

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 84/2009

Coram:

Shri S. Jayaraman, Member

Shri M. Deena Dayalan, Member

Date of Hearing: 11.5.2010

Date of Order : 31.7.2012

In the matter of:

Petition under Section 146 read with Sections 142, 149 and 11(2) of the Electricity Act 2003.

And in the matter of:

M/s Global Energy Ltd. (GEL)

.....**Petitioner**

Vs.

1. State of Karnataka through Principal Secretary, Energy Deptt., Bangalore,
 2. Karnataka State Load Despatch Centre (SLDC),
 3. Karnataka Power Transmission Corporation Ltd. (KPTCL),
 4. Western Regional Load Despatch Centre (WRLDC).
- Respondents**

The following were present:

1. Mr. Rajiv Yadal, Advocate, GEL.
2. Mr. Sanjay Sen, Advocate, GEL.
3. Ms. Swapna Seshadri, Advocate, KPTCL.

ORDER

The petitioner, Global Energy Limited has filed the present petition under Section 146 read with Sections 142, 149 and 11(2) of the Electricity Act, 2003, the Act, with the prayers as follows:

“(a) Pass an order, directing the Respondents to implement the order dated 3.2.2009, passed by this Hon’ble Commission in petition no. 153 of 2008, by giving concurrence to the Petitioner’s inter-State open access applications;

(b) Pass an order, imposing maximum penalty under Sections 142 and 146 of the Electricity Act, 2003 against the Respondent Nos. 2 & 3 and their erring officials;

(c) Pass an order, directing the Respondent Nos.1, 2 and 3 to pay a sum of Rs. 4,09,25,700/- to the Petitioner, being the financial loss suffered by the Petitioner on account of denial of open access as a result of the government orders notified by the State of Karnataka;

(d) Pass an order, directing the Respondent Nos. 1, 2 and 3 to pay interest @18% per annum to the Petitioner on the aforesaid sum of Rs. 4,09,25,700/-;

(e) Pass such other order(s) as this Hon'ble Commission may deem fit and proper in the facts and circumstances of the case."

2. The petitioner has established a 5 MW bagasse-based power plant, the generating station, in Karnataka State and is therefore a generating company. The generating station is connected to the State grid. The petitioner had made arrangements for sale of power to Reliance Energy Ltd, Mumbai during the month of November 2008 and up to 31.3.2009. The power was proposed to be conveyed outside the State by availing short-term open access on the transmission network owned by the third respondent. The second respondent as system operator controlled and operated by the third respondent, however, did not grant open access to the petitioner as its application was kept pending. Therefore, the petitioner filed a petition, being Petition No 153/2008 before this Commission seeking directions primarily to the second and third respondents herein to immediately provide open access to the petitioner.

3. During pendency of the petition, the State Government of Karnataka. the first respondent, issued direction dated 30.12.2008 in exercise of powers under sub-section (1) of Section 11 of the Act asking all the generators in the State, which included the petitioner, to supply all its exportable power to the State grid

for drawal by the distribution companies in the State. The petition earlier filed by the petitioner was considered by this Commission. After detailed examination of the matter, this Commission, by order dated 3.2.2009 directed that the applications for concurrence for open access on the State grid for inter-State transmission of electricity made by the petitioner or any other person, be considered by the respondents and decided strictly in accordance with provisions of the open access regulations notified by this Commission, notwithstanding the directions issued by the first respondent under sub-section (1) of Section 11 of the Act.

4. Despite the directions of this Commission in its order dated 3.2.2009, the petitioner was not granted open access for conveyance of electricity outside the State, ostensibly in view of the directions of the State Government dated 30.12.2008. The present petition was filed accordingly with prayers noted in the opening part of this order.

5. The State Government filed Writ Petition No 13338/2009 impugning this Commission's order dated 3.2.2009 before the Hon'ble High Court of Karnataka. By its judgment and order dated 26.3.2010, the Hon'ble High Court allowed the writ petition filed by the State Government , upheld the directions of the State Government under sub-section (1) of section 11 and set aside this Commission's order dated 3.2.2009. The appeals filed before the Hon'ble Supreme Court against the judgment dated 26.3.2009 are presently pending. It bears notice that the Hon'ble High Court in its judgment dated 26.3.2009 took notice of the present petition.

6. Against the above background, the question arises whether the petitioner is entitled to the relief it has prayed for in the present petition. As regards the prayers for direction to the respondents to implement this Commission's order dated 3.2.2009 in Petition No. 153/2008 and imposing of penalty under Sections 142 and 146 of the Act the same have become infructuous after setting aside of the order dated 3.2.2009. It is trite law that when a judgment or order is set aside by the superior court it becomes extinct and gets obliterated as if it never existed. In the light of this established legal position, the question of implementation of the directions of this Commission as per the said order dated 3.2.2009 does not survive at this stage. *A fortiori*, the question of any penal action for its non-implementation cannot arise. This discussion disposes of the petitioner's prayers at (a) and (b).

7. The next question is whether the petitioner can be granted compensation for the losses allegedly suffered by it because of the direction of the State Government under sub-section (1) of Section 11 of the Act. The relevant statutory provision under which compensation can be considered is sub-section (2) of Section 11, which is extracted hereunder:

“(2) The Appropriate Commission may offset the adverse financial impact of the directions referred to in sub-section (1) on any generating company in such manner as it considers appropriate.”

8. Thus, in terms of sub-section (2), the Appropriate Commission is empowered to offset the impact of the direction of the Appropriate Government on the generating company. Learned counsel for the petitioner at the hearing submitted that the petitioner was entitled to compensation envisaged under sub-section (2) of Section 11 to offset the adverse financial impact of the direction by

the State Government issued under sub-section (1) of section 11 and the same was payable even though the direction contemplated therein was held to be valid. It was argued that there was nothing in sub-section (2) to suggest that compensation was payable only when the power under sub-section (1) was wrongfully exercised by the Appropriate Government. There is merit in the submission made on behalf of the petitioner. There cannot be any dispute about the proposition that sub-section (2) can be invoked in the circumstance only when the power is legitimately exercised by the Appropriate Government.

9. The question that still remains to be considered is whether this Commission is the Appropriate Commission to award compensation in the present case. Learned counsel for the petitioner argued that this Commission is the Appropriate Commission envisaged under sub-section (2) as the petitioner suffered monetary loss on account of denial of open access on the inter-State transmission system in contravention of the Central Electricity Regulatory Commission (Open Access on Inter-State Transmission) Regulations, 2008, as amended. On the other hand, the learned counsel for the respondent opposed the submission. The controversy should not detain us as the matter has been considered by the Hon'ble High Court in the judgment dated 26.3.2010. The Hon'ble High Court held as under:

"15. M/S. Global Energy Limited is the Company incorporated under the provisions of the Companies Act, 1956. It owns, operates and maintains a generating station at Village Belgundi, District Belgaum within the State of Karnataka. They also filed a petition no. 153/2008 before the Central Commission seeking open access for export of power generated by them outside the State of Karnataka. The Central Commission vide order dated 3.2.2009 simply followed the earlier order dated 22.1.2009 which is the subject matter of WP No.2703/2009 passed by the Central Commission directing the KPTCL to grant open access to Global Energy Limited. In fact, as this Court had stayed the operation of the order

*dated 22.01.2009, the Global Energy Limited preferred a Special Leave Petition and a Writ Petition in WP No. 126/2009 before the Hon'ble Supreme Court of India against the aforesaid interim order. The Hon'ble Supreme Court rejected the permission to file SLP and dismiss the Writ Petition by order dated 27.3.2009. Subsequently, the Global Energy Limited has filed a petition before the Central Commission under Section 146 and other applicable provisions of the Electricity Act including Section 142, 149 and 11(2) for taking action against the Government of Karnataka and the KPTCL and their officials including imposing penalty and also imprisonment of the officials of the Government of Karnataka and KPTCL. **They also sought to invoke the jurisdiction of the Central Commission under Section 11(2) of the Electricity Act seeking compensation, whereas the same is within the jurisdiction of the Karnataka Electricity Regulatory Commission constituted for the State of Karnataka.....**" (Emphasis supplied)*

10. In accordance with the above observations of the Hon'ble High Court, this Commission in the present circumstances is not inclined to go into the question of compensation under sub-section (2) of Section 11 of the Act.

11. In the light of the above discussion, we do not consider it appropriate to keep the present petition pending. Accordingly, the petition is hereby disposed of. The petitioner is, however, at liberty to take up further steps regarding its claim for compensation in accordance with law.

sd/-
(M.DEENA DAYALAN)
MEMBER

sd/-
(S. JAYARAMAN)
MEMBER