

COURT-1

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

DFR No : 267 of 2024 & IA No. 909 OF 2024 & IA No. 910 OF 2024

Dated: 22nd July, 2024

Present : Hon`ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon`ble Ms. Seema Gupta, Technical Member (Electricity)

In the matter of:

Bihar State Power (Holding) Company Limited Appellant(s)
Versus
Central Electricity Regulatory Commission & Ors. Respondent(s)

Counsel on record for the Appellant(s) : Rohini Prasad for App. 1

Counsel on record for the Respondent(s) : Hemant Singh
Mridul Chakravarty
Biju Mattam
Sourav Roy
Supriya Rastogi Agarwal
Chetan Kumar Garg
Lakshyajit Singh Bagdwal
Ankita Bafna
Nehul Sharma
Robin Kumar
Harshit Singh
Alchi Thapliyal
Lavanya Panwar
Sanjeev Singh Thakur for Res. 2

Ravi Kishore
Niraj Singh
Perna Singh
Keshav Singh for Res. 3

ORDER

IA NO. 909 OF 2024

(For condonation of delay of 01 day in filing the Appeal)

The delay of one day in filing the appeal is not opposed by learned Counsel for the Respondent. The delay is condoned. The application is, accordingly, disposed of.

IA NO. 910 OF 2024
(for interim relief)

The 2nd Respondent in this Appeal had earlier invoked the jurisdiction of the CERC by way of Petition No. 109/MP/2022, contending that the Appellant herein had misinterpreted the provisions of mis-declaration stipulated in Article 11 of the Pilot Agreement for procurement of Power (PAPP). They sought a direction to the Respondent to refund a sum of Rs.46.16 lakh already deducted; not to deduct any further amount including Rs.25.35 crores on this account from the monthly energy bills issued /to be issued to them along with interest/ carrying cost; and to direct the Appellant to adhere to the provisions of the PAPP/ PPSA in their letter and spirit.

In the order impugned in this Appeal, the CERC observed that there was no event of mis-declaration on the part of the 2nd Respondent - Petitioner in terms of Article 11 of the PAPP/ PPSA for the period in question. Consequently, the communications/ letters dated 16.12.2020 and 11.02.2022 issued by the Appellant and PTC India Limited (PTCIL) were set aside. The Appellant was directed to refund, the amount deducted by it by alleging mis-declaration, to PTCIL within a period of one month from the date of passing of the order along with the applicable interest as per the provisions of the PPSA, and PTCIL was further directed to make payment to the 2nd Respondent - Petitioner as soon as it was in receipt of payment from the Appellant. The CERC further clarified that the scope of their examination in the order was limited to the occurrence of the event of mis-declaration in terms of

Article 11.2.1, Article 11.2.4 and Article 11.2.5 of the PAPP/ PPSA as raised in the Petition.

In the order, impugned in this Appeal, the CERC took note of a similar order passed by it in Petition No. 94/MP/2022 dated 16.12.2022; and to the fact that this Tribunal had, by its order in Appeal No. 499 of 2023 along with IA No. 383 of 2023 dated 02.06.2023, refused to grant stay and had dismissed the said IA.

During today's hearing, Ms. Rohini Prasad, learned Counsel for the Appellant, while fairly stating that the interim order passed by this Tribunal (as referred to in the impugned order) would govern the issue of mis-declaration at least till the main Appeal is finally heard, would further state that the Commission had itself noted, in paragraph 23 of the impugned order, that Article 10.2.3 of the PPAP/ PPSA permitted deviation in the declared availability from the supplier side up to 15% of the contracted capacity for which open access had been approved; and had provided for compensation only in the event the quantum of shortfall was in excess of the permitted deviation of 15%. Learned Counsel would draw our attention to the written submissions filed by the 2nd Respondent - Petitioner, (as extracted in the impugned order), wherein they are said to have admitted that, during the disputed period, they had declared availability at 68.75 MW, and had been scheduling the said quantum, which it had declared.

According to the Learned Counsel for the Appellant, since the permitted deviation is only up to 15% and it is admitted that the contracted capacity was 125 MW, the Appellant is entitled for compensation for any deviation beyond 106.25 MW; and since the 2nd Respondent - Petitioner admits to have declared its availability at 68.75

MW, the Appellant is entitled to seek compensation for the differential quantum.

Mr. Buddy A. Ranganadhan, learned Counsel for the 2nd Respondent – Petitioner, while disputing the submissions of the Appellant on merits, would point out, rightly so, that no such claim for compensation was ever raised by the Appellant before the CERC; this was also not the subject matter of proceedings before the CERC in the Petition filed by the 2nd Respondent; and it is impermissible for the Appellant by a side wind, and that too at the appellate stage of these proceedings, to now raise such a claim that too in an Appeal preferred by them against the order passed by the CERC in a Petition filed by the 2nd Respondent questioning their entitlement to impose penalty for mis-declaration.

On a reading of the impugned order, we are satisfied that the issue now raised before us by Ms. Rohini Prasad, learned Counsel for the Appellant, was neither urged by the Appellant before the CERC nor was it an issue which arose for consideration in the proceedings before the CERC. As the present Appeal is preferred against the order of the CERC rejecting the Appellant's claim of mis-declaration by the 2nd Respondent, the question whether or not they are entitled to seek compensation for reduced availability cannot be the subject matter of enquiry in the present Appeal as it was not even in issue in the proceedings before the CERC.

Suffice it, in such circumstances, to make it clear that this order does not disable the Appellant from taking such action as it considers appropriate in accordance with law, and for the 2nd Respondent, if need be, to avail their legal remedies in case they are aggrieved by any action which the Appellant may take. It is also made clear that we have not

expressed any opinion on the Appellant's entitlement or otherwise to seek compensation on this ground, since this issue was not the subject matter of consideration before the CERC and cannot, therefore, be the subject matter of the present Appeal.

In the light of the earlier order passed by this Tribunal in Appeal No. 499 of 2023 along with IA No. 383 of 2023 dated 02.06.2023, the Appellant's prayer, for grant of interim relief is rejected. Needless to state that the impugned order passed by the CERC shall be subject to the result of the main Appeal.

The IA is dismissed.

DFR NO. 267 OF 2024

Reply shall be filed by the Respondents within six weeks and rejoinder, if any, shall be filed within four weeks' thereafter. After pleadings are complete, and after verification by the Registry, let this Appeal be included in the '**List of Finals**' to be taken up from there, along with Appeal No. 499 of 2023, in its turn.

Seema Gupta
Technical Member (Electricity)

Justice Ramesh Ranganathan
Chairperson

tpd/dk/skj