

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

Appeal No. 230 of 2013

Dated: 7th August, 2014

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

In the matter of:

Chhattisgarh State Power Trading Co. Ltd.,
2nd Floor, Vidyut Sewa Bhawan, Danganiya,
Raipur-492 014.
(Chhattisgarh)

... Appellant (s)

Versus

1. Chhattisgarh State Electricity Regulatory Commission,
Irrigation Colony, Shanti Nagar,
Raipur-492 001,
Chhattisgarh.

2. M/s. ACB (India) Limited,
Rajendra Nagar Chowk,
Link Road Bilaspur-495001,
Chhattisgarh

...Respondent(s)

Counsel for the Appellant(s) : Ms. Suparna Srivastava
Ms. Shivani Rana

Counsel for the Respondent(s) : Mr. Abhinav Vasisth, Sr. Adv.
Mr. Sumit Goel
Mr. Ranjan M
Ms. Lakshmi Iyer,
Ms. Pallavi Sharma,
Mr. Kshtrashal Raj
Mr. S.R. Muduli for R-2

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

The present appeal has been filed by Chhattisgarh State Power Trading Co. Ltd. against the impugned order dated 12.7.2013 passed by Chhattisgarh State Electricity Regulatory Commission (“State Commission”) wherein the State Commission has adjudicated upon the legality of the demand raised by the appellant on the respondent no. 2 towards the transmission losses on account of evacuation of power from the power plant of the respondent no. 2 to the distribution licensee and has quashed the said demand.

2. The appellant is the successor of the erstwhile Chhattisgarh State Electricity Board and has been constituted in terms of the Transfer Scheme after unbundling of the Electricity Board. The State

Commission is the first Respondent. M/s. ACB India Ltd. is the second respondent which has set up a Captive Power Plant and has also entered into a Power Purchase Agreement (“PPA”) with the distribution company for sale of surplus power produced by it.

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

(i) The respondent no. 2 has set up a 33 MW Captive Power Plant. The power generated by the respondent no. 2 was utilized for captive consumption and the surplus power was sold to the Electricity Board till 31.3.2009 and thereafter to the distribution company under the various PPAs. The power was injected by the Power Plant of the respondent no. 2 into 132 kV Korba-Bango transmission line of the transmission company by a solid tap.

(ii) During the year 2009-10, the respondent no. 2 sold 23 MW firm power to the distribution company through PPAs executed on 17.9.2009 for the period 1.4.2009 to 30.9.2009, dated 12.1.2010 for the period 1.10.2009 to 31.10.2009 and dated 27.1.2010 for the period 1.1.2010 to 31.3.2010. During this period, the transfer scheme, 2008 notified by the State Government was modified by the Transfer Scheme Rules, 2010. Under this scheme, the power purchased from captive power plants in the State was assigned to the appellant. In this way the power purchased and sold by the distribution company from the appointed date of 1.1.2009 was assigned by operation of law to the appellant and came to be accounted for in the books of accounts of the appellant notwithstanding that the same was purchased by the distribution company.

(iii) While the power was being supplied by the respondent no. 2 to the distribution company, an internal audit took place in the appellant company which raised an objection on account of excess payment having been made to the respondent no. 2 due to non consideration of transmission losses for the period 2009-10. In furtherance of the said audit objection, the appellant calculated the said excess payment made to the respondent no. 2 together with interest @ 1% per month for non-payment of dues after considering 5% transmission losses for that period. Accordingly, a demand note dated 23.4.2011 was issued by the appellant to the respondent no. 2 for recovery of the said excess amount. This demand was not accepted by the respondent no. 2.

(iv) Being aggrieved by the above demand, the respondent no. 2 filed a petition before the State Commission.

(v) The State Commission vide impugned order dated 12.7.2013, relying on its earlier order dated 14.12.2011, declined to accept the right of the appellant to raise the demand note towards transmission losses based on the internal audit as the appellant did not have any contractual relation with the respondent no. 2 during the relevant period.

(vi) Aggrieved by the impugned order dated 12.7.2013, the appellant has filed this appeal.

4. The appellant has made following submissions assailing the impugned order:

(a) Under the 2010 Transfer Scheme, the erstwhile Board has been unbundled into various

entities which are classified as Generating Undertaking, Transmission Undertaking, Distribution Undertaking and Trading Undertaking (the appellant herein) and Holding Undertaking. The appointed date for coming into force of the 2010 Scheme has been designated as 1.1.2009.

(b) While general provisions have been made in the 2010 Scheme for vesting of all contracts and agreements relating to power purchase in the Distribution Company and only the contracts relating to trading activities are vested in the Trading Company, a specific provision has been made in the Scheme with respect to purchase of power from captive power plants in the State wherein the Appellant has been designated as the trading representative on behalf of the State Government w.e.f. the appointed date i.e. 1.1.2009. This means that all contracts for

power purchase entered into with captive generating plants in the State including with Respondent No.2 after the coming into force of 2010 Scheme i.e. after 1.1.2009 have been deemed to be entered into by the Appellant as the Trading Company on behalf of the State Government. For this purpose, a provision has also been made in the Scheme for maintaining a separate account as provided in clause 7(h) as under:

“(h) The Trading Company, as an authorized representative of the State, shall be responsible for maintaining separate accounting records and bank accounts in respect of discharge of the abovementioned functions and duties in accordance with prudent accounting practices.”

(c) It is a settled principle of law of interpretation that special provisions prevail over the general provisions in a statute, which statute must be read as

a whole and in a manner that all provisions appearing therein are harmonized and given effect to. Any interpretation which renders a provision in a statute nugatory or without any effect, is necessarily to be rejected. That being so, the provisions in the 2010 Scheme vesting the power purchase rights in the Distribution Company and making the Appellant a representative of the State Government to purchase power from captive generating plants in the State w.e.f. 1.1.2009 are necessarily to be read harmoniously and in manner that effect is given to both.

(d) It is in the aforesaid manner that ownership of power being received by the Distribution Company from Respondent No.2 under the PPAs has passed on from the Distribution Company and vested with the State Government on and from 1.1.2009 deeming the State Government to be the recipient of power under

the PPAs executed with the Distribution Company on and from 2.2.2009. Thereafter, the PPAs executed with captive power generators in the State including from Respondent No.2 have been assigned from the State Government to the Appellant w.e.f. 1.1.2009. The Appointed Date of 1.1.2009 has created a situation imposed in law of deemed receipt of power under the said PPAs by the Appellant w.e.f. 1.1.2009 notwithstanding that such power has actually been supplied to the Distribution Company upto the notification of the Scheme on 31.3.2010. Thus, it is by operation of law that the right to receive power under the PPAs executed with the Distribution Company has come to vest in the Appellant w.e.f. 1.1.2009. Since the obligation to maintain separate accounting records in discharge of its assigned functions has been cast on the Appellant under the Scheme, the effect in books of

accounts for power purchase has been given from 1.1.2009 even when the functions of the Trading Company have commenced only w.e.f. 1.4.2010, power has been purchased by the Distribution Company and payment has been released by the Holding Company. Accordingly, the Appellant has come within its right to raise any demand on Respondent No.2 including towards transmission losses with respect to the power supplied by it under the PPAs executed with the Distribution Company. The State Commission has lost sight of the manner of operation of the Scheme which confers a locus in law on the Appellant to raise the impugned demand on Respondent No.2 and has erroneously held that there is no contractual relationship between the Respondent No.2 and the Appellant so as to entitle the Appellant to raise the impugned demand on Respondent No.2 and that the

Appellant has acted beyond its jurisdiction in that behalf.

(e) Under the Grid Code 2006, a generator is required to have connectivity through independent/dedicated feeder with EHV sub-station of the transmission licensee for the purpose of evacuation of power. The interface point is to be the out coming feeder of the transmission licensee's sub-station and the metering point is to be the incoming feeder gantry of the EHV Sub-station. Thus, as per the Grid Code, the line losses for the evacuation of power to a licensee are to be borne by the generator. Since as on 1.4.2009, when the PPAs have been executed, the connectivity of the respondent no. 2 has not been through dedicated EHV transmission line as required under the Grid Code, the respondent no. 2

has become liable to bear the transmission losses for evacuation of power upto the EHV sub-station of the Transmission Company. However, while making payment to the respondent no. 2 for supply of power to the Distribution Company, the said losses were not deducted erroneously.

(f) Thus, the findings of the State Commission are contrary to the Grid Code Regulations.

(g) The quantum of losses of 5% imposed by the appellant based on the average transmission losses of the State are reasonable.

(h) The State Commission has wrongly imposed litigation costs on the appellant despite no equities having existed in favour of the respondent no. 2 so as to entitle it to any litigation expenses for a litigation

initiated by it despite the express provisions of law in favour of the appellant.

(i) The State Commission could not have relied on its earlier order dated 14.12.2011 in which similar demand note was set aside by the State Commission. The appellant had challenged the order dated 14.12.2011 before this Tribunal in appeals, however, the said appeals were dismissed by the Tribunal on ground of delay and as such, no occasion arose for adjudication of the appeals on merits. The judgment dated 14.12.2011 has operated in personam and not a judgment in rem. A judgment in rem is one which declares, defines or otherwise determines the jural relation of a person or thing to the world generally. This law has been laid down by the Hon'ble Supreme Court in (1975) 3 SCC 351 and (2006) 1 SCC 212.

5. In reply to the contentions of the appellant, the respondent no. 2 has made the following submissions:

(a) The appellant had no legal right to raise the said demand for alleged transmission losses for the period 2009-10 as during that period the respondent no.2 was supplying electricity to the distribution company through validly executed PPA.

(b) The appellant is not a successor company of the distribution licensee, therefore, appellant is not authorized to raise the demand. No authority from the distribution company to recover the transmission losses from the respondent no. 2 was produced by the appellant.

(c) There is no vesting of PPAs with IPPs in the trading company as per the Transfer Scheme Rules, 2010.

(d) Clause 4.1.4 of the Grid Code provides that all the existing Captive Generating Plants shall have to ensure connectivity with the grid as per the prescribed options given under clause 4.1.2 and 4.1.3 i.e. through dedicated transmission lines, etc., failing which their connectivity shall be liable for disconnection from the grid. There is no provision of charging transmission losses.

(e) The State Commission had itself taken *suo motu* cognizance of non compliance of Clause 4.1.4 of the Grid Code against many generating companies including the respondent no.2 and had initiated penal action under section 142 of the Electricity Act, 2003

for such defaulting generators who did not arrange independent connectivity and continued to have tapped arrangement for evacuation of power through the transmission line of the transmission company beyond permitted date provided in the Grid Code. However, the State Commission by order dated 05.12.2011 took the view that since necessary actions were taken by the respective generating companies, it was not necessary to take action against them under Section 142 of the Act and hence the *suo motu* petition was dropped. The dedicated transmission line of the appellant is being executed by the State Utility as a deposit work.

(f) The claim for transmission losses is contrary to the PPA and clearly an afterthought. The PPA between the respondent no. 2 and the distribution licensee was approved by the State Commission and

did not have any provision for charging of transmission losses.

(g) Levy of transmission loss @ 5% is arbitrary. Such levy of transmission loss is erroneous as the respondent no. 2 was supplying electricity to the Distribution Licensee and not to any third party through open access.

(h) The case is covered by the judgment dated 14.12.2011 passed by the State Commission which has attained finality.

(i) The respondent no. 2 is similarly situated as other Generating Companies to whom the appellant has refunded money and accepted the judgment dated 14.12.2011 of the State Commission.

6. On the above issues we have heard Ms. Suparna Srivastava, learned counsel for the appellant and Mr. Abhinav Vasisth, Sr. Advocate representing the respondent no. 2.

7. After carefully considering the contentions of the rival parties, the following questions arise before this Tribunal for consideration:

(i) Whether the appellant has locus to demand and recover the transmission losses from the respondent no. 2 for the period 2009-10 during which the Power Purchase Agreement existed only between the respondent no. 2 and the Distribution Licensee, after conclusion of the PPA?

(ii) Whether the transmission loss on the transmission line from the bus bars of the generating station of the respondent no. 2 and the sub-station of the Transmission Company through which power is

evacuated and supplied to the distribution company is to be borne by the respondent no. 2?

(iii) If the respondent no. 2 is liable to bear the above transmission losses then whether the levy of 5% transmission loss is justified?

8. We shall deal with all the above issues together.

9. We find that the State Commission relying on its earlier order dated 14.12.2011 by which it had quashed the demand note raised by the appellant for transmission loss on some generating companies had held as under:

(a) Respondent has acted beyond its jurisdiction in asking petitioner for payment towards transmission loss for the year 2009-10.

(b) Respondent has incorrectly raised the demand on the petitioner for payment towards transmission loss, when there is no such provision in the PPA executed between petitioner and CSPDCL, the Distribution Company, for the period 2009-10. Further, 5% transmission loss which is applicable to open access customer has been considered for billing purposes, whereas generator actually supplied power to CSPDCL and has not availed open access to supply power to third party during this period.

(c) Respondent has taken action against petitioner on account of violation of clause 4.1.4 of grid code, whereas such action is within the competency of this Commission. The Commission had already initiated action under *suo motu* petition and the matter remained subjudice.

(d) Respondent has deprived the petitioner from natural justice by billing the transmission loss and interest thereon together, without giving them any opportunity to be heard.

10. We find that the State Government had notified Transfer Scheme Rules, 2008 on 19.12.2008 in exercise of the power conferred by Section 131 read with sub-section (1) & (2) of Section 133 of the Electricity Act, 2003. These rules were superseded by Transfer Scheme Rules, 2010 vide notification dated 31.3.2010. Let us now examine the Transfer Scheme Rules, 2010.

(a) As per clause 6 (a) of the Transfer Scheme 2010, from 1.1.2009 all interests, rights, liabilities and proceedings of the board as specified in the schedules I to V stand transferred to and vested in the State Government.

(b) Clause 6 (c) of the Transfer Scheme 2010 provides for retention of ownership of the power contracted through the distribution licensee from various IPPs and CPPs in the State as on the Appointed Date and thereafter. The Appointed Date is 1.1.2009.

(c) As per clause 7, the Undertakings forming part of Generating Undertaking, Transmission Undertaking, Distribution Undertaking, Trading Undertaking and Holding Undertaking as set out the respective schedules shall stand transferred to and vested to the respective companies.

(d) As per Schedule III Part I, the assets of the Distribution Undertaking includes all agreements and contracts with Central Power Sector Undertakings, IPPs and Captive Power Plants which shall vest in the Distribution Company.

(e) The functions and duties of the Distribution Company are defined under Part II and include execution of agreement for sale and purchase of power to or from other distribution companies, trading companies and other persons. The functions and duties also includes to tender and to finalize contracts for purchase of power from new generating stations including Independent Power Producers.

(f) The assets and liabilities of the Trading Undertaking include that belonging to the Electricity Board concerning the trading of electricity. These include contracts, agreements, interest and arrangements to the extent they are associated with or related to trading activities or to the Undertakings or assets referred to above including all agreements and contracts with Central Power Sector Undertakings (for

which no allocation of power is made by the Central Government for the State), other than contracts, agreements, interest and arrangements with Independent Power Producers and Captive Power Plants in the State.

Thus, the assets of the Trading Company exclude the agreements with the IPPs and Captive Power Plants in the State.

(g) The functions of the Trading Company includes the execution of agreements for sale or purchase of power to or from other distribution company and other persons.

(h) The functions of the Trading Company includes to invite tenders and finalise contracts for purchase of power from captive power plants and new generating plants being developed by IPPs w.e.f. the appointed date i.e. 1.1.2009. The trading company

has to carry out the business of purchasing, importing, exporting, trading, etc.

11. In terms of the above Scheme, the PPAs with IPPs and CPPs stand vested with the Distribution Company. The assets of the Trading Company (appellant) exclude the agreements with IPPs and CPPs in the State. The Distribution Company also has the function to tender and finalize contracts for purchase of power from new generating plants including IPPs. However, the Trading Company has been assigned function of inviting tenders and finalize contracts for purchase of power on behalf of the State Government and act as the Trading representative w.e.f. 1.1.2009.

12. Admittedly, the Power Purchase Agreement dated 12.1.2010 with the respondent no. 2 has been entered into directly by the Distribution Company. This

agreement was also approved by the State Commission. On that day there was no understanding or agreement between the Distribution Company and the appellant for procurement of power by the appellant on behalf of and for meeting the demand of the Distribution Company. The Transfer Scheme provides that the function of the Trading Company is to purchase power on behalf of the Distribution Company for meeting any shortfall of power on short term basis and for this purpose the Trading Company has to arrange for short term power purchase and also enter into bulk power sale agreement with the Distribution Company. Admittedly no such understanding or agreement was reached between the appellant and the Distribution Company during 2009-10 and the Distribution Company procured power on its own from the respondent no. 2. There is

no deeming provision under the Transfer Scheme, 2010 for all contracts for purchase entered into w.e.f. 1.1.2009 with CPPs including the respondent no. 2 to be deemed to be entered into by the appellant as Trading Company on behalf of the State Government. We also do not accept the contention of the appellant that clause (h) of the Part II (functions of the Trading Company) of the Transfer Scheme, 2010 regarding maintaining of a separate accounts by the Trading Company as an authorized representative of the State in respect of its functions is a specific provision which overrides the other general provisions of the Transfer Scheme and it would have an effect of deemed transfer of a PPA entered into between the respondent no. 2 and the distribution licensee from the distribution licensee to the appellant.

13. Accordingly, the issue of locus of the appellant to raise demand for transmission loss on the respondent no. 2 is decided against the appellant.

14. Let us examine the provisions of the PPA.

15. The PPA does not provide for any transmission loss on the transmission line evacuating power from the power plant of the respondent no. 2.

16. The rate of the energy supplied by the respondent no. 2 has been agreed to at Rs. 2.95 per unit for off peak at load factor of 80% and above and Rs. 2.95 per unit plus 5% incentive for peak power at load factor of 80% and above. For condition when load factor of the power plant is less than 80%, a formula linked to load factor has been specified for calculating the effective rate of energy.

17. Admittedly, the transmission arrangement for evacuation of power during 2009-10 was through a solid tee connection on the 132 kV transmission line of the Transmission Company. The supply of energy under the arrangement as existing then has to be metered at the generating station end only for computing the Load Factor. If some transmission loss on the transmission line has to be accounted for in computing the Load Factor then there has to be a specific provision for the same in the formula given in the PPA. No such provision for transmission loss has been made in the PPA.

18. The Distribution Company had been making payment to the respondent no. 2 on the basis of meter reading at the power plant end. Therefore, there was clear understanding between the parties about the metering and billing and payment in terms of the PPA.

21. Admittedly, the Grid Code was also binding on the respondent no. 2. The Grid Code provides as under:

“4.1.2 *All the new generating stations including captive generating plants (CGP) having injection and / or drawal requirements of more than 15 MVA shall have connectivity with the grid under either of the following modes, at their own cost, subject to technical feasibility :-*

(i) At nearest EHV sub-station through dedicated EHV transmission line.

(ii) At pooled / switching / load catering / step up EHV sub-station with dedicated EHV transmission line.

(iii) At nearest EHV sub-station through a common pooled EHV transmission line with individual connectivity to this line under Gas Insulated Substation (GIS) control and metering system. This mode shall, however, be available only to such

generating station / CGP which has injection and / or drawal requirement of not more than 35 MVA.”

*“4.1.4 All the existing generators including CGPs connected with the grid under any modes other than prescribed at Clause 4.1.2 and 4.1.3 shall have to ensure connectivity with the grid as per prescribed options given in Clause 4.1.2 / 4.1.3 latest by **31.03.2009** failing which their connectivity shall be liable for disconnection from the grid.*

Provided that this time limit may be relaxed by the Commission in suitable cases where the Commission is satisfied that there are sufficient grounds for such relaxation”.

22. Thus, for new power plants of more than 15 MVA, the generating company has to provide the connectivity at its own cost through a dedicated transmission line at the nearest EHV sub-station of the transmission company. However, the existing

Captive power Plants, who are connected by any other mode have to ensure connectivity with the grid as per the prescribed option under clause 4.1.2 latest by 31.3.2009, failing which the generator may be disconnected from the grid. The State Commission can relax the time limit in suitable cases. However, there is no provision for charging of transmission loss from the existing CPPs till it completes the dedicated evacuation arrangements as per the Grid Code.

23. Admittedly, the State Commission had initiated the *suo motu* proceedings against the generating companies including the respondent no. 2, u/s 142 of the Act for failure to construct dedicated line for evacuation of power as per the Grid Code within the stipulated period. However, after hearing the parties, these proceedings were dropped by the State Commission's order dated 5.12.2011.

24. The PPA entered into between the respondent no. 2 and the appellant was agreed to at a rate of power supply with understanding of metering at the power plant end without any consequence of transmission loss. The recovery of transmission loss could not have been brought in at a later date after the agreement was completed, by the back door by a provision of the Grid Code which only gives a time schedule to the existing CPPs for constructing dedicated transmission line and completing the stipulated arrangement within a specified time.

25. We find that the State Commission in similar cases had earlier set aside the demand not raised by the appellant on other CPPs by order dated 14.12.2011. We do not find any infirmity in State Commission's impugned order relying on its findings

in the earlier order dated 14.12.2013 which are perfectly as per law.

26. In view of above, the second question is also answered in negative against the appellant.

27. We also find that the quantum of transmission loss recovered by the appellant from the respondent no. 2 is also arbitrary. The average loss of the entire transmission system cannot be adopted as the loss for a line interconnecting the power plant with the sub-station at 132 kV level. Since we have already decided that transmission loss is not to be recovered from the respondent no. 2, we do not want to deliberate on this issue any further.

28. The Appellant has also raised the issue of cost imposed by the State Commission. We feel that imposition of cost is the judicial discretion of the State Commission and in a case where the State

Commission feels that a party needs to bear the cost, it can levy such cost on the party. However, such imposition of cost should not be arbitrary. In this case the State Commission felt that the appellant Trading Company had acted frivolously beyond its jurisdiction without application of mind only on observation of audit and deprived the respondent no. 2 from natural justice which resulted in the respondent no. 2 filing the petition. The State Commission has directed appellant to pay legal expenses to the respondent no. 2 as per the actual limited to Government schedule. We do not intend to interfere with the same.

29. Summary of our findings

- i) After considering the provisions of the transfer scheme and the Power Purchase Agreement we have come to the conclusion that the Appellant does not have the locus to demand and recover

the transmission losses from the Respondent no.2 for the period 2009-10 during which the Power Purchase Agreement existed only between the Respondent no. 2 and the Distribution Licensee. The Respondent no.2 is not liable to bear the transmission loss on the transmission line interconnecting the power plant of the Respondent no.2 with the sub-station of the transmission company.

30. In view of above, the Appeal is dismissed and the impugned order of the State Commission is confirmed.

No order as to costs.

31. Pronounced in the open court on the

7th day of August, 2014.

(Justice Surendra Kumar)
Judicial Member

(Rakesh Nath)
Technical Member

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REPORTABLE/NON-REPORTABLE

Vs