

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

**Appeal No. 646 of 2023 &
IA Nos. 443, 1925 and 1926 of 2023**

Dated: 15th September, 2023

**Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member**

IN THE MATTER OF:

M P Power Management Company Ltd.
Through its Managing Director,
CoF Block, Shakti Bhawan,
Rampur, Jabalpur (M.P.) – 482008.

... Appellant(s)

Vs.

(1) CLP Wind Farms (India) Pvt. Ltd.
Through its Managing Director,
Plot No. D-1, 3rd Floor, Salcon Ras Vilas,
District Centre, Saket,
New Delhi – 110017.

(2) Madhya Pradesh Electricity Regulatory Commission
Through its Secretary,
5th Floor, Metro Plaza, Arera Colony,
Bittan Market,
Bhopal (M.P.) – 462016.

... Respondent(s)

Counsel for the Appellant(s) : Mr. Manoj Kumar Dubey

Counsel for the Respondent(s) : Mr. Syed Jafar Alam
Mr. Deep Rao Palepu
Mr. Saahil Kaul
Mr. Jafar Alam
Mr. Ashwin Ramanathan
Mr. Gokul Holani
Ms. Ankita Gupta

Mr. Parinay Deep Shah for R-1

Mr. Vikas Upadhyay for R-2

JUDGEMENT

PER HON'BLE MR. SANDESH KUMAR SHARMA, TECHNICAL MEMBER

1. The Appellant, M/s. M. P. Power Management Company Limited has filed the captioned Appeal challenging the orders dated 20-05-2022 and dated 27-09-2022 (in short "Impugned Orders") passed in Petition No. 25/2018 and Petition No. 45/2022, respectively, by the Madhya Pradesh Electricity Regulatory Commission (in short "State Commission" or "MPERC").
2. The Appellant also filed the IA 443 of 2023 seeking stay of the order passed by the State Commission imposing a penalty of Rs. 1 Lac on the Appellant under section 142 of the Electricity Act, 2003 (in short "Act"), after hearing the contesting parties, it was agreed to dispose of the Appeal itself as there is only one issue to be adjudicated that is the imposition of penalty.
3. The Appellant, MP Power Management Company Ltd. (in short "MPPMCL") is the nominee of the Government of Madhya Pradesh entrusted with the function of purchase of bulk power on behalf of the distribution companies of the State of Madhya Pradesh (in short "MP").
4. The Respondent No. 1 i.e. CLP Wind Farms (India) Pvt. Ltd. (in short "CLP") is the generating company having signed the PPA with the Appellant for supply of electricity.

5. The Respondent No. 1, the State Commission is the statutory authority established under the Electricity Act, 2003 (in short "Act") and vested with the powers to adjudicate the matter under section 86 of the Act.

6. The Respondent No.1, CLP, being aggrieved by non-payment of dues, filed the Petition No. 33/2016 claiming the outstanding amounts towards energy bills, the Petition was disposed of by the State Commission directing the Appellant to make the payment of outstanding invoices to the Respondent No. 1 i.e. CLP in terms of the provisions of the PPAs/tariff orders, however, the Appellant argued that the order has been passed without considering the defence made by the Appellant stating that the Respondent No. 1 had not raised the dispute in terms of the provisions of the PPA, the State Commission also directed the Appellant to make suitable arrangements so that in future such delay is avoided and generation of electricity from renewable sources of energy is promoted as envisaged under Section 86 (1)(e) of the Electricity Act, 2003.

7. The Appellant submitted that it has already made payments in compliance of the said order, however some payments got delayed, being aggrieved by non-payment, the Respondent No. 1 filed Petition No. 25/2018, under section 142 of the Act before the Respondent No. 2, which was disposed of by order dated 25.01.2019, observing as under:

"14. ----- the Commission issued the directives to the respondent for making the payment of outstanding bills to the petitioner in terms of the provisions of the PPAs/ tariff orders and to devise suitable arrangements to avoid delay in payment in future and also reporting the compliance to the Commission promptly. On non-compliance of

the aforesaid directives of the Commission, the petitioner filed the instant petition under section 142 of the Electricity Act 2003.

15. The Commission has observed that after issue of the order dated 02.09.2016, although the respondent made the payments from time to time, the outstanding bills are still pending. -----

Alternatively, both the parties should sit together and mutually come out with a way as per the provisions of the PPA executed between them so that in future the issue of timely payment of the energy bills as well as outstanding bills may be resolved amicably. It is a responsibility of the respondent to make best efforts and clear all the outstanding bills as per provisions of the PPA/tariff order in minimum possible time.”

8. Being aggrieved by the decision of the State Commission for not taking appropriate action under section 142, even after recording/ observing non-compliance of its order by the Appellant, the Respondent No. 1 challenged the aforesaid order by way of Appeal No. 184/2019, this Tribunal, vide judgment dated 04.02.2022, set aside the order dated 25.01.2019 and remanded the matter to the State Commission with the directions for fresh consideration, after hearing the parties, the relevant extract is quoted as under:

“14. In our considered view, it is incumbent upon the State Commission to also adjudicate, upon such situation being brought to it, whether its order or direction has been complied with or not and if it is established that a case of deliberate or unjustified non-compliance is made out, then consequences inter alia as provided under Sections 142 and 146 of the Electricity Act must follow. The

credibility of judicial hierarchical system is founded on the expectation that the respective forum at each level would perform its duties as prescribed in law. Non-exercise of jurisdiction makes the institution suffer and the hallowed objective of expeditious and effective dispute resolution is defeated. There is no reason why the Commissions should shy away from deciding the underlying issues of willful non-compliance reflecting anarchy.

15. *We see no justification as to why the Commission's order is silent on the prayer under the provision contained in Section 142 of the Electricity Act, 2003. It appears that in the PPA there is possibility of the generator to invoke the relevant clause on account of event of default of this kind by denying the supply of electricity to the procurer. But then, given the small level at which it operates, such recourse would undoubtedly be counter-productive for the appellant since there is strong probability of it being stranded.*

16. *The fact remains that the State agency which is procuring supply cannot make the source from which it procures the electricity for distribution through the licensees operating in the State run dry or be in indefinite wait for the reasonable returns under the contract to be paid to it. The fact that the State Commission had issued directions to the first respondent to make the payments itself creates an onus on the Commission to ensure due compliance therewith. Such directions by a statutory authority cannot be handed out as mere paper decrees, if that expression could be employed here. The adjudicatory forum must be in a position to take the matter to the logical end and with that objective in mind it*

ought not ignore that it is equipped with the requisite teeth in the form of provision contained not only in Section 142, but also a penal clause in Section 146 of the Electricity act, 2003. The Commission has failed to live up to the expectations of the parties that appear before it by not exercising the jurisdiction which is vested in it by the law. We cannot approve of such evasive disposition as has been rendered in the matter at hand. Mere lip service will not produce results in disputes of this kind, it being the obligation of the Commission to adopt further measures to ensure due compliance.

17. *With the above observations, we set aside the impugned order and remit the matter to the State Commission directing further consideration for fresh and all necessary orders to be passed, after hearing the parties, dealing with each prayer in the petition that was laid before it by the appellant. Given the delay which has occurred over the period, we would expect the Commission to pass the necessary orders requiring due compliance with its directives on the subject of payment of energy charges within a period of four weeks hereof.*

18. *We make it clear that given the track record of the parties before us, the Commission will put in position requisite mechanism not only for the past dues but also for the future responsibility for the procurer for the remainder of the duration of the PPA.*

19. *The appeal and the pending applications are disposed of in above terms.”*

9. The State Commission, in compliance to the remand, allowed the said Petition No. 25/2019, and passed the Impugned Order dated 20.05.2022, imposing a penalty of Rs. 1 lac on the Appellant, the relevant extract in quoted as under:

“18. In view of foregoing submissions by both the parties, the Commission has observed that the Respondent has not been able to make the payments due to the petitioner towards supply of electricity from the petitioner’s WEGs as per the schedule provided in the power purchase agreements executed between both the parties and also in the tariff order dated 26.03.2013 for procurement of power from wind electric generators issued by this Commission. The Commission has also noted that the Respondent has been making payments for principal amount only that too intermittently with a substantial delay as against the period specified in PPAs/Tariff order. Further, as per petitioner’s submission the Respondent has not paid surcharge on delayed payments and total outstanding dues towards principal and DPS as on 31.03.2022 have increased to INR 1,19,30,66,999/- and INR 70,57,30,190/-, respectively. The Respondent has not denied or disputed the bills but the main reason stated by the Respondent for delayed payment is its financial liquidity/adverse financial situation.

19. Vide Commission’s Order dated 02.09.2016 in Petition No. 33 of 2016, the Respondent was directed to make payment of outstanding invoices to the petitioner in terms of provisions under PPAs/tariff orders. The Respondent was also directed to make suitable arrangements to avoid such delay in payments in future.

Due to non-compliance of aforesaid directions of the Commission by Respondent, the petitioner has filed the subject petition seeking directions to Respondent to clear all outstanding dues including DPS and also to initiate penalty proceedings under Section 142 of the Electricity Act' 2003. In the subject petition, the petitioner has also sought directions to Respondent to open letter of credit in favor of petitioner to secure the bills issued and the future bills to be issued by the petitioner, in terms of the Tariff Order and Commission's order dated 02.09.2016 in petition No. 33 of 2016.

20. *The Commission has noted with concern that despite clear directives in order dated 02.09.2016 in petition No. 33 of 2016, the Respondent has still not cleared /paid all outstanding dues including DPS towards the electricity supplied by the petitioner which is clear non-compliance of the Commission's directions by Respondent. In its reply to this petition invoking Section 142 of the Electricity Act 2003, the Respondent has placed the following questions of law:*

- (i) Whether a contempt proceeding as being sought by the Petitioner is a substitute of the execution proceeding if there exists an alternate remedy for compliance of the order dated 02-09-2016 passed in the earlier Petition No. 33/2016?"*
- (ii) Whether, in a proceeding for contempt or u/s. 142 to 146 of the Act, the provisions of Rules and Regulations under the Electricity Act, 2003 and those of the contractual obligations of the parties under the relevant PPAs relating to outstanding payments can be overwritten?*

(iii) Whether the Petitioner has resorted to the mandatory contractual obligation of resorting to the express provisions of Article 9.2 and 9.4 of the PPA? If not, consequences thereof in relation to present proceedings u/s. 142 of the Act?

(iv) Whether, in view of the fact that the Respondent is making periodical payments to the Petitioner demonstrates the Respondent to be in willful defiance of orders passed by Hon'ble Commission and liable to be proceeded for proceedings u/s. 142 of the Act?

21. *In light of the background since year 2016 and also the facts and circumstances at present in this matter, the Commission has found that the above questions raised by Respondent have no merit consideration at this stage since the Respondent was given adequate opportunity to comply with the Commission's order dated 02.09.2016 in petition No. 33 of 2016 which was of the nature of executive proceeding. The Respondent has been making payments intermittently for principal amount only that too with a substantial delay and without surcharge on delayed payments. Further, as recorded by Hon'ble Tribunal in para 9 and 10 of its Order dated 04.02.2022 in Appeal No. 184 of 2019, requisite payments (75% of outstanding) were not made by Respondent to the petitioner in the letter and spirit of the directions of Hon'ble Tribunal in its Interlocutory Order dated 02.03.2020. As informed by the petitioner in the instant proceedings, the Respondent could make only 62% payment without any payment towards DPS. With regard to other issues raised by Respondent in respect of contractual obligations under Article 9.2 and 9.4 of PPAs, Hon'ble*

Tribunal in para 15 of its judgment dated 04.02.2022 in this matter (under Appeal no. 184 of 2019) has held that:

“It appears that in the PPA there is possibility of the generator to invoke the relevant clause on account of event of default of this kind by denying the supply of electricity to the procurer. But then, given the small level at which it operates, such recourse would undoubtedly be counter-productive for the appellant since there is strong probability of it being stranded.”

22. *In view of all foregoing, the findings of Commission on the prayer made by the petitioner in the subject petition are as under:*

(i) The Respondent is directed to pay all the legitimate dues in terms of PPAs to the petitioner within 45 days of this order without discriminating it on non-waiver of DPS.

(ii) The Respondent is directed to pay a penalty of Rs One Lakh to the Commission within 45 days of this order towards non-compliance of the Commission’s order dated 02.09.2016 in petition No. 33 of 2016.

(iii) The Respondent is directed to open Letter of Credit in favor of Petitioner to secure payment of future bills to be raised for supply of electricity from its wind generating units under subject petition in terms of PPAs executed between the parties.

(iv) No order as to cost.”

10. We find no infirmity in the Impugned Order passed by the State Commission, the Appellant has been given enough time to make the requisite payments, however, its failure to make the payment and also non-compliance

of the Order of the State Commission deserves invocation of section 142 of the Act by the State Commission.

11. The Appellant vaguely challenged the Impugned Order stating that there are no findings on the entire defence placed by it and also on the questions of law raised by the Appellant, also submitted that the Review Petition, after issuing notices on maintainability, was also dismissed by the State Commission.

12. The only plea taken by the Appellant for not complying with the orders of the State Commission is the liquidity crunch frequently faced by the State DISCOMs and the consequential difficulty faced is in knowledge of the Central Government and the State Governments.

13. We strongly decline such submissions, its failure to adhere to law and the inefficiency cannot be accepted, this Tribunal while remanding the matter has observed that ***“We make it clear that given the track record of the parties before us, the Commission will put in position requisite mechanism not only for the past dues but also for the future responsibility for the procurer for the remainder of the duration of the PPA.”***

14. Further, the submissions of the Appellant taking defence under the Electricity (Late Payment Surcharge and Related Matters) Rules, 2022 is irrelevant and only to deviate the issue, the Appellant itself have agreed that it has defaulted, however, pleading that such a default on his part is due to fund constraints.

15. The Appellant, a State Utility, is bound to honour the contractual liabilities, its failure to comply with the terms and conditions *inter-alia* making payments as per the contract cannot be allowed under the law, the State Commission has rightly addressed the issue.

16. We are satisfied that the Impugned Order passed by the State Commission is without any infirmity and is upheld.

ORDER

For the foregoing reasons as stated above, we are of the considered view that the present Appeal No. 646 of 2023 filed by MPPMCL is devoid of merit and is dismissed.

IAs, pending if any, are also dismissed accordingly.

**PRONOUNCED IN THE OPEN COURT ON THIS 15th DAY OF SEPTEMBER,
2023.**

**(Sandesh Kumar Sharma)
Technical Member**

pr/mkj

**(Justice Ramesh Ranganathan)
Chairperson**