

(2023) 10 KAR CK 0053
In the Karnataka High Court
Case No : Writ Petition No. 23642 Of 2023

JSW Energy Limited

APPELLANT

Vs

State Of Karnataka And Others

RESPONDENT

Date of Decision : 27-10-2023

Acts Referred:

Electricity Act, 2003 — Section 2(5), 2(5)(a)(ii), 11, 11(2), 146, 147

Citation : (2023) 10 KAR CK 0053

Hon'ble Judges : B M Shyam Prasad, J

Bench : Single Bench

Advocate : Mukul Rohatgi, K. G. Raghavan, Dhyani Chinnappa, K Shashi Kiran Shetty, S Sriranga

Judgement

B M Shyam Prasad, J

ORDERS ON THE PETITIONER'S INTERIM PRAYER

1. The petitioner, which owns and operates an Imported Coal Based Power Plant [ICB Power Plant] in the State of Karnataka, has impugned the State Government's order dated 16.10.2023 issued in exercise of the jurisdiction under Section 11 of the Electricity Act, 2003 [for short, 'the Electricity Act'] and the second respondent's Communication dated 17.10.2023. The State Government by the first order has directed 'All the generators in the State of Karnataka' to operate and maintain the concerned generating stations to maximum exportable capacity and supply all the electricity generated to the State Grid subject to certain conditions, and one of the conditions stipulated is that the ESCOMs shall pay at Rs.4.86/ per unit provisionally subject to the proceedings before the KERC. Consequentially, the second respondent by the impugned Communication dated 17.10.2023 has withdrawn all the NOCs/consents.

2. The petitioner contends that the impugned order dated 16.10.2023 is in the teeth of the Central Government's order dated 20.02.2023 also issued in exercise of the jurisdiction under Section 11 of the Electricity Act. The Central

Government has issued this order dated 20.02.2023. It is undisputed that this order which had to prevail for a certain period is now extended to be in force until 30.04.2024 stipulating, amongst others, that all ICB Power Plants shall at the first instance supply power to the Power Purchase Agreement [PPA] holders and any surplus power left thereafter, or any power for which there is no PPA, shall be sold through the Power Exchanges, and if a ICB Power Plant has PPA with multiple DISCOMs and if one of the DISCOM does not schedule any quantity of power according to its PPA, the power shall be offered to other PPA holders and remaining quantity thereafter shall again be sold through Power Exchanges. The petitioner has sought for stay of the operation of the impugned Order dated 16.10.2023 and the Communication dated 17.10.2023.

3. Sri Mukul Rohatgi, Sri K. G. Raghavan and Sri.Dhyan Chinnappa, the learned Senior Counsels for the petitioners, and they, in support of the petitioner's request for interim prayer for stay of the operation of the impugned Order dated 16.10.2023 and the Communication dated 17.10.2023, submit that the petitioner is engaged in interstate sale of electricity and therefore is bound by the Central Government's order dated 20.02.2023 issued under Section 11 of the Electricity Act, and the State Government, which cannot assert any dominion over interstate sale of electricity and whose dominion is limited to intrastate supply of electricity, has issued its order dated 16.10.2023 despite the Central Government's order dated 20.02.2023. As such, the impugned Order dated 16.10.2023 is not only without jurisdiction but also unreasonable.

4. The learned Senior Counsels contend that the petitioner who depends upon imported coal must operate its plant at the optimum capacity and must sell surplus electricity [i.e., in excess of its captive consumption] only through Power Exchanges at price fixed by the concerned Committee in terms of the order dated 20.02.2023 to comply with the terms of such order. The petitioner must adhere to the directions in the order 20.02.2023, and if there is any violation, the petitioner will incur liability under Section 146 of the Electricity Act.

5. The learned Senior Counsels further contend that the petitioner, by its communication dated 11.08.2023 [Annexure - J], has informed the State Government, through Power Company of Karnataka Limited [the fourth respondent] that it is willing to offer available/surplus power at a rate of Rs.7.25/- KWh [Ex-Bus] through Power Exchanges on Long Duration Contract [LDC] basis. The State Government without considering the same has issued the impugned order. If the petitioner, notwithstanding the Central Government's order dated 20.02.2023, supplies power to the State Government other than through Power Exchanges, it will not only be in contravention thereof and the provisions of the Electricity Act, but also incur a substantial loss of more than Rs.10 crore per day.

6. The learned Senior Counsels canvass that the Central Government, for the reasons recorded in the order dated 20.02.2023 such as High Electricity demand in the nation, likely gap in demand and supply of domestic coal, and the need for

use of importing coal for blending with domestic coal at international prices, has stipulated that ICB power plants must generate power to full capacity and supply power through the Power Exchanges, and these are overwhelming circumstances too.

7. Sri K Shashi Kiran Shetty, the learned Advocate General for the first respondent, and Sri S Sriranga, the learned Senior Counsel for the second respondent, oppose the grant of interim order. They submit that the Central Government's jurisdiction as the Appropriate Government for the purposes of Section 11 of the Electricity Act is confined to interstate supply of electricity to its different installations as mentioned in Section 2(5)(a)(ii) of the Electricity Act and it cannot exercise any dominion or jurisdiction over other generating companies whether ICB Power Plants or otherwise. They rely upon a decision of a Division Bench of this Court in GMR Energy Limited and another v. Government of Karnataka and others ILR 2010 KAR 2620, and they assert that the petitioner, as such, cannot take shelter under the Central Government's order dated 20.02.2023.

8. The learned Advocate General and the learned Senior counsel urge that the State Government, faced with daily energy short fall because of a drought situation resulting in reduced water levels in hydro reservoirs and the reduced capacity because renewable energy's uncertainty to meet Round-the-Clock [RTC] demand, is constrained to exercise its jurisdiction under Section 11 of the Electricity Act to direct all the generating companies to operate and maintain generating stations to maximum exportable energy and supply electricity only to the State Grid. They submit that the State Government even on earlier occasion has invoked its jurisdiction under Section 11 of the Electricity Act to mitigate power crisis, and present the directions are issued after a complete review of power situation in the State in a meeting headed by the Hon'ble Chief Minister.

9. The learned Advocate General and the learned Senior counsel contend that the petitioner's qualms with the impugned order dated 16.10.2023 is only because it will have to receive payment at the rate of Rs.4.86/- per unit, and if the petitioner is aggrieved, its remedy is under Section 11(2) of the Electricity Act. The petitioner must approach the Karnataka Electricity Regulatory Commission [KERC] but cannot bypass such remedy under the guise of impugning the order dated 16.10.2023. They urge that if there is any interim order, the State, which is reeling under daily energy short fall, would be visited with further difficulties.

10. In rejoinder, the learned senior counsels for the petitioner submit that the Division Bench's order in GMR Energy Limited supra is called in question before the Hon'ble Supreme Court in Writ petition/civil appeals which are disposed of as having become infructuous but recording that the question of law relating to the interpretation of Section 11 and Section 2(5) of the Electricity Act is kept open, and that this decision is also distinguishable inasmuch as the Division Bench was not examining a case where there were two simultaneous directions under Section 11 of the Electricity Act. They further submit that in any event, in the

decision in *Energy Watchdog v. Central Electricity Regulatory Commission and others* (2017) 14 SCC 80, the Hon'ble Supreme Court has expounded that whenever there is interstate supply of electricity it is the Central Government and the Central Regulatory Commission that are involved and whenever there is intrastate supply of electricity, the State Government and the State Commission are involved declaring that this is the precise scheme of the entire Act including the provisions of Sections 79 and 86. Thus, they argue that the petitioner is justified in contending that the State Government could not have issued the impugned order dated 16.10.2023 in any manner that would impinge the Central Government's order dated 20.02.2023.

11. This Court must also record that if it is argued on behalf of the petitioner that it is an interstate supplier of electricity, it is argued on behalf of the State and the second respondent that the petitioner is an embedded entity with its capacity tied to the State, and when queried, the following are placed on record as indisputable circumstances:

[a] The petitioner is one of the two ICB power plants in the State and the other ICB power plant in the State has accepted the impugned order dated 16.10.2023.

[b] The petitioner, with the issuance of the impugned order dated 16.10.2023 and the communication dated 17.10.2023, has been supplying electricity, except the captive consumption, to the State grid.

The learned Senior Counsels for the petitioner also submit that the petitioner, subject to the final orders in the present proceedings, in terms of its Communication dated 11.08.2023 [Annexure-J] is willing to supply surplus electricity [excluding captive consumption] to the State grid

(a) through Power Exchanges and (b) at the per unit price offered in the said Communication.

12. In view of the rival submissions, this Court must observe that whether the Central Government would be the 'Appropriate Government' as contemplated under Section 2(5) of the Electricity Act for the purposes of Section 11 thereof in the case of interstate supply of electricity will have to be considered in the light of the orders of the Hon'ble Supreme Court in *W.P.(S)(Civil) No.244/2010* and connected civil appeals and the decision in *Electricity Watchdog supra*, and unless this aspect is considered in detail after hearing all the concerned, it cannot be conclusively opined that the Central Government will not be the Appropriate Government for the purposes of issuing directions in the case of interstate supply of electricity under Section 11 of the Electricity Act.

13. Further, though it is contended that the petitioner cannot be called an interstate supplier of electricity because it has entered into agreements with the entities outside the State, this aspect, as canvassed on behalf of the petitioner, may have to be considered in the light of the fact that the Karnataka State Load Despatch Center [Kar. SLDC] has issued standing clearance with the Northern

Regional Load Despatch Center [NRLDC] also permitting Rajasthan Urja Vikas Nigam Limited to draw power from the petitioner. Furthermore, this Court apart from these aspects, will also have to consider the different circumstances in which both the Central and State Governments have issued directions under Section 11 of the Electricity Act. As such, this Court must opine that the petitioner has demonstrated that there are questions to be considered for final decision and hence, a prima facie case is established.

14. This Court must next consider the balance of convenience and the irreparable injury that could be caused to the petitioner if there is no interim order and to the State if there is some interim order. These aspects must be considered, amongst others, in the light of the question whether the petitioner must approach KERC or the NERC. This Court must observe that the answer to this question will hinge on the final opinion on whether the Central Government would be the 'Appropriate Government', and if the final opinion is that the Central Government is indeed the 'Appropriate Government', admittedly NERC will be the competent commission. This Court must also consider the following circumstances in deciding the balance of convenience and irreparable injury.

15. It remains rather indisputable that the State has received deficient rains resulting in reduced water levels in reservoirs, and it is also arguable that because 50% of State's installed capacity is from Renewable Energy Sources, generation of electricity from these sources could be uncertain exacerbating the State's energy short fall. If the Central Government's order dated 20.02.2023 prevails the petitioner, an undisputed ICB Power Plant, will have to sell its surplus electricity, which is generated using imported coal procured at International Coal price through Power Exchanges, and the petitioner will also have to operate at its maximum capacity. The petitioner, with the issuance of the impugned order, has started supplying its surplus electricity to the State grid, and has also invoked this Court jurisdiction at the earliest. This arrangement must be directed to continue, until the further orders of this Court, without the petitioner being visited with the consequences under Section 146 or 147 of the Electricity Act.

16. If the petitioner thus sells its surplus electricity to the State grid but at the rate in terms of the Central Government's order dated 20.02.2023, it could absorb the cost of importing coal at International Coal price as recorded in the Central Government's order dated 20.02.2023. The petitioner has placed its offer in this regard in submitting its representation on 11.08.2023 [Annexure – J] through the fourth respondent, but there is nothing on record, at this stage, to demonstrate that this representation by the petitioner, which is one of the two ICB Power Plants, is forwarded to the State and considered. Therefore, the State must consider the representation, decide in the circumstances peculiar to the petitioner and pay for the electricity supplied accordingly subject to the final outcome of this petition, or the earlier orders in the present proceedings. As aforesaid, if the controversy persists despite such decision and payment, whether the petitioner must approach KERC will have to be decided in the present

proceedings. Hence, the following

ORDER

[a] The petitioner, subject to further orders, is directed to continue supplying its surplus electricity to the State Grid pursuant to these orders and is reserved liberty to file a representation with the first respondent, within a week from today, for payment of charges on par with the Power Exchange Rate/s as of the date of the impugned Order dated 16.10.2023.

[b] If the petitioner files such representation, the first respondent, subject to further orders of this Court, consider the same, decide on the Rate as aforesaid and commence paying at such rate to the petitioner. The decision in this regard shall be taken within a period of two [2] weeks from the date of the petitioner's representation.

ORDER ON DISPENSATION OF NOTICE

Sri. K.G.Raghavan, the learned Senior counsel for the petitioner, seeks leave to place on record a memo for dispensation of notice to the third and fourth respondents.

The memo is accepted, and notice to the aforesaid respondents stands dispensed with.

The office is directed to show the representation of the learned Additional Government Advocate for the first respondent and Smt. Sumana Naganand for the second respondent.

Insofar as the fifth respondent, the learned counsel on record for the petitioner, is called upon to serve copies of the petition/annexures on the chambers of Sri. Shanthi Bhushan H., the learned Deputy Solicitor General and the copies shall be furnished within a week from today.