

N./18/19/20/21 of 2020

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,
No.16, C-1, Millers Tank Bed Area, Vasanth Nagar, Bengaluru-560 052.**

Dated: 14.09.2021

Present

Shri Shambhu Dayal Meena : Chairman
Shri H.M. Manjunatha : Member
Shri M.D. Ravi : Member

1. RP No.01/2020

BETWEEN:

P. Venganna Setty & Brothers,
A partnership firm registered under
the Partnership Act, 1932

Having its registered office at Baldota Enclave,
Abheraj Baldota Road,
Hospet – 583 203,
Karnataka.

.... PETITIONER

[Represented by Shri Aditya Narayan, Advocate
for M/s Saakshya Law]

AND:

Mangalore Electricity Supply Company Limited,
A Government of Karnataka undertaking
incorporated under the Companies Act, 1956,

Having its registered office at Paradigm Plaza
A B Shetty Circle,
Mangalore – 565 101.

.... RESPONDENT

[Represented by Sri Shahbaaz Husain Advocate]

2. RP No.02/2020

BETWEEN:

MSPL Limited,
A Company incorporated under
the Companies Act, 1956

Having its registered office at Baldota Bhavan,
117, Maharshi Karve Road,
Mumbai – 400 020.
Maharashtra.

and its Corporate office at Baldota Enclave
Abheraj Baldota Road,
Hospet – 583 203,
Karnataka.

.... PETITIONER

[Represented by Sri Aditya Narayan, Advocate
for M/s Saakshya Law]

AND:

Mangalore Electricity Supply Company Limited,
A Government of Karnataka undertaking
incorporated under the Companies Act, 1956

Having its registered office at Paradigm Plaza,
A B Shetty Circle,
Mangalore – 565 101.

.... RESPONDENT

[Represented by Sri Shahbaaz Husain, Advocate]

3. RP No.03/2020

BETWEEN:

P. Venganna Setty & Brothers,
A partnership firm registered under the
Partnership Act, 1932

Having its registered office at Baldota Enclave,
Abheraj Baldota Road,
Hospet – 583 203,
Karnataka.

.... PETITIONER

[Represented by Sri Aditya Narayan, Advocate
for M/s Saakshya Law]

AND:

Gulbarga Electricity Supply Company Limited,
A Government of Karnataka undertaking
incorporated under the Companies Act, 1956

Having its registered office at Station Main Road
Gulbarga – 585 102.

[Represented by Sri Shahbaaz Husain, Advocate]

.... RESPONDENT

4. RP No.04/2020

BETWEEN:

Ramgad Minerals and Mining Limited,
A Company registered under
the Companies Act, 1956

Having its registered office at Baldota Enclave,
Abheraj Baldota Road,
Hospet – 583 203,
Karnataka.

[Represented by Sri Aditya Narayan, Advocate
for M/s Saakshya Law]

.... PETITIONER

AND:

Gulbarga Electricity Supply Company Limited,
A Government of Karnataka undertaking
incorporated under the Companies Act, 1956

Having its registered office at Station Main Road,
Gulbarga – 585 102.

[Represented by Sri Murugesh V Charati &
Ms. Latha S.S. Advocates]

.... RESPONDENT

COMMON ORDERS

1. In the above cases, the questions of fact and law in dispute are similar,
therefore, this Common Order is being passed.

2. These are Review Petitions for review of the common order dated 28.02.2019, passed in OP Nos.123/2017 to 126/2017. The Review Petitioners are petitioners in OP Nos.123/2017 to 126/2017 respectively.
3. The Review Petitions are filed before this Commission on 14.01.2020. The Review Petitioners claim that they received the certified copy of the common order on 15.03.2019, issued by the Registry of this Commission. They have filed applications in each of the Review Petitions praying for condonation of delay of 215 days in filing the Review Petitions, for the reasons stated in the said applications. It is not in dispute that the period of limitation provided for filing the Review Petition is 90 days from the making or issuing of the Order under review as specified in Regulation 8 of the KERC (General & Conduct of Proceedings) Regulations, 2000. Therefore, the Review Petitioners stated that there was delay of 215 days in filing the Review Petitions.
4. In all the applications filed for condonation of delay in filing the Review Petitions, the grounds urged for condoning the delay, are one and the same and they are at paras 4 to 7 of the said applications. These paras read as follows.

“4. It is submitted that as per the common orders of this Commission, the respondent was directed to make payments to the petitioner, and both parties were directed to prepare memo of calculations of the amounts due to the petitioner based on the common order. It is humbly submitted that the petitioner initially focussed its efforts on,

first, preparing the calculations as per the common order as directed by this Commission, and second, in reconciling the differences in figures, as calculated by the petitioner and as calculated by the respondent, to settle the dispute, as per the common order.

5. Further, it is submitted that the petitioner, in its attempts to settle the matter, verily believed that the respondent will make all efforts to ensure the petitioner was paid its dues, and that disputes of the same nature would not arise any further. Thereafter, however, due to the respondent's repeated delayed payments since the filing of OP No.123/2017 and despite the common order dated 28.02.2019, the petitioner was forced to make its best efforts to procure and collate all necessary information and seek advice from its counsels for filing the present petition.

(Note: In the above para 5, in RP Nos.1 & 2 it is stated that the final orders dated 28.02.2019 were complied with by the respondent on 19.12.2019 and 27.08.2019 respectively and in RP Nos.3 & 4 it is stated that the final orders dated 28.02.2019 are not yet fully complied with by the respondent)

6. It is humbly submitted that due to the nature of the case and the facts laid out hereinabove, delays arose, along with certain delays in procuring and collating the necessary information and documents and conveying the same to the counsel, despite the petitioner's best efforts.
7. It is submitted that the delays occurred due to the reasons mentioned above, is genuine, *bona fide* and has not arisen due to negligence."

5. Therefore, it is prayed to allow the applications for condonation of delay in filing the Review Petitions.
6. The gist of the grounds urged in the Review Petitions, are stated to be the very same grounds urged in the rejoinders filed by the Review Petitioners in OP No.123 to 126 of 2017 to the respondents' Statement of Objections filled in the said original proceedings. They are as follows:
 - a) That the petitioners' claim for monies due in respect of delayed payments made between 2006-07 until 22.07.2014, is not barred by limitation as the petitioners' account with the respondents is a running account and dues pending from the respondents to the petitioners are united to form one continuous demand since the commencement of the Power Purchase Agreement till date;
 - b) That the petitioners commenced supplying electricity to the respondents from the commissioning of the respective wind projects, and raised invoices from time to time. The respondents treated the total outstanding dues owed to the petitioners under the said invoices as a single debt, and made payments towards the debt, on an *ad hoc* basis, in lump sums. Further, the respondents computed the charges for meter reading on the total monies paid, in every instance, instead of invoice wise;
 - c) It is settled law that where supplies are made from time to time, and the payment for the said supplies are also made from time to time,

such account is considered as a running account and the limitation for recovery of monies due is to be computed from the date of the last payment as per Article 14 read with Article 19 of the Limitation Act;

- d) The petitioners were continuing to supply electricity to the respondents and continued to receive payments towards the invoices raised by the petitioners for the supplies made by them. The last payment made by the respondents in favour of the petitioners was in December 2017 (as on the date of filing the rejoinder). Therefore, it is clear that petitioners' claims were well within the period of limitation.
- e) That this Commission misinterpreted the applicability of the Judgment passed by the Hon'ble Delhi High Court, in Ashok Parshad Vs. Mahalaxmi Sugar Mills Co. Limited, while passing the impugned Orders. That the meaning of 'running account' as interpreted in Ashok Parshad's case was not appreciated properly in the impugned Order.
- f) That in the facts and circumstances brought out in the original proceedings, it is made out that the accounts maintained by the Review Petitioners relating to the energy supplied to the respondents, was running account and also there was continuous breach of agreement regarding payment of interest, there by Section 22 of the Limitation Act was applicable.
- g) This Commission had not considered all these aspects while holding that the claims for interest were time barred.

- h) Therefore, there was error apparent on the face of record in the impugned Orders. Therefore, it is requested to allow the Review Petitions.
7. The respondents appeared and objected both the applications for condonation of delay as well as the application for review of the Impugned Common Order. The respondents have filed objections to the Interim applications as well as to Review Petitions in the Statement of Objections filed by them.
8. The following grounds are urged to oppose the Interim Applications for condonation of delay in filing the Review Petitions. The said grounds stated in para 3 of the Statement of Objections, are as follows:
- a) The Review Petition is time barred as per the Karnataka Electricity Regulatory Commission (General and Conduct of Proceedings) Regulations, 2000. The Regulations mandate that the Review Petition be filed within 90 days from the date of the Order under review. The petitioner has filed the Review Petition after an inordinate delay of 215 days from the date of the Order under review. No cogent reasons explaining such delay are forthcoming from Interlocutory Application for Condonation of Delay filed by the petitioner.
- b) In this Interlocutory Application for Condonation of Delay, the petitioner has merely stated that preparing the calculations, reconciling the figure differences and obtaining level advice led to

delay in filing the Review Petition. The period of 90 days as envisaged under the aforesaid regulations were sufficient to cater to the respondent's grievances that allegedly caused delay in filing the Review Petition.

- c) In any case, the petitioner in the instant Review Petition has sought payment of interest that accrued prior to 22.07.2014, which relief has no relevance to the issue of reconciliation. The averment that the respondent delayed in making payment subsequent to the Order under review is denied as false. The respondent has promptly made the payment in terms of the Order review. It is the petitioner which sought additional interest on some invoices on untenable grounds, which came to be dismissed by this Hon'ble Commission. Wherefore, the petitioner has not adduced any cogent reason for the inordinate and extra-ordinary delay in filing the Review Petition and accordingly the instant petition is liable to be dismissed at its threshold.

9. The objections to Review Petitions as narrated in para 3.5 to 3.9 are as follow:

“3.5) It is a settled provision of law as established by the Hon'ble Supreme Court and also by the Civil Procedure Code that scope of Review Petition is highly limited and restricted to patent errors, if any in the Order under review and the provision certainly does not allow the petitioner to force adjudication of decided matters without pointing out patent and grave errors. Grievances, if any

pertaining to interpretation of rules or application of law on facts cannot be deliberated upon in Review Petition, unlike an appeal.

3.6) The power of Review is distinct from the power of the courts to hear Appeals. The purpose of reviews is limited to remedying an apparent error. The Supreme court in *Akhilesh Yadav Vs. Vishwanath Chaturvedi and Ors.* has upheld this position, the relevant portion of the judgment is quoted hereunder:

“As far as the others review petitioners are concerned, we have to keep in mind that the scope and ambit of a review proceeding is limited and the order dated 01.03.2017, in respect of which review has been sought, was neither irregular nor without jurisdiction and was passed after considering the submissions made on behalf of the respective parties. The review proceedings cannot be converted into an appeal.”

3.7) The petitioner has gravely failed in pointing out any error apparent on the face of record. The petitioner has merely stated that a decision of the Delhi High Court has been misinterpreted by this Commission while passing the Order under review. The petition is bad in law for the scope of review is a limited one under the Electricity Act and the rules framed by the KERC thereunder. In *Dolat Industries Gondal Vs. Krishna Oil Industries (AIR 2002 Guj (91) 94)*, the Gujrat High Court has held that review is not permissible on ground that the court had proceeded on the wrong proposition of law. The court further held that review is also not permissible on the

ground that the decision is erroneous on merits. The same was also held by the Supreme Court in *Ajith Kumar Rath Vs. State of Orissa (1999 (9) SCC 596)*. The relevant extract of the decision is produced hereunder for the sake of convenience of this Hon'ble Commission.

"A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for establishing it."

3.8) It is imperative to note that the petitioner has raised a new ground in para 15 of the Order by citing a CERC judgement of *Udupi Power Corporation Limited Vs. KPTCL. In Dokka Samuel Vs. Jacob Lazarus Chelly (1997) 4 SCC 478*, the Supreme Court held that omission on part of the party to cite an authority does not amount to error apparent on face of record to constitute a ground for reviewing prior judgment. The relevant extract of the authority is cited hereunder for the sake of convenience:

"It was contended before the learned single Judge that various decisions were not cited; proper consideration was paid; in fact the sale deed was acted for valid consideration. The omission to cite an authority of law is not a ground for reviewing the prior judgment saying that there is an error apparent on the face of the record, since the counsel has committed an error in not bringing to the notice of the court the relevant precedents."

3.9) Wherefore, as elaborated above it is explicitly and unequivocally clear that the petitioner has no locus standi under law to file the above petition as no real cause of action, enabling the petitioner to file the above petition is forthcoming from the petition. The petitioner is not aggrieved by the Order under review in any manner that may be legally acceptable."

10. We have heard the learned counsel for the parties. The learned counsel for the Review Petitioners has also filed the written submissions and relied upon the decision of the Hon'ble ATE dated 02.11.2020 in Appeal No.10/2020 and other connected appeals, between Power Company Karnataka Limited and another Vs. Udupi Power Corporation Limited and Others to contend that the claims made by the Review Petitioners in the Original Petitions were not time barred. The learned counsel for respondents have relied upon certain decisions noted in Memo of Citations dated 24.08.2021 filed before this Commission.

11. From the rival contentions, the following points arise for our consideration.

- (i) Whether the Review Petitioners have made out sufficient grounds for condonation of delay of 215 days in filing the Review Petitions?
- (ii) Whether the Review Petitioners have made out any of the grounds stated in Order 47 Rule 1 CPC for allowing the Review of the Impugned Orders passed in OP No.123/2017 to 126/2017 dated 28.02.2019?
- (iii) What Order?

12. After considering the records and the submissions of the parties our findings on the above points are as follows:

13. Point No.1: Whether the Review Petitioners have made out sufficient grounds for condonation of delay of 215 days in filing the Review Petitions?

- a) It is an admitted fact that a Review Petition can be filed within a period of 90 days of the making or issuing of any Order as provided in Regulation 8 of the KERC (General & Conduct of Proceedings) Regulations 2000. Though the said Regulations do not provide for filing an application for condonation of delay, Section 5 of the Limitation Act can be relied upon for condoning the delay on showing sufficient cause for not preferring the Review Petition within 90 days as provided in Regulation 8.
- b) An application of condonation of delay is liberally construed. However, if there is negligence on the part of the applicant, the delay is not condoned. The applicant seeking condonation of delay, has to establish his bona fides as to the reasons why there was delay in preferring the Review Petition.
- c) In the application for condonation of delay it is alleged that the petitioners initially focussed its efforts on preparing the calculations as per the common orders and in reconciling the differences in figures, as calculated by the petitioners and as calculated by the respondents, to settle the dispute, as per the common order. It is further

alleged that however due to respondents' repeated delayed payments there was delay in procuring and collating the necessary information and documents and conveying the same to the counsel, for filing Review Petitioners.

- d) The respondents contended that no cogent reasons explaining delay of 215 days in filing the Review Petitions, are made out and that the reasons stated by the Review Petitioners have no relevance for condonation of delay in filing the Review Petitions.
- e) After considering the grounds urged by the rival parties, we are of the considered opinion that the Review Petitioners have failed to make out any sufficient cause for condoning the delay of 215 days in filing the Review Petitions. The reasons for the same are as follows:
- (i) The preparation of calculations and reconciliation of figures would not have required more than a week's period in different cases.
 - (ii) The delay if any on the part of the respondents in paying the amounts found to be due after reconciliation of the accounts, has no relevance for the delay in filing the Review Petitions.
 - (iii) The Review Petitioners have not stated which were the facts and information they collated and collected for filing the Review Petitions. The only ground urged in the Review Petitions relates to the bar of limitation in respect of the claim for interest. That ground is mainly a question of law and the facts required if any in support of that question of law, were already in possession of the petitioners at the time of filing of the Original Petitions itself. Therefore, the say of the Review Petitioners that there was delay

in procuring and collating the necessary information and documents and in conveying the same to the counsel, cannot be considered as a sufficient cause.

- (iv) From the above facts and circumstances it can be said that the Review Petitioners were negligent in taking necessary steps for filing the Review Petitions within the specified time. The grounds alleged by them cannot be treated as sufficient cause for not preferring the Review Petitions in time.
- (v) For the above reasons the applications filed for condonation of delay in filing the Review Petitions are dismissed.
- (vi) Accordingly, point No.1 is held in negative.

14. Point No.2: Whether the Review Petitioners have made out any of the grounds stated in Order 47 Rule 1 of Civil Procedure Code 1908 for allowing the review of the impugned orders passed in OP No.123/2017 to 126/2017 dated 28.02.2019?

a) For better understanding of the grounds urged in the Review Petitions for review of the impugned common order the following facts may be noted.

(i) The Review Petitioners in these cases operate wind power plants of different capacities, located at various places in Davanagere District and have entered into PPAs with the respective respondents as detailed below:

Petitioner in OP No.	Capacity of the Plant (in MW)	Date of PPA	Tariff agreed (Rs. per unit)	Purchasing ESCOM
123/2017	0.6	26.07.2006	3.40	MESCOM
124/2017	6.00	26.07.2006	3.40	MESCOM
125/2017	1.25	25.08.2009	3.40	GESCOM
126/2017	2.5	22.03.2010	3.70	GESCOM

(ii) In all the PPAs, the provisions in Article 6, dealing with 'Billing and Payment' are similar. Article 6.1 relates to raising of Monthly Invoice for each Billing Period for the energy supplied. Article 6.2 and 6.3, which are relevant in these cases, are as follows:

“6.2 Payment: ESCOM shall make payment of the amounts due in Indian Rupees within fifteen (15) days from the date of receipt of the Tariff Invoices by the designated office of the Corporation.

6.3 Late Payment: If any payment from ESCOM is not paid when due, there shall be due and payable to the Company interest at the rate of SBI medium term lending rate per annum for such payment from the date such payment was due until such payment is made in full.”

(iii) All the OP Nos.123/2017 to 126/2017 have been filed before this Commission on 21.07.2017. In all these cases, Claim-1 pertains to the accrued interest, due to the delay in payment of the Monthly Tariff Invoiced, as per Article 6.2 and 6.3 of the PPAs. Article 25 of the Limitation Act, 1963 would apply for recovery of interest, which reads thus:

<i>“</i>	<i>Description of Suit</i>	<i>Period of limitation</i>	<i>Time from which Period begins to run</i>
	<i>25. For money payable for interest upon money due from the defendant to the plaintiff.”</i>	<i>Three years</i>	<i>When the interest becomes due</i>

- b) The learned counsel for the review petitioners relied upon Appeal No. 10 of 2020 & other connected appeals decided on 02.11.2020 by the Hon'ble ATE. Further, he submitted that the facts in those appeals and the facts in OP No.123 to 126 of 2017, are exactly similar and the Hon'ble ATE after analysing the law on the question of bar of limitation towards claim for interest, has held that the claim for interest beyond three years from the date of petition is not barred.
- c) The learned counsel for the respondents submitted that the facts in appeals considered by the Hon'ble ATE are different from the facts of the present case and the principles stated by the Hon'ble ATE are not applicable in the present cases. Further, he submitted that the scope of the Review is limited and there cannot be detailed re-appreciation of the evidence as done in Appellate Court against the order challenged.
- d) After considering the principles laid down in the above appeals regarding the applicability of Limitation Act, 1963, for recovery of late payment surcharge by the generator from the distribution licensee concerned in those cases, we are of the considered opinion that the said principles cannot be applied in the present cases for the following reasons:
- (i) The Hon'ble ATE after elaborate consideration of the Generation Tariff Regulations issued by the CERC for different review periods, has held in para 94 of the judgment that Late

Payment Surcharge (LPSC) specified in those Regulations is part of tariff and, therefore, regulatory in nature – not a matter for parties to PPA (Generator and Procurer) to negotiate and provide in, or control by, contractual terms. Therefore, it is held by the Hon'ble ATE that Article 25 of the Limitation Act governing limitation for payment of interest upon money due, does not apply to recovery of LPSC due under the said Regulations. In the present cases, the claim is in respect of payment of interest for late payment of the amount due under the tariff invoices issued by the generator. Such payment of interest is stated in the PPA as noted above. There is no Regulation issued by this Commission relating to Renewable Energy Procurement from Generators to ESCOMs regarding payment of LPSC as specified in the CERC Generation Regulations. On the other hand, the term regarding payment of interest is agreed between the parties and incorporated in the PPAs. At any rate, the payment of interest under the PPAs in question cannot be treated as part of tariff.

- (ii) It is also held in para 127 of the judgment by the Hon'ble ATE that in the case of tariff matters, the decision dated 16.10.2015 in Civil Appeal No.6036/2012 between AP Power Coordination Committee and Others Vs. Lanco Kondapalli Power Limited & Others does not apply. The relevant portion of the judgment is as follows:

“Pertinently, even in Lanco, the Supreme Court qualified the conclusion by observing that *“such limitation upon the Commission on account of this decision would be only in respect of its judicial power under clause (f) of sub-section 1 of Section 86 of the Electricity Act, 2003 and not in respect of its other powers or functions which may be administrative or regulatory”*. We have already held that the issue of LPSC is one of enforcement of Regulations and not a contractual dispute leading to claim for recovery.”

In the present cases, the dispute regarding payment of interest has arisen out of contractual terms.

(iii) The Hon'ble ATE in para 194 of the judgment has laid down as follows:

“The pattern shown by the above-mentioned details of billing and payments is clearly indicative of the procurers having understood the arrangement with seller to be such as obliged running accounts to be maintained. This being the sequitur, the argument of the respondent Udupi Power that it is a case of “continuing cause of action” gets validated and strengthened rendering the plea of limitation bar superfluous. But the appellants contest invocation of Section 22 Act by referring to provisions of PPA.”

In the present cases, the review petitioners had not urged the applicability of Section 22 of the Limitation Act, in their

statement of objections or in the rejoinders filed by them in the Original Proceedings. Apart from it, it is a question of fact to be determined after elaborate evaluation of the evidence relevant on the applicability of Section 22 of the Limitation Act. Such exercise of re-appreciation of evidence cannot be undertaken in the review proceedings.

- e) The review petitioners have contended that the claims for interest in the present cases are to be treated as “recurring claim for interest” or “running account” and the same cannot be said to be barred by the limitation by applying three-year period stated under Article 25 of the Limitation Act. This question is already dealt with in paras 9 (d) & also 13 of the impugned common orders.
- f) In the written arguments filed by the review petitioners, it is stated that in the impugned orders relating to OP No.125 & 126 of 2017, the claims for breach of contract and the consequent entitlement for damages arising out of the failure by respondents of those cases to maintain the Letter of Credit (LOC), have not been considered at all by the Commission. In response to the said submission it can be said that when such claim is not considered, it is deemed to have been rejected.
- g) The learned counsel for the respondents have relied upon the following decisions in support of his contention that the review petitions are not maintainable:

- (i) Akhilesh Yadav Vs. Vishwanath Chaturvedi and Others (2013) 2 SCC;
- (ii) Ajit Kumar Rath Vs. State of Orissa (1999) 9 SCC 596;
- (iii) Dokka Samuel Vs. Jacob Lazarus Chelly (1977) 4 SCC 478;
- (iv) All India Reporter Karamachari Sangh Vs. All India Reporter Limited (1988) SCC (472);
- (v) Dolat Industries Vs. Krishna Oil Industries AIR (2002) Guj 91.

We have perused the above decisions. We are of the opinion that the said judgments need not be discussed, in view of the findings already arrived by us.

h) For the above reasons, we hold Point No.2 in the negative.

15. Point No.3: What Order?

For the above reasons, we pass the following:

ORDERS

- a) The Interim Applications filed by the Review Petitioners for condoning the delay of 215 days in filing the review petitions, are dismissed;
- b) The review petitions, are also dismissed as there is no merit in them;
- c) The original order be kept in RP No.01/2020 and the copies of it be kept in other connected Review Petitions.

sd/-
(SHAMBHU DAYAL MEENA)
Chairman

sd/-
(H.M. MANJUNATHA)
Member

sd/-
(M.D. RAVI)
Member