(2018) 07 MP CK 0179

In the Madhya Pradesh High Court

Case No : Writ Appeal No. 3420 OF 2018

Orchid Renewable Pvt. Ltd. & Another — APPELLANT

Vs

Madhya Pradesh Electricity Regulatory Commission And Others — RESPONDENT

Date of Decision : 20-07-2018

Acts Referred:
Electricity Supply Act, 1948 — Section 18(a)
Electricity Act, 2003 — Section 42, 86(1), 86(1)(f)

Citation : (2018) 07 MP CK 0179

Hon'ble Judges : Prakash Shrivastava, J

Bench : Single Bench

Advocate : Ajay Bagadiya, S.S. Chouhan, P. Prasad, D.S. Panwar

Final Decision : Dismissed

Judgement

Heard.

By this writ petition, the petitioner has prayed for a direction that the amended regulation No. 12.2 of MP Electricity Regulatory Commission (Co-

generation and Generation of Electricity from Renewable Sources of Energy) (Revision-I) Regulations-2010 is not applicable to the petitioner

company.

Learned counsel for respondents have pointed out that all identical writ petitions have already been dismissed and in some of the matters the

Coordinate Bench has also declined admission. They have also submitted that mere pendency of writ appeal will not make any difference because

there is no interim order passed in the writ appeal.

This court in WP No. 10559/18Â by order dated 17/5/2018 had passed following order:

Â Shri Arvind Dudawat, learned counsel for the petitioner.

Shri P. Prasad, learned counsel for the respondent on caveat.

Heard on the question of admission and interim relief.

By this writ petition, the petitioner has prayed for a direction that the amended regulation No.12.2 of M.P. Electricity Regulatory Commission (Co-

generation and Generation of Electricity from Renewable Sources of Energy) (Revision-I) Regulations-2010 is not applicable to the petitioner and the

petitioner is not liable to pay the open access charges for the electricity generated by the Solar Power Based Projects of the petitioner.

Learned counsel for the respondents has raised a preliminary objection that the petitioner has an alternative remedy of raising the grievance before the

M.P. Electricity Regulatory Commission, hence the present writ petition is not maintainable. In support of his submission he has placed reliance upon

the order dated 15/3/2018 passed in WP No.727/2018 in the case of M/s Ascent Hydro Projects Limited and another Vs. Madhya Pradesh Electricity

Regulatory Commission and others and the order dated 15/5/2018 passed in WP No.10901/2018 in the case of M/s Indra Vidhya Power Vs. Madhya

Pradesh Electricity Regulatory Commission and others by the coordinate Bench.

Learned counsel for the petitioner opposing the prayer has submitted that the orders passed by the coordinate Bench are in respect of the hydel power

generators whereas the petitioner is generating power through solar energy. He further submits that the petitioner is questioning the applicability of the

amended provision.

Having heard the learned counsel for the parties on the issue of availability of the alternate remedy, it is noticed that the coordinate Bench in the case

of M/s Ascent Hydro Projects Limited (supra) has examined the issue of availability of alternate remedy in respect of the similar grievance relating to

the applicability of the amended regulation 12.2 of the Regulations of 2010 and levy of electricity charges under the said Regulation and has held that

the alternate remedy is available by raising the grievance before the M.P. Electricity Regulatory Commission.

The coordinate Bench in the case of M/s Ascent Hydro Projects Limited (supra) has held as under:-

â??The petitioner has filed the present petition seeking writ of mandamus or certiorari to declare and held that the regulation 12.2 of the Madhya

Pradesh Electricity Regulatory Commission (Co-Generation and Generation of Electricity from Renewable Sources of Energy) (Revision-1)

Regulations, 2010, Seventh Amendment notified on 17.11.2017 is not applicable to the petitioner No.1, 3 and 4 and that be struck down accordingly.

After notice in the writ petition, the respondent Nos.2 and 3 have raised the preliminary objection about the maintainability of this petition due to

availability of the alternate remedy before the Madhya Pradesh Electricity Regulatory Commission (in short 'MPERC') for redressal of the

grievances. By order dated 01.03.2018, this Court has directed counsel appearing for the MPERC to obtain the instructions specially on the aspect of

the matter that the MPERC is competent to decide such dispute.

Shri S.S. Chouhan, learned counsel submitted on instructions that the MPERC is competent to decide the dispute raised in this petition.

Shri Ajay Bagadiya, learned counsel for the petitioner submitted that the impugned amendment in the Regulation 2010 can be struck down by this

Court only and for which the MPERC is not competent who itself has passed the regulation, therefore, the writ petition is only remedy available to the

petitioner and the preliminary objection taken by the respondent Nos.2 and 3 is liable to be rejected and they be directed to file parawise reply to the

writ petition.

The petitioner No.1 is a company incorporated under the provisions of Companies Act' 1956. The petitioner No.2 is a share holder of petitioner No.1.

The petitioner No.1 had set up its 2 x 1100 KW electricity generating project called as at Birsinghpur Mini Hydel Project at Village Mangthar, District

Umaria, Madhya Pradesh. Under the policy of the State Government dated 26.09.1994. Vide order dated 20.06.2002, the Government of Madhya

Pradesh granted permission under Section 18(a) of the Electricity Supply Act, 1948 for establishment of 2 x 1100 KW Birsinghpur Mini Hydel Project

in continuation with the agreement dated 26.07.1999. The then Madhya Pradesh Electricity Board, vide letter dated 02.11.1999 issued a necessary

permission also. In pursuant to the aforesaid agreement and permission, the petitioner started commercial operation from the said power project in the

year 2006.

That by policy dated 26.09.1994 and agreement dated 26.07.1999, the petitioner No.1 was permitted to sale and supply electricity to third parties other than the Government and Electricity Company. Petitioner No.2 and 3 are customers who have purchases the excess electricity generated by the

petitioner No.1 and 2. As per the policy dated 20.09.1994, the petitioner No.1 was liable to pay 2% wheeling charges for selling the electricity to third

party through MPEB's transmission/distribution system for which the State Government will separately compensate the MPEB towards the lime loses

@ 2 % of the power wheel.

Now, all the petitioners are aggrieved by the amendment made by respondent No.1 in regulation 12.2 of the Renewable Source of Energy Regulation,

2010 (w.e.f 17.11.2007). According to which, the wheeling charges, cross subsidy charges, additional charges under Section 42 shall be applicable at

the rate as decided by the Commission from time to time.

Prior to the aforesaid amendment, the captive consumer and open access consumer were exempted from payment of open access charges in respect

of energy produced from renewable source of energy. By way of present amendment dated 17.11.2017, the respondent No.1 has omitted the payment

of open access charges to the captive consumer and open access consumer. The provision prior to amendment is reproduced below:

12.2 Wheeling charges, cross subsidy surcharge and applicable surcharge on Wheeling charges shall be applicable as decided by the Commission

from time to time. Captive consumers and Open Access Consumers shall be exempted from payment of Open Access charges in respect of energy

procured from renewable sources of Energy.

The amended provisions is also reproduced below:

12.2. Wheeling charges, Cross subsidy surcharge, additional surcharge on the wheeling charges and such other charges, if any, under Section 42 of

the Electricity Act, 2003 shall be applicable at the rate as decided by the Commission from time to time in its retail supply tariff order.

In substance by the aforesaid amendment, the benefit of payment of open access charges available to captive consumer and open access consumers

like petitions has been withdrawn.

In view of the aforesaid amendment, the Madhya Pradesh Paschim Kshetra Vidyut Vitaran Company Limited issued a bill to petitioner Nos.3 & 4

raising the demand under the head of ""open access charges"" because ultimately that charges are payable by the purchaser, therefore, the petitioner

Nos.1 and 2 have joined them in the writ petition as petitioner Nos.3 & 4.

So far as the petitioner Nos.1 and 2 are concerned, they have registered office at Mumbai & Generation Unit at Umaria, therefore, they ought to have

to file a writ petition before the Principal bench of High Court at Jabalpur to challenge the impugned notification dated 17.11.2017. The petition is

maintainable at Indore Bench at the instance of petitioner no. 3&4 against respondent Nos.3 and 4 to challenge the notification as well as demand of

additional demand of charges.

By this petition, the petitioners are not challenging the validity of regulation 12.2 of the Renewable Source of Energy Regulation, 2010 as amended

vide notification dated 17.11.2017. The petitioners are assailing the impugned notification on the ground that the same is not applicable to them and

they are entitled to enjoy the exemption from payment of open access charges. By the amendment as held above the captive consumers and open

access consumers have been made liable to pay the open access charges, not the generating unit like petitioner No.1 & 2. The petitioners No.1 & 2

are still liable to pay the wheeling charges, cross subsidy charges at the rate decided by the Commission from time to time, even after issuance of the

impugned notification therefore, the petitioner No.1 & 2 are having remedy to approach the Commission under Section 86(1)(f) of the Electricity Act

2003 to challenge the applicability of the amended regulation.

Under the incentive policy for the development of Small Hydro Power Projects in Madhya Pradesh, 2006 published in the Madhya Pradesh Gazette

Notification (Extraordinary) dated 8th August 2006 the MPERC is having exclusive jurisdiction to decide the dispute. Clause 9.0 of the Incentive

Policy for the Development of Small Hydro Power Projects in Madhya Pradesh, 2006 is reproduced below: ""Part-A- 9.0-Exclusive Jurisdiction of

MPERC A9.0 Exclusive Jurisdiction of MPERC:

A9.1 MPERC has exclusive jurisdiction on those provisions of this Policy which are within its regulatory mandate under the provision of EA 2003,

especially regarding electricity sale rates, power purchase agreements and provisions regarding wheeling, banking, distribution and transmission loss

charges etc. Similarly, MPERC has jurisdiction, as per provision of the EA 2003, as regards the promotion of non-conventional energy sources,

facilities for transmission of energy and sharing of purchase of power amongst the MPPTCL / Transmission Licensee / Distribution Licensee. Orders

regulations, directives, guidelines issued by MPERC regarding these issues from time to time shall be binding on all.

A9.2 In the event of dispute in interpretation of this policy or any clause in the agreement between developer & WRD/NVDA or

MPPTCL/Transmission Licensee/ Distribution Licensee, the same shall be referred to MPERC to the extent of its jurisdiction under Section 86(1) and

other provisions of the EA 2003.

Under Madhya Pradesh Electricity Regulatory Commission (Cogeneration and Generation of Electricity from Renewable Sources of Energy)

Regulations, 2008 (G-33 of 2008), Clause 1.40 and 1.41 provides power to MPERC to amend any provision of regulations and remove the defects on

an application submitted by any person generating electricity from cogeneration and renewal source etc. Clause 1.40 and 1.41 are reproduced below:

Power to Amend:

1.40. The Commission may at any time, add, vary, alter, modify or amend any provision of these Regulations Power to Remove Difficulties:

1.41 The Commission may suo moto or on an application from any person generating electricity from Co-generation and Renewable Sources or

distribution licensee, review these Regulations and pass appropriate orders to remove any difficulty in implementing the provision of these Regulations

Therefore, in view of the above, the MPERC is competent to adjudicate the dispute raised by the petitioners in this petition, hence, petition is dismissed

for want of alternate and efficacious remedy available to the petitioner.

At the end of the arguments, Shri Ajay Bagadiya, learned counsel for the petitioner submitted that if this Court comes to the conclusion that the

petitioners are having alternate remedy, then interim protection may be granted because after the amendment, the petitioners are require to pay the

heavy amount of charges on per day basis.

As held above, there is no demand from the petitioner Nos.1 and 2 and only the bills have been issued to petitioner Nos.3 and 4 only. They may

deposit the amount and if they succeed before the MPERC the said amount can be refunded or adjusted by the respondent No.2 to 4 in their bills.

Writ Petition is finally disposed of. No order as to cost.â??

Similar writ petition M/s Indra Vidhya Power (supra) has also been dismissed by another coordinate Bench on the ground of availability of alternate

efficacious remedy. The present writ petition stands on the same footing and merely because the petitioner has set up a solar power project, that

would not furnish any ground for entertaining the writ petition directly without availing the alternate remedy of approaching the M.P. ElectricityÂ

Regulatory Commission.

Having regard to the aforesaid, no case is made out to entertain the writ petition directly, which is accordingly dismissed, however with liberty to the

petitioner to avail the alternate remedy as mentioned above.

Undisputedly the present case stands on same footing therefore,Â for the detailed reasons which have been assigned in WP no.10559/18Â no case

is made out to entertain the writ petition directly, which is accordingly dismissed, however with liberty to the petitioner to avail the alternate remedy.

C.C. As per rules.