



**IN THE HIGH COURT OF ANDHRA PRADESH
AT AMARAVATI
(Special Original Jurisdiction)**

[3209]

THURSDAY, THE FOURTH DAY OF APRIL
TWO THOUSAND AND TWENTY FOUR

PRESENT

THE HONOURABLE SRI JUSTICE NINALA JAYASURYA

CONTEMPT CASE NO: 2088 OF 2023

Between:

Tata Power Renewable Energy Limited and **...PETITIONER(S)**
Others

AND

K Santhosha Rao **...CONTEMNOR**

Counsel for the Petitioner(S): Mr. O.Manohar Reddy, Senior
Counsel, assisted by Mr. Sai
Sanjay Suraneni, Advocate.

Counsel for the Contemnor: Mr.V.R.Reddy Kovvuri (SC for APSPDCL)

The Court made the following:

ORDER:

1) This Contempt Case is filed alleging, deliberate violation / disobedience and non-compliance of the interim order dated 01.11.2018, passed in I.A.No.2 of 2018 in W.P.No.38203 of 2018.

2) The petitioners filed above said Writ Petition challenging the order passed by the Andhra Pradesh State

Electricity Regulation Commission (for short “the APERC”) dated 28.07.2018, in O.P.No.1 of 2017 wherein APERC, *inter alia*, directed the wind power generation companies, including the 1st petitioner company herein, to give credit in the tariff determined for the wind power projects, the Generation Based Incentive (for short “GBI”) claimed and availed by them and the petitioners therein i.e., Southern Power Distribution Company of A.P. and Eastern Power Distribution Company of A.P., were permitted to deduct the amounts so claimed and availed by them towards such GBI by the wind power generators and only pay the balance of tariff payable to them for the electricity supplied by such generators to the said Distribution companies, out of the monthly bills payable since the filing of the above said O.P. until such availed GBI is totally given credit to in the tariff payable by the distribution companies to such generators respectively.

3) Challenging the said order, one of the wind power generation companies filed W.P.No.29841 of 2018 and A learned Judge after expressing *prima facie* satisfaction that the APERC has no jurisdiction to exercise the power of review in the manner it did, vide orders dated 23.08.2018 in I.A.No.1 of 2018 in W.P.No.29841 of 2018 granted interim suspension of the order dated 28.07.2018 passed by the APERC in O.P.No.1 of 2017.

4) In so far as the Writ Petition No.38203 of 2018 filed by the present writ petitioners, a learned Judge at the time of considering the matter for admission passed the following order:

“Learned counsel on either side submitted that on consideration of the matter, learned single Judge of this Court in W.P.No.29847 of 2018 granted interim suspension of order dated 28.07.2018. In view of the same, petitioner herein is also entitled to interim suspension of order dated 28.07.2018. Perused the order. There shall be interim stay as prayed for.

At this stage, learned standing counsel for respondents informs the Court that after granting interim suspension, matters are placed before the Division Bench and they are coming up for hearing. In view of the said submission, office to verify and place the matter before the Division Bench along with connected W.P.No.33534 of 2018, after obtaining necessary instructions from the Hon’ble the Chief Justice.”

5) Referring to the order dated 01.11.2018, Mr.O.Manohar Reddy, learned Senior Counsel, *inter alia*, made detailed submissions by drawing the attention of this Court to the chronological events. The learned Senior Counsel submits that by virtue of the interim orders referred to above, the distribution companies are not entitled to deduct the GBI. However, in September-2018, the A.P. Southern Power Distribution Company Ltd., (APSPDCL) completely stopped payment of tariff amounts; thereby the GBI deductions were also stopped. He submits that

subsequently APSPDCL filed O.P.No.17 of 2019 before APERC seeking retrospective revision of GBI tariff and various generating companies filed a Batch of Writ Petitions (WP Nos.2401 of 2019 etc.,) challenging the maintainability of the O.P.No.17 of 2019.

6) While the matters were pending consideration, the learned counsel submits that the Government of Andhra Pradesh issued G.O.Ms.No.63, dated 01.07.2019, constituting a High Level Negotiations Committee to review and renegotiate the Wind and Solar Power PPA tariffs. He submits that thereafter the PPA tariff was reduced Rs.2.43 ps., per unit and the generating companies were directed to submit revised bills for payment. Aggrieved by the same, the learned counsel submits that the petitioner company herein and other generating companies filed W.P.No.9874 of 2019 & Batch and the said Batch and the other Batch W.P.No.2401 of 2019 etc., were disposed of vide separate orders dated 24.09.2019, wherein a learned single Judge directed the APERC to conclude the hearing in O.P.No.17 of 2019 expeditiously and the distribution companies were directed to pay interim tariff of Rs.2.43 ps., per Unit for Wind and Rs.2.44 ps., per Unit for Solar Power producers, until final disposal of the above said O.P. by the APERC. The generating companies challenged the said orders of the learned single Judge in W.A.No.393 of 2019

& batch and the learned counsel submits that during the pendency of writ appeals the distribution companies made payments to the petitioner herein and other generating companies of interim tariff at Rs.2.43 ps., per unit and during the said period did not deduct GBI from the said payments.

7) Mr. O. Manohar Reddy, learned Senior Counsel further submits that the said batch of Appeals were disposed of by the Hon'ble Division Bench vide orders dated 15.03.2022 holding, *inter alia*, that APERC lacks jurisdiction to entertain O.P.No.17 of 2019 and directed the distribution companies to clear all the past dues of wind generators, including the petitioner company, with a further direction to pay future invoices at PPA tariffs @ Rs.4.83 ps. Learned Senior Counsel submits that though the APSPDCL started making tariff payments from June, 2022, to the petitioner's dismay, started deducting GBI for the first time after interim order dated 01.11.2018. In elaboration, he submits that from 01.11.2018 till June 2022, APSPDCL did not deduct GBI from the tariff payments to the petitioner and after disposal of W.A.No.393 of 2019 and batch, the APSPDCL started making payments from June, 2022 at full PPA tariff i.e., Rs.4.83 ps., per unit, but started deducting GBI. Learned Senior Counsel submits that the action of the APSPDCL in deducting the GBI, amounts to

willful and deliberate violation of interim orders dated 01.11.2018 referred to supra.

8) Learned Senior Counsel submits that the plea taken by the respondents that the Contempt Case is barred by limitation as it was not filed within one year from the date of the interim order i.e., 01.11.2018, is misconceived. He submits that the period of limitation under Section 20-D of the Contempt of Courts Act shall commence from June, 2022 when the APSPDCL started making payments of PPA tariff @ Rs.4.83 ps., per unit and started deducting the GBI. He submits that the contempt case filed on 31.12.2023 is well within the period of limitation and not barred by limitation.

9) In so far as the plea taken by the respondents with reference to the decision of the Hon'ble Supreme Court of India reported in ***State of J&K v Mohd. Yaqoob Khan and Others***¹, learned Senior Counsel while distinguishing the said judgment contends that mere pendency of a stay vacate petition would not confer any power on the APSPDCL to deduct the GBI and therefore APSPDCL cannot refuse to comply with the interim order on the said premise.

¹ (1992) 4 SCC 167

10) Learned Senior Counsel submits that in the present case, at the time of admission both the parties were heard and thereafter the interim orders dated 01.11.2018 were granted. Therefore, the same cannot be treated as an *ex parte* interim order, more particularly when reasons were assigned by the learned Judge while granting the interim orders following the earlier orders in similar matters. He submits that as the order of the APERC dated 28.07.2018 is stayed / suspended, the respondent distribution company should not have deducted the GBI and its action in deducting the GBI, constitutes willful disobedience. He submits that in fact, the APSPDCL except filing the memo adopting the counter in W.P.No.29841 of 2018, had not filed vacate stay petition.

11) Learned Senior Counsel also emphasized that the power purchase agreement (PPA) entered into between the parties is valid upto 2040 and the distribution company can recover the GBI in the event of the dismissal of the Writ Petition. Learned Senior Counsel places reliance on the decisions of Hon'ble Supreme Court of India in ***Reliance Industries Limited v Vijayan A²*** and ***Dr.H.Phunindre Singh and Others V K.K. Sethi***

² 2022 LiveLaw (SC) 950

and Another³ etc., and further contends that the respondent instead of complying with the interim orders, which are in force, seeks to justify his actions in utter disregard and willful defiance of the orders of the Court and is therefore liable for punishment under the provisions of the Contempt of Courts Act.

12) On the other hand, Mr.V.R. Reddy Kovvuri, learned counsel appearing for the respondents refuted the said submissions by contending that there is no positive direction of the Hon'ble Court in the order dated 01.11.2018. He submits that a detailed counter was filed along with the Vacate Stay petition in W.P.No.29877 of 2018, wherein the order of the APERC dated 28.07.2018 was under challenge. He submits that adopting the counter affidavit in the said Writ Petition, a Memo was filed with USR No13902 of 2022, dated 25.03.2022, and the matters are pending for consideration before the Hon'ble Division Bench. While stating that non-filing of a separate counter and vacate stay petition is a mere technicality, the learned counsel submits that the order dated 01.11.2018 is an *ex parte* order. He submits that mere representation / appearance on behalf of the respondents / DISCOMS at the stage of admission and granting of interim orders would not amount to a final order in the I.A. He submits that

³ (1998) 8 SCC 640

after giving an opportunity of filing counter affidavit and after hearing the matter, if an order is passed disposing of the application finally, it would amount to final order in the I.A. Learned counsel also submits that in fact, the petitioners filed a separate Miscellaneous Application i.e., I.A.No.1 of 2018 to refund the GBI deducted by the DISCOM, which is pending and the petitioners instead of pursuing the same, filed the present Contempt Case. He submits that the petitioner under the guise of the present Contempt Case is seeking to get the relief which could not be obtained until final disposal of the Writ Petition and the same is not tenable.

13) Learned counsel submits that as there is a serious dispute with regard to the petitioner's entitlement for GBI and unless the said issue is decided, the petitioners cannot be permitted to avail the benefit of GBI by virtue of the interim orders. Placing reliance on decision of the Hon'ble Supreme Court of India in the ***State of J&K (1 supra)***, learned counsel urges for dismissal of the Contempt Case.

14) On consideration of the contentions raised by the learned counsel appearing on both sides and on perusal of the material on record, the points that arise for adjudication of this Court are –

(a) Whether the Contempt Case is filed within the period of limitation as per Section 20 of the Contempt of Courts Act?

(b) Whether the action on the part of the respondent amounts to willful and deliberate violation of the orders dated 01.11.2018? And if so,

(c) Whether he is guilty of Contempt of Court?

POINT No.(a):

15) The interim orders alleging violation of which the present Contempt Case has been filed, it is not in dispute that was passed on 01.11.2018. It is also not in dispute that in view of the subsequent litigation between the parties, the GBI was not deducted and only from June, 2022, after disposal of W.A.No.393 of 2019 and Batch, the APSPDCL started deducting GBI. In view of the same, the petitioners filed the contempt case on 31.03.2023 i.e., within one year from June, 2022 when APSPDCL started deducting GBI. Therefore, the Contempt Case is well within the period of limitation.

POINT No.(b&c):

16) With regard to the contention that the order dated 01.11.2018 was passed after hearing both sides and unless the same is vacated, the DISCOM is bound to implement the same and expect filing of adoption memo no vacate stay petition is filed,

it is to be noted that even prior to filing of the Contempt Case on 31.03.2023, it is not in dispute that the DISCOM filed a Memo vide USR No13902 of 2022, dated 25.03.2022 adopting the counter affidavit in W.P.No.29877 of 2018. No doubt, along with the counter DISCOM is required to file a separate vacate petition even though it is adopting the counter filed in W.P.No.29877 of 2018. Be that as it may, the said interim order dated 01.11.2018 was passed at the time of considering the matter for admission. Though the learned Judge expressed a *prima facie* view in the matter and granted interim orders keeping in view the earlier interim orders challenging the orders of the APERC, the same cannot be treated as a final order in the I.A. In fact, in the **State of J&K case (1 supra)** similar contentions like in the present case were raised. A Three Member Bench of the Hon'ble Supreme Court of India dealing with the matter, wherein the High Court passed orders while the stay application was not disposed of, *inter alia*, opined that '*we find great force in the argument of Mr. Salve that so long the stay matter in the Writ Petition was not finally disposed of, the further proceeding in the contempt case was itself misconceived and no orders therein should have been passed*'.

17) The Hon'ble Supreme Court of India further held that "*the High Court should have first taken up the stay matter without*

any threat to the respondents in the writ case of being punished for contempt. Only after disposing it of, the other case should have been taken up. It is further significant to note that the respondents before the High Court were raising a serious objection disputing the claim of the writ petitioner.”

18) Referring to the above said decision of the Hon’ble Supreme Court of India in ***Modern Food Industries (India) Ltd., and another v Schindanand Dass and Another***⁴, it was *inter alia* held as follows:

“..... Whether the order whose disobedience is complained about is appealed against and stay of its operation is pending before the Court, it will be appropriate to take up for consideration the prayer for stay either earlier or at least simultaneously with the complaint for contempt. To keep the prayer for stay stand-by and to insist upon proceeding with the complaint for contempt might in many conceivable cases, as here, cause serious prejudice. This is the view taken in *State of J&K v Modh. Yaqoob Khan*.”

19) However, in the decision on which ***Dr.H.Phunindre Singh case (3 supra)*** on which reliance is placed, by the learned Senior Counsel, the Hon’ble Supreme Court of India opined that when the order passed by the learned Single Judge of High Court was not stayed by the Division Bench, Contempt Petition should have been disposed of on merits, instead of adjourning the same

⁴ 1995 Supp (4) SCC 465

till disposal of the Appeal, so that the question of deliberate violation of the subsisting order of the Court is considered and enforceability of the Court's order is not permitted to be diluted. Though the learned Senior Counsel with reference to the above said decision made submissions by distinguishing the decision in the ***State of J&K case (1 supra)***, in the light of the binding nature of the decision of a Larger Bench in the said case, this Court is not inclined to concur with the submissions made on behalf of the petitioners.

20) Even in the latest decision in ***Reliance Industries Ltd., (2 supra)***, the Hon'ble Supreme Court of India while referring to the decisions in the ***Modern Food Industries and State of J&K cases*** in the attending facts and circumstances held as follows:

"We have gone through the aforesaid decisions and the subsequent order passed by this Court dated 12.10.2022 in Review Petition (Crl.) No.250/2022. The pendency of an appeal and/or writ petition along with stay cannot be equated with pendency of the review petition. There is a final decision by this Court in an appeal. Merely because the stay application is pending in review petition cannot be a ground to grant stay by the respondent on its own and not to comply with the directions issued by this Court.

It is required to be noted that the State of J and K Vs. Mohd. Yaqoob Khan and others (supra) was a case where

against the ex-parte order passed by the learned Single Judge, pending writ petition, the contempt proceedings were initiated. Therefore, this Court observed that when the stay application is yet to be heard and decided and disposed of, the contempt proceedings cannot be initiated. Under the circumstances, the said decision(s) cannot be of any assistance to the respondent.”

21) In the light of the expression of the Hon’ble Supreme Court of India with reference to the decision in ***State of J&K case (1 supra)***, this Court finds force in the submissions made by the learned counsel for the respondents that as the stay petition has not been decided and disposed of finally, the contempt proceedings are not sustainable. As noted earlier, even prior to the filing of the Contempt Case, the respondents filed a memo adopting the counter affidavit in the Writ Petition filed challenging the very same order of APERC dated 28.07.2018. This Court is also of the view that when there is a dispute with regard to the claim of GBI, the matter needs to be examined and the petitioners under the guise of non-implementation of the interim order, cannot secure the main relief. It may also be pertinent to mention that the petitioner’s application, I.A.No.1 of 2018, seeking a specific direction not to deduct GBI, has not been disposed of finally, let alone I.A.No.2 of 2018, in the said circumstances, this Court is of the view that the action on the part of the respondent

would not amount to willful disobedience of the order dated 01.11.2018. Though a contention was raised by the learned Senior Counsel to the effect that the implementation of the interim orders would not cause any prejudice to the respondents on the premise that the PPA is in force till 2040 and in the event of dismissal of the Writ Petition, the GBI amounts can be recovered, this Court is not inclined to accept the same. To put it in a different way, in the event the petitioner succeeds in the Writ Petition, it would be entitled for payment of GBI amounts. Under the guise of contempt proceedings the petitioners cannot seek to secure the relief which is sought for, till the Writ Petition is finally decided.

22) In the aforesaid view of the matter and the conclusions arrived at supra, this Court see no reason to take a view or hold that the respondent herein is guilty of willful and deliberate disobedience of the order passed by this Court. Points a & b are answered accordingly.

23) In the result, the Contempt Case is dismissed. No order as to costs.

NINALA JAYASURYA, J

Date:04.04.2024.

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