

COURT-I

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

**IA NO. 116 OF 2019
IN
APPEAL NO. 23 OF 2019**

Dated: 13th March, 2019

**Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. S.D. Dubey, Technical Member**

In the matter of:

Global Energy Private Limited Appellant

Vs.

**Maharashtra Electricity Regulatory Commission & Respondent(s)
Ors.**

Counsel for the Appellant : Mr. Matrugupta Mishra
Mr. Hemant Singh
Mr. Biju Mattam

Counsel for the Respondent(s) : Mr. S.K. Raungta, Sr.Adv.
Mr. Buddy A. Ranganadhan
Ms. Stuti Krishn for R-1

Mr. Shish Singh for R-2 to 5

Mr. Anup Jain for R-6

ORDER

**IA NO. 116 OF 2019
*(Application for Stay)***

PER HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER

1. The present IA No.116 of 2019 in Appeal No.23 of 2019 is filed by Global Energy Private Limited, the Appellant herein, seeking

interim directions against the impugned order dated 01.03.2018, passed by Maharashtra Electricity Regulatory Commission (Respondent Commission/ MERC) in Petition No. 242 of 2018 .

2. The Appellant has sought the following reliefs in the instant IA, being IA No. 116 of 2019 in Appeal No. 23 of 2019:

a. Issue direction to enquiry committee to not initiate any administrative action to the extent of the scope of investigation which is beyond the jurisdiction of the Respondent Commission till the pendency of instant appeal;

b. Pass any order and/or any such orders as this Hon'ble Tribunal may deem fit and proper under the facts and circumstances of the present case and in the interest of justice.

3. **The Appellant has brought out the following submissions for our consideration:-**

3.1 Pursuant to the passage of impugned order dated 15.10.2018, the Respondent Commission vide Notification dated 15.11.2018 appointed a one member enquiry committee under its Regulation 82 of the Conduct of Business Regulations 2004 to study, investigate and probe into the books of accounts of the Applicant with respect to matters which are within the jurisdiction of the Respondent Commission. However, the terms of the "scope of the

investigation” in the said notification dated 15.11.2018, evidences that the Respondent Commission has acted contrary to the mandate of the said regulation and has therefore acted in exercise of jurisdiction which are extraneous to the powers conferred on the Respondent Commission under the Electricity Act, 2003.

3.2 The Respondent Commission at the pretext of appointing an enquiry committee has sought details of transactions undertaken by the Applicant under Inter-State Trading License issued by Central Electricity Regulatory Commission (CERC) and has thereby made an error of jurisdictional fact which renders the impugned order dated 15.10.2018 ultra vires.

3.3 The Respondent Commission has acted contrary to the specific mandate of Regulation 82 which empowers the Respondent Commission to \probe and order an enquiry with respect to the facts and circumstances of the matter within its jurisdiction alone. As such, the scope of investigation outlined under the Notification dated 15.11.2018, is de hors the jurisdiction of the Respondent Commission and is therefore liable to be set aside.

3.4 The Respondent Commission acting contrary to its scope of authority has further assumed jurisdiction over the facts and circumstances of cases *res sub judice* before this Tribunal as well

as Arbitral Tribunal and has therefore committed an error of “adjudicatory fact” alongside the error of “jurisdictional fact”.

3.5 The impugned order dated 15.10.2018 was passed by the Respondent Commission in Petition No. 242 of 2018 which was preferred by the Respondent No. 2 – 5, while the Respondent No. 6/ MSEDCL sought an impleadment in the proceedings before the Respondent Commission.

3.6 It would be pertinent to mention herein that all the Respondents No. 2 – 6, have ongoing monetary disputes with the Applicant/ Appellant, pending adjudication before various fora including Arbitral Tribunal. Considering the fact that, while the “adjudicatory facts” in various proceedings are yet to be conclusively determined, the Respondent Commission has however in exercise of its power extraneous to what has been conferred upon it under the Conduct of Business Regulations 2004 as well as the Act of 2003, assumed jurisdiction over the subject matter of the proceedings pending before various fora, including itself, to come to a prima facie finding that the subject matter of other proceedings being essentially similar in nature to the proceedings under Petition 242 of 2018, it would be appropriate to deal with the same along with the main petition.

3.7 The aforesaid view was vehemently opposed by the Applicant, in its arguments before the Respondent Commission and it was specifically pleaded that the application of Respondent No. 6/ MSEDCL in Petition No. 78 of 2018 be decided before going into the merits of the Petition No. 242 of 2018 which gives rise to the present impugned order. The said finding of the Respondent Commission under para 10 of the impugned order dated 15.10.2018 is being reproduced herein below for ready reference of this Tribunal:

“10. Through this Petition, four Petitioners (viz. POSCO Maharashtra Steel Private Ltd., Dhariwal Industries Ltd., R.M. Dhariwal & Co. and Siddhayu Ayurvedic Research Foundation Pvt. Ltd.) have approached the Commission seeking enquiry into conduct of GEPL as a Trading Licensee and seeking revocation of the Trading Licence granted by the Commission on 27 April, 2018 vide its Order in Case No. 132 of 2015. MSEDCL has filed an application seeking intervention in the matter which supports the grounds of the Petition and seeking revocation of the Trading Licence of GEPL. GEPL has requested the Commission to decide MSEDCL’s application first before going into the merit of main Petition. However, the Commission is of the view that the contents and issues in the MSEDCL’s application are essentially of the same nature as those

in the main Petition, hence the MSEDCL's Application is being dealt with in a combined manner along with the main Petition."

- 3.8 A perusal of the facts and circumstances of all the individual disputes, pending adjudication before various fora including the Respondent Commission itself, amply demonstrates that all the issues pertain to monetary claim against which the Applicant has initiated various proceedings. While the Petition No. 78 of 2018 pertains to claims/ counter-claims of Respondent No. 6 and the Applicant, the lis with Respondent No. 2/ POSCO pertains to claims/ counter-claims before Arbitral Tribunal. It would be imperative to mention herein that the counter-claim of the Applicant in the said Arbitral proceedings, exceed far more than what has been claimed by the Respondent No. 2 in its Statement of Claim. Likewise, the subject matter of dispute with Respondents No. 3 and 4 pertain to time barred claims of the said Respondents which are pending appeal before this Tribunal.
- 3.9 The Impugned Order passed by the Respondent Commission and the subsequent communication/ Letter dated 26.11.2018 issued by the Secretary, Enquiry Committee appointed by the Respondent Commission, suffers from patent infirmities in law, is wholly erroneous and is grossly in excess of the jurisdiction conferred

under the provisions of the Act and if allowed to subsist will cause grave injustice to the Appellant as well as resulting in the failure of the process under law.

3.10 The Respondent Commission has erred in seeking details of “Facilitation Agreements” which are related to an unrecognized and unregulated activity, especially when under the terms of paragraph 5.1 (a) of the Trading Licence No.1 of 2018, it is clear the Appellant is only prevented from undertaking the business of transmission of electricity and there is nothing under law which prevents the Appellant from undertaking any other lawful business. While holding that the Appellant needs to provide details of ‘Facilitation Agreements’ entered by it, had failed to recognize that no statutory authority can assume jurisdiction in respect of subject matter which the statute does not confer on it and if by deciding erroneously the fact on which jurisdiction depends the authority exercises the jurisdiction then the order is vitiated and that error of jurisdictional fact renders the order ultra vires and bad.

3.11 In view of the above, the Applicant seeks indulgence of this Tribunal for issue necessary direction to the Enquiry Committee, and for grant of interim protection till the pendency of appeal. In fact, the balance of convenience lies in favour of the Applicant/ Appellant, and prima facie case is also in favour of the Applicant

on account of the submissions made in the main appeal and the present application. It is further submitted that no hardship is likely to be caused to the Respondents in the event the relief as prayed for is granted. In view of these facts, this Tribunal may accord a hearing at the earliest on the present application or issue a direction to the Enquiry Committee to not take any action as regards the scope of jurisdiction which impinges upon the jurisdiction of the Respondent Commission, till the pendency of the present appeal.

3.12 That unless the prayers prayed herein are granted, the Applicant shall suffer irreparable injury. This application is bonafide and made in the interest of justice.

4. ***Per contra***, learned counsel for the Respondent Commission submitted that the present IA in main Appeal No.23 of 2019 has been preferred for challenging the impugned order dated 15.10.2018 passed by MERC in Case No.242 of 2018 wherein the Commission had directed that an enquiry be initiated to ascertain for whether the Appellant is in default in doing any of the duty/obligation cast upon it by or under the Electricity Act, 2003 or the Rules and Regulations made thereunder and also, the terms and conditions of its license. He quick to point out that the Appellant has also challenged the notification dated 15.11.2018 by

which the State Commission has constituted an one member Enquiry Committee seeking various documents / details relevant to the enquiry. Learned counsel vehemently submitted that the Appellant has failed to make out any case for interference by this Tribunal which would be evident from the facts and submissions made herein after and, therefore, the IA/Appeal deserves to be dismissed as devoid of any merit.

- 4.1 Learned counsel for the Respondent Commission further submitted that the contentions made by the Appellant that the impugned order and the subsequent notifications issued by the Commission including the letter issued by the Secretary (Enquiry Committee) are illegal, arbitrary, without jurisdiction and contrary to law are baseless and frivolous as Section 19 of the Electricity Act empowers the State Commission to revoke a License granted to a Distribution/Transmission/Trading Licensee, after making an enquiry, if it is of the opinion that the licensee has made wilful and prolonged default in doing anything required under the license. Learned counsel contended that Section 97 of the Electricity Act clearly provides that the State Commission may by general or special order in writing, delegate to any Member, Secretary, officers of the Commission or any other person, subject to such conditions, if any, as may be specified in order as it may deem

necessary. Section 94 of the Act further provides that the Commission for the purpose of any enquiry or proceeding under the Act shall have same powers as are vested in the Civil Court under the CPC 1908. Learned counsel further emphasised that as per Regulation 82 of the MERC (Conduct of Business) Regulations, 2004, the Commission may make such directions or orders as it deems fit for collection of information, enquiry, investigation, entry, search, seizure etc..

4.2 Learned counsel for the Commission submitted that in exercise of the powers conferred under Section 15 of the Electricity Act, 2003, the State Commission has issued a Trading License No.1 of 2018 dated 27.04.2018 to the Appellant and, therefore, the Appellant is an entity regulated by the State Commission under the MERC Regulations, 2004 and amendment thereof. Learned counsel further submitted that the Respondent Commission on the petitions filed by Respondent Nos.2 to 4 has proceeded in the matter and passed reasoned and speaking order. Further, the circumstances under which the State Commission was constrained to initiate an enquiry proceeding against the Appellant have been duly explained in Para 11, 12,14, 20, 22, 23, 24 & 25 of the impugned order. In view of the reasoning given by the State Commission in above mentioned paras, it is crystal clear that rather than

adjudicating the disputes of parties in an individual manner and verifying claims / counter claims thereof, the State Commission deemed it appropriate to constitute a separate enquiry for ascertaining the truth about the allegations made on the Appellant by various parties. Regarding the contentions raised by the Appellant on the legality of notification dated 15.10.2018 and also the letter dated 25.11.2018 issued by Enquiry Committee, learned counsel for the Respondent Commission submitted that the above communications were fall out of the directions issued by the State Commission in its impugned order regarding commencing of the enquiry. The notification clearly states that the Enquiry Committee shall confront the Appellant with the relevant issues collected during the enquiry and provide reasonable time to the Appellant to make submissions in this regard.

4.3 Learned counsel, on the allegations of the Appellant that the Respondent Commission has committed an error of jurisdictional fact and has erroneously assumed jurisdiction over Inter-State transactions, submitted that the Appellant at the time of the proceeding before the State Commission in Case No.242 of 2018 was silent and did not make any submissions regarding the nature of the transactions i.e. Inter-State or Intra-State Trading. Learned counsel quick to point out that the State Commission in the

impugned order has noted that the Appellant being an Inter-State Trading Licensee was still trading electricity within Maharashtra under Rule 9 of the Electricity Rules, 2005 between FY 2012 till FY 2018. To substantiate his submissions, learned counsel placed reliance on the judgment of the Hon'ble Supreme Court in the matter of Grid Corporation of Orissa Ltd. Vs. Gajendra Haldea & Others which, among others, held that there is no restriction on the Inter-State Trading Licensee to obtain a separate license on the State Commission for Intra-State Trading of Electricity and that an electricity trader is governed by the State Commission under whose jurisdiction the sale and purchase transaction is executed.

- 4.4 In view of these facts, learned counsel contended that there is no merit in the contentions of the Appellant that Respondent Commission has committed an error of jurisdictional fact. Learned counsel further pointed out that the Appellant, being Inter-State Trading licensee was permitted to undertake Intra-State Trading transactions but it has sought another trading license from MERC for the reasons best known to the Appellant. The objective of the enquiry initiated by the State Commission is to bring out the relevant truth about the above allegations, *inter alia*, the other allegations.

4.5 Over the allegations of the Appellant that the State Commission has set up the One Member Enquiry Committee to enquire into the transactions which were never undertaken by the Appellant in pursuance of its Trading License No.1 of 2018, learned counsel submitted that the ambit of enquiry is neither within the scope of investigation nor relate to any of the transactions undertaken by the Appellant under the present trading license. In fact, the issues / allegations relating to the conduct of the Appellant regarding non-payment to various generators, over billing, Facilitation Agreement, invoking the bank guarantees etc. are pertaining to the inter-state trading license and the State Commission has considered it prudent to enquire such disputes involving substantial monetary claims. Keeping these aspects in view, the details sought by the Enquiry Committee are relevant and rather within the ambit of the enquiry. Therefore, the contentions raised by the Appellant need to be disregarded. Learned counsel vehemently submitted that under Section 94 of Act and Clause 7 of the Trading Licence, the Appellant is required to furnish to the Commission such information, documents and details relating to the Licensed Business as the Commission may require. Further, Regulation 79 (c) read with Regulation 84 of the MERC (Conduct of Business) Regulations, 2004, empowers the State Commission to withhold

documents which it deems to be confidential from inspection or publication. Hence, there is no merit in the contention of the Appellant that the documents/ details sought are of confidential and proprietary nature. Regarding contentions of the Appellant that the impugned order has been passed on the issues which are sub-judice before various forums, learned counsel for the Respondent Commission submitted that the Appellant had raised similar contentions before the State Commission which has been duly addressed under Para 19 of the impugned order which reads as under:-

*“19. GEPL has stated that the commercial dispute between GEPL and the parties such as MSEDCL, Dhariwal Industries Ltd. and Siddhayu Ayurvedic Research Foundation Pvt. Ltd. are sub-judice before the ATE and other Forums, therefore the present Petition is barred by Section 10 of the Civil Procedure Code 1908. This Section prohibits to proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court have jurisdiction to grant the relief claimed, and having like jurisdiction, or before the Supreme Court. **The Commission has already observed that Section 19 of the Electricity Act, 2003 is an independent and inherent provision which cannot be sidelined merely on the basis of pendency of ongoing***

individual disputes. The Commission also notes that the concerns raised by the Petitioners are not specific to them alone, but are general in nature which casts a doubt on the manner and functioning of GEPL as a Trading Licensee in Maharashtra.”

4.6 Learned counsel for the Respondent Commission submitted that the contentions of the Appellant that the issues raised by the Respondents had already been considered by the Commission in Case No. 132 of 2015 while granting the Intra-State Trading Licence to the Appellant on 27 April, 2018. Learned counsel, on such contentions of the Appellant, pointed out that the State Commission had received various objections from generators/ consumers objecting grant of License to the Appellant. The Respondent Commission has granted Licence to the Appellant, upon fulfilment of the requisite criteria under the Regulations. However, it would not be appropriate to conclude that the State Commission had accepted the Appellant's replies on the objections or the State Commission has disregarded these objections altogether. Considering the fact that the proceeding was regarding grant of License, the State Commission did not consider it appropriate to go into the disputes as it was not an adjudication proceeding. Learned counsel further contended that as such the

proceeding in Case No.242 of 2018 is on different footing seeking revocation of the Trading Licence on account of violation of the terms and conditions of Licence and other Regulations. Learned counsel reiterated that the enquiry ordered by the State Commission is to ascertain the correct facts and falls well within the jurisdictional/adjudicatory powers of the State Commission. Therefore, there is no merit in the application/contentions of the Appellant and IA / Appeal deserves to be rejected.

5. Our Consideration:-

5.1 We have carefully considered the rival contentions of the learned counsel for the Appellant as well as the learned counsel for the Respondents and also, took note of the various judgments relied upon by the learned counsel. It is not in dispute that based on the requisite criteria under the MERC Regulations, the Appellant was granted a Trading License No.1 of 2018 on 27.04.2018. However, in view of the complaints/allegations by a number of generators / consumers, the State Commission has set up an Enquiry Committee and in the process, a number of documents and details have been asked to be submitted by the Appellant on which it is now agitating due to the fact that the details as asked for pertains to previous periods and some of the documents are said to be confidential/ proprietary in nature.

- 5.2 The other contention of the Appellant is that despite objections and allegations during the proceedings of the State Commission for grant of license, it has been given the trading license and, therefore, such objections / allegations are of no relevance now. On the other hand, it is the opinion of the Respondent Commission that while granting the license, such complaints were not adjudicated due to the fact that the same was relating to the proceeding for grant of license only and not for adjudication of complaints or disputes. As of now, more and more objections/complaints involving considerable financial transactions having been received in the Commission, it is considered prudent by the Commission to ascertain the facts and truth in such complaints so as to act upon the same under the MERC Regulations.
- 5.3 While going through the provisions under Section 19, 94 & 97 of the Act and MERC Regulation 79 & 82 etc., it is pertinent to note that the State Commission is duly mandated to enquire into the affairs and complaints relating to any regulated entity granted license under its Regulations. We do not notice any ambiguity or illegality in the decision of the State Commission to appoint an Enquiry Committee to look into various complaints and to ascertain the truth in such complaints / disputes. Accordingly, the State

Commission and in turn the Enquiry Committee constituted by it is duly empowered to collect requisite information, details, documents etc. for evaluation of the various claims / counter claims and to arrive at a factual / correct decision in the matter. The Trading license granted to the Appellant also stipulates that the information/documents asked for by the State Commission would need to be furnished by the licensee.

- 5.4 Before concluding our opinion in the matter, we feel relevant to point out that the State Commission ought to have examined the complaints / allegations during the proceedings itself held by it for grant of trading license to the Appellant and only after adjudication/findings in such complaints, the State Commission ought to have considered to grant the license or not. Since the Trading License No.1 of 2018 has already been granted to the Appellant and a number of further complaints/allegations have been received, it appears just and appropriate that the same are adjudicated afresh after collecting the requisite information/details so as to further decide on the course of action under the statute and MERC Regulations. We do not find force in the contentions of the Appellant that the matter needs to be adjudicated only for the period after 27.04.2018 and the data and details for the previous periods should not be asked for by the Enquiry Committee.

5.5 For the forgoing reasons, as stated supra, we do not find merit in the IA No.116 of 2019 and hence, the IA is hereby dismissed.

List the main appeal for hearing on **16.05.2019**.

No order as to costs.

Pronounced in the Open Court on this **13th day of March, 2019.**

(S.D. Dubey)
Technical Member

Pr

(Justice Manjula Chellur)
Chairperson