of the Petitioner and direct the Respondent to change the name of the Petitioner in its records and in the accreditation certificate and registration certificate from the date when the Scheme of Amalgamation became effective (i.e. 23.03.2017), and*
- b) In alternative direct the Respondent to grant re-accreditation certificate and re-registration certificate in favour of the Petitioner from the date when the Scheme of Amalgamation became effective (i.e. 23.03.2017) and onwards, and*
- c) Direct Respondent to issue 10,379 nos. of RECs to Petitioner for the period December, 2017 to March, 2018 as verified and approved by the Respondent, SLDC pertaining to co-generation from Petitioner Unit; and*
- d) Direct Respondent to issue RECs to Petitioner for the period subsequent to March, 2018 pertaining to co-generation from Petitioner Unit; and*
- e) Pass any other order(s) as deemed fit, necessary and appropriate.”*

6. The Electricity Act, 2003 creates an obligation on the Electricity Regulatory Commissions to promote generation and use of

renewable energy and specific provision in this regard is included in clause (e) of Section 86(1). In furtherance of the said objective, each State Government prepares a policy on renewable energy wherein benefits are granted to the energy generators. The State Electricity Regulatory Commissions have framed Renewable Energy Purchase Obligation (RPO) Regulations. On similar lines, the Central Commission has also created a regulatory framework in terms of Section 66 of the Electricity Act, 2003 to create a market catering to REC mechanism. In furtherance of such obligation, it has enacted *Central Electricity Regulatory Commission (Terms and Conditions for recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010* (hereinafter referred to as “the REC Regulations”). The Central Commission introduced in 2010 the concept of Renewable Energy Certificates (RECs) under the REC scheme to eligible renewable energy generators (Projects) they being expected to register with a nodal agency. For present purposes, the first Respondent, Power System Operation Corporation Limited represents the relevant entity i.e. National Load Despatch Centre (NLDC).

7. The issue involved in the present appeal concerns the claim for benefits under the REC scheme accruing as a result of the operations of bagasse-based power project run on the premises of Hasanpur Sugar Mills which, prior to the events that later unfolded, was a unit of, and controlled by, a company named *Upper Ganges Sugar & Industries Limited* (for short “Upper Ganges”). It may be mentioned here that such projects of Upper Ganges have been collectively

described as “Bihar Sugar Business Undertaking”. A scheme of arrangement was prepared and presented under Sections 391 - 394 of the Companies Act before the National Company Law Tribunal (“NCLT”) in terms of which the ownership of Hasanpur Sugar Mills, then a unit of Upper Ganges, was to be transferred “*as a going concern*” to the appellant company i.e. *Magadh Sugar and Energy Ltd.* (hereinafter referred to as “Magadh Sugar”). As per the scheme of arrangement the effective date (*appointed day*) was specified to be 01.04.2015. It may be mentioned here that prior to the scheme being presented Upper Ganges had got itself registered and accredited with NLDC with effect from 22.01.2015 for being a beneficiary of REC scheme in respect of the power generated through the project at Hasanpur Sugar Mills.

8. The scheme of arrangement came to be accorded approval by NCLT by its order dated 02.03.2017, it having come into effect, by application of the law on the subject, (retrospectively) from 01.04.2015 which was specified in the scheme as the appointed day.
9. The regulatory authorities have also prepared and introduced *Model Procedure/Guidelines for Accreditation of Renewable Energy Generation Project or Distribution Licensee, as the case may be, under REC Mechanism by State Agency* (hereinafter referred to as “the REC Guidelines”). The following part of the REC Guidelines, as introduced in 2015, is relevant here:

4. FUNCTIONS, ROLES AND RESPONSIBILITIES OF ENTITIES INVOLVED

The roles and responsibilities of the entities involved is elaborated in the following paragraphs,

4.1. Generating Company or Distribution Licensee, as the case may be (Applicant)

*a. The Generating Company shall apply for the accreditation of its RE generation project facility as per **FORMAT-1.1: “Application for Accreditation of RE Generation Project under REC Mechanism”** enclosed to this Procedure. The distribution licensee shall apply for the accreditation as per **FORMAT-1.1.1” Application for Accreditation of distribution licensee under REC Mechanism”** enclosed to procedure.*

*...
j. Whenever there is a change in the legal status of the eligible entity (e.g. change from partnership to company), the eligible entity shall immediately intimate the concerned State Agency and the Central Agency about the said change and apply afresh for Accreditation by the concerned State Agency and Registration by the Central Agency. In all other cases involving a change in the name of the eligible entity, only the name of the entity shall be updated with the records of the State Agency and the Central Agency based on the intimation given by the eligible entity. In such cases eligible entity shall provide relevant documents in hard copy.*

10. The above-mentioned guidelines came to be amended on 16.03.2018 whereupon clause (j) of para 4.1 would read thus: -

“4. FUNCTIONS, ROLES AND RESPONSIBILITIES OF ENTITIES INVOLVED

The roles and responsibilities of the entities involved is elaborated in the following paragraphs,

4.1. Generating Company or Distribution Licensee, as the case may be (Applicant)

a. The Generating Company shall apply for the accreditation of its RE generation project facility as per **FORMAT-1.1: “Application for Accreditation of RE Generation Project under REC Mechanism”** enclosed to this Procedure. The distribution licensee shall apply for the accreditation as per **FORMAT-1.1.1” Application for Accreditation of distribution licensee under REC Mechanism”** enclosed to procedure.

...

j. Whenever there is a change in legal status of registered entity (e.g. change from partnership to company, Pvt. Limited to Public Limited, new entity subsequent to demerger, change in ownership of the company, asset sale/transfer to other company, etc.), it shall inform the concerned State Agency and the Central Agency within one month from the date of said change, along with the following:

- i) request for revocation of the project from the REC Mechanism
- ii) request for re-accreditation/fresh accreditation and reregistration/fresh registration of the project under REC, if desired
- iii) request for transfer of RECs to the new entity

Supporting documents including revised PPAs (if any) and Certificate from Registrar of Companies must be submitted.

Upon verification, the State Agency shall accredit the new legal entity, and update the Central Agency.

Subsequently the Central Agency shall register the new legal entity, and transfer ownership of existing valid RECs.

New RECs shall only be issued to the new entity from the date of application for re-accreditation/fresh accreditation.

In cases involving a change in name of the registered entity, it shall inform the concerned State Agency and the Central Agency within one month from the date of said change, along with relevant documents including but not limited to Board Resolution regarding the name change, certificate of name change from Registrar of Companies, approval of concerned authorities, State Agency etc.”

(emphasis supplied)

11. In the wake of approval of the scheme of arrangement by NCLT, by its order dated 02.03.2017, the appellant having taken over the ownership and operations of Hasanpur Sugar Mills from Upper Ganges applied for a *change of name* in terms of the pre-amended model guidelines taking the position that it could not be construed as a case of *change in the legal status* of the eligible entity. The NLDC did not grant the request and this led to the above-mentioned petition being filed before the Central Commission. It may be mentioned here that the Appellant had also moved an application, later on 07.05.2018, for fresh registration presumably under the amended guidelines. The said request eventually was declined by communication dated 12.12.2018 issued by the first respondent for the reason the application had been filed belatedly, the period of limitation for

application for change of the registration in favour of the other legal entity being “one month”.

12. The Central Commission was not impressed with the arguments advanced before it by the appellant to the effect that the transfer of Hasanpur Sugar Mills from Upper Ganges to Magadh Sugar was a case of only change of name. Contending that the reasons on which such a view was taken are incorrect, the order was challenged by the appeal at hand.

13. During the course of hearing, however, the learned counsel for the appellant fairly conceded that the transfer of the asset i.e. Hasanpur Sugar Mills which is bagasse based co-generation power plant, by its erstwhile owner Upper Ganges to the appellant company, in terms of the approval granted by NCLT by its order dated 02.03.2017 constitutes a clear case of *change in the legal status*, it concededly not being a case of mere change of name, in as much as it involves *change in ownership, by transfer*. The learned counsel submitted that under the amended guidelines such a request made on 07.05.2018 for fresh registration *vis-à-vis* Hasanpur Sugar Mills in the name of the transferee company i.e. the appellant herein, should have been allowed. It is submitted that such fresh registration would also ensure that the benefit of RECs accrued anterior to the date of transfer inures in favour of the transferee Company, the denial by communication dated 12.12.2018 being unjust and unfair, the prayer clause (b) in the petition before the Central Commission having been glossed over.

14. Against the backdrop of the facts and circumstances noted above, the learned counsel for the appellant, having taken instructions, presses the alternative prayer clause (c) as noted earlier seeking a direction to the respondents to grant re-accreditation certificate and re-registration certificate in its favour from the date from which the scheme of arrangement had become effective i.e. 01.04.2015 (there being typographical error in the text of the memo of appeal).

15. We have given anxious consideration to the alternative prayer. In our view, there is no reason why the alternative prayer ought not have received due consideration by the Central Commission or as to why it ought not have been granted. The scheme of arrangement was presented in 2015. It received approval of NCLT only on 02.03.2017. The transfer of the asset i.e. Hasanpur Sugar Mills from the hands of Upper Ganges to Magadh Sugar would take place, by legal fiction, from the appointed date i.e. 01.04.2015. It cannot be said that the appellant was expected to move an application for transfer of the registration or for fresh registration under the REC scheme within one month of 01.04.2015, in anticipation of such approval being accorded by NCLT.

16. It does appear that there has been delay in filing of the application for fresh registration even after the NCLT order dated 02.03.2017, such move having being made only on 07.05.2018. But then, as explained by the learned counsel, the legal advice given was that it was a case of only *change in name* towards which end the matter was being

prosecuted diligently. The fact that such advice was incorrect and deficient cannot be ignored. We are of the view that the delay caused by pursuit of a wrong remedy, under deficient and incorrect legal advice, should not come in the way of substantive justice being rendered. The party, otherwise entitled in terms of approval of Scheme of Arrangement by NCLT, and under the Regulations / Guidelines, cannot be made to suffer loss of benefits under the REC scheme that had accrued in favour of the erstwhile owner in respect of the co-generation plant, only because it was ill advised earlier. It is in nobody's interest that such benefits should get forfeited or exhausted. Such REC benefits deserve to be transferred to the hands of the transferee. This can be ensured only if its application dated 07.05.2018 is accepted.

17. In the above facts and circumstances, we find it just and proper to allow the alternative prayer as noted above.
18. We, thus, direct that the concerned authorities shall pass necessary order on the application made by the Appellant on 07.05.2018 for fresh registration in terms of amended para 4.1 (h) of the model guidelines and allow the registration *vis-à-vis* REC benefits of Hasanpur Sugar Mills to be transferred and granted in favour of the appellant on basis of the scheme of arrangement approved by NCLT on 02.03.2017.
19. A red flag, however, was added by learned counsel representing the Respondent NLDC, pointing out that under the fourth amendment to

the REC Regulations, notified on 23.03.2016, the captive generating plants registered after 30.06.2016 cannot be granted the benefit of REC scheme.

20. It appears that such concern had been expressed before the Central Commission as well, in the proceedings from which the impugned order arose. But then, as is conceded by both sides no issue to that effect was framed or addressed.
21. It does appear that doubts as to eligibility of the appellant for such benefits to be given post such amendment of the REC Regulations notified on 27.03.2016 might arise in the proceedings that would follow the disposal of the appeal at hand. Suffice it to observe that in taking an appropriate view the concerned authorities will bear in mind the time spent by the appellant under wrong or deficient legal advice in pursuing a wrong course of action. Further, the fact that the transfer of ownership of Hasanpur Sugar Mill has taken effect from 01.04.2015, by virtue of the approval granted by NCLT on 02.03.2017, should leave no scope for doubts to be entertained that all consequences flow from the Scheme of Arrangement, under the company law, including transfer of assets and liabilities (concerning the said unit) of the transferor company (Upper Ganges) in favour of the transferee company (Magadh Sugar) – and that undoubtedly includes the RECs already accrued - with reference to the said crucial day i.e. 01.04.2015. The amendment of the REC Regulations notified on 27.03.2016 cannot possibly have retrospective effect.

22. We, thus, set aside the order whereby the application made for fresh registration on 07.05.2018 was declined only on the ground of it being belated. We direct the concerned authorities i.e. NLDC to pass a fresh order, bearing in mind the observations recorded above and accord registration/accreditation *vis-à-vis* Hasanpur Sugar Mills in favour of the appellant, also expressly providing for benefit of the REC Scheme, including the benefits already accrued in favour of Upper Ganges prior to the change, to be passed on to the transferee i.e. the appellant, within one month of this judgment. In case the appellant has any further grievances with regard to compliance/non-compliance with these directions, it shall have the liberty to approach this tribunal by moving an appropriate application with reference to the captioned appeal.
23. The appeal and pending application stand disposed of in above terms.

**PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO
CONFERRING ON THIS 20th DAY OF MAY, 2021.**

(Justice R.K. Gauba)
Judicial Member
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(Ravindra Kumar Verma)
Technical Member

√
REPORTABLE/NON-REPORTABLE

A.NO. 174 of 2021
