

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
NEW DELHI**

(APPELLATE JURISDICTION)

EXECUTION PETITION NO. 7 OF 2023

Dated: 6th November, 2023

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

In the matter of:

SIRWAR RENEWABLE ENERGY PRIVATE LIMITED

Represented by its Director

Having its Registered Office at:-

H.No.2-2-20/L/7,

Flat No.203, Golden Towers-2,

DD Colony, Baghamberpet,

Hyderabad – 500 013

.... PETITIONER(S)

VERSUS

**1. THE MANAGING DIRECTOR
GULBARGA ELECTRICITY SUPPLY
COMPANY LIMITED**

Station main road, Kalaburagi – 585 102

2. KARNATAKA ELECTRICITY REGULATORY COMMISSION

Through its Secretary

9/2, 06th & 07th Floor,

Mahalaxmi Chambers,

M.G. Road, Bangaluru – 560001

**3. THE MANAGING DIRECTOR
KARNATAKA POWER TRANSMISSION
CORPORATION LIMITED**

Transmission Zone,

Sedam Road,

Kalaburgai – 585105

4. THE ADDITIONAL CHIEF SECRETARY TO

**GOVERNMENT OF KARNATAKA,
ENERGY DEPARTMENT,
Vikasa Soudha,
Dr. Ambedkar Veedhi,
Bangaluru – 560001**

... RESPONDENT(S)

Counsel on record for the Petitioner(s) : Ujjal Banerjee
Akash Khurana For App1

Counsel on record for the Respondent(s) : Arunav Patnaik
Bhabna Das For Res1

ORDER

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

EP. No.7 of 2023 is filed seeking execution/enforcement of the order passed by this Tribunal in Appeal No.245 of 2019 dated 12.08.2021. By the order, execution of which is sought, this Tribunal set aside the order impugned therein, and allowed the Appeal holding that the Appellant was entitled to be paid Rs.8.40 per unit, in terms of the Power Purchase Agreement (PPA), from the date of commissioning of the solar power plant. The 1st Respondent was directed to pay the differential tariff from the date of commissioning of the plant, along with Late Payment Surcharge (LPS) in terms of the PPA, within one month. This Tribunal further held that the Appellant was not liable to pay any damages, and so also the liquidated damages.

It is not in dispute that, in compliance with the aforesaid order of this Tribunal, the 1st Respondent, in July, 2023, paid the Petitioner the differential tariff from the date of commissioning of the plant till the order was passed by this Tribunal on 12.08.2021. Besides the differential tariff, the Petitioner was also paid LPS from 21.01.2017 when their plant was commissioned till the end of December, 2017 and, thereafter, on the total differential tariff from

30.09.2021 till July, 2023. The claim in this EP is restricted to non-payment of Late Payment Surcharge (“LPS” for short) for the period from 01.01.2018 till 30.08.2021 ie till the date the Petitioner had raised an invoice pursuant to the order under execution.

It is useful at this stage to note the relevant facts. Pursuant to the PPA, entered into between the Petitioner and the 1st Respondent, the Petitioner’s generating unit was commissioned on 01.01.2017. Though the tariff stipulated in the PPA was Rs.8.40 per unit, the 1st Respondent did not make any payment, resulting in the Petitioner invoking the jurisdiction of the Karnataka Electricity Regulatory Commission (“KERC” for short). An interim order was passed by the KERC on 22.08.2017 directing the 1st Respondent to pay, to the Petitioner, tariff at Rs.6.51 per unit. The said Petition was disposed of by KERC on 04.09.2018 confirming the tariff of Rs.6.51 per unit as directed to be paid by way of the earlier interim order.

Aggrieved thereby, the Petitioner filed Appeal No.245 of 2019 before this Tribunal. While the Petitioner did not have the benefit of any interim order during the pendency of the appellate proceedings, the said Appeal was eventually disposed of, by the order of this Tribunal dated 12.08.2021, the operative (decretal) part of which reads as under:-

“..... In light of our above discussion and reasoning, we are of the opinion that the impugned order cannot be sustained and the Appeal deserves to be allowed. Hence, we pass the following order:

O R D E R

(a) The Appeal is allowed and the impugned order is set aside.

(b) The Appellant is entitled for Rs. 8.40 per unit in terms of PPA from the date of commissioning the solar power plant.

(c) The 1st Respondent - GESCOM to pay the difference of the tariff paid per unit from the date of commissioning of the plant along with late payment surcharge in terms of PPA within one month from today.

(d) The Appellants are not liable to pay any damages and so also liquidated damages.....”

Pursuant to the order of this Tribunal dated 12.08.2021, the Petitioner raised an invoice on 30.08.2021 claiming differential tariff from 21.01.2017 when its unit was commissioned, till 12.08.2021 when the appeal was disposed of by this Tribunal. In addition, the Petitioner also claimed LPS. As noted hereinabove while the differential amount along with LPS, for a part of this period, was paid to the Petitioner in July 2023, the present Execution Petition relates to the remaining period.

Yet another fact which must be noted is that, after raising a consolidated invoice on 30.08.2021 for payment of arrears of the differential tariff along with LPS, the Petitioner continued to raise monthly bills from September 2021 till May 2023 claiming payment only at Rs.6.51 per unit, though, in terms of the order of this Tribunal dated 12.08.2021, they were entitled to be paid Rs.8.40 per unit as tariff. It is also relevant to note that, aggrieved by the order passed by this Tribunal, the 1st Respondent carried the matter in appeal to the Supreme Court by way of Civil Appeal No.6386 of 2021 and, while the appeal is said to be still pending before the Supreme Court, the 1st Respondent's request for grant of stay was rejected by the order of the Supreme Court dated 09.09.2022.

The Petitioner's claim for payment of Late Payment Surcharge is largely based on direction (c) extracted hereinabove, whereby the Respondent was directed to pay the differential tariff (ie the difference between Rs. 8.40 per

unit as per direction (b) and Rs.6.51 per unit as per the order of the Commission) along with Late Payment Surcharge in terms of the PPA (which they claim is 1% per month) from the date of commissioning of the plant till 12.08.2021 when this Tribunal passed the Order. This amount, the Petitioner claims, they were entitled to be paid within one month from 12.08.2021 ie on or before 12.09.2021.

It is not in dispute that the Appellant was paid the differential tariff (ie the difference between Rs. 8.40 per unit as per the order of this Tribunal and Rs. 6.51 per unit in terms of the order passed by the KERC) from the date of commissioning till the date of the order; and they have, thereafter, been paid at Rs.8.40 per unit. The dispute in this EP relates to non-payment of Late Payment Surcharge for the period from 01.01.2018 till the impugned order was passed on 12.08.2021.

Mr. Buddy Ranganadhan, Learned Counsel appearing on behalf of the Petitioner, would submit that, from a plain reading of the decretal part of the order of this Tribunal in Appeal No.245 of 2019 dated 12.08.2021, it is evident that the obligation cast on the 1st Respondent was to make payment to the Petitioner on its own, without awaiting an invoice being raised by the petitioner; reference to the PPA, in the decretal part of the order of this Tribunal, is only to the LPS rate of 1% per month; and the other requirements of the LPS clause in the PPA, including the time for such payment, are inapplicable in the light of the directions, issued in the order of this Tribunal, to the 1st Respondent to make payment within one month.

On the question why the Petitioner continued to raise invoices from September, 2021 till May, 2023 at Rs.6.51 per unit, though the order passed by this Tribunal entitled them to claim Rs.8.40 per unit, Mr. Buddy Ranganadhan, Learned Counsel for the Petitioner, would submit that, as has been stated by them in the EP, and in the rejoinder filed on 29.09.2023,

they had perforce to raise such invoices since they were requested to do so by the 1st Respondent; the invoices raised by the Petitioner earlier at Rs.6.51 per unit, during the period January, 2018 till 04.09.2018, was in compliance with the interim order passed by the KERC, and thereafter till 12.08.2021 - in compliance with the final order passed by the KERC on 04.09.2018; and compliance of the order of a Court/Tribunal cannot be understood as the Petitioner being disentitled from claiming payment of the differential amount along with LPS, from the date of commissioning ie 21.01.2017 till the entire amount was paid to them in July, 2023, on application of the doctrine of restitution.

On the other hand, Ms. Bhabna Das, Learned Counsel for the 1st Respondent, would submit that it is not open to this Tribunal, in execution proceedings, to go behind the decree; the decretal part of the order of this Tribunal, in Appeal No.245 of 2019 dated 12.08.2021, is clear and unambiguous; in terms thereof, the 1st Respondent was obligated to pay the differential tariff from the date of commissioning of the plant, which they paid till the date of order of this Tribunal ie 12.08.2021; the obligation cast by the said order, on the 1st Respondent to pay LPS, is in terms of clause 6.4 of the PPA; LPS is payable at 1% per month, only if payment is delayed beyond one month after the invoice is raised; since the obligation to make payment is within one month of such an invoice being raised, the 1st Respondent's obligation to pay LPS to the Petitioner is only after one month of such an invoice being raised; as the Petitioner raised an invoice for payment of the entire arrears of differential tariff only on 30.08.2021, their entitlement for LPS commences from 30.09.2021; and for the arrears of differential tariff, as reflected in the invoice dated 30.08.2021, LPS was paid from 30.09.2021 till July, 2023, when the entire invoice amount was paid; the order, execution of which is sought, does not require the 1st Respondent to pay LPS from the date on which the Petitioner's generating unit was commissioned on

21.01.2017; for the monthly invoices raised by the Petitioner from September, 2021 till May, 2023, LPS was paid for belated payment of such invoices in terms of the PPA; the 1st Respondent cannot be faulted for the Petitioner having raised invoices at the lower tariff of Rs.6.51 per unit, though the order of this Tribunal entitled them to claim Rs.8.40 per unit; the plea of their being requested by the 1st Respondent, to raise invoices only at the lower tariff of Rs.6.51 per unit, is without any basis and is evidently an afterthought to justify their error in raising invoices for a lower sum; and the payment made by the 1st Respondent, in compliance with the order of this Tribunal, is without prejudice to their contentions in the Civil Appeal pending before the Supreme Court.

Section 120 of the Electricity Act, 2003 (“the Act” for short) prescribes the procedure and powers of the Appellate Tribunal. Sub-section (3) thereof stipulates that an order, made by the Appellate Tribunal under the Act, shall be executable by the Appellate Tribunal as a decree of the Civil Court and, for this purpose, the Appellate Tribunal shall have all the powers of a Civil Court. The power of execution, vested in this Tribunal, is not an implied power. As it has been expressly conferred, the said power is circumscribed by, and is confined to, what has been stipulated in Section 120 (3) of the Act. Though the word “Order” is not defined in the Act, it has been defined in the 2007 Rules made by the Central Government. Rule 91, which relates to Orders, stipulates that the final decision of the Tribunal, on an application/petition before it, shall be described as a Judgment. Rule 92 relates to the operative portion of the order, and provides that all orders or directions of the Bench shall be stated in clear and precise terms in the last paragraph of the order.

In view of Section 120(3) of the Act, an order of this Tribunal,

for the limited purpose of its execution, must be treated as a decree of the Civil Court. Under the Civil Procedure Code, the Court determines the liability of a party and the corresponding right of the other party, and incorporates them in the decree. In another proceeding it executes the decree, i.e. at the instance of one party, it specifically enforces the liability against the other. There can be no execution or specific enforcement of a liability without a previous determination of the liability by a court which is incorporated in a formal document called a decree. **(Maharaj Kumar Mahmud Hasan Khan vs Moti Lal Banker : AIR 1961 All 1(FB): 1960 SCCONLINE All 89).**

Section 47 CPC is confined to determining all questions arising between the parties to the suit and relating to the execution, discharge or satisfaction of the decree. Any question that does not relate to the execution, discharge or satisfaction of the decree is thus not within the jurisdiction of the executing court. **(Maharaj Kumar Mahmud Hasan Khan vs Moti Lal Banker : AIR 1961 All 1(FB): 1960 SCC ONLINE All 89).**

An executing Court cannot go behind the decree. **(Sunder Dass vs Ram Prakash : AIR 1977 SC 1201 :1977 2 SCC 662; Jai Narain Ram Lundia vs Kedar Nath Khetan And Others : AIR 1956 SC 359:1956 SCR 62).** The decree must either be executed as it stands in one of the ways allowed by law or not at all, unless the Court which passed it alters or modifies it. **(Jai Narain Ram Lundia vs Kedar Nath Khetan And Others: AIR 1956 SC 359:1956 SCR 62).** A Court executing a decree can neither add to such a decree nor vary its terms. **(Muhammad Sulaiman v. Jhukki Lal [I.L.R. XI All. 228; Maharaj Kumar Mahmud Hasan Khan vs Moti Lal Banker : AIR 1961 All 1(FB): 1960 SCCONLINE All 89).** The duty of an executing

court is to execute the decree as it finds it. It has no jurisdiction to alter or vary it, and to execute it as it would stand after the alteration or variance. (**Gobardhan's case** [A.I.R. 1932 All. 273 : 1932 A.L.J. 365 (F.B.): I.L.R. 54 All. 573; **Maharaj Kumar Mahmud Hasan Khan vs Moti Lal Banker** : AIR 1961 All 1(FB): 1960 SCCONLINE All 89). It is also not open to the Executing Court to add to a decree of which execution is sought, or to travel behind the decree to add or modify the directions contained therein. (**J&K Bank Ltd. v. Jagdish C. Gupta**, (2004) 10 SCC 568; **Gurdev Singh v. Narain Singh**, (2007) 14 SCC 173). The entire purpose of execution proceedings is to enforce the directions passed in the decree (**Firm Rajasthan Udyog & Ors. v. Hindustan Engineering and Industries Ltd.** (2020) 6 SCC 660).

To sum up, the principles which govern execution of a decree are that there can be no execution, or specific enforcement of a liability, without a previous determination of the liability by a court which is incorporated in a formal document called a decree. Any question, that does not relate to the execution of the decree, is not within the jurisdiction of the executing court. The executing court can neither go behind the decree nor can it question its legality or correctness. The decree must either be executed as it stands in one of the ways allowed by law or not at all, unless the Court which passed it alters or modifies it. A Court executing a decree can neither add to such a decree nor vary its terms. It is not within the jurisdiction of the executing court to enforce any liability other than the judgment-debtor's decretal liability. The Executing Court cannot travel beyond the original *lis* between the parties, to any subsequent cause of action. It is also not open to the Executing Court to add to a decree or to modify the directions contained therein or to grant a direction that was neither prayed for nor formed part of the original *lis* between the

parties. The entire purpose of execution proceedings is to enforce the directions passed in the decree, and nothing more. As the executing court, while executing the decree, is only concerned with the execution part of it and nothing else, the court should take the judgment at its face value. (**Meenakshi Saxena v. ECGC Ltd., (2018) 7 SCC 479**).

Bearing these principles in mind, let us now examine whether the relief which the petitioner seeks in the present proceedings falls within the ambit of an execution proceeding under Section 120(3) of the Act.

As noted hereinabove, the liability of the Respondent-GESCOM was to pay Late Payment Surcharge on the differential tariff in terms of the PPA within one month from the date of the order. It is, therefore, necessary to note what the PPA stipulates regarding payment of Late Payment Surcharge. Clauses 6.3 and 6.4 of the PPA read as under:-

“6.3 Payment of monthly bills:

6.3.1 GESCOM shall pay the amount payable under the monthly bill/ supplementary bill by the (fifth) 5th day of the immediately succeeding Month (the Due Date) in which the monthly bill/ supplementary bill is issued by the SPD to the GESCOM, to such account of the SPD, as shall have been previously notified by the SPD in accordance with Clause 6.3.2 (c) below. In case the monthly bill or any other bill, including a Supplementary Bill is issued after the 15th (fifteenth) day of a month, the Due Date for payment would be 30th day from the date of presentation of the bill.

6.3.2 All payments required to be made by GESCOM under this Agreement shall be subject to any deduction or set off for:

a. deductions required by Law; and

b. amounts claimed by GESCOM, if any, from the SPD, through an invoice and not paid within fifteen (15) days of receipt of the said invoice.

c. The SPD shall open a bank account at Kalaburagi (the “SPD’s Designated Account”) for all Tariff Payments (including supplementary bills) to be made by GESCOM to the SPD, and notify GESCOM of the details of such account at least 90 (ninety) days before the dispatch of the first monthly bill.

Provided further the SPD shall be obligated to open a new “Designated Account” in the name of the Special Purpose Vehicle if such conditions occur as per Clause 12.11(i).

6.4 Late Payment surcharge:

In the event of payment of the monthly bill being made by GESCOM after the due date, a late payment surcharge shall be payable to the SPD at the rate of 1.0% per month on the bill amount (being “Late Payment Surcharge”), computed on a pro rata basis on the number of days of the delay in payment. The Late Payment Surcharge shall be claimed by the SPD through the Supplementary Bill.”

In terms of Clause 6.3 of the PPA, the Respondent-GESCOM’s liability to pay the amount, under the monthly bill/supplementary bill, is by the 5th of the immediately succeeding month which is specified, in Clause 6.3.1 of the PPA, to be the due date. However, the very same clause further stipulates that, if the monthly bill or any other bill including the supplementary bill is issued after the 15th of a month, the due date for payment would be the 30th day from the date of presentation of the bill. Clause 6.4 of the PPA, which relates to Late Payment Surcharge, is attracted only when GESCOM makes payment of the monthly bill after the due date. For such belated payment, a Late Payment Surcharge is payable to the Petitioner at 1% per month on the bill amount computed on

a pro-rata basis on the number of days of delay in payment. A claim for Late Payment Surcharge is also required to be raised by the Petitioner through a supplementary bill. Since the Petitioner had raised the bill, (for payment of the entire differential tariff ie from the date of commissioning till the judgment of this Tribunal dated 12.08.2021), on 30.08.2021, the liability of the Respondent-GESCOM, to make payment of the said invoice, in terms of Clause 6.3.1 of the PPA, arose 30 days thereafter ie on 30.09.2021. Since Clause 6.4 of the PPA requires Late Payment Surcharge to be made only for payment of the bills beyond the due date, the obligation of GESCOM, to pay Late Payment Surcharge, only arose after 30.09.2021, and not prior thereto.

The submission, urged on behalf of the Petitioner, that the order of this Tribunal dated 12.08.2021 did not require them even to raise a bill does not merit acceptance, since GESCOM was required to make payment of Late Payment Surcharge only in terms of the PPA which obligation, as noted hereinabove, arose only 30 days after a bill was presented by the Petitioner for payment of dues. While it is true that the order of this Tribunal dated 12.08.2021 required payment to be made within one month from the date of the order ie by 12.09.2021, such a requirement must be read in conjunction with the earlier part of the order which required Late Payment Surcharge to be made in terms of the PPA. Consequently, if the bill had been raised before 15.08.2021, the due date for payment, in terms of Clause 6.3.1 of the PPA, would have arisen by 05.09.2021. Payment by the due date of 05.09.2021, would have ensured compliance of the order of this Tribunal ie to make payment within 30 days ie before 12.09.2021. We find nothing, in the order of this Tribunal dated 12.08.2021, which supports the Petitioner's claim to be entitled for Late Payment Surcharge even during the pendency of proceedings both before the Commission and this Tribunal, or from the date of commissioning till

the order of this Tribunal dated 12.08.2021. Since the obligation to make payment of LPS was fastened, under direction (b) and (c) extracted hereinabove, only in terms of the PPA, the Petitioner's claim that the said directions, in the Order of this Tribunal dated 12.08.2021, refers only to the rate of interest of 1% per month as stipulated in Clause 6.3.1 of the PPA, does not merit acceptance.

The submission that, even after 30.09.2021, the monthly bills raised by the Petitioner at Rs. 6.51 per unit was at the request of GESCOM is itself belied by such a contention having been raised for the first time in the EP filed before this Tribunal on 13.04.2023; and the Petitioner having, soon thereafter, started raising monthly bills in terms of the order of this Tribunal dated 12.08.2021 at Rs. 8.40 per unit. Our attention has not been drawn to any material on record to show why the Petitioner had a change of heart, and started raising monthly bills at Rs. 8.40 per unit from June 2023 onwards, soon after their having filed the Execution Petition before this Tribunal, though they could have raised monthly bills, claiming tariff at Rs. 8.40 per unit, from the month following 30.08.2021 when they raised the consolidated bill seeking payment of arrears of the differential tariff from the date of commissioning of the plant till 12.08.2021. In any event the Petitioner has since been paid the differential tariff even for this period, and all that they have not received is Late Payment Surcharge for the differential tariff in the monthly bills raised by them after 30.08.2021. Since, in terms of Clause 6.3.1 read with Clause 6.4 of the PPA, the liability to pay Late Payment Surcharge arises only for belated payment of the invoices raised by them, the Petitioner cannot take advantage of its own error in raising monthly bills at the lower tariff of Rs.6.51 per unit even after 30.08.2021, and claim Late Payment Surcharge for the amounts which they have not even claimed in their monthly bills.

Since the jurisdiction, conferred on this Tribunal under Section 120(3) of the Act, is confined to the decree, and it is impermissible for the executing court to travel beyond it, the Petitioner's claim for payment of Late Payment Surcharge from the date of commissioning of their Plant till 12.08.2021, as also for the subsequent monthly bills raised at a lower tariff, necessitates rejection.

Viewed from any angle we are satisfied that the Petitioner's claim, in the present execution proceedings, does not merit acceptance. The Execution Petition fails and is, accordingly, dismissed.

Pronounced in the open court on this the 6th day of November, 2023.

(Sandesh Kumar Sharma)
Technical Member

(Justice Ramesh Ranganathan)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

tp/mk