HON'BLE SRI JUSTICE S.V.BHATT

W.P.No.35327 OF 2016

ORDER:

The petitioner prays for Mandamus declaring (i) Letter No.SE/O/KNL/SAO/JAO/H.T.Rev./D.No.450/16 dated 25.07.2016, (ii) Letter No.SE/O/KNL/SAO/JAO/H.T.Rev./D. No.470/16 dated 03.08.2016, (iii) Letter No.GM (APPCC/SAO (PP&S)D.No.564 dated 14.09.2016 communicating adjustment of Rs.1,06,44,550/- and (iv) Letter No.CGM(R&I)/GM/®/AO/HT/JAO/HT/D.No.1271 dated 26.09.2016 demanding Rs.1, 38,90,395/- as illegal, arbitrary and unconstitutional.

The petitioner prays for consequential direction to 1st respondent to refund to petitioner Rs.1,88,19,534/- together with interest at 18% per annum, and 1st and 4th respondents to make full payment towards energy sold by petitioner for the month of June,2016.

The writ prayer though appears to be complex and overlapping, this Court is of the view that the prayers can be simplified by categorising the prayers as dealing with (i) cross subsidy surcharge for the year 2005-2011 and 2015-16, (ii) wheeling charges and (iii) alleged excess amount received by petitioner from respondents for the power purchased from time to time. The affidavit of petitioner in the considered view of this Court refers to details more than once. Both for convenience and to identify issues in a simple way, the gist of the case pleaded by petitioner in the writ affidavit is stated, but not the averments as made in this behalf.

The petitioner is a company incorporated under the Companies Act, 1956 and is engaged in the business of generation and sale of electricity. The petitioner has established and been running 5.5 MW biomass based renewable energy project at Aswathapuram Village, Kurnool District. The petitioner and respondents entered into power purchase and wheeling agreement dated 30.06.1999. Sree Rayalaseema Green Stelloy Limited is a sister concern of petitioner herein. The sister concern produces sponge iron. The petitioner by technically harnessing hot waste gases generated by sister concern channelling the hot waste gases into a waste head recovery boiler, thereafter to common steam header at petitioner's power purchase plant, generating power. The petitioner alleges that reciprocal arrangement of supply of power by petitioner and likewise utilising waste gas generated by sister concern is in place. Finally the power generated and available for evacuation is distributed through respondents 1 and 2.

On 31.03.2011, the unit of petitioner was inspected and 3rd respondent basing on such inspection report through letter dated 19.09.2011 demanded a sum of Rs.4,30,76,676/- towards alleged Cross Subsidy Surcharge (for short 'CSS') at 1.32 per unit on the captive consumption by SRGSL and Rs.1,80,26,376/- towards differential wheeling charges on the power generated from the waste heat recovery boiler steam and wheeled to third party consumers between 2005-2011. It is further alleged that the 3rd respondent revised the demand through letters dated 09.05.2012 for Rs.11,10,20,000/- towards CSS and Rs.5,85,85,726/- towards differential wheeling charges. The petitioner objected to these revised demands by filing explanation dated 25.06.2012 and 08.07.2012. While matters stood thus, the 3rd respondent on 26.10.2012, revised and issued demand for Rs.9,44,99,958/- towards CSS and further a sum of Rs.5,85,85,726/- towards differential wheeling charges. As demands are periodically and consistently raised by respondents without examining the reply of petitioner, the petitioner it is alleged through the intervention of Hon'ble Chief Minister and the Principal Secretary to the Chief Minister, a technical Committee was constituted vide proceedings dated 24.10.2013. The Technical Committee submitted report dated 25.11.2013 determining the CSS payable by petitioner from April,2005 to March,2011 as Rs.2,78,74,537/- and the differential wheeling charges from April,2005 to 2011 as Rs.1,84,03,509/-. As the petitioner is objecting to the report, the Committee was directed to examine petitioner's representation, give opportunity to petitioner to put forward the objections of petitioner on the tentative conclusions arrived at by the Committee. On 29.01.2014, the report was submitted. The petitioner objects the report as perfunctory and that the report does not reflect proper appreciation of the details given by it. By letter dated 12.03.2014, the petitioner informed the calibration of flow meters and requested for deputation of an officer to quantify the steam flow from both boilers i.e. in power generation plant and Sponge Iron Plant. On 02.05.2014, the CMD of A.P. Transco constituted a Committee to take meter readings of the waste gas for one month to determine corresponding production of electricity from the waste gas. The petitioner paid wheeling charges. The petitioner vide letter dated 02.05.2014 without prejudice to its contentions consented to the conditions stipulated in letter dated 02.05.2014.

The petitioner filed W.P.No.17912 of 2014 challenging the action of respondents in demanding Rs.2,87,74,537/- towards CSS for the period from April,2005 to March,2011, Rs.1,84,03,509/- towards differential wheeling charges from April,2005 to March,2011 and Rs.19,49,547/- towards recovery of excess payments in power purchase bills. On 26.08.2014, this Court in WPMP No.22455 of 2014 in W.P. No.17912 of 2014 granted interim direction to respondents not to disconnect power supply on the condition of petitioner depositing Rs.1Crore towards CSS and differential wheeling charges in 12 equal monthly instalments from September,2014 pending finalisation of issue by the Committee as per the proceedings dated 30.05.2014. The petitioner claims to have complied conditions imposed by this Court. The respondents do not dispute the statement.

It is further alleged that the Committee constituted vide proceedings dated 30.05.2014 submitted report dated 04.09.2015. Adverting to the issue of cross subsidy levied by respondents, it is alleged that, Andhra Pradesh Electricity Regulatory Commission (APERC) at the first instance determined CSS for 2005-06, 2006-07 and the determination was subject matter of appeal before the Appellate Tribunal. The Appellate Tribunal by Judgment dated 05.07.2007 set aside the determination of CSS by APERC and remitted the matter back to APERC for re-determination of the surcharge on the basis of National Tariff Policy and in the light of the observations made in Judgment dated 05.07.2007. Aggrieved by the Judgment dated 05.07.2007 APERC filed Civil Appeal Nos.4936-4941 of 2007 before the Hon'ble Supreme Court. Pending appeal, the Hon'ble Supreme Court granted interim stay of judgment dated 05.07.2007. On 21.03.2016, Civil Appeal Nos.4936-4941 of 2007 filed by APERC were dismissed. Therefore, the case of petitioner is that the cross subsidy determined by APERC is not subsisting as on date, therefore the CSS demand cannot and could not be effectuated by resorting to unauthorised realisation. The further allegation in this behalf is that APERC while deciding the cross subsidy payable for subsequent years, has decided CSS subject to the outcome of Civil Appeal Nos.4936-4941 of 2007 and once appeals filed by APERC were dismissed on 21.03.2016 the determination of cross subsidy by APERC for subsequent years does not stand independently for realisation from company. It is stated, as a matter of fact that the cross subsidy payable by the consumers for the period 2005-2011 is pending consideration before APERC and incidentally the petitioner relies upon public notice issued for determination of CSS for financial year 2005-06; to year 2012-13 and for financial year 2015-16. Petitioner further alleges that SPDCL/3rd respondent having regard to National Tariff Policy and the directions issued by the Appellate Tribunal has forwarded CSS proposals and no CSS is proposed for the periods 2005-06, 2011-12 for this category of industries.

It is further alleged that while matters stood thus, the 3rd respondent communicated impugned letter dated 25.07.2016 which reads thus:

"In the reference 1st cited, the Hon'ble High Court of A.P. issued interim direction as follows: " In view of the above facts and circumstances, there shall be an interim direction to the respondents on condition of the petitioner depositing Rs.1 Crore towards cross subsidy surcharge and differential wheeling charges in 12 equal monthly instalments, starting from September,2014 pending finalization of the issue by the committee to be constituted, as per the proceedings dated 30.05.2014. However, this order will be subject to further determination of the amounts by the committee and that the petitioner shall pay the balance amount, after determination of the same by the newly constituted committee.

The committee submitted the report to the Chairman & Managing Director, APSPDCL, Tirupati and it was decided to collect the following amounts from M/s.Sree Rayalaseema Green Energy Ltd, Kallur (M) Kurnool.

a. Cross Subsidy Surcharge upto 03/2011	**Rs.2,87,74,537/-**
b. Revision of Power Purchase Bills	**Rs. 19,49,547/-**
Total	**Rs. 3,07,24,084/-**
Amount Paid/Recovered from Power Purchase Bills	**Rs. 2,00,79,534/-**
Balance payable	**Rs. 1,06,44,550/-**

Hence, it is requested to arrange for payment of the above balance amount within 15 days. The belated payment surcharge amount and further amounts from 03/2011 to till date will be worked out and the same will be intimated separately for arranging payment."

The 3rd respondent by letter dated 03.08.2016 informed the petitioner that the CSS has been for the period 2011-12 and 2012-13 as Rs.7,12,90,421 and Rs.7,70,07,679/- respectively amounting to Rs.14,82,98,100/-. The petitioner through letter dated 24.08.2016, objected to the computation of working of units for levying of CSS, the number of units of captive consumption etc. There has been communication between parties on the levy and demand of CSS vide letter dated 25.07.2016 and 25.08.2016. The case of petitioner against levy and demand of CSS is that the Committee or APSPDCL does not have lawful authority, legal basis to levy CSS and no demand can be raised on the basis of orders of APERC which have been set aside by the Appellate Tribunal and confirmed by the Hon'ble Supreme Court. The petitioner sent detailed reply on 25.08.2016 calling upon the respondents to withdraw the demands. The petitioner asserts that by referring to reply dated 14.09.2016 of 1st respondent it can be understood that the figures arrived at in the impugned letters are not based on correct inputs.

The electricity generated and sold by petitioner during the month of June,2016 to respondents and the sale price ought to have been paid on or before 03.08.2016 to petitioner. The petitioner did not receive the sale price for the power supplied by it for the month of June, 2016. The 4th respondent vide letter dated 14.09.2016 informed the petitioner as follows:

"From,	To
The General Manager/APPCC, Room No.547,Vidyut Soudha, Hyderabad.	The Chief General Manager (Rev &IA) Corporate Office, APSPDCl, Tirupathi

Lr.No.GM(APPCC/SAO (PP &S)/ D.No.564/2016, Dt.14.09.2016.

Sir,

Sub: APPCC-M/s.Rayalseema Green Energy Ltd., Biomass Generator- Adjustment of dues payable by Generator to APSPDCL against the Monthly Energy bill payments- Reg.

Ref: 1.Company's Bill No.SRGEL/HO/16-17/51, Dt.03.07.2016

2.Company's Bill No.SRGEL/HO/16-17/66 Dt.03.08.2016

3.Lr.No.SE/O/KNL/SAO/JAO/H.T.Rev/D.No.450/16, Dt.25.0716

……..

In the reference 1st and 2nd cited, M/s,.Rayalseema Green Energy Ltd has furnished invoices for an amount of Rs.1,72,13,105/- and Rs.93,95,035/- towards sale of energy to APSPDCL for the month of June,16 and July,16 respectively.

Further ion the ref 3rd cited, the Superintending Engineer/OP/ Kurnool has stated that the balance amount payable by the generator to APSPDCL towards the cross subsidy charges upto 03/2011 as per the committee report amounts to Rs.1,06,44,550/-.

As such, the said amount of Rs.1,06,44,550/- is recovered from the June,16 energy bill and net amount paid for June,16 & July,16 are as below:

Period	Energy	FC Rate	VC Rate	Total Cost	Dues Adjusted By APPCC	Rebate	Net Paid to Generator
June,16	2648170	1.56	4.37	15703648	10644550	0	5059098
July,16	1445390	1.56	4.37	8571163	0	85712	8485451
Total	4093560			24274811	10644550	85712	13544549

This is for favour of information.

Yours faithfully,
Sd/-
General Manager/APPCC
Vidyut Soudha, Hyderabad."

The 1st respondent by letter dated 26.09.2016 communicated to 4th respondent as follows:

From
The Chief General Manager (Rev.& IA)
APSPDCL, Corporation Office,
Sereenivasapuram Tiruchanoor Road
Tirupathi

To
The General Manager/APPCC
Room No.549,
Vidyut Soudha, Khairtabad
Hyderabad,

Lr.No.CGM/R&D/GMO/AO/IHT/JAO/HT.D.No.1271/16 dt.26.09.2016

Sir,

Sub:APSPDCL/Confirmation of Energy Delivered, Wheeled and Proposed for sale to APSPDCL in respect of M/s Sree Rayalaseema Green Energy Ltd., for the period from 03.08.2016 to 03.09.2016-Reg.

Ref:1. SROEL/RO/2014-15/115, dt.06.11.2014
2.Memo No.CGM(Fin)/OMO/SAO/MO/SA/HT/D.No.568/14 dt.6-11-14.
3.Lr.No.GM (APPCC)SAO(PP&S)/D.No.573/2015 dt.06.11.15.
4. SRGEL/HO/15-16/138 dt.24.12.2015
5.Lr.No.CGM (R&IA)/GMO/AD/HT/JAO/HT/D.No830/16 dt.01.07.2016
6.Lr.No.CGM(R&IA) GMO/AO/HT/JAO/HT/D.No.1037/16 dt.08.08.16
7.Lr.No.SE/O/KNL/SAO/JAO/HT.Rev./D.No.470/16 dt.03.08.16
8.Lr.No.GM (APPCC)/SAO (PP&S)/D.No.564/2016 dt.14.09.2015
9.Note Order Dt.26.09.2016.

It is to inform that, the Biomass Generator M/s.Sree Rayaseema Green Energy Ltd., vide reference 1st cited requested the Chairman & Managing Director/APSPDCL for adjustment of the proceeds of sale of power against the dues payable to APSPDCL. Hence, the details of Energy delivered, Wheeled and Proposed for sale to APSPDCL are furnished hereunder.

Sl.No.	Particulars	08/2016 KWH (03.08.16 to 03.09.16)
1	Gross Energy Generated	20,78,400
2	Export of Energy from APSPDCL	17,900
3	Net Energy Supplied to Grid	20,60,500
4	Energy Wheeled to Scheduled Consumers	Nil
5	Energy Sold to APSPDCL	20,60,500

> In the reference 9[th] cited, it was approved to revise the Cross Subsidy Surcharge on In-House Captive Consumption. Accordingly, the same was calculated and an amount of Rs,78,73,279/- is to be recovered from the generator towards CSS for the period from 04/2011 to 03/2016. Further, the generator has to pay an amount of Rs.60,17,116/- towards belated payment surcharge on the amount already recovered for CSS up to the period 03/2011. Hence, it is requested to recover an amount of Rs.1,38,90,395/- from the amount payable to the generator and transfer the amount recovered through TCA to the Senior Accounts Officer/Operation Circle, Kurnool along with SAP document number for accounting the same against the generator service.
>
> Sd/-
>
> Chief General Manager (Rev.& IA)"

Therefore, it appears the grievance of petitioner is that adjusting Rs.1,06,44,550/- towards CSS from the sale price payable to petitioner for sale of electricity for the month of June,2016 is illegal, arbitrary and unauthorised. It is stated that the petitioner never received demands from 2nd and 3rd respondents for a sum of Rs.78,73,279/- towards CSS and Rs.60,17,116/- towards belated payment charges. The petitioner further alleges that the impugned communication dated 26.09.2016 demanding further sum of Rs.1,38,90,395/- from petitioner by 1st respondent is arbitrary, illegal, unauthorised and unconstitutional. Hence the writ petition.

Respondents 1,3 and 4 through the Chief General Manager, Mr.K.Santosha Rao filed counter affidavit. The stand of respondents is that the writ petition is not maintainable and the reliefs sought for in the writ petition involve disputed questions of fact. The writ remedy is not appropriate and convenient for adjudication of such disputed questions of fact. It is further alleged that the subject disputes namely CSS, the demand for excess amount paid for power purchase bills and the wheeling charges are based on misconception of facts and regulations in force.

According to respondents, the petitioner commenced, at the first instance generation of power and sale of power to 3rd parties, sell balance power, if available to Discoms. The respondents admit existence of power wheeling and power purchase agreement between the parties. It is stated that the petitioner avails HT power supply from respondents to meet auxiliary consumption requirements. The petitioner established sponge iron unit in the year 2005 and clandestinely used the power supplied by the respondents to sponge iron unit. Such unauthorised use is theft under Section 126 of the Electricity Act, 2003. At the request of petitioner in the year 2013 a Committee was constituted to resolve the technical disputes and data details. The respondents admit appointment of Committee vide letter dated 30.05.2014. On 04.09.2015, the 2nd Committee submitted report. The revision of bills of petitioner has been undertaken basing on the report dated 04.09.2015. The respondents admit to levy of CSS is subject to revision of bills, subject to the final orders of APERC in this regard. This Court finds it convenient to excerpt the general reply of respondents on a crucial and relevant circumstance between the parties:

> " The 2nd committee constituted in 2014 submitted its report on 04.09.2015. Subsequently, as per the report of the said committee, the respondents finally revised the bills of power purchase, since the petitioner received excess amount towards sale of power to respondents. The respondents also levied Cross Subsidy Surcharge (CSS), which is subject to revision as per the orders that may be passed by A.P. Electricity Regulatory Commission (ERC) in that regard. Therefore, there are several disputed facts in the matter and involves

> interpretation of terms of agreement resulting in to recovery of amounts from the petitioner. Section 86 (1) (f) of Electricity Act 2003 says that all and any dispute between generator and the respondents shall be adjudicated or arbitrated by A.P. Electricity Regulatory Commission. "

The respondents justify wheeling charges by relying on decision of Apex Court in PTC India Ltd. Vs. Central Electricity Regulatory Commission[1]. The respondents pray for dismissal of the writ petition.

Mr.Gopal Chowdary appearing for petitioner contends that levy and demand of amount towards CSS for a period i.e. 2005 till date is untenable, illegal and unauthorised. He places strong reliance upon the reply of respondents to contend that the respondents admit that as on date, cross subsidy is not determined by APERC. Therefore levy and collection of CSS from consumer by observing that the collection of CSS is subject to determination by APERC, is nothing but arbitrary exercise of power. He further contends that the CSS payable by other industries, could not have been adjusted as done in the case on hand, for those consumers are not expected to get money i.e. by way of sale of power from respondents. On the contrary, in the case on hand, the petitioner is to get sale price for power supplied and the respondents without paying the amount have unilaterally set off or adjusted and recorded part satisfaction of alleged demand towards CSS etc. and such recovery is arbitrary, illegal and unavailable. He places strong reliance on Annexure P.6 dated 24.08.2006 and contends that CSS is not recommended for payment by the consumer.

[1] (2010) 4 SCC 603

Therefore, the recovery or adjustment towards CSS at this stage from the details available on record is untenable and erroneous. As regards wheeling charges or alleged excess payment of revised power bills, he fairly submits that the issue was referred to the committee vide letter dated 30.05.2014 and the report of the committee is not made available to petitioner. The respondents are under obligation to supply a copy of 2nd committee report dated 04.09.2015, consider objections of petitioner and determine the amount payable by petitioner. Therefore, he prays for setting aside the letters impugned in the writ petition and prays for refund amounts recovered or paid by petitioner from time to time.

Mr.Siva Reddy for respondents 1,3 and 4 at the outset fairly concedes that the issue of CSS is pending decision before APERC. However, he justifies the demand of CSS and also adjusting a sum of Rs.1,06,44,550/- on the ground that the adjustment is subject to orders of APERC and the bills will be accordingly revised. According to him, the respondents communicated the report dated 04.09.2014 to petitioner and the petitioner did not receive the same. Therefore, if a decision is taken based on the report, the petitioner is not justified in raising objections and according to him, the report is binding on the respondents and they have acted accordingly in the matter. Therefore, he prays for dismissing the writ petition.

I have perused the material on record, taken note of submissions of learned counsel appearing for parties and the following points are framed for consideration:

1. Whether the levy and demand of cross subsidy surcharge through letters impugned in the writ petition when the issue of cross subsidy surcharge is pending decision before the A.P. Electricity Regulatory Commission is valid, legal and tenable?

2. Whether the levy and demand through letters impugned in the writ petition any amount towards excess payment on revised power bills/wheeling charges without communicating copy of report dated 04.09.2015 to petitioner is valid, legal and tenable?

3. To what relief?

Point No.1:

Briefly restated on 31.03.2011, the unit of petitioner was inspected by the Officers of respondents 1,3 and 4. On 19.09.2011, the 3rd respondent demanded a sum of Rs.4,30,76,676/- towards CSS and differential wheeling charges on the alleged power generated from the waste heat recovery boiler steam and wheeled to 3rd party consumers between 2005-2011. The case of petitioner is that the CSS was based upon the decision of APERC for 2005-06 and 2006-07. These orders are set aside by Appellate Tribunal and confirmed by the Apex Court. Therefore, there is no determination of CSS for the period 2005-06 to 2011-12 and 2015-16. Under these circumstances, levy, demand and adjustment of amount towards CSS is arbitrary, illegal and unconstitutional. This Court is required to examine the force in these submissions if respondents 1,3 and 4 are disputing the allegations or legal basis raised by petitioner in this behalf. On the other hand, the respondents admit that determination of CSS is pending before

APERC, the amounts are claimed and the collection is subject to outcome of the decision before the APERC and revision of bills by respondents 1,3 and 4. It is not the case of respondents that pending consideration of CSS the respondents are empowered to levy and demand CSS from a consumer. The objection of petitioner is that in the absence of demur on fact or that the respondents show the authority under the Electricity Act, 2003 to levy CSS at this stage of the matter, is tenable and the temporary arrangement of adjusting the amount payable to petitioner by respondents is unauthorised. This Court is aware of the jurisdiction of APERC in determining the CSS payable by consumer and though an attempt is made by learned counsel for petitioner to consider the details given along with letter dated 24.08.2016 (annexure P.6) the details are not considered, for the issue is in the consideration of a specialised body. But at the same time, this Court has difficulty in accepting the arbitrary mode and manner of levying CSS, demanded and adjusted from the amount payable to petitioner for the power sold by it under power purchase agreement. Therefore, this point is answered in favour of petitioner and against the respondents.

Point No.2:

The point covers two disputes namely payment of excess money on revised bills and amount payable by way of wheeling charges by the petitioner. The relevant circumstance which has bearing on the consideration of the instant point is that from the inception of the dispute between the parties, both the sides are trying to iron out a few technical issues, details of quantity of waste steam generated, consumer diversified and utilised etc. The respondents have admitted to the necessity sorting out these technical details by constituting a Committee. The Committee has given report dated 04.09.2015. This Court is of the view that deciding amount payable under these heads by relying upon the report dated 04.09.2015 without furnishing a copy to petitioner does not appear to be conforming to the requirement of fairness in action and principles of natural justice. The report now given by the Committee is likely to be the basis on which further decision is taken by respondents 1, 3 and 4. Therefore, the petitioner is given opportunity to make its representation on the disputed areas between the parties. As the dispute relates to arriving at various quantities on appreciation of technical principles and their adoption on project the copy ought to have been made available to petitioner and thereafter further steps in this regard ought to have been taken up by respondents 1, 3 and 4. The reply of learned standing counsel that the report was sent to petitioner and the cover was refused firstly is not supported by evidence and secondly this Court has difficulty in appreciating the lack of initiative on the part of respondents 1,3 and 4 in serving the copy to petitioner by other mode namely e-mail address of the company. Therefore, on the ground that the disputes covered by this point are decided and amounts demanded without furnishing the copy of the report dated 04.09.2015, the point is answered in favour of petitioner and against the respondents.

<u>Point No.3</u>:

The Court has considered the authority of respondents to levy and demand CSS from petitioner and that the further levy and demand under different heads is violative of fairness of action and principles of natural justice. The Court having regard to the correspondence from 25.07.2016 till 14.09.2016 confines refund of a sum of Rs.1,06,44,550/- to petitioner within two weeks from the date of receipt of copy of this order. The prayer covered by 'F' in the considered view of this Court is pursuant to the orders of this Court in WPMP No.22455 of 2014 in W.P.No.17912 of 2014. The amounts deposited pursuant to the said interim order, it is made clear, are in terms of the order of this Court and are subject to decision of all disputes between the parties.

The writ petition is ordered as indicated above. Though the Court is inclined to award exemplary costs, Mr.Siva Reddy persuades the Court to impose nominal costs of Rs.2,000/-. The costs of Rs.2,000/- is payable by respondents along with the refund referred to above.

Miscellaneous petitions, pending if any, shall stand closed.

S.V.BHATT,J

Date:23.12.2016
Stp