IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

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Writ Petition No.3275 of 2015

BETWEEN:

Rain CII Carbon (Vizag) Limited, a company incorporated under the Companies Act,1956, rep. by its authorised signatory, Sri C.H.Krishna Prasad, Hyderabad and another

.. Petitioners

And

The State of A.P. rep. by the Secretary, Dept. of Energy, Hyderabad and four others

.. Respondents

DATE OF JUDGMENT PRONOUNCED: **14.07.2015**

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE R. KANTHA RAO

1	Whether Reporters of Local newspapers may be allowed to see the Judgments?	Yes/No
2	Whether the copies of judgment may be marked to Law Reports/Journals	Yes/No
3	Whether Their Ladyship/Lordship wish to see the fair copy of the Judgment?	Yes/No

HON'BLE SRI JUSTICE R. KANTHA RAO

Writ Petition No.3275 OF 2015

ORDER:

This writ petition is filed by the petitioner under Article 226 of the Constitution of India seeking a writ of mandamus declaring the letter dated 21.01.2015 sent by respondent No.3 to the petitioners as being illegal, arbitrary and contrary to the judgment dated 31.12.2014 in W.P.No.30327 of 2014 and batch, and consequently to set aside the same and direct the respondent Nos.1 to 4 to allocate 39,31,693 units to the petitioners' scheduled consumer (respondent No.5) out of the total banked units of 1,90,74,312 as sought for by the petitioner by its letter dated 13.01.2015.

2. Heard the leaned counsel appearing for the petitioners and the learned Counsel appearing for the respondents.

3. The petitioner No.1 which is an integrated industrial project based on unique concept of generating power entered into agreement with Transmission Corporation of Andhra Pradesh Limited for short 'APTRANSCO' (formerly A.P. State Electricity Board) which was succeeded by the second respondent APTRANSCO after the enactment of the Andhra Pradesh Electricity Reforms Act, 1998. The Government of Andhra Pradesh through the Department of Energy & Forests vide Memo No.15558/Pr.I/1/94, conveyed its approval to the Modified Power Wheeling and Purchase Agreement hereinafter referred to as 'MPWPA' to be entered into between the petitioner and respondents and consequent to the approval of Government of Andhra Pradesh, the MPWPA dated 04.011.1994 was entered into between the petitioner and APTRANSCO. During the subsistence of the MPWPA, the State of Andhra Pradesh was bifurcated with effect from 02.06.2014 by the Andhra Pradesh Reorganisation Act, 2014 into two States i.e. the State of Andhra Pradesh and the State of Telangana. As per Section 92 r/w

Schedule XII.C.2 of the Act provided to ensure that the terms of the PPAs. which were entered into much before the bifurcation of the State would not be effected due to the bifurcation which would consequently have an adverse impact on the business of the power producers as well as their consumers. The petitioners' plant is situated in the State of Andhra Pradesh and some of the scheduled consumers of the petitioners are in the State of Telangana.

4. While the matters stood thus, the petitioners received letter from the Eastern Power Distribution Company of the Andhra Pradesh (for short 'APEPDCL') dated 28.08.2014 stating that all the existing wheeling transactions will be allowed up to 31.08.2014 only and from 01.09.2014 onwards, interstate wheeling transactions will not be allowed under any circumstances. The petitioner was requested to change the exit points within the state for wheeled energy to avoid interstate open access charges. It was further stated that if interstate wheeling energy is continued, the petitioner would have to follow CERC Open Access Regulations. In the letter, there was a reference to an earlier letter dated 02.08.2014 issued by the Transmission Corporation of Andhra Pradesh Limited (APTRANSCO)/2nd respondent. According to the petitioner, it had no knowledge of the letter dated 02.08.2014 prior to receiving the letter dated 28.08.2014. The letter dated 02.08.2014 which is the basis for the letter dated 28.08.2014 states that Open Access users have to change exit points within the state so that transactions will become intra state and that if the Open Access user does not have the provision to change the exit points to fall within the same State as that of the generator, it would become an interstate transaction and CERC Open Access Regulations would have to be followed.

5. Aggrieved by the said letters dated 28.08.2014 and 02.08.2014, the petitioners filed W.P.No.25561 of 2014. It is further submitted by the petitioners that they filed W.P.Nos.30327 of 2014, 33601 of 2014, 33611 of 2014 and 38841 of 2014 challenging the inaction of the TSSPDCL in not including the units supplied by the petitioners in the bill issued to the respondent No.5 and another scheduled consumer of the petitioners for the

months of September, 2014 to November, 2014. The version of the petitioners is that it cannot be put to loss because of the fact that a Government entity in one State failed or chose not to wheel the power supplied by the petitioners which was meant to be supplied to its scheduled consumer in Telangana, to a government entity in another State. According to the petitioners, since the respondent Nos.2 and 3 have chosen to consume the units supplied by the petitioners without wheeling them to TSSPDCL which would further wheel the same to petitioners scheduled consumers in Telangana, they are bound to make payment of the amount that is sought to be collected from the petitioners by TSSPDCL in relation to the units in question to TSSPDCL.

6. The learned single Judge of this Court passed a common order in the above writ petitions along with other writ petitions of the similar nature on 31.12.2014 and in the said writ petitions, upon recording the statement of the Standing Counsel for APEPDCL that though the petitioners have been feeding power into its grid, APEPDCL could not send the power across to Telangana due to legal constraints and that such power which was fed into the grid may be treated as having been banked, was pleased to direct that the power which was fed into the grid of APEPDCL by the petitioners shall be treated as having been banked which may be wheeled and supplied by the petitioners for captive purposes or to scheduled consumers of the petitioners as per their wheeling agreement if and when open access licences were obtained by them. The petitioners and others were given a period of three months time for this purpose.

7. While so, on 21.01.2015 the third respondent addressed letter to the petitioners stating that there is no provision for banking in the MPWPA and therefore, it is not possible to consider to allocate the said portion of the banked units of 39,31,693 to which the petitioners through its counsel sent a reply notice to the third respondent on 22.01.2014 stating that if the third respondent fails to allocate the units banked pursuant to the order, dated 31.12.2014 passed in W.P.No.30327 of 2014 as requested by the petitioners

vide its letter dated 13.01.2015, the petitioners would be constrained to initiate appropriate proceedings before this Court. It is under these circumstances, the petitioners filed present writ petition seeking writ of mandamus declaring the letter dated 21.01.2015 sent by third respondent to the petitioners as being illegal, arbitrary and contrary to the judgment dated 31.12.2014 passed in W.P.No.30327 of 2014 and batch and consequently to set aside the same directing the respondents 1 to 4 to allocate 39,31,693 units to the petitioners' scheduled consumer (respondent No.5) out of the total banked units of 1,90,74,312 as sought for by the petitioners by its letter, dated 13.01.2015.

8. Thus, the contention of the petitioner in the present writ petition is that the letter dated 21.01.2015 sent by the third respondent is contrary to the common judgment passed by this Court in W.P.No.30327 of 2014 and batch and therefore, it is liable to be set aside and consequential direction is sought to be issued.

9. In the counter filed by the third respondent, it has been contended *inter alia* as follows:

APEPDCL agreed for banking in case of M/s. Sudha Agro Oil & Chemical Industries Ltd. in W.P.No.27241 of 2014 as there is a provision for banking under Article 2 of PWPA, dated 26.05.1999 but not in the case of the petitioners in W.P.No.25561 of 2014. There is no such clause of banking in the MPWPA with the petitioners. Number of cases pertaining to different wheeling agreements entered into with various developers entered on different terms and conditions were posted for common hearing. APEPDCL filed counter affidavit as per the terms and conditions of respective wheeling agreements only and therefore, the common judgment in the batch of writ petitions is not applicable in the present case. It is further contended that in the common judgment the petitioners were allowed a period of three months to obtain Open Access licences and if the petitioners fail to obtain Open Access licenses within this period, the respective DISCOMs are entitled to treat the same as having been appropriated and the cost of the power as provided under the existing agreements shall be paid to the petitioners.

10. Refuting the allegations mentioned in the counter, the petitioners filed reply-affidavit stating hereunder:

The judgment passed by this Court was in the context of the peculiar circumstances that had arisen pursuant to the bifurcation of the erstwhile State of Andhra Pradesh where the respondent No.3 after receiving power from the petitioners to be supplied to its consumers in the State of Telangana, did not wheel the said energy to the Telangana State Southern Power Distribution Company Limited for it to be supplied to its consumers and that after having misappropriated the energy supplied by the petitioners and after having made a submission that the said energy can be considered to be banked energy, the third respondent cannot take a stand that the energy cannot be considered to be banked energy due to the provisions in the MPWPA. Had this been the concern of the third respondent, the third respondent ought to have submitted the same before this Court prior to passing of the common judgment dated 31.12.2014. After having submitted that the said energy may be considered to be treated as having been banked, the respondent No.3 cannot take a completely different stand altogether to wriggle out of the obligation created by the judgment of this Court. The judgment of this Court is operational as on today. Unless the said order is suspended or set aside, the respondent No.3 is obligated to abide by it. The submission that respondent No.3 agreed for banking in the case of Sudha Agro Oil as there is provision for banking in their agreement is an afterthought and is misleading. A direction has been given by this Court in all the cases including that of the petitioners and the submission made by the counsel for the respondent No.3 is also in all the cases of batch including that of the petitioners as is evident from the judgment dated 31.12.2014.

11. Now the question arises for consideration in the present writ petition is whether the issue involved in the present case is covered by the judgment in W.P.No.30327 of 2014 and batch rendered by the learned single Judge of

this Court and if so, whether the petitioners are entitled for the relief prayed for in the present writ petition.

12. In the common judgment passed in W.P.No.30327 of 2014 and batch, the learned single Judge took the view that even if the respective TRANSCOS and the DISCOMs are under obligation to wheel the power, such wheeling shall not be inconsistent with the provisions of the 2003 Act and the Regulations made thereunder. As the 2003 Act and the Regulations made thereunder mandate obtaining of Open Access for Inter-State transmission, the petitioners cannot insist on continuing the arrangement which existed prior to the division of the erstwhile State of Andhra Pradesh.

13. Dealing with the issue as to how to treat the power fed into the grid by the petitioners, the learned single Judge held that the APEPDCL has fairly admitted that the petitioners who hold power wheeling and power purchase agreements have been feeding the power into their grid and that due to legal constraints, they could not send the power across the State of Telangana.

14. The learned Single Judge further observed that, the learned Standing Counsel for APEPDCL has fairly submitted that the power which has been fed into the grid but billed by the TSSPDCL may be treated as having been banked. The learned counsel for the petitioners has stated that their clients are not willing to exercise the option of sale of power to APEPDCL. Similarly, the learned counsel for the petitioner in W.P.No.30602 of 2014 has stated that his client is not willing to sell the power to TSSPDCL. In the peculiar facts and circumstances, the learned single Judge felt that it is appropriate if the power which is fed by the petitioners into the Grid in the area of operation of the respective DISCOMs shall be treated as having been banked which may be wheeled and supplied by them either for captive purposes or to the scheduled consumers of the petitioners as per the respective wheeling agreements, if and when Open Access licenses are obtained by them. The petitioners are allowed a period of three months time from the date of receipt of this judgment for this purpose. If the petitioners fail to obtain Open Access

licenses within this period, the respective DISCOMs are entitled to treat the same as having been appropriated and the cost of the power as provided under the existing agreements shall be paid to the petitioners.

15. The learned single Judge rendered the common judgment without reference to any specific clauses in the power purchases agreements and basing on the unconditional submission made by the learned Standing Counsel for APEPDCL that the power which has been fed into the Grid but billed by the TSSPDCL may be treated as having been banked. Therefore, I absolutely see no force in the contention put-forth by the learned Advocate General for the State of Andhra Pradesh appearing for the third respondent that as there is no provision for banking in the MPWPA entered into by the petitioners, the common judgment rendered by the learned single Judge is not applicable in the present case. The judgment was rendered by the learned single Judge keeping in view the situation which arose out of the A.P. Reorganisation Act.

16. Therefore, the issue involved in the present case is squarely covered by the common judgment passed by the learned single Judge in W.P.No.30327 of 2014 and batch and the writ petition is therefore disposed in terms thereof. There shall be no order as to costs.

Pending miscellaneous petitions, if any, shall stand closed in consequence.

R.KANTHA RAO,J

Date:14.07.2015
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THE HON'BLE MR JUSTICE R. KANTHA RAO

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WRIT PETITION No.3275 OF 2015

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