

**THE HONOURABLE SRI JUSTICE A.V.SESHA SAI**

**WRIT PETITION No.18071 OF 2021**

**ORDER:**

Heard Sri Avinash Desai, learned counsel for petitioner, Sri Y.Nagi Reddy, learned Standing Counsel for respondents 1 and 4, Sri V.R.N.Prashanth, learned Standing Counsel for 2<sup>nd</sup> respondent and the learned Government Pleader for Energy for 3<sup>rd</sup> respondent, apart from perusing the material available on record.

2. Challenge in the present Writ Petition is to the Memo bearing No.APSPDCL/TPT/CGM/O&M/GM/IPC/EE /FMemo/D.No.758/21, dated 21.08.2021, issued by the Chief General Manager/O&M, Southern Power Distribution Company of Andhra Pradesh Limited(APSPDCL), Tirupati-1<sup>st</sup> respondent herein.

3. According to the petitioner, it is a company incorporated under the provisions of the Companies Act, 1956 and is engaged in the business of generation of wind energy at Burgula of Kurnool district. 1<sup>st</sup> respondent herein applied for approval of Power Purchase Agreement (PPA) dated 12.02.2014, and 2<sup>nd</sup> respondent-Andhra Pradesh Electricity Regulatory Commission (APERC) accorded consent under Section 21 (4) (b) of the Andhra Pradesh Electricity Reform Act, 1998 read with Section 86

of the Electricity Act, 2003 *vide* letter bearing No.E-897/Dir-Engg/JD(PPP)/D.No.975/2013-01, dated 03.12.2013, subject to the PPA being revised in consistent with the observations made therein and submission of the same to the Commission.

4. According to the learned counsel for the petitioner, clauses (ii) and (xiv) of the letter dated 03.12.2003 are only the cosmetic changes suggested by 2nd respondent-APERC. 1<sup>st</sup> respondent herein, vide letter No. No.CGM/Comm1 & RA)/SE(IPC)/F.Mylrah/D.No.6192/13, dated 21.02.2014, submitted the final PPA and the last two paragraphs of the said letter read as follows:

“Accordingly, Final Power Purchase Agreement was entered with M/s Mylrah Vayu (Krishna) Private Limited on 12.02.2014 duly modifying the existing PPA as per the certain observations of Hon’ble APERC vide reference third cited and is submitted herewith for record. The copy of the PPA and modifications carried out to the existing PPA is enclosed as Annexure ‘A’.

Further certain observations of APERC are noted by future guidance for incorporating in the upcoming PPA and certain observations of APERC for which changes are not required as per the opinion of APCPDCL like clarifications etc., are herewith enclosed as Annexure ‘B’ & ‘C’ respectively”.

5. Thereafter, by way of letter bearing No.E-897/Dir-Engg/JD(PPP)/D.No.623/2014-02, dated 11.06.2014, 2<sup>nd</sup> respondent herein wrote back to 1<sup>st</sup> respondent and paragraph No.4 of the said letter reads thus:

“Subsequently the matter was discussed by the Commission in a meeting scheduled on 03.05.2014 with APCPDCL and APPCC officials. The following are the decisions of the Commission:

- i) The time of 45 days given by the Commission vide letter, dated 03.12.2013 at reference 2<sup>nd</sup> cited for submitting the revised PPA, stands extended upto 12.02.2014 pursuant to the request of APCPDCL vide letter 3<sup>rd</sup> cited.
- ii) All other commitments/assurances given in the letter dated 21.02.2014, other than the issues explicitly dealt with herein, need to be adhered to by the DISCOMs.
- iii) The PPA dated 12.02.2014 is to be amended keeping in view the following observations of the Commission and the amendments to be submitted within 45 days from the date of issue of this letter failing which the consent already granted vide letter 2<sup>nd</sup> cited will be deemed to have been withdrawn.
  - a) “Interest at SBI’s base rate plus one percent” may be applied instead of “Interest at existing nationalized bank rate (Prime Lending Rate)”. Consequential changes may also be made.
  - b) Article 4: If NEDCAP cancellation is to be an event of default of the PPA, it should be specifically mentioned in Article 9 rather than under Article 4.

c) Necessary changes may be made recognizing change of jurisdiction from APCPDCL to APSPDCL, due to the bifurcation of States.

*Vide* letter bearing No.APSPDCL/TPT/CGM/O&M/GM/IPC/EE/F325/D.No.1421/20, dated 17.12.2020, the Chief General Manager of 1<sup>st</sup> respondent company requested the petitioner herein to depute its authorized representative to the Corporate Office of 1<sup>st</sup> respondent-Corporation to carry out the amendments to PPA, dated 12.02.2014, as directed by 2<sup>nd</sup> respondent –APERC in letter dated 11.06.2014. Later, vide letter bearing No.APSPDCL/TPT/GM/IPC/F.325/D.No.42/21, dated 19.01.2021, 1<sup>st</sup> respondent herein made a request to 2<sup>nd</sup> respondent-APERC to accord permission for executing the amendments to the PPA, dated 12.02.2014. In the said letter, 1<sup>st</sup> respondent also requested 2<sup>nd</sup> respondent-APERC to condone the delay in incorporating the amendments.

6. By way of the impugned Memo bearing No. APSPDCL/TPT/CGM/O&M/GM/IPC/EE/FMemo/D.No.75 8/21, dated 21.08.2021, 1<sup>st</sup> respondent herein, while noting that approval of PPA granted stood withdrawn by 2<sup>nd</sup> respondent-APERC, requested the Superintending Engineer/Operation, APSPDCL, Kurnool -4<sup>th</sup> respondent herein, to arrange to disconnect the generator at the

interconnection point immediately and to report compliance. This Writ Petition came to be filed on 23.08.2021. According to the learned counsel for the petitioner, at about 4.00 PM on 24.08.2021, the Superintending Engineer/Operation, APSPDCL, Kurnool-4<sup>th</sup> respondent herein, had given effect to the said order and had disconnected the generator at the interconnection point. This matter came up before this Court on 25.08.2021, and at request of the learned Standing Counsel, this Court directed the matter to be listed on the next date.

7. According to the learned counsel for the petitioner Sri Avinash Desai, the action impugned in the present Writ Petition is a gross violation of Fundamental Rights guaranteed to the petitioner under Articles 14 and 19 (1) (g) of the Constitution of India, besides being a clear infraction of the principles of natural justice. In elaboration, it is contended by the learned counsel that without being preceded by any notice or opportunity of being heard, to the petitioner, the respondents resorted to the impugned action. Learned counsel for the petitioner also argues that the obligation to obtain consent rests solely on 1<sup>st</sup> respondent-Discom as per the provisions of Section 21 (4) (b) of the Andhra Pradesh Electricity Reform

Act, 1998 and for the fault on the part of 1<sup>st</sup> respondent in taking timely action, petitioner herein can neither be penalized nor faulted. It is also the submission of the learned counsel that in respect of 3 other similarly situated generating companies viz. M/s. Rayala Wind Power Company Private Limited, M/s. Woodside Fashions Limited and M/s. Hi-Tech Systems and Services Limited, amended PPAs have been entered into and hence, the petitioner herein cannot be discriminated.

8. On the other hand, strongly resisting the Writ Petition, Sri V.R.N.Prashanth, learned Standing Counsel for 2<sup>nd</sup> respondent-APERC submits that in the absence of any consent secured from 2<sup>nd</sup> respondent-APERC under Section 21 (4) (b) of the Andhra Pradesh Electricity Reform Act, 1998, the agreement is required to be treated as void and the same cannot be acted upon. It is also the submission of the learned counsel that admittedly, 2<sup>nd</sup> respondent herein did not issue any consent and in fact, on 25.09.2017, the Secretary, APERC, vide letter No.APERC/JD(PPP)/DD (P&PP)/F.E-897/D.No.813/2017, dated 25.09.2017 also informed the petitioner that the conditional consent is deemed to have been withdrawn.

However, learned counsel for the petitioner strongly denied receipt of the same by the petitioner.

9. Sri Y.Nagi Reddy, learned Standing Counsel for respondents 1 and 4 has brought to the notice of this Court that vide letter No.APSPDCL/TPT/GM/IPC/ F.325/D.No. 42/21, dated 19.01.2021, 1<sup>st</sup> respondent herein made a request to 2<sup>nd</sup> respondent to accord permission for executing amendments to the PPA dated 12.02.2014 duly appending the remarks pointed out by 2<sup>nd</sup> respondent vide letter dated 11.06.2014. It is also brought to the notice of this Court by the learned counsel that vide notice dated 11.08.2021, 2<sup>nd</sup> respondent herein called upon 1<sup>st</sup> respondent to submit the explanation for initiating action under Section 142 of the Electricity Act, 2003. It is also brought to the notice of this Court by the learned Standing Counsel that in the event of there being any dispute, the agreement provides for resolution of the same before 2<sup>nd</sup> respondent vide clause 10.4 of the Agreement.

10. It is a settled and well established principle of law that any action, which has civil consequences, must necessarily be preceded by notice and opportunity of being heard to the persons likely to be affected by such action. The specific stand taken by the learned counsel for the petitioner in the instant case is that for the fault on the part of 1<sup>st</sup> respondent in taking action in a timely manner, the petitioner herein cannot be penalized and the

respondents herein ought to have issued a show-cause notice before resorting to the impugned action of disconnection, and had a notice been issued to the petitioner herein, necessary steps would have been taken by the petitioner herein before 2<sup>nd</sup> respondent. Since 2<sup>nd</sup> respondent herein already initiated action under Section 142 of the Electricity Act, 2003 against 1<sup>st</sup> respondent herein and issued notice, and as the said enquiry is pending, this Court deems it appropriate to dispose of the Writ Petition, with a liberty to the petitioner herein to file appropriate representation/ application before 2<sup>nd</sup> respondent-APERC, explaining all these aspects, by enclosing copies of necessary documents in support of its stand, for consideration of the same by 2<sup>nd</sup> respondent and for passing appropriate orders.

11. Accordingly, the Writ Petition is disposed of, with a liberty to the petitioner herein to file appropriate representation/application before 2<sup>nd</sup> respondent-APERC, explaining all the aspects, by enclosing copies of necessary documents in support of its stand, within a period of one week from today, for consideration of the same and for passing appropriate orders, by 2<sup>nd</sup> respondent-APERC. Since the impugned action came to be resorted to, without any notice to the petitioner and as the said action is a



patent violation of principles of natural justice, pending consideration of the said application and the issue before 2<sup>nd</sup> respondent, 1<sup>st</sup> respondent herein shall restore the connection to the petitioner herein within 2 days from the date of receipt of a copy of this order. It is also made clear that in the event of failure on the part of the petitioner to submit such representation/application within the time stipulated above, this order will not enure to the benefit of the petitioner herein.

No costs as to costs of the Writ Petition.

As a sequel, interlocutory applications pending, if any, in the Writ Petition shall stand closed.

02.09.2021  
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**A.V.SESHA SAI, J**

**THE HONOURABLE SRI JUSTICE A.V.SESHA SAI**

**WRIT PETITION No.18071 OF 2021**

**02.09.2021**

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