

**BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY
Appellate Jurisdiction, New Delhi**

Appeal No. 15 of 2007

Dated this 5th day of February, 2008

**Coram : Hon'ble Mr. H.L. Bajaj, Technical Member
Hon'ble Ms. Justice Manju Goel, Judicial Member**

IN THE MATTER OF:

Maharashtra State Elecy. Dist. Co. Ltd.

(A company incorporated under the Company Act 1956 and having its office at Prakashgad, Bandra (East), Mumbai 400 051

Through its Managing Director

....Appellant

Versus

1. **Maharashtra Electricity Regulatory Commission,**
Mumbai Centre 1, 13th Floor, World Trade Centre,
Cuffe Parade, Kolaba, Mumbai 400 005
Through its Secretary
2. **Renewable Developers Association of Maharashtra,**
Empire House, 214, Dr. D.N. Road,
Ent. A.K. Nayak Marg, Fort, Mumbai 01.
Through its Secretary
3. **Prayas (Energy Group),**
Amrita Clinic Athawale Corner, Lakdipool,
Karvey Road Junction, Deccan Gymkhana,
Karvey Road, Pune- 400 056.
Through its Secretary

4. **Mumbai Grahak Panchayat,**
Grahak Bhawan, Sant Dynaeshwar Marg,
Behind Cooper Hospita, Vile Parle (West),
Mumbai 400 056
Through its Secretary
 5. **Thane Belapur Industries Association,**
Plot No. P-14, MIDC, Rabale Village,
P.O. Ghansoli, Navi Mumbai 400 701.
Through its Secretary
 6. **Vidarbha Industries Association,**
1st Floor, Udyog Bhawan,
Civil Lines, Nagpur 440 001
Through its Secretary
 7. **The Director General,**
Maharashtra Energy Development,
Agency, MHADA Commercial Complex,
2nd Floor, Opp. Tridal Nagar, Yerwada,
Pune- 411 006.
Through its Secretary
- ...Respondents

J U D G M E N T

Ms. Justice Manju Goel, Judicial Member

1. The present appeal is directed against the order of the Maharashtra Electricity Regulatory Commission (MERC or Commission for short) dated 12.9.2006. The case No. 10/06 was filed by M/s. Renewable Developers Association of Maharashtra, (REDAM for short) seeking implementation of the Commission's order dated

24.11.2003 read with the clarificatory order dated 30.9.2004 in case No. 17/03, 3, 4 & 5 of 2002.

Facts of the case:

2. On 12.3.1998 Government of Maharashtra issued revised policy for development of renewable energy projects. This policy was based on the Government of India guidelines for Wind Power Projects. One of the highlight of the policy related to rate at which energy could be purchased from the wind farms and the same is as under:

*“ **Energy Purchase Rate:** All the delivered units would be purchased by MSEB @ Rs. 2.25 per unit based year 1994-95 and would escalate @ 5% every year thereafter. The escalation at the simple rate would be for the first 10 years of operation of the wind farm project. After 10th year, energy rate would remain constant for next three years (i.e. from 11th to 13th years) and would again escalate @ 5% every year from the 14th years for the next 7 years.”*

3. Maharashtra State Electricity Board (MSEB for short) issued its revised policy vide a circular dated 5.10.01 after the Maharashtra Electricity Regulatory Commission (MERC for short) was established under the Electricity Regulatory Commission's Act 1998. The MSEB vide its letter dated 4.3.2002 approached the Commission seeking approval of energy purchase from wind/solar project in line with their existing policy. Meanwhile MSEB stopped

executing Energy Purchase Agreement and Energy Wheeling Agreement and withheld the payment for energy fed into the grid by the wind energy developers on the excuse that the wind power producers were required to obtain approval of MERC under the ERC act 1998. Renewable Energy Developers Association of Maharashtra (REDAM) and Indian Wind Energy Association (In WEA) approached the MERC for certain reliefs. The MERC vide letter dated 3.6.2002 passed an interim order directing MSEB to make 70% of the payment to the wind power developers against valid NOCs leaving 30% to be adjusted as per the final order of MERC. The MERC passed a tariff order for Wind power projects for the year 2003-2004 on 24.11.2003 after following the due process including public hearing. Relevant for the present dispute is the following direction in the order dt. 24.11.03.

“1.5.2.1 For sale to MSEB and other Utilities/ Licensees in the state:

The purchase rate shall be as notified by the GoM vides its Order No. NCP/1097/CR-75/NRG-7 dated 12th March, 1998 i.e. Rs. 2.25 per unit in the base year 1994-95. The purchase rate shall be increased at 5% per year (simple rate)

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1.6.7 Billing and Payment

The developers shall raise a monthly energy bill based on the joint meter reading taken by the Developers

and the MSEB/Utility at the end of each month. The due date for the payment by the Utility shall be 45 days from the date of the bill. In case of delay in payment beyond the due date, the developer shall be entitled for an interest on delayed payment 2% above the State Bank of India Short term lending rate.

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2.4.6 Commission’s Ruling:

The Commission appreciates that timely payment by the utility for the energy purchased by it is an essential requirement without which the developer cannot meet his liabilities in time. The Commission also notes that the main cost component for generation of wind power is the interest liability on the debt. Any delay in payment of debt and/ or interest would have substantial impact on the wind power tariff, and if the tariff were to be maintained as constant, it would adversely affect the viability of the project. The Commission understands the need for the security of payment and need for compensation to the developer in case of delay in payment. The Commission, therefore, has decided that a Revolving Irrevocable Letter of Credit, at the option of the developer, with a nationalized bank should be provided to the developer as security for payment to ensure timely payment. The Commission also prescribes that the expenses involved in opening the LC, for an amount equivalent to the average monthly bill, should be borne by the developer. Further to provide the compensation in case of inordinate delay in payment, the utility will pay penal interest on any outstanding amount at the rate of 2% above the short term lending rate of the State Bank of India

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3.4.10. Billing and Payment:

The developer shall raise a monthly energy bill based on the joint meter reading taken by the developer and the MSDEB/Utility at the end of each month. The due date for the payment by the utility shall be 45 days from the date of the bill. In case of delay in payment beyond the due date, the developer shall be entitled to interest on delayed payment at 2% above the State Bank of India short-term lending rates. (for details please refer to the Commissions rulings under Section 2.4.6.)”.

4. It appears that despite directions of the MERC, the MSEB and its successor MSEDCL, the appellant herein, did not make payment for the price of the energy fed into the grid by the members of REDAM for the purpose of purchase of power by the MSEDCL and erstwhile MSEB. REDAM approached the commission with a prayer for clarification as well as implementation of the MERC order dated 24.11.2003 and subsequent order dated 30.9.2004 which was registered as case No. 10 of 2006. This petition was disposed of vide the impugned order dated 12.9.2006. The part of the order, which is relevant for the present purpose is extracted below:

“Payment of interest on delayed payment:

17. The petitioner submitted that, despite sending reminders and making several requests to MSEDCL, the wind farm developers have not been paid interest on delayed payments which they are entitled to claim in light of the Commission’s Order dated 24th November 2003 wherein it has been clearly stipulated in paragraph 1.6.7 that ‘ in case of delay in payment

beyond the due date, the Developer shall be entitled for an interest on delayed payment @ 2% above the State Bank of India, short-term lending rate'. Also paragraph 2.4.6 of the said order stipulated that ...the utility will pay penal interest on any outstanding amount at the rate of 2% above the short term lending rate of the State Bank of India.

18. MSEDCL contended that MERC vide its interim order dated 3rd June 2002 directed MSEB to release 70% payment to wind farm developers having NOCs for sale to MSEB only. MSEDCL further contended that NOCs were issued to wind developers for sale to MSEB in absence of identification of third party. MSEB released payment to such developers as per the interim orders dated 18th October, 2002 and 30th June, 2003. Therefore, payment of interest of all wind developers from the date of commissioning cannot be considered.

19. The Commission in this regard notes that its para II (b) of the Interim Order clearly stated that 70% payment was to be released in case of wind developers having NOCs for sale to MSEB in absence of any third party verification. It is incorrect on part of MSEDCL to state that 70% payment was authorized for sale to MSEB only.

20. Further, paragraphs 1.6.7 and 2.4.6 of Order dated 24th November 2003 are clear and unambiguous and do not distinguish payment of interest on the basis of nature of NOC.

21. Further, it should be noted that as and when the energy is generated and fed into grid, it is sold and appropriate revenue is realized by the MSEB/MSEDCL. Therefore, it is inappropriate on part of MSEDCL to hold back payment for purchase of power as mandated by the Commission. Therefore,

the Commission hereby directs the MSEDCL to make payment of interest within one month of the date of this order to all wind developers, having any type of valid NOC, for the period since the date of commissioning of the plant

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29. The Commission directs MSEDCL to pay interest on delayed payments within one month of the date of this Order, to all wind developers having any type of valid NOC, for the period since the date of commissioning of the plant.”

5. The present appeal challenges the part of the impugned order which is extracted above on the following grounds.

- (1) The payment of 70% as directed was released on the order of the MERC and therefore for the balance 30% no interest should be levied.
- (2) The delay in payment is attributable to the delay in Commission’s passing an order fixing tariff and directing payment.
- (3) The payment could not have been made till MERC fixed the rate at which payment was required to be made and accordingly it will be improper to direct interest on the outstanding dues.
- (4) The burden of interest may be in crores of rupees and hence would not be proper to be levied.

6. The appellant filed a rejoinder and supplementary affidavit in which it further crystallized its objections. The appellant pleads that the period prior to 24.11.03 is a grey area during which payment has been made from time to time as and when bills were raised and it would not be liable to pay interest before 24.11.03. The appellant also brought to notice a departmental circular with a revised policy for generation of wind and solar energy issued on 15.10.01. Clause 14 of this circular relates the clause regarding payment and says inter-alia “delay beyond 45 days will attract interest at savings banks rates.”

7. The appeal is vehemently opposed by the respondent REDAM who have filed a counter affidavit. It is contended by the respondent No. 2 that the interim relief directing payment of 70% did not prohibit the appellant from effecting the full payment to the wind developers and there is no force in their contention that interest should not be made payable on the 30% balance amount. Further it is contended that even in the absence of tariff being fixed by MERC, MSEB and MSEDCL were liable to make payment at the rate prescribed by the Government of Maharashtra or as was contractually determined between the parties. It may be added here that MERC maintained the same tariff as was fixed earlier by the Government and also followed by Government of Mahatrashttra. It is further

submitted that the energy has to be fed into the grid immediately on its generation and therefore the appellant has obtained the energy and has supplied the energy to its consumers on tariff payable to it. The respondent No. 2 contends that it was improper for the appellant to withhold payment and dispute the liability to pay interest. The respondent No. 2 further contends that interest is payable to it by way of compensation even if the appellant is able to avoid payment of penal interest.

Decision with reasons:

8. The tariff order dated 24.11.03 which determined the purchase rate to be the same as notified by Government of Maharashtra in its order No. NCOP 1097/CR-75/NRG-7 dated 12.3.1998 and directed for payment of interest at 2% above State Bank of India short term lending rate was not challenged by the appellant. Accordingly, the appellant cannot challenge either the tariff or the direction to pay interest or rate of interest viz 2% above the SBI short term lending rate. The impugned order was passed on a petition filed by the respondent No. 2 REDAM for implementation and clarification of the order. In the clarificatory order, the Commission clarified the position as extracted above in paragraph No. 4. In the first place, since the appellant had not made payment despite

reminders, the Commission referred to its order dated 24.11.03 wherein it had already directed interest on delayed payment. The Commission also negated the arguments of the appellant that by the earlier order dated 3.6.02 a direction was made for release of 70% payment only. The Commission made it clear that the interim order directed release of 70% as an interim measure and it would be incorrect to state that only 70% of payment was authorized. Finally, the Commission made a categorical order that interest was payable not only from the date of the tariff order but also from the date of commissioning of the plant. The respondent No. 2 accepts that the interest is payable from the date energy is fed into the grid which according to it is the same as the date of commissioning of the plant. In other words, the Commission had made it categorical that interest is payable not only for the period after the order dated 24.11.03 but also for the period prior to it in case the payment was due. It is this clarification which is under challenge. What therefore, is in dispute is whether the appellant is liable for payment of interest on the dues accruing prior to 24.11.03. It may be stated here that no question of limitation has been raised here by the parties and it may be probably because earliest payment due was not beyond three years prior to 24.11.2003.

9. There is hardly any force in the appellant's contention that since interim order directed payment of 70% of the dues claimed by the respondent No. 2, the appellant should not be liable for interest of the balance 30%. The interim order was passed because the amount was due. The authority or liability to pay interest did not arise because of the interim order. The interim order was in the nature of relief to the respondent No. 2. The respondent No. 2 was entitled to the dues and accordingly to interest independent of the interim direction or of the tariff order.

10. The argument of the appellant that prior to 24-11-2003, there was a grey area also does not hold any water. It is true that after the Commission came into existence and was made responsible to fix tariff, tariff was payable only at the rate fixed by the Commission. It does not mean that nothing fell due for the energy supplied to the grid by the members of the respondent no.2 for the benefit of the appellant. The appellant could have continued payment at the rate at which it was making the payment. If the appellant intended to reduce the rate of purchase from the wind power developers, it could have paid at such reduced rates. The appellant can not say that it was not liable to make any payment since no rate at all was fixed. Section 70 of the Indian Contract Act 1872 makes its obligatory on the person who enjoys the benefits of non-gratuitous act to

pay compensation to the person who has provided the benefit. The plea that no payment could be made because the area was grey has therefore only to be rejected.

11. So far as the departmental circular is concerned, the same can not bind the members of the respondent No.2. The circular does not have either any statutory force or contractual force.
12. Interest is a natural corollary of any delayed payment. Sometimes different interest rates are prescribed so as to differentiate between the normal or compensatory rate of interest and a penal rate of interest. As mentioned earlier, the rate of interest as such has not been challenged in this appeal. What has been challenged is merely the liability to make the payment of interest on the amount falling due prior to 24.11.2003. We add, as disclosed by the appellant's counsel at the hearing, that the appellant for its borrowing has been making payment of interest at rates between 8% to 14% per annum.
13. The Supreme Court in Central Bank of India Vs. Ravindra & Ors. [(2202) 1 Supreme Court Case 367] has quoted with approval the following part of the judgment of the Punjab High Court in the case of CIT Vs. Shyam Lal

Narula (AIR 1963 Punjab 411). The same is given hereunder:

“8. The words ‘interest’ and ‘compensation’ are sometimes used interchangeably and on other occasions they have distinct connotation. ‘Interest’ in general terms is the return or compensation for the use or retention by one person of a sum of money belonging to or owned to another. In its narrow sense ‘interest’ is understood to mean the amount which one has contracted to pay for use of borrowed money...In whatever category ‘interest’ in a particular case may be put, it is a consideration paid either for the use of money or for forbearance in demanding it, after it has fallen due, and thus, it is a charge for the use or forbearance of money. In this sense, it is a compensation allowed by law or fixed by parties, or permitted by custom or usage, for use of money, belonging to another, or for the delay in paying money after it has become payable.”

Thus interest is basically intended to compensate the party who was entitled for payment of amount due to it.

14. The appellant was in fact in default in not making payment of the electricity which it had received from the members of the respondent No. 2. Therefore it will not be wrong to say that rate of interest on amount which was long due, should be payable at penal rate. Since the commission has already fixed the rate, and, as mentioned earlier, the rate itself is not in challenge, the appellant is liable to pay interest at the rate so fixed.

15. The appellant is liable to pay interest. There is no reason why the appellant should not pay interest from the date payment became due. The payment became due when the energy was received by the appellant from the members of Respondent No.2 Such date may be before or after 24.11.2003 as there was nothing to prevent such payment when the energy was received.

16. We find no flaw in the impugned order directing payment of interest from the date of commissioning i.e. date on which energy was first fed into the grid by the members of Respondent No.2. The appeal has no force and the same is accordingly dismissed with costs.

Pronounced in open court on this 5th ***day of February,***
2008.

(Ms. Justice Manju Goel)
Judicial Member

(H.L. Bajaj)
Technical Member