

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY  
AT NEW DELHI**

**APPELLATE JURISDICTION**

**APPEAL NO. 233 OF 2017 AND**

**IA NO. 578 OF 2017**

**Dated:** 07<sup>TH</sup> MAY, 2018

**Present:** HON'BLE MR. N.K. PATIL, JUDICIAL MEMBER  
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER

**IN THE MATTER OF:**

**Jodhpur Vidyut Vitran Nigam Limited**

New Power House, Basani,  
Jodhpur- 342003

....Appellant

VERSUS

- 1. Ultratech Cement Limited**  
Through its Chairman & Managing Director  
(Unit : Birla White)  
Works : PO - KhariyaKhangar  
Tehsil :Bhopalgarh, Jodhpur – 342006  
Office : D-7, Shastri Nagar,  
Jodhpur – 342003
- 2. Rajasthan State Load Despatch Centre,**  
Rajasthan RajyaVidyutPrasaran Nigam Ltd,  
Through its Chief Engineer(LD)  
New Prasaran Building, Heerapura,  
Jaipur- 302 024.

3. **Rajasthan Electricity Regulatory Commission**

Through its Secretary  
VidyutViniyamakBhawan,  
Sahkar Marg, Near State Motor Garage,  
Jaipur – 302005

..Respondents

Counsel for the Appellant	...	Mr. Anand K. Ganesan Ms. Swapna Seshadri Mr. Ashwin Ramanathan
Counsel for the Respondent(s)...		Mr. P.N. Bhandari for R-1  Mr. Pradeep Misra Mr. Manoj Kr. Sharma for R-2  Mr. Raj Kumar Mehta Ms. Himanshi Andley for R-3

**JUDGEMENT**

**PER HON'BLE MR. JUSTICE N.K. PATIL, JUDICIAL MEMBER**

1. The present Appeal is filed under Section 111 of the Electricity Act, 2003 against order dated 13/06/2017 passed by the Rajasthan Electricity Regulatory Commission (hereinafter called the '**State Regulatory Commission**') passed in Petition No. RERC-878/16 whereby the State Regulatory Commission has disposed of the Petition filed by the Respondent No. 1. The Respondent No.1 is a consumer of the Appellant and is availing Short Term Open Access under the Rajasthan Electricity Regulatory Commission (Terms & Conditions of Open Access)

Regulations, 2016 (hereinafter called the **Regulations**). The State Regulatory Commission, while holding that the Respondent No. 1 did not act in compliance with the Regulations and gave a schedule contrary to the Regulations which could not have been acted upon, has proceeded to direct the Appellant to pay for such electricity procured by the Respondent No. 1 from third parties and injected into the grid. Such electricity was injected without the permission of the Appellant, was not required by the Appellant, no opportunity was given to the Appellant to reject the electricity, the Respondent No. 1 had violated the provisions of the Regulations and in such circumstances the question of the Appellant being required to pay for the electricity does not arise.

**BRIEF FACTS OF THE CASE:**

2. The Appellant is a company incorporated under the provisions of the Companies Act, 1956 and existing under the provisions of the Companies Act, 2013, having its registered office in Jodhpur. The Appellant is one of the successor entities of the erstwhile Electricity Board and is vested with the functions of distribution and retail supply of electricity in the specified area of operation in the State of Rajasthan.

3. The Respondent no. 1 is an industrial consumer of Jodhpur Discom and also draws its part of the power from Power Exchange. The Respondent No. 2 is the State Load Despatch Centre for the State of Rajasthan, performing the statutory functions as provided for under the provisions of the Electricity Act, 2003. The Respondent No. 3 is the Regulatory Commission for the State of Rajasthan, exercising powers and discharging functions under the provisions of the Electricity Act, 2003.

4. The Respondent No. 1, from time to time, procures electricity from open access sources, primarily from the energy exchange to meet its power requirements, in addition to drawl of power from the Appellant. When the Respondent No. 1 procures power from third parties, under the terms of the Open Access Regulations, 2016 notified by the State Regulatory Commission, the contract demand and the obligation of the Appellant to supply power automatically gets reduced to such extent. For the above purpose, the Appellant as a distribution licensee is required to know in advance the quantum of electricity proposed to be procured by the consumer from third parties, by way of intimation of the schedule.

**QUESTIONS OF LAW:**

5. The following questions of law arise in the present appeal:
- A. Whether the State Commission is justified in directing the payment of money by the Appellant to the Respondent No. 1 for electricity injected without the consent of the Appellant and when the Respondent No. 1 had acted contrary to the Regulations?
  - B. Whether the State Commission is justified in granting relief to the Respondent No. 1 who has not followed the Regulations which had resulted in the present claim being made?
  - C. Whether the principles of quantum merit can be applied to the electricity transactions which occur on real time basis?
  - D. Whether the Appellant as the innocent party can be asked to pay any amount to the Respondent No. 1 who has acted contrary to the Regulations?

6. It is the case of the Appellant that the first Respondent on various occasions in the months of June and July, 2016 had sought to procure electricity through open access contrary to the provisions of the Open Access Regulations, in as much as not meeting the requirements of schedule for the day, limits on deviation in schedule etc. Therefore, the schedules could not be processed or acted upon. Consequently, the Appellant had planned its affairs including its power purchases and supply to consumers on the said basis of the schedules of the first Respondent not being acted upon. The Appellant raised the bills for supply of electricity accordingly. The first Respondent deposited the monthly invoices raised by the Appellant for the months June and July, 2016 and thereafter, approached the State Regulatory Commission instead of filing a representation before the second Respondent as envisaged under Regulation 30 of the Open Access Regulations, 2016.

7. The Appellant opposed the reliefs sought in the Petition filed by the first Respondent in its Petition before the State Regulatory Commission contending that first Respondent was in default in not complying with the provisions of the Regulations in giving the schedule. As per Regulations 26 of the Regulations, it is

mandatory on the part of the first Respondent to give the schedule. Therefore, the Appellant was not in a position to give any credit to the first Respondent in energy on post-facto basis. The entire transaction on real time basis occurred on the basis that there was no proper schedule provided for by the first Respondent.

8. The State Regulatory Commission has passed the Impugned Order stating that the first Respondent did not comply with the Regulations and had in fact acted contrary to the Regulations. Therefore, the first Respondent could not seek the benefit of such electricity from open access sources, when the Appellant had arranged its affairs and supplied electricity to the first Respondent. The State Regulatory Commission upheld the bills raised by the first Respondent.

9. However, the State Regulatory Commission has erred in holding that the first Respondent should be compensated for the electricity injected from open access sources as the same was not intended to be supplied to the distribution licensee free of cost. The State Regulatory Commission ought not have directed the payment of actual energy charges by the Appellant as paid by the first Respondent contrary to the case made out by the Appellant.

10. The State Regulatory Commission also erred in granting relief of energy charges to the first Respondent against the Appellant, when the electricity was not sought for by the Appellant, no opportunity can be granted to reject the electricity and therefore, there can be no question of application of the principles of quantum merit. Not being satisfied by the Order impugned passed by the State Regulatory Commission, the Appellant felt necessitated to present this Appeal seeking relief as stated above.

**SUBMISSION OF LEARNED COUNSEL APPEARING FOR THE APPELLANT, SHRI ANAND K. GANESAN:**

11. The State Regulatory Commission has grossly erred in holding that the Appellant is liable to pay the actual energy charges paid by the first Respondent from open access sources. The State Regulatory Commission has also failed to appreciate that the situation had arisen on account of the default of the first Respondent and the first Respondent could not seek any benefit out of the same.

12. The submission of the learned counsel appearing for the Appellant is that the State Regulatory Commission has failed to

appreciate that the first Respondent did not provide schedule in terms of the Regulations and had in fact acted contrary to the Regulations for procurement of electricity from open access sources. By not providing for the schedule in terms of the Regulations, the Appellant could not process the schedule or approve the same. The schedules are approved based on a pre-loaded software which is in terms of the Regulations. When the schedule could not be acted upon as per the Regulations, the entire energy was arranged for from the existing sources and supplied by the Appellant. The transactions having occurred on real time basis, there is no occasion for post-facto payment of any amounts of electricity injected without the consent of the Appellant.

13. The State Regulatory Commission has failed to appreciate that electricity operations are on real time basis. The electricity is injected based on the schedules finalized by the stake-holders and the parties arrange their affairs accordingly. The Appellant had supplied electricity to the Respondent No. 1 to meet its demand and had also arranged its power purchases and daily schedules accordingly. The Appellant cannot be post facto asked to purchase electricity it did not require and it did not ask for. The State

Regulatory Commission also failed to appreciate that the Regulations do not provide for any such compensation to be paid for. There is no contract also between the Appellant and the Respondent No. 1 to pay any such compensation. In the circumstances, without any legal basis the State Regulatory Commission has provided for payment of amounts to the Respondent No. 1 which is not sustainable and is incorrect.

14. Further, the counsel appearing for the Appellant contended that the State Regulatory Commission has failed to appreciate that the principle of quantum merit in terms of Section 70 of the Contract Act also does not apply to electricity transactions. This is because electricity transactions are on real time basis. The Appellant not in the knowledge of the schedule is not aware, on real time basis, of the injection of electricity and further there is no opportunity to the Appellant to reject the electricity. In the circumstances, the State Regulatory Commission has erred in granting any money on alleged equitable grounds.

15. Further, he vehemently submitted that the State Regulatory Commission has erred in observing that the Appellant has not denied the flow of electricity into the system. The State Regulatory

Commission has failed to appreciate that the electricity flow is not regulated, but operates in terms of laws of physics. The Appellant, not in the knowledge of the injection or schedule, cannot be asked to pay for such electricity injected contrary to the relevant provisions of the Regulations and also failed to appreciate that the electricity was not intended to be supplied free of cost. The State Regulatory Commission has failed to appreciate that the test for applying the principle of payment of compensation on equitable basis is that the Appellant ought to have voluntarily received the goods and enjoyed the use of the same. In the absence of the same, there was no occasion for grant of compensation by the State Regulatory Commission.

16. The State Regulatory Commission has also failed to appreciate that the prayers made by the Respondent No. 1 was only on the issue for directions to adjudicate the disputes by the relevant forum under Section 42. The Respondent No. 1 had invoked Section 56 and Section 142, which had no application and also has been held so by the State Regulatory Commission. In the circumstances, the State Regulatory Commission has erred in granting monetary relief to the Respondent No. 1 contrary to the relevant material available on records.

17. The learned counsel appearing for the Appellant fairly submitted that being aggrieved by the Issue No. 2 answered in favour of the first Respondent and the State Regulatory Commission issuing directions to the Appellant to give deduction for the bill rendered to the extent of price paid by the first Respondent as one-time-measure subject to first Respondent producing relevant details, the Appellant presented the instant Appeal.

**SUBMISSIONS OF THE LEARNED COUNSEL APPEARING FOR THE FIRST RESPONDENT, SHRI P. N. BHANDARI:**

18. *Per contra*, the learned counsel, Shri P.N. Bhandari, appearing for the first Respondent, inter alia, contended and vehemently submitted that the instant Appeal filed by the Appellant is frivolous, baseless and legally unsustainable. The Appeal deserves to be dismissed with heavy cost for the gross harassment of the first Respondent and blatant illegality in billing for electricity, which did not belong to the appellant Discom in the interest of justice and equity.

19. The learned counsel appearing for the first Respondent vehemently submitted that it is wrong to say that there was any violation of the Regulations by the first Respondent. Rather it was the appellant Discom, who has acted in blatantly illegal manner by raising bills for the electricity which the answering Respondent had purchased from the power exchange. It is absurd to say that such electricity was **injected without the permission of the appellant** on the ground that the Power Exchanges are operating at National level. The Rules and Procedure **for procurement of power through open access from the Power Exchanges is uniform all over the country.** The No Objection Certificate was issued by the Appellant without which the open access transactions cannot proceed further. Once the monthly NOC has been given by the Appellant, there is no question of seeking daily permission from the Appellant. **If the authorities had any objection, they could have rejected the schedule,** under Reg. 12(3)(XIV) which reads thus-

**“NODAL AGENCY SHALL REJECT BIDS WHICH ARE INCOMPLETE, VOGUE IN ANY MANNER OR NOT FOUND IN CONFORMITY WITH THE GUIDELINES.”**

20. Therefore, what further permission was expected from the first respondent. It is grossly absurd to say that the electricity was not required by the appellant. **In fact, it was not meant for the appellant. It was meant for the first Respondent. The appellant was only a carrier of this electricity, despatched by the power exchange, in pursuance of the no objection certificate given by the appellant.** The electricity was dispatched by the Power Exchange for the first Respondent and was accordingly consumed by the first Respondent's factory. The limited issue is that **the appellant has illegally raised bills for that electricity, which did not belong to it. This is outright deception and fraud. It amounts to cheating under criminal law.**

21. The first Respondent is a regular industrial consumer of the appellant. It has a contract demand of 11MVA from the appellant. There is no question of reduction of any demand, simply because part of the supplies are met through open access. Even while it is procuring electricity under open access, **it is always within the limits of total sanctioned load and it pays for the full contract demand, even while the drawl gets reduced, due to purchase of electricity from alternative source under open access.**

Consumption of the first Respondent has always remained within the total sanctioned contract demand. **There is no allegation against the answering respondent drawing excess power, beyond the total sanctioned load. Nor is there any allegation of the respondent having procured more than the No Objection Certificate issued by the appellant or the daily schedule given by the respondent for procuring power from the Power Exchange.** The schedules were invariably submitted in advance, **as per the prescribed procedure all over the country.** In pursuance of the daily schedules submitted by the first respondent, the second respondent has sent injection schedule every day to the first respondent and the appellant, informing about the specific electricity to be supplied to the first respondent under open access.

22. **If there was any lapse at the level of the respondent, the second respondent would have rejected the schedules or would not have injected the electricity. The fact that the second respondent has informed every day to the first respondent as well as the appellant about the injection schedule confirms the full compliance of the provisions by the first respondent.** Further, he vehemently submitted that how the schedules are

processed is an internal matter for the appellant but surely if there was anything wrong, neither the second respondent would have sent the injection schedule every day to the first respondent nor the appellant would have injected the electricity every day, as per the injection schedule of second Respondent.

**23. Having acted totally upon the schedules submitted by the first respondent and having injected the electricity every day received from the power exchange, any contrary claim of the appellant is preposterous and malafide.** In the entire proceedings, nowhere any specific violation was pointed out beyond sweeping generalizations. Even in reply to the petition filed before the State Regulatory Commission by the first respondent, the appellant failed to indicate any specific violations.

24. The schedule shows that the first respondent did not use properly as per schedule given by the first respondent and same is not followed as per Regulation 26(7)(iii) of the Regulations, 2016. Therefore, schedule was not properly considered. The error in the schedule shows that the first respondent has used electricity and accordingly bills have been raised as per Regulations 2016 without any fault on the part of the first respondent. The appellant

completely failed to point out any specific error. It is a sweeping and totally vague statement. Not a single example has been disclosed before the State Regulatory Commission as to which schedule was delayed and for how long. Therefore, the Appeal filed by the appellant is liable to be set aside.

25. The learned counsel appearing for the first Respondent submitted that the Appellant cannot go beyond the pleadings before the State Regulatory Commission and build up a fresh case. It is absurd to say that the schedules could not be processed or acted upon. Every day 100% schedules were sent in advance by the first respondent to both the second respondent and the appellant and were duly received by them. There is no allegation that the schedules were not received by the appellant every day. The appellant was receiving schedules from the first respondent and also injecting schedules every day from the second respondent but for two months, not a whisper was raised by the appellant. But suddenly, after a lapse of two months' period, the appellant had arbitrarily raised the bills, without even informing the first respondent as to what was the lapse. The Hon'ble Electricity Tribunal has held in a number of judgments that where the regulations have to be interpreted, the Commissions can directly

deal with such adjudication without the requirement of consumer approaching the Grievance Redressal Forum. This is yet another example of the appellant trying to unnecessarily deflect the matter on flimsy grounds. The appellant is only a carrier of the electricity purchased by the first respondent. A carrier has no authority to give or not to give adjustment. The injection schedules sent by the second respondent to the appellant as well as to the open access consumers every day, clearly indicates the number of electricity units received by the first respondent from the Power Exchange. The appellant has no option but to allow the adjustment as per the daily injection schedules of the second respondent. But in fact, the State Regulatory Commission has not allowed full refund of the wrongly raised bills by the appellant. The State Regulatory Commission has held thus regarding the ownership of the procured power as held in para 36 of the Order. Further, he submitted that it appears that the authorities had taken a somewhat liberal view, as the procedure under the Regulations was quite complex and had been introduced for the first time.

26. Hence, if the second respondent has not acted even once under the above provision, it has to be presumed that it had consciously ignored the so-called 'defects' in the schedules and

continued the open access operations without any interruption. It would be a case of deemed approval. Therefore the appellant has no right to encroach upon the exclusive jurisdiction of the second respondent, two months after the event. On the ground of delay and laches the stand of the appellant has to be rejected.

27. The dispatch of injection schedules, every day by the second respondent to the appellant was undoubtedly a 'RECOGNITION' AND AN ENDORSEMENT BY THE AUTHORITIES. Otherwise, the authorities would have stopped injecting electricity from the Power Exchange to the factory of the first respondent to show their disapproval.

28. The learned counsel appearing for the first respondent submitted that it is outright falsehood to claim that the appellant was not having knowledge of the schedule. The schedules were filed before the appellant and the second respondent every day. Therefore, any claim of not having knowledge is an outright lie. Such false statement on oath should be taken serious note by this Hon'ble Tribunal. At no stage, the appellant has denied before the State Regulatory Commission the receipt of the daily schedules. The Regulations do give power to the second respondent for

rejection of any defective schedule. But no such power was exercised.

29. Therefore, it is a blatant lie to say that the appellant was not in the knowledge of the schedules or injection schedules. They were sent every day to the appellant and the second respondent. Even before the State Regulatory Commission, the appellant had not denied the receipt of schedules/injection schedules.

30. If for two months, the appellant fails to take notice of schedules and injection schedules and wakes up suddenly after that, it cannot blame anyone. But the fact that it meticulously followed the daily schedules filed by the first respondent and injection schedules sent by the second respondent, shows that it was fully aware and had no objection of any kind.

31. The State Regulatory Commission was only echoing the judgments of the Hon'ble Tribunal when it stated that the electricity was not supposed to be supplied free of cost to the appellant. The appellant has grossly distorted the concept and methodology of open access operations. Under such circumstances, the appellant is not the 'receiver of goods' but only

a 'carrier of goods'. The electricity was neither dispatched by Power Exchange for the consumption of the appellant nor was requisitioned by the appellant. It was not meant for the 'use' of the appellant.

32. Therefore, what has been allowed by the State Regulatory Commission is the refund of the amount wrongly billed and not the 'compensation'.

33. In the light of the above submissions of the learned counsel appearing for the appellant, the learned counsel appearing for the first respondent prayed that the instant Appeal filed by the Appellant may be dismissed with heavy cost.

**SUBMISSIONS OF THE LEARNED COUNSEL APPEARING FOR  
THE SECOND RESPONDENT, SHRI PRADEEP MISRA:**

34. The learned counsel appearing for second Respondent, Shri Pradeep Misra submitted that the dispute in the present case is between the appellant and the first Respondent. There is no dispute with regard to the second Respondent. Hence the present short reply is being filed for deletion of name of the second respondent i.e., Rajasthan State Load Despatch Centre, Rajasthan

Vidyut Prasaran Nigam Ltd through its Chief Engineer(D), Heerapur, Jaipur from the array of parties. Further, he submitted that in the Appeal neither any averment has been made against the second Respondent nor any prayer is made against the second Respondent. In these facts and circumstances of the case, the presence of the second Respondent is not required. It is very humbly submitted that the name of the second Respondent be deleted from the array of the parties in the interest of justice.

**SUBMISSIONS OF THE LEARNED COUNSEL APPEARING FOR THE THIRD RESPONDENT, SHRI RAJ KUMAR MEHTA:**

35. The learned counsel appearing for third Respondent, Shri Raj Kumar Mehta at the outset submitted that the instant Appeal filed by the Appellant is liable to be dismissed as devoid of merits. To substantiate his submission, he quick to point out and vehemently submitted that the State Regulatory Commission, after thorough evaluation of the oral and documentary evidence available on file and after going through the relevant Regulations has assigned valid and cogent reasons and recorded the finding in paras 36 & 37 of the impugned Order, the said reasoning is well-founded and well-reasoned. Therefore, interference of this Tribunal does not call for. Further, he submitted that this Hon'ble Tribunal also is

following the Order dated 17.04.2017 passed in the case of M/s Tirupati Fibres & Industries Ltd as held in paras 21 & 22 of the said Order has been considered and directed the Appellant to give deduction in the Bills rendered to the extent of the price paid by the first Respondent as one time measure subject to first Respondent producing the relevant details within one month from the date of this Order. It is crystal clear from the reasoning assigned by the State Regulatory Commission strictly in consonance with the relevant Regulations in spite of affording sufficient opportunity to the Appellant has not produced any documentary evidence and in fact the Appellant has not disputed that the first Respondent has purchased electricity from the exchange and the said power has flown to the State Grid. The Appellant's only dispute is that the said power has not been purchased duly following the procedure prescribed and such objection was taken after a lapse of more than two months. Therefore, the State Regulatory Commission has rightly justified in answering the issue against the Appellant. Taking all these relevant facts into consideration he submitted that the Appeal filed by the Appellant may be disposed of as misconceived in the interest of justice and equity.

**OUR CONSIDERATION:**

36. We have heard the learned counsel appearing for the Appellant, Shri Anand K. Ganesan, learned counsel appearing the first Respondent, Shri P. N. Bhandari, learned counsel appearing for the second Respondent, Shri Pradeep Misra and learned counsel appearing for the third Respondent, Shri Raj Kumar Mehta at considerable length of time and we also carefully perused the grounds urged in the Memo of Appeal and the replies filed by the respondents and other relevant material on record. The only issue that arises for our consideration is as follows:

*“Whether the impugned Order dated 17.04.2017 passed in Petition No. RERC-1090/17 so far it relates to issue No.2 answered by the State Regulatory Commission against the Appellant is sustainable in law?”*

37. The State Regulatory Commission after hearing the counsel appearing for all the parties and after perusal of the relevant material on records and after appreciation of the oral and documentary evidence available on the file has assigned valid and cogent reasons and recorded the finding in paras 36 & 37 which are reproduced herein below :-

*“36. Commission has looked into the facts as submitted. The fact that Petitioner has purchased the electricity from*

*Exchange is not disputed by the Discom and the said power has flown to the State grid. Discom's only dispute is that the said power has not been purchased duly following the procedure prescribed. In the similar case of M/s Tirupati Fibres & Industries Ltd., Commission in its order dated 17.04.2017 has held that-*

*"21. Commission has looked into the facts as submitted. The fact that Petitioner has purchased the electricity from Exchange is not disputed by the Discom. Discom's dispute is that the said power has not been purchased duly following the procedure prescribed. Thus the power purchased has cost the Petitioner and the same was not intended for the Discoms to be supplied free of cost. Any power purchased even if not consented to, but utilized in the system, due to the very nature of electricity cannot be considered as available to Discoms free of cost. The Respondents have nowhere denied the power that has been purchased by the Petitioner has not flown into the system.*

*22. In the light of facts and circumstances of this case, it will be equitable that Discoms are directed to give credit for the actual energy charges paid by the Petitioner to the Power Exchange for purchase of energy during the disputed period. Petitioner, within 15 days from the date of this Order, shall submit to the Discoms, the*

*documentary evidence that it has bought the energy through Power Exchange and paid for it. In case it fails to produce the document as evidence, within the time allowed, then no credit shall allowed thereafter by Discoms.”*

37. *Considering the fact that the power purchased has cost the Petitioner and the same was not intended to be used by the Discoms at free of cost, and in view of the earlier order referred to above, Commission directs the Discom to give deduction in the bills rendered, to the extent of price paid by the Petitioner as one time measure subject to Petitioner producing the relevant details within one month from the date of this order.”*

38. The learned counsel appearing for the Appellant, Shri Anand K. Ganesan at the outset submitted that, there is no prior intimation to the Appellant by the first Respondent and therefore, the Appellant has got no knowledge nor communicated to the Appellant.

39. The learned counsel appearing for the Appellant further submitted that the said power has not been purchased duly following the procedure prescribed under the relevant Regulations, the same was intended for the Appellant to be supplied free of cost

and any power purchased even if not consented to, but utilized in the system, due to the very nature of electricity cannot be considered as available to the Appellant free of cost. The said reasoning assigned by the State Regulatory Commission cannot be sustainable and is liable to be set-aside. Further, the learned counsel appearing for the Appellant vehemently submitted that the State Regulatory Commission also committed an error holding that the Appellant nowhere denied the power that has been purchased by the first Respondent has not flown into the system but, **what is relevant to be considered by the State Regulatory Commission whether the purchased electricity by the first Respondent followed the procedure prescribed under the** relevant regulations and the State Regulatory Commission held that the action taken by the Appellant, in issuing the bill, without giving deduction to energy purchased in Open Access is justified and legal and issue No. 1 answered in favour of the Appellant and against the first Respondent. If that is the case, the State Regulatory Commission, ought not to have issued direction to the Appellant to give credit for the actual energy charges paid by the first Respondent to the power exchange for purchase of energy during disputed period cannot be sustainable in the eyes of law. Therefore, he submitted that, the Order impugned passed by the

State Regulatory Commission is liable to be set aside on this ground also.

40. The learned counsel submitted that, the State Regulatory Commission is not justified in directing the payment of money by the Appellant to the first Respondent for electricity injected without knowledge and consent of the Appellant and also not justified in granting relief to the first Respondent who has not followed the relevant provisions of the Regulations which has resulted in the present claim being made by the first Respondent. The State Regulatory Commission ought to have taken judicial note regarding the stand of the Appellant, being innocent party, can be asked to pay any amount to the first Respondent who has acted contrary to the relevant provisions of the Regulations and have taken holistic approach in the matter, before issuing the directions to give deduction in the bills rendered to the extent of a price paid by the first Respondent as one time measure subject to the first Respondent producing relevant details will not be justiciable. Therefore, he submitted that taking all these facts into consideration, the Order impugned is liable to be vitiated.

41. The learned counsel appearing for the first Respondent, Shri P. N. Bhandari vehemently submitted that the Appellant has acted in blatantly illegal manner by raising bills for the electricity which the first Respondent has produced from the Power exchange. It is absurd to say that such electricity was injected without the permission of the Appellant. On the ground that the power exchanges are operating on a national level, the rules and procedures for procurement of power through open access from the power exchanges is uniform all over the country. The No Objection Certificate issued by the Appellant without which the open access transactions cannot proceed further. Once the monthly NOC has been given by the Appellant, there is no question of seeking daily permission from the Appellant. **If the authorities had any objection, they could have rejected the schedule,** under Reg. 12(3)(XIV) which reads thus-

**“NODAL AGENCY SHALL REJECT BIDS WHICH ARE INCOMPLETE, VOGUE IN ANY MANNER OR NOT FOUND IN CONFORMITY WITH THE GUIDELINES.”**

42. Further, he quick to point out and submitted that it is grossly absurd to say that the electricity was not required by the appellant. **In fact, it was not meant for the appellant. It was**

**meant for the first Respondent. The appellant was only a carrier of this electricity, despatched by the power exchange, in pursuance of the no objection certificate given by the appellant.** The electricity was dispatched by the Power Exchange for the first Respondent and was accordingly consumed by the first Respondent's factory. The limited issue is that **the appellant has illegally raised bills for that electricity, which did not belong to it. This is outright deception and fraud. It amounts to cheating under criminal law.**

43. It is outright falsehood to claim that the appellant was not having knowledge of the schedule. The schedules were filed before the appellant and the second respondent every day. Therefore, any claim of not having knowledge is an outright lie. Such false statement on oath should be taken serious note by this Hon'ble Tribunal. At no stage, the appellant has denied before the State Regulatory Commission the receipt of the daily schedules. The Regulations do give power to the second respondent for rejection of any defective schedule. But no such power was exercised. It is very unfair on the part of the Appellant to contend that the Appellant was not in the knowledge of the schedules or injection schedules. They were

sent every day to the appellant and the second respondent. Even before the State Regulatory Commission, the appellant had not denied the receipt of schedules/injection schedules anywhere in the pleadings. Further he pointed out that it is pertinent to note that the Appellant failed to take notice of schedules and injection schedules and wakes up suddenly after that, it cannot blame anyone. But the fact it meticulously followed the daily schedules filed by the first respondent and injection schedules sent by the second respondent, shows that it was fully aware and had no objection of any kind.

44. The State Regulatory Commission has merely directed the Appellant to reimburse the cost of the electricity having been procured by the first Respondent from the power exchange. The direction is not for purchasing electricity post-facto or otherwise but only to refund the cost of electricity procured by the first Respondent from the power exchange. The State Regulatory Commission has merely recognized the fact that the electricity units were purchased by the first Respondent and hence the cost incurred by the first Respondent should be refunded to it. How can the Appellant raise a bill for electricity not supplied by it? This is a broad day light deception. It is cheating.

Therefore, the stand taken by the Appellant cannot be sustainable in law, nor is it applicable to the facts and circumstances of the case.

45. It is misleading to say that the State Regulatory Commission has allowed any compensation to the first Respondent since the Appellant had raised the bill for the electricity which did not belong to it. Therefore, the State Regulatory Commission has also directed for refunding the cost of power purchased from the power exchange to the first Respondent.

46. The first Respondent has been allowed only the refund of the amount which the Appellant has wrongly charged for electricity which did not belong to it. By any stretch of imagination can it be called the compensation? The ownership rights for movable or immovable property did not change simply because the transaction had been on real-time basis. The law remains the same. Neither logic nor ethics can in any law permit the Appellant to raise the bill for electricity not supplied by it. Therefore, he submitted that the Appeal filed by the Appellant is frivolous, baseless and legally unsustainable and

hence the Appeal deserves to be disallowed with heavy cost for the gross harassment of the first Respondent and blatant illegality in billing for electricity which did not belong to the Appellant.

47. Further, the counsel appearing for the Respondents submitted that the reliance placed by the learned counsel appearing for the Appellant on the judgment of the Hon'ble Apex Court and this Tribunal are not applicable to the facts and circumstances of the case in hand on the ground that it is not the case of the Appellant to seek any relief under Section 70 of the Contract Act. The Appellant misconstrued that the State Regulatory Commission has directed to pay the compensation is contrary to the direction given by the State Regulatory Commission. To substantiate their submission, they pointed out that the State Regulatory Commission has directed to give credit for the actual energy charges paid by the first Respondent to the power exchange for purchase of energy during the disputed period. Therefore, they submitted that, on this ground also the appeal filed by the Appellant is liable to be dismissed with costs.

48. After careful consideration of the case made out by the learned counsel appearing for the Appellant and the learned counsel appearing for the first Respondent, as stated supra, the core issue arise for our consideration is whether direction issued by the State Regulatory Commission to the Appellant to give credit for the actual energy charges paid by the first Respondent to the power exchange for purchase of energy during the disputed period is justifiable in the eyes of law. It is significant to note that what has emerged from the relevant material available on record and not in dispute that the first Respondent has purchased electricity from the exchange. The Appellant's dispute is that the said power has not been purchased duly following the procedure prescribed under the relevant provisions of the Regulations. It is pertinent to note that, after critical evaluation of the oral and documentary evidence available on the file and after considering the case made out by the Appellant and the Respondents, the State Regulatory Commission has recorded its finding that any power purchased even if not consented to, but utilized in the system, due to the very nature of electricity cannot be considered as available to the Appellant free of cost. The Appellant nowhere denied the power that has been purchased by the first

Respondent has not flown into the system except making the bald statement that the said purchase of power was not as per the procedure prescribed under the relevant regulation but they have failed to produce any iota of documentary evidence to substantiate their stand. Therefore, we are of the considered view that in the findings recorded in the paragraph nos. 36 & 37 of the impugned Order passed by the State Regulatory Commission, we do not find any error, illegality, infirmity or perversity in passing the impugned Order. Further, we are of the considered opinion that having regard to the facts and circumstances of the case in hand, the State Regulatory Commission has rightly justified in giving equitable relief to the Appellant and the first Respondent which is just and proper and also rightly justified by issuing direction to the Appellant to give credit for the actual energy charges paid by the first Respondent to the power exchange for purchase of energy during the disputed period.

49. It is significant to note that the State Regulatory Commission has, further, rightly justified in directing the first Respondent to submit the documentary evidence to the Appellant that it has bought the energy through power exchange

and paid for it. In case it fails to produce the document as evidence, within the time allowed, then no credit shall be allowed thereafter by the Appellant. The said observation made is just and proper. We do not find any error or arbitrariness in the findings recorded and direction issued by the State Regulatory Commission in paragraph nos. 36 & 37 of the impugned Order. Therefore, on this ground also interference by this Court does not call for.

50. Further, it is the case of the Appellant that the State Regulatory Commission has failed to appreciate that the principle of quantum merit in terms of Section 70 of the Contract Act also does not apply to the electricity transactions. This is because the electricity transactions are on real time basis. The Appellant not in the knowledge of schedule is not aware of real time basis for injection of electricity and, further, there is no opportunity to the Appellant to reject the electricity. Therefore, the State Regulatory Commission has erred in granting any money on alleged equitable grounds. It is significant to note that it is not the case of the first Respondent nor they sought any relief to pay the compensation under Section 70 of the Contract Act and when the same is not for

consideration nor the pleadings to that effect before the State Regulatory Commission, the question of consideration by the State Regulatory Commission does not arise and, further, the reliance placed by the learned counsel appearing for the Appellant, as stated supra, the judgments of the Hon'ble Supreme Court and this Appellate Tribunal is not applicable to the facts and circumstances of the case in hand. Therefore, on this ground also, the Appellant has failed to make out any case to consider the relief sought in this Appeal. Hence, the instant Appeal is liable to be dismissed on this ground also.

51. Taking all these relevant facts into consideration, as stated supra, we are of the considered view that the instant Appeal filed by the Appellant deserves to be dismissed as devoid of merits.

### **ORDER**

We are of the considered view that the issues raised in the instant Appeal, being Appeal No. 233 of 2017, on the file of the Appellate Tribunal for Electricity, New Delhi, have no merit. Hence, the Appeal filed by the Appellant is dismissed.

The Impugned Order dated 13.06.2017 passed in Petition No. RERC-878/16 on the file of the Rajasthan Electricity Regulatory Commission, Jaipur is hereby upheld.

**IA NO. 578 OF 2017**

In view of the Appeal No. 233 of 2017 on the file of the Appellant Tribunal for Electricity, New Delhi being dismissed, the relief sought in IA No. 578 of 2017 does not survive for consideration.

No order as to costs.

**PRONOUNCED IN THE OPEN COURT ON THIS 7<sup>TH</sup> DAY OF MAY, 2018.**

**(S.D. Dubey)**  
**Technical Member**

**(Justice N.K. Patil)**  
**Judicial Member**

√ **REPORTABLE/ ~~NON-REPORTABLE~~**

*bn*