

THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM

WRIT PETITION No.34838 of 2011

ORDER:

This writ petition is filed seeking the following relief:

“to declare the paragraphs 6 and 7 of the 3rd respondent's letter No.APERC/E-205.DD Dist/2011 dated 17.10.2011 issued by its Deputy Director (Distribution), as illegal, arbitrary, unreasonable, irrational and contrary to law; to declare the demands of the 1st respondent upon the petitioner for any differential amounts for the months of April 2010 to November 2011 in and by letters SE/O/ELR/SAO/HT/D.No.793/11 dated 7.12.2011 and SE/O/ELR/SAO/HT/D.No.794/11 dated 7.12.2011 and/or otherwise pursuant to paragraphs 6 and 7 of the 3rd Respondent's letter AAPERC/E-205/DD Dist/2011 dated 17.10.2011 for the aforesaid periods and also for subsequent periods as illegal and to set aside the same; and to direct refund of any of amounts paid by the Petitioner in the meantime pursuant to impugned demands or on any other basis or letters or orders under coercive threats or otherwise together with compensatory costs.”

2. The facts, in brief, are that petitioner-The Andhra Sugars Limited, is an Industrial concern availing power from respondent No.1 and also energy generated by respondent No.4 as a participating Industry. Petitioner being a shareholder of respondent No.4 generating company, is entitled to avail 18.06 megawatts of power generated by respondent No.4 in terms of the Memorandum of Understanding dated 19.04.1997. The Andhra Pradesh Electricity Regulatory Commission-Respondent No.3, vide letter dated 06.05.2010 issued certain directions with regard to the method and manner of computation of

the energy consumed by the petitioner, which is in contradiction with the Memorandum of Understanding dated 19.04.1997 entered into between the petitioner and respondent No.4. Respondent No.3 purported to have issued the impugned letter dated 17.10.2011, at the instance of the DISCOMS seeking clarification dated 20.06.2011. Petitioner is particularly aggrieved with paragraphs 6 and 7 of the letter dated 17.10.2011. Said letter, in turn, was purported to have been issued as a clarification to the proceedings dated 06.05.2010 of respondent No.3.

3. While the letter dated 06.05.2010 issued by respondent No.3 is challenged independently by the petitioner by filing W.P.No.26566 of 2010 both on merits as well as on the grounds of violation of principles of natural justice, the present writ petition is filed challenging the letter dated 17.10.2011 and the principal ground of challenge is that the impugned letter is issued in the name of the Deputy Director (Distribution) is totally unauthorized and in contravention of the procedure prescribed under the Central Electricity Regulatory Commission, (Conduct of Business) Regulations, 1999 (for short, "the Regulations").

4. Counter affidavit is filed by the respondents, in which a stand taken by the third respondent that the letter dated 17.10.2011 is only a communication from the Deputy Director and, in fact, the same is the culmination of the Review Meeting held on 26.09.2011, whereunder the Commission directed that necessary directions be issued.

Elaborating further by making reference to Sections 9 and 54 of the AP Reforms Act and the Regulations, it is submitted by the third respondent that the letter/order dated 17.10.2011 is the order of the Commission and with the approval of the Chairman, an Officer of the Commission has communicated it to the distribution companies.

Relevant paragraphs of the counter affidavit reads as follows:

“6. As per the provisions of the Andhra Pradesh Electricity Reform Act, 1998 all decisions, directions and orders of the Commission shall be in writing. Sub-section (7) of Section 9 of the Reform Act is extracted here under for reference:

“All decisions, directions and orders of the Commission shall be in writing and shall be supported by reasons. The decisions, directions and orders of the Commission shall be available for inspection by any person and copies of the same shall also be made available in a manner the Commission may prescribe.”

7. In exercise of the powers conferred by Section 9(2) and Section 54 (2) (a) of the Andhra Pradesh Electricity Reform Act, 1998 the Andhra Pradesh Electricity Regulatory Commission made the APERC (Conduct of Business) Regulations, 1999 and manner of communication of orders/decisions of the Commission is mentioned in Regulation 19 thereunder. The relevant Regulations are extracted hereunder for reference:

19. Orders of the Commission

(1) XXXXXXXX

(2) XXXXXXXX

(3) All orders and decisions issued or communicated by the Commission shall be certified by the signature of the Secretary or an Officer empowered in this behalf by the Chairman and bear the official seal of the Commission.

(4) All final orders of the Commission shall be communicated to the parties in the proceeding under the signature of the Secretary or an Officer empowered in this behalf by the Chairman or the Secretary.”

8. Section 92 of the Electricity Act, 2003 deals with “Proceedings of Appropriate Commission” and relevant Sub-Section thereunder is extracted hereunder for reference:

(5) All orders and decisions of the Appropriate Commission shall be authenticated by its Secretary or any other officer of the Commission duly authorized by the Chairperson in this behalf.”

5. It is the contention of the learned counsel for the petitioner that the Deputy Director (Distribution) is not competent authority to make an order/a communication as it is the Commissioner alone who is the

competent authority and authorized to make an order under Section 11 read with Regulations 7, 18 and 19 of the Regulations.

6. On the other hand, Sri P.Srinivasa Rao, learned counsel appearing for the third respondent, submits that inasmuch as the very proceedings dated 06.05.2010 has been set aside in W.P.No.26566 of 2010, there is no necessity to adjudicate the present writ petition as the letter dated 17.10.2011 is only a clarification with respect to the Commission's proceedings dated 06.05.2010. Learned counsel would also reiterate the contents of the counter affidavit contending that the letter dated 17.10.2011 is only a communication of the decision made by the Commission.

7. Having considered the respective submissions, the method and manner of conduct of proceedings before the Commission culminating an order is governed under the APERC Regulations, particularly Regulations 7 to 19 of the Regulations. It may be noted that in the case on hand the petitioner is aggrieved with paragraphs 6 and 7 of the impugned letter. For appreciation of the controversy, the said paragraphs are extracted hereunder:

“6. In case of power purchase from other than DISCOMs, APTRANSCO and DISCOMs are only transport companies to transmit power purchased from the generator end to the consumer end. Transmission and Distribution Losses are inherent property of the system. The losses do happen in both demand and energy. The Demand Integrated with respect to time is energy. The transmission or Distribution Company cannot bear the losses.

7. In view of the above, it is clarified that, to arrive at the demand share of participating industry, the net energy share of participating industry has to be divided with the number of calendar hours of the billing month.”

8. As it is the contention of the petitioner that the same is in contravention of the Memorandum of Understanding dated 19.04.1997 between the petitioner and the fourth respondent, particularly, clause 1.1 r/w clause 2.1 and the same also may be noted as under:

“1.1 Actual delivered capacity at interconnection point in MB is $A/B \times 1000$ where A: is the energy units in kilo-watt hours actually delivered at the interconnection point during a month. B: No. of hours in the month. The above is applicable to and between the Party of the 1st part and the second part.

2.1. Basis for sharing of Demand and Energy: The Participants agree that both demand and energy to be generated out of the proposed Power Generating Station of the Company shall be shared by them in proportion to the number of shares held in the expansion project from time to time.

The sharing of Actual Delivered Capacity (i.e. Demand and Energy) out of the proposed power Generating station shall be pro-rata with reference to the number of shares held in the expansion project i.e., the capacity sharing shall be proportional to the actual delivered capacity and net energy delivered at the interconnection point during the Billing Month. The demand and energy delivered shall be regulated on monthly basis by the party of the first part.”

9. A reading of the same disclose that the method in which the Commission seeks to contribute the energy and recovering of the charges is in contradiction with the terms of the Memorandum of Understanding, which is in force for the last about twenty years. Admittedly, there are two stages in the Memorandum of Understanding i.e., stages I and II. These aspects are not in dispute. The net effect of clarification which is being sought by the distribution companies through their letter dated 20.06.2011 is a clarification to the order of the Commission dated 06.05.2010. An order of the Commission, which is made following the procedure prescribed under the Act, can be varied only in the manner prescribed under the Act and the Regulations. While the Commission is entitled to review its order either

suo motu or on an application under Section 94(1)(f) of the Electricity Act, 2003 so far as the procedure prescribed is concerned, is governed by the Regulations, particularly Regulations 7.2.2, 18 and 19. In the case on hand, it is not in dispute that the procedure prescribed has not been followed and as a matter of fact even with respect to the Commission orders dated 06.05.2010 have been declared as null and void and set aside by this court on the grounds of affected parties not having been given adequate opportunity. Though in the light of allowing of the W.P.No.26566 of 2010, the very basis of the impugned communication dated 17.10.2011 does not in fact survive and the validity of the same is considered in this writ petition from the angle of the method and manner in which the proceedings have emanated, particularly considering the specific contentions raised by the petitioner in relation to the same being issued in contravention of the Regulations.

10. Inasmuch as the impugned proceedings have been issued in contravention of the Regulations, which is impermissible, the letter dated 17.10.2011 is declared ultra vires and accordingly set aside and consequently the demands raised pursuant to the same are also set aside.

Writ petition is, accordingly, allowed. As a sequel, the miscellaneous applications, if any, shall stand closed. There shall be no order as to costs.

JUSTICE CHALLA KODANDA RAM

December 13, 2016
LMV

