

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal of 125 of 2012

Dated: 10th April, 2013

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam,
Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member**

In the matter of:

**M/s. Hindalco Industries Limited
Century Bhawan,
Dr. Annie Besant Road
Mumbai**

....Appellant(s)

Vs

**The Uttar Pradesh Electricity Regulatory
Commission
Kisan Mandi Bhawan, IInd Floor
Gomti Nagar
Lucknow – 226010**

...Respondent(s)

Counsel for the Appellant (s):

**Mr. Parag Tripathy, Sr. Adv.
Mr. Syed Shahid Hussain Rizvi
Mr. Arunabh Ganguli
Mr. Shadar Farasat**

**Counsel for the Respondents (s): Mr. Sanjay Singh
Mr. Kunal Verma
Mr. Ashok Kr. Singh**

JUDGMENT

**HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,
CHAIRPERSON**

This Appeal has been filed by M/s. Hindalco Industries Ltd. against the order dated 04.11.2011 passed by the UP Electricity Regulatory Commission ("State Commission") in the petition of the Appellant seeking some clarification in the Renewable Purchase Obligation Regulation, 2010 of the State Commission.

2. The Appellant has set up an aluminium industry with a captive power plant to meet its requirement. The State Commission is the Respondent.

3. The brief facts of the case are as under:

- (A) The Appellant is engaged in the manufacturing of aluminium with factory and works located at Renusagar and Renukoot. The Appellant has set up its captive thermal power plant of 742 MW capacity at Renusagar for ensuring uninterrupted and continuous supply to its aluminium plant. In addition to above captive power plant of 742 MW, the Appellant has also set up a co-generation plant of 78 MW capacity at Renukoot. The steam generated in the co-generation plant is utilized in the production process.
- (B) In order to promote the use of renewable energy the State Commission has framed UPERC (Promotion of Green Energy to Renewable Purchase Obligation), Regulation, 2010 on 17.8.2010. The Regulation, *interalia*, mandates purchase of minimum percentage of

total consumption of electricity by the obligated entity from Renewable Energy Sources.

(C) According to the above Regulations, an obligated entity is under obligation to purchase the stipulated percentage of its total electricity consumption from Renewable Energy Sources.

(D) The Appellant filed a clarificatory petition in January, 2011, before the State Commission referring to the decision of this Tribunal in judgment dated 26.4.2010 in Appeal no. 57 of 2009 in the matter of M/s. Century Rayon Vs. Maharashtra Electricity Regulatory Commission that fastening of the obligation on the co-generation plant to procure electricity from renewable energy would defeat the object of 86(1)(e) which provides for promotion of cogeneration as well as generation from renewable sources of energy.

(E) The State Commission vide order dated 04.11.2011 holding that the matter will be taken up by the Commission suo-motu as and when required disposed of the said petition neither rejecting it nor allowing it.

(F) Aggrieved by the impugned order dated 04.11.2011 of the State Commission, the Appellant has filed this Appeal.

4. The Appellant has made the following submissions, while assailing the impugned order.

(A) The Tribunal in Appeal no. 57 of 2009 in the matter of M/s. Century Rayon Vs. MERC & Anr. dealt with the specific issue whether a co-generation unit could be compelled to purchase electricity from the Renewable Sources of Energy. This Tribunal clearly laid down that

the electricity produced by co-generation plant could be treated at par with electricity generated from Renewable Sources of Energy and that the co-generator, the Appellant was under no obligation to purchase electricity from renewable sources of energy as it would defeat the object of Section 86(1)(e) of the Electricity Act, 2003.

(B) The above judgment of the Tribunal which is a judgment in rem has become final and binding. Therefore, all the State Commissions are bound to follow the law laid down by the Tribunal in Century Rayon case.

(C) After the Tribunal has explicitly laid down the law to be followed by all the State Commissions, the UP State Commission in purported exercise of powers under Section 61, 66, 86(1)(e) and 181 of the Act framed the

UPERC (Promotion of Green Energy through Renewable Purchase Obligation), Regulations, 2010 on 17.8.2010 which, *interalia*, mandate purchase of minimum percentage of total electricity consumption by the obligated entity from the Renewable Energy Sources. Under these Regulations, the co-generation facility based on fossil fuel like the Appellant is under obligation to purchase the stipulated percentage of its total electricity consumption from Renewable Sources of Energy. This is contrary to the legislative mandate under Section 86(1)(e) of the Act as well as to the law laid down by the Tribunal in Century Rayon case.

- (D) The State Commission in the impugned order, instead of following the law laid down in the Century Rayon case has preferred to follow the contrary observations recorded in the Forum of Regulators in its meeting held on 29th and 30th April, 2011 to the effect that the RPO

should be made applicable to co-generation based captive consumers as well in line with the spirit of Section 86(1)(e) of the Act and only the non-fossil fuel based co-generation plants should be covered under the said provision for the purpose of Renewable Purchase Obligation.

(E) The State Commission has wrongly refused to treat the electricity generated by co-generation unit of the Appellant at par with the electricity generated from Renewable Energy Services and disposed of the said clarification petition by merely observing that the matter would be taken up by it suo motu as and when required.

5. Learned Counsel for the State Commission in reply has made the following submissions.

(A) The Appellant's prayer before the State Commission was to include it in the definition of Renewable Energy Sources though it is an admitted fact that the Appellant's co-generation plant was based on fossil fuel which is non-renewable source of energy. The Appellant did not pray before the State Commission that it should not be fastened with the obligation to purchase energy from Renewable Sources of Energy for the reasons given by the Tribunal in the Century Rayon case.

(B) The State Commission is conscious of the fact that the directions given by the Tribunal are binding in nature and whereas the deliberation of Forum of Regulators is directory in nature and in case the Tribunal is not satisfied with the explanation given by the State Commission in its order dated 04.11.2011 the same may be modified to the extent that the reference of

Forum of Regulators may be expunged or ordered to be ignored.

6. In view of the rival contentions of the Appellant and the State Commission, the following question would arise for our consideration.

“Whether the Appellant having fossil based co-generation facilities could be fastened with the requirement of Renewable Purchase Obligation from the Renewable Sources of Energy?

7. The issue had already been dealt with by this Tribunal in detail in its judgment dated 26.04.2010 in Appeal no. 57 of 2009 in the matter of Century Rayon Vs. Maharashtra Electricity Regulatory Commission. IN this Appeal, this Tribunal decided that the fastening of the obligation on the co-generator to procure electricity

from renewable energy sources would defeat the Object of Section 86(1)(e) by the Electricity Act, 2003.

The relevant extracts of the judgment are as under:

“16. The Appellant is a co-generator. It produces energy more efficiently as compared to conventional power plants which is to be treated at par with the electricity from the renewable source of generation. When such being the case, the fastening of obligation on the co-generator to procure electricity from renewable energy producer would defeat the object of section 86(1)(e). These two categories of generators namely: (i) Co-generators and (ii) generators of electricity through renewable sources of energy are required to sell the electricity to any person as may be directed by the State Commission. Any obligation for purchase of electricity from these two sources can be imposed only on the distribution licensee and not on the captive consumers who are generating electricity through co-generation irrespective of the fuel used.”

“21. It is no doubt true that the generation of electricity from renewable sources is to be promoted as per section 86(1)(e) of the Act. It is equally true that co-generation of electricity is also to be promoted as it gives several benefits to the society at large.”

- “22. When such is the intent of the legislature, the Appellant who is a co-generating unit, cannot be fastened with any obligation to purchase power generated by a renewable energy source particularly when the co-generation of power is also one of the power which is meant to be promoted by the same provision of law.”*
- “23. As indicated above, the expression used in section 86(1)(e) is to promote both co-generation and generation of electricity from renewable source of energy. The clear meaning of these words is both are different and both are required to be promoted. Fastening of liability on one in preference to the other is totally contrary to legislative intent. The co-generation by different sources of fuel has not been distinguished by the Parliament either in section 2(12) or section 86(1)(e) of the Act.”*
- “34. In the light of the above, when we notice the meaning of the Section 86(1)(e) of the Act, it is clear that it mandates the State Commissions to promote both the categories (1) co-generation plant (2) generation of electricity through renewable source of energy. The perusal of this section in conjunction with section 2(12) of the Act clearly indicate that the intention of the legislature is to promote co-generation in the industry without reference to the fuel used for such co-generation. In other words, the intention of the legislature is to clearly promote co-generation in the industry generally and not co-generation from renewable energy sources alone.”*

“45. Summary of our conclusions is given below:-

(I) The plain reading of Section 86(1)(e) does not show that the expression ‘co-generation’ means generation from renewable sources alone. The meaning of the term ‘co-generation’ has to be understood as defined in definition Section 2 (12) of the Act.”

“(VI) The intention of the legislature is to clearly promote cogeneration in this industry generally irrespective of the nature of the fuel used for such cogeneration and not cogeneration or generation from renewable energy sources alone.”

“46. In view of the above conclusions, we are of the considered opinion that the finding rendered by the Commission suffers from infirmity. Therefore, the same is liable to be set aside. Accordingly, the same is set aside. Appeal is allowed in terms of the above conclusions as well as the findings referred to in aforesaid paras 16,17,22 and 44. While concluding, we must make it clear that the Appeal being generic in nature, our conclusions in this Appeal will be equally applicable to all co-generation based captive consumers who may be using any fuel. We order accordingly.”

8. Thus, the Tribunal by its judgment in Century Rayon case gave a clear mandate that the fastening of the obligation on the co-generation to procure electricity from renewable energy sources would defeat the object of Section 86(1)(e). It was also stated that the Appeal being generic in nature, the conclusions in the Appeal will be equally applicable to all co-generation based captive consumers who may be using any fuel.

9. Despite the above clear ruling of the Tribunal given by judgment dated 26.04.2010, the State Commission has framed Regulations on 17.08.2010 subsequent to ruling by the Tribunal fastening the obligation of Renewable Purchase Obligation on the captive consumers with captive co-generation using fossil fuel.

10. Let us now examine the promotion of Green Energy Regulations framed by the State Commission:

11. The obligated entity is defined as under:

*“**obligated entity**” means the distribution licensee, captive user and open access consumer in the state, which is mandated to fulfill renewable purchase obligation under these regulations subject to fulfillment of conditions outlined under clause 3.2 hereof.”*

12. Renewable Purchase obligation has been defined as:

*“**renewable purchase obligation**” means the requirement as specified in clause 4 hereof, under clause (e) of sub-section (1) of section 86 of the Act, for the obligated entity to purchase electricity generated from renewable energy sources;*

13. Renewable Purchase Obligation has been described under Regulation 4 as under:

“4.1 Every obligated entity shall purchase a minimum percentage of its total consumption of electricity (in kWh) from renewable energy sources under the

renewable purchase obligation during each financial year.

The minimum percentages referred to above are given below in Table – A:

Year	Minimum quantum of purchase from renewable energy sources as % age of total energy consumed (in kWh)		
	Non-Solar	Solar	Total (2+3)
<i>(1)</i>	<i>(2)</i>	<i>(3)</i>	<i>(4)</i>
2010-11	3.75	0.25	4
2011-12	4.50	0.5	5
2012-13	5.0	1	6

.....

Provided further that renewable energy being received if any, by the obligated entity for own use from its own generating station, shall be accounted for fulfillment of its renewable purchase obligation.”

14. Thus, the State Commission in contravention of the law laid down by this Tribunal, fastened Renewable Purchase Obligation even on the captive consumers consuming the specified energy from the captive fossil fuel based co-generation plant.
15. Let us now deal with the impugned order dated 04.11.2011 of the State Commission.
16. The State Commission has taken note of the conclusions arrived at by the Tribunal in the Century Rayon case regarding fastening of RPO obligation on captive consumers having co-generation plant using any fuel. Despite noting the findings of the Tribunal, the State Commission has decided not to exempt the Appellant from RPO obligations referring to the decision taken by the Forum of Regulators. The relevant extracts of the impugned order are reproduced below:

“8. In light of the Electricity Act, 2003, National Electricity Policy and Hon’ble APTEL’s

conclusions, the Commission reckons that co-generation based on fossil fuel should also be promoted but the generation based on renewable energy sources has its definite category under Regulation 2 (p) of the UPERC (Promotion of Green Energy through Renewable Purchase Obligations) Regulation, 2010 and therefore, cannot include co-generation from fossil fuel under its definition. In this regard the Forum of Regulators (FOR) in 23rd Meeting on 29th & 30th April, 2011 has also agreed that “the RPO should be made applicable to co-generation based captive consumers as well, in line with the spirit of Section 86(1)(e) of the Electricity Act, 2003. It was also felt that the scope of Section 86 (1)(e) is to promote Renewable and that **only the non-fossil fuel based cogeneration plants should be covered under the said provision for the purpose of RPO.** It was agreed that MNRE and MOP should be apprised of this development and professional support, if any, required by GERC in contesting the case before the High Court may be extended by FOR Secretariat.

- “9. Therefore, the Commission opines that in present situation, the co-generation by grid connected fossil fuel based co-generating plants cannot be considered for fulfillment of Renewable Purchase Obligation under the Regulations. The matter shall be taken up by the Commission suo-motu as and when required.”

17. As mentioned above, the findings of the Tribunal in Century Rayon case have attained finality and are binding on the State Commission. The principle of judicial discipline requires that the orders of the higher Appellate authorities are followed unreservedly by the subordinate authorities. If a subordinate authority refuses to carry out directions given to it by the Superior Tribunal in exercise of appellate powers, the result will be chaos in the administration of justice and in fact be destructive of one of the basic principles of the administration of justice.
18. It is unfortunate that the State Commission have decided to follow the observation made by the Forum of Regulators which does not have any force of law by ignoring the binding directions of the Tribunal.
19. We would, therefore, direct the State Commission **not** to enforce Renewable Purchase Obligation on the

captive consumers who meet the specified percentage of energy from the captive co-generation plant using any fuel and exempt them from RPO obligation in consonance with the finding of the Tribunal in Century Rayon case in relaxation of its Regulations. Accordingly directed.

20. In view of above the impugned order is set aside.

The State Commission *is* directed to pass consequential orders as per the directions of the Tribunal at the earliest. No order as to costs.

21. Pronounced in the open court on this 10th day of April, 2013.

**(Rakesh Nath)
Technical Member**

**(Justice M. Karpaga Vinayagam)
Chairperson**

REPORTABLE/NON-REPORTABLE

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***The corrections shown and made in italics and bold in paragraph 19 and 20 above are done as per the directions of the Hon'ble Tribunal given in the order dated 26.4.2013 in IA No. 143 of 2013.**