

THE HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

WRIT PETITION No. 27210 OF 2017

ORDER :

This writ petition is filed for the following relief;

“..... To issue an appropriate Order, Writ, or Direction more particularly one in the nature of Writ of Mandamus under Article 226 of the Constitution of India (1) for declaring the impugned letter issued by the 3rd respondent in D.No.534/2017, dt. 30.06.2017, by rejecting petitioner's request for availing open access power on the ground that the allowance of open access facility is not possible due to non-availability of distribution network corridor by rejecting their application as illegal, arbitrary, in violation of provisions contained under Sec.42(2) of Indian Electricity Act 2003, read with provisions of Andhra Pradesh Regulatory Commission, Terms and Conditions of Open Access regulation, 2005, (Regulation 2 of 2005) and more specifically the respondents herein are stopped from denying petitioner's request by going behind their earlier promise under the principle of Promissory Estoppel and thus to set aside the same. Consequently, the respondents may be directed to process the allowance of open access facility at entrance point and exit point immediately in the interest of justice, and to award compensation for causing damage to their interest by the respondents under their irresponsible handling of the matters arising out of allowance of open access supply system as petitioner's have already incurred heavy loss; (2) and to grant any such other or further relief as may be deemed fit and proper under the circumstances of the case;

Sri A.Sudershan Reddy, learned Senior Counsel appearing for the petitioner submits that after filing of application by the petitioner to make available open access to their company to get power supply from Tata Power Company Limited through the distribution system of the respondents, petitioner was asked to pay Rs.3,75,000/- towards charges for granting open access supply under Regulation 2 of AP/TS Regulatory Commission(Terms and Conditions of Open Access) Regulation 2005; that the petitioner has also paid Rs.3,75,000/- to the respondents; and that when the respondents have not accorded approval for open access supply of electricity to the petitioners after remitting the aforesaid amount, petitioner filed WP.No.7533 of 2017 and the same was disposed of directing the petitioner to make representation afresh for redressal of its grievance, explaining all the things, within a period of two weeks from the date of receipt of copy of the order and on such representation the respondents are directed to consider and take appropriate action, in accordance with law, within a period of two months thereafter. In pursuance of the aforesaid order now the impugned order is passed, rejecting the application of the petitioner on the ground of non-availability of distribution network corridor and also on the ground that the petitioner has not made representation within two weeks from the date of receipt of order in WP.No.7533 of 2017, which is illegal. He also submits that as per Section 42(2) of the Electricity Act, 2003 and as per 8.2 of Regulation 2 of Regulations, 2005, no eligible should be denied open access on the ground of operational constraint system.

On the other hand Sri R.Vinod Reddy, learned Standing Counsel for respondents basing on the counter submits that due to non-availability of net work corridor, the application of the petitioner for open access could not be considered. He also submits that petitioner can make application afresh and on such application the respondents again look into the aspect of availability of net work corridor and basing on the same his application will be considered.

In this case it is to be seen that the facts that the petitioner made application for open access; that the petitioner was asked to pay necessary charges and that the petitioner paid necessary charges for considering their application for grant of open access are all not disputed. Though several contentions raised in the counter affidavit, but the impugned order is passed rejecting the application of the petitioner for open access only on the ground of non-availability of net work corridor and also on the ground that the petitioner has not made application within the period stipulated in WP.No.7533 of 2017. Both the grounds have to be rejected by virtue of para 8.2 of the Regulation 2 of Regulations, 2005, which reads as follows;

“The licensees shall make all reasonable attempts to ensure that operational constraints in Transmission and/ or Distribution System as the case may be, including metering, communication systems, capacity determination, etc. are removed as per the phasing plan indicated above so that, as far as possible, no eligible consumer is denied open access on the ground of operational constraints in the system.”

Section 42(2) reads as follows

42. Duties of distribution licensees and open access:

(2) The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constraints:

Provided that [such open access shall be allowed on payment of a surcharge] in additional to the charges for wheeling as may be determined by the State Commission:

Provided further that such surcharge shall be utilised to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee:

Provided also that such surcharge and cross subsidies shall be progressively reduced in the manner as may be specified by the State Commission:

Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use:

[Provided also that the State Commission shall, not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003 (57 of 2003) by regulations, provide such open access to all consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt.]

In view of Regulation 2 of Regulations, 2005, the Open Access cannot be denied only on the ground of operational constraint in the system. In this case it is not the case of the respondents that the petitioner is not eligible for open access. In the impugned order the application of the petitioner for open access was rejected on the ground

of operational constraints which is not in tune with para 8.2 of Regulation 2 of Regulations, 2005.

Learned Single Judge also considered the similar issue in WP.No.25144 of 2017 and allowed the writ petition and the relevant para of the said Judgment reads as follows;

“.....Petitioner also pointed out that the letter dt.04.08.2017 issued by 2nd respondent after filing of the Writ Petition refusing permission to avail open access on the alleged ground of non-availability of distribution network corridor cannot stand since such a reason has not been assigned in the counter-affidavit filed subsequently.

10. I completely agree with the contentions of the learned counsel for petitioner.

11. Once the respondents have themselves admitted that the petitioner has a dedicated/independent feeder after it took additional load of 4500 KVA, and the 2nd respondent himself sanctioned such additional load, for which the petitioner erected a dedicated line in 2017, the reason assigned in the counter-affidavit that the petitioner is being fed through mixed/express feeder, is factually incorrect.

12. Once the respondents have developed and are maintaining distribution network as per the provisions of the Act, and have introduced ‘open access’ governed by Regulation 2 of 2005 of APERC, they cannot deny such open access to the petitioner by giving dubious reasons in counter-affidavit and discriminate the petitioner vis-à-vis other HT industries in the area.”

This Court also granted interim order considering the same in WP.MP.No.44559 of 2013 in WP.No.35829 of 2013.

In view of the aforesaid facts and circumstances, the impugned order is set aside and the writ petition is allowed. No order as to costs.

As a sequel thereto, miscellaneous petitions, if any, pending in the writ petition, shall stand closed.

A.RAJASHEKER REDDY, J

20.09.2019
tk



THE HON'BLE SRI JUSTICE A.RAJASHEKER REDDY



WRIT PETITION No. 27210 of 2017

20.09.2019

tk