

Punjab State Power Corporation Ltd. vs M/S Shree Polyphase Meters (India) Pvt. ... on 8 December, 2011

OP 10/1998

NATIONAL
CONSUMER DISPUTES REDRESSAL COMMISSION

NEW DELHI

ORIGINAL PETITION NO.
149 OF 2001

Punjab State
Electricity Board

Now known as
Punjab State Power Corporation Ltd. (PSPCL)

Through
Additional Superintending Engineer/

Energy Audit
& MMTS, PSPCL

Patiala,
Punjab
Complainant

Versus

1. M/s Shree Polyphase
Meters (India) Pvt. Ltd.

(Earlier known as M/s Polyphase Meters (India) Pvt. Ltd.)

Through its Director

D-12, Ramkutir,
Plot 18/A, Bangur Nagar

Goregaon (W),
Mumbai-400090

2. Shri R.P. Aggarwal

Director, M/s Shree Polyphase Meters (India) Pvt. Ltd.

305/6, Apeejay
House

130, Bombay Samachar
Marg

Mumbai-400023

3. Shri N. Dube

Manager (Commercial)

M/s Shree Polyphase Meters (India) Pvt. Ltd.

305/6, Appejay House

130, Bombay Samachar
Marg

Mumbai-400023

4. M/s Landis and Gyr

Energy Management AG

Gulbeistrasse,
CH-6301 ZUG

Switzerland Opposite Parties

BEFORE

:

HONBLE MR. JUSTICE R.C. JAIN,
PRESIDING MEMBER

HONBLE MR. S.K. NAIK, MEMBERS

Appearance

:

For the
Complainant : Mr. S.S. Gulati,
Advocate

For the
Opposite Parties : Mr. R.M. Kedia,
Advocate

for OP 1 &
2

Pronounced on : 8th
December, 2011

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R D E R

PER S.K.
NAIK, MEMBER

1. The erstwhile Punjab State Electricity Board now known as the Punjab State Power Corporation Limited has filed this original complaint against M/s Shree Polyphase Meters (India) Pvt. Ltd. and three others as arrayed in the complaint alleging deficiency in service on their part arising out of breach of contracts with regard to repair and return of certain electrical equipments supplied by them and have sought a direction to be issued to Opposite Parties No. 1 and 2 to return the machines of the complainant-Corporation lying with them after removing the defects to their satisfaction or in the alternative to pay a sum of Rs.37.00 Lakhs with approximate sum of Rs.22.00 Lakhs subject to actual calculation as per clause 9 of the contract. In addition, the complainant-Corporation have prayed for a direction to award a compensation of Rs.4.00 Lakhs for harassment, negligence, compensatory cost and for delay in rectification of the defects because of which work of the complainant-Corporation of the checking meters has suffered badly.

2. Briefly stated, the case of the complainant-Corporation is that in response to a tender floated by them for the supply of six sets of three-phase Phantom Load Set Type (Phantom Testing Machine) and four sets of Portable Solid State Watt Hour Reference Standard Meter Type (Watt Hour Testing Machine), the offer of opposite party no.1 as warranted by their manufacturer, M/s Landis And Gyr, Energy Management AG, Switzerland, opposite party no.4, was accepted and orders for supply were placed on them on the 13th of September, 1995. Each one of the Phantom Testing Machine w to cost Rs.5.50 Lakhs and the Watt Hour Testing Machine Rs.10.00 Lakhs. Thus, the total machines as per the contract were required to be supplied within a period of 45 to 60 days, however, they were delivered later.

3. Even though the supplier i.e. opposite party no.1 had assured that the machines supplied were of very high quality and were also warranted by their manufacturer in Switzerland, to their surprise problems started cropping up in their functioning within few months of their being pressed into service.

4. On the 26th of March, 1996, the Senior Executive Engineer, MMTS, Jalandhar reported problems in the functioning of Watt Hour Testing Machine No. 67388178. The hand-switch of this machine w be defective. The matter had been reported to opposite party no.1, with a request to replace the hand-switch but of no response.

5. On 24th of June, 1996

another complaint was made by Senior Executive Manager, MMTS, Patiala to opposite party no.1 in respect of Phantom Testing Machine No.65535858. The problem there was not operating at 120 Volt tapping at delta formation while testing the meter. A request for immediate necessary

action to rectify the defects evoked no response from the opposite party no.1 despite the fax messages and reminders.

The matter was also brought to the notice of opposite party no.2 with a request to depute an expert engineer but of no avail.

6. On the 12th of September, 1996 yet another complaint

was received from the Senior Executive Engineer MMTS, Jalandhar with regard to the Phantom Testing Machine No. 65535857.

Opposite party no.1 was informed that the machine was showing defect in current circuit in red and yellow pages but even that did not bother opposite party no.1 to take any corrective measure.

7. It has also been alleged that the Senior Executive Engineer,

Energy Audit and MMTS, Bhatinda also complained about

another Watt Hour Testing Machine and one Phantom Testing Machine and the matter was brought to the notice of opposite party no.1 but of no avail.

8. Disappointed with the lack of response despite a series of

communication, the matter was again brought to the notice of opposite party no.2 by a letter dated 13th of March, 1997, whereafter

a reply was received that their service engineer would visit the complainant-Corporation in the second week of April, 1997 to repair the Phantom Testing Machines and the Watt Hour Testing Machines. Finally,

authorized representative one Mr. N. Dubey, Manager

(Commercial), opposite party no.3, visited the head office of the complainant-Corporation at Patiala on the 7th of May, 1997, who after inspection of the equipments intended to c

testing facilities were available at Patiala but he was asked to return to his headquarters at Bombay by air due to some urgent work and, therefore, he could not carry the machines. Later, however,

on the 2nd of June, 1997 the machines along with pulse switch of

Watt Hour Testing Machine No. 67388176 were collected by opposite party no.1 through one Kailash Chomal,

their authorized representative. While

the complainant-Corporation expected that the defects in the machines would be set right and the machines would be returned to them, to their dismay they found the attitude of the opposite parties no. 1 and 2 totally disappointing as a series of letters, telegrams and fax messages did not evoke any positive response. On the contrary, supplier/opposite

party vide their letter dated 15th of April, 1998 asked the

complainant-Corporation to pay 6000 Swiss Franks towards

the cost of repair of the machines as claimed by their manufacturer at

Switzerland. The complainant-Corporation vide their reply dated 30th of April, 1998 addressed to Shri R.P. Aggarwal, opposite party no.2, expressed their surprise that after a long silence of over 11 months, the supplier/opposite party no.1 has come out with a proposal to repair their defective instruments by levying exorbitant charges and it was pointed out that as per warranty clause of the purchase order they were bound to repair/replace the defective equipments free of cost and also deliver it to the complainant at the complainants premises. Joining issues with opposite party no.1 vide letter dated 26th of May, 1998 addressed to the complainant-Corporation stated that the goods had been sent to Switzerland and the manufacturer had confirmed that the defects occurred because of faulty handling, which was not covered under the warranty. They, therefore, reiterated their stand that they need to bill the complainant-Corporation to meet the cost of repairs.

9. Meanwhile, the complainant-Corporation were informed by the original manufacturer of the machines that they have not received any defective equipment from opposite party no.1 or anyone else in India for repairs and they cautioned the complainant-Corporation of the possibility of their equipment getting repaired by the supplier through unauthorized personnel. On the face of the claim of opposite party no.1 that the machines had been sent to the original manufacturer at Switzerland and the original manufacturer contending that no such machine had been received by them, it came as a big surprise to the complainant-Corporation and apprehending that the opposite party no.1 has not been resorting to ethical business practice, they vide their letter dated 4th of September, 1998 issued a final notice under Clause 12 of the general terms and conditions of the agreement, clearly stating therein that unless the machines were repaired and returned within a period of 21 days, they will be at liberty to invoke Clause 12 of the agreement for getting the defective equipments repaired at their risk and cost after collecting the machines from them without prejudice. In response to the said notice, the opposite party no.1 vide its reply dated 25th of September, 1998 denied the complainant-Corporations right to invoke Clause 12 contending once again that the defects in the machines occurred because of mishandling by the complainants personnel in the field and the warranty did not cover such mishandling. It was obvious that the opposite party was not interested to get the machinery repaired and return to the complainant-Corporation. Therefore, a Junior Engineer was deputed to the complainant-Corporation to collect the machines from the opposite party along with an authority letter dated 21st of October, 1998. Opposite party no.1, however, refused to hand over the equipments to the said Junior Engineer and vide their reply dated 27th of November, 1998 reiterated their earlier stand that since there was no manufacturing defects with the equipments and the connections were made in a proper manner, the defects occurred because of and wrong connections, it did not fall within the warranty clause. In the said communication, the opposite party no.1 stated that the equipments will be returned if the complainant-Corporation accepted that there is no liability of opposite party no.1 for free repair, risk purchase, negligence and default and if the complainant-Corporation agreed to get the machines repaired at their own cost and further that they withdraw all claims against opposite party no.1 with an assurance that they will not invoke Clause 12 of the agreement.

10. Since the opposite parties no. 1 and 2 neither repaired the defective equipments after getting them collected through their representative nor were they inclined to return the machines for being repaired by the complainant-Corporation at their cost and risk and sufficient time had elapsed in the process, the complainant-Corporation approached the District Forum at Patiala by filing a consumer complaint on the 21st of June, 2000. The opposite parties in their written version raised a preliminary objection that the complaint was not maintainable on account of pecuniary jurisdiction as laid down in the Consumer Protection Act, 1986 as the cost of machines was Rs.37.00 Lakhs while the pecuniary jurisdiction of the District Forum was restricted to Rs.5.00 Lakhs only. This objection of the opposite parties was upheld by the District Forum who vide their order dated 13th of December, 2000 returned the complaint to the complainant-Corporation for being presented before the competent authority. The complainant-Corporation thereafter have filed this complaint to invoke the jurisdiction of this Commission.

11. On presentation of the complaint, notices were issued to the opposite parties. While opposite parties no. 1 and 2 are duly represented before this Commission, opposite parties no.3 and 4 despite due service of notice remained absent and are being proceeded ex-parte. While opposite party no.1 has filed the written version denying any deficiency or liability on their part, opposite party no.2 has adopted the written version filed by opposite party no.1. Both of them have raised a number of preliminary objections. In that they contend that it was not a consumer, that the complainant-Corporation has not approached the Commission with clean hands and suppressed material facts, that the complaint was hit by the principle of res-judicata and that they were only suppliers of the equipments/machinery and not manufacturers and that the complaint was also beyond limitation. On the merits of the complaint, it has been stated by opposite party no. 1 that the machines were thoroughly tested prior to the delivery so the question of defects arising so early did not arise. It has also been averred that the machines having been dispatched by 8th of December, 1995, the period covered by the warranty was upto 15th of December, 1996. The defects having occurred after the expiry of period of warranty, no liability can be fastened on the opposite parties. It has been admitted that a letter dated 27th of November, 1998 refusing to return the equipments was issued by them in doing so on the ground of non-payment of the balance 5% of the cost of the equipments liability on the basis of the letter given to the complainant-Corporation by opposite party no.3 stating that opposite party no.3 was not connected with opposite party no.1 in any capacity nor did he have any authority to collect the machinery on their behalf. According to them, the letter dated 7th of May, 1997 was procured by the complainant-Corporation from opposite party no.3. In any case he was not a technical person and was not aware of the nature of defects in the machinery. The opposite parties have also stated that the complaint is not maintainable as it was earlier filed before the

District Forum, who returned the same, but the complainant-Corporation have made material changes, including the prayer clause in the complaint filed before this Commission. Opposite party no.2 in his WS has also taken the additional plea that he was not a Director of the opposite party no.1/company at the time of the transaction and, therefore, the complaint was not maintainable against him as there could be no cause of action against him personally.

12. The complainant-Corporation have filed their rejoinder reiterating their plea in the complaint and have specifically denied the contention of opposite party no.1 that any of their officers ever visited Switzerland prior to the purchase of the machines and have reiterated their contention that opposite party no. 2 was a Director and continued to be so even in the year 2000 as can be seen from page 117 of the paper-book.

13. When called upon to lead their respective evidences, the complainant-Corporation has filed the affidavit of one Bhajan Singh, Assistant Executive Engineer and another of Devraj, Junior Engineer and finally affidavit of one Kulwant Singh Sidhu, Senior Executive Engineer, has been filed giving the assessment of loss. On behalf of the opposite parties, affidavit of Mr. Chandra Prakash Jalan, Director of opposite party no.1 has been filed.

14. We have heard the learned counsel for the parties and have carefully perused the records of the case and have also considered the submissions made by the parties.

15. At the outset, it may be stated that this case has a chequered background, inasmuch as it had originally approached the District Consumer Disputes Redressal Forum, Patiala by filing a consumer complaint on the 19th of June, 2000 seeking a direction to the opposite parties to return the equipments retained by them and taking it away from the custody of the complainant-Corporation for repair. It was further prayed that the opposite parties be burdened with punitive compensatory cost along with damages and loss suffered by the complainant-Corporation to the tune of Rs.4.00 Lakhs. The complainant-Corporation had arrayed only three opposite parties and had not made the manufacturer, M/s Landis And Gyr, Switzerland as a party. Since the value of the goods in dispute exceeded the pecuniary jurisdiction of the District Forum, the opposite parties had raised a preliminary objection with regard to entertainability of the complaint which was accepted by the District Forum, who in the operative part of its order dated 13th of December, 2000 held as under :-

In the present case the value of the goods is Rs.37 lacs and the complainants have claimed compensation of Rs.4 lacs. The aggregate exceeds Rs.5 lacs and thus this Forum has no power to proceed with the complaint.

The complaint is ordered to be returned to the complainants for presentation before the competent authority.

16. Thereafter the complainant-Corporation filed the present complaint before this Commission on the 23rd of May, 2001, inter alia seeking the reliefs as already stated earlier. The complaint was admitted on the 30th of May, 2001 and on notice being issued to the opposite parties, opposite party no.3 and 4 despite due service failed to put in appearance and were, therefore, ordered to be proceeded ex-parte. Opposite party no.1 and 2 filed their written version contesting the complaint both on the ground of a number of preliminary objections as also on merit. While the process of adducing evidence on behalf of either of the parties was going on, it appears that the possibility of amicably resolving the dispute between the parties was explored as would be evident from this Commission's order dated 24th of October, 2002, which reads as under :-

Mr. Gulati will take instructions. The question of limitation will be considered in case the matter is not amicably resolved between the parties. During the course of hearing, it was given that the Complainant will take back the machine after paying the balance of the purchase price and so far as repairs are concerned, an estimate will be submitted by the Respondent to the Counsel for the complainant and certain

charges can be apportioned between the parties.

The Respondent No.2, who is Director of Respondent No.1, states that the repairs will come to Rs.3-4 lakhs. On a further suggestion, he agreed that the company will get the machine fully repaired only for a token charge of rupees one lakh. Let Mr. Gulati take instructions in this

connection. The Respondent No.1 will also file complete estimate of the repairs and also give a copy to Mr. Gulati.

To be listed on 29.01.03. A copy of this order be given to both the parties.

17. Subsequently, it appears from the order dated 13th of February, 2004 that even though the complainant-Corporation were agreeable to the direction issued by this Commission on the 24th of October, 2002; there was no possibility of any compromise between the parties and the parties were directed to complete adducing of their respective evidences. It appears that in order to advance the cause of justice and provide some relief to the complainant-Corporation, this Commission vide its order dated 7th of February, 2006, without prejudice to the rights of the parties, directed the opposite parties to get the machines repaired and obtain a certificate from IIT, Mumbai that they are in proper working condition and hand them over to the complainant-Corporation leaving the question of compensation and damages etc. for the delay to be considered thereafter. This direction was issued to ensure that opposite party no.1 was bonafide interested in a solution and was not trying to take undue advantage of the situation. Since IIT, Mumbai did not have the technical knowhow/facility four out of five machines were finally entrusted to the National Physical Laboratory, New Delhi, who calibrated the machines on 9th of January, 2007 and certified them to be OK. Thereafter the opposite party no.1 delivered these machines to the complainant-Corporation on 23rd of March, 2007. The fifth Phantom Load Machine No. 6535856, however, had been declared beyond repair by the MTE Service Pvt. Ltd, Delhi, who, it appears, had been approached by the opposite parties for repair of the machines at their own level.

18. Thus, the dispute boils down to the delay in the repair of the four machines from 2nd of June, 1997 when they were carried to Bombay by opposite party no.3 through his representative Mr. Chomal and 21st of March, 2007 when the machines were delivered to the complainant-Corporation spanning over a period of more than 10 years. In addition, the complainant-Corporation have been deprived of the use of the fifth Phantom Testing Machine forever after it was taken away from them on the 2nd of June, 1997.

19. Before, however, we adjudicate on the rights and liabilities of the parties on this issue, it may be stated that Shri R.M. Kedia, learned counsel for the opposite parties no. 1 and 2, has vehemently addressed his arguments on the preliminary objections that have been raised in their written version as well as in the synopsis of written arguments. Mr. Kedia has contended that the present complaint is not maintainable as it is hopelessly barred by the ground of limitation. In support of this contention, he has referred to the earlier complaint filed by the complainant-Corporation before the District Forum, which was returned to them on the 13th of December, 2000 for being presented before a competent authority but the complainant-Corporation, who ought to have filed the same complaint before this Commission within a period of one month, have filed the same on the 23rd of May, 2001, amounting to a delay by more than four months. We take note of this contention only to be rejected for the simple reason that the District Forum while returning the complaint vide its order dated 13th of December, 2000 has neither stated the authority before whom the complaint

was to be presented nor indicated/prescribed any time limit within which it was to be presented. Learned counsel has not been able to show us any ruling on the subject that a complaint once returned must be filed within a month before the competent authority/appropriate forum. The delay cannot be held to be unreasonable. An application for condonation of delay has been filed which shows sufficient cause.

20. Since the learned counsel for the opposite parties no. 1 and 2 has also contended that the complaint even before the District Forum was barred by limitation, we have gone through Clause 9 of the agreement, which prescribes the warranty and the various dates, on which the complainant-Corporation have brought the defects occurring in the machine to the notice of opposite parties no.1 and 2. As per the said warranty clause, if any defect in material or workmanship occurred or appears within twelve months from the date of its commissioning, the supplier was responsible to replace/repair such machines free of cost and deliver it at the destination of the purchaser i.e. the complainant-Corporation in this case. From the chronology of the defects occurring one after the other and the dates on which the opposite parties no. 1 and 2 have been approached make it abundantly clear that beginning with 26th of March, 1996 and ending on the 12th of September, 1996 all these defects were communicated to the opposite parties no. 1 and 2 within the prescribed warranty period of one year as the machines appear to have been delivered sometime in December, 1995. Besides, the opposite party no.2 vide his letter dated 13th of March, 1997 had informed the complainant-Corporation that their engineer would be sent by the second week of April, 1997 to carry out the repairs. Thus, while the defects occurred during the one year warranty period and were promptly communicated to the opposite parties no. 1 and 2, the contention of the learned counsel that the complaint was ab initio barred by limitation has to be rejected. Further, by virtue of their own commitment to send their engineer for repairs make it a case of continuing cause of action and the objection on the ground of limitation is being advanced without any merit whatsoever.

21. In the other limb of his argument, the learned counsel has contended that the complainant-Corporation have made material changes in the original complaint and have not only added an additional opposite party i.e. opposite party no.4, but have also amended the prayer clause. According to him, the changes made in the complaint would amount to a new complaint being filed before this Commission on 23rd of May, 2001, which is hopelessly barred by limitation. According to him, the cause of action arose during the year 1996-97 and the complaint even before the District Forum was barred by limitation. We reject this plea of the learned counsel for the opposite parties no. 1 and 2 as the cause of action arose on the 27th of November, 1998, when the opposite parties refused to hand over the machines to the complainants representative, who had travelled to Bombay to bring them back for repairs. It does not lie in the mouth of opposite parties to say that the cause of action arose during 1996-97 since they had themselves collected the machinery through their representative in June, 1997 and had not only failed to respond to the plethora of communications from the complainant-Corporation but also have cleverly changed their stand to demand the repair charges contrary to the terms of the agreement and that too falsely claiming that the equipments had been sent to the original manufacturer at Switzerland, opposite party no.4. The complainant-Corporation in order to defend themselves against such an objection being raised by the opposite parties have filed an application for condonation of delay. We have

considered the same. We cannot take a pedantic and hyper-technical view merely because the opposite parties have raised an objection and taking an overall view of the background of the case and stakes involved in the complaint and in the interest of justice hold the objection of the complaint being barred by limitation fails.

22. The other preliminary objection raised by Mr. Kedia is that the complaint is not maintainable as it is hit by the principle of res-judicata. According to him, the complainant-Corporation having approached the District Forum earlier is debarred from approaching the National Commission for the same relief based on the same cause of action. In this regard, he has relied upon the judgment of the Bombay High Court in the case of M/s Foreshore Cooperative Housing Society Ltd. V. Shri Praveen Desai & Ors., 2006 (2) All MR 371, and has contended that when a plaint, which is returned by one court having no jurisdiction to entertain the suit is presented in the same condition to the court having the jurisdiction, it amounts to institution of fresh suit. This objection again has to be overruled for the simple reason that the District Forum has not adjudicated the complaint on its merit and has returned it on the ground of lack of pecuniary jurisdiction, to be presented before a competent authority.

In any case, even if the complaint is to be treated as a fresh one as already discussed in the preceding paragraph it is within the period of limitation. His objection with regard to addition of opposite party no.4 as a necessary party or the changes effected in the prayer clause would not amount to any illegality or material irregularity and, therefore, the complaint is maintainable under Section 21 of the Consumer Protection Act, 1986.

23. Finally, the learned counsel has contended that the complainant-Corporation is not a consumer, inasmuch as the machinery/equipments have been purchased for commercial purpose.

No doubt, the buyer/purchaser of goods/machinery for commercial purpose does not qualify to be a consumer under the Consumer Protection Act, 1986 but the case made out by the complainant-Corporation is that in the purchase agreement there is a specific clause with regard to the service to be rendered by the supplier i.e. the opposite party and therefore, under Section 2(1)(d)(ii) of the unamended Act they were legally entitled to file a complaint being a consumer to avail the service of the supplier/opposite party. In this context, it would be relevant to peruse Clause 9 of the agreement, on which the learned counsel for the complainant-Corporation has relied.

It reads as under :-

9.0 WARRANTY :

The supplier/contractor shall be responsible to replace free of cost with no transportation and insurance expenses to the purchaser upto the destination of material/equipment, the whole or any part of the material, which under normal and proper use and maintenance, proves defective in material or workmanship within 12

months from the date, it is commissioned by the purchaser or 18 months from the date of dispatch in respect of indigenous equipment, 24 months from the date of shipment for imported material whichever expires earlier provided the purchaser gives prompt written notice of such defects to the supplier/contractor. Such replacement shall be affected by the supplier/contractor within a reasonable time not exceeding 6 months of intimation of defects.

Suppliers /Contractors responsibility arising out of supply of material or its use whether on warranties or otherwise shall not in any case exceed the cost of correcting the defects or replacing the defective part/material and upon the expiry (sic) the warranty terminate.

The above provision shall equally apply to the material so replaced/repared by the Supplier/Contractor under this clause in case the same is again found to be defective within 12 months of its replacement/repair.

In case the replacement/repair of defective material is not carried out within six months of intimation of defects, the supplier/contractor shall have to pay interest @ 12% per annum on the value of each complete operational unit of equipment beginning from the date of its becoming defective upto date of its re-commissioning after the replacement/repair.

24. A plain reading of this clause squarely refers to the post-purchase services/obligations of the supplier/opposite party. Even though the learned counsel for the complainant-Corporation has contended that the machinery/equipments in question were purchased only for the purpose of testing and had no commercial angle, prior to the Amendment Act 62 of 2002, effective from 15th of March, 2003, the hiring of services even for commercial purpose was covered under the Consumer Protection Act, 1986 and, therefore, the objection of the learned counsel for the opposite party/supplier that the complainant-Corporation was not a consumer has no legs to stand.

25. A number of citations/rulings relied upon by the learned counsel for the opposite parties no. 1 and 2 on interpretation of Section 2(1)(d) of the Consumer Protection Act, 1986 are on different set of circumstances and would not help the opposite parties in any manner.

26. Learned counsel for the opposite parties no. 1 and 2 has also advanced the plea that the dispute relates to the breach of contract and the transactions are of a complex nature and, therefore, he urges that the matter be remitted to a Civil Court for adjudication.

There is no weight in this argument, inasmuch as the dispute is not so complicated as to warrant resolution of complicated issues. To be noted that on behalf of the opposite parties only a loan affidavit of one Mr. Chandra Prakash Jalan, Director of opposite party no.1, has been filed. The other objection with regard to non-joinder of the parties also has to fail as opposite parties no. 3 and

4 were duly served but have failed to appear and the Commission has already passed an order to proceed against them ex-parte.

27. Having dealt with the preliminary objections, now we come to the merits of the case. On the direction of this Commission, four out of five machines/equipments were got repaired and tested from the National Physical Laboratory, New Delhi and handed over to the complainant-Corporation.

Thereafter, when the matter was listed for hearing on the 30th of June, 2010 counsel for the complainant-Corporation Shri Gulati had sought permission of this Commission to file an additional affidavit touching the value of the fifth machine, which had been declared unserviceable and not delivered to the complainant-Corporation and the damages suffered by the complainant-Corporation on account of ten years of delay in handing over the four machines after repairs. On permission being allowed subject to cost of Rs.10,000/-, the complainant-Corporation have filed the additional affidavit on the 27th of September, 2010 estimating therein the tentative loss per machine per month at Rs.5,84,000/-. Even though learned counsel for the supplier/opposite party had stated that he wanted to file a rebuttal affidavit to the calculations so made by the complainant-Corporation, no such rebuttal affidavit was filed. On the facts of the case, we find that the supplier/opposite parties no. 1 and 2 had been grossly deficient in rendering service to the complainant-Corporation. After getting the purchase order for the six Phantom Testing Machines and four Watt Hour Testing Machines after convincing the complainant-Corporation that they were fully warranted by the original manufacturer in Switzerland, opposite party no.4 and to that effect produced their certificate and warranties, they have not bothered to attend to various complaints of the complainant-Corporation after delivery. A number of letters/telegrams/fax messages and other communications from the side of the complainant-Corporation right from the 26th of March, 1996 when the Senior Executive Engineer, Jalandhar brought to their notice that Watt Hour Machine No.67388178 has gone defective followed by fax dated 3rd of July, 1996 from the Executive Engineer, Patiala with regard to complaint in Phantom Testing Machine No. 65535858 followed by telegram dated 12th of September, 1996 from the Senior Executive Engineer, Patiala with regard to one more Watt Hour Testing Machine, there was absolutely no response from the opposite parties. After more than a year on the 7th of May, 1997 opposite party no.3 Mr. N. Dubey, who was the Manager (Commercial) made a visit to the complainant-Corporation and after satisfying with regard to the problems or defects in the machines wanted to take the machines to their headquarters at Bombay for repair. He had, however, recalled and returned by air for some urgent work. The letter given by him to the complainant-Corporation is very relevant and is reproduced below :-

SHREE POLYPHASE METERS (INDIA) PVT. LTD.

(Formerly known as Polyphase Meters (India) Pvt. Ltd.

305/306, Apeejay House, 130, Bombay Samachar Marg, Bombay-400023 Fax :

(91) (22) 2049381, Tel: 2841815, 2844503, 2843976, 2825573, Email .

Ref.

No. (Sic) Dated :- 7.5.1997 To The Chief Engineer/EA & Enforcement, PSEB, Shakti Sadan, The Mall, Patiala-147001 Sub:- Rectification of defective equipments P.O. No. 101 and 102 both dated 13.9.95.

Dear Sir, With reference to your various references, telephonic talk and personal discussions regarding the rectification of L&G make Reference Standard Meter and Phantom Load Sets supplied by us against subject cited purchase orders. Since these equipments carry warranty and we are responsible to repair/rectify the defects free of cost. Therefore, I am carrying on the following defective instruments with me to Bombay for doing the needful as no testing facility is available at Patiala.

i) L&T TVE 102/3 Watt Hour meter :

S.No. 67388176 and 67388178

ii) L&G make TVT 5.6 Phantom Load Sets :

S.No. 65535856, 65535857, 65535858 The above mentioned equipments shall be sent back to Patiala free of cost as per terms and conditions of the Purchase Orders, duly repaired/rectification to your entire satisfaction.

Yours faithfully, For Shree Polyphase Meters (India) Pvt. Ltd.

Sd/-

(N. DUBE) Manager/Commercial

28. While this reference makes it abundantly clear that the equipments were within the warranty period and the supplier/opposite party no.1 was responsible to repair/rectify the defects free of cost as per terms and conditions of the purchase order, the opposite parties have at a later stage disowned their own employee stating that he was not on their employment on the 7th of May, 1997. To be noted that this letter has been given by Shri Dubey in the capacity of being the Manager (Commercial) of the opposite party no.1 on their letter head. We further notice with distress that the opposite parties no. 1 and 2 in their written version filed before the District Forum when the

complainant-Corporation had initially approached them, in para-2 thereof, had denied that the complainant-Corporation ever purchased the machinery/ equipments vide purchase order no. 101 and 102. They had totally denied receipt of any letters from the side of the complainant-Corporation with regard to the problem in the machinery. They even completely deny that the machinery/equipments were collected by them through Mr. Kailash Chomal on the 7th of May, 1997. This is a totally false averment, inasmuch as the same very opposite party have in their WS in para 10C filed before this Commission have stated as under :-

In pursuance of the aforesaid purchase orders placed by the Petitioner, this Respondent also paid security deposit of Rs.40,000/- against Purchase Order No. 101 and an amount of Rs.33,000/- against Purchase Order No.

102. Thereafter, this Respondent arranged for supply of the said equipment in compliance of their obligation under the said Purchase Orders.

29. The supplier/opposite party apart from their audacity to deny that machines were ever purchased by the complainant-Corporation from them, have gone on to even disown their own officers, opposite party no.3 Mr. Dubey & Mr. Chomal. If these persons had no authority to collect the machines, they have not explained how they reached their headquarters, and subsequently even going to the extent of claiming that the machines had been dispatched to the original manufacturer at Switzerland and claiming 6000 Swiss Franks from the complainant-Corporation, which is not based on facts.

30. On the contrary, the supplier/opposite parties have now submitted that the machines were got repaired from one M/s MTE Service Pvt. Ltd. on payment of Rs.3,57,544/-. The opposite parties were exposed of this false claim by the communication received by the complainant-Corporation from the local representative of the original manufacturer, who in their letter dated 17th of June, 1998 (page 99 of the paper-book) clearly stated that they have not received the defective equipments for repair and may be that the supplier was getting them repaired from some unauthorized sources. The fact that the machines were never sent to Switzerland despite the opposite parties claim stands fully established.

31. We also take note of the argument advanced by the learned counsel for the opposite parties that opposite party no.2 was not the Director of opposite party no.1 at the time of transaction and, therefore, he could not be held liable for any deficiency in person.

We outright reject this contention for the simple reason that this assertion runs contrary to the record, inasmuch as in their own written reply filed before the District Forum, Patiala filed on 6th of December, 2000 at page 117 of the paper-book Shri R.P. Aggarwal has been clearly stated to be a Director. Thus, when he was a Director even in December, 2000 to deny his status as a Director runs contrary to their own record and we take serious view of the opposite parties trying to mislead this Commission.

32. We also take note of the fact that the opposite parties have made a false averment that the engineers of the complainant-Corporation had been sent to Switzerland prior to procurement of the equipments/machinery which has been emphatically denied by the complainant-Corporation in their rejoinder.

33. In the totality of the facts and circumstances, we not only find that the opposite parties have been grossly deficient in rendering service but have resorted to totally false and untenable grounds to escape the liability. In our view, they deserve to be sternly dealt with.

34. Coming to the question of compensation, we have already stated that there has been a delay of more than 10 years in the repair and return of the equipments to the complainant-Corporation and they have been deprived of utilizing these machines for this period. It has also been admitted that one Phantom Testing Machine No. 6535856 had become unserviceable and the complainant-Corporation were deprived of its service ever since it was handed over to the opposite party on 02.06.1997. Now the question that arises is how to quantify the loss that the complainant-Corporation has suffered due to the unavailability of these equipments for the said period.

35. Both the Phantom Load Testing Machines and the Watt Hour Testing Machines are used for testing other machines/meters. The complainant-Corporation in their additional affidavit have claimed that non-usage of one Watt Hour Testing Machine and one Phantom Load Testing Machine for a period of one month has resulted in pecuniary loss of Rs.5,84,000/-.

Going by this calculation, the loss for a period of 10 years for combination of one Watt Hour Testing Machine and one Phantom Load Testing Machine would amount to Rs.5,84,000/- x 120 months i.e. 10 years = Rs.7,00,80,000/-.

Since two sets of this machines i.e. two Watt Hour Testing Machines and two Phantom Load Testing Machines were repaired and delivered the gross loss would come to Rs.7,00,80,000/- x 2 = Rs.14,01,60,000/-. Additionally, the complainant-Corporation would be entitled to the cost of one Phantom Load Testing Machine, which was declared to be unserviceable and not handed over to the complainant-Corporation ever.

36. Even though learned counsel for the opposite parties no. 1 and 2 had expressed his desire to file rebuttal to the additional affidavit of the complainant-Corporation, no such additional affidavit has been filed. Further, we find that the estimated loss calculated by the complainant-Corporation is not backed by any authentic data. They have been calculated on the basis of the capacity of the machines and it has been presumed that they will be put to full use. Being only testing machines, their usage depends upon the flow of work order/inventory about which there is no mention. The additional affidavit also does not make it clear as to whether one Watt Hour Testing Machine can calibrate/test 10 Single Phase Meters or 8 Three Phase 4 Wire Whole Current Meter or 8 LT Three Phase 4 Wire CT Meter or 6 HT Three Phase 4 Wire Meters or can test all these four different categories of meters on the same day and as per the numbers indicated against each. There is a lot of ambiguity in this claim, inasmuch as if one Watt Hour Testing Machine can calibrate/test only 10 Single Phase Meters

on a day, the estimated loss would work out to only Rs.20,000/- per machine per month as the charge for testing the Single Phase Meter is only Rs.100/-.

If the Watt Hour Testing Machine is not capable of testing on the four different categories of meters numbering 10+8+8+6 on the same day, it would be fallacious on part of the complainant-Corporation to claim that their loss will amount to Rs.5,84,000/- per month. It also makes no mention as to what alternate arrangements were made to meet the contingent absence of these machines and the expenditure incurred. In view of these anomalies, we are not inclined to accept the claim which even otherwise will amount to more than Rs.14,00,00,000/- for the delayed period, which is exorbitant. Besides, the complainant-Corporation have not explained or furnished any accounts with regard to the fall of revenue on this count, which they have actually suffered in the absence of these machines. Be that as it may, there is no doubt that for the gross neglect and negligence on part of the opposite parties no. 1 and 2, they have been deprived of the usage of these machines over a decade and that would entitle them compensation.

37. We find that the warranty clause, as incorporated in para-9 of the purchase agreement, which is binding on the parties, in its last sub-para, which states that In case the replacement/repair of defective material is not carried out within six months of intimation of defects, the supplier/contractor shall have to pay interest @ 12% per annum on the value of each complete operational unit of equipment beginning from the date of its becoming defective upto date of its re-commissioning after the replacement/repair., makes it obligatory on part of the supplier to pay only interest @ 12% per annum on the value of each of operational unit of equipments from the date of the equipments becoming defective until the date of their re-commissioning. The application to this clause, to our mind, appears to be a proper and just compensation.

Applying this clause, the opposite parties would be liable to pay the following amounts :-

(a) 12% interest on the value of Rs.20.00 Lakhs for the two Watt Hour Machines for a period of ten years, which comes to Rs.24.00 Lakhs (i.e. Rs.20.00 Lakhs x 12% per annum x 10 years = Rs.24.00 Lakhs).

(b) 12% interest on the value of Rs.11.00 Lakhs for the two Phantom Testing Machines for a period of ten years, which comes to Rs.13.20 Lakhs (i.e. Rs.11.00 Lakhs x 12% per annum x 10 years = Rs.13.20 Lakhs).

Thus, the total compensation for the two Watt Hour Machines and two Phantom Testing Machines, which were repaired and returned to the complainant-Corporation after a period of ten years, comes to Rs.37.20 Lakhs.

38. Insofar as the fifth Phantom Machine, which was taken away for repairs but was never returned to the complainant-Corporation, being unserviceable, is concerned, we are of the view that the complainant-Corporation would be entitled to the refund of its full value rather than any interest on its value.

The total compensation, thus would come to Rs.37.20 Lakhs + Rs.5.50 Lakhs = Rs.42.70 Lakhs. This, in our view, would be a just and appropriate compensation.

39. The complaint, accordingly, is allowed with the following directions:-

The opposite parties no. 1 and 2 will jointly and severally pay a lump sum compensation of Rs.42.70 Lakhs on account of deprivation of machinery/equipments being used by the complainant-Corporation for a period of ten years and towards cost of the fifth machine which they failed to return till date despite direction of this commission.

A cost of Rs.1.00 Lakh is also considered appropriate to be imposed on the opposite parties no. 1 and 2.

The opposite parties no. 1 and 2 are directed to make the payment within a period of six weeks, failing which the amounts will carry interest @ 10% per annum for the period of default.

Sd/-

(R. C. JAIN, J.) PRESIDING MEMBER Sd/-

(S.K. NAIK) (MEMBER) Mukesh