

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.33 of 2012

Dated:18th Feb, 2013

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

In the Matter of:

**M/s. Godawari Power & Ispat Ltd.,
428/2, Phase-I, Industrial Area,
Siltara, Distt-Raipur,
Chhattisgarh-493 111**

...Appellant

Versus

- 1. The Chhattisgarh State Electricity Regulatory Commission
Irrigation Colony, Shanti Nagar,
Raipur, Chhattisgarh,
PIN-492 001**
- 2. Chhattisgarh State Power Distribution Company Ltd.,
Daganiya,
Raipur, Chhattisgarh,
PIN-492 014**
- 3. Chief Electrical Inspector,
Government of Chhattisgarh,
Raipur, Chhattisgarh,
PIN-492 001**

...Respondent(s)

**Counsel for the Appellant(s) : Mr. Raunak Jain
Mr. Sanjay Sen**

**Counsel for the Respondent(s): Mr. M.G Ramachandran,
Mr. Anand K. Ganesan
Ms. Swapna Seshadri for R-1
Mr. Sudhir Kathpalia
Ms. Suparna Srivastava for R-2**

J U D G M E N T

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

1. M/s. Godavari Power and Ispat Limited is the Appellant.
2. Challenging the legality of the order dated 12.12.2011 passed by the Chhattisgarh State Commission rejecting the prayer of the Appellant to provide relaxation in the norms of captive consumption of at least 51% for being qualified as a Captive Power Plant, has presented this Appeal.
3. The Short facts are as under:
 - (a) The Appellant is an integrated Steel Plant comprising of manufacturing facilities for Sponge Iron (DRI), MS Billets, Ferro Alloys and MS Wires. For meeting its own captive power requirements, the Appellant has set up generation facility of 53 MW.
 - (b) On 9.8.2009, the Shed of Steel Melting Shop of the Appellant suddenly collapsed due to which the Steel Melting Shop for manufacturing Billets had to be forcefully shut down.
 - (c) The Deputy Director, Industrial Health and Safety, Phaphadih, Raipur, Chhattisgarh also by the order dated 11.8.2009 directed the Appellant to stop manufacturing activities in the Steel Melting Shop till

the time entire shed was repaired and clearance was obtained.

(d) The entire repair work of the Shed was completed by the Appellant on 14.12.2009. Thereafter, the Appellant made a request to the Deputy Director, Industrial Health and Safety, Raipur to permit the Appellant to resume production facilities at the Steel Melting Shop. Accordingly, the Appellant was allowed to resume the production activities from January, 2010.

(e) On getting information from the officer concerned, the third Respondent that the generation of the Captive Power Plant was not functional for four months, the State Commission by the order dated 11.3.2011 sought verification from the Appellant with reference to its not fulfilling the requisite criteria for the Captive Power Plant for the year 2009-10.

(f) On receipt of the said notice, the Appellant informed the State Commission regarding the factual background leading to the inability of the Appellant to consume 51% of the power generated for captive use. After considering the reply of the Appellant, the State Commission declared by the order dated 10.6.2011 that the Appellant was unable to maintain captive consumption of 51% of the power generated for the

Financial Year 2009-10 and consequently, the Appellant could not maintain the status of Captive Power Plant for that year.

(g) On the basis of this order, the Distribution Licensee, Respondent No.2 issued a supplementary bill on 13.7.2011 demanding the Cross Subsidy Surcharge for the Financial Year 2009-10 from the Appellant due to failure to maintain Captive Power Plant status.

(h) Aggrieved by this, the Appellant on 21.7.2011 filed a Petition before the State Commission praying for the relaxation from fulfilling the norms laid down relating to 51% of the captive consumption on account of Force Majeure condition and consequently for quashing the supplementary bills.

(i) After conducting the inquiry, the State Commission, ultimately passed the impugned order dated 12.12.2011 dismissing the Petition filed by the Appellant.

(j) Aggrieved over that, the Appellant has filed this Appeal.

4. The Learned Counsel for the Appellant has submitted the following submissions to assail the impugned order which is as follows:

“For the Financial Year 2009-10, its Captive Generation Plant has been unable to achieve the prescribed consumption requirement of 51% on account of collapse of the Shed of its Steel Melting Plant leading to shutdown for the repair and maintenance work for a few months. The shut down of its plant and consequent inability to consume the captive power for its plant during the period of its shut down had been for the reasons beyond its control and led by a situation of Force Majeure. Therefore, the Appellant prayed for relaxation with reference to the norms to the status of captive generating plant for the year 2009-10. This relaxation is in accordance with the scheme of the promotion of captive generation envisaged under the 2003 Act. As a follow up of the relief, supplementary bill dated 13.7.2011 issued by the Distribution Company, Respondent 2 has to be quashed. But, the State Commission without applying its mind merely dismissed the Petition on the ground that it has no power to give such relaxation.

5. In reply to above submissions, the Learned Counsel for both the State Commission as well as the Distribution Company have elaborately argued defending the impugned order and submitted that the State Commission has no power to make

such a relaxation and as such the impugned order is valid in law.

6. The State Commission in its impugned order has denied relaxation in the norms to the Appellant on the following three grounds:

(a) There is no dispute that the Steel Melting Shop remained closed on account of collapse of a part of a shed but it could not be understood as to how it took four months time just to repair the shed on account of which the steel melting shop of Appellant remained closed for that period and also that the Appellant did not give any justification for it.

(b) The authorities relied upon by the Appellant would relate to the severe damage of the wind mills on account of cyclone which is an Act of God and was not within control of wind mill owner whereas the collapsing of part of the shed has not been on account of any such cyclone and hence cannot be considered as a Act of God.

(c) There is no provision for any relaxation in 51% consumption for captive use for a generator to fulfil criteria of CPP as provided in Rule 3 of Electricity Rules, 2005.

7. The three grounds would indicate that the State Commission though found that the collapsing of the part of the Shed led to the shut down of the shop, has given a finding that there is no provision for any relaxation in respect of 51% of consumption for captive use for generator to fulfil the criteria of captive power plant either under the Act or under the Rules. Therefore, the main question to be considered in this Appeal is this:

“Whether the State Commission is empowered to pass an order for relaxation in the norms of captive consumption of at least 51% for being qualified as a Captive Power Plant within the meaning and definition of a captive power plant under the Definition Section 2 (8) of the Act, 2003 and Rule-3 of the Electricity Rule, 2005”.

8. On this issue, the Learned Counsel for both the parties have made their elaborate submissions.
9. We have carefully considered their submissions and given our thoughtful consideration to the issue.
10. The issue involves interpretation of the relevant Section of the Act, 2003 as well as the relevant Rule of the Electricity Rules, 2005.
11. **Let us quote those Sections which are as under:**

Section-2 (8) of the Electricity Act, 2003

“2(8) “Captive generating plant” means a power plant set up by any person to generate electricity primarily for his own use and includes a power plant set up by any co-operative society or association of persons for generating electricity primarily for use of members of such co-operative society or association;”

9. Captive generation:

(1) Notwithstanding anything contained in this Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines;

Provided that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company.

(2) Every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use:

Provided that such open access shall be subject to availability of adequate transmission facility and such availability of transmission facility shall be determined by the Central Transmission Utility-or the State Transmission Utility, as the case may be;

Provided further that any dispute regarding the availability of transmission facility shall be adjudicated upon by the Appropriate Commission”.

Rule-3 of the Electricity Rules, 2005

3. *Requirements of Captive Generating Plants:*

(1) *No power Plant shall qualify as “Captive Generating Plant” under Section 9 read with clause (8) of Section 2 of the Act, unless-*

(a) In case of power plant-

(i) not less than twenty six percent of the ownership is held by the captive user(s), and

(ii) not less than fifty one percent of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for the captive use:

Provided that in case of power plant set up by registered co-operative society, the conditions mentioned under paragraphs (i) and (ii) above shall be satisfied collectively by the members of the co-operative society;

Provided further that in case of association of persons, the captive user(s) shall hold not less than twenty six percent of the ownership of the plant in aggregate and such captive user(s) shall consume not less than fifty one percent of the electricity generated, determined on an annual basis, in proportion to their shares in ownership of the power plant within a variation not exceeding ten percent;

(b) *In case of a generating station owned by a company formed as special purpose vehicle for such generating station, a unit or units of such generating station identified for captive use and not the entire generating station satisfy(ies) the conditions contained in paragraphs (i) and (ii) of sub clause (a) above including-*

Explanation-

(1) *The electricity required to be consumed by captive users shall be determined with reference to such generating unit or units in aggregate identified for captive use and not with reference to generating station as a whole; and*

(2) *The equity shared to be held by the captive user(s) in the generating station shall not be less than twenty six percent of the proportionate of the equity of the company related to the generating unit or units identified as the captive generating plant.*

Illustration

In a generating station with two units of 50 MW each namely Units A and B, one unit of 50 MW namely Unit A may be identified as the Captive Generating Plant. The Captive users shall hold no less than thirteen percent of the equity shares in the company (being the twenty six percent proportionate to Unit A of 50 MW) and not less than fifty one percent of the electricity generated in Unit A determined on an annual basis is to be consumed by the captive users.

(2) *It shall be the obligation of the captive users to ensure that the consumption by the captive users at the percentages mentioned in sub clauses (a) and (b) of sub rule (1) above is maintained and in case the*

minimum percentage of captive use is not complied with in any year, the entire electricity generated shall be treated as if it is a supply of electricity by a generating company.

Explanation-1 For the purpose of this rule:-

- (a) "annual basis" shall be determined based on a financial year;*
- (b) "Captive User" shall mean the end user of the electricity generated in a Captive Generating Plant and the term "captive use" shall be construed accordingly;*
- (c) "Ownership" in relation to a generating station or power plant set-up by a Company or any other body corporate shall mean the equity share capital with voting rights. In other cases, ownership shall mean proprietary interest and control over the generating station or power plant;*
- (d) "Special Purpose Vehicle" shall mean a legal entity owning, operating and maintaining a generating station and with no other business or activity to be engaged in by the legal entity".*

12. Thus, both the Section 2 (8) of Act, 2003 and Rule-3 of the Electricity Rule-2005 would provide for the criteria to qualify as a captive power plant. The two requirements to be satisfied by the Generating Plant to qualify as a captive power plant are as follows:

- (a) Ownership i.e. holding 26% of the ownership;
- (b) Consumption of 51% of the units generated.

13. Rule-3 of Electricity Rules 2005 specifically prescribes the conditions to be satisfied by the Power Plant to be qualified as captive power plant. Therefore, a power plant will be qualified as a captive power plant only when it satisfies both the conditions.
14. Even if any one of the conditions is not fulfilled, the captive power plant will lose its status and become a generating plant or independent power producer.
15. According to the Appellant, the State Commission has got the powers for relaxing the provisions of the Electricity Rules, 2005 to provide relief to captive power plant in view of the fact that this Tribunal earlier held that the State Commission has the power to determine whether the power plant has satisfied the requirements to claim captive status for a particular year as decided in the judgment in Appeal No.270 of 2006 dated 21.2.2011 in the matter Chhatisgarh State Power Distribution Company Vs M/s. J P Saboo and Others.
16. This contention has no basis as the said decision rendered by this Tribunal did not lay down the ratio that the State Commission has got the powers of relaxation of Rule-3 of the Electricity Rules.
17. On the other hand, the ratio decided in that case was that the State Commission has got the powers to decide whether the power plant qualifies as a captive power plant or not and in that

process, it has to see whether a power plant qualifies as a captive power plant strictly in terms of the Rule-3 of the Electricity Act, 2005. Therefore, the said decision is of no help to the Appellant.

18. The Learned Counsel for the State Commission has cited an authority which has been rendered by this Tribunal in the judgment dated 18.2.2011 in Appeal No.77 of 2010 M/s. Jayaswal Neco Industries V CSERC which dealt with this issue. The relevant portion is as under:

“We in the instant case find no absurdity in the plain meaning of Rule 3 of the Rules (ibid) read with Section 2(8) and Section 9 of the Act of 2003. On the contrary, the plain meaning, as it is so obvious to us, harmonizes the object of the statute.

In New India Sugar Mills Ltd. Vs. Commissioner of Sales Tax Bihar (AIR 1963 SC 1207) the Hon’ble Supreme Court held that the expressions used in a statute should ordinarily be understood in a sense in which they best harmonize with the object of the statute. It has rightly been said by the learned counsel for the Respondent No. 2 that cross subsidy surcharge is utilized to meet the requirements of current level of cross-subsidy within the area of supply of the distribution licensee and hence, has a direct bearing on the tariff formulization of the distribution licensee which in turn has its impact on the tariff payable by the consumers. Thus,

one who is unable to fulfill the twin requirements of Rule 3 is not permitted under the law to have exemption from payment of cross-subsidy surcharge while availing of the open access or any other rigor of law to which a generating company or a distribution company is subjected to. We notice the fourth proviso to Section 42 of the Act which reads thus:

“Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generation plant for carrying the electricity to the destination of his own use.”

Therefore, this is not without purpose or object that the words ‘captive generating plant’ used in Section 2(8) and Section 9 of the Act, 2003 and Rule 3 of the Rules, 2005 framed there under have been qualified with the prefix ‘a’ before them. It is necessary in this connection to read paragraph (2) below the illustration to the Rule 3 of the Rules:

“(2) It shall be the obligation of the captive user to ensure that the consumption by the captive user at the percentage mentioned in sub-clause (a) and (b) of sub-rule (1) above, is maintained and in case the minimum percentage of the captive use is not complied with in any year, the entire electricity generated be treated as if it is a supply of electricity by a generating company.”

18. *The argument of Mr. Sen that once MUUL is held to be the captive generation plant of the Appellant it ceases to be a different plant for the purpose of applicability of Rule 3 is thus difficult to accept. Two power plants are distinct having respective generation capacity of their own and they cannot be combined with one another, although legal ownership with respect to the two plants vests in one and the same person.*

19. *In effect, what the Appellant is asking for is deviation from Rules based on equity which we are unable to concede to. It is well settled principle of interpretation that statute by implication imports the equitable principle but we are not having Court of Equity. The modern statutes are framed with a view to equitable as well as legal principles, although equity subordinates itself to statutes. Therefore, impliedly equity does not reveal apparent harshness that is perceived in a modern statute. Reference may be made on the treaties of Bennion on Statutory Interpretation (Indian reprint 5th edition page 1064).*

19. The above decision lays down the following dictums:

- (a) One who is unable to fulfil the twin requirements of Rule-3, is not permitted under the law to have exemption from payment of cross subsidy surcharge.

(b) Illustration 2 of Rule-3 provides that when the minimum percentage of the captive use is not complied with in any year, the entire electricity generated to be treated as the electricity generated by a generating company.

(c) This rule cannot be deviated based on equity.

This decision would squarely apply to the present case.

20. The Power of the State Commission to decide about whether the requirements have been satisfied is one thing. At the same time, the power of the State Commission to relax mandates relating to the norms fixed for those requirements fixed by the Rules and the Act is a different thing.

21. The Appellant instead of satisfying the mandatory requirements cannot ask the State Commission for deviation from these Rules framed under the Central Act based upon equity which is not permissible under the law. It is well settled principle of interpretation that the statute by implication imports the equitable principle. The modern statutes are framed with a view to equitable as well as legal principles but equity would subordinate itself to statutes.

22. The question raised in this Appeal is whether the State Commission has got the powers to relax the Rules framed by the Central Government with intent to carrying out the provisions of the Central Act or not. This eligibility prescription of 51% of annual consumption is in conformity

with the statutory requirements as provided U/S 2 (8) of the Act, 2003. The definition of captive generating plants as per definition U/S 2 (8) is that the power plant set-up by any person to generate electricity “primarily for his own use”. It means that the major part of the power produced by the captive power plant is to be used for captive consumption.

23. Similarly, the Sub Rule 2 of rule-3 wherein the word “shall” has been used would make it clear that the obligation of the captive generating plant are mandatorily to be complied with failing which the provisions of Sub Rule-2 would automatically come into operation and consequently the electricity generated in that year by the plant has to be treated as it is the supply of electricity by a generating Company. Therefore, it has to be held that the State Commission does not have any power to relax the rigours of Rule-3 under any circumstances.

24. The settled legal position is when it is prescribed in a statute that a particular act is to be done in a particular manner, then requirement to the Act in that manner is mandatory and the specified Section of non compliance have necessary to follow. This principle has been laid down in (1980) 1 SCC 403 in the case of Sharif-Ud-Din Vs Abdul Gani Lone. The relevant portion of the judgment is as under:

“Where, however, a provision of law prescribes that a certain act has to be done in a particular

manner by a person in order to acquire a right and it is coupled with another provision which confers an immunity on another when such act is not done in that manner, the former has to be regarded as a mandatory one”.

.....
.....

“Whenever a statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to a specific consequence, it would be difficult to hold that the requirement is not mandatory and the specified consequence should not follow”.

25. The very same principle has been laid down in (2001) 6 SCC 461 in the case of Raj Sekhar Gogoi Vs State of Assam and Others.

26. This ratio which has been laid down by the Hon’ble Supreme Court would indicate that when Rule-3 of 2005, Electricity Rules prescribes that a captive generating plant must consume 51% of the electricity generated from the plant for his own use on an annual basis and further prescribes that when failure to do so, will result in the electricity generated in that year to be treated as the electricity generated by a generating plant, then the provisions of Rule-3 are automatically to be held as mandatory. As such, the State Commission does not have powers for relaxing the provisions of Rule-3 for any reasons.

27. The other claim of the Appellant is that the State Commission has in an earlier case pertaining to another captive power plant in the Petition No.17 of 2008 has considered similar force majeure conditions and relaxed the provisions under Rule 3 of the Electricity Act, 2005. When this order in Petition No.17 of 2008 dated 25.5.2009 had been cited by the Appellant before the State Commission in order to substantiate the plea that the State Commission has got the powers for relaxation, the State Commission has rightly distinguished and clarified the said order by stating that it did not lay down that the State Commission has jurisdiction. On the other hand that order would not be applicable to this case.
28. The relevant portion of the observations of the State Commission is as follows:

“From the above, it is evident that there was an error in submission of data of the auxiliary consumption by the generating company on account of which the calculated captive consumption was found less than 51% and subsequently after application of correct data of auxiliary consumption the captive consumption was found 52.42% and thus the status of CPP was maintained. The Commission has not considered the period of breakdown of industry in deciding the captive status of the power plant. Therefore, the conclusion arrived on our order dated 25.5.2009 in Petition No.17 of 2008 will not be applicable here.

Since, there is no provision of any relaxation in 51% consumption for captive use for a generator to fulfil criteria of CPP in Rule-3 of Electricity Rules, 2005; we

do not find any justification in request of petitioner for consideration. The Petition is therefore, dismissed”.

29. So, in view of the observations made by the State Commission in the impugned order, the Appellant cannot contend that the State Commission has earlier relaxed the provisions of the Rule-3 of the Electricity Rules in an another case.

30. **To Sum Up**

(a) **Rule 3 of Electricity Rules 2005 specifically prescribes that two conditions are to be satisfied by the power plant to be qualified as a captive power plant. If any one of those conditions is not fulfilled, the captive power plant will lose its status and become a generating plant. Hence, the State Commission does not have any powers to relax the provisions of the Electricity Act, 2005.**

(b) **In the present case, the Appellant could not satisfy one of the conditions of Rule 3 viz consumption of 51% of the annual aggregate electricity generated by its power plant for captive use during the year 2009-10 due to breakdown in its Steel Plant. Therefore, the power generation from its power plant shall be treated as if it is a supply of electricity by a generating company as per Rule 3(2) of the Electricity Rules, 2005. The State**

Commission does not have any power to relax the requirement of consumption of not less than 51% of the electricity generated from the Appellant's power plant for captive use.

31. In view of our above findings, we do not find any ground to hold that the impugned order does suffer from any infirmity warranting any interference by this Tribunal.
32. Thus the Appeal, being devoid of any merit, is liable to be dismissed. Accordingly, the same is dismissed. However, there is no order as to costs.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated:18th Feb, 2013

✓ ~~REPORTABLE/NON-REPORTABLE~~