

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

COURT-II

**APPEAL NO. 141 OF 2018 &
IA NO. 667 OF 2018**

Dated: 6th July, 2021

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

In the matter of:

**Transmission Corporation of Andhra Pradesh Ltd
Vidyut Soudha
Hyderabad 500 082**

.... Appellant

VERSUS

1. ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION

[Through its Secretary]
4th & 5th Floor, Singareni Bhavan,
Red Hills, Lakadi-ka-pul,
Hyderabad – 500 004.

2. SHRI GIRIJA ALLOY AND POWER (I) PVT. LTD.

[Formerly Sri Girija Power Pvt. Ltd]
[Through its Director]
Sy. No. 162 & 153, A.D.B. Road,
Peddapuram, East Godavari District
Andhra Pradesh – 537 437.

**3. THE ANDHRA PRADESH EASTERN POWER DISTRIBUTION
COMPANY LTD.**

[Through its Chairman & Managing Director]
Nakkavani Palem Sub-Station,
Near Gurudwara,
Vishakhapatnam – 530 013

.... Respondents

Counsel for the Appellant (s) : Ms. Prerna Singh

Counsel for the Respondent (s) : Mr. Sridhar Potaraju
Mr. Mukunda Rao Angara
Ms. Ankita Sharma
Ms. Shivani Tushir
Mr. Aayush for R-1

Ms. Devahuti Tamuli for R-2

Rohit Rao. N
Mr. Ananga Bhattacharyya for R-2

J U D G M E N T

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

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 has been presented by Transmission Corporation of Andhra Pradesh Ltd. (hereinafter referred to as “the *Appellant*” or “the *AP Transco*”) questioning the legality, propriety and validity of the directions given by Andhra Pradesh Electricity Regulatory Commission (for short, “the *State Commission*”) by its Order dated 24.02.2018 whereby the Original Petition, being OP No. 27 of 2016, presented by the second respondent i.e. Shri Girija Alloy and Power (I) Pvt. Ltd. (for short, “the *second respondent*”) was granted and the appellant was directed to refund an amount of Rs.2,77,99,180/- to the second respondent, the said amount being part of the charges that were collected in the name of ‘*development charges*’. The proceedings before the State Commission included the appellant herein impleaded as the second respondent, the prime opposite party (first respondent in said proceedings) being the Andhra Pradesh Eastern Power Distribution Company Ltd. (hereinafter referred to also as “the *AP Discom*”), the said party having been impleaded as the third respondent in the present appeal.

3. The second respondent is a private limited company which was incorporated in 2004. It runs an industrial unit wherein it operates and maintains a Ferro Alloy Plant. The respondent had moved an application on 08.11.2010 before the AP Discom for supply of power. The request was for sanction of Contracted Maximum Demand of 36 MVA of power at 220kV level for operating the Ferro Alloy Plant. It was stated at that time that the second respondent proposed to set up Captive Power Plant (“*CPP*”) of 108 MW which would commence operation from 2013 whereafter the power supply for the Ferro Alloy Plant would be made from the CPP and 50 MW power of surplus would be exported.

4. Section 43 of the Electricity Act 2003, casts a duty on the Distribution Licensees to supply electricity on request to any premises within one month after receipt of application from the owner or occupier of the premises. However, where such supply requires extension of distribution mains or commissioning of new substations, the Distribution Licensee is expected to supply the electricity immediately after such extension or commissioning or within such period as may be specified by the Regulatory Commission. It may also be mentioned here that Section 46 of the Electricity Act, 2003 has vested the State Commission with the power to authorize the Distribution Licensee to recover the expenses reasonably incurred in providing any electric line or plant used for the purposes of giving supply to a person pursuant to its statutory obligation envisaged in Section 43.

5. The Andhra Pradesh Electricity Regulatory Commission has framed Regulations (No. 4 of 2013) titled as “*Andhra Pradesh Electricity Regulatory Commission (Licensee's duty for supply of electricity on request) Regulation, 2013*”. It may be noted here that the timelines for supply of electricity pursuant to the request made to a licensee by the owner or occupier of the premises within its area of operation and the corresponding duty along with the timelines are set out in regulation 4 of the said Regulations. It may also be mentioned here that having regard to the nature of request of the second respondent to it, the AP Discom was obliged in terms of Regulation 4(2)(b)(ii), to provide the Extra High Tension (EHT) supply within a period of 180 days of the moving of the said application complete in all respects which, of course, would include the liability to pay the necessary charges that included *development charges*. Regulation 4, to the extent relevant, may be quoted as under:

“4. Duty of Licensee to supply on request

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(3) The Distribution Licensee shall be responsible to collect all Service Line Charges and Development Charges pertaining to EHT services and remit the same to the respective Transmission Licensee. The Transmission Licensee shall take up the work after receipt of service line charges and development as mentioned in clause 6, clause 7 and clause 8. The Distribution Licensee shall work in coordination with Transmission Licensee, in respect of releasing the service within stipulated time permitted by the Commission.

(4) Transmission Licensee shall be liable to reimburse to the Distribution Licensee, any compensation required to be payable in extending the power supply to the EHT Consumer, in fulfilling the obligation under this regulation and Standards of Performance Regulations issued by the Commission.

(5) If the Consumer fails to pay the necessary charges and security deposit as intimated by the Licensee, within three months from the date of intimation, without any

prejudice to the rights and obligations of the licensee, the application made ceases to be valid.

(6) Subject to the above, it shall be the responsibility of the Distribution Licensee to have necessary commercial arrangements with the respective transmission licensee(s) to ensure that the required supply at Extra High Tension (EHT) is made available within the time frame specified under clause 4(2) above.

(7) The Licensee shall not be responsible for the delay, if any, in extending supply, if the same is on account of problems relating to statutory clearances, right of way, acquisition of land, or the delay in consumer's obligation to obtain approval of Chief Electrical Inspector for his High Tension or Extra High-Tension installation, or for any other similar reasons beyond the reasonable control of the Licensee.

(8) In cases where the village or hamlet or area is not electrified earlier, the distribution licensee shall give supply of electricity to such premises after the village or hamlet or area is covered for electrification under any programme of electrification of habitations covered in the investment plan approved by the Commission. The supply shall be extended within the time frame specified in such investment plan approved by the Commission.

...”

6. The aforementioned regulations explain the justification of levy of development charges as under:

“8. Specific provision for Development charges

(1) The Distribution Licensee shall collect development charges subject to the provisions of Act and this Regulation and subject to such directions, orders or guidelines, the Commission may issue from time to time. The Distribution Licensee is authorized to recover from an applicant, requiring supply of electricity, expenses on normative basis towards part of upstream network cost that the Distribution Licensee has already incurred or to be incurred in extending power supply to the applicant.

(2) The development charges on normative basis are arrived using shallow approach limiting the network cost to the next immediate higher voltage level. The Distribution Licensee shall levy development charges on per kVA/kW basis as per the schedule (Annexure-1) enclosed.

(3) The Distribution Licensee shall recover full cost of transformer in case of commercial complexes, apartments and multi storied buildings where a dedicated transformer is provided while extending new LT service connections. In such cases, the Distribution Licensee is not entitled to collect development charges and shall own the transformer and maintain it. The Distribution Licensee shall not extend power supply to any other consumer from the dedicated transformer other than the consumer who has borne the full cost of Transformer.

(4) In case of LT supply, the responsibility of erection of distribution transformer lies with the Distribution Licensee and shall not charge cost of transformer to any consumer except those consumers mentioned in para 3 above and levy only development charges.

(5) The Distribution Licensee shall not charge development charges to a consumer who seek temporary supply.

(6) The Distribution Licensee is entitled to collect difference cost of development charges, in case of change of category from lower development charges category to higher development charges category. The Distribution Licensee is not entitled to collect development charges for restoring the de-rated capacity to the original level.

(7) If any existing consumer requests for splitting of service into two different categories, the Distribution Licensee is not entitled to collect full development charges. The DISCOM is entitled to collect short fall amount if any resulting out of splitting. For example, a 50 kW commercial service may require splitting of his service into two categories, viz., 20 kW commercial category and 30 kW industrial category.

(8) Subject to the provisions of Act and this Regulation and subject to such directions, orders or guidelines issued by the Commission, the Distribution Licensee shall file revised development charges, if required, for approval, once in five years along with MYT proposals.”

7. The Regulations also cover consequences of default on the part of the Distribution Licensee to meet the timelines for compliance with the request for supply of electricity, the relevant provision reading thus:

“5. Consequences of default

(1) The Distribution Licensee who fails to comply with the time frame for supply of electricity stipulated in clause 3 above shall be liable to pay penalty as may be decided by the adjudicating officer of the Commission in accordance with sub-section (3) of section 43 of the Act.

(2) The liability to pay penalty under the Regulation for default if any, does not absolve the distribution licensee from the liability to pay compensation to the affected person as per the regulation notified under sub-section (2) of section 57 of the Act.”

8. It may be added here, for the sake of completion, that regulation 11 provides that the time frame specified in clause 3 above shall not be operative where the distribution licensee is prevented from giving supply of electricity on account of cyclones, floods, storms and other occurrences beyond his control.

9. It is not in dispute that the transactions of such nature as is subject matter of the proceedings are governed by General Terms and Conditions of Supply of Distribution & Retail Supply Licensees in AP (for short, "GTCS"). Reliance was placed in the course of submissions before the State Commission, as indeed before us in the present appeal, on para 5.3.3.1 on the subject of "*Development Charges*" which, to the extent relevant, may be quoted thus:

"5.3.3 Development Charges

5.3.3.1 The amounts payable by the consumer towards development charges of new connection/additional load under LT and HT categories shall be at the rates notified by the Company with the approval of the Commission from time to time. The consumer shall pay these charges in advance, failing which the works for extension of supply shall not be taken up. These charges are non-refundable.

Provided that where any applicant withdraws his requisition before the Company takes up the works of the sanctioned scheme, the Company may refund the development charges paid by him without any interest. However, where the service line charges are not sufficient to cover the 10% of the cost of the sanctioned scheme, mentioned in clause 5.3.2.1 above, the balance amount of 10% of the cost of the sanctioned scheme shall be deducted from the development charges paid by him."

10. Pursuant to the aforementioned request for supply of electricity, upon demand being made by the Distribution Licensee, in which the appellant seems to have joined, the proposal was approved by the appellant on 29.03.2011 agreeing to extend power supply on the condition that deposit would be made by the second respondent in the sum of Rs.4,30,64,414/- this including Rs.2,70,00,000/- towards development charges calculated at Rs.750 per KVA, the balance being towards cost of spares, supervision/establishment charges and service tax leviable thereupon.

11. During the hearing, it has been fairly conceded by the learned counsel for the second respondent that the amount of Rs.2,70,00,000/- collected from the second respondent by the appellant towards development charges was correctly calculated on the basis of the request for contracted maximum demand of 36 MVA of power at 220 kV level.

12. The pleadings of both sides do show that the Distribution Licensee was unable to supply electricity as demanded for a prolonged period. Some justification in the nature of *force majeure* events was referred to in the pleadings and submissions before the State Commission. Be that as it may, after a prolonged wait, the second respondent claiming that there was inordinate delay in sanctioning and supply of power, it having expedited the construction of CPP, made a revised request on 07.09.2012 for release of startup power of 7 MVA also requesting that the charges applicable to 7 MVA only be retained, the balance to be adjusted against the payment of development charges earlier deposited. The request for refund of Rs. 2.475 crores was declined by the appellant by its communication dated 19.11.2013, *inter-alia*, referring to clause 5.3.3 of GTCS quoted earlier also stating that the work in respect of expansion of the Licensee's Network had already been completed and commissioned, the refund of balance of development charges being not feasible or permissible. The second respondent then filed the Petition, being OP No. 27 of 2016, invoking the jurisdiction of the State Commission under section 86(1)(f) read with section

46 of Electricity Act, 2003. The petition was contested both by the appellant and by the AP Discom (third respondent). The Commission, rejected the explanation offered by the AP Transco and AP Discom, also repelling the objection that the second respondent was only a consumer que the parties against whom it had sought relief and granted refund to be made which direction is questioned by this appeal.

13. After some hearing, the learned counsel for the second respondent (Petitioner before the State Commission), having taken instructions from Mr. C. Srinivas Raju, Director, who is also present before us in the hearing that was resumed after giving opportunity to the learned counsel to seek instructions, fairly conceded that in terms of clause 5.3.3 of GTCS, the development charges cannot be ordered to be refunded by the Transmission Licensee (Appellant). The learned counsel for the second respondent, however, submitted that the second respondent has realized on proper legal advice that the appropriate remedy to be pursued was in terms of regulation no. 5 of the Andhra Pradesh Electricity Regulatory Commission (Licensee's duty for supply of electricity on request) Regulation, 2013, because there was an inordinate delay on the part of the Distribution Licensee to supply electricity within the statutory time frame, this giving rise to a cause of action for prayer to be made for penalty to be imposed under section 43(3) of the Electricity Act, 2003 and for award of compensation for the consequential loss suffered by the second respondent in terms of Section 57(2) of

Electricity Act, 2003. The learned counsel for the second respondent, upon instructions, while conceding that the impugned order may be set aside upholding the contention of the appellant that development charges having been paid, no request for refund having been moved before the crucial point of time in terms of the Regulations read with clause 5.3.3.1 of GTCS, requested that liberty may be given to the second respondent to pursue and prosecute appropriate reliefs in terms of regulation 5, as mentioned above.

14. The third respondent (AP Discom) has chosen to remain absent from these proceedings despite notice. The learned counsel for the appellant, on one hand, and for the State Commission (first respondent), on the other, on being asked, submitted that they have nothing to say on the prayer for liberty as above to be granted, their only request being that the observations recorded in the impugned order should not influence the judgment of the adjudicating officer of the Commission on the petition under section 43(3) and or of the Commission on the petition under section 57(2) of Electricity Act, 2003 which the second respondent proposes to now prefer and prosecute.

15. In the facts and circumstances, as noted above, we do uphold the contention of the appellant that the approach of the State Commission was misdirected and erroneous, it having treated the development charges as refundable glossing over the inhibition contained in clause 5.3.3.1 of GTCS.

The impugned order is, thus, liable to be set aside. We order accordingly.

16. We appreciate the submissions and agree with the learned counsel that in the given facts and circumstances the second respondent cannot be rendered remediless. Its contention that there was inordinate delay in complying with the time frame for supply of electricity and in adhering to the standards of performance by the State Discom (third respondent) has resulted in losses would need to be put to trial, should the second respondent proceed ahead and file petition(s) for appropriate directions/reliefs under section 43(3) and section 57(2) of the Electricity Act, 2003. A long period has been spent in the proceedings leading to this appeal and adjudication in appeal thereupon. This has caused delay in pursuit or prosecution of the appropriate remedy, apparently under wrong legal advice. The second respondent ought not to suffer on that account. In these circumstances, we grant liberty, as prayed, to the second respondent to approach, within four weeks' of today, the appropriate authorities in terms of section 43(3) and section 57(2) of the Electricity Act, 2003 for appropriate proceedings to be taken out and adjudicated upon in accordance with law. We make it clear that in the event of the second respondent approaching the appropriate authority in the manner, as stated above, within the time granted by us, such petition will not be rejected on account of it being time barred or suffering from laches.

17. Needles to add, in the proceedings that may be taken out by the second respondent in terms of the liberty as above granted by us, the

concerned Statutory Authority will take a decision on the basis of material placed before it after giving due opportunity of hearing to all sides, uninfluenced by observations made or conclusions reached by the State Commission in the impugned order or in the present judgment rendered on the appeal at hand by us.

18. With these observations, the instant appeal and the applications pending therein stand disposed of.

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