

**BEFORE THE HARYANA ELECTRICITY REGULATORY COMMISSION
AT PANCHKULA**

Case No. HERC/PRO- 53 of 2020

Date of Hearing : 03.11.2020

Date of Order : 04.11.2020

In the Matter of

Petition under Section 142 read with Section 146 of the Electricity Act, 2003 as amended from time to time to call for the records of the respondents and take appropriate action on account of non-compliance of the orders dated 05.08.2020, Annexure A-1, passed by this Hon'ble Commission whereby the DHBVNL was directed to release electricity connection to the petitioner application for which was made to the Nigam way back in 2018 (22.05.2018).

Petitioner

M/s EIH Ltd.

V/s

Respondents

The Chairman-cum-Managing Director
Dakshin Haryana Bijli Vitran Nigam Limited and others

Present

On behalf of the Petitioner

Sh. Ashwani Talwar, Advocate

On behalf of the Respondents

Ms. Nikita Choukse, Advocate

QUORUM

Shri Pravindra Singh, Member

Shri Naresh Sardana, Member

ORDER

1. Brief Background of the Case

The Petitioner has submitted as under:

- 1.1 That the instant petition is being filed against the respondents who are all functionaries of the respondent-DHBVNL, on account of willful disobedience and noncompliance of the orders dated 05.08.2020 passed by this Hon'ble Commission.
- 1.2 That the facts leading to filing of the instant petition are as follows: -

- i. That the petitioner, M/S EIH limited bought a commercial project comprised in sector 24-25 and 25 A Gurugram measuring 1.073 acres along with the construction raised thereupon from M/s DLF Cyber City Developer Ltd., Gurugram vide sale deed dated 29.06.2017.
- ii. That for development of cyber city by M/s DLF Cyber City Developer Ltd., the respondent-DHBVNL, had, vide orders dated 14.06.2017, accorded approval for ultimate load requirement of 56.196 MW and 56.976 MW for project's Phase II and Phase III respectively. By way of order dated 30.08.2017, approval for partial load of 45 MW was accorded for DLF Phase-III and ultimately vide order dated 23.04.2019, respondent-Nigam granted sanction for release of partial load of 45 MW for Phase III and 35 MW for Phase II.
- iii. That petitioner having come in the ownership of the aforesaid land/building, by way of application dated 22.05.2018, applied to the Respondent No.1 for release of an NDS connection with a connected load of 950 KW. The said application was submitted in terms of order dated 27.06.2013 of this Hon'ble commission passed in view of judgment dated 03.10.2012 passed by the APTEL. By way of this order, the individual consumers were called upon to apply to DISCOM for electricity connection.
- iv. That when despite repeated correspondence and representations, the respondents did not release the electricity connection to the petitioner, the instant petition bearing No. HERC/PRO-16 of 2020 was filed before this Hon'ble Commission.
- v. That after completion of the pleadings, arguments were heard at length and ultimately, vide detailed and reasoned orders dated 05.08.2020 (A-1), this Hon'ble Commission directed the respondent-DHBVNL to release the connection to the petitioner subject to bearing cost of line and switchgear for 11 KV feeder from nearest 66KV Substation (from where it is feasible to feed requisite load) as per its submission. The Hon'ble Commission further specifically noticed that the said release of connection will not only address the issue of order of NGT regarding the use of DG Sets but also comply with the directions issued by APTEL in 2013.

This Hon'ble Commission in its orders further noticed that the right of the petitioner to get electricity connection from the respondent (Sole Distribution Licensee), has crystalized since 2018 and the action of Utility (Of not releasing the connection) also has negative impact on the ease of doing business paradigm and such acts hamper the State Government's tenacious efforts towards

establishing the paradigm which is expected to cater to the great hopes held by the State Citizenry.

- 1.3 That although the respondents were a party to the proceedings before this Hon'ble Commission and have the knowledge of the passing of the orders dated 05.08.2020 (A-1) but still as a matter of abundant caution and propriety, by way of e-mail dated 08.08.2020, the respondents No. 4 & 5 were specifically informed about the orders and by attaching a copy thereof, it was requested that the electricity connection be released immediately so that the use of DG Sets by the petitioner, being not environmental friendly may be discontinued.
- 1.4 That the respondent No. 4, vide his letter dated 13.08.2020, sent the communication to the respondent No. 5 as well as respondent No. 6 and directed them to take action as per the instructions of the Nigam.
- 1.5 That the petitioner, vide e-mail dated 13.08.2020, took up the matter with the respondent No. 1, the Chairman-cum-Managing Director and he was requested to issue requisite directions for immediate release of electricity connection as the petitioner was being forced to use DG Sets for providing of electricity in its Complex in the absence of electricity. It was further informed that the requisite security deposit of Rs. 9,70,000/- had already been deposited at the time of moving the application for release of electricity connection way back on 22.05.2018.
- 1.6 That the respondent No. 6, the SDO DLF 'Op' City Sub Division, Gurugram, vide his letter dated 19.08.2020, informed that the sanctioning authority for the load of 950 KVA is Superintending Engineer-R-APDRP and only after sanctioning of the load by the said authority i.e. respondent No. 2, the necessary action shall be taken. Copy of the above orders was sent to respondents No. 4 & 5 also by the respondent No. 6.
- 1.7 That the petitioner, thereafter, kept on taking the matter with all the Authorities and was assured of prompt action. However, when after waiting for more than one month after the letter (A-5) of the respondent No. 6, no electricity connection was released and even no such approval was accorded by the competent authority, the petitioner was constrained to take up the matter with the respondent No. 2 i.e. Chief Engineer 'Op' New Delhi vide e-mail dated 11.09.2020, it was strongly taken up that the petitioner is not being released electricity connection despite specific orders of this Hon'ble Commission and being the sole distribution licensee, it is duty bound to supply electricity to the petitioner.
- 1.8 That however, despite the above said correspondents with each and every respondent in their personal name, no action whatsoever has been taken. On the other hand, the petitioner, through counsel received a communication that the respondents have decided to file a Review Petition before this Hon'ble Commission for review of orders

dated 05.08.2020 (A-1). It is a settled proposition of law that merely filing of a review petition does not give any substantive right to a party not to comply with the orders of this Hon'ble Commission unless and until, the Hon'ble Commission itself or any authority superior to it, passes orders of stay. No such orders having been passed, the orders dated 05.08.2020 (A-1), remain applicable with full rigour and the respondents remain bound in law to comply with the same.

- 1.9 That Section 142 of the Electricity Act, 2003 (as amended upto date) specifically provides that if there is any non compliance of the orders of the Hon'ble Commission by any authority/person, such person shall be held liable under this Act to pay penalty upto Rs. 1 lac and in case of continuing failure, additional penalty of Rs. 6,000/- per day may be imposed. Section 146 of the said Act provides for imprisonment upto 3 months or fine upto Rs. 1 lac or both. The said two Sections are reproduced below for ready reference: -

“Section 142. (Punishment for non-compliance of directions by Appropriate Commission):- In case any complaint is filed before the Appropriate Commission by any person or if that Commission is satisfied that any person has contravened any of the provisions of this Act or the rules or regulations made thereunder, or any direction issued by the Commission, the Appropriate Commission may after giving such person an opportunity of being heard in the matter, by order in writing, direct that, without prejudice to any other penalty to which he may be liable under this Act, such person shall pay, by way of penalty, which shall not exceed one lakh rupees for each contravention and in case of a continuing failure with an additional penalty which may extend to six thousand rupees for every day during which the failure continues after contravention of the first such direction.”

Section 146. (Punishment for non-compliance of orders or directions):- Whoever, fails to comply with any order or direction given under this Act, within such time as may be specified in the said order or direction or contravenes or attempts or abets the contravention of any of the provisions of this Act or any rules or regulations made thereunder, shall be punishable with imprisonment for a term which may extend to three months or with fine, which may extend to one lakh rupees, or with both in respect of each offence and in the case of a continuing failure, with an additional fine which may extend to five thousand rupees for every day during which the failure continues after conviction of the first such offence: 1[Provided that nothing contained in this section shall

apply to the orders, instructions or directions issued under section 121.]”

- 1.10 That from a perusal of sequence of events, it is evident that the respondents No. 1 to 6 have individually and/or collectively made themselves liable for being proceeded against in accordance with the above said provisions of Electricity Act for willful disobedience of the orders dated 05.08.2020 of this Hon’ble Commission and punished in accordance with law.
- 1.11 That no such or similar petition has been filed by the petitioner either in this Hon’ble Commission or in any other superior Tribunal or Court.

It is therefore, respectfully prayed that the entire records of the case may be called for and after perusing the same, this Hon’ble Commission may be pleased to summon the respondents No. 1 to 7 and punish them for willful disobedience of the orders dated 05.08.2020 in accordance with law and as deemed appropriate.

This Hon’ble Commission may pass any other orders or directions deemed appropriate in the facts and circumstances of the present case.

2. Proceedings

- 2.1 The case was heard by the Commission on 20.10.2020, as scheduled, through virtual court.
- 2.2 At the outset, the counsel of Petitioner argued that the electricity connection has not been released till date. Per Contra, the counsel of Respondents has stated that in compliance with the Commission’s orders dated 05.08.2020, the load has been sanctioned and further process of releasing of connection is in progress. However, the Respondents, requested to grant some time to do the needful in the matter, accordingly, acceding to the request of Respondents, the matter is adjourned for 03.11.2020 at 11.30 PM.

3. Reply dated: 19.10.2020 on behalf of Respondent no. 1 to 6 (DHBVNL),

- 3.1 The Petitioner has filed the instant Petition under Section 142 read with Section 146 of the Electricity Act 2003 (Act) seeking action against the answering Respondents for alleged non-compliance of the Order dated 05.08.2020 passed by this Hon’ble Commission in PRO 16 of 2020 (“Order dated 05.08.2020”). By way of Order dated 05.08.2020, this Hon’ble Commission directed the Respondents to release a connection to the Petitioner herein subject to the Petitioner bearing cost of line and switchgear for 11 KV feeder from nearest 66 KV substation (from where it is feasible to feed requisite load).
- 3.2 The contents of the Petition under reply are specifically denied for being completely erroneous and frivolous, except those are matters of record and/or specifically admitted herein.

3.3 At the outset, it is submitted that the present Petition under Section 142 read with section 146 of the Act is not maintainable considering that there is no willful disobedience of the Order dated 05.08.2020 on the part of the Respondents. The Petitioner is well aware that the Respondents have, in exercise of its statutory right, preferred a petition seeking review of the Order dated 05.08.2020 before this Hon'ble Commission. The said petition had been filed on 19.09.2020, and is pending consideration and adjudication ("Review Petition"). The Review Petition seeks to correct an error in the Order dated 05.08.2020, which is apparent on the face of the record in respect to the question of law decided therein and which ought to be corrected by this Hon'ble Commission. Thus, this Petition under Section 142 will not sustain unless the said issues/ question of law are adjudicated by this Hon'ble Commission in the Review Petition. Briefly, the following grounds have been raised in the Review Petition:

- i. In terms of the Haryana Electricity Regulatory Commission (Duty to supply electricity on request, power to recover expenditure incurred in providing supply and Power to require security) Regulations, 2016 ("Duty to Supply Regulations") and the Haryana Electricity Regulatory Commission (Electricity Supply) Code, 2014 ("Electricity Supply Code") unless required infrastructure has been set up and installed as per the approved plans, the obligation of the distribution licensee doesn't arise to take over the infrastructure and supply electricity. Reference is made to Section 43 of the Act, Regulation 4.12.2 of the Duty to Supply Regulations read with Regulation 4 of the Electricity Supply Code. Hence, for those consumers whose premises are within the area / under the scheme of a colonizer, it is the duty of the distribution licensee of the area to ensure at the time of energization of the system that the electrical system has been laid down by the coloniser as per the approved electrification plan. The Distribution licensee cannot release single point connections or individual connections unless such coloniser furnishes required bank guarantee for the balance work to be executed as per the approved electrification plan. Rather, in other words, there is no enabling provision for release of independent connections / supply of electricity to consumers situated within the area of a coloniser.
- ii. The Hon'ble Commission has completely overlooked the true import and intent with which the Hon'ble APTEL issued the order dated 03.10.2012. Without noting the true intent behind the said order, the Hon'ble Commission notes that the Petitioner herein has rightly applied to the Respondent herein for release of connection, whereas no part of the order issued by Hon'ble APTEL either confirms or reinforces the said

understanding of the Hon'ble Commission. The order passed by the Hon'ble APTEL required that the supply of electricity shall be given by DHBVN within its licensed area, and not DLF Cyber City (M/s DLF), which is using its own generation and distribution facility. In furtherance of the said finding, the Hon'ble APTEL noted that supply of electricity should be regularised to the existing consumers who were receiving supply from M/s DLF Ltd. Pursuant to the said direction, and bearing in mind that the supply to M/s DLF will be under the category of single point supply discussions ensued between parties when M/s DLF requested for release of 2 nos. Single point electricity connections at 66 KV level for their 15 buildings in cyber city Gurugram and expressed their inclination to close down their own generating facility as soon as they get power from the state utility. This fact has also been recorded by the Hon'ble Supreme Court in its order dated 23.08.2013 in the appeal filed by M/s DLF Utilities being C.A no. 2029 of 2013, to the effect that DHBVN has decided to implement the APTEL order dated 03.10.2012 and since complicated issues were involved in the matter, the Hon'ble Supreme Court granted status quo in the matter. The Hon'ble Commission failed to appreciate the true import of the Hon'ble APTEL's and Hon'ble Supreme Court's order which in no manner suggest or further pleas from standalone consumers of the 'single point supply' category to make independent applications for release of connections. In other words, the Hon'ble APTEL does not require a distribution licensee to overlook the Regulations governing the field and release connections in absence of electrical infrastructure to cater to the load of its consumer base, as has sought to be done in the instant case. Such a scenario, would only lead to undue advantage to the developers / colonisers at the cost of the entire consumer base of the distribution licensee.

- iii. The Order dated 05.08.2020 records contradictory findings in as much as the Hon'ble Commission has acknowledged and recorded in the order that the responsibility of the setting up requisite infrastructure as per the approved plans lies on the developers / colonizers, yet directing release of connection to the Petitioner (single user within a colonisers area) in complete contradiction to the settled law governing Duty to Supply to colonizers. Hence, the Hon'ble Commission has recorded (at Para 32) that the right of an applicant / Petitioner herein to get electricity connection is kept at a high pedestal and the said right has been regulated in terms of the condition that the infrastructure commissioning is necessary for the said purpose that has to be undertaken by the developer, i.e. M/s DLF. In

view of the admitted fact that infrastructure for the said purpose has not been laid down by the M/s DLF, the direction given by the Hon'ble Commission under order dated 05.08.2020 to the Respondents to release connection to the Petitioner is an error apparent on the face of record. Such an order is erroneous for the same is in anti-thesis to the obligations cast on developers / colonizers to meet their obligations in a timely manner. Rather the Hon'ble Commission's inference of the distribution licensee's obligation to supply being paramount is an opportunity afforded to colonizers to wriggle out of their obligations for developing an adequate infrastructure for all consumers within such colony.

- iv. The Hon'ble Commission's direction to release electricity connection to the Petitioner is in the teeth of the Regulations Single Point Supply Regulation notified by the Commission itself wherein there is no provision to release individual connections, when single point connection is issued. If such a finding is permitted to be sustained, it will lead to opening of Pandora's box whereby every such owner similarly placed as the Petitioner will make applications to the distribution licensee for releasing connection to them de hors whether adequate infrastructure exists or not or whether the developer has complied by the terms of the sanctioned electrification plan.

For the sake of brevity and to avoid repetition, the Respondents crave leave of this Hon'ble Commission to refer and rely upon the contents of the Review Petition filed by the Respondents.

Re: Grounds for contempt are not made out

- 3.4 Further, the requirements for contempt i.e. a willful disobedience or failure to abide by any law on the part of the Respondents, is not made out in the instant case. Rather, the Respondent in good faith awaits adjudication of its Review Petition. In this regard, reliance is placed on the following:

- (a) In **Sudhir Vasudeva, Chairman and Managing Director, Oil and Natural Gas Corporation Limited and others v. M. George Ravishekar and others, (2014) 3 SCC 373, (Para 19)**, the Hon'ble Supreme Court held as under:

19. The power vested in the High Courts as well as this Court to punish for contempt is a special and rare power available both under the Constitution as well as the Contempt of Courts Act, 1971. It is a drastic power which, if misdirected, could even curb the liberty of the individual charged with commission of contempt. The very nature of the power casts a sacred duty in the Courts to exercise the same with the greatest of care and caution. This is also necessary as, more often than not, adjudication of a contempt plea involves a process of self-determination of the sweep, meaning and effect of the order in

respect of which disobedience is alleged.....Only such directions which are explicit in a judgment or order or are plainly self-evident ought to be taken into account for the purpose of consideration as to whether there has been any disobedience or wilful violation of the same”

- (b) In **Ashok Paper Kamgar Union v. Dharam Godha & Ors., (2003) 11 SCC 1, (Para 17), Ram Kishan vs. Tarun Bajaj & Ors (2014) 16 SCC 204 (para 10)**, the Court analyzed the concept of willful disobedience of the order of the Court and it was held that element of willingness is an indispensable requirement for holding a person guilty of contempt. Para 17 of the said judgment is extracted hereunder:

“17. Section 2(b) of Contempt of Courts Act defines 'civil contempt' and it means willful disobedience to any judgment, decree, direction, order, writ or other process of a Court or willful breach of undertaking given to a Court. 'Wilful' means an act or omission which is done voluntarily and intentionally and with the specific intent to do something the law forbids or with the specific intent to fail to do something the law requires to be done, that is to say with bad purpose either to disobey or to disregard the law. It signifies a deliberate action done with evil intent or with a bad motive or purpose. Therefore, in order to constitute contempt the order of the Court must be of such a nature which is capable of execution by the person charged in normal circumstances. It should not require any extra ordinary effort nor should be dependent, either wholly or in part, upon any act or omission of a third party for its compliance. This has to be judged having regard to the facts and circumstances of each case.”

[Emphasis Supplied]

- (c) The Hon'ble Supreme Court in Ram Kishan vs. Tarun Bajaj & Ors (2014) 16 SCC 204 held as under:

“10. Thus, in order to punish a contemnor, it has to be established that disobedience of the order is 'wilful'. The word 'wilful' introduces a mental element and hence, requires looking into the mind of person/ contemnor by gauging his actions, which is an indication of one's state of mind. 'Wilful' means knowingly intentional, conscious, calculated and deliberate with full knowledge of consequences flowing therefrom. It excludes casual, accidental, bonafide or unintentional acts or genuine inability. Wilful acts does not encompass involuntarily or negligent actions. The act has to be done with a “bad purpose or without justifiable excuse or stubbornly, obstinately or perversely”. Wilful act is to be distinguished from an act done carelessly, thoughtlessly, heedlessly or inadvertently. It does not include any act done negligently or involuntarily. The deliberate

conduct of a person means that he knows what he is doing and intends to do the same. Therefore, there has to be a calculated action with evil motive on his part. Even if there is a disobedience of an order, but such disobedience is the result of some compelling circumstances under which it was not possible for the contemnor to comply with the order, the contemnor cannot be punished. "Committal or sequestration will not be ordered unless contempt involves a degree of default or misconduct". (Vide: **S. Sundaram Pillai, etc. v. V.R. Pattabiraman**; AIR 1985 SC 582; **Rakapalli Raja Rama Gopala Rao v. Naragani Govinda Sehararao&Anr.**, AIR 1989 SC 2185; **Niaz Mohammad & Ors. etc.etc. v. State of Haryana &Ors.**, AIR 1995 SC 308; **Chordia Automobiles v. S. Moosa**, AIR 2000 SC 1880; **M/s. Ashok Paper Kamgar Union &Ors. v. Dharam Godha &Ors.**, AIR 2004 SC 105; **State of Orissa &Ors. v. Md. Illiyas**, AIR 2006 SC 258; and **Uniworth Textiles Ltd. v. CCE, Raipur**, (2013) 9 SCC 753).

11. In **Lt. Col. K.D. Gupta v. Union of India &Anr.**, AIR 1989 SC 2071, this Court dealt with a case wherein direction was issued to the Union of India to pay the amount of Rs. 4 lakhs to the applicant therein and release him from defence service. The said amount was paid to the applicant after deducting the income tax payable on the said amount. While dealing with the contempt application, this Court held that "withholding the amount cannot be held to be either malafide or was there any scope to impute that the respondents intended to violate the direction of this Court."

- 3.5 In the given facts and circumstances and the settled position of law as stated above, the present Petition is not maintainable under Section 142 r/w Section 146 of the Act for alleged non-compliance of the Order dated 05.08.2020 as the element of wilfulness to abide by any law on the part of the Respondent is missing. Rather the Review Petition has been filed as the Respondents are striving to act in compliance of the Act and the Regulations in vogue. The electricity connection cannot be released to the Petitioner in view of the settled position of law and the provisions of the Act and the applicable regulations framed by this Hon'ble Commission as well as the technical constraints which have been overlooked by this Hon'ble Commission while issuing directions for the same under Order dated 05.08.2020.

4. Commission's Analysis and Order

The matter was finally heard on 03.11.2020. At the out-set, the Counsel for the petitioner informed that the Electricity connection to the petitioner in compliance with the Commission's order dated 05.08.2020 has been released by the respondents. However, their supply was disrupted yesterday due to fault in cable but being O&M issue, he

wouldn't press this point. The Commission, is of the view that since the connection has been released in compliance with order dated 05.08.2020, present petition has become infructuous.

In view of the above facts, the instant petition is disposed-off being infructuous.

This Order is signed, dated and issued by the Haryana Electricity Regulatory Commission on 04/11/2020.

Date: 04.11.2020

Place: Panchkula

(Naresh Sardana)

Member

(Pravindra Singh)

Member

HERC