Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.59 of 2012

Dated: 31st January, 2013

Present : HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

In the Matter of:

VEDANTA ALUMINIUM LTD. (VAL)
City Mart Complex, First Floor,
PO Baramunda,
Bhubaneshwar-751 003
Orissa

…Appellant

Versus

Orissa Electricity Regulatory Commission
Bidyut Niyamak Bhawan,
Unit-VIII,
Bhubaneshwar-751 012
Orissa

...Respondent(s)

Counsel for the Appellant(s) : Mr. C S Vaidyanathan,Sr Adv.
Mr. Prashanto Chandra Sen,
Ms. Anchal Saini

Counsel for the Respondent(s): Mr. B K Nayak
Mr. Rutwik Panda

J U D G M E NT

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

1. Vedanta Aluminium Ltd (VAL), the Appellant has filed this Appeal as against the impugned order dated 13.2.2012 passed by the Orissa Electricity Regulatory Commission (State Commission) in Suo-Moto Case No.111 of 2011.

2. The short facts are given as below:

   (a) The Appellant, Vedanta Aluminium Ltd (VAL) is a manufacturer of Aluminium and Alumina at Jharsuguda and Lanjigarh.

   (b) At Jharsuguda, the Appellant is operating 0.5 million tonnes per annum Aluminium Smeleter and 1215 MW Captive Power Plant. At Lanjigarh, the Appellant is operating a Alumina Refiner along with 90 MW Co-Generation Plant. The total captive consumption at both the locations is approximately 600 MU per month.

   (c) On 30.9.2010, the Orissa State Commission approved the Orissa Electricity Regulatory Commission (Renewable and Co-generation

Purchase Obligation and its Compliance) Regulations, 2010.

(d) As per the said RCPO Regulations, every obligated entity was to purchase not less than 5% of its total annual consumption of energy from co-generation and renewable energy sources from the year 2011-12 onwards.

(e) One M/s. Bhushan Steel and Power Ltd had filed a Petition before the State Commission praying for waiver/relaxation of the renewable energy purchase obligation for the year 2011-12 as it has generated electricity from its co-generation captive power plant.

(f) In order to have a comprehensive hearing and to take a decision on the issues involved, the State Commission decided to hear all the entities of the State including the Appellant. Accordingly, a public notice was issued in the above case inviting their views and suggestions from various persons, institutions and industries etc.,

(g) In response to the said notice, the State Commission received suggestions and objections from various entities including the Appellant. With

a view to take a common decision on the renewable Purchase Obligation, the State Commission took up the matter as Suo-Moto proceedings in Case No.111 of 2011 to hear the entities. Accordingly, the Appellant also appeared and objected to the applicability of the said Regulations to the Appellant on various grounds and alternatively, it sought for exemption from (Renewable and Co-generation Purchase Obligation and its Compliance) Regulations, 2010. However, the State Commission rejected the submissions made by the Appellant and held in the impugned order that the Appellant would be an obligated entity under the Regulations.

(h) Aggrieved by this order dated 13.2.2012, the Appellant has filed the present Appeal.

3. The Appellant has made the following submissions while assailing the impugned order:

(a) The Appellant is not an obligated entity under the Renewable and Co-generation Purchase Obligation Regulations, 2010 and as such these Regulations would not apply to the Appellant.

(b) Even if the Regulations would apply to the Appellant, it has fulfilled its obligation under the said Regulations since 7% of the total consumption of the Appellant involves consumption from its co-generation plant. In fact, the Regulations mandate that not less than 5% of its total annual consumption of energy shall be purchased by the obligated entity from the co-generation and renewable energy sources.

(c) The State Commission has not exercised the power of relaxation in respect of co-generation without any reason but has relaxed the obligation in respect of solar and non solar resources.

4. On these grounds, the impugned order dated 13.02.2012 was sought to be set-aside. The Appellant further prayed that directions be issued to the State Commission to relax the applicability of the Renewable and Co-generation Purchase Obligation Regulations, 2010 in respect of the Appellant.

5. The learned Counsel for the State Commission has argued in reply to the above grounds in support of the impugned order by pointing out the grounds of rejection of the prayer by the Appellant contained in the impugned order.

6. In the light of the rival contentions, the following questions would arise for consideration:

   i) **Whether the Appellant is an obligated entity which would be covered within the Orissa Regulatory Commission (Renewable Purchase Obligation and its Compliance) Regulations, 2010 which has been framed u/s 86 (1) (e) of the Electricity Act, 2003?**

   ii) **Even if the Appellant is an obligated entity whether it has fulfilled the RCPO obligation if the percentage of its consumption from the captive co-generation plant is equal to or in excess of the total RCPO obligation specified from the renewable energy sources and co-generation?**

7. According to the Appellant, the Appellant is not an obligated entity under the OERC (Renewable and Co-generation Purchase Obligation and its Compliance) Regulation, 2010 and therefore, it would not be covered under the definition and consequently, the OERC Regulations would not apply to the Appellant. Even if the RPO Regulations apply to the Appellant, it has fulfilled its obligation since 7% of the total consumption of the Appellant involves consumption from co-generation plant as against total RCPO obligation of 5%

specified in the Regulations. It is further submitted that the issue in question has already been decided in favour of the Appellant in Appeal No.57 of 2009 in Century Rayon Case, which has been ignored by the State Commission.

8. On the other hand, the Respondent Commission has contended that the Appellant which acknowledges itself as an obligated entity made an application before the State Commission as well as before this Tribunal praying for exemption for purchasing power from Renewable Source of energy and as such, the Appellant's stand which is being contrary, cannot be accepted.

9. In the light of the rival contentions, we have to analyse the definition of the obligated entity.

10. The obligated entity has been defined under the OERC (Renewable and Co-generation Purchase Obligation and its compliance) Regulations, 2010 (OERC Regulations). The same is as follows:

> 2(h) - *"Obligated entity means the entity mandated under Clause (e) of sub-Section (1) of Section 86 of the Act to fulfil the renewable purchase obligation and identified under Clause 3 of these Regulations;*
>
> *(1) Distribution Licensee (or any entity procuring power on their behalf).*

(2) Any other person consuming electricity (i) generated from conventional Captive Generating Plant having capacity of 5 MW and above for his own use and/or (ii) procured from conventional generation through open access and third party sale."

11. While interpreting Clause 3 of the OERC Regulations, the State Commission in the impugned order dated 13.2.2012 has observed as follows after rejecting the plea of the Appellant:

"*23. Regulations 3 of RCPO Regulations, clearly specifies the minimum Purchase Obligation from (i) Renewable Energy Sources (Solar and Non-Solar) and (ii) Co-generation Sources separately. Thus, the RCPO Regulation has been framed as per the legislative mandate under Section 86 (1) (e) of the Act, by promoting both the above sources simultaneously, unlike in case of Maharashtra, where fastening of liability on Renewable was promoted in preference to that Co-generation, as indicated in Para 45 (IV) of the Hon'ble ATE Order in Appeal No.57/2009.*

24. Further, in order to remove difficulties likely to be faced by Obligated Entities, the Commission has clarified that the Obligation in respect of Co-generation can be met from both solar and non-solar sources in order to achieve the total purchase requirement of the financial year but the solar and non-solar Purchase Obligations has to be met mandatorily by the Obligated Entities. The Commission further wants to make it abundantly clear that consuming electricity only from Co-generation sources shall not relieve any obligated entity from its

responsibility of meeting Renewable obligations of solar and non-solar renewable energy certificates (RECs) ".

12. While rejecting the plea of the Appellant, the State Commission has distinguished this Tribunal's judgment rendered in Century Rayon case in Appeal No.57 of 2009 stating that the judgment was rendered on the basis of the Regulations framed by the Maharashtra State Commission and same would not apply to Orissa State Commission. Let us see the ratio in the form of the conclusion decided by this Tribunal in Appeal No.57 of 2009:

"45. <u>Summary of our conclusions is given below</u>:-

(I) The plain reading of Section 86(1)(e) does not show that the expression 'co-generation' means cogeneration 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.

(II) As per Section 86(1)(e), there are two categories of `generators namely (1) co-generators (2) Generators of electricity through renewable sources of energy. It is clear from this Section that both these categories must be promoted by the State Commission by directing the distribution licensees to purchase electricity from both of these categories.

(III) The fastening of the obligation on the co-generator to procure electricity from renewable energy procures would defeat the object of Section 86 (1)(e).

(IV) The clear meaning of the words contained in Section 86(1)(e) is that both are different and both are required to be promoted and as such the fastening of liability on one in preference to the other is totally contrary to the legislative interest.

(V) Under the scheme of the Act, both renewable source of energy and cogeneration power plant, are equally entitled to be promoted by State Commission through the suitable methods and suitable directions, in view of the fact that cogeneration plants, who provide many number of benefits to environment as well as to the public at large, are to be entitled to be treated at par with the other renewable energy sources.

(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 side. 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. No costs."

13. Thus, while arriving at such a conclusion referred to above, the Tribunal has specifically made a mention that the conclusion in the Appeal No.57 of 2009 being generic in

nature, would apply to all the co-generation based captive consumers who may be using any fuel. Therefore, the reasonings given by the State Commission for distinguishing the judgment of this Tribunal, which is binding on the State Commission is utterly wrong.

14. Now let us deal with the other reasonings which have been referred to in the impugned order.

15. It is to be pointed out that the relevant definition of the 'obligated entity' would not cover a case where a person is consuming power from co-generating plant. This definition only covers an entity consuming power from a conventional captive generating plant or procured from conventional generation through open access and third party sale. Therefore, the contention that the consumers i.e. industrial unit consuming power from Co-generation captive power plant is to be considered to be 'obligated entity', cannot be accepted in the light of the ratio already decided by this Tribunal in Appeal No.57 of 2009.

16. Further, it is noticed that the Regulations 2 (h) of the OERC Regulations, 2010 has defined the obligated entity, an entity mandated under Section 86 (1) (e) of the Electricity Act, 2003. As such, this shall be applicable to person consuming electricity generated from conventional Captive Generation Plant in terms of findings of this Tribunal in the judgment in

Appeal No.57 of 2009. However, it is pointed out that this definition does not explicitly mention about the Co-generation unit.

17. It was argued during the hearing in the Appeal by the learned Counsel for the Commission that Co-Generation Plant also would come under the Conventional Generating Plant category if its source is fossil fuel. This plea raised by the State Commission has not been referred to in the impugned order. This additional submission raised by the State Commission during the hearing of the Appeal would amount to reading into the words contained in the definition of the obligated entity under Clause 2 (h). The said definition nowhere provides that a co-generation plant having fossil fuel as its basis would be a conventional captive generating plant and that therefore, it is an obligated entity.

18. As a matter of fact, this Tribunal in its judgment in Appeal No.57 of 2009, has specifically observed that the intention of the legislature is to clearly promote the co-generation also irrespective of the nature of the fuel used for such co-generation as well as the co-generation from renewable source. This ratio which has been decided by this Tribunal has not been taken into consideration by the State Commission.

19. Thus, a consumer consuming power from captive Co-generation plant would not be covered in the definition of the obligated entity. However, we notice that in this particular case the Appellant has been consuming major percentage of its power from conventional coal fired power plant of 1215 MW capacity and only part of consumption from captive co-generation plant of 90 MW capacity. Therefore, the Appellant will come under the definition of obligated entity.

20. According to the Appellant, even assuming without conceding that it is an obligated entity and the Regulations do apply to the Appellant, it has fulfilled its obligations under the Regulations since 7% of the total consumption of the Appellant involves consumption from co-generation plant even though Regulation 3 (1) mandates that every obligated entity shall purchase not less than 5% of its total annual consumption of energy from co-generation and renewable energy source. This fact has not been disputed by the State Commission.

21. In this connection, the learned Counsel for the State Commission has pointed out the relevant observations made by the State Commission in the impugned order dated 13.2.2012 with regard to the definition that the RCPO obligation is applicable to the Industrial Units consuming

power from fossil fuel based captive plants. The relevant observations is as follows:

> "*RCPO Regulation is applicable to industries of the State, for its consumption of power source from its fossil fuel based captive plant and all open access consumers. Industries and Open Access consumers consuming electricity are the obligated entity and not any generators generating electricity. Therefore, the contention of some of the objectors (e.g. M/s. VAL) that CPP should be exempted from RCPO obligation has no relevance. The RCPO obligation is applicable to the Industrial Units consuming power from fossil fuel based captive plants. Accordingly, RCPO obligation is not applicable to auxiliary consumption of any generating station including CPP."*

22. It is true that the RCPO obligation is applicable to the industrial unit consuming power from its captive power plant. However, while making such an observation, the State Commission has not considered that the industrial unit is consuming electricity from captive Co-generation plant and has also not taken into consideration the relevant findings given by this Tribunal in Appeal No.57 of 2009. The same is as follows:

> *"18. The reliance placed on the reading of para 6.4 of the Tariff Policy that uses the word including co-generation is misplaced. In fact, the para 6.4 of the Tariff Policy does not suggest that the expression "co-generation" used in section 86(1)(e) is to cover co-generation only from non-fossil fuel. The mere mention of co-generation in para 6.4 of the Tariff*

Policy cannot mean that co-generation mentioned under 86(1)(e) mean only co-generation units using non-fossil fuel.

20. As a matter of fact, the reading of the section 86 (1)(e) along with the other sections, including the definition Section and the materials placed on record by the Appellant would clearly establish that the intention of the legislature is to promote both co-generation irrespective of the usage of fuel as well as the generation of electricity from renewable source of energy.

39. These documents as well as the relevant provisions of the Act and the National Electricity Policy and National Electricity Plan and Tariff Policy would make it clear that it is mandatory on the part of the State Commission to give encouragement to co-generation in the industry without reference to any type of fuel or the nature of source of energy whether conventional or non-conventional".

23. In these paragraphs, the Tribunal has clearly held that both the co-generations irrespective of the usage of fuel as well as generation of electricity from the renewable source of energy shall be promoted and such co-generation using non fossil fuel also cannot be compelled to undergo the renewable purchase obligation.

24. As a matter of fact, it was sought to be argued by the State Commission that the Renewable purchase obligation of 5% of total consumption of energy is to be from co-generation and renewable source of energy. It has been pointed out by

the State Commission that the Appellant is aiming to fulfil its obligation only from co-generation and not from renewable source. He has also pointed out the following observations made by the State Commission in the impugned order dated 13.2.2012:

> *"24. Further, in order to remove difficulties likely to be faced by Obligated Entities, the Commission has clarified that the Obligation in respect of Co-generation can be met from both solar and non-solar sources in order to achieve the total purchase requirement of the financial year but the solar and non-solar Purchase Obligations has to be met mandatorily by the Obligated Entities. The Commission further wants to make it abundantly clear that consuming electricity only from Co-generation sources shall not relieve any obligated entity from its responsibility of meeting Renewable obligations of solar and non-solar renewable energy certificates (RECs)".*

25. The above observation would make it clear that the State Commission has relaxed the obligation to purchase from co-generation but has made it mandatory that the co-generation must purchase from renewable sources of energy. When such a relaxation has been made, the State Commission should have given relaxation in respect of consumers consuming energy from captive co-generation power plant using fossil fuel in excess of the specified RCPO obligations in view of findings of this Tribunal in Century Rayon caser that fastening of the obligation on the Co-generator to

procure electricity from renewable energy would defeat the object of Section 86(1)(e).

26. The State Commission has in fact, relaxed the obligation to purchase from co-generation source allowing the obligated entities to purchase entirely from renewable sources of energy.

27. On the other hand, it has not relaxed the requirement of consumers consuming electricity from captive co-generation plants for purchasing from renewable source of energy in light of the judgment in Century Rayon case. However, the State Commission has failed to follow the judgment given by this Tribunal in Century Rayon case.

28. This issue has already been decided by the Tribunal in judgment dated 30.01.2013 in Appeal No.54 of 2012 wherein the same impugned order was challenged by M/s Emami Paper Mills Ltd. In this judgment, this Tribunal has held that the State Commission ought to have also mandated that the consumers meeting electricity consumption from captive Co-generation plant in excess of the total specified RCPO obligation will also be exempted from obtaining electricity from renewable sources of energy.

29. The judgment of this Tribunal in the Century Rayon case became final and binding on all the State Commission in the

absence of any Appeal taken by the authorities or the persons concerned to the Hon'ble Supreme Court. Admittedly, the judgement of this Tribunal has not been set aside by the Appellate forum. Therefore, all the State Commissions are bound to follow the law laid down by this Tribunal in Century Rayon case.

30. But, in this case the State Commission has not only ignored the law laid down in the Century Rayon case but also has given its own interpretation which is quite contrary to the interpretation given by this Tribunal. This would show the attitude of the State Commission by not following the judicial discipline which is required to be maintained by the subordinate authorities.

31. It is well settled law that the characteristic attribute of the judicial act or a decision of the Appellate Authority would bind the subordinate authorities whether it be right or wrong. In other words, the alleged error of law or error of fact committed by the Appellate Judicial body can not be impeached by the subordinate authority except by the judgment in the Appeal by the Appellate Forum.

32. The principle of judicial discipline requires that the orders of the higher Appellate authorities should be followed scrupulously by its subordinate authorities. If the Subordinate authority refuses to carry out the directions or to follow the dictums given by the superior Tribunal in exercise

of Appellate powers, the result would be chaos in the administration of the justice. In fact, it will be destructive of one of the basic principles of the administration of the justice.

33. Summary of our findings:-

i) This Tribunal in its judgment in Appeal No.57 of 2009 has specifically observed that the intention of the legislature is to clearly promote the co-generation also irrespective of the nature of fuel used and fastening of the renewable purchase obligation on the co-generator would defeat the object of Section 86(1)(e). The Tribunal also mentioned in the above judgment that the conclusion in Appeal No.57 of 2009 of being generic in nature, would apply to all the co-generation based captive consumers who may be using any fuel. Therefore, reasoning given by the State Commission for distinguishing the judgment of this Tribunal, which is binding on the State Commission, is wrong.

ii) The definition of the obligated entity would not cover a case where a person is consuming power from co-generation plant. However, in the present case, since, the Appellant is consuming power

mainly from conventional coal based power plant and only a small percentage from the co-generation plant, it will be covered under the RCPO Regulation as obligated entity.

iii) The State Commission by the impugned order, in order to remove difficulties faced by the obligated entities, has clarified that the obligation in respect of co-generation can be met from solar and non-solar sources but the solar and non-solar purchase obligation has to be met mandatorily by the obligated entities and consuming electricity only from the co-generation sources shall not relieve any obligated entity. When such relaxation has been made, the same yardstick must be followed in respect of consumers meeting electricity consumption from the captive Co-generation power plant in excess of the specified RCPO obligations. Failure to do so would amount to violation of Section 86(1)(e) of the electricity Act, which provides that both co-generation as well as generation of electricity from renewable source of energy must be encouraged as per the finding of this Tribunal in Appeal No.57 of 2009. Unfortunately, the State Commission has failed to follow the judgement in Century Rayon case.

34. In view of our above findings, the impugned order is set aside. The State Commission is directed to pass the consequential orders in terms of this judgment and Century Rayon case by following the ratio given by this Tribunal.

35. Pronounced in the open court on the **31st January, 2013**.

(Rakesh Nath) ***(Justice M. Karpaga Vinayagam)***
Technical Member ***Chairperson***

Dated: 31st January, 2013

√REPORTABLE/~~NON-REPORTABALE~~