

**APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI  
(APPELLATE JURISDICTION)**

**APPEAL NO. 293 of 2017 &  
IA NO. 758 OF 2017**

**Dated : 29<sup>th</sup> July, 2019**

**PRESENT: HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON  
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER**

**IN THE MATTER OF :**

1. **M/s. Indsil Hydro Power and Manganese Limited**  
Indsil House, T. V. Samy Road (West)  
R.S. Puram, Coimbatore  
having its Factory at Pallatheri  
Palakkad – 678 007. .... **APPELLANT**

**Versus**

1. **Kerala State Electricity Regulatory Commission**  
C. V. Raman Pillai Road  
Vellayambalam  
Thiruvananthapuram – 695 010  
Kerala
2. **Kerala State Electricity Board Limited**  
Vydyuthi Bhavanam  
Pattom Palace P.O.  
Thiruvananthapuram – 695 004  
Kerala
3. **The Chief Engineer (Commercial and Tariff)**  
Kerala State Electricity Board Limited  
8<sup>th</sup> Floor, Vydyuthi Bhavanam, Pattom  
Thiruvananthapuram – 695 004  
Kerala .... **RESPONDENTS**

- Counsel for the Appellant(s)** : Mr. Joseph Kodianthara, Sr. Adv.  
Mr. Atul Shankar  
Mr. M. P. Vinod
- Counsel for the Respondent(s)** : Mr. James P. Thomas  
Ms. Jasmin Kurian  
Dr. P. George Giri **for R-1**
- Mr. Mukund P. Unny  
Mr. P. V. Dinesh  
Ms. Arushi Singh **for R-2**

## **J U D G M E N T**

### **PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON**

1. The present Appeal pertains to issue of non-payment of bill/invoice dated 29.07.2016 raised by the Appellant generator (for banked energy).
2. In brief the facts that led to filing of the Appeal are as under:
  - (i) The Appellant is a hydro power generator and an Extra High Tension Consumer, manufacturing Silico Manganese, Ferro Silicon etc. at Pallatheri in Palakkad District, Kerala. It is not in dispute that in terms of Government policy dated 07.12.1990 and 12.03.1992, the Appellant was allotted 21 MW Hydro Electric Project at Kuthungal in

Idukki District in terms of small/mini/micro hydel schemes by private agencies. This 21 MW hydro electric project was meant for its captive use. First unit was commissioned on 15.05.2000. Regarding construction, commissioning, operation and maintenance including adjustment of captive consumption, banking etc, an Agreement came to be executed between the Appellant and Kerala State Electricity Board Limited (**hereinafter referred to as “KSEB Ltd”**) on 30.12.1994. The relevant clause relied upon by the Appellant is Clause 11 of the Agreement which shall be referred to later.

(ii) It is not in dispute that in terms of order of Central Electricity Regulatory Commission (**hereinafter referred to as “CERC”**) (terms and conditions for Recognition and Issuance of Renewable Energy) Regulations of 2010, Kerala State Electricity Regulatory Commission (**hereinafter referred to as “KSERC” or “Commission”**) vide order dated 07.08.2013 in OP No. 30/2012 had endorsed accreditation granted by the State agency, i.e. Agency for Non-conventional Energy & Rural Technology (**ANERT**). The relevant paragraphs are Para 2(c) and 3 of the said order dated 07.08.2013 which shall be referred to later.

**(iii)** It is not in dispute that the Appellant did execute an undertaking on 27.08.2013 wherein the invoice for the banked energy has to be raised strictly at the average pooled cost rate. Meanwhile, CERC by notification dated 23.03.2016 amended the Regulations of 2010 and in the light of the said amendment, the Kuthungal power plant of the Appellant became ineligible for participating in the REC scheme from 01.04.2016. Consequence of this, according to Appellant, is banked energy have to be billed as per the original Clause 11 of the Agreement dated 30.12.1994 executed between the Appellant and KSEB Ltd.

**(iv)** When the Appellant raised bill dated 29.07.2016 for Rs.53,06,680/- for the excess banked energy for 10,82,996 units as on 30.06.2016 at the rate of Rs.4.90 per unit at the Extra High Tension tariff said to be applicable to the Appellant in terms of Clause 11 of the above referred Agreement, KSEB Ltd did not respond in spite of several representations and representative of Appellant personally meeting the authorities of KSEB Ltd. KSEB Ltd authorities orally informed the Appellant that despite non-applicability of REC scheme to the Appellant, the Appellant is entitled to claim the price of banked energy at the average pooled cost of purchase rate subject to further conditions as aforementioned in the Order of the Commission dated 07.08.2013 in the above-

mentioned OP. Aggrieved by the same, the Appellant approached Respondent - Commission with a petition under Section 86(f) of the Electricity Act 2003 seeking the following prayers:

- “i. Direct the respondents KSEB to forthwith settle and pay the Petitioner’s invoice dated 29.07.2016 in full and accordingly to settle any future invoice for banked energy also strictly in accordance with original clause 11 of the agreement dated 30.12.1994 and uninfluenced and undisturbed by the subsequent directions and undertakings in sub para(3) of the para 53 of the order dated 07.08.2013.*
- ii. Pass such other orders as are deemed just and necessary in the facts and circumstances of the case.”*

**(v)** According to the Appellant, in terms of Clause 11 of the Agreement dated 30.12.1994, the Appellant was entitled for the benefit in respect of energy generated in excess of its requirement. According to the Appellant, the opinion expressed by the Respondent – Commission and further direction to approach the

Commission with proposal to modify the Agreement dated 30.12.1994 is arbitrary and is exceeding its jurisdiction.

**(vi)** Before the Respondent – Commission the Appellant contended that for Kuthungal hydro electric project, the entire capital investment of Rs.55 crores was invested by the Appellant and there was no contribution of any nature from KSEB Ltd. According to the Appellant, by the time the first unit was installed and generated power on 15.05.2000, the capital investment for the project was in excess of Rs.55 crores. The power generated by the Appellant company and fed into KSEB Ltd grid immediately on generation can be utilized by it in the month of generation and if not utilized in that month can be carried forward for adjustment in the subsequent months within the accounting year in terms of Agreement dated 30.12.1994.

**(vii)** The Appellant further contends that the accounting year is July to June in terms of the Agreement. Therefore, according to the Appellant, sale of power banked arises only at the end of accounting year since the Appellant company can carry forward energy generated till the accounting year end. The excess energy generated above requirement could be carried forward for future adjustment within the accounting year, but not beyond. Therefore,

sale can be only at the end of accounting year and the rate has to be the one prevailing at the end of accounting year. Since all rights of sale vested with the Appellant company and the restriction on the company not to sell the excess power to elsewhere or to anyone other than KSEB Ltd in terms of Agreement and in the light of Clause 11 of Agreement, it is very clear that KSEB Ltd has obligation to buy banked power at the end of the accounting year. According to the Appellant, the sale is deemed as EHT terminal of the KSEB Ltd for the quantity equivalent to the excess banked energy with no wheeling charges applicable.

**(viii)** According to the Appellant, the terms and conditions of the Agreement were concluded after discussions between the parties and the KSEB Ltd with eyes wide open signed the Agreement. Therefore, KSEB Ltd is bound by terms and conditions of the Agreement even if some of the clauses of the Agreement were to be burdensome at a future date.

**(ix)** By way of affidavit dated 05.01.2017, the Appellant brought on record additional submissions which are as under:

*“(i) The petitioner had received a letter dated 22.12.2016 from the respondent KSEB Ltd. The copy of the letter is attached as Annexure to the*

*additional affidavit. In the letter, KSEB raised untenable claim to deny the petitioners entitlement to settle its invoice in question. The petitioner therefore to place on record the letter of the KSEB Ltd dated 22.12.2016 and to challenge the same as part of the main petition before the Commission.*

- (ii) The petitioner submitted that, the letter of the KSEB dated 22.12.2016 is illegal and unsustainable. Right of the petitioner to bank energy is at the petitioners desire as per the clause 10 of the agreement dated 30.12.1994. The clause 11 of the agreement dated 30.12.1994, does not in any manner specify or restrict as to what are the contingencies in which the energy in excess of the requirement of the petitioner is generated and banked. KSEB Ltd is liable to pay charge for the energy banked with KSEB Ltd. The fact that the petitioner has purchased energy under the open access or any other issue that has led to the reduction of the petitioners requirement and any resultant excess generation banked is irrelevant in so far as the liability of KSEB Ltd to*



*pay for the banked energy is concerned. The stand taken by KSEB Ltd. in the letter is patently illegal, arbitrary and unsustainable.*

- (iii) Strictly without prejudice to the above, if such view of KSEB is permitted which is absolutely alien to, and in fact, contrary to the agreement dated 30.12.1994, in such a situation, the only alternative is to carry forward the banked energy and the allow the petitioner to consume the same as and when the requirement arises in any subsequent year. Suffice to state, KSEB which has admittedly received the banked energy must either pay for the same per the clause-11 of the agreement dated 30.12.1994 or make such energy available as and when the same is required by the Petitioner at any subsequent point of time. The petitioner therefore requested to treat the affidavit dated 05.01.2017 as part of the main petition. It is also prayed that, the relief sought in the main petition be allowed and the letter dated 22.12.2016 of the KSEB Ltd may set aside.”*

(x) The case of the Respondent licensee (erstwhile KSEB Ltd) before the Commission (KSERC) was as under:

(A) The Respondents admit the execution of Agreement dated 30.12.1994. They also reiterate the policy guidelines in relation to captive hydro plant set up by private agencies in terms of Government policy dated 07.12.1990 and 12.03.1992. They also contend that the Agreement dated 30.12.1994 is valid according to KSEB Ltd. They contend that Clauses 10, 11, 12 and 13 of the Agreement are relevant for the purpose of considering the controversy in issue.

(B) According to the Respondent, commercial operation of the project started on 01.06.2001. This project was allotted before commencement of the Electricity Act 2003. Clause 13 of the Agreement is relevant which says that the power consumption in the factories of the Company and their associates is inclusive of the power supplied from KSEB Ltd grid as well as the power generated by the Company and fed into the KSEB Ltd grid. The net drawal of power from KSEB Ltd grid is worked out by deducting the net generation from Kuthungal plant (after adjusting 12% towards T&D losses and wheeling charges).

(C) The Respondent contended that ANERT granted REC accreditation for Kuthungal plant of the Appellant on 19.12.2011. The said action of ANERT was endorsed by Respondent – Commission vide Order dated 07.08.2013. The relevant Paragraphs of the Order dated 07.08.2013 are indicated as under:

*“a) The energy, if any, banked by M/s. INDSIL with KSEB shall be permitted to be consumed by M/s. INDSIL only in such a way that the banking facility benefit as contemplated in the Central Electricity Regulatory Commission (Terms and Conditions for Recognition and Issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010 dated 14.01.2010 read with its amendment dated 29.09.2010 is not available to M/s. INDSIL.*

*b) Carrying over of the excess energy on any day or month shall be allowed as provided in the Agreement dated 30.12.1994 between the generator and KSEB, on a time zone wise basis.*

*c) The generator shall have **the option** to sell the excess energy in any accounting year to KSEB as*

*provided in the Agreement 'at a price not exceeding the average pooled cost of power purchase of KSEB as per clause (c) of sub regulation (1) of regulation 5 of the CERC REC regulations dated 14.1.2010 read with its amendment dated 29.09.2010.*

*(3) The generator shall execute an undertaking in stamp paper agreeing to the above conditions before the state agency ANERT within one month under intimation to KSEB and the Commission, failing which reporting of injection by the generator by SLDC to the Central Agency will be suspended and the state agency ANERT and Central Agency shall proceed with action to revoke accreditation and registration as per CERC regulations. This undertaking shall form part and parcel of the agreement dated 30.12.1994 between KSEB and M/s. INDSIL."*

(D) The Appellant executed undertaking with ANERT on 27.08.2013 agreeing to the specific conditions in the Order dated 07.08.2013. The relevant sale rate for the excess energy if any, banked with KSEB Ltd is to be charged at the APPC (Average Pooled cost of Power Purchase) rate. In view of the REC

mechanism availed by the Petitioner, KSEB Ltd was not accounting the energy generated from Kuthungal plant towards its RPO, though KSEB Ltd has been providing banking facility to the Appellant.

(E) Though provision of open access was not envisaged in the Agreement executed between the parties in 1994, from 25.02.2015 Appellant started availing open access also for meeting its consumption at their factories at Palakkad. Till February 2016, the open access availed by the Appellant was up to 30% of the total consumption and the balance was met through banked energy of its own generation from Kuthungal plant and shortfall, if any, was met through drawing power supply from KSEB Ltd.

(F) When in 2016 amended Regulations came in terms of CERC, the captive plants which came prior to 29.09.2010 were not eligible for REC, since such captive plants were already adequately compensated in terms of savings on tariff because of lesser procurement of power from distribution companies. Therefore, the Appellant became ineligible for REC benefit with effect from 01.04.2016.

(G) Subsequent to amendment to REC Regulations by CERC, the Appellant started availing more volume of open access power for meeting the consumption of their factories at Palakkad

keeping the captive generation at Kuthungal banked un-utilised. The volume of open access availed went beyond 50% after March 2016 and up to the level of 88% of the total consumption in September 2016.

(H) During the months of May and June 2016 (last months of water year), the Appellant, instead of utilising this banked energy, availed open access to the tune of 3.337 MU in May and 4.087 MU in June, 2016 for meeting its consumption. Adjustment of banked energy was made as per the request of the Appellant. Copies of the bills raised for the months of April, May and June clearly indicate that the Appellant was carrying out a process of hidden trading by purchasing low cost power through open access and was selling energy to KSEB Ltd at higher cost. It is contrary to the statutes, rules and regulations and in violation of Section 12 of the Electricity Act 2003.

(I) In terms of Agreement, the Appellant Company can sell excess banked energy to KSEB Ltd only if the energy generated is in excess of the requirement of factories and associates of the Company.

(J) The Appellant banked surplus power to the tune of 10,82,996 units at the end of June 2016 and raised invoice of

Rs.53,06,680/- at the rate of Rs.4.90 per unit. However, Respondent – Board (KSEB Ltd) considered that the said bill is illegal and it is not bound to honour this bill. According to Respondent, the sale of banked power to KSEB Ltd as per the Agreement is only optional, and not mandatory; correspondingly, buying of power by KSEB Ltd is also optional. KSEB Ltd need to consider quantum of energy requirement and cost thereof before making a purchase decision. There was no correspondence between the Appellant and the licensee in respect of sale offer or purchase intimation of excess banked power. There is no written or implied contract. According to Respondent – licensee, there is no provision in the Agreement for the mandatory purchase of power by KSEB Ltd from Kuthungal plant, since it was mainly set up for meeting the captive requirement of the factories of Appellant – INDSIL at Palakkad.

(K) The case of Respondent – licensee before the Respondent – Commission was that in terms of Clause 11 of the Agreement, the unused banked energy during one accounting year cannot be carried over and the same gets lapsed. This clause though provides an option to sell excess energy to KSEB Ltd on the terms specified in the Agreement, KSEB Ltd is not bound to purchase all the banked power. In the Agreement, Clause 11

provides an option for sale of excess banked energy to KSEB Ltd, which is to be exercised only based on the discretion of KSEB Ltd and cannot be imposed on KSEB Ltd by Appellant – INDSIL. Therefore, the bill raised claiming Rs.53,06,680/- was not admitted by KSEB Ltd and accordingly intimated to Appellant - INDSIL. They further intimated that purchase of banked power of INDSIL at a high rate of Rs.4.90 which is much higher than APPC will incur huge financial liability to KSEB Ltd and ultimately consumers of the State has to take the burden. The Appellant was carrying out unethical practice; therefore, KSEB Ltd requested the State Commission to dismiss the petition with a direction to Appellant/Petitioner to restrict the open access quantum strictly to the requirement of the factories of INDSIL after utilising the entire generation from Kuthungal project.

**(xi)** KSERC, after hearing both the parties passed the impugned order.

**(xii)** Aggrieved by the same, the Appellant is before this Forum contending that the impugned order is in clear violation of clean and simple terms - Clause 11 of Agreement.

**3.** The Appellant contends before us that question of splitting up of banked energy as done in the impugned order is unreasonable, illegal and erroneous. They also contend that the KSERC has denied the Appellant



its right to carry forward the un-utilised power during the subsequent months of April to June, since the first part of the order considers the accounting year as ending with 31.03.2016 which is contrary to the terms of Agreement. The restriction imposed on the Appellant not to sell the power elsewhere other than KSEB Ltd creates a right of sale vested in the Appellant. Therefore, there is an obligation of KSEB Ltd to purchase the power at the end of accounting year. 31.03.2016 cannot be reckoned as the date of sale, since it violates right of the Appellant to carry forward the un-utilised power for subsequent months, i.e. April, May and June. The subject matter of invoice was for the accounting year, i.e. July 2015 to June 2016. Clause 13 of the Agreement provides for consumption of power during a period and does not deal with any restriction. The Commission (KSERC) in second part of the Order has wrongly interpreted Clause 13, which is irrelevant to the subject matter of the controversy. Since the Agreement was concluded after due deliberations and discussions, Commission ought not to have directed KSEB Ltd to approach the Commission with proposal for modification of the Agreement. Similar types of agreement are with other captive generators who were not parties to the dispute before the Commission. Therefore, terms of the Agreement cannot be changed now. With the above submissions they have sought for setting aside the impugned order.

4. Respondents contend that the State Commission after considering all relevant facts and amended regulations pertaining to REC scheme rightly passed the impugned order. They also contend that undertaking of Appellant while seeking REC benefit changes the entire scenario. Therefore, Respondent – Commission was justified in passing the impugned order.

5. The issues which arise for our consideration in the light of the above pleadings are as under:

- (a) “Whether the impugned order is in violation of the terms of the Agreement dated 30.12.1994 and in particular, clause 11 thereof?”
- (b) “Whether the Kerala State Electricity Regulatory Commission erred in law in effecting the split up of banked energy as on 31.03.2016 and thereafter from 01.04.2016 to 30.06.2016, contrary to clause 11 of the Agreement?”
- (c) “Whether the Regulatory Commission erred in unilaterally granting KSEB Ltd alone the option to approach the Commission with proposal for modifying the Agreement dated 30.12.1994?”

6. According to the Appellant, the Agreement dated 30.12.1994 regarding Kuthungal hydro project (allotted by the State Government for

captive consumption) covers various aspects pertaining to project including implementation, operation, maintenance, scheduling and despatching etc. The Appellant stresses on Paragraph 11 of the Agreement contending that the Appellant has option to sell the excess energy to KSEB Ltd. and the accounting year for the purpose of sale of excess energy under the Agreement is from 1<sup>st</sup> July to 30<sup>th</sup> June. Appellant contends if banked energy is not utilised during that accounting year, it cannot be carried over to the next accounting year and the excess banked energy fed into grid of the KSEB Ltd would be accounted after deducting banking commission, royalty and/or other duties and levies that are leviable; therefore, such banked energy after the above-stated deductions shall be the energy sold to KSEB Ltd at the rate at which KSEB Ltd sell the energy to EHT consumers in the same voltage class at which KSEB Ltd receives energy from the Appellant company. According to the Appellant during the accounting year of 2015-2016, the excess banked energy was 10,82,996 units as on 30.06.2016; therefore, Appellant was entitled to raise invoice at the rate of Rs.4.90 per unit which comes to Rs.53,06,680/-.

7. It is not in dispute that the Appellant is not allowed to sell excess energy generated from its project to another party other than KSEB Ltd; therefore, excess banked energy if not sold to Respondent KSEB Ltd, it will get lapsed.

**8.** Appellant also contends that Respondent KSEB Ltd was permitting the Appellant to bank the energy at zone-wise (peak period, normal period and off-peak period) separately. The excess energy banked is only during peak period and this was only on account of KSEB Ltd not permitting the Appellant to use the excess energy banked at peak period against its industrial consumption. The banked energy is about 2.7% of the total energy generated from Appellant's project.

**9.** During the pendency of the petition before KSERC, KSEB Ltd brought on record additional facts; contending that during the period when the Appellant availed REC mechanism, facility for adjustment of banked energy of any zone with the consumption of other zones had been extended to the Appellant. They also brought on record that the Commission while allowing the Appellant to have benefit of REC to its Kuthungal plant, by its order on 07.08.2013 that the Appellant shall not avail the benefit of banking energy in terms of CERC (REC for REG) Regulations of 2010.

**10.** It is not in dispute that the Appellant gave an undertaking wherein they undertook that the adjustment of generation and consumption of power had to be done only on zone to zone basis and the rate of sale of excess energy, if any, to KSEB Ltd is to be charged at APPC rate after adjustment of banked energy towards requirement of Appellant and its

associates. However, this facility apparently, was withdrawn in the month of March 2016 since REC mechanism was withdrawn to those plants which were commissioned prior to 29.09.2010. Therefore, the Appellant seeks revival of the Agreement dated 30.12.1994.

11. For the year 2014-2015, according to Appellant, it had excess banked energy which was intimated to KSEB Ltd well in advance. But for the year 2015-2016, there was no such correspondence and the Appellant straightway raised an invoice without any agreement on purchase. But Respondent – KSEB Ltd contends that in respect of the excess banked energy for the peak hours as on 31.03.2016, there was no requirement from the side of INDSIL for adjustment of this excess banked energy in the peak hours. Nothing is placed on record to show it was otherwise.

12. The State Government in its policy dated 07.12.1990 so far as setting up of small/mini/micro Hydel Scheme by private agencies did stipulate certain protocol so far as metering, banking and adjustment of excess energy fed into the grid from the captive power plants which read as under (extracted from impugned order):

*“a. KSEB shall deliver the energy generated from the captive plant less 12% towards wheeling charges and T&D losses, at the HT terminals of the consumer end of the captive power developer.*

- b. *In case energy in excess of the requirement of the agency is generated from the scheme, during one accounting year, such excess energy shall necessarily be fed into the state grid itself at rates to be mutually agreed upon by the KSEB and the captive producer.*
- c. *Under no circumstances shall the agency be entitled for the sale/transfer of any excess energy or any energy produced from the plant to any party other than the Government/Board.*
- d. *The accounting of the energy fed into the grid and supplied to the company by the Board will be settled on an annual basis, the year being reckoned from 1<sup>st</sup> of July to 30<sup>th</sup> June.*
- e. *In case the state grid is not in a position to absorb the energy generated from the scheme for any reason the generation from the scheme will have to be temporarily stopped as directed by the Board.”*

**13.** In terms of the policy guidelines of the State Government, KSEB Ltd had allotted Kuthungal Small Hydro Project in INDSIL Electro Smelts Ltd. for execution and operation of the project for 30 years from Commercial Operation Date, i.e. 01.06.2001. In this regard, Agreement dated 30.12.1994 came into existence between the parties. Relevant Paragraphs of the Agreement (10,11, 12 & 13) are as under:

*“10. The energy from Kuthungal Phase 1 & Phase II project fed into the KSEB grid will be metered at a location as detailed*

above (using meter calibrated by KSEB and this quantum of energy less 12% (twelve percent) towards wheeling charges and T&D losses will be delivered free of cost to the company and their associates M/s. Sun Metals & Alloys Pvt. Ltd. Kanjikode, Palaghat at the EHT terminals at the point of supply in their installations if any, or it will be banked by the KSEB, if the company so desires. The KSEB will collect 1% (one percent) of the energy so banked as its commission. This will be in addition to wheeling and loss towards transmission and distribution charges.

11. If the energy in excess of the requirement of the Company is generated from the project during one accounting year is not utilized by the Company and their associates during that accounting year, the Company may sell the excess banked energy to KSEB. The sale shall be deemed to be effected at the EHT terminals of the KSEB where the power generated by the Company is fed into the KSEB grid. The energy fed into the KSEB grid less banking commission, royalty and/or other levies shall be deemed to be the energy sold to the KSEB. The wheeling charge and loss towards transmission and distribution shall not be taken into account to determine the energy sold. The rate at which the KSEB shall pay to the company for such sale will be at the rate at which the KSEB sell the energy to the EHT consumers in the same voltage clause at which the KSEB receives the energy from the company. The KSEB shall not pay to the Company for the maximum demand component of the energy sold to KSEB. Under no circumstances shall the Company be entitled to sell or

*transfer any excess energy or any energy produced from the project to any party other than the KSEB and their associates. The accounting and billing of the energy fed into the grid by the Company and/or supplied by KSEB to the company for operating its factories, if any, in Kerala will be settled on monthly basis. The year of accounting will be reckoned from 1<sup>st</sup> of July to 30<sup>th</sup> June. In the case of supply or receipt made in LT lines of the Company the charges for losses will be extra as stipulated by the KSEB. If the energy banked is not utilized by the Company and their associates during one accounting year, it shall not be carried over to the next accounting year and shall be treated as lapsed. The Company has however the option to sell the excess energy to KSEB on the terms specified in the agreement. Otherwise, the company has no claim over the energy banked.*

12. *If the KSEB grid is not in a position to absorb the energy generated from the project for any reason such as high level of storage in reservoirs, breakdown of transmission lines and/or other reasons beyond the control of KSEB, the generation from the project will have to be restricted to the extent of generation for captive consumption as directed by KSEB. The schedule of power generation from the project shall be as directed by the KSEB.*
13. *The total power consumption in the factories of the Company and their associates is inclusive of the power supplied from the KSEB grid as well as the power generated by the Company and fed into the KSEB grid. During the period of power cut and/or other restrictions*



*imposed by the KSEB, the KSEB shall work out the base consumption by the company and their associates based on total consumption for its factories on the same principle as applicable to the consumers fed by the KSEB.”*

**14.** The Appellant company can either consume energy generated from the Kuthungal project for its factory and associates located at Palakkad or can bank the energy with KSEB Ltd. If the Appellant opts so, 1% of the energy banked with KSEB Ltd will be adjusted as commission for banking. In case such generated energy in excess of consumption of the plant of the Appellant and its associates at Palakkad during an accounting year and is not utilised by the Appellant and their associates in that accounting year, the Appellant may sell the excess banked energy only to KSEB Ltd as and when scheduled by KSEB Ltd. The rate for sale of excess banked energy is at which KSEB Ltd sells its energy to EHT consumers.

**15.** It is not in dispute that the Appellant cannot sell or transfer such excess energy to any third party. The accounting and billing of energy fed into the grid by the Appellant will be settled on monthly basis. Banked energy cannot be carried forward for the next accounting year if the Appellant has not utilised the entire energy banked during an accounting year. The un-utilised banked energy lapses in such situation. The Appellant has option to sell the excess energy so banked to KSEB Ltd. in terms of various clauses of Agreement. Except this option, the Appellant

has no claim over un-utilised banked energy. The schedule of power has to be as directed by KSEB Ltd, which means the Appellant cannot schedule power unless a direction comes from KSEB Ltd. It is also clear that total consumption of power in the factories of the Appellant company and their associates is inclusive of the power supply from KSEB Ltd's grid as well as the power generated by the Appellant fed into the grid. The Appellant is free to use the energy generated or banked without any restriction against the energy consumption of the factory at any time zone/period during that accounting year.

**16.** In terms of 2010 Regulation notified by CERC on 14.01.2010 and in terms of Regulation 5 (eligibility criteria of generating company from renewable energy sources) which came to be amended in September 2010 wherein captive power producer became eligible for the entire energy generated from such plants for participating in the REC scheme subject to certain terms and conditions. Apparently, the Appellant applied for accreditation of its project at Kuthungal as a renewable generator before ANERT and got accreditation. This came to be objected to by KSEB Ltd; but the same came to be dismissed. Commission held that the accreditation given to the Appellant - M/s. INDSIL shall be continued and the Appellant company shall be eligible to avail REC benefit subject to certain terms and conditions. The order dated 07.08.2013 reads as under:

*“Order of the commission*

53. *After carefully examining the petition, counter statements, the documents and arguments presented by all the parties the Commission issues the following orders:*

- (1) The petition submission by KSEB is dismissed.*
- (2) The accreditation given to M/s. INDSIL shall continue to be valid and the company shall be eligible to avail REC benefits subject to the following conditions:*

*a) The energy, if any, banked by M/s. INDSIL with KSEB shall be permitted to be consumed by M/s. INDSIL only in such a way that the banking facility benefit as contemplated in the Central Electricity Regulatory Commission (Terms and Conditions for Recognition and Issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010 dated 14.01.2010 read with its amendment dated 29.09.2010 is not available to M/s. INDSIL.*

*b) Carrying over of the excess energy on any day or month shall be allowed as provided in the Agreement dated 30.12.1994 between the generator and KSEB, on a time zone wise basis.*

*c) The generator shall have the option to sell the excess energy in any accounting year to KSEB as provided in the Agreement ‘at a price not exceeding the average pooled cost of power purchase of KSEB as per clause (c) of sub regulation (1) of regulation 5 of the CERC*

REC regulations dated 14.1.2010 read with its amendment dated 29.09.2010.

(3) *The generator shall execute an undertaking in stamp paper agreeing to the above conditions before the state agency ANERT within one month under intimation to KSEB and the Commission, failing which reporting of injection by the generator by SLDC to the Central Agency will be suspended and the state agency ANERT and Central Agency shall proceed with action to revoke accreditation and registration as per CERC regulations. This undertaking shall form part and parcel of the agreement dated 30.12.1994 between KSEB and M/s. INDSIL.*

(4) *The state designated agency ANERT shall issue notice to the generator incorporating the above directives under Section 9 of the detailed procedure approved by CERC by order dated 1.6.2010 and other enabling provisions immediately.”*

**17.** In terms of this Order, so far as banking facilities, the Appellant cannot have banking facility of energy generated since it got accreditation benefit in terms of 2010 Regulations. Therefore, the unconditional banking in terms of Agreement dated 30.12.1994 came to an end by order of the Commission dated 07.08.2013. Similarly, the maximum rate for the sale of excess power is fixed at the average pooled cost of power purchase of KSEB Ltd instead of EHT tariff applicable in terms of Clause 11 of the Agreement dated 30.12.1994. Admittedly, the Appellant gave undertaking in compliance with the above directions of the Commission.

**18.** Fortunately or unfortunately, in terms of 4<sup>th</sup> amendment to CERC Regulations of 2010 pertaining to REC for Renewable Energy Generation brought out in 2016, such benefit became inapplicable to captive power plants commissioned prior to 29.10.2010. As a result, the appellant became ineligible for getting REC benefit from 01.04.2016. As Kuthungal plant of the Appellant achieved its COD in June 2001, it became ineligible for REC in terms of 4<sup>th</sup> amendment of Regulations 2016.

**19.** It is clear from the above admitted facts that the terms and conditions pertaining to banked energy and sale of excess banked energy unutilised after requirement of industries of the Appellant company at Palakkad which came to be agreed upon between the parties in 1994 came to be replaced by order of the Commission dated 07.08.2013 which was accepted and implemented by the Appellant company in unequivocal terms by giving undertaking as mentioned above.

**20.** The bill raised for 10,82,996 units amounting to Rs.53,06.680/- for the accounting year 2015-2016 was not admitted by the Respondent – KSEB Ltd on the ground that the Appellant had purchased 12.79 Million Units through open access for the consumption of the factories of the Appellant at Palakkad instead of utilising the energy generated from Kuthungal plant which was allotted exclusively for the captive consumption of the factories of the Appellant at INDSIL.

**21.** KSEB Ltd is right in contending that the Appellant neither exercised its facility for adjusting the excess power generated during peak hours in other time zone nor approached KSEB Ltd with the option of purchase of excess energy. Therefore, the excess energy banked got lapsed.

**22.** Respondent – Commission rightly opined that CERC Regulations amended in 2016 pertaining to REC for Renewable Energy Generation since came into effect only from 01.04.2016; therefore, electricity generated from Kuthungal plant up to 31.03.2016 is eligible for REC in terms of first amendment of Regulations of 2010. Therefore, the Respondent – Commission was also justified in opining that directions of Respondent – Commission which came to be admitted by an undertaking of the Appellant in 2013 were applicable till 31.03.2016 in respect of the accounting year 2015-2016.

**23.** In terms of the month-wise consumption of energy of factories of INDSIL, as noted in the impugned order, comes to 26.87 MU up to 31.03.2016 during the accounting year 2015-2016. REC issued to RE Generator is valid for 1095 days, i.e. three years from the date of issue of the Certificate. Therefore, Respondent - Commission was justified in considering electricity generated from Kuthungal plant up to 31.03.2016. So far as REC benefit, the net banked energy of Kuthungal plant at the EHT terminal of the factory up to 31.03.2016 was 1.72 MU and the net

banked energy up to 31.03.2016 was directed to be settled in terms of the order of the Commission dated 07.08.2013 which reached finality. Therefore, the Respondent – Commission was right in opining that the Appellant had the option to sell the excess energy banked with KSEB Ltd as on 31.03.2016 at a price not exceeding the APPC rate of KSEB Ltd. which was 3.14 per unit for the year 2015-2016 in terms of order of the Commission dated 30.09.2014.

**24.** The argument of the Appellant that the accounting year being 1<sup>st</sup> July every year till 30<sup>th</sup> June of next year and the same was unilaterally changed by the Commission is not correct. The accounting year was considered from July to June; but in view of the 4<sup>th</sup> amendment of REC Regulations, which became effective from 01.04.2016, the Commission was justified in extending the REC benefit to the Appellant up to 31.03.2016 and so also fixing the price so far as excess energy banked at not exceeding APPC rate of KSEB Ltd at 3.14 per unit.

**25.** Then coming to the subsequent period of 01.04.2016 to 30.06.2016, the balance accounting period, Commission opined that in terms of Clause 13 of the Agreement dated 30.12.1994, total power consumption of Appellant's factories and their associates have to be settled against the electricity generated from Kuthungal plant and the power supplied from KSEB Ltd. At this juncture, the Commission had to take into consideration

the Electricity Act 2003 since the Agreement dated 30.12.1994 was much prior to Electricity Act 2003. The Respondent – Commission rightly opined that the Appellant's factories did not have the option to purchase power from traders/generators through open access facility and the entire electricity requirement had to be met from KSEB Ltd and/or by consuming the power generated from the captive power plant at Kuthungal prior to Electricity Act of 2003.

**26.** It is not in dispute that in terms of the Agreement, sale of excess energy banked with KSEB Ltd could be opted out only after meeting the requirement of factories of the Appellant. This would mean, after utilising the power required for the factories of the Appellant and its associates, the excess banked energy has to be arrived at. Since the Act 2003 has introduced the scenario of facility of open access and created Electricity Regulatory Commission for regulating the electricity purchase and procurement process of the distribution licensees including the price at which power can be purchased, one cannot dispute the fact that State Regulatory Commission has the authority to revisit the terms and conditions of even the concluded contracts, i.e. PPA, if circumstances warrant.

**27.** Since the 1994 Agreement between the parties came into existence much prior to the Electricity Act 2003, the Commission opined that terms



of the Agreement have to be modified in line with the provisions of the Electricity Act 2003. Commission had genuine reasons why such opinion was expressed by the Respondent – Commission. The factual situation reveals that the Appellant started obtaining power through open access without consuming the energy from the captive power plant even though there was energy banked. It started purchasing power through open access facility without using the power generated from captive power plant thereby it did not consume the required power generated from captive power plant for its factories. On the other hand, it accumulated the said power as banked energy by resorting to method of open access facility provided in the Electricity Act 2003.

**28.** Since the Respondent – KSEB Ltd had to purchase unutilised excess banked energy at EHT rate at which KSEB Ltd sells to similar consumers, this would affect the interest of larger sections of consumers of the State by way of tariff, the Respondent – Commission opined that KSEB Ltd shall approach the Commission with a proposal for modifying the Agreement dated 30.12.1994.

**29.** Therefore, on considering the entire facts, reasoning and opinion of the Respondent – Commission in its impugned order dated 02.06.2017, and in the light of our analysis and reasoning, we find that the impugned order does not warrant any interference. Accordingly, the matter being

Appeal No. 293 of 2017 stands dismissed. All issues are held in favour of Respondent – KSEB Ltd.

**30.** Pending IAs, if any, shall stand disposed of.

**31.** No order as to costs.

**32.** Pronounced in the Open Court on this **29<sup>th</sup> day of July, 2019.**

**(S.D. Dubey)**  
**Technical Member**

**(Justice Manjula Chellur)**  
**Chairperson**

✓  
**REPORTABLE / NON-REPORTABLE**

*tpd*