

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

Appeal No. 256 of 2012

Dated: 1st October, 2014

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

In the matter of:

**M/s. Nava Bharat Ventures Limited
Khadagaprasad, Near Meramundali
Railway Station
District: Dhenkanal – 759 121, Odisha**

....Appellant(s)

Versus

**1. Odisha Electricity Regulatory
Commission
Bidyut Niyamak Bhawan, Unit VIII
Bhubaneswar – 751 012**

....Respondent(s)

**2. GRIDCO Limited
Janpath, Bhubaneswar – 751 022
District – Khurda, Odisha**

Counsel for the Appellant (s): **Mr. Ashok K. Parija, Sr. Adv.
Mr. R.M. Patnaik
Mr. P.P. Mohanty
Mr. Dhananjay Mishra
Mr. Raj Bhushan Shinde
Mr. B.K. Patra**

Counsel for the Respondents (s):Mr. Rutwik Panda for R-1
Mr. R.K. Mehta
Mr. Elangbam P.S.
Mr. Antaryami Upadhyay
Mr. R.R. Pathak
Ms. Ishita Das Gupta for R-2

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

This Appeal has been filed by Nava Bharat Ventures Limited challenging the order dated 01.10.2012 passed by Odisha Electricity Regulatory Commission (“State Commission”) in case no. 86 of 2011.

2. The State Commission is the Respondent no.1, GRIDCO Limited which procures powers from the Appellant for supply to the distribution licensees is the Respondent no. 2.
3. The facts of the case are as under:-

3.1 The Appellant is a public limited company registered under the Companies Act 1956. It has established a Ferro Alloy unit in the State of Odisha. The Appellant has also set up two Captive Generating Plants comprising one unit of 30 MW and another unit of 64 MW within its plant premises. The Appellant is also a member of Confederation of Captive Power Plants, Orissa. Confederation of Captive Power Plants, hereinafter referred to as "CCPPO", represents the members to put forth grievances and difficulties faced by the Captive Generating Plants in the State before various Forums. The Appellant is also a member of CCPPO.

3.2 In case no. 86 of 2011 in which the impugned order has been passed by the State Commission, CCPPO was representing all Captive Generating Plants before the State Commission. The Appellant also impleaded itself in the proceedings and made its individual submissions in addition to those being made by CCPPO.

3.3 The State Commission through a consultative process followed by public hearing issued a policy of harnessing of surplus power from Captive Generating Plants vide order dated 14.03.2008 in case no. 72 of 2007.

3.4 In the year 2009 there was an acute power shortage in the State and pursuant to the order of the State Commission dated 14.3.2008, GRIDCO, the Respondent no.2 herein, filed number of applications before the State Commission for procurement of surplus power from the various Captive Generating Plants to meet the demand of the State. The said applications were registered as case no. 6 of 2009 to 20 of 2009 wherein case No. 19 of 2009 relates to the present Appellant.

3.5 The State Commission by an interim order dated 28.02.2009 determined the price for the energy supplied by the Captive

Generating Plants/Co-generation Plants to GRIDCO with effect from 01.03.2009.

3.6 Being aggrieved by the aforesaid order of the State Commission dated 28.02.2009, GRIDCO (Respondent no.2) filed a Review Petition which was registered as case no. 59 of 2009. The State Commission disposed of the Review Petition by order dated 27.06.2009 stating that the Commission has not stipulated any guidelines for payment security mechanism in the interim order dated 28.02.2009. However it directed a rebate of 2% to be allowed to GRIDCO by captive generating plants if the payment is made within four working days of raising the bills and 1% rebate if the payment is made within a period of 30 days. However, in case payment of bills by GRIDCO is delayed beyond a period of 30 days from the date of presentation of the bill, a late payment surcharge at the rate 1.25% per month shall be

levied by Captive Generating Plants on the unpaid amount from the date of presentation of the bill.

3.7 On 03.07.2010, GRIDCO filed a Petition before the State Commission with a prayer to reduce the price/rate of procurement of surplus power from the Captive Generating Plants/Co-generation Plants. On 23.11.2010, the State Commission disposed of the said Petition being case no 117 of 2010. The State Commission accepted the GRIDCO's contention that any power injected by captive generating plants/co-generation plants to the State grid at frequency of 50.20 Hertz and above shall be priced at zero cost as it was expected that the captive generator would back down the generation up to the captive consumption at higher frequency at 50.20 Hz and above. The State Commission also determined the price of supply up to 7.3 MU per month and the price for supply of incremental energy above 7.3 MU per month and also price for inadvertent power/infirm power

injected by Captive/Co-generation Plant within frequency band of 49.5 Hz to 50.18 Hz. The revised tariff was made applicable with effect from 10.11.2010 upto 31.03.2011. Accordingly, case no. 117 of 2010 was disposed of by order dated 23.11.2010.

3.8 Being aggrieved by non-implementation of the order dated 23.11.2010 passed by the State Commission in case no. 117 of 2010, CCPPO filed a Petition Application before the State Commission under Section 142 of the Electricity Act, 2003 in case no. 22 of 2011.

3.9 On 29.08.2011, the State Commission disposed of case no. 22 of 2011. The State Commission in this order gave directions regarding rate applicable for non-firm/infirm power and inadvertent power injected by the Captive Generating Plants and Co-generation Plants. On the issue of non-payment of the delayed payment surcharge by GRIDCO to

Captive Generating Plants/Co-generation Plant, the State Commission directed that if all the outstanding dues are paid by GRIDCO up to the month of August 2011 within 31.10.2011 then these Captive Generating Plants/Co-Generation Plants should forgo the Delayed Payment Surcharge ('DPS') as one time settlement. However, in respect of payment of current bills starting from the month of September, 2011 onwards the rebate and DPS as approved by the State Commission by order dated 27.06.2009 in case no. 59 of 2009 should be strictly enforced.

3.10. GRIDCO without complying the aforesaid order of the State Commission, on 27.10.2011, filed a Petition before the State Commission under Section 94(f) of the Act 2003 read with Regulation 70 of State Commission's Conduct of Business Regulations 2004 for Review of order dated 29.08.2011 passed in case no. 22 of 2011 and the said case was registered in case no. 86 of 2011. On 14.11.2011, the State

Commission passed interim order further extending the time period allowed to GRIDCO for payment of outstanding dues of Captive Generating Plants upto 31.01.2012 without payment of Delayed Payment Surcharge.

3.11 On 01.10.2012, the State Commission passed the impugned order in case no. 86 of 2011 directing the Captive Generating Plants/Co-generation Plants to forego the DPS charges upto 31.03.2012 and further relaxing the payment period. Aggrieved by the impugned order dated 01.10.2012, the Appellant has filed the present Appeal.

4. The Appellant has made the following submissions:-

4.1 The State Commission has erred in exercising the Review jurisdiction in case no. 86 of 2011 and granting waiver of Delayed Payment Surcharge and extension of time for payment by GRIDCO to CGPs. The State Commission has exercised Review jurisdiction in absence of mistake or error

apparent on the face of record, discovery of new important matter or evidence which was not within the knowledge or could have been produced at the time of passing of original order.

4.2 The State Commission has wrongly exercised Review jurisdiction in the present case on the basis of sympathetic considerations in view of financial hardship faced by the GRIDCO.

4.3 The State Commission's repeated waiver of Delayed Payment Surcharge and extension of time for payment amount to breach of the '*actus curiae neminem gravabit*', that is, an act of Court shall prejudice no one which is well accepted by the Hon'ble Supreme Court. The Appellant is prejudiced on account of State Commission's repeated waiver of Delayed Payment Surcharge and extension of time for payment.

4.4 The waiver of Delayed Payment Surcharge cannot be justified on the basis of exercise of “inherent power of the State Commission”.

4.5 The order in case no. 22 of 2011 amounts to the State Commission going into the merits of the case in a contempt proceeding which is not permissible. Case no. 22 of 2011 was initiated by the CCPPO on the basis of the Petition under Section 142 of the Electricity Act for implementation of the directions issued by the State Commission on 23.11.2010 in case no. 117 of 2010. It is a settled law that in a contempt proceeding the correctness or wrongness of the original error is not to be looked into again nor any fresh directions passed. Therefore, the State Commission has erred in waiving Delayed Payment Surcharge in case no. 22 of 2011.

4.6. Repeated agitation of the same issue is not permissible. The issue of fixation of tariff determined in the first case nos. 6-20 of 2009 was finalized by the State Commission in case no. 59 of 2009 on a review filed by GRIDCO. Reagitation of the same issue after the order dated 27.06.2009 in Review Petition in case no. 59 of 2009, is not permissible.

4.7 The Delayed Payment Surcharge is in the nature of interest for late payment of outstanding dues, the same is liable to be paid by GRIDCO as GRIDCO had failed to pay the energy charges to the Appellant within a period of 30 days from the date of presentation of bill. The State Commission without appreciating such facts has waived the payment of DPS by GRIDCO to the Appellant.

4.8 GRIDCO has had also wrongly claimed rebate *suo motu* from the bills of the Appellant without paying the outstanding

dues within a period of 30 days for the date of presentation of bill in contravention to the directions of the State Commission in order dated 27.06.2009. The State Commission in the impugned order did not take into consideration the submissions filed by the Appellant in this regard.

4.9 The State Commission in its order no. 23.11.2010 in case no. 117 of 2010 had decided that the revised price of supply of incremental energy above 7.3 MU/month with effect from 10.11.2010. Hence the Appellant is entitled to get the rate for incremental energy fixed by the State Commission from time to time.

5. GRIDCO in reply to the above contentions of the Appellant has submitted as under:

- 5.1 The Appellant has not challenged any of the earlier orders of the State Commission either on merits or with regard to extension of time. The challenge in the present Appeal is thus confined on the ground of extension of time without DPS under the impugned order.
- 5.2 After the order dated 14.11.2011, GRIDCO attempted to carry out the reconciliation for the period from 01.03.2009 to 31.08.2011 with the CGPs. GRIDCO also convened a meeting on 14.02.2012 with CGPs including the Appellant.
- 5.3 The State Commission by the impugned order dated 01.10.2012 has clarified the confusion regarding the concept of treatment of injection by CGPs as 'Free Power' and directed GRIDCO to clear the outstanding dues of CGPs upto 31.03.2012 by 15.11.2012.

5.4 The present case arises out of the exercise of regulatory jurisdiction of the Commission. The regulatory powers of the State Commission extend beyond purely legal approach which is applicable to civil disputes. The regulatory jurisdiction of the Commission cannot be put in a straight jacket formula. The Commission has to ensure that power supply in the State is maintained. By the very nature of its functions, the State Commission has to be alive to the ground realities of power situation prevailing in the State. The State Commission has to evolve methodologies for grant of relief in a given situation and mould its order accordingly.

5.5 The extension of time with or without DPS does not strictly fall within the realm of review. Such power of extension of time is exercised by the Courts in given circumstances.

5.6 The State Commission has to balance the interest of various stakeholders, namely, the CGPs, Distribution Companies, consumer and GRIDCO. The power of extension of time has, therefore, to be conceded to the State Commission as a part of its regulatory jurisdiction.

5.7 Although, some of the applications of GRIDCO for extension of time may have been nomenclatured as Review petition, in substance, the said applications were not mere applications for extension of time. In the said applications, GRIDCO also prayed for various classification/modifications from time to time. It is a settled law that the nomenclature is not important and the substance of the matter has to be seen. Relief granted can be sustained if it could be granted under some provision other than the provision under which it was claimed.

- 5.8 The question of Delayed Payment Surcharge arises only after the amount payable becomes 'ascertained amount'. The liability for payment of DPS cannot arise as long as the amount is an 'unascertained' or 'unascertainable' sum.
- 5.9 In the present case, the amount became ascertainable only after the impugned order dated 01.10.2012 by which the last clarification regarding free power was issued by the State Commission.
- 5.10 The Captive Generating Plants have been granted several facilities and concessions under the Industrial Policy Resolutions of the State Government. Thus, in lieu of these concessions, the CGPs should forgo their DPS claim.

6. On the above issues we have heard Mr. Ashok K. Parija, Learned Senior Counsel for the Appellant, Shri R.K. Mehta, Learned Counsel for GRIDCO (Respondent no.1) and Mr. Rutwik Panda, Learned Counsel for the State Commission. On the basis of the rival contentions of the parties, the following questions would arise for our consideration:

- i) **Whether the State Commission erred in allowing the Review Petition of GRIDCO in the absence of any apparent error or mistake in the order dated 29.08.2011 passed in case no. 22 of 2011?**
- ii) **Whether the State Commission has erred in allowing the Review Petition of GRIDCO for grant of additional time for payment of outstanding dues without payment of Delayed Payment Surcharge on the ground of financial constraints being faced by GRIDCO?**

- iii) Whether the State Commission has erred in extending time to settle outstanding dues of Appellant upto 31.01.2012 without levy of Delayed Payment Surcharge in the interim order dated 14.11.2011 during the proceedings in case no. 86 of 2011?**
 - iv) Whether the State Commission has erred in directing the Appellant to forego the Delayed Payment Surcharge upto 31.03.2012 and deciding that only if GRIDCO failed to pay outstanding dues of the Appellant as on 31.03.2012 latest by 15.11.2012, GRIDCO has to pay the Delayed Payment Surcharge on the unpaid amount at the applicable rate?**
 - v) Whether GRIDCO is entitled to rebate on bills raised by the Appellant without paying the dues of the Appellant within a period of thirty days from the date of presentation of the respective bill?**
7. All the above issues are interconnected. Hence, we shall be dealing with them together.

8. Before examining the issues, let us refer to the background of the case.

9. The State Commission in the *suo motu* proceeding in case no. 72 of 2007 in order to give effect to the policy of the State Government for “Harnessing the surplus power from Captive Generating Plants”, passed an order dated 14.03.2008 laying down concept of “Firm Power, ‘Non-firm Power’ and ‘Inadvertent Power’ in respect of surplus power supplies from CGPs. However, no rate was fixed in the said order.

10. GRIDCO filed Petitions before the State Commission numbered as case no. 6 of 2009 to 20 of 2009 praying for fixation of tariff for purchase of surplus power from the various CGPs. The State Commission by an interim order dated 28.02.2009 for supply of firm power fixed a rate of Rs. 3 per kWh for general CGPs and Rs. 3.10 per kWh for CGPs

having co-generation facility with effect from 01.03.2009. Accordingly, GRIDCO started procuring power for CGPs in accordance with the order dated 28.02.2009. The firm power was considered as the power scheduled on a day ahead basis. Power which is injected without a day ahead schedule was considered the inadvertent power and the rate of such inadvertent power was decided as equal to the pooled cost of hydro power in the State with effect from 01.03.2009. It was decided that the arrangements would be reviewed after 30.06.2009.

11. On 27.06.2009 the State Commission in the Petition filed by GRIDCO passed an order in case no. 59 of 2009 reviewing its order dated 28.02.2009 in case no. 6 of 2009. The decisions in the Review order dated 27.06.2009 relevant to the present case are:

- i) Considering the constraints under which both GRIDCO and CCPPO are operating Commission directs that a rebate of 2% would be allowed to GRIDCO by CCPPOs if the payment is made within four working days (except holidays under NI Act) of raising bills and 1% rebate would be allowed if the payment is made within a period of 30 days (counted from the date of presentation of bill). In case payment of bills by the GRIDCO is delayed beyond a period of 30 days from the date of presentation of bill, a late payment surcharge @ 1.25% per month shall be levied by CGPs on the unpaid amount from the date of presentation of bills.
- ii) Nav Bharat Venture is entitled to a payment of Rs. 3.00/kWH in respect of power supply to GRIDCO after meeting its committed supply to M/s. Tata Power.
- iii) All industries generating power by waste heat process meets the qualifying requirement of co-generation facility and are

entitled to a price of Rs. 3.10/kWh in respect of supply to GRIDCO.

12. On 28.10.2009, the State Commission after reviewing the arrangements of procurement of power from CGPs by GRIDCO and after hearing the parties issued the order in respect of pricing of surplus power from the CGPs. In view of deficit situation prevailing in the State, the State Commission felt it necessary to incentivize the CGPs through utilisation of their capacity so as to ensure supply of surplus power to the grid. Accordingly slab rates of Rs. 3.10/kWh, Rs. 3.40/kWh, Rs.3.70/kWh and Rs.4.05/kWh were introduced for supply upto 3.6 MU/month, for incremental supply from 3.6 MU/month upto 36 MU/month, for supply of incremental energy above 36 MU/month upto 72 MU/month and for supply of incremental energy above 72 MU/month respectively from CGPs. In case of CGPs having co-generation facilities the first slab was to be Rs. 3.20/kWh

and next slabs were the same as that of other CGPs. These rates were made effective from 01.11.2009.

13. Thereafter GRIDCO filed a Petition before the State Commission for reduction of tariff registered as case no. 117 of 2010. A CGP also filed a Petition for increase in tariff (case no. 118 of 2010). The State Commission by order dated 23.11.2010 disposed of the Petition nos. 117 and 118 of 2010. The State Commission introduced two sets of slab rates one for CGPs intending to supply 100% surplus power and another for CGPs wanting to sell 40% of their surplus power through open access and balance 60% to GRIDCO. The revised tariff was made applicable from 10.11.2011.

14. CCPPO filed a petition under Section 142 of the Electricity Act for non-compliance by GRIDCO of order dated 23.11.2010 passed in case nos. 117 and 118 of 2010. The State Commission by order dated 29.08.2011 issued

clarifications in respect of pricing of surplus power. The State Commission also ordered for one time settlement towards payment of arrears due to CGPs by GRIDCO without levy of any DPS if dues of CGPs upto August 2011 were cleared by GRIDCO within 31.10.2011. However, the State Commission decided that in respect of payment of current bills starting from September 2011 onwards the rebate and Delayed payment Surcharge as approved by the State Commission by order dated 27.06.2009 in case no. 59 of 2009 should be strictly enforced.

15. GRIDCO filed a Petition for Review of order dated 29.08.2011 for extension of time for payment of outstanding dues by 3 months which was registered as case no. 86 of 2011. While issuing notice to the other party, the State Commission passed interim order dated 14.11.2011 allowing the extension of time by 3 months. Thus, time granted in order dated 29.08.2011 for payment of bills upto end of

August 2011 till 31.10.2011 was extended to 31.01.2012. Thereafter by the impugned order dated 01.10.2012 in case no. 86 of 2011, the State Commission directed the CGPs to forego DPS charges for their dues upto 31.03.2012 and allowed further relaxation in time for payment of outstanding dues by GRIDCO to CGPs.

16. Let us examine the impugned order dated 01.10.2012.

17. The impugned order dated 01.10.2012 was passed in the Petition filed by GRIDCO with a prayer to Review the order dated 29.08.2011 of the State Commission in case no. 22 of 2011 wherein the State Commission had directed that if all outstanding dues of CGPs upto the month of August 2011 are paid by GRIDCO within 31.10.2011 as per the rate fixed by the Commission from time to time, then GRIDCO would be exempted from paying Delayed Payment Surcharge to Captive Generating Plants. Through this Petition, GRIDCO

had sought further extension of time for payment of outstanding dues without levy of DPS. The State Commission by an interim order allowed the prayer to allow three more months to clear the outstanding dues of CGPs without levy of DPS and directed GRIDCO to pay the arrears of CGPs on or before 31.01.2012. GRIDCO again sought extension for last date of settlement of dues from 31.01.2012 to 31.03.2012 for the power availed by them from 01.03.2009 to 30.11.2011 without payment of DPS as they were facing financial constraints. This was opposed by the CCPPO stating that the extension of date would invite enormous financial hardship for them arising out of escalating cost of fuel and accumulation of interest on loan incurred by them.

18. Finally the State Commission passed the following order on 01.10.2012.

“The Commission is very much aware of the problems of both GRIDCO & CGPs. Taking into account the difficulties of both GRIDCO & CGPs, the Commission directs GRIDCO to reconcile energy transactions of all the CGPs within one month time as per the above clarification on zero cost power and also the clarification made in the order dated 29.08.2011 in Case No. 22 of 2011 and pay their outstanding dues within 15 days thereafter as per the price fixed by the Commission in its order dated 23.11.2010 in Case No. 117 & 118 of 2010. The existence of CGP and GRIDCO are symbiotic in nature i.e. one is dependent on other. Therefore, the Commission directs that considering the current financial position of GRIDCO, the CGPs/Co-generation Plants would forego the DPS charges for their dues up to 31.03.2012. If GRIDCO fails to pay the outstanding dues of CGPs as on 31.03.2012 latest by 15.11.2012, GRIDCO has to pay the DPS on the unpaid amount at the applicable rate. No further request for extension of time to GRIDCO for payment of CGP dues will be entertained. It is needless to mention here that, in case of any default on current bills i.e. on the bills from the month of April, 2012 onwards, GRIDCO should pay the DPS to the CGPs on the unpaid amount as applicable.”

19. Thus, the State Commission considering the financial position of GRIDCO, directed the CGPs to forego the DPS charges for their outstanding dues as on 31.03.2012. The State Commission further allowed GRIDCO to make

payment latest by 15.11.2012 and if payment is not made by 15.11.2012, then GRIDCO has to pay the DPS on the unpaid amount.

20. We find that the State Commission in the impugned order has exercised its Review jurisdiction under Section 94(f) of the Electricity Act, 2003 in granting waiver of DPS and extension of time for payment of outstanding dues of CGPs by GRIDCO further to that allowed in its order dated 29.08.2011. As per order 47, Rule 1 of the CPC, the review jurisdiction can be exercised on the ground of (a) mistake or error apparent on the face of the record (b) discovery of new and important matter or evidence which was not within the knowledge or could not have been produced at the time of passing the main order (c) any other sufficient cause.

21. In the present case there was no mistake or error apparent on the face of the record and there was no discovery of new and important matter or evidence.

22. As held by Hon'ble Supreme Court in *Ajit Kumar Rath v State of Orissa* (1999) 9 SCC 596, the expression "any other sufficient reason" used in order 47 Rule 1 means a reason sufficiently analogous to those specified in the rule. The State Commission has exercised the Review jurisdiction considering the plea of GRIDCO that they were facing financial problem. This cannot be a reason for Review of the order, as financial difficulty in making payment will not fall within the grounds on which review can be allowed. This reason will also not be covered under "any other sufficient reason". The power to Review is not absolute and is hedged in by the restrictions indicated in order 47.

23. The State Commission in the impugned order has noted the problems of CGPs also but strangely without considering the submissions of CGPs that they were facing enormous financial hardship due to rising cost of fuel and accumulation of interest on loan incurred by them due to long outstanding dues of GRIDCO, reviewed its earlier order dated 29.08.2011 and passed one sided order waiving the DPS charges and further extending the time for payment of outstanding dues, without any jurisdiction.

24. We find that the State Commission has been extending the time period of payment of outstanding dues without payment of DPS and without considering the difficulties of CGPs which have incurred fuel cost and other expenses to supply electricity to GRIDCO in the period when the State was facing power shortage. When the dues are not paid to CGPs they have to arrange loans to procure fuel and meet other expenses to sustain their operations and continue power

supply. The Delayed Payment Surcharge is nothing but interest on the moneys due to the CGPs. When payment is delayed beyond 30 days from the date of billing, the interest becomes due to the CGP as per the order of the State Commission dated 27.06.2009.

25. Hon'ble Supreme Court in Gursharan Singh & Ors Vs. NDMC (1996) 2 SCC 495 has held that in view of legal maxim "*actus curiae neminem gravabit*" which means that act of Court shall prejudice no man, NDMC was justified in making a claim for interest over arrears that had remained unpaid for years because of the interim orders passed by the Court.

26. Delayed Payment Surcharge is in the nature of interest and the same is entitled to be charged, else the same would amount to a breach of principle of '*actus curiae neminem gravabit*' as held by Calcutta High Court in Tapan Kumar

Sinha Vs West Bengal Electricity Board & Ors. (1997)2
CalLT71.

27. Regulation 76(1) of the Conduct of Business Regulations, 2004 grants inherent power to the State Commission. However, these powers cannot be exercised in the present case. This provision is *pari materia* to Section 151 of the CPC. In Padam Sen Vs. State of UP, AIR 1961 SC 218, the Hon'ble Supreme Court held that power under Section 151 of the CPC are limited to the extent that they cannot be exercised in a manner that the same is in conflict with statute. The fixation of tariff and amount of DPS/rebate for early payment is a statutory exercise carried out by the State Commission. Therefore, the State Commission was not empowered to waive the DPS which was decided by the State Commission itself.

28. Mr. Mehta, Learned Counsel for the GRIDCO has argued that the State Commission has exercised its regulatory jurisdiction in waiving the DPS and extending the time for payment. According to him the nomenclature of their Petition as Review Petition is not important and the substance of the matter has to be seen. Even though such a claim has not been made by Learned Counsel for the State Commission or find place in the impugned order, let us deal with it now.

29. The State Commission under Section 61 of the Electricity Act in specifying the terms and conditions for determining the tariff has to safeguard the consumer's interest and at the same time ensure recovery of cost of electricity in a reasonable manner and follow commercial principles. The State Commission has to balance the interests of the consumer as also the commercial interests of the generators to ensure recovery of the prudent expenditure incurred by them. In the present case the State Commission has not

balanced the interests of the consumers and the generators. The State Commission has waived the DPS due to the CGPs in contravention to its own order dated 27.06.2009 specifying the terms and conditions of supply of power by CGPs to GRIDCO and caused a prejudice to the CGPs by its action in denying the moneys due to them.

30. According to Shri Mehta, Learned Counsel for GRIDCO, the payment of DPS arises only after the amount payable becomes ascertained amount and the liability of DPS cannot arise so long the amount is an 'unascertained' or 'unascertainable' sum.

31. This is a new issue being raised by GRIDCO at the Appellate stage which is not permissible. GRIDCO had approached the State Commission to extend the time for payment of outstanding dues without DPS due to financial constraints and not due to any other reasons. However, in

the impugned order the State Commission has dealt with two issues over which GRIDCO and CGPs differed causing difficulty in reconciliation of outstanding dues. These two issues were treatment of “Must Run” status of CGPs as per order dated 23.11.2010 and applicability of “Zero Cost Power” of CGP as per the same order. The State Commission with impugned order has simply reproduced the relevant portion of the order dated 23.11.2010 on these two issues and has reiterated its earlier findings.

32. We find that there was no ambiguity in the order dated 23.11.2010 on the issue of ‘Must Run Status of CGPs’ and applicability of zero cost power. The order of the State Commission dated 23.11.2010 was quite clear. We feel that GRIDCO has without any reason raised a controversy and consequently disputed the bills raised by CGPs. The conduct of GRIDCO is also in question as they have not paid the full amount that was due to the Appellant and other CGPs as

per their own calculation. We, therefore, reject the contention of Mr. Mehta, Learned Counsel for GRIDCO justifying non-payment of outstanding dues of CGPs due to reconciliation of dues.

33. Shri Parija, Learned Senior Counsel for the Appellant has submitted that GRIDCO has claimed rebate from the bills even though the amount has not been paid within 30 days of presentation of the bills.

34. We feel that GRIDCO is not entitled to claim rebate if the payment is made after 30 days of presentation of bill. As per order dated 27.06.2009 passed by the State Commission in case no. 59 of 2009, GRIDCO is entitled to a rebate of 2% if the payment is made within four working days of raising bills and 1% rebate if payment is made within a period of 30 days from the date of presentation of bill. Therefore, GRIDCO

cannot claim rebate if the payment against a bills is made beyond 30 days from the date of presentation of the bill.

35. In view of above discussion, we set aside the impugned order dated 01.10.2012 passed by the State Commission. Accordingly, the Appellant is entitled to Delayed Payment Surcharge at the rate 1.25% per month on the unpaid amount as on 01.11.2011 against the energy bills upto the month of August 2011 from the date of presentation of bills raised at the tariff decided by the State Commission from time to time. In respect of the bills for September 2011 onwards, the Delayed Payment Surcharge at the rate of 1.25% per month would be applicable as per the order of the State Commission dated 27.06.2009, i.e. DPS to be charged from the date of presentation of bill if a bill has not been cleared within 30 days of presentation of the bill raised at the tariff decided by the State Commission from time to

time. This judgment will also be applicable similarly placed CGPs/Co-generation Plants.

36. Summary of our findings

- i) The State Commission in the impugned order has exercised the Review jurisdiction considering the financial problem of GRIDCO. This cannot be a ground for review of the order as it would not fall within the ground on which Review can be allowed as per order 47, Rule 1 of CPC. Delayed Payment Surcharge is in the nature of interest and the same is entitled to be charged by the Captive Generating Plants/Co-generation Plants.**
- ii) The State Commission also cannot exercise inherent power under Regulation 76(1) of the Conduct of Business Regulations 2004 in the present case to waive DPS and extend time for payment of outstanding dues without payment of DPS.**

- iii) The State Commission under Section 61 of the Electricity Act in specifying the terms and conditions for determining the tariff has to safeguard the consumer's interest and at the same time ensure recovery of cost of electricity in reasonable manner and also follow commercial principles. The State Commission has to balance the interest of the consumers as also the commercial interest of the generators to ensure recovery of the prudent expenditure incurred by them. In the present case the State Commission has not balanced the interest of the consumers and the Captive Generating Plants. The State Commission has waived the DPS due to CGPs in contravention to its own order dated 27.06.2009 and without any jurisdiction causing prejudice to the CGPs by its action in denying the moneys due to them.**
- iv) GRIDCO is not entitled to claim rebate if the payment is made after 30 days of presentation of bill. As per order**

dated 27.06.2009 passed by the State Commission in case no. 59 of 2009, GRIDCO is entitled to a rebate of 2% if the payment is made within four working days of raising bill and 1% rebate if payment is made within a period of 30 days from the date of presentation of bill. Therefore, GRIDCO cannot claim rebate if the payment against a bills is made beyond 30 days from the date of presentation of the bill.

- v) The Appellant is entitled to Delayed Payment Surcharge at the rate of 1.25% per month on the unpaid amount as on 01.11.2011 against the energy bills upto the month of August 2011 from the date of presentation of the bills raised at the tariff decided by the State Commission from time to time. In respect of the bills for September 2011 onwards, the Delayed Payment Surcharge at the rate of 1.25% per month would be applicable as per the order of the State Commission dated 27.06.2009, i.e. DPS to be charged if a bill has not been cleared within**

30 days of presentation of the bill raised at the tariff decided by the State Commission from time to time from the date of presentation of the bill. This judgment will also be applicable to similarly placed CGPs/Co-generation Plants.

37. In view of our above findings, the Appeal is allowed. The impugned order is set aside. GRIDCO is directed to make payment of arrears along with Delayed Payment Surcharge to the Appellant as per the directions given in this judgment within 30 days from the date of this judgment.

38. Pronounced in the open court on this 1st day of October, 2014.

**(Rakesh Nath)
Technical Member**

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REPORTABLE/NON-REPORTABLE

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