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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment pronounced on: 04.04.2018

+ W.P.(C) 3061/2018

GLOBAL ENERGY PRIVATE LIMITED Petitioner

Through: Mr.Sajan Poovayya, Sr.Adv. with Mr.Raj
Shekhar and Mr.Rajiv Yadav, Advs.

versus

CENTRAL ELECTRICITY REGULATORY COMMISSION & ANR.

..... Respondents

Through; Mr.Rajiv Sr.Adv. with Mr.Shri Venkatesh,
Mr.Pratyush Singh, Mr.Vikas Maini, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J (ORAL)

1. This writ petition is directed against the order dated 27.02.2018, passed by the Central Electricity Regulatory Commission (in short "CERC"). The operative directions issued by CERC via the impugned order are contained in paragraphs 36 and 37.

"36. We have noticed that the Respondent has not paid the outstanding dues of the Petitioner for the supply of power under LOIS dated 17.04.2014 and 30.05.2015. The Respondent had given post dated cheques for payment of the outstanding dues which could not be encashed by the petitioner on account of the instructions of GEPL for stopping payment against these cheques. Without prejudice to the action pending before the MM and High Court of Delhi for dishonour of cheques, we are of the view that failure to release payments against post dated cheques for outstanding dues amounts to prolonged and wilful defaults on the part of GEPL to ensure timely payment to the Petitioner for supply of power with GEPL as a trading licensee is required to comply with in term of Regulation 7(h) of the Trading Licence Regulations. Therefore, it

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satisfies the conditions of Section 190(1)(a) of the Act. Further, the trading in electricity is a regulated activity under the Act as trading is envisaged to promote competition and thereby serve public interest. If the trading licensees are allowed to flout the terms and conditions of the agreements for purchase and sale of electricity in the course of trading, there will be chaos in the market, shake the confidence of the generating companies and distribution licensees/consumers and thereby will affect competition which is against public interest. Therefore, public interest demands that such practices are strongly discouraged and the licensees indulging in such practices are dealt with strictly in accordance with law. We are of the view that a case against GEPL under Section 19(1)(a) of the Act for revocation of licence has been made out.

37. According to sub-section (3) of Section 19 of the Act, the Commission is required to give three months' notice to the licensee stating the grounds for revocation of licence and take a decision after considering the cause shown by the licensee. Accordingly, notice is hereby given to GEPL to show cause as to why its licence for inter-State trading of electricity should not be revoked for its failure to pay the outstanding dues of JPL for the power supplied in terms of Lols dated 17.4.2014 and 30.5.2015 and late payment surcharge thereon which is in contravention of the Regulation 7(h) of the Trading Licence Regulations. The reply to the show clause notice shall be filed by GEPL by 23.3.2018. Section 19(4) of the Act provides that the Commission may instead of revoking the licence under sub-section (1) of Section 19, permit it to remain in force subject to such further terms and conditions it thinks fit to impose and such terms and conditions shall be binding on the licensee. In exercise of power under Section 19(4), we direct that if GEPL makes the full and final payment of the outstanding dues and late payment surcharge to JPL in terms of the Lols dated 17.4.2014 and 30.5.2015 on or before 23.3.2018 and further submits an undertaking to comply with the terms and conditions of the agreements for purchase and sale of power and not make any default in payment in future, the Commission will take a view with regard to the proposed revocation of licence."

2. The writ petitioner, who is the respondent in the proceedings before the

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CERC is aggrieved by the directions contained in the impugned order, broadly, on the ground that even though the CERC had kept back the matter to decide the issue of jurisdiction, it proceeded to decide, the matter on merits.

2.1 In this behalf reliance is placed on the proceeding sheet of CERC dated 20.12.2016. In support of aforesaid contention it is also submitted on behalf of the writ petitioner that CERC has no jurisdiction to decide the dispute which is the subject matter of the petition filed before it as the dispute raised arises between a power generator, that is, respondent No.2 herein and the writ petitioner, which trades in power. For this purpose, Mr. Poovayya, who appears for the writ petitioner has drawn my attention to Section 86(1)(f) and Section 79(1)(a) to (e) and (f) of the Electricity Act (hereafter referred to as the "2003 Act"). Section 86(1)(f) is cited by Mr. Poovayya to contrast in the language employed in Section 74(1)(f).

2.2 It is the contention of learned counsel that Section 86 (1)(f) of the 2003 Act, sets out the powers of the State Commission, while Section 79 of the very same act sets out the powers of the Central Commission.

2.3 Learned counsel says that a perusal of the provisions of various sub clauses of Section 79(1) would show that the dispute which is obtaining between the writ petitioner and respondent No.2 does not fall within the domain of CERC.

3. I may also indicate that Mr. Poovayya has stated that a suit for recovery of dues has instituted against respondent no.2, in this Court. This suit, I am told, is numbered as: CS(COMM) No.174/2016.

3.1 It is not in dispute that this suit, in the first instance, was dismissed; a situation which was retrieved with the passing of order dated 06.10.2015 by the Division Bench in RFA (OS) 93/2015.

3.2 It is the contended on behalf of the writ petitioner that the suit is pending adjudication.

4. Furthermore, it is also the contention of learned counsel for the petitioner that the revocation of license which has been ordered by the CERC is contrary to the provisions of Section 19(1)(a) read with Section 19(3)&(4) of the 2003 Act. In this behalf, Mr. Poovayya contends that assuming without admitting that the writ petitioner owes amounts to respondent No.2 and that held by CERC was of the view that the default qua repayment of dues was both "wilful" and "prolonged", then, a show cause notice should have been issued which could not have had a returnable time line of less than 3 months.

4.1 It is submitted that only thereafter, further steps, if at all, under Section 19(4) of 2003 Act could have been taken, against the writ petitioner.

4.2 In nutshell, it is the case of the petitioner that the safeguards provided in Section 19(3) and 19(4) of the 2003 Act were given a go by CERC, which began with a show cause notice being issued which had a timeline of less than 3 months.

5. On the other hand, Mr. Nayyar, who appears for respondent no.2, says that qua the impugned order, the writ petitioner can take recourse to an alternative remedy provided under Section 111 of 2003 Act.

5.1. In this behalf, Mr. Nayyar contends that the scope and ambit of Section 111 is wide enough to enable "any person", who is aggrieved by "any" order of the CERC to prefer an appeal with the Appellate Tribunal.

6. I have heard the counsel for the parties. According to me, what impresses me at this juncture, is the fact that CERC proceeded to decide the matter on merits, when, it had reserved its decision on maintainability of the action filed by respondent no.2.

6.1 In that sense, CERC did not adhere to a procedure, which is followed by most quasi judicial bodies, and as a matter of fact by any adjudicatory forum of limited jurisdiction, which is, that it rules on the issue as to whether it has jurisdiction to entertain and try the matter placed before it. This decision

necessarily would have to be taken prior to concerned quasi-judicial body embarking on a journey, so to speak, to decide the matter on merits.

6.2 It goes without saying, that CERC could have carried out this exercise by passing a composite order if, it was otherwise of the view that it had jurisdiction in the matter. CERC could have also decided to first rule on the issue of jurisdiction and, then, proceeded to decide the matter on merits. CERC in this case chose to decide the matter on merits without ruling on the aspect of jurisdiction. Though reference was made to Section 79 of the 2003 Act, no finding was returned by CERC on that aspect of the matter. In my view, CERC could not have proceeded to decide the matter on merits without rendering its decision on the issue of jurisdiction. As a matter of fact, no opportunity was granted by CERC to the writ petitioner to file a reply on merits.

7. Thus, having regard to this aspect of the matter, I am inclined to set aside the impugned order. CERC is accordingly, directed to revisit the issues which arise for consideration in the petition filed under Section 19 of 2003 Act by respondent No.2. However, before proceedings further in the matter CERC would in the first instance, rule on its jurisdiction to entertain the matter. In case, CERC is of the view that it has jurisdiction the matter, it will call upon the writ petitioner to address the arguments on merits. In such a situation CERC, if it deems fit, could pass a composite order on jurisdiction as well as on merits. Needless to say that since respondent no.2 says its dues have remained outstanding for quite some time CERC, would decide the petition at the earliest, though, not later than 10 weeks from date of receipt of the a copy of the order. Since, no reply has been filed by the writ petitioner before CERC, it will do the needful within next two weeks.

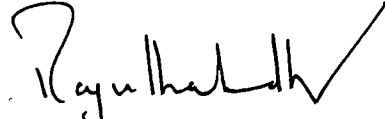
8. I am informed that the matter is listed before CERC on 12.04.2018. Accordingly, CERC is requested to fix dates for arguments in the matter keeping in mind the timeline set forth above.

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9. The writ petition is disposed of in aforementioned terms.

10. It is clarified that the mere fact that the impugned order has been set aside will not impact the decision on merits, which is required to be taken on merits by CERC.

11. No costs.


RAJIV SHAKDHER, J

APRIL 04, 2018
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