APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)

APPEAL NO. 265 of 2015

Dated : 14th September, 2018

PRESENT: HON'BLE MR. JUSTICE N.K. PATIL, JUDICIAL MEMBER
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER

IN THE MATTER OF :-

M/s Vandana Global Ltd.,
Through its Authorized Signatory
Shri Pankaj Baldua,
Office: 'Vandana Bhawan',
M.G. Road, Raipur,
Chhattisgarh – 492 001 **…. Appellant**

Versus

1) **Chhattisgarh State Power Distribution Company Ltd.,**
Through its Managing Director
Dagania, Raipur,
Chhattisgarh - 492 013

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

3) **Chhattisgarh State Load Despatch Centre,**
Through its Executive Director(LD),

Chhattisgarh State Power Transmission Co. Ltd.,
Dagania, Raipur,
Chhattisgarh – 492 013 **…. Respondent(s)**

Counsel for the Appellant(s) **:** Mr. M. G. Ramachandran,
Mr.Raunak Jain,
Mr. Vishvendra Tomar,

Counsel for the Respondent(s) **:** Mr. K. Gopal Choudhary, for R-1

Mr. C. K. Rai,
Mr. Sachin Dubey for R-2,
Mr. Ravind Dubey for R-3

J U D G M E N T

PER HON'BLE MR. JUSTICE N. K. PATIL, JUDICIAL MEMBER

1. M/s Vandana Global Ltd., Appellant herein, assailing the validity, legality and propriety to quash the Impugned Order dated 18.09.2015 in Petition No. 46 of 2014 (M), passed by Chhattisgarh State Electricity Regulatory Commission (**CSERC)**, [**Respondent No. 2/State Commission],** has sought the following reliefs :-

a) Quash and set aside the impugned Order dated 18.09.2015 to the extent that it has failed to uphold the principles of natural justice and consequently set-aside the Letter dated 20.08.2014

and penal tariff imposed unilaterally by Respondent No. 1 on the Appellant;

b) Quash and set-aside the impugned Order dated 18.09.2015 to the extent that it has failed to uphold the violation of Clause 11 of the PPAs regarding “Dispute Resolution” by the Respondent No. 1;

c) Quash and set-aside the findings of the Learned Commission in the impugned Order dated 18.09.2015 to the extent that it affirms the action of the Respondent to “revise” and “adjust” the past power purchase bills of the generating companies based on equity and because it a regulated entity, *de hors* the provisions of the PPAs as well as Section 171 of the Contract Act;

d) Direct the Learned Commission to separately address the submissions of the Appellant in respect of Non-receipt of alleged BDIs by the Appellant during the period in question and issuance of BDIs as per the requirements of the State Grid Code;

e) Quash and set-aside the impugned Order dated 18.09.2015 to the extent that it upholds the Letter dated 20.08.2014 of the Respondent No. 1 and penal tariff imposed upon the Appellant, in

view of failure of Respondent No. 1 to satisfy the conditions prescribed under first part of Clause 2 of the PPAs;

f) Pass any further order / orders / directions which the Hon'ble Tribunal may deem fit in the interest of justice, equity and good conscience.

2. The Appellant has submitted the following questions of law for our consideration :-

A. Whether the Learned Commission has erred by failing to give any findings with respect to the issue raised by the Appellant regarding violation of principles of natural justice by the Respondent No. 1 in the instant case while making the unilateral determinations, revisions and adjustments to the power purchase bills of the Appellant?

B. Whether the Respondent No. 1 is bound by the terms of the PPAs and has followed the provisions of Clause 11 regarding "Dispute Resolution" as provided under the PPAs while making the unilateral determinations, revisions and adjustments to the power purchase bills of the Appellant?

C. Whether the Respondent No. 1 has any inherent right in equity or otherwise to “adjust” or “revise” the power purchase bills of the Appellant generating company as per the PPAs and as per Section 171 of the India Contract Act, 1872?

D. Whether the Learned Commission has erroneously presumed that the Appellant has received all the alleged BDIs during the period in question issued by SLDC as per requirements of the State Grid Code?

E. Whether the penal tariff of Re 1/- per unit imposed by the Respondent No. 1 vide its Letter dated 20.08.2014 on account of alleged “non-compliance of backing-down instruction” issued by the SLDC, is correct in view of Clause 2 of the PPAs regarding “Merit Order Purchase”?

3. The Appellant filed the instant Appeal questioning the legality, validity and propriety of the Impugned Order dated 18.09.2015 passed by the State Commission in Petition No. 46 of 2014 wherein the second Respondent State Commission has rejected the Petition filed by the Appellant and also questioning the correctness of the Impugned communicated dated 20.08.2014 issued by the Respondent No. 1

wherein it has decided to recover a sum of Rs. 29,89,128.45 (Rupees Twenty Nine Lacs Eighty Nine Thousand One Hundred Twenty Eight and Paise forty Five only) from the Appellant on account of revision in the power purchase bills of the Appellant due to non-compliance of alleged Backing Down Instructions ("BDIs") issued by Chhattisgarh State Load Despatch Centre ("SLDC") during the period August 2012 – March 2013. The Appellant has filed the Petition No. 46 of 2014 on the file of the second Respondent herein for seeking the reliefs as under :-

(a) Quash / set aside the Letter dated 20.8.2014 issued by the Respondent distribution licensee and further hold that the Respondent has no authority in law to unilaterally revise and adjust the power purchase bills of the Petitioner without resorting to Clause 11 of the PPA;

(b) Direct the Respondent to refund the amount of Rs. 29,89,128.45 illegally recovered and adjusted against the power purchase bills of the Petitioner for the month of March 2014 with interest as per PPA;

(c) Direct the Respondent to pay 'delayed payment surcharge' as per Clause 9 of the PPA for the delay in release of the power purchase bills of the Petitioner for othe month of March 2014;

(d) Grant costs of the instant litigation on actual basis in favour of the Petitioner, including legal expenses; and

(e) Pass any other order/orders as this Commission may deem fit in the interest of justice, equity and good conscience.

4. The Respondent State Commission by the Impugned Order dated 18.09.2015 has dismissed the Petition filed by the Appellant, inter alia, on the ground that BDI instructions issued by the Respondent No. 3 SLDC are to be followed strictly. The State Commission further held that if a generator or CGP ignores and overlooks directions of SLDC, it is not only subject to penal actions under Section 33 of the Electricity Act but also the quantum of injection violating BDI has to be treated in accordance with settled principle and application orders. Since Respondent No. 1, CSPDCL in the present case had paid power purchase bills, without considering backing down instructions given by SLDC, the Respondent No. 1 CSPDCL is obligated to review and examine the bills paid towards its expenses and any excess payment by utility has to be rectified.

5. The said matter had come up for consideration before the Respondent No. 2 State Commission. After the case made out by the Appellant and Respondent Nos. 1 & 2 and taking into consideration their written submissions, submissions of the counsel representing the parties, has passed the Order dated 18.09.2015 in Petition no. 46 of 2014 in paras 7, 8 & 9 of the Order impugned.

6. The Respondent No. 2 State Commission, while passing the Impugned Order dated 18.09.2015 relied upon the Order dated 30.4.2010 passed in suo-moto Petition No. 5 of 2010. The Order dated 30.4.2010 was passed in the matter of terms and conditions and pricing of power to be purchased in short-term from captive generating plants (CGPs) wherein it is held that there is a need to impose over injection limit for peak short term supply. The Respondent No. 2 State Commission, in the Order dated 30.4.2010 has giver a view that apart from monitoring the injection during real time operations, there should be disincentive if the supplier continues to supply power over the specified limit. For the power supply during off-peak hours, the rate of power supply beyond specified limits was fixed at Rs. 1 per unit and it held that the directions by the SLDC to ensure secured and economic grid

operation of the State grid shall be strictly followed by the CGP's/IPP's failing which they shall attract penal provision as per the relevant provisions of the Electricity Act.

7. It is crystal clear that the above Order dated 30.4.2010 passed by the Respondent No. 2 State Commission clearly mentions that quantum of energy for backing down period shall be treated as deemed generation and shall be factored in for load factor calculations for suppliers who adhere to BDI of SLDC. But if a generator or CGP ignores and overlooks directions of SLDC, it is not only subject to penal actions under Section 33 of the Electricity Act but also the quantum of injection violating BDI has to be treated in accordance with settled principle and applicable orders. In the instant case after issuance of BDI by SLDC, the Appellant continued to over inject power beyond the revised schedule due to BDI and therefore State Commission has held that the Respondent No. 1 CSPDCL is justified in adjusting the amount inadvertently paid in excess to the Appellant by adjusting in the subsequent monthly bills.

8. It is further submitted that the recovery of excess payment by the CSPDCL is merely recovery of excess payments that ought not to have

been paid in the circumstances of non-compliance with backing down instructions given by the SLDC. The CSPDCL reviewed the power purchase bills after it was pointed out in course of routine internal audit that the effect of backing down was considered only for the purpose of computing deemed generation for load factor calculation but not considered for the computation of the over injection on non-compliance with the backing down instructions issued by the SLDC. Upon such review, the Respondent No. 1 CSPDCL found that an amount of Rs. 29,89,128.45 was paid in excess against the Appellant's bills for the energy supplied during the period from August 2012 to March 2013 and that the same is to be recovered. Thereupon, the Respondent No. 1 CSPDCL sent communication dated 20.08.2014 for the amounts to be adjusted along with details and the recovery was then made from the payment to the Appellant for March 2014 onwards power purchase bill.

9. As per Section 32(e) (Functions of State Load Despatch Centres) of the Electricity Act, 2003, one of the basic functions of SLDC is specified which reads as under :-

> *"(e) be responsible for carrying out real time operations for grid control and dispatch of electricity within the State through secure*

and economic operation of the State grid in accordance with the Grid Standards and the State Grid Code."

10. The State Commission also in the Order dated 30.4.2010 in Petition No. 5/2010 relied in the impugned order has directed that the directions by the SLDC to ensure secured and economic grid operation of the State grid shall be strictly followed by the CGPs / IPPs failing which they shall attract penal provision of the Electricity Act.

11. It is the case of the Appellant that they have not received the Backing Down instructions issued by the SLDC and that this aspect had not been looked into nor considered in the light of the fact that the power purchase bills of the Appellant under the PPA dated 24.08.2013 and Supplementary PPA dated 04.01.2013, had been long settled by the Respondent No. 1 at the relevant time and no disputes were ever raised by the Respondent No. 1 at any time prior to 20.08.2014. All of a sudden, vide communication dated 20.08.2014, the Respondent No. 1 communicated its unilateral decision to revise the past power purchase bills of the Appellant in a manner it feels befitting and further to adjust the amount due as per such revision, from the power purchase bills submitted by the Appellant under the separate and fresh PPA dated

04.03.2014 from the month of March 2014 onwards. Therefore, the impugned communication issued by the Respondent No. 1 is liable to be struck down for non-compliance on principles of natural justice.

12. On the same ground that as per the routine audit, they detected that excess payment had been made to the Appellant. Thereafter, the Respondent No. 1 has sou moto, “adjusted” the alleged recoverable amount from some other payments that were required to be made to the Appellant for the energy supplied in March 2014. The Impugned Order is liable to be set aside and the matter may be remitted back to the Respondent No. 2 for re-consideration afresh in accordance with the law and decide the same after affording reasonable opportunity to the Appellant and the Respondents.

13. Being aggrieved by the Impugned Order passed by the Respondent No. 2, the Appellant felt necessitated to present this Appeal for redressing their grievances as stated supra.

14. The principal submission of the learned counsel appearing for the Appellant, Shri M. G. Ramachandran, is that the Power Purchase Bill of the Appellant under the Power Purchase Agreement date 24.8.2012 and

supplementary PPA dated 4.1.2013 had been long settled by the Respondent No. 1. At the relevant point of time, no disputes were raised by the Respondent No. 1. At no point of time prior to communication dated 20.8.2014, it communicated its unilateral decision taken to revise the past power purchase bill of the Appellant in a manner it felt befitting and further to adjust the amount due as per such revision from the PPB submitted by the Appellant under the fresh PPA dated 4.3.2014 from the month of March, 2014 onwards.

15. Further, he vehemently submitted that in para 8 of reply before the learned Commission by the Respondent No. 1, it was submitted that --

> "…, the Respondent reviewed the power purchase bills after it was pointed out in due course of routine audit that the effect of backing down was considered only for the purpose of computing deemed generation for load factor calculation but not considered for the computation of over injection on non-compliance with the backing down instructions issued by the SLDC. Upon such review, the Respondent found that an amount of Rs. 29,89,128.25/- was paid in excess against the Petitioner's bills for the energy supplied during the period from August 2012 to March 2013 and that the same is to be recovered. Thereupon, the Respondent adjusted the amount from the amount then payable to the Petitioner and intimated the Petitioner of the same in the payment advice for the energy supplied in March 2014…."

16. The Respondent No. 1 has admitted that it has taken an independent decision as per its routine audit, without providing any notice to the Appellant, that the effect of an alleged element was allegedly not considered previously and that the alleged amount was found recoverable. Thereafter, the Respondent No. 1 has sou motu, “adjusted” the alleged recoverable amount from some other payments that were required to be made to the Appellant for the energy supplied in March 2014. This unilateral action of the Appellant is liable to be set aside at the threshold on account of gross violation of the principles of natural justice.

17. Further, he submitted that Respondent No. 1 is not entitled to take any unilateral determination, deductions, adjustments or recoveries, as has been done, without issuing a show cause notice or providing reasonable opportunity to the Appellant generating company to explain as to why such amount should not be recovered or adjusted. Therefore, on this ground alone, the impugned communication dated 20.8.2014 is liable to be set aside.

18. The learned counsel appearing for the Appellant was quick to point out and vehemently submitted that the Appellant has specifically raised the issue in his written submissions before the Respondent No. 2 State Commission. There is no discussion regarding the same in the Impugned Order. Secondly, there are no findings recorded by the State Commission on ground that the first Respondent's unilaterally revising the past PPBs of the Appellant and adjusting them are liable to be vitiated on this ground also.

19. The decision taken by the Respondent No. 1 is a violation of Clause 11 – Dispute Resolution under the PPAs by the Respondent No. 1. As per the Clause 11 of the PPA executed between the Appellant and the Respondent No. 1, it is provided that –

> "**Clause 11 - Dispute Resolution:** In the event of any dispute arising between the Company and the licensee as regard the implementation of this agreement or any other matter arising out of or in connection with this agreement, such dispute or difference shall be referred to the CSERC for settlement of the dispute."

20. It is settled principle of law that the terms of contract, bind both the parties equally. The aforesaid Clause 11 is equally applicable to the Respondent No. 1 and without having followed the provisions of Clause-

11, the Respondent No. 1 has no right to make any unilateral determinations, deductions, adjustments or recoveries from the PPBs of the Appellant which have been long paid and settled without any disputes or reservations by either party on the ground that the PPBs already paid by the Appellant under the PPA dated 24.8.2013 and supplementary PPA dated 4.1.2013 which have been concluded long back and taking unilateral decision after lapse of 1½ years, that too, without affording reasonable opportunity of hearing to the Appellant of deducting the alleged amount of excess payment made cannot be sustainable in law and therefore the Impugned Order is liable to be set aside.

21. The learned counsel appearing for the Appellant further submitted that the Penal tariff imposed by the Respondent No. 1 vide its Communication dated 20.08.2014 on account of alleged "non-compliance of backing-down instruction" issued by the SLDC and Clause 2 of the PPAs regarding "Merit Order Purchase", the Respondent No. 2 State Commission, in the impugned Order, has wholly and erroneously relied upon its previous Order dated 30.04.2010 in Suo Motu Petition No. 5 of 2010, in the matter of terms and conditions and

pricing of power to be purchased in short-term from captive generating plants (CGPs) and IPPs of the State of Chhattisgarh by the Chhattisgarh State Power Distribution Company Ltd. for the year 2010-11.

22. Para 7 of order dated 30.04.2010 would show that the limits of over injection was sought by Respondent No. 1 due to unrestricted injection during peak hours is mis-utilized by some of the generators to avail undue benefit from the market. That reliance placed by the State Commission has no bearing on the facts and circumstances of the case and hence the same is liable to be rejected.

23. It is the case of the Respondent No. 1 that it has taken an action in pursuance of the findings of the Internal Audit as routine nature and subsequently done the adjustment of the alleged amount. Therefore, the action is an after-thought. It is a trite law that an audit objection is not final decision and cannot be given the same and color and meaning as a considered decision arrived at by the Statutory authority. An audit objection is merely an opinion or objection in the form of questions which may be answered to the satisfaction of the objector or else if the objections are found valid, corrective action may be taken by the concerned, after following due process of law.

24. In the instant case, the Respondent No. 1 had acted unilaterally and decided to adjust the claim without raising the dispute for resolution. The Respondent No. 1 cannot be a judge of its own cause. The Respondent No. 1 ought to have approached the State Commission under Section 86 (1) (f) read with Clause 11 – Dispute Resolution clause contained in the PPA for adjudication of the claim and by producing material to the satisfaction of the State Commission that the amount is due. The unilateral action on the part of Respondent No. 1 is arbitrary, illegal and without following due process of law and without complying with principles of natural justice. Therefore, the impugned Order passed by the Respondent No. 2 is liable to be set aside on this ground also.

25. ***Per-contra,*** the learned counsel appearing for the Respondent No. 1, Shri Gopal Choudhary, inter alila, contended and substantiated the Impugned Order passed by the Respondent No. 2 State Commission, strictly in accordance with the law and after affording reasonable opportunity of hearing to both the parties, has passed the Impugned Order upholding the recovery of the amount by the Respondent No. 1, CSPDCL by its Order dated 18.9.2015. Therefore, interference by this Tribunal does not call for.

26. The supplies made under the PPA from time to time were paid for at the rates applicable for the Load Factor of supply as specified in the CSERC Order dated 30.4.2010. While computing the load factor for the purpose of rate, effect was given to deemed generation for the period of backing down to the extent intimated to CSPDCL by the Appellant or otherwise in terms of the CSERC Order dated 30.4.2010. By mistake, the same rate was also applied to the energy supplied by the Appellant in contravention of SLDC back down instructions and thereby excess payment was made wrongly. He further submitted that the error was noticed in the course of routine audit, and thereupon the excess amount paid was recovered from the Appellant from amounts due to them with due intimation in payment advice on 21.7.2014.

27. The Appellant sought details of the calculation for the amount of Rs. 29.89 lakhs deducted by letter dated 25.7.2014. The calculation details were given with letter dated 20.8.2014. No protest or dispute was raised thereto with CSPDCL by the Appellant herein. The Appellant filed Petition No. 46 of 2014 before the Respondent no. 2 CSERC, inter alia seeking to quash the communication dated 20.8.2014 and for refund of Rs. 29,89,128.45 recovered by the Respondent No. 1 CSPDCL. The

State Commission, after due hearing, was pleased to dismiss the Petition and upheld the recovery of the amount by CSPDCL by order dated 18.9.2015.

28. Not being satisfied with the Impugned Order, the Appellant VGL is in appeal against the aforesaid Order passed by the State Commission. The Appellant has not approached this Court with clean hands nor stated the true facts. Under Paras 10(d), (e), (f), (g) and (h), the action of the Respondent No. 1, CSPDCL was always on correction of excess payment immediately and there was no question of any dispute. Routine audit, Internal or otherwise, is part and parcel of the internal management and checks and balances, and the action taken pursuant to detection of error cannot be said to be other than warranted necessary consequential step taken by the Respondent No. 1, CSPDCL. It is the case of the Appellant that it has not received revised SLDC backing down instructions. The Appellant has stated facts which known to it to be untrue and false. This fact has specifically been stated by the Respondent No. 1 in reply in IA 202/2016 (Pages 1 to 4). The Appellant has never raised any objection with the Respondent No. 1, CSPDCL, about non-receipt of any backing down instruction prior to the filing of

the Petition before the State Commission. It is not the case of the Appellant that it had raised any dispute or issue with the SLDC with regard to backing down instructions from SLDC nor that it has instituted any valid proceedings in that respect. Therefore, it is not open to the Appellant to contend before this Tribunal that they have not received the backing down instructions from the Respondent No. 3, SLDC having regard to several correspondences made by the Appellant at Annexure R-1.3 to R-1.7. It is established that the Appellant has got the knowledge about the backing down instructions by the SLDC. Therefore, the Appeal filed by the Appellant is liable to be dismissed on this ground alone.

29. The Appellant admitted the receipt of backing down instructions as in the letter dated 21.8.2012. The Appellant falsely denies, under oath, receipt of any other backing down instructions.

30. A copy of the Appellant's letter dated 25.8.2012 (CSPDCL Reply in IA 202/2016, Annexure R1-4, R1-5 and letter dated 22.11.2012, Annexure R1-6 and letter dated 14.12.2012, Annexure R1-4 clearly show that the Appellant had received backing down instructions and accordingly, the calculation of load factor is also claimed for the purpose

of the tariff to be applied. It is therefore clear that the averments under oath of the Appellant that no backing down instructions have been received by them and the subsequent averments that no backing down instructions were received, other than those in the letter dated 21.8.2012, are false and willfully averred knowing it to be false. Thereby the Appellant has perjured repeatedly.

31. The learned counsel appearing for the Respondent No. 1 submitted that how energy injected in contravention of SLDC backing down instructions is to be treated. In the proceedings before the State Commission, the Respondent had raised the issue as to whether at all the Appellant is entitled to any payment for the energy injected contrary to backing down instructions in terms of para 19 at page 251 of the Appeal Paper-Book and the Impugned Order's Para 5.13 at Page No. 52.

32. As the State Commission, while rejecting the prayer in the Petition did not deal with the issue raised by the Respondent as aforesaid, the Respondent has filed a review petition which was dismissed. Backing down instructions are given when there is sufficient or tendency for excess energy vis a vis demand. The purchase of energy under such

conditions is a cost upon the consumer when energy is not required to be purchased and is contrary to consumer interest. The injection of energy in violation of SLDC backing down instructions is gross violation of grid discipline in real time and undoubtedly illegal. The Hon'ble Tribunal may take a view on which of the two aforesaid is the correct and proper course.

33. The contentions of the Appellant in para 15 are wholly misconceived. The question as to whether any action is to be taken by way of penal action under section 33 or otherwise is a matter to be separately decided by the SLDC and/or the State Commission. It is not relevant to the issue of payment for supply which is to be under law and contract. The PPA clearly makes the SLDC backing down instructions binding upon the Appellant. Violation of backing down instruction is also violative of Section 33(2) and punishable under Section 33(5) and thereby forbidden by law. An illegal and forbidden act cannot merit remuneration or payment being grossly against law and public policy. This aspect of the matter has been rightly considered by the State Commission, Respondent NO. 2 herein and held against the Appellant and interference by this Court does not call for.

34. The learned counsel appearing for the Respondent No. 1 submitted that the Respondent No. 1 is entitled, justified and/or duty-bound to recover the excess payment made by mistake, The State Commission has correctly observed and held that the Respondent No. 1 is entitled to review bills and payments made thereof and if any error in processing and/or payment by inadvertence or otherwise is noticed or comes to its notice, he is entitled to review the same and recover the same to whom he has made the payment. The Commission noticed that the backing down instruction was considered for calculating the load factor but the commercial implication of energy injected during backing down was not properly analysed. The Commission has rightly held that in the instant case after issuance of BDI by SLDC, the entity is required to adhere to the schedule given by SLDC for securing grid operations and in case it continues to over inject power beyond the revised schedule due to BDI, such power has to be treated as over injection and has to be paid as per the order. Further, the State Commission has held that the utility is obligated to review and examine the bills paid towards expenses and any excess payment by utility has to be rectified. In a regulated entity context, public utilities assume a statutory status and

are duty-bound to abide by orders for all its expenses also. In instances of a mistaken over-payment of its bill by a public utility, the erring company holds not only the right, but the obligation, to rectify the same as its expenses are regulated and passed to consumers of State. It was further observed that the action taken was not a penal action but in compliance with orders of power purchase, and that a regulated distribution utility is duty-bound to pay correct power purchase bills, and that no provisions in law prohibit distribution licensee to rectify its mistake of over payment of power purchase bills. After recording the said findings by assigning valid and cogent reasons in the Impugned order, the Petition filed by the Appellant was dismissed.

35. The learned counsel appearing for the Respondent No. 1 vehemently contended that it is immaterial as to how the error or mistake of over-payment was noticed or came to light, whether during audit or otherwise. The Respondent No. 1 is bound to take corrective action in any event. It is true that the error came to light during audit. Thereupon the issue was examined by the competent authority of the Respondent No. 1 and upon finding that the error was indeed made and required corrective action, the qualification of excess and recovery was

carried out. The submissions of the Appellant in para 16 are misconceived and incorrect and the case law cited does not support the contention of the Appellant and/or is not relevant or applicable to the facts and circumstances of the case. This aspect of the matter was also rightly considered by assigning valid and cogent reasons and by recording findings of facts against the Appellant on the basis of the case made out by the respective parties. Therefore, interference by this Court does not call for and hence the Appeal filed by the Appellant is liable to be dismissed in limini.

36. The submission of the learned counsel appearing for the Respondent No. 2, Shri C. K. Rai, is that State Commission by Impugned Order dated 18.9.2015 has dismissed the petition filed by the Appellant inter-alia on the ground that the BDIs issued by SLDC are to be followed strictly. The Commission further held that if a generator or CGP ignores and overlooks directions of SLDC it is not only subject to penal actions under Section 33 of the Act but also the quantum of injection violating BDI has to be treated in accordance with settled principle and applicable orders. Since the Respondent No. 1 in the present case had paid power purchase Bills of the Appellant without

considering the non-compliance of the backing down instructions given by the SLDC, the Respondent No. 1 is obligated to review and examine the bills paid towards its expenses and any excess payment by utility needed to be rectified. The State Commission after due consideration of the case made out by the Appellant and the stand taken by the Respondent No. 1 passed the Impugned Order dated 18.9.2015 in Petition No. 46 of 2014(M) by assigning valid and cogent reasons assigned in paras 7, 8 & 9 of the Order. The Appellant has not made out any case to interfere with the valid reasons given in paras 7, 8 & 9 of the Impugned Order and the Appeal filed by the Appellant may be dismissed. As per the Order dated 30.4.2010 passed by the State Commission in Petition No. 5/2010, it clearly mentions that the quantum of the energy for BDI period shall be treated as deemed generation and shall be factored in for load factor calculations for suppliers who adhere to BDI of SLDC. But if a generator or CGP ignores and overlooks directions of SLDC it is not only subject to penal actions under Section 33 of the Act but also the quantum of injection violating BDI has to be treated in accordance with settled principle and applicable orders. In the instant case, after issuance of BDI by SLDC, the entity is required to

adhere to schedule given by SLDC for secured grid operations and in case it continues to over inject power beyond the revised schedule due to BDI, and, therefore, the State Commission has held that the Respondent No. 1 is justified in adjusting the amount inadvertently paid in excess to the Appellant by deducting in the subsequent bills. The recovery of excess payment by the Respondent No. 1 is merely a recovery of an excess payment that ought not to have been paid in the circumstances of non-compliance with the backing down instructions given by the SLDC. The Respondent No. 1 reviewed the power purchase bills after it was pointed out in the course of routine internal audit that the effect of backing down was considered only for the purpose of computing deemed generation for load factor calculation but not considered for the computation of the over-injection on non-compliance with the backing down instructions issued by the SLDC. Upon such review, the Respondent No. 1 found that an amount of Rs. 29,89,128.45 was paid in excess against the Appellant's bills for the energy supplied during the period from August 2012 to March 2013 and that the same is to be recovered. Thereupon, the Respondent No. 1 sent communication dated 20.8.2014 of the amounts to be adjusted

along with details and the recovery was then made from the payment to the Appellant for the month of March 2014 power purchase bill.

37. Further, the State Commission in its Order dated 30.4.2010 in Petition No. 5/2010 relied upon the impugned order and stated that the directions by the SLDC to ensure secured and economic grid operation of the State grid shall be strictly followed by the CGP's /IIP's failing which they shall attract penal provision as per the Act.

38. Further, the learned counsel appearing for the Respondent No. 2 submitted that the Appellant, allegedly, has not received the BDIs issued by SLDC and that the Petition No. 70 of 2013 since remain pending, the Commission ought not to have passed the impugned order. It is most respectfully submitted that Petition No. 70 of 2013 was filed by the SLDC in the Matter of inquiry under Section 143 of the Electricity Act, 2003 for the alleged non-compliance of backing down instructions during the period 1.4.2012 to 30.6.2012 and for imposing penalty of Rs. 12,000/- for non-compliance. It shows that the Appellant is guilty of non-compliance of BDIs issued by SLDC. Therefore, taking into consideration this aspect also, the Appellant is not entitled to redress its grievance nor has it made out any good ground in the instant Appeal to

interfere with the well-considered Order passed by the State Commission. Therefore, on this ground also, the Appeal filed by the Appellant is liable to be dismissed.

39. The learned counsel appearing for the Respondent No. 3, Shri Ravin Dubey, submitted that the SLDC was neither a party in the Petition no. 46 of 2014 (M) nor any relief was sought against the Respondent No. 3. During the pendency of its Appeal, the Appellant has filed IA No. 202 of 2016 for impleadment of SLDC. The said application was allowed and therefore, it has been impleaded.

40. The issue which is primarily related to the role of the Respondent No. 3 appears to be Issue (D). In this regard, it is most humbly submitted that this issue is answered by the Respondent No. 3 is Para 10 to 12 of the Reply Affidavit dated 28.11.2016 filed by it. The Respondent No. 3 had filed Petition No. 70 of 2013 (M) before Learned State Commission, under relevant legal provisions, on the issue of non-compliance of BDIs by several CPPs/IPPs/Biomass Generators and for imposing penalty against them. The Appellant was one of the respondents in the said petition.

41. The Respondent No. 2, after conducting the inquiry through the Adjudicating Officer and after analyzing the material placed on record, has found the Appellant guilty of non-compliance of the BDIs and imposed a penalty of Rs. 12,000/- for non-compliance through Order dated 29.10.2015. He submitted that the Respondent No. 3 had been following the standard procedure generally followed by all the SLDCs for issuing BDIs. The BDIs have been issued assigning unique "Backing Down Code" and "Backing Down Normal Code" in respect of each BDI. These Codes are recorded in a Register maintained for the record along with the names of the Entities to whom the BDIs are issued along with the start time, the end time, the scheduled generation, the requested generation, the quantum of injection at the start of the Backing Down period and at the end of the Backing Down period and the frequency of the Grid during the period also recorded. During the course of the submissions, he also produced the copy of the BDI Register and pointed out that monitoring the register carefully in the instant case shows that the Appellant has injected more power contrary to the requirement of power. This aspect of the matter has been rightly considered by the State Commission Respondent No. 2 herein, by assigning valid and

cogent reasons in paras 7, 8 & 9 of the Impugned Order and has rightly justified in passing the Impugned Order against the Appellant. Therefore, interference by this Court does not call for.

42. After thoughtful consideration of the submission of the learned counsel appearing for the Appellant and the counsel appearing for the Respondents and after going through the reply and the written submissions filed by the respective counsels and other relevant materials on records, the issues that arise for our consideration are described hereunder :-

ISSUE-1 Whether the State Regulatory Commission, Respondent No. 2, has committed an error and failed to give any findings with respect to the specific issue raised by the Appellant regarding gross and total violation of principles of natural justice by the Respondent No.1 while making unilateral determination, revision and adjustments to the power purchase bills of the Appellant.

ISSUE-2 Whether the Respondent No. 1 is bound by the terms of the power purchase agreement and has followed the provisions of Clause 11 regarding 'Dispute Resolution' as envisaged under the State Grid Code.

ISSUE-3 Whether the Respondent No. 2, State Regulatory Commission has erroneously presumed that the Appellant has received all the alleged Backing Down

Instructions during the period in question issued by the SLDC as envisaged under the State Grid Code.

RE : ISSUE NOS. 1, 2 & 3 :

43. The bone contention of the learned counsel appearing for the Appellant, Shri M. G. Ramachandran, is that the Impugned Order passed by the second Respondent State Commission is liable to be vitiated on three grounds, i.e., on the ground of gross and total violation of principles of natural justice by the Respondent No.1 while making unilateral determination, revision and adjustments to the power purchase bills of the Appellant. Secondly, the Respondent No. 1 herein is bound by the terms and conditions of the power purchase agreement and has followed the provisions of Clause-11 regarding 'Dispute Resolution' as envisaged under the PPA while taking decision of unilateral determination, revision and adjustments to the power purchase bills of the Appellant. Thirdly, the State Commission has erroneously assigned the reason that the Appellant has received all the alleged Backing Down Instructions during the relevant period in question issued by the SLDC as per the requirement of the State Grid Code. This aspect of the matter has not been looked into nor considered by the

Respondent No. 2 and it has failed to consider the specific stand taken by the Appellant in the written submissions. It is manifest on the countenance of the Order that there is no consideration of this specific core contention of the Appellant. Therefore, he submitted that the Impugned Order passed by the second Respondent is liable to be set aside at the threshold without going into other material and the matter requires to be considered afresh in accordance with the law.

44. ***Per Contra,*** the learned counsel appearing for the Respondent No. 1, Shri K. Gopal Choudhary, inter alia, contended and substantiated the Impugned Order passed by the second Respondent State Commission strictly in accordance with the law and after affording reasonable opportunity of hearing to the Appellant has passed the Impugned Order upholding the recovery of the amount by the first Respondent, CSPDCL by its Order dated 18.9.2015. Therefore, interference by this Tribunal does not call for.

45. Further, the counsel appearing for the first Respondent, vehemently submitted that the supplies made under the PPA from time to time were paid for at the rates applicable for the Load Factor of supply as specified in the CSERC Order dated 30.4.2010. While computing the

load factor for the purpose of rate, effect was given to deemed generation for the period of backing down to the extent intimated to CSPDCL by the Appellant or otherwise in terms of the CSERC Order dated 30.4.2010. By over-sight, the same rate was also applied to the energy supplied by the Appellant in contravention of SLDC back down instructions and thereby excess payment was made wrongly. He further submitted that the error was noticed in the course of routine audit, and thereupon the excess amount paid was recovered from the Appellant from amounts due to them with due intimation in payment advice on 21.7.2014.

46. It is the case of the Appellant that it had not raised any dispute or issue with the SLDC with regard to backing down instructions from SLDC nor that it has instituted any valid proceedings in that respect. Therefore, it is not open to the Appellant to contend before this Tribunal that they have not received the backing down instructions from the Respondent No. 3, SLDC having regard to several correspondences made by the Appellant at Annexure R-1.3 to R-1.7. It is established beyond reasonable doubt that the Appellant has got the knowledge

about the backing down instructions issued by the SLDC. Therefore, the contention of the Appellant is wholly misconceived.

47. The learned counsel appearing for the Respondent No. 2, Shri C. K. Rai, contended that the second Respondent State Commission after critical evaluation of the entire material on record has rightly justified by assigning valid and cogent reasons in paras 7, 8 & 9 of the Order and dismissed the Appeal filed by the Appellant on account of the violation of the instructions of the SLDC regarding BDI's. Therefore, it is rightly justified by dismissing the Appeal filed by the Appellant and interference of this Tribunal does not call for. Whereas, the counsel appearing for the third Respondent submitted that he was not an arrayed party before the second Respondent State Commission, nor any relief has been sought against him. The third Respondent has been following the standard procedure generally followed by all the SLDCs for issuing BDI's.

48. The learned counsel appearing for the Respondent No.3, Shri Ravin Dubey contended that the BDIs have been issued assigning unique "Backing Down Code" and "Backing Down Normal Code" in respect of each BDI. These Codes are recorded in a Register

maintained for the record along with the names of the Entities to whom the BDIs are issued along with the start time, the end time, the scheduled generation, the requested generation, the quantum of injection at the start of the Backing Down period and at the end of the Backing Down period and the frequency of the Grid during the period also recorded. During the course of the submissions, he also produced the copy of the BDI Register and pointed out that monitoring the register carefully in the instant case, it shows that the Appellant has injected more power contrary to the requirement of power. This aspect of the matter has been rightly considered by the State Commission Respondent No. 2 herein, by assigning valid and cogent reasons in paras 7, 8 & 9 of the Impugned Order and has rightly justified while declining the Prayer sought by the Appellant. Therefore, the Appeal filed by the Appellant may be dismissed as being devoid of merits.

49. After careful perusal of the Impugned order passed by the second Respondent State Commission, it is manifest on the face of the Order that the second Respondent has committed a grave error, much less material irregularity, by non-considering the specific stand taken by the Appellant in the written submissions regarding gross and total violation

of the principles of natural justice by the first Respondent for taking unilateral decision of recovering the alleged excess amount paid to the Appellant and also failed to consider the Clause 11 of the PPA arrived between the Appellant and the first Respondent. It is the specific case of the Appellant that the first Respondent State Commission has erroneously presumed that the Appellant has received all the alleged BDIs during the period in question issued by SLDC as per requirements of the State Grid Code. There is no proper issue framed to decide the matter strictly in consonance with the relevant provisions of the Electricity Act, 2003, relevant regulations and terms and conditions of the PPA is not coming forth and therefore we are of the considered view that at any stretch of imagination, such Order cannot be sustainable in the eye of law. Therefore, without expressing any further opinion on merits and demerits of the case and the case made out by the Appellant and the Respondents and their stand in the written submissions, assigning reasons will not be justiciable and it will affect the matter to be considered by the second Respondent on merits after affording reasonable opportunity of hearing to the Appellant, Respondent No. 1 and Respondent No. 3. Therefore, we are of the considered view that

the Impugned Order passed by the second Respondent State Commission is liable to be set aside. If an appropriate Order is passed, it will meet the ends of justice and safeguard the interests of the Appellant and the Respondents.

ORDER

50. For the foregoing reasons as stated supra, the instant Appeal filed by the Appellant is allowed in part and the Impugned Order dated 18.09.2015 passed in Petition No. 46 of 2014 (M) on the file of the Second Respondent/State Regulatory Commission is hereby set aside.

The matter stands remitted back to the second Respondent for reconsidering afresh and pass appropriate Order in accordance with the law after affording reasonable opportunity of hearing to the Appellant and the Respondent Nos. 1 & 3 as expeditiously as possible, at any rate, within a period of six months from the date of appearance of the parties.

The Appellant and the Respondent Nos. 1 & 3 are directed to appear before the second Respondent personally or through their

counsel without notice on 29.10.2018 at 11.00 a.m. to collect the necessary date of hearing.

All the contentions of both the parties are left open.

(S.D. Dubey)
Technical Member

(Justice N.K. Patil)
Judicial Member

√**REPORTABLE / ~~NON-REPORTABLE~~**

Bn