

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.32 of 2013

Dated: 03rd July, 2013

Present: HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. V J TALWAR, TECHNICAL MEMBER

In the Matter of:

Brindavan Hydropower Private Limited
No.7, N.S. Iyengar Street,
Sheshadripuram,
Bangalore-560 020

...Appellant

Versus

- 1. Karnataka Electricity Regulatory Commission**
6th & 7th Floor, Mahalaxmi Chambers,
No.9/2, M.G. Road,
Bangalore-560 001
- 2. Mangalore Electricity Supply Company Limited.,**
Paradigm Plaza, A B Shetty Circle,
Mangalore-575 001
- 3. Karnataka Power Transmission Corporation Limited.,**
Cauvery Bhavan
Bangalore-560 009
- 4. State Load Despatch Centre Karnataka**
Ananda Rao Circle,
Bangalore-560 009

..... Respondent(s)

Counsel for the Appellant(s) : Mr. Shridhar Prabhu,
Mr. Lokesh R Yadav,
Mr. V Ravi

Counsel for the Respondent(s): Ms. Sumana Naganand for R-2

J U D G M E N T

**PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,
CHAIRPERSON**

1. Mr. Brindavan Hydro Power Private Limited., is the Appellant herein.
2. Aggrieved by the portion of the impugned order dated 15.11.2012 passed by the Karnataka State Commission rejecting the interim prayer sought for by the Appellant though main prayer was allowed, the Appellant has filed this Appeal.
3. The short facts are as follows:
 - (a) The Appellant is a Generating Plant. It owns, operates and maintains 1.5 MW Mini Hydel based power Plant.
 - (b) Karnataka State Commission is the First Respondent. Mangalore Electricity Supply Company Limited (MESCOMM), the Distribution Licensee is the Second Respondent. Karnataka Power Transmission Corporation Limited, the Transmission Licensee, is the

3rd Respondent. The State Load Despatch Centre, Karnataka is the 4th Respondent.

(c) The Appellant executed a Wheeling and Banking Agreement with the MESCOM (R-2) and Transmission Company (R-3) on 5.6.2010.

(d) As per this Agreement, the term “Water Year” under Article 1.1. is defined as “from the first day of July to 30th day of June of the next year”.

(e) In yet another case i.e. in the case of M/s. Ambuteertha Vs MESCOM in OP No.27 of 2011, the State Commission passed the order dated 13.1.2012 made certain changes to the definition of the term “Water Year”.

(f) In this order, the parties were directed by the State Commission to modify the definition of the “Water Year” to the effect from 01 June of 2012 to 31 May of the following year.

(g) On the basis of this order, M/s. MESCOM (2nd Respondent) sent a letter to the Appellant on 5.3.2012 requesting the Appellant to make necessary changes in the definition of the term “Water Year” as formed in the Wheeling and Banking Agreement dated 5.6.2010 and to submit the supplemental Wheeling and Banking Agreement in the matter of definition of “Water year”.

Along with the said letter, MESCOM (R-2) sent the copy of the order passed by the State Commission order dated 13.1.2012 in the case of M/s. Ambuteertha to the Appellant.

(h) On this issue, the discussions between the Appellant and MESCOM were held between the parties. After the discussion, the Appellant sent a letter to the MESCOM (R-2) seeking a permission to wheel the banked energy as on 31.5.2012 in the month of June, 2012 since the order dated 13.1.2012 did not apply to the Appellant as it is the existing project which had already commenced operation with existing Wheeling and Banking Agreement.

(i) In reply to the same, MESCOM (R-2) wrote a letter on 15.5.2012 to the Appellant directing the Appellant to utilise the energy generated during May, 2012 including the banked energy, if any, in the month of May, 2012 itself as the order giving the change of definition for the term "Water Year" would come into effect from the year June, 2012 itself.

(j) Being aggrieved by the claim by the MESCOM with regard to the change in the definition of the term "Water Year", the Appellant filed a Petition on 28.5.2012 before the State Commission in OP No.24 of

2012 seeking for the direction to the 2nd Respondent (MESCO) to strictly adhere to the terms and conditions of the Wheeling and Banking Agreement dated 5.6.2010 by setting-aside the letters sent by MESCO dated 5.3.2012 and 15.5.2012. Along with this petition, the Appellant filed an interim application seeking for the interim prayer for permission to use the energy banked in the month of May, 2012 keeping in terms of the Agreement dated 5.6.2012. The main Petition and the interim Application were taken up by the State Commission on 21.6.2012.

(k) After hearing the Appellant, the State Commission on 21.6.2012 admitted the Main Petition and issued the ex-parte interim order in the interim Application allowing the Appellant to utilise the energy banked as on 31.5.2012 in June, 2012 as provided in the Agreement subject to the final order.

(l) Pursuant to issuance of the interim order dated 21.6.2012, the Appellant made all efforts to sell the banked energy to its consumers. However, one of the customers of the Appellant namely M/s. Ruchi Soya Industries Limited could not consume the share of the energy from the Appellant. Consequently, the Appellant was not able to wheel about 4,98,253 Units of banked energy within June, 2012 itself. When this

was informed by the Appellant to MESCOM, a letter was sent by the MESCOM (R-2) on 17.7.2012 to the Appellant informing that the Appellant's balance energy of 4,98,253 units could not be carried forward as the State Commission had allowed the Appellant to wheel the energy within June, 2012 itself.

(m) In view of the negative response of the MESCOM, the Appellant in the same proceedings pending before the State Commission in OP No.24 of 2012, filed another interim Application on 9.8.2012 seeking for the direction to MESCOM to permit the Appellant to utilise and wheel the unutilised balance energy of 4,98,253 units during the month of August, 2012. The objections were filed by MESCOM (Respondent) both in the Main Petition as well as in this Interim Application. Thereupon, the arguments by both the parties were heard by the State Commission in both the Main Petition and the Interim Application.

(n) Ultimately, the State Commission by the impugned order dated 15.11.2012, allowed the Main Petition filed by the Appellant by directing both the parties to implement the Wheeling and Banking Agreement dated 5.6.2010 without making any modification to the definition of the "Water Year" as found in the Agreement.

(o) However, in the very same order, the State Commission rejected the prayer made in the Interim Application dated 9.8.2012 wherein the Appellant had sought a direction to the MESCOM to permit the wheeling of the balance energy of 4,98,253 units during August, 2012.

(p) The Appellant though, obtained the relief from the State Commission in the Main Petition, felt aggrieved by the portion of the order rejecting the interim application dated 9.8.2012. Hence, the Appellant has presented this appeal as against that portion of the order.

4. The learned Counsel for the Appellant has made the following arguments assailing the said portion of the impugned order:

(a) The interim prayer made by the Appellant was in consonance with the Wheeling and Banking Agreement. The action of MESCOM (R-2) in not allowing the utilisation of the energy generated during the month of May, 2012 was in violation of the Terms of the Agreement.

(b) The State Commission having upheld the Appellant's contentions with regard to the adherence to the Wheeling and Banking Agreement ought to have

permitted the Appellant for utilisation of the energy generated in the month of May, 2012.

(c) The MESCOM, despite signing Wheeling and Banking Agreement and despite being bound by the order dated 11.7.2008 passed in rem, did not allow the Appellant to wheel the energy generated during the month of May, 2012 on the pretext of some inapplicable orders. In the present case, the State Commission has agreed and accepted the contentions of the Appellant with regard to the inapplicability of the said order but even then, the claim through interim application was wrongly disallowed in spite of the fact that there was no fault on the part of the Appellant.

5. In reply to the above submissions, the learned Counsel for the Respondent (MESCOMM) has made the following points:

(a) In the original Petition, the Appellant sought for implementation of the terms of the Wheeling and Banking Agreement but in the interim application filed in the very same proceedings, a prayer has been sought which is just opposite to the term of the Wheeling and Banking Agreement. Thus, the interim relief is not in consonance with the main relief sought for in the Original petition.

(b) It is settled law that an interim relief ought to be in furtherance of the final relief sought for and it cannot be in excess of the said relief. In this case, the Appellant has made a mutually self restrictive prayer which cannot be allowed in view of the principle laid down in 2001 3 SCC 68 case namely Ritona Consultancy Private Limited and Others Vs Lohia Jute Press and Others.

(c) In fact, even on the date of the admission of the main Petition, ex-parte interim order was passed by the State Commission, but the Appellant without completing all the formalities required to be fulfilled within the time frame specified by the State Commission in the said Interim Order, the Appellant again approached the State Commission stating that it was unable to wheel all the energy banked as on 31.5.2012 and this is purely due to the inaction on the part of the Appellant. The Appellant has failed in this case to take timely action. Therefore, the Appellant cannot take advantage of its own wrong. If the prayer in the interim application is allowed then it would amount to directly contrary to the main relief granted in this case. Therefore, the impugned order is well justified.

6. Having regard to the rival contentions urged by both the parties, the question that would arise for our consideration is as follows:

“Whether the interim relief sought for in the present proceedings before the State Commission is completely opposite to the main relief sought for and granted in the main proceedings by the State Commission?”

7. As indicated above, the main relief seeking for the direction as against the MESCOM is for the implementation of the terms and conditions of the Wheeling and Banking Agreement. Admittedly, this main relief has been granted by the State Commission in the impugned order.
8. As far as the interim prayer which was sought for by the Appellant during the pendency of the main proceedings before the State Commission is concerned, the State Commission disallowed the said interim relief on the ground that the interim relief sought for was not in consonance with the main relief sought for in the Petition. Thus, the Appellant even though obtained the main relief sought for, through the impugned order passed by the State Commission, has filed this Appeal seeking for the limited prayer to allow the interim relief as the same is in consonance with the Wheeling and Banking Agreement.

9. Before dealing with this contention, it would be worthwhile to refer to the findings of the State Commission rendered on this issue which is as under:

“ 9. As regards the prayer made by the Petitioner in the IA filed by it on 9.8.2012, for directing the Respondent to permit the Petitioner to utilize / wheel the electricity generated by it up to May, 2012, during the month of August, 2012, we are of the view that the said prayer cannot be accepted. It is noticed that this Commission, after hearing the Petitioner, granted an Interim Order on 21.6.2012, i.e., the day on which the matter came up for admission. On the date of passing of this Interim Order, the issue raised by the Petitioner in IA was not brought to the notice of the Commission. It has been raised only in August, 2012, after obtaining the Interim Order. If we grant the prayer made by the Petitioner in the IA, it would be opposed to the prayer made in the main Petition, to the effect that the WBA dated 5.6.2010 should be continued in its original terms. Therefore, the prayer made in the IA by the Petitioner has to be rejected and accordingly it stands rejected.”

10. This finding would indicate that the State Commission was not inclined to grant the interim relief mainly because the interim prayer made by the Appellant in interim Application would be opposite to the main prayer made in the main Petition which has been granted.
11. In view of the above, let us see the prayer made in the main Petition as well as in the Interim Application.

12. The prayer made in the Main petition in OP No.24 of 2012 is as follows:

“23. Prayer

WHEREFORE, it is most respectfully prayed that this Hon'ble Commission may be pleased to-

- a. *Direct the 1st Respondent to strictly adhere to the terms and conditions of Agreement dated 5th June, 2010 at Annexure P-1.*
- b. *Set aside the letter dated 5th March, 2012 at Annexure P-3 issued by the 1st Respondent.*
- c. *Set aside the letter dated 15th May, 2012 P-5 issued by the 1st Respondent.*
- d. *Pass any other order/s including an order to grant cost to this Petition, to meet the ends of justice and equity.”*

13. The perusal of the entire Petition coupled with the prayer would indicate that the plea of the Petitioner/Appellant was that the definition for the term “Water Year” referred to in the Wheeling and Banking Agreement entered into between the Appellant and MESCOM (Respondent) to the effect that first day of July to 30th Day of June next year cannot be changed to “from the 1st day of June to 31st day of May next year” as referred to in some other proceedings in which the order under OP No.27 of 2011 dated 13.1.2012 had been passed by the State Commission in which the Appellant was not a party and therefore, it would not apply to the Appellant.

14. On this point, elaborate arguments were advanced by the Petitioner/Appellant before the State Commission which in turn accepted this argument and allowed the Petition by holding the said order dated 13.1.2012 passed in OP No.27 of 2011 in some other proceedings in which the Petitioner was not a party, would not apply to the Petitioner/Appellant. Thus, the plea of the Petitioner before the State Commission was accepted and accordingly the relief was granted.
15. The only grievance before this Tribunal pleaded by the Appellant is that the interim relief sought for by the Appellant was not granted in spite of the fact that the plea of the Appellant was accepted by the State Commission granting the main relief.
16. The Main prayer in the main Petition sought for by the Petitioner would confine itself to the direction to be issued to the MESCOM to adhere to the terms and conditions of the Agreement dated 5.6.2010 entered into between the parties and consequently, the letters sent by the MESCOM dated 5.3.2012 and 15.5.2012 which are not in line with the said Agreement, were liable to be set aside.
17. As mentioned above, the entire prayer made in the Petition has been allowed.
18. However, the State Commission did not incline to grant interim relief sought for by the Appellant on the ground that

the interim relief was not in consonance with the main prayer.

19. Let us now see the interim prayer sought for in the interim application filed by the Appellant Petitioner during the present proceedings before the State Commission. The same is as follows:

“ PRAYER

WHEREFORE, it is most respectfully prayed that this Hon'ble Commission pleased to direct the Respondent to permit the applicant to utilize/wheel the un-utilised balance energy to an extent of 4,98,253 units during the month of August, 2012 in the interest of Justice and equity.”

20. This prayer would indicate that the Appellant sought for the directions to the MESCOM to permit the Appellant to utilise and wheel the unutilised balance energy **during the month of August, 2012** in the interest of the justice. This prayer does not show that the direction sought for in line with the Wheeling and Banking Agreement dated 5.6.2010.
21. As indicated above, on 5.6.2010, the Appellant and MESCOM (R-2) entered into a Wheeling and Banking Agreement which specified that the “Water Year” to be from July to June of the following year.
22. On 13.1.2012, the State Commission passed an order in some other proceedings in OP No.27 of 2011 wherein the

change was made to the definition of “Water year” which would come into effect prospectively from 01 June, 2012 to 31st May of the next year.

- 23.** In furtherance of this order, the MESCOMM (Respondent) sent a communication on 5.3.2012 and 15.5.2012 requested the Appellant to make necessary changes in the definition of “Water Year” on the strength of the order passed by the State Commission dated 13.1.2012.
- 24.** Having felt that the order dated 13.1.2012 passed by the State Commission would not apply to the Appellant and consequently it would not affect the definition of the “Water Year” as referred to in the Agreement dated 5.6.2010, the Appellant approached the State Commission for seeking the relief through the directions to be issued to MESCOMM for implementation of the Agreement dated 5.6.2010 without any change in the definition.
- 25.** On this basis, the State Commission while admitting the main Petition, passed ex-parte interim order on 21.6.2012 permitting the Appellant to utilise the energy banked as on 30.5.2012 in the month of June, 2012 as provided in the Agreement.
- 26.** In pursuance of the same, the Appellants wheeled 9,00,000 units until the end of June, 2012. Thereafter, in the pending proceedings in OP No.24 of 2012, the Appellant filed

another interim application on 9.8.2012 seeking for the permission to utilise and wheel their balance energy of 4,98,253 units in the month of **August, 2012.**

27. Though the interim order was passed on 21.6.2012 by the State Commission permitting the Appellant to utilise the energy banked as on 30.5.2012 in the month of June, 2012 which is as per the Agreement, the State Commission did not allow this prayer i.e. seeking the permission for Wheeling the balance energy in the month of August, 2012 which cannot be in line with the Agreement dated 5.6.2012.

28. As pointed out by the learned Counsel for the Respondent, the judgment of Hon'ble Supreme Court in the case of Ritona Consultancy Pvt Ltd and Others Vs Lohia Jute Press and Others (2001) 3 SCC 68 squarely apply to this case.

29. The relevant portion of the observation is as follows:

“An interlocutory order is made by way of aid to the proper adjudication of the claims and dispute arising in and not made beyond the scope of the suit or against the parties who are not before the court. That neither excessive conservatism or technical approach nor overzealous activist approach is conducive to advancement of justice.”

30. As per the settled law, the State Commission would not be empowered to grant such an interim relief sought for by the Appellant which would certainly be opposite to the main prayer which is made and granted.

31. To sum up:-

“The prayer made in the interim application was not only inconsistent with the main prayer in the Petition but also in violation of the Wheeling and Banking Agreement dated 5.6.2010. The State Commission having allowed the main prayer by directing the parties to continue to implement the Wheeling and Banking Agreement signed on 5.6.2010 without any modification to the definition of “Water Year” as contained in the said Agreement, could not give a direction as prayed for by the Appellant in the interim application to permit the Appellant to utilise and wheel the balance energy in the month of August, 2012 which is not provided in the Agreement.”

32. In view of the above finding, there is no merit in the Appeal. Consequently, the Appeal is dismissed.

33. However, there is no order as to costs.

(V.J TALWAR)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 03rd July, 2013

✓ ~~REPORTABLE/NON-REPORTABLE~~