

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,
BENGALURU**

Dated : 1st January, 2015

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| 1. Sri M.R. Sreenivasa Murthy | Chairman |
| 2. Sri H.D. Arun Kumar | Member |
| 3. Sri D.B. Manival Raju | Member |

Complaint No.3/2014

BETWEEN:

Jasper Energy Private Limited,
701 & 702, Prestige Meredian-II,
M.G. Road,
Bengaluru – 560 001

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COMPLAINANT

[Represented by M/s. Link Legal India Law Services, Advocates]

AND

- 1) Karnataka Power Transmission Corporation Limited,
Kaveri Bhavan,
Bengaluru – 560 009
- 2) Hubli Electricity Supply Company Limited,
P.B. Road,
Hubballi – 580 029
- 3) State Load Despatch Centre – Karnataka,
Ananda Rao Circle,
Bengaluru – 560 009

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RESPONDENTS

[Respondents 1 & 2 represented by M/s. Justlaw, Advocates]

- 1) This Complaint Petition is filed under Section 142 read with Section 146 of the Electricity Act, 2003, praying for :

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- a) Securing compliance of the consequential Order dated 13.6.2013 in OP No.28/2011, by directing Respondent-2 to execute a Wheeling & Banking Agreement (W&BA);
 - b) Initiating appropriate action against Respondent 2 under Section 142 of the Electricity Act 2003 for willfully disobeying the order of the Commission; and
 - c) Initiating appropriate action against Respondents-1 and 3 for not discharging their statutory functions, in directing Respondent-2 to execute the W&BA.
- 2) The brief background of this case is as hereunder;
- (a) The complainant had executed a Power Purchase Agreement (PPA) with Respondent-2 on 1.2.2007 for sale of power from its Mini-Hydel Power Project of 10.5 Mega Watts (MW) Capacity. Alleging defaults by Respondent-2, the Complainant had filed OP No.28/2011 before the Commission for a declaration that the PPA had been validly terminated by it, vide termination notice dated 5-11-2011, and for permission to avail open access. The Petition was disposed of by the Commission on 7.6.2012, holding that the termination of PPA was invalid. The Complainant challenged this order of the Commission in Appeal No.145/2012 before the Hon'ble Appellate Tribunal for Electricity (ATE). The Appeal was allowed, vide Judgment dated 30.4.2013 holding that the Termination

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Notice dated 5.4.2011 was valid. The Hon'ble ATE directed the Commission to pass consequential Orders in the light of the findings given in the said Order. Pursuant to receipt of the Hon'ble ATE's Judgment, the Commission passed an Order in OP No.28/2011 on 13.6.2013, to the effect that the Petitioner (Complainant) may file an application seeking open access and the Respondents shall consider the same in accordance with applicable Regulations. Alleging that the Order of the Commission has not been complied with, this Complaint Petition is filed on 19.3.2014.

- 3) On issuance of notice, Respondents 1 & 2 entered appearance through their counsel. The Respondents have not filed any written submissions. The Respondents have all through the hearing of the case submitted that a Civil Appeal filed by them before the Hon'ble Supreme Court against the Judgment in Appeal No. 145/2012, is pending.
- 4) The point which arises for consideration is, whether the Respondents are liable to be penalised under Section 142 of the Electricity Act 2003, for non-compliance of the Order dated 13-6-2013 passed by this Commission in OP No.28/2011.
- 5) We have heard the learned counsel for both parties. The learned counsel for the Complainant submitted that the statutory right of Open Access is curtailed by Respondent-2, as the application for Open Access filed on 29.6.2013 has not been considered by Respondent-2, although Bangalore

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Electricity Supply Company Limited (BESCOM) and Respondent-3 have signed the Agreement. He has submitted that the Civil Appeal before the Hon'ble Supreme Court has not been admitted and no Stay Order granted. He has further insisted that the Order of the Commission dated 13.6.2013 has to be complied with by the Respondents. The learned counsel for the Respondents has submitted that the Civil Appeal in the matter has been admitted on 1.11.2013 and Notice has been issued on the prayer for interim relief of staying the operation of the Hon'ble ATE's Order, and that, if the Order of the Commission to grant Open Access is complied with, the Civil Appeal before the Hon'ble Supreme Court would become infructuous. He, therefore, requested that the hearing on the Complaint Petition be deferred. The learned counsel for the Respondents has also submitted the following citations in support of his contention that no penal action should be taken for non-compliance of an Order, when an Appeal against such Order is pending before the Hon'ble Supreme Court :

- (a) (2004) 2 SCC 747 (Union of India & others Vs. West Coast paper Mills Limited and another).
- (b) 1995 Supp (3) SCC 434 (Chhavi Mehrotra Vs. Director General, Health Services).

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- (c) AIR 1986 SC 1323 (D.K. Trivedi & Sons & Others Vs. State of Gujarat and others).
- 6) It is the case of the Complainant that Respondent-3 and BESCO have signed a W&BA upon the request made by the Complainant for open access on 29.6.2013, but open access is not granted so far, as Respondent-2 has failed to sign the W&BA. It is the case of Respondent-2 that it has challenged the Judgment of the Hon'ble ATE, declaring that the PPA has been validly terminated, by filing the Civil Appeal before the Hon'ble Supreme Court, and that the said Civil Appeal has been admitted and Notice issued on the interim prayer, on 1-11-2013.
- 7) Admittedly, Civil Appeal No.10293/2013 (earlier Civil Appeal D.No.26007/2013) is pending before the Hon'ble Supreme Court. In the above circumstances, it is to be seen whether penal action could be initiated against Respondent-2 for non-compliance of the Order dated 13.6.2013 of this Commission passed in OP No.28/2011, and whether any subsequent developments come in the way of Respondent-2 complying with the said Order. The decisions cited by the learned counsel for the Respondents relate to the action that could be taken by a lower forum when an Appeal is preferred before the Hon'ble Supreme Court and when the same is admitted.

- 8) In **(2004) 2 SCC 747** (Union of India & others Vs. West Coast paper Mills Limited and another), the Hon'ble Supreme Court has held as follows:

"14.....Once a special leave is granted and the appeal is admitted, the correctness or otherwise of the judgment of the Tribunal becomes wide open. In such an appeal, the court is entitled to go into both questions of fact as well as law. In such an event the correctness of the judgment is in jeopardy.

15. Even in relation to a civil dispute, an appeal is considered to be a continuation of the suit and a decree becomes executable only when the same is finally disposed of by the court of appeal."

- 9) In **1995 Supp (3) SCC 434** (Chhavi Mehrotra Vs. Director General, Health Services), the Hon'ble Supreme Court, has held as follows:

"1..... It is a clear case where the High Court ought not to have exercised jurisdiction under Article 226 where the matter was clearly seized of by this Court in a petition under Article 32. The petitioner was eo nomine a party to the proceedings before this Court. It is an unhappy situation that the learned Judge of the High Court permitted himself to issue certain directions which, if implemented, would detract from the plenitude of the orders of this Court. The learned Single Judge's perception of justice of the matter might have been different and the abstinence that the observance of judicial propriety, counsels might be unsatisfactory; but judicial discipline would require that in a

hierarchical system it is imperative that such conflicting exercise of jurisdiction should strictly be avoided....”.

- 10) In **AIR 1986 SC 1323** (*D.K. Trivedi & Sons & Others Vs. State of Gujarat and others*), the Hon'ble Supreme Court has stated thus:

“83. Civil Appeal Nos. 1525 and 1526 of 1982 are directed against the order of the Gujarat High Court dismissing the writ petitions filed by the Appellants challenging the constitutionality of section 15 of the Mines and Minerals (Regulation and Development) Act, 1957, and the validity of Notification No.GU-81/75/MCR2181/(168)-4536-CHH dated June 18, 1981, and directing the Appellants to approach the Supreme court as similar matters were pending there. In our opinion, the course adopted by the High Court was not correct. If the High Court thought that the point raised by the Appellants was the same as was pending in this Court, it ought to have stayed the hearing of the writ petitions until this Court disposed of the other matters.”

- 11) The Hon'ble Supreme Court has held in the above decisions that, in a situation where an Order is appealed against before the Hon'ble Supreme Court, it is not proper on the part of subordinate Courts or other authorities to proceed to seek implementation of such Order.
- 12) In this case, the Respondent-2 has filed the Civil Appeal and the same has been admitted by the Hon'ble Supreme Court on 1.11.2013. The interim

prayer in the Civil Appeal is pending consideration. In the said circumstances, we feel that it would not be proper for us to direct the Respondent-2 to comply with the Order of the Commission dated 13.6.2013.

- 13) Now, we need to see if penal proceedings have to be initiated against the Respondent-2 under Section 142 of the Electricity Act, 2003, which reads thus :

“142. Punishment for non-compliance of directions by Appropriate Commission.

In case any complaint is filed before the Appropriate Commission by any person or if that Commission is satisfied that any person has contravened any of the provisions of this Act or the rules or regulations made thereunder, or any direction issued by the Commission, the Appropriate Commission may after giving such person an opportunity of being heard in the matter, by order in writing, direct that, without prejudice to any other penalty to which he may be liable under this Act, such person shall pay, by way of penalty, which shall not exceed one lakh rupees for each contravention and in case of continuing failure with an additional penalty which may extend to six thousand rupees for every day during which the failure continues after contravention of the first such direction”.

- 14) As could be seen from the above provision of law, before initiating the penal proceedings against any person, the Commission has to satisfy itself

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that he has contravened any of the provisions of this Act or the Rules or Regulations made thereunder, or any direction issued by the Commission. In the facts and circumstances of the present case, as discussed in the preceding paragraphs, we are not satisfied that Respondent-2 is liable to be punished under Section 142 of the Electricity Act, 2003. The situation would have been different, if Respondent-2 had not complied with the Order of the Commission and also not challenged the same in Appeal. Such action could have been assumed as wilful disobedience / non-compliance of the Order of this Commission. It is not so in the present case.

- 15) We deem it appropriate to quote the relevant portion of the decision of the Hon'ble Supreme Court reported in **1969 (2) SCC 627** (*M/s Hindustan Steel Ltd –Vs- State of Orissa*) as follows:

“8.....An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, that authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a

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technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute."

- 16) In this case, the statute provides for appeal remedies before Hon'ble ATE and Hon'ble Supreme Court. The Respondent-2 having availed of appeal remedy, cannot be held to have acted in a manner violating the Order of the Commission, necessitating initiation of punitive action, as the interim prayer made in the Civil Appeal is still under consideration before the Hon'ble Supreme Court.
- 17) Therefore, considering the facts and circumstances of the case, we are of view that it is not appropriate to initiate any penal action against Respondents, at this point of time.
- 18) For the foregoing reasons, we pass the following :

ORDER

The Complaint Petition is rejected.

Sd/-

(M.R. SREENIVASA MURTHY)
CHAIRMAN

Sd/-

(H.D. ARUN KUMAR)
MEMBER

Sd/-

(D.B. MANIVAL RAJU)
MEMBER