

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

**IA No.184 OF 2024 IN
APPEAL NO. 49 OF 2024**

Dated: 03rd May, 2024

**Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Smt. Seema Gupta, Technical Member (Electricity)**

In the matter of:

M.P. POWER MANAGEMENT CO LTD.

CGM – Regulatory,

Block No.11, Second Floor,
Shakti Bhawan, Vidyut Nagar,
Rampur, Jabalpur,
Madhya Pradesh-482008

... Appellant(s)

VERSUS

- 1. CENTRAL ELECTRICITY REGULATORY COMMISSION,**
Through Secretary,
3rd & 4th Floor, Chanderlok Building,
36, Janpath, New Delhi – 110001
...Respondent No.1
- 2. NHDC Limited**
Through its General Manager (Commercial),
NHDC Parisar, Shyamla Hills,
Bhopal, Madhya Pradesh-462013
...Respondent No.2
- 3. NARMADA VALLEY DEVELOPMENT DEPARTMENT,**
Through its Additional Chief Secretary,
Government of Madhya Pradesh,
Mantralaya, Bhopal,
Madhya Pradesh – 462004
...Respondent No.3
- 4. THE ENERGY DEPARTMENT**
Government of Madhya Pradesh,
*Through its Chief Engineer (Electrical Safety)
and Chief Electrical Inspector*
A-Wing, III-Floor Satpura Bhawan,
Bhopal - 462004
...Respondent No.4

Counsel on record for the Appellant(s) : Ravi Sharma for App. 1

Counsel on record for the Respondent(s) : Suparna Srivastava for Res. 2

ORDER

PER HON'BLE SMT. SEEMA GUPTA, TECHNICAL MEMBER (ELECTRICITY)

1. The Appellant, Madhya Pradesh Power Management Company Ltd (“**MPPMCL**”) has filed the instant Appeal No 49 of 2024 challenging the Order dated 14.12.2023 (“**Impugned Order**”) passed by the Central Electricity Regulatory Commission (“**CERC**”) in Petition No. 93/MP/2022 filed by Respondent No. 2, the National Hydro Development Corporation Ltd (“**NHDCL**”) along with IA No. 184 of 2024 seeking interim relief. The Appellant is aggrieved by specific determinations made in the impugned order especially with a direction to the Appellant to make reimbursement of about Rs 97.96 Crore which was levied upon Respondent No. 2 as interest due to delayed payment of ED & EDC, in 10 monthly instalments to Respondent No. 2 without revising the generation tariff and capitalising the said interest.

2. Respondent No. 2, the NHDCL (Formerly known as Narmada Hydroelectric Development Corporation Ltd) is a joint venture company of NHPC Limited and Govt of Madhya Pradesh with equity participation of 51 % and 49 % respectively and is operating two hydro projects namely Indira Sagar Project (1000 MW) and Omkareshwar Project (520 MW) on River Narmada in the State of Madhya Pradesh. The entire power from these two projects has been allocated to State of Madhya Pradesh by

Ministry of Power and is being undertaken in terms of Tripartite Power Purchase Agreement (PPA) dated 27.04.2007 executed between the Respondent No 2 (NHDCL), Appellant (MPPMCL) and Govt of Madhya Pradesh.

3. After commissioning of Indira Sagar project on 25.08.2005, the Energy Department of Govt of Madhya Pradesh (Respondent No 4), a revenue authority empowered to collect the Electricity Duty and cess on supply of energy and auxiliary consumption, vide letter dated 28.12.2005, as well as subsequent letters dated 21.11.2006 and 02.12.2006, informed Respondent No. 2 i.e. NHDCL that it was liable to pay Electricity Duty (ED) under Madhya Pradesh Electricity Duty Act 1949 ("1949 Act") and Energy Development Cess (EDC) under Madhya Pradesh Upkar Adhinyam 1981 ("1981 Adhinyam") on supply of Energy and Auxiliary consumption.

4. Respondent No.2 i.e. NHDCL has disputed this payment liability raised by Respondent No.4, and vide its letter dated 09.01.2007 informed them that Respondent No. 2 is a joint venture undertaking of NHPCL and Govt. of MP; and is a govt company, they were not liable to pay Electricity Duty and Energy Development Cess under the provisions of the 1949 Act and 1981 Adhinyam. However, Respondent No. 4 did not agree with this explanation and vide its letter dated 24.05.2007 and several other subsequent letters demanded payment of Electricity Duty and Energy Development Cess from Respondent No. 2. It is the case of the Appellant that Respondent No. 2 never tried to deposit the said ED and EDC even under protest. Respondent No. 2 also sought intervention of Govt of Madhya Pradesh but of no avail.

5. Govt. of Madhya Pradesh notified Madhya Pradesh Vidyut Shulk Adhiniyam 2012 and repealed the 1981 Adhiniyam, however in both these Adhinyams (1981 and 2012) there was threshold of 51 % shareholding of State Govt of Madhya Pradesh to get exemption from Electricity Duty and Energy Development Cess. Respondent No 4, following up with their earlier letter, again vide letter dated 03.08.2013 informed Respondent No 2 about their liability for payment of ED and EDC on the energy being generated and auxiliary consumption within the provisions of Adhiniyam. From time to time, Respondent No 2 kept disputing the Levy of ED and EDC and vide its letter dated 02.01.2014 requested Principal Secretary (Energy) in the Govt. of Madhya Pradesh to notify Respondent No. 2-NHDCL as an exempted generating utility under provisions of the 2011 Sanshodhan Adhiniyam and 2012 Adhiniyam. However, such a request was not acceded to by the Principal Secretary (Energy) Govt of Madhya Pradesh, who in turn vide its letter dated 23.01.2014 informed that as per existing provisions, NHDCL generators are required to pay these charges. Finally, on 15.03.2014, Respondent No 2 deposited Rs 241.49 Crore towards ED and EDC (up to a period ending 28.02.2014), which has already been reimbursed by the Appellant under the tariff bills raised on it by Respondent No.2.

6. Due to the delay in depositing ED and EDC by Respondent No.2, Respondent No 4 issued a demand notice for an amount of Rs 64,08,28,348/- towards interest on ED and EDC of Rs 241.49 Crore remitted on 15.03.2014. Respondent No 2 disputed this amount as well, but Respondent No 4 refused to withdraw/waive the interest levied on Respondent No.2. Subsequently, various show cause notices were

issued by Respondent No 4 to Respondent No.2 demanding payment of interest. When the matter was again taken up with the Energy Department, Govt. of Madhya Pradesh and Ministry of Power, Govt. of India, it was informed by Secretary (Power) Government of India vide letter dated 28.01.2020 that as stated by Govt. of Madhya Pradesh, penal interest, being statutory in nature, were liable to be paid by Respondent No 2. Respondent No 2, again disputed the payment of said interest. Respondent No 4, vide its letter dated 31.08.2020 re-calculated the interest and enhanced the same to Rs 120.10 Crore. Aggrieved thereby, Respondent No 2, filed a Writ Petition No 2037/2021 in the High Court of Madhya Pradesh, Jabalpur seeking relief from payment of ED & EDC by its generation project. However, on the request of the State, that the State will call the parties involved for out of the court settlement with regard to waiver of interest, the matter was adjourned. Accordingly, as an outcome of reconciliation meeting held on 07.09.2021 by energy Department, Govt. of Madhya Pradesh, interest amount was reconciled as Rs 97,95,56,491/- which was paid by Respondent No 2 on 25.11.2021.

7. Thereafter, Respondent No 2 approached CERC vide petition No 93/MP/2022 seeking reimbursement of interest amount of Rs 97,95,56,491/- as pass through in tariff of Respondent No.2 herein and for a direction to the Appellant to pay the said amount under the bills to be raised in terms of clause 7.2 of PPA. CERC vide its order dated 14.12.2023 (“**impugned order**”) though did not allow the said interest amount as a pass through in tariff, held that levy of interest of Rs 97.96 Crore paid by Respondent No 2 herein is the statutory Interest in terms of Rule 5 of the Madhya Pradesh Electricity Duty Rules 1949 and accordingly, the Appellant was directed to reimburse the said amount of

Rs 97.96 Crore to Respondent No 2 in 10 Monthly instalments. Relevant portion of the CERC order dated 14.12.2023 is reproduced below:

“In view of this, we find no reason to allow the interest amount of Rs 97.96 crore, paid by the Petitioner, as a pass through in tariff. Article 7.2(iv) of the PPA provides that the Respondent MPPMCL is liable to pay to the Petitioner, all payments made or payable by it on account of taxes/cess/levy/fee or other imposition etc. levied or to be levied in future as a new tax by any other Govt. or other authority in respect of generation, transmission and supply or energy including activities incidental and ancillary thereto. Similarly, Regulation 56 of the 2019 Tariff Regulations permit the Petitioner to recover the statutory charges imposed by Central or State Government. We have, in this order, held that the levy of interest of Rs 97.96. crore by the GoMP and paid by the Petitioner, is the statutory interest in terms of Rule 5 of the Madhya Pradesh Electricity Duty Rules, 1949, Considering the aspects in totality, we direct the Respondent MPPMCL to reimburse the said amount of Rs 97.96 crore to the Petitioner, in ten (10) monthly installments, without interest. The first installment shall be paid within 15 days from the date of issue of this order. We decide accordingly.”

8. Aggrieved by the said order dated 14.12.2023, the Appellant filed the instant appeal alongside IA No. 184 of 2024 seeking interim stay of the impugned order.

9. The main contention urged by learned counsel for the Appellant is that while CERC has not allowed payment of interest of Rs 97,95,56,491/-

levied upon the Respondent No 2 due to delayed deposit of electricity Duty and Energy Development Cess to be pass through in the tariff of generating company, but directed the Appellant to reimburse the same to Respondent No 2. In fact, it was Respondent No 2, who failed to pay ED and EDC on time and invited penal interest, while Respondent No 2 always had the option to timely deposit ED & EDC under protest, which could have avoided the imposition of penal interest. Learned Counsel for the Appellant further submitted that as per Clause 7.2 (iv) of the PPA, Respondent No.2 is liable to pay tax/cess/levy/fees or other imposition etc levied or to be levied, and penal interest paid by Respondent No 2, due to their actions is not covered under this clause. It was also pointed out that on one hand the Commission has not allowed the interest paid by Respondent No.2 as pass through in tariff of Generation Project so that it can be considered as input cost of generation for them, and on the other hand the Appellant has been directed to reimburse the same to Respondent No 2, for no fault of them.

10. Per contra, learned counsel for Respondent No 2 submitted that as per Madhya Pradesh Electricity Duty Act 1949, no duty is payable in respect of electrical energy sold or supplied to State Government for consumption by that Govt. therefore they have represented at various levels for exemption from payment of ED and EDC. Further, as per 1949 Act, amount of Duty due and which was remaining unpaid shall carry interest at such rate and in such circumstances as may be prescribed, and therefore, the interest levied is statutory in nature and has to be paid by the Appellant as per clause 7.2 of PPA. The Appellant, can however, approach the State commission seeking reimbursement of interest so paid in line with impugned order as pass through in their tariff. In support of

her contention, learned Counsel for Respondent No 2 has relied on the judgments of the Hon'ble Supreme Court in "**Alok Shankar Pandey Vs. Union of India & Ors,**" ((2007) 3 SCC 545) and "**Central Bank Of India Vs. Ravindra and Others,**" ((2002) 1 SCC 367).

11. After going through the contentions raised by the Appellant and Respondent No 2, it is noticed that Respondent No. 2 has made several efforts at various levels to obviate the payment of Electricity Duty and Energy Development Cess, demand of which was raised by Respondent No 4, however it yielded no fruitful outcome in favour of Respondent No 2. Ultimately, the ED and EDC amount of Rs 241.49 (upto 28.02.2014) has been paid by Respondent No 2 to respondent No 4 on 15.03.2014, which has already been reimbursed by the Appellant as part of energy bills raised from time to time. The dispute is with regard to payment of reconciled interest amount of Rs 97,95,56,491 (up to period ending 28.02.2014) accrued due to delayed payment of ED and EDC on 15.03.2014 by Respondent No 2, which has been directed to be paid by the Appellant as per impugned order in 10 monthly instalments, though not allowed to as pass through in Generation Tariff.

12. At this stage i.e. while considering the IA for interim relief, we are not going into the details as to whether such levy of interest is a statutory levy payable by the Appellant as per PPA or penal in nature and its mode of reimbursement; all these issues along with legal prepositions cited by the Appellant and Respondent No 2 shall be dealt with at the time of hearing of main appeal. However, the fact remains that during this entire process of disputing of levy of ED & EDC by Respondent No 2 and payment of the same on 15.03.2014, has resulted in levy of interest in

which Appellant has no role to play. In fact, as per the impugned order, CERC has not allowed it as pass through in generation tariff, otherwise it could have been added to input cost of procurement of power by the Appellant and could have been reimbursed to the Appellant from its customers. However, reimbursement of said interest by way of 10 monthly instalments by the Appellant to Respondent No 2 in line with the impugned order, has affixed its liability on to the Appellant, while its reimbursement from the customers of Appellant is not certain in view of its non-inclusion in generation cost as pass through. Therefore, we hold that there is a *prima facie* case in favor of the Appellant and the balance of convenience lies in favour of Appellant for grant of interim relief. However, in view of the fact that Respondent No 2 has made several efforts in taking up the matter at various forums to get exemption of payment of ED and EDC to Respondent No 4 as well as for reduction in interest amount originally demanded by Respondent No 4, which has since been paid by Respondent No 2 on 25.11.2021 and has not been considered by CERC as pass through in its generation tariff, it is considered to be just, equitable and reasonable to grant stay on the 50% of the instalments indicated in the impugned order.

13. For the reasons delineated above, the application for interim stay is hereby allowed to the extent indicated. As an interim measure, the Appellant is directed to pay only five instalments (i.e. 50% of ten instalments as indicated in the impugned order). Needless to state that the above directions are subject to the result of main appeal. The IA is accordingly, disposed of.

14. After pleadings are complete, Registry to verify the same and then include the appeal in the 'List of Finals' to be taken up from there, in its turn.

Pronounced in open court on this 03rd day of May, 2024

(Seema Gupta)
Technical Member (Electricity)

(Justice Ramesh Ranganathan)
Chairperson

ts/ag/dk