

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

**(APPELLATE JURISDICTION)**

**APPEAL NO. 9 OF 2014**

**Dated: 20<sup>th</sup> March, 2015**

**Present: Hon'ble Mr. Rakesh Nath, Technical Member  
Hon'ble Mr. Justice Surendra Kumar, Judicial Member**

**IN THE MATTER OF**

Balaji Power (A Unit of M/s Hira Ferro Alloys Ltd.)  
Through its Authorized Signatory,  
Shri Vinay Agrawal,  
s/o Shri Hanuman Prasad Agarwal,  
Regd. Office – 567B, 568 & 563B,  
Urla Industrial Complex,  
Raipur, Chhattisgarh – 493 221

...Appellant/Petitioner

***VERSUS***

1. Chattisgarh State Power Distribution Company Ltd.,  
Through its Managing Director,  
Vidyut Sewa Bhawan, Daganiya,  
Raipur, Chhattisgarh – 492 014

2. The Chhattisgarh State Electricity  
Regulatory Commission,  
Through its Secretary,  
Irrigation Colony, Shanti Nagar,  
Raipur, Chhattisgarh – 492 001

...Respondents

Counsel for the Appellant ... Mr. Raunak Jain

Counsel for the Respondent(s)... Ms. Suparna Srivastava  
Ms. Nishtha Sikroria for R-1

Mr. Anand K. Ganesan  
Ms. Swapna Seshadri  
Ms. Mandakini Ghosh for R-2

**J U D G M E N T****PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER**

1. The instant Appeal under Section 111 of the Electricity Act, 2003, has been preferred by M/s Balaji Power (A Unit of M/s Hira Ferro Alloys Ltd.) (in short, the '**Appellant**'), challenging the Impugned Order, dated 29.10.2013, passed by the Chhattisgarh State Electricity Regulatory Commission (in short, **State Commission**)/Respondent No.2 herein, in Petition No.41 of 2012(D) whereby, the learned State Commission while disposing of the aforesaid petition under Section 86(1)(f) read with Section 142 of the Electricity Act, 2003, has passed the impugned order, the relevant part of which is reproduced as under:-

*"6. We have heard both the petitioner and the Respondent's arguments in detail and also gone through the petition, reply, rejoinder and its reply submitted by them including the supporting documents. Petitioner being a biomass based generator and having long term PPA with the respondent is supposed to furnish monthly schedule for injection into grid at least 15 days in advance as contained in Commission's order dated 11.11.2005 in petition No. 07 of 2005.*

*The petitioner normally ensured to submit the monthly schedule for injection in advance to the office of respondent. Only for the month of Aug'2011 the submission of schedule for injection was disputed. The petitioner claims that the schedule of injection for the month of Aug'2011 was submitted to commercial office of respondent on dated 13.07.2011 whereas respondent states that no such schedule was received in its office, as such, there was no entry in invert register of respondent in token of receipt of letter of schedule for the month of Aug'2011.*

*During argument, the petitioner was directed by us to produce the original receipt copy of letter dated 13.07.2011. In compliance, the same was produced by petitioner on dated 10.11.2011, during hearing of the case. The respondent after going through the copy of letter dated 13.07.2011 stated that signature in token of receipt appearing on the letter dated 13.07.2011 is not matching with the signature of any of the officials in office of the respondent.*

*We had gone through the copy of letter dated 13.07.2011 and observed that impression of official round seal of the respondent's office was endorsed on the copy of letter with a signature.*

*We asked the respondent as if the round seal the impression of which is appearing on the letter dated 13.07.2011 is belonging*

respondent's office, it was replied by respondent that the seal appears to be its office but the signature within the seal impression does not match to the signature of any of the official in its office. We therefore, asked the respondent as if they will take any action in to this under provision of law as the copy of letter dated 13.07.2011 was also submitted to the respondent along with the copy of petition dated 24.08.2012. The reply by respondent was positive.

While, going through the case file at the time of issuing order, it was noticed that no report on investigation on the status letter dated 13.07.2011 was submitted to the Commission by the respondent. The respondent by order dated 17.06.2013 was directed to submit the investigation report, if any, by 24.06.2013.

7. We observe that respondent did not intimate in writing to the petitioner well in time regarding deduction of bill which is mandatory on part of respondent. As also, regarding non receipt of advance schedule, the respondent could have intimated to petitioner being a long term power supplier, although submission of advance schedule is obligatory on the part of petitioner.

In some of the petitions which were decided by the Commission in past, it was felt that the respondent normally do not feel its responsibility to intimate in writing to its power suppliers well in time regarding details of deduction in payment of bills. In this case also the respondent failed to intimate in writing to petitioner regarding deduction bill at the time of releasing cheque towards payment of power supply bills.

8. We have carefully considered the submissions made by both the parties and have also gone through the arguments made in depth and conclude that the petitioner and or the respondent did not take any initiation to act under legal provisions / law to address the status of letter dated 13.07.2011 of the petitioner, if the respondent feels it to be a forged document.

Thus, the dispute is related to non receipt of letter dated 13.07.2011 of the petitioner, which is not a matter that can be addressed by the Commission under the provisions of the Electricity Act, 2003. It would be proper that dispute related to receipt of letter dated 13.07.2011 of petitioner be resolved first by the appropriate authority, thereafter the parties may approach to the Commission.

*We dispose off the petition accordingly."*

2. The Appellant/petitioner, is an 8.5 MW biomass-based power plant and a unit of M/s Hira Ferro Alloys Ltd., a company registered under the Companies Act, 1956, engaging in the manufacture of ferro alloys, besides

generation of electricity. The said biomass-based power plant was formerly owned and operated by M/s Shivalik Power & Steels Pvt. Ltd. and w.e.f. April, 2011, the Appellant has acquired full ownership and management of the said power plant.

3. The Respondent No. 1, is the Distribution Company and Respondent No.2 is the State Electricity Regulator.

4. The Appellant/petitioner (M/s Balaji Power herein) filed a petition being Petition No.41 of 2012(D) under Section 86(1)(f) read with Section 142 of the Electricity Act, 2003, inter-alia, claiming correct tariff for power supplied by the Appellant's 8.5 MW biomass based power plant to the Respondent No.1 (Distribution Licensee) for the month of August, 2011, as per PPAs, dated 12.5.2006 and 14.10.2011, executed between the parties and in non-compliance with the Orders, dated 11.11.2005 and 15.1.2008, passed by the State Commission in Petition No. 7 of 2005.

5. The relevant facts giving rise to the instant Appeal are as under:

- (a) that the Appellant/petitioner is a 8.5 MW biomass based power plant and a unit of M/s Hira Ferro Alloys Ltd., a company registered under the Companies Act, 1956, engaging in the manufacture of Ferro Alloys as well as generation of electricity. The said biomass based unit was formerly owned and operated by M/s Shivalik Power & Steels Pvt. and from 1.4.2011 the Appellant/petitioner had acquired full ownership and management of the unit.
- (b) that in accordance with the provisions contained in Section 131, 134 of the Electricity Act 2003, the Govt. of Chhattisgarh, vide Notification, dated 19.12.2008, created the Chhattisgarh State Power Distribution Company Limited (CSPDCL), as one of the successor companies of the erstwhile Chhattisgarh State Electricity Board. Thus, the Respondent No.1 namely; CSPDCL

(Distribution Licensee), is responsible for contracting and purchase of power from generating companies, such as the Appellant/petitioner.

- (c) that the Appellant/petitioner is aggrieved due to the non-action of the Distribution Licensee to make complete payment against power sold by the Appellant/petitioner to the Respondent (Distribution Licensee) for the months of July and August 2011.
- (d) that despite submission of due declaration regarding schedule of power injection and despite the fact that the same being duly acknowledged by the Distribution Licensee, the Appellant has only received partial payment on 15.12.2011 for the power injected during the months of July and August, 2011.
- (e) that according to the Appellant/petitioner the Distribution Licensee (Respondent No.1 herein) has made payment of Rs. 92,20,944/- against the actual due amount of Rs.1,27,01,760/- for 3144000 units injected by the Appellant/petitioner into the Distribution Licensee's system in the months of July and August 2011, as per the meter reading at the end of the Respondent No.1, thereby leading to a shortfall of Rs. 34,80,816/- to be recovered by the Appellant.
- (f) that the Appellant/petitioner, after analysis of the payment details, found that the Respondent No.1 has wrongly treated the case of the Appellant as that of biomass based generators, where annual energy plant load factor (PLF) had exceeded 100%, as mentioned in para 9.6 of the order, dated 15.1.2008, in Petition No. 7 of 2005, passed by the State Commission, and had accordingly made payment @ Rs. 2.71/- (variable cost + 30 paise/Kwh) per unit. The annual energy PLF of the Appellant was also only about 38.29% for FY 2011-2012 and that the Appellant had supplied more than 70% of the energy scheduled to the Respondent No.1. According to the Appellant, he was

entitled to receive normal tariff fixed by the State Commission for energy fed into the Respondent No.1's system for the months of July and August 2011 i.e. @ Rs. 4.04/- per unit.

- (g) that the Appellant/petitioner was owning and operating a 8.5 MW biomass based power plant and was supplying power to the Respondent No.1 under existing Power Purchase Agreement (PPA), dated 12.5.2006, executed between M/s Shivalik Power & Steels Ltd. and erstwhile Chhattisgarh State Electricity Board (CSEB) and, Supplementary PPA, dated 14.10.2011, executed between Appellant/petitioner and Respondent No.1 for change of name. Due to failure of Respondent No.1 to make payments to the Appellant for supply of power as per PPA, the Appellant filed the impugned petition being Petition No. 41 of 2012(D) as per the observations of the Hon'ble Supreme Court in the case of Gujarat Urja Vikas Nigam Ltd. V/s Essar Power Ltd. (2008) 4 SCC 755). The Appellant/petitioner was further entitled to invoke the jurisdiction of the State Commission under Section 142 of the Electricity Act, 2003 as the Respondent No.1 had contravened the orders, dated 11.11.2005 and 15.1.2008, in Petition No. 7 of 2005, passed by the State Commission regarding scheduling of power by biomass based projects, PLF and tariff thereof.
- (h) that the State Commission, in its order, dated 11.11.2005, in Petition No. 7 of 2005, (determination of tariff and related dispensation for procurement of power from biomass based generation projects) held as under:

*"The Commission decides that the biomass-based projects shall be entitled to a tariff with the component of fixed charge based on the year of operation (nth year) and variable charge corresponding to financial year of operation as per rates indicated above. This tariff shall be applicable to only the new biomass-based projects, which may commence generation of electricity on or after 1.4.2005. The cut-off date of 1.4.2005 is adopted as the tariff has been calculated on the basis of financial parameters, pertaining to the*

*financial year 2004-05. This tariff shall be operative for ten years till 2014-15, but may be reviewed after 5 years on the request of any biomass-based generating unit or a licensee.*

*The above tariff shall be subject to the condition that in case a supplier delivers energy less than 70% of the scheduled energy to the licensee in the given period or if it injects power more than 105% of the scheduled energy, then the tariff for sale of energy for such power will be the variable cost only plus 30 paise per unit. The plants should give monthly schedule of energy proposed to be sold to a distribution licensee at least 15 days in advance. However, sale of energy prior to commercial operation date may be treated as infirm power and rate of infirm power will be the variable charges only.”*

- (i) that biomass developers association filed an Appeal in this Tribunal, against the State Commission’s order, dated 11.11.2005, and this Tribunal, vide its Judgment, dated 7.9.2006, in Appeal No. 20 of 2006 had set aside the State Commission’s order, dated 11.11.2005 and remit the matter to the State Commission for fresh adjudication.
- (j) that the Judgment, dated 7.9.2006, of this Appellate Tribunal was further challenged in Appeal under Section 125 of the Electricity Act, 2003 by the Distribution Licensee/Respondent No.1 before the Hon’ble Supreme Court in Civil Appeal No. 12 of 2007, wherein the Hon’ble Supreme Court, vide Order, dated 15.1.2007, dismissed the appeal filed by the distribution licensee.
- (k) that, thereafter, the State Commission vide its Order, dated 15.1.2008, in Petition No. 7 of 2005, re-determined the tariff and related dispensation for procurement of power from biomass-based generation projects and with regard to the issues of scheduling of power by biomass-based projects, PLF and tariff thereon, the State Commission had held as under–

**“9.6 Scheduling of power for purchase by licensees:**

*We had in our earlier order specified that if the biomass generator supplies less than 70% or more than 105% of the*

*scheduled energy, tariff for such power will be at variable cost plus 30P/Kwh. In para 25 of their judgement the Hon'ble Tribunal has directed that capping of 105% energy be relaxed and regulated in a manner that 'annual energy PLF does not exceed 100%'. Accordingly we order that the stipulation of variable cost plus 30P would be applicable only to the supply of less than 70% of scheduled energy. The supplier may provide and be paid normal tariff for supply of energy above 70% of schedule without a cap of 105%. Monthly billing shall be done on the basis of energy delivered at normal rate upto eleven months. At the end of the year necessary adjustment may be made in the bill for the twelfth month of the year to ensure that energy delivered above 100% PLF is billed at the same rate as for supply below 70% of the scheduled energy."*

(l) that, accordingly, PPA, dated 12.5.2006, was executed between M/s Shivalik Power & Steels Pvt. Ltd. and the State Electricity Board for supply of 8.5 MW firm power till FY 2014-15 to which the Appellant and Respondent No.1 (successor-in-interest of State Electricity Board) agreed.

(m) that the relevant terms of the PPA, dated 12.5.2006, provided as under –

*"Clause 3 - The Company shall furnish to the Board and the State Transmission Utility (STU) for State Load Despatch Centre (SLDC), as the case may be, a month-wise supply schedule 15 days in advance along with other requisite information. Supply of power will be governed by the pre-decided schedule as will be prescribed by the SLDC on day-to-day basis, as may be mutually agreed upon between both the parties.*

*Clause 4 – The power purchase rate, other charges and conditions shall be applicable as incorporated in the Commission's order dated 11.11.2005 and amended from time to time. In addition, reactive energy charges as decided by the Commission from time to time shall also be payable to the Company."*

(n) that with effect from April 2011, the Appellant took over the ownership and control of the 8.5 MW power plant and during the period of trial runs, the Appellant supplied 8000 units in April 2011, 3000 units in May 2011 and 0 units in June 2011



to the Respondent No. 1, for which no bills were raised by the Appellant.

- (o) that for the month of July 2011, the Appellant duly submitted the schedule for injection and has received the normal tariff as determined by the State Commission.
- (p) that vide letter, dated 13.7.2011, the Appellant specifically informed the Respondent No. 1 that it had purchased the aforesaid power plant and proposed to inject 5 lac units of power in the system of Respondent No.1 in the month of August 2011. The letter, dated 13.7.2011, was duly submitted to the Commercial office of the Respondent No.1 and an acknowledgement by way of seal and signature was also obtained by the Appellant. All communications to the Commercial office of the Respondent No.1 are usually submitted in this manner, in the ordinary course of business, wherein an office man affixes the seal and signs his initials to the receiving.
- (q) that the Appellant had supplied 2179200 units to the Respondent No. 1 in the month of August 2011 and raised its bill, dated 15.9.2011, requesting payment of tariff as determined by the State Commission in its orders, dated 11.11.2005 and 15.1.2008.
- (r) that in response to the letter, dated 13.7.2011, of the Appellant, informing the Respondent No.1 regarding purchase of the said power plant vide letter, dated 17.10.2011, Respondent No.1 executed a Supplementary PPA, dated 14.10.2011, with the Appellant for supply of power, due to change in name of the Company, on the same terms and conditions as the PPA, dated 12.5.2006 provided.
- (s) that without providing any details and without providing any interest for delayed payment as per Clause 12 of the PPA, the

Respondent No.1 after a lapse of over 3 months, straightaway issued cheque, dated 15.12.2011, for Rs.1,63,40,144/- in favour of the Appellant. The said amount included payments for power supplied by the Appellant during other months as well, besides August 2011, the Respondent No.1 gave no payment advice and it could not be ascertained as to what payments had been received and what amounts were due.

- (t) that on scrutinizing the details, it came to light that there was short-fall in payments received from the Respondent No.1 amounting to Rs.34,80,816/- for power supplied by the Appellant during the month of August 2011. The Appellant, vide letter, dated 7.1.2012, informed the Respondent No.1 of the shortfall in payments and requested to release the balance amount at the earliest. Since, no reply from the Respondent No.1 was received, the Appellant filed the impugned petition before the State Commission on 24.8.2012 for adjudication of dispute and prayed that the Respondent No.1 be directed to make the payment of Rs. 34,80,816/-, along with interest on the amount illegally withheld due to wrong application of tariff. In its reply before the State Commission, the Respondent No.1, on 12.10.2012, for the first time contended that it had not received the declaration schedule from the Appellant for the month August 2011 i.e. letter, dated 13.7.2011, and in the absence of the same, the bill of the Appellant had been processed considering the entire contracted power as per PPA (8.5 MW), as schedule, and accordingly, the load factor was worked out as 34.46% considering the number of units supplied (21,79,200), which is below 70% and hence, payment at the rate of variable cost only plus 30 paise had been made for the month of August 2011.
- (u) that the Appellant had submitted declaration schedule, vide letter, dated 13.7.2011 and had also obtained due

acknowledgement from the concerned office of the Respondent No.1. If for some reason, the Respondent No.1 had not received the declaration schedule, it could have pointed out to the Appellant or could have continued the earlier schedule for previous months. The lapse on the part of the Respondent No.1 by omitting to record the receipt of the schedule could not have a financial impact causing loss in terms of the tariff to be paid to the Appellant. In any case, the orders of the State Commission and/or the PPAs do not provide for payment of tariff at the rate of variable cost +30 paise when the declaration schedule was not submitted timely or not submitted at all. To the contrary, the payment of tariff at the rate of variable cost +30 paise had been clearly prescribed by the State Commission to be applicable in certain conditions only.

- (v) that during the hearing of the case, the State Commission directed the Appellant to produce the original copy of the letter, dated 13.7.2011, which was duly produced by the Appellant before the State Commission on 10.11.2011. Thereafter, the State Commission directed the Respondent No.1 to examine the seal and signature affixed on the letter, dated 13.7.2011. The Respondent No.1, having examined the letter, dated 13.7.2011, on 16.11.2012, submitted before the State Commission that **“It has been found that the signature of the person on the letter is not matching with the signature of any of the officials in this office.”** This squarely implied that the seal of the Respondent No.1 had been verified to be true, however, there might have been some concerns with the signatures of the person.
- (w) that in para 8 of the impugned order, dated 29.10.2013, the State Commission has also observed that the Appellant and the Respondent No.1 did not take any initiation to act under legal provisions/law to address the status of letter, dated 13.7.2011

of the Appellant, the Respondent No.1 felt it to be a forged document.

- (x) that despite rendering the findings in favor of the Appellant and having found that the Appellant had always submitted the schedule in time and it is only the schedule for the month of August 2011 that is disputed by the Respondent No.1, though the seal affixed on the letter, dated 13.7.2011, appears to be the Respondent No.1's office, the State Commission has failed to direct the Respondent No.1 to make the entire payment of tariff to the Appellant as per the tariff orders. The State Commission has further failed to take into account the various orders of the State Commission and the PPAs executed between the parties.
- (y) that the State Commission, has strangely shifted the onus to prove that the letter, dated 13.7.2011, of the Appellant is forged, in case the Respondent No.1 feels as such. Thus, the Appellant is being held responsible for alleged failure to take necessary steps to prove that its own document is allegedly a forged one.

6. We have heard Mr. Raunak Jain, learned counsel for the Appellant, Ms. Suparna Srivastava, learned counsel for the Respondent No.1 and Ms. Mandakini Ghosh, learned counsel for Respondent No.2. We have deeply gone through the evidence and other material available on record including the impugned order passed by the State Commission and written submissions.

7. The issues that arise for our consideration are:

- (A) Whether the State Commission has erred in not adjudicating upon the dispute between the generating company and the distribution licensee u/s 86(1)(f) of the Act instead of directing the Appellant to have the dispute regarding receipt of letter, dated 13.7.2011, resolved by the appropriate authority first?**

- (B) Whether the distribution licensee was correct in assuming the schedule for the month of August, 2011 at a load factor of 100% of the contracted capacity in the absence of receipt of the schedule from the Appellant?**
- (C) Whether non-submission of declaration schedule in time could have any adverse financial impact on the tariff to be paid to the Appellant as per earlier tariff Orders, dated 11.11.2005 and 15.1.2008, in Petition No. 7 of 2005 of the State Commission?**

8. All the issues are interconnected and hence being dealt with by us together.

9. On these issues, the learned counsel for the Appellant/petitioner has made the following contentions:

- (a) that the Appellant filed a petition being Petition No.41 of 2012(D) under Section 86(1)(f) read with Section 142 of the Electricity Act, 2003, inter-alia, claiming correct tariff for power supplied by the Appellant's 8.5 MW biomass based power plant to the Respondent No.1 (Distribution Licensee) for the month of August, 2011, as per PPAs, dated 12.5.2006 and 14.10.2011, executed between the parties and in non-compliance with the Orders, dated 11.11.2005 and 15.1.2008, passed by the State Commission in Petition No. 7 of 2005.
- (b) that despite submission of due declaration regarding schedule of power injection and despite the fact that the same being duly acknowledged by the Distribution Licensee, the Appellant has only received partial payment on 15.12.2011 for the power injected during the months of July and August, 2011.
- (c) that the Distribution Licensee has made payment of Rs.92,20,944/- against the actual due amount of Rs.1,27,01,760/- for the units injected by the Appellant into the Distribution Licensee's system in the months of July and

August 2011, as per the meter reading at the end of the Respondent No.1, thereby leading to a shortfall of Rs.34,80,816/- to be recovered by the Appellant.

- (d) that the Appellant after analysis of the payment details, found that the Respondent No.1 had wrongly treated the case of the Appellant as that of biomass based generators, where annual energy plant load factor (PLF) had exceeded 100%, as mentioned in para 9.6 of the order, dated 15.1.2008, in Petition No. 7 of 2005 of the State Commission, and had accordingly made payment @ Rs. 2.71/- (variable cost + 30 paise/Kwh) per unit. The annual energy PLF of the Appellant was also only about 38.29% for FY 2011-2012 and that the Appellant had supplied more than 70% of the energy scheduled to the Respondent No.1 (Distribution Licensee). Thus, the Appellant was entitled to receive normal tariff fixed by the State Commission for energy fed into the Respondent No.1's system for the months of July and August 2011 i.e. @ Rs. 4.04/- per unit.
- (e) that due to failure of Respondent No.1 to make payments to the Appellant for supply of power as per PPA, the Appellant filed the impugned petition being Petition No. 41 of 2012(D) as per the observations of the Hon'ble Supreme Court in the case of Gujarat Urja Vikas Nigam Ltd. V/s Essar Power Ltd. (2008) 4 SCC 755).
- (f) that the State Commission, after going through the judgments of this Appellate Tribunal, dated 7.9.2006, and Hon'ble Supreme Court, dated 15.1.2007, in Civil Appeal No. 12 of 2007, vide its order, dated 15.1.2008, in Petition No. 7 of 2005, re-determined the tariff and related dispensation for procurement of power from biomass based generation projects and with regard to the issues of scheduling of power by biomass based projects, PLF and tariff thereon, held that the stipulation

of variable cost plus 30p would be applicable only to the supply of less than 70% of scheduled energy. The supplier may provide and be paid normal tariff for supply of energy above 70% of schedule without a cap of 105%. Monthly billing shall be done on the basis of energy delivered at normal rate upto eleven months. At the end of the year necessary adjustment may be made in the bill for the twelfth month of the year to ensure that energy delivered above 100% PLF is billed at the same rate as for supply below 70% of the scheduled energy.

- (g) that the Appellant is a biomass generator and is aggrieved due to short-payments made by the Respondent No. 1 by wrong application of tariff, contrary to the orders of the State Commission as well as the PPAs executed between the parties.
- (h) that the dispute relating to payment of tariff and being a dispute between a generating company and a distribution licensee, has to be necessarily adjudicated upon by the State Commission.
- (i) that the State Commission having recorded finding in the impugned order that the Appellant always submitted the schedule in time and it is only the schedule for the month of August 2011 that is disputed by the Respondent No. 1, though the seal affixed on the letter, dated 13.7.2011, appears to be the Respondent No. 1's office, the State Commission ought to have decided the dispute and directed the Respondent No. 1 to make the entire payment of tariff to the Appellant as per the tariff orders and the PPAs entered into between the parties.
- (j) that the payment of tariff at the rate of variable cost +30 paise has to be made to a biomass generator only in specific applicable instances as per tariff orders, dated 11.11.2005 and 15.1.2008, of the State Commission, such as, when supply is less than 70% of the scheduled supply in any given month or

when the Annual Average PLF of the biomass generator exceeds 100%.

- (k) that in the instant case, the Appellant had supplied power in the month of August 2011 as per its declared schedule, which was more than 70%, and Appellant's Annual Average PLF during the FY 2011-12 was only about 38.29%, the Appellant is entitled to get normal tariff.
- (l) that the tariff orders, dated 11.11.2005 and 15.1.2008 of the State Commission and/or the PPAs did not provide for payment of tariff at the rate of variable cost +30paise when the declaration schedule is not submitted timely or not submitted at all. In the absence of the same, the Respondent No. 1 cannot read the same into the PPA and make payment of variable cost + 30 paise only.
- (m) that the provision for advance scheduling in the PPA executed between the parties was meant to assist the distribution licensee in meeting its obligations as per the Renewable Purchase Obligation (RPO) Regulations and not to penalize the renewable energy generators. However, failure of the distribution licensee to meet its purchase obligations itself takes away the significance of submitting the advance schedule. Thus, whatever power is made available to the licensee, it will only assist in fulfilling its purchase obligations which remain unfulfilled.
- (n) that as per Clause 11.1 and 11.2 of Chapter-1 captioned "General Principles" of the CERC (Terms and conditions for determination of generation tariff and related matters for electricity generated by plants based on renewable energy sources) Regulations, 2012, the biomass based power plants of less than 10 MW capacity, including the Appellant, have been exempted from any kind of scheduling and are paid full tariff



for whatever energy is supplied by them to the licensee. However, variable cost +30paise only shall be paid in case their Annual Average PLF exceeds 100% in any given year. Similar approach should have also been followed in the instant case and the Appellant is entitled to get full tariff for the power supplied to the licensee in the month of August, 2011.

10. **Per contra**, the learned counsel for the Respondents have made the following submissions:

- (a) that the Appellant agreed and undertook with Respondent No.1 that,
  - (i) Appellant would supply the entire capacity generated from its plant round the clock as defined by the State Commission in Petition No.7 of 2005 and amended from time to time;
  - (ii) Appellant would furnish to the Respondent No.1 a month-wise supply schedule 15 days in advance along with other requisite information;
  - (iii) Appellant would effect supply as per the pre-decided schedule as prescribed by the State Load Despatch Centre; and
  - (iv) Appellant would apply power purchase rates and other charges and conditions as incorporated in the State Commission's Order, dated 11.11.2005, and amended from time to time.
- (b) that pre-intimation of supply schedule, and that too 15 days in advance on the part of the Appellant, thus became an essential term of the PPA. Since, the PPA was for sale of the entire quantum of power generated from the project, it followed as a natural corollary that in the absence of advance monthly

schedule for a given month, the entire generation capacity of the plant was to be taken as the scheduled quantum for supply during that month. If no such monthly schedule was at all submitted by the Appellant for supply to be effected in a given month, then the entire contracted quantity under the PPA, dated 12.5.2006, was to be taken as the scheduled quantum for supply of power in that month for calculation of tariff payment as prescribed in Order, dated 11.11.2005.

- (c) that the Appellant submitted its declaration schedule to Respondent No.1 in reference to the PPA for injecting 5 lakh units into the grid in the month of July, 2011. However, for the month of August, 2011 no such declaration/advance schedule was submitted by the Appellant to Respondent No.1 and as such, the entire contracted power came to be construed as scheduled energy for supply of power in the month of August, 2011.
- (d) that the letter, dated 13.7.2011 of the Appellant had not been received by the Respondent as claimed by the Appellant. Xerox copy of the letter receipt register for the period 29.6.2011 to 31.7.2011, which has relevance here, shows that there is no record of receipt of above said letter, dated 13.7.2011 of the Appellant in the letter receipt register of the Respondent No.1. The letter receipt register of the Respondent is an official record of all the general letters received in the office and is maintained by an official duly authorized for the purpose. The advance schedule submitted by the Appellant and its receipt in the letter receipt register of the Respondent for supply of power during the months of July, 2011, September, 2011 and October, 2011 had been received in the office of the Respondent No.1.
- (e) that all the letters are received at receive – dispatch section of the office where an official, duly authorized to receive letters, gives dated acknowledgement. At the same time, receipt of the

said letter is recorded by the official in the letter receipt register. Since the letter had not been received in the office, hence above official procedure was not carried out. Further, as per directions of the State Commission, the original acknowledgement of the Appellant's letter, dated 13.7.2012, produced by the Appellant on 16.11.2012, had been verified and it was found that the signature of the aforesaid person on the letter is not matching with the signature of any of the officials of the office of the Respondent No.1.

11. **Our consideration and conclusion:**

11.1 From the contentions made by the rival parties, the following facts remained undisputed:

- (i) that the Appellant/petitioner, as per the PPA executed between the Appellant and Respondent No.1/distribution licensee, was required to submit monthly advance schedule for supply of power to the Respondent No.1 and the Appellant had been submitting advance schedule for supply of power to the Respondent No.1 for the whole months namely, the relevant period for the months of July, 2011, Sept., 2011, Oct., 2011, Nov., 2011 and Dec., 2011. The learned counsel for the Respondent No.1 has clearly admitted the receipt of the letters, dated 26.6.2011, 20.8.2011, 15.9.2011, 13.10.2011 and 14.11.2011 of the Appellant/petitioner in regard to the advance schedule for the month of July, Sep., Oct, Nov. and Dec., 2011 and the relevant pages of the said receipt-register had been enclosed on behalf of the Respondent No.1 saying that the said letters had been received in the office of the Respondent No.1 as per the said register.
- (ii) that the purpose of advance schedule of supply of power by the Appellant to the Respondent No.1 is to enable the Respondent

No.1 to procure the electricity and to plan its distribution on monthly basis.

- 11.2 The learned State Commission, in the impugned order, has recorded a finding that *“we had gone through the copy of letter, dated 13.7.2011, and observed that impression of official round seal of the respondent's office was endorsed on the copy of letter with a signature”*.
- 11.3 The State Commission asked the Respondent No.1 as if the round seal the impression of which is appearing on the letter dated 13.7.2011 belongs to the respondent's office, it was replied by respondent that the seal appears to be its office. The State Commission further asked the Respondent No.1 if the Respondent No.1 will take any action in to the matter under provision of law, the Respondent No.1 replied in positive. The State Commission further observed that no report on investigation on the status letter, dated 13.7.2011, was submitted by the Respondent No.1 to the State Commission. The State Commission again directed, vide order, dated 17.6.2013 to the Respondent No.1 to submit the investigation report on the said letter, dated 13.7.2011 of the Appellant by 24.6.2013. The State Commission further observed in the impugned order that Respondent No.1 did not intimate in writing to the Appellant well in time regarding deduction of bill which was mandatory on part of Respondent No.1. Regarding non receipt of advance schedule, the Respondent No.1 could have intimated the Appellant being a long term power supplier, but the Respondent No.1 never informed or asked the Appellant for non-submission of advance monthly schedule of the power.
- 11.4 The State Commission has further observed in the impugned order that in the past also, the Respondent No.1 normally do not feel its responsibility to intimate in writing to its power suppliers well in time regarding details of deduction in payment of bills and in the case in hand also, the Respondent No.1 failed to intimate in writing to the

Appellant/ petitioner regarding deduction in payment of bills at the time of releasing cheque towards payment of power supply bills. The further conclusion of the State Commission in the impugned order is that the Appellant/ petitioner and or the Respondent No.1 did not take any initiation to act under legal provisions to address the status of letter, dated 13.7.2011 of the Appellant, if the Respondent No.1 felt it to be a forged document.

- 11.5 The learned State Commission, by the impugned order, dismissed the petition of the Appellant/petitioner just on the ground that the dispute is related to non-receipt of the letter, dated 13.7.2011, of the Appellant/ petitioner and the said matter could not be addressed by the State Commission under the provision of the Electricity Act, 2003. Further clarifying that the dispute relating to non-receipt of the letter, dated 13.7.2011, of the Appellant be resolved first by the appropriate authority thereafter, the Appellant may approach the State Commission.
- 11.6 The State Commission, in the impugned order, after recording the aforesaid findings and giving certain observations did not proceed to decide the petition of the Appellant on merits but prefer it to dismiss it on the ground that the resolution of the dispute about non-receipt of the said letter of the Appellant is not within competence of the State Commission under the provision of the Electricity Act, 2003.
- 11.7 We may further note that the learned State Commission, in the impugned order, on some occasion, directed the Respondent No.1/ distribution licensee to investigate or make inquiry about the fact of the receipt of the letter, dated 13.7.2011, of the Appellant/petitioner and the Respondent No.1 even after giving assurance to the learned State Commission to make inquiry and submit the status report of the said letter, did not make any effort whether the said letter was received in the office of the Appellant or not and round seal of the office of the Respondent No.1 was affixed on the said letter of the Appellant. The learned State Commission, even after recording a

finding that the said letter, dated 13.7.2011, of the Appellant/petitioner had the round seal impression of the office of the Respondent No.1 left the petition of the Appellant undecided on merits and dismissed the same on the aforesaid ground.

11.8 It is the established fact that the Appellant/petitioner is a long term power supplier to the Respondent No.1/distribution licensee and in such long term power supply transactions, if the advance monthly power schedule for the month of Aug., 2011 was not received in the office of the Respondent No.1, it could have intimated or informed the Appellant about the non-receipt of such monthly power supply schedule. The Respondent No.1 preferred to keep mum and deducted the amount as placed in the bills for the month of August, 2011 as contended by the learned counsel for the Appellant.

11.9 Since, the dispute between the Appellant and the Respondent No.1/distribution licensee is with regard to the tariff of electricity supplied during the month of Aug., 2011 only, we find that the letter regarding monthly advance schedule of the power supply by the Appellant to the Respondent No.1, vide letter, dated 13.7.2011 was got received by the Appellant in the office of the Respondent No.1/distribution licensee and on such receipt, the round seal of the office was got affixed on the same. If the seal of the office of the Respondent No.1/distribution licensee is on the said letter, dated 13.7.2011, of the Appellant, it was the duty of the Respondent No.1/distribution licensee to make inquiry as to how the seal of its office was so easily available anywhere with any person and same was so easily affixed on the said letter of the Appellant. Once the seal of the office of the Respondent No.1 is found on the said letter of the Appellant, it becomes the liability and responsibility of the Respondent No.1/distribution licensee to rely on the said letter and to act thereon accordingly.

11.10 We find that the said letter of the Appellant/petitioner, dated 13.7.2011, was got received in the office of the Respondent No.1/

distribution licensee on the said date. Thus, the Appellant/petitioner is entitled to the tariff as per the then existing legal provision at the relevant time for the power supplied by the Appellant to Respondent No.1/distribution licensee in the month of August, 2011.

12. Section 86(1)(f) provides that the State Commission has to adjudicate upon the dispute between the generating company and the distribution licensee. Therefore, the State Commission should have decided the issue instead of directing the Appellant to approach the appropriate authority to get the issue regarding receipt of letter, dated 13.7.2011, resolved. The State Commission itself is the appropriate authority to resolve the dispute by adjudicating upon the dispute under Section 86(1)(f) of the Electricity Act, 2003.

13. Normally for scheduling of generation, the availability for different time blocks of a day is to be intimated by the generating company to the distribution company one day in advance. The distribution company depending on the anticipated load demand in different time blocks of the day and the merit order of the various generating stations from which it sources power, gives a generation schedule for the next day to the various generating stations. The advance monthly energy generation programme, as sought in the present case by the distribution licensee, is for broad planning for meeting the energy requirement for the month. We do not feel that non-receipt of advance monthly generation schedule for the Appellant's power plant as contended by the Respondent No.1 would have any significant impact on the advance planning of the Respondent No.1 as the energy injection by the power plant even at its full capacity (8.5 MW) is insignificant compared to the total energy consumption of the licensed area of the Respondent No.1 which extends the entire State of Chhattisgarh. Even if it is assumed for argument sake that it would have any impact on the planning, the distribution licensee on non-receipt of the schedule should have contacted the Appellant for obtaining the schedule instead of assuming supply at 100% load factor at full capacity. Making an

unrealistic assumption of 100% schedule which was also not in the proximity of the schedules given in the previous months would have equally adverse impact on the monthly planning of the distribution licensee.

14. In the circumstances of the case, it would be prudent to assume the generation schedule for the month of August, 2011 as allegedly submitted by the Appellant by letter, dated 13.7.2011, for the purpose of tariff.

15. In view of the above discussions, the issue is decided in favour of the Appellant and against the Respondent No.1/distribution licensee.

16. We further conclude that non-submission of monthly schedule by the Appellant/petitioner, only for the month of August, 2011, could not have any adverse financial impact on the tariff to be paid to the Appellant. In these circumstances, the instant Appeal is liable to be allowed.

17. **SUMMARY OF OUR FINDINGS:**

17.1 The Appellant/petitioner continued to send written information about advance schedule for supply of power to the Respondent No.1/distribution licensee and the said written information for the months of July, 2011, September, 2011, October, 2011 and December, 2011 were admittedly received in the office of Respondent No.1/distribution licensee. The receipt of written information submitting advance schedule for supply of power by the Appellant/petitioner to the Respondent No.1 only for the month of August, 2011 has been denied by the Respondent No.1/distribution licensee in its office. According to the Appellant/petitioner, the Appellant got the said letter, dated 13.7.2011, received in the office of Respondent No.1/ distribution licensee and the same admittedly had the round seal of the office of the Respondent No.1/ distribution licensee on it. The categorical finding of the learned State Commission in the impugned order is that the said letter, dated



13.7.2011, allegedly sent by the Appellant/petitioner had the seal impression of the office of the Respondent No.1/ distribution licensee. Since, the seal on the said disputed letter of the Appellant/petitioner has been denied by the Respondent No.1/ distribution licensee merely saying that the seal might be of its office on the said letter but the initials on the said letter did not match with that of the official deputed for the purpose in the office of the Respondent No.1/ distribution licensee. There is very strong presumption of the receipt of the letter, dated 13.7.2011, of the Appellant/petitioner in the office of the Respondent No.1/ distribution licensee and by all preponderance of probabilities as required in the civil case for the proof of the said document. The availability of the seal or lying of the seal in the office of the Respondent No.1/ distribution licensee or easily availability of such seal in the office of the Respondent No.1/ distribution licensee makes it responsible and liable for the consequences of the receipt of such kind of document. The Respondent No.1/ distribution licensee cannot be allowed to run-away from the consequences of such kind of receipt of the letter in its office. If the letter did not bear the initial or signature of the official deputed for this purpose in the office of the Respondent No.1/ distribution licensee or the said letter was forged, it was incumbent upon the Respondent No.1/ distribution licensee to have investigated or inquired into the matter or complied with the direction of the State Commission particularly, when the Respondent No.1/ distribution licensee agreed to make such inquiry and investigation about the receipt of such letter, dated 13.7.2011, of the Appellant/petitioner and, subsequently, it resiled from such inquiry or investigation. It was imperative on the Respondent No.1/ distribution licensee to find out the truthness into the fact of the receipt of the said letter and its resiling there-from creates a strong ground or basis against the Distribution Licensee resulting into the strong presumption in favour of the receipt of the said letter, dated 13.7.2011, by the Appellant Petitioner in the office of the Distribution Licensee, giving information

about the advance schedule for supply of power for the month of August, 2011. Since, the Appellant was a long term power seller, the distribution licensee could have informed or asked the Appellant about the non-receipt of advance schedule of supply of power but it preferred to keep mum.

17.2 We disapprove the approach adopted by the State Commission in passing the impugned order, dated 29.10.2013, and dismissing the petition being Petition No. 41 of 2012(D) filed by the Appellant/petitioner before the State Commission just on the ground that the dispute is related to non-receipt of letter, dated 13.7.2011, of the Appellant/petitioner and further that the said matter could not be addressed by the State Commission under the provisions of law. The impugned order is totally illegal and against all the established judicial canons and the said petition could not be legally dismissed on the aforesaid ground and further directing the Appellant/petitioner to get the dispute related to receipt of letter, dated 13.7.2011, of the Appellant, resolved first by the appropriate authority and, thereafter, only move the State Commission..

17.3 The Appellant/petitioner filed the aforesaid petition being Petition No.41 of 2012(D) under Section 86(1)(f) read with Section 142 of the Electricity Act, 2003, inter-alia, claiming correct tariff for power supplied by the Appellant's 8.5 MW biomass based power plant to the Respondent No.1/distribution licensee for the month of August, 2011, as per PPAs, dated 12.5.2006 and 14.10.2011, executed between the parties and in non-compliance with the orders, dated 11.11.2005 and 15.1.2008, passed by the State Commission in Petition No. 7 of 2005. The said petition has illegally and wrongly been dismissed on the aforesaid ground by the impugned order. The State Commission should have adjudicated upon the matter u/s 86(1)(f) of the Act.

17.4 We hereby quash and set-aside the impugned order, dated 29.10.2013, passed by the State Commission, to the extent

mentioned above by us. The Respondent No.1 is directed to make the tariff payment to the Appellant on the basis of the schedule given in the letter, dated 13.7.2011 of the Appellant. We further hold that non-submission of monthly schedule for supply of power by the Appellant/petitioner only for the month of August, 2011, even if was there, it could not have any adverse impact on the tariff to be paid to the Appellant/petitioner by the distribution licensee for the reasons given in paragraph 13 above.

18. Consequently, in view of the above discussions, the instant Appeal, being Appeal No. 9 of 2014, is hereby allowed as indicated above without any order as to costs. The impugned order, dated 29.10.2013, is hereby quashed and set aside. The Respondent No.1 is directed to make tariff payment on the basis of the schedule given in the letter, dated 13.7.2011 of the Appellant as per the provisions then existing within one month from the date of communication of this judgment.

**PRONOUNCED IN THE OPEN COURT ON THIS 20<sup>th</sup> DAY OF MARCH, 2015.**

**(Justice Surendra Kumar)  
Judicial Member**

**(Rakesh Nath)  
Technical Member**

**√ REPORTABLE/NON-REPORTABLE**

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