

No.N/278/2018

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**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,**

**No. 16 C-1, Miller Tank Bed Area, Vasanth Nagar, Bengaluru- 560 052.**

**Dated: 12.03.2020**

**Present:**

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

**RP No.17/2018**

**BETWEEN:**

Bangalore Electricity Supply Company Ltd

Having its Corporate Office at

K.R. Circle, Bengaluru – 560 009.

(Represented by its General Manager, DSM)

[Represented by M/s Just Law,  
Advocate, Bengaluru]

**... Review Petitioner.**

**AND:**

Chandranandan N

S/o G.N. Narayan swamy,

Kamala Poultry Breeding Farm,

Maralakunta Village & Post

Chikkaballapur District – 562 101

[Represented by Smt. Poonam Patil Advocate)

**... Respondent.**

## ORDERS

1. The Petitioner has filed this Review petition under Section 94 of the Electricity Act, 2003 read with Regulation No. 8 of the KERC (G&C Proceedings) Regulations, 2000, praying for the following reliefs:

“this Commission may be pleased to Review/modify the order dated 25.09.2018 and hold that the respondent has commissioned its SRTPV plant belatedly by virtue of which the respondent is entitled to a tariff of Rs.5.67 per unit as per the Generic Tariff Order dated 02.05.2016 in the interest of justice”.

2. The learned Counsel for the Petitioner i.e., Bangalore Electricity Supply Company Limited (BESCOM), submitted that:-

- a. The discovery of new evidence which was not with in its knowledge despite the exercise of due diligence made, came to its knowledge during the inspection work conducted on 23.10.2018 and made it to realise its importance in the proceedings of the impugned order. The said new material/inspection report clearly indicates that the injection of energy from the Respondents' SRPTV plant did not commence from the SCOD/28.06.2016, but it began only on 01.07.2016. During the inspection work conducted on 23.10.2018, it was discovered that the inverter was installed only on 01.07.2018 as supported by the photos/Annexure B1 to B5 and the certificate/ Annexure C issued by the Manufacturer of the inverter M/s Delta Power Solution India Pvt Ltd in response to its letter. The Annexure C/

certificate could not be placed in the proceedings of the Main Petition, as it was discovered only after the impugned order is passed.

b. The Review Petitioner had addressed a letter to the said M/s. Delta Power Solutions India Ltd, who has certified that the installation date, set in the RPI Series Grid Tied Solar String Inverters, cannot be changed unless the inverter is returned to default mode and only after which the inverter can be completely reset and old data can be erased. Further, the manufacturer has also confirmed that in order to reset the inverter to default mode, the prior permission of the Delta Support Authority is required. In the instant case neither the Petitioner nor the Respondent has returned the inverter to the manufacturer for recalibration/ resetting the same. Moreover, the data indicated in the said inverters is authentic and clearly indicates that injection of energy only began on 01.07.2016 (Annexure-C). The said proof could not be placed before the Commission at the time of consideration of original petition in spite of due diligence.

c. The Grid tied inverter of SRTPV is an essential intermediary without which no energy could have been pumped in the Grid. In the instant case, the information of injecting energy on 01.07.2006 has only come to the knowledge of the Petitioner after the impugned order was passed. This also indicates that the respondents had suppressed the material facts and made false statement before the

Commission and is entitled to lower the tariff of Rs.5.67 per unit as per the generic order dated 02.05.2016.

- d. It is further submitted that the office of the Executive Engineer (Ele.) M T Division BMAZ has conducted Pre-Commissioning test on 28.06.2016 and issued check meter and main meter calibration report which indicates that on 28.06.2016, at 17:14 hours check meter reading was zero and main meter reading was also zero at 17:08 hours. Therefore, it is abundantly clear that the Petitioner has not injected any energy on 28.02.2016. Therefore, the said date cannot be considered to the commercial operation date (Annexure-D). Hence, the respondent is not entitled to the original tariff of PPA, but entitled to lower tariff of Rs.5.67 per unit as per the Generic Tariff Order dated 02.05.2016 and prayed for review order in OP 169 of 2017. Hence, this Review Petition is filed on 19.12.2018.
3. The Respondent filed his objection statement questioning the maintainability of this petition, contending that:
- a. The Review petition is filed as an afterthought to defeat his accrued rights. The averment that new evidence was not within the knowledge of the Petitioner is denied as patently false. There is no explanation for the delay in discovering the new and important matter and it shows that the Petitioner has not exercised due diligence in ascertaining the inspection report of inverters of SRTPV installations. There is no explanation as to why the Petitioner did not

produce the certificate in the proceedings of impugned judgement and hence the certificate produced belatedly cannot be accepted.

- b. It is a settled position of law under order 47 Rule 1 of Code of Civil Procedure (CPC), 1908, that Review on the ground of discovery of new and important matter or evidence is permissible only when the said matter or evidence could not be produced even after exercise of due diligence. In the present case, the cause of action to file the present Review Petition being discovery of new and important matter with regarding to inverters of the SRTPV installation having been discovered at the time of inspection conducted on 23.10.2018, after the disposal of the petition, and in the absence of offering any explanation for the delay clearly goes to show that the Petitioner had not exercised due diligence to ascertain the alleged information about the inverters. There was nothing to stop the Review Petitioner from inspecting the premises of the Respondent during the pendency of the original petition which was pending before this Commission for a period of one year.
- c. The Review Petitioner has suppressed the material facts and made baseless allegations by providing incomplete information and documents to mislead this Commission. Out of 8 inverters listed in CEIG approval and installed, the Petitioner has provided the data of inverter number 4 to 8 only. Other 3 inverters were

installed on 06.10.2018 28.07.2011, 21.09.2018 as shown in the photos (Annexure R1) (a-c) and (Annexure R3) (a-h). He had complained about the problem in the inverters wherein the alarm light in all inverters kept blinking. The technical hand from the manufacturer Company attended on 18.02.2017 and addressed the issue (Annexure R2) by replacing inverter no. 1 & 3 and by updating the software in the remaining inverters. The PPA also does not provide for injection of power to prove the SCOD and hence it was not the criteria to achieve the SCOD. The Petitioner is well aware that even showing of 0.1 recording of energy, the SPD has to use 300 units which takes minimum of 2-3 days, as evident from the monthly bills which show consumption of average 40 units per day in the month of July 2016, thereby the time gap between 17.14 Hrs and 17.08 Hrs cannot be the yardstick for effective generation of energy. It is true that existing meter was removed on 01.07.2016, but it cannot be presumed that injection began from 01.07.2018 only. SRPTV meters are dealt by HT department and old meters by LT department. The HT department disconnected the old meters and installed the new meters on 28.06.2016. No representative from LT department came on 28.06.2016 to remove the old meter and they visited plant only on 01.07.2016. The annexure D of the Petitioner is the clinching proof of installation of SRTPV meters on 28.06.2016 and

the communications (Annexure R4) show that the Petitioner is misleading the Commission about the technical aspects.

- d. The scope of Review petition being very limited, re-argument as in the case of appeal matter cannot be permitted. The Petitioner who paid the agreed tariff of Rs.9.56 per unit for about a year as per the direction of this Commission cannot challenge the Order belatedly. The respondent is entitled to get Rs.9.56 per unit. He is facing financial crisis to discharge the bank loan amount as communicated in Annexure R5. The Review petition is liable to be dismissed with exemplary cost.
  
4. The Review Petitioner has relied on Annexure A to G. The Respondent has relied on the photos of inverters 1 to 8, and Annexure R1 to R5 and 2 additional documents. Arguments of the counsels of both the sides were heard and decisions relied on by them were perused along with the records of this petition.
  
5. The points that arise for our consideration in this Review Petition are:
  - 1) Whether the Petitioner has made out the ground of alleged discovery of new and important matter or evidence which, after the exercise of due diligence was not within its knowledge and could not be produced by it in the proceedings of the Main Petition?
  - 2) To what order the Review Petitioner is entitled?

6. Our answers are as hereunder for the following.

**REASONS**

7. Point No. 1: Whether the Petitioner has made out the ground of alleged discovery of new and important matter or evidence which, after the exercise of due diligence was not within its knowledge and could not be produced by it in the proceedings of the Main Petition?
8. The Respondent/Sri. Chandranandan N, had filed the OP No. 169/2017 against the Petitioner/BESCOM and it came to be allowed by this commission on 25.09.2018, by upholding his right of collecting the tariff of Rs. 9.56 only per unit, as agreed to in the PPA for the term of the PPA, with a direction to the BESCOM to pay it with interest in two months after adjusting the interim tariff of Rs. 5.67 per unit.
9. The Review Petitioner/BESCOM contends that the discovery of new evidence which was not with in its knowledge despite the exercise of due diligence made, came to its knowledge during the inspection work conducted on 23.10.2018 and made it to realise its importance in the proceedings of the impugned order. As per the inspection report, the inverter was installed only on 01.07.2016 as supported by the photos/Annexure B1 to B5 and the certificate/ Annexure C issued by the Manufacturer of the inverter M/s Delta Power Solution India Pvt Ltd in response to its letter. The Annexure C/ certificate could not be

placed in the proceedings of the Main Petition, as it came to its knowledge only after the impugned order is passed.

10. The Respondent contended that the Petitioner has failed to make out the alleged ground of discovering the new material which could not be obtained despite its due diligence as mentioned in Order 47 Rule 1 CPC namely the review provision and thereby has questioned the maintainability of this Review petition.
11. The Review Petitioner has relied on the Annexure D, E, F and G and further document, viz., answer to questionnaire, along with Rejoinder dated 23.07.2019. The Respondent also later filed 2 documents issued by the KPTCL and Manufacturer of the Invertors on 22.08.2019.
12. The Review Petitioner relying on the decision of Hon'ble Supreme Court dated 25.07.2019 in Civil Appeal Nos 9218-9219 of 2018,(M.P. Power Management Co. Ltd and another Vs M/s Dhar Wind Power Projects Pvt Ltd and others) contended that the observation therein that "objective data on the record indicates that the injection of power into Grid took place on 1st April 2016 based on which the claim for the entering into a PPA should be founded" has to be made applicable to the Main Petition of the Respondent.
13. The Respondent also relying on the decision (2013) 8 SCC 337 (Union of India Vs Sandur Manganese and Iron ores limited and Others) contended that the well-reasoned and answered impugned judgment

cannot be disturbed, by insisting re-agitation of the decided issue, in the guise that an alternative view is possible under Review jurisdiction and it is impermissible in law.

14. The powers of this Commission under section 94(1) (f) of the Electricity Act, 2003, for Reviewing its decision, directions and orders are equivalent to that of the civil court, as its proceedings shall be deemed to be judicial proceedings as stated under Section 95. The court of Review has only a limited jurisdiction circumscribed by the definitive limits fixed by language used in on 3 grounds only. It must be conferred by law either specifically or by implication as stated in AIR 1970 SC 1273. The power of Review is a creature of the statute and no court or quasi-judicial body or administrative authority can Review its judgment or order or decision unless it is legally empowered to do so, as observed in the case (2012) SCC 200-208. A court or tribunal has no inherent power to Review, under the garb of clarification / modification / correction (2010) 9 SCC 437 ( Kalabharati Advertising Vs Hemant Vimallesh Narichania). The court is required to exercise high degree of diligence on the part of the Petitioner in seeking Review since the object is to secure finality of litigation at some stage or the other in the long process (AIR 1960 Mys 214). Thus Review means the act of looking after something- again with a view to correction or improvement (A.I.R. 2000 SC 1650-1652 Lily Thomas Vs Union of India).

15. The Review Petitioner has raised the ground of alleged discovery of new evidence which was not within its knowledge despite the exercise of due diligence made. Mere discovery of new matter or evidence is not sufficient ground for Review *ex debito justitiae*. The party seeking Review has also to show that such additional matter or evidence was not within its knowledge even after exercise of due diligence, the same could not be placed before the court earlier. [2013 (1) Civil L J 521 (SC) Haryana State Industrial Development Corporation limited V Mawasi] and also in 2008 (8) SCC 612 State of West Bengal Vs Kamal Sengupta.
16. The Review Petitioner contends that it discovered the new and important matter during the inspection work conducted on 23.10.2018. The said new matter supported by the inspection materials (Annexure D, E, F, G) and the report (Annexure C) clearly indicate that the injection of energy from the Respondents' SRPTV plant did not commence from the SCOD/28.06.2016 but it began only on 01.07.2016.
17. The application for Review on the ground of discovering new evidence should be considered with great caution. The discovery refers only to a discovery made since the order sought to be Reviewed was passed. The discovery contemplated is not by the court but by the party. The only material dates would be those between the institution of suit and the date of decree. A court's power to Review depends on a ground which existed on the date when the order was made and cannot be exercised on the grounds which had come into existence

subsequently. After considering the relevant materials produced by both the parties, we are of the view that the Review Petitioner has placed incomplete materials which are not sufficient evidence to consider a Review petition. We rely on the decision of the Hon'ble Supreme Court in case of Kamalesh Verma Vs Mayavathi (AIR 2013 SC 3301) also.

18. This Review petition was filed on 19.12.2018. The impugned order was passed on 25.09.2018 by considering the merits of the case. In the main petition OP No. 169 of 2017, the Review Petitioner has filed its own commissioning certificate showing COD as 28.06.2016 and it was found that the Review Petitioner was paying the energy charges till February, 2017 at Rs.9.56 per unit, till centralised bill centre scrutinised the same. The result of the scrutiny by centralised bill centre only made the Petitioner to apply its mind for future steps to stop the payment and it supports the absence of due diligence at least towards collecting the materials in the proceeding of the main petition. Due diligence was required because of the contention in the main petition that the SCOD falls on 27.06.2016 and not on 28.06.2016. The Review Petitioner had more than sufficient time about two years from February, 2017 till filing of the main petition and later also till the impugned order is passed. But the Petitioner discovered alleged new and important matter during the inspection work conducted on 23.10.2018 i.e. about a month after date of impugned order passed by KERC. Thereby it has become clear that the due diligence was not exercised by the Petitioner. It also

cannot be held that the Petitioner could not with reasonable care and diligence have been brought forward at the time of passing impugned order. It cannot be stated that the said alleged new material was not within the knowledge of the Petitioner. The Petitioner could have started collecting the information supported by Annexure C to G at least from February, 2017 itself.

19. The contention of the Review Petitioner, that it came to know about the alleged new material/evidence only during inspection held on 23.10.2018 clearly shows, that the Petitioner never cared to furnish the suitable evidence to this Commission till final order was passed and it becomes an act subsequent to impugned order. Subsequent act cannot be the ground to seek the Review of the impugned order of the Commission.

20. Such being the legal status of this proceedings, the further allegations and counter allegations made against each other by the parties to this petition which requires re opening of disposed of O.P.169 of 2017, do not survive for consideration in this Review petition. The allegations of the Petitioner, that the Respondent has produced the fabricated Annexure R3 documents, that during the pre-commissioning test, the test was conducted without putting the equipment in to live condition, and the counter allegations that the Petitioner has suppressed the material facts without disclosing the required details of 3 meters in

Annexure B1 to 5 photos, out of 8 meters as shown in Annexure R3 photos become inconsequential.

21. It appears that the Review Petitioner has not come to the court with clean hands, in as much as has been trying to seek re-trial by virtue of the present Review petition. The grounds urged in this petition do not come under the purview of Review powers. Hence, we answer this Point No.1 in the Negative.

22. Point No. 2: To what order the Review Petitioner is entitled?

23. Being guided by the principles of natural justice, this commission has perused the impugned judgment in the light of the above alleged grounds and found that it is not a fit case to Review the same. The decision relied on by the Review Petitioner cannot be made applicable to this Review proceeding. Hence the Review Petitioner is not entitled to get any other relief sought for. Interim relief granted on 09.04.2019 also becomes liable to be set aside. Hence we pass the following.

**ORDER**

This Review Petition No. 18/2017 seeking review of order dated 25.09.2018 in OP No 169/2018 is dismissed.

No order as to costs.

Sd/-  
(SHAMBHU DAYAL MEENA)  
CHAIRMAN

Sd/-  
(H.M. MANJUNATHA)  
MEMBER

Sd/-  
(M.D.RAVI)  
MEMBER