

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI**

(APPELLATE JURISDICTION)

APPEAL NO. 41 OF 2013

Dated: 10th March, 2014

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

IN THE MATTER OF :

1. Bharat Sugar Mills
A unit of M/s Upper Ganges Sugar & Industries Ltd.
P.O Sidhwalia, Dist Gopalganj,
Bihar. Pin- 841423
Having it's registered office at Seohara, District Bijnor,
Uttar Pradesh, PIN 246746
Through it's Financial Controller
Mr. Mahesh Agarwal
 2. New Swadeshi Sugar Mills
A unit of M/s The Oudh Sugar Mills Limited
P.O Narkatiaganj, Dist West Champaran,
Bihar, Pin- 845455
Having it's registered office at
Hargaon, District Sitapur,
Uttar Pradesh, PIN 261101
Through it's Vice President
Mr. R.K.Agarwal
- ... Appellants/Petitioners

VERSUS

1. Bihar State Electricity Board,
Vidyut Bhawan, J.L Nehru Marg,
Patna-800021,
 2. Bihar Electricity Regulatory Commission,
Vidyut Bhawan-II, J.L Nehru Marg,
Bailly Road, Patna-800021,
 3. The Chief Engineer Transmission (O&M)
Bihar State Electricity Board,
Vidyut Bhawan, J.L Nehru Marg,
Patna-800021,
- ... Respondents

Counsel for the Appellant(s) ... Mr. Pankaj Bhagat
Counsel for the Respondent(s) ... Mr. Mohit Kumar Shah
for R-1 & R-3

JUDGMENT

PER HON'BLE MR. JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

1. This is an Appeal preferred under Section 111 of the Electricity Act, 2003 against the Order dated 18.7.2012 passed by the Bihar State Electricity Regulatory Commission (hereinafter called the '**State Commission**') in Case No. 14 of 2011 and 15 of 2011 whereby the learned State Commission has rejected the petitions of the Appellants/Petitioners on the ground that since the petitioners namely; M/s Bharat Sugar Mills and M/s New Swadeshi Sugar Mills, even after being given opportunity several times, did not file any petition for determination of tariff specific to their generation plants and the State Commission has not determined the tariff for their plants for the period prior to 1.6.2009.

2. The Appellants-Petitioners have challenged the impugned order dated 18.7.2012 on the ground that though the State Commission upheld and reiterated the norms and benchmarks fixed by it, but failed to apply the same and made a clear departure from the said norms and benchmarks, so fixed. The learned State Commission has erred in arriving at a finding that the process (concept paper followed by fixation of tariff) was not initiated for determination of tariff for sale/purchase of energy generated from the Appellants' plants. It also erred in upholding the provisional tariff so agreed by the appellants as final tariff.

3. The relevant facts of the case are as follows:

- (a) that the Appellant No.1 is a sugar factory having 18 MW co-generation power plant at Sidhwalia, Dist. Gopalganj, Bihar.

The Appellant No.2 is also a sugar factory owning a 10 MW co-generation power plant at Narkatiaganj, Dist. West Champaran, Bihar. The co-generation plant of each Appellant is an integral part of the respective Appellant sugar factory.

- (b) that both the Appellants are supplying power to Bihar State Electricity Board (hereinafter called as “**BSEB or Board**”).
- (c) that Respondent No.1 is Bihar State Electricity Board which is a deemed licensee and is engaged in the business of generation, transmission and distribution of electricity in the State of Bihar.
- (d) that Respondent No.2 is the Bihar Electricity Regulatory Commission discharging function to determine tariff of generation, supply, distribution and wheeling of electricity, wholesale, bulk or retail in the State of Bihar.
- (e) that Section 86(1)(e) of the Electricity Act, 2003 mandates the commission to promote co-generation and generation of electricity from renewable sources of energy. The State Commission is also under an obligation to decide the tariff for sale of energy generated by co-generation and from non-convention/renewable energy sources in the state of Bihar to licensee and other allied issues.
- (f) that the State Commission, for the first time, with intention to determine tariff for sale of energy generated by non-conventional/renewal energy sources (Bagasse based Co-generation plants) in Bihar and other allied issues, initiated suo-motu proceedings and issued a concept paper for fixation of tariff for sale of energy generated by co-generation and non conventional/ renewal energy sources in Bihar state and invited comments/suggestions from the Government of Bihar, Board, Association of Industries, interested developers and general public etc vide Commission's letter dated 8.8.2007.

- (g) that a Power Purchase Agreement (PPA) was signed between the Appellants and the Board on 17.9.2007 and 18.9.2007 respectively for supply of electricity to the Board. As per PPA, the Board agreed to purchase all power made available to Board's system from Mill's facility. The parties to this agreement also agreed that the final tariff rates fixed by State Commission for the contract period shall be agreeable to the parties. The parties further decided and agreed that during the intervening period prior to the finalization of tariff rate by the State Commission, Board has agreed to pay to the Mills a provisional tariff rate of Rs.2.98 per unit for the Financial Year 2007-08 for purchase of electricity from the Appellants' Mills, which is equivalent to the rate per unit fixed by UPERC for the power purchased by UPPCL from the sugar factory in Utter Pradesh for the Financial Year 2007-08. The provisional tariff rate for successive Financial Years shall be equivalent to the rate fixed by the State Commission for previous financial year until decided by the State Commission. Both the parties further agreed to settle/adjust to the other parties the difference amount between the final tariff rate fixed by the State Commission and the provisional rate as agreed in this Agreement.
- (h) that the State Commission extended the date for submission of comments/suggestions on the concept paper upto 5.10.2007 and further upto 31.10.2007.
- (i) that after receiving comments from various associations, individuals, stakeholders, including the appellant and the Board, wherein anonymously suggestions were made to set norms for determination of "generic tariff" for bagasse based co-generation plants based on "normative values" and to exempt bagasse based co-generation plants from tariff determination based on capital expenditure actually incurred.

- (j) that the State Commission after hearing all the parties, passed its order in suo-motu proceeding no. 2/2008 on 21.5.2009 wherein the State Commission accepted the principle of “Generalized Benchmark Tariff” instead of ‘Plant Specific Tariff’ for bagasse based co-generation power plants and the reason assigned for adopting generalized tariff was equity and overall growth of the industry.
- (k) that in the aforesaid order dated 21.5.2009, the State Commission at para 7.1.2 considered the applicable tariff for the cogeneration plants coming into operation in the year 2008-09 and 2009-10, but fixed the tariff as applicable in the financial year 2009-10 (w.e.f. 1.6.2009) and onwards. Hence, no tariff was fixed for the year 2007-08 and 2008-09 for the plants which commenced operation earlier.
- (l) that para 7.1.2 of the Order dated 21.5.2009 passed by the State Commission in suo-motu proceedings no. 2 of 2008 is reproduced as under:
- “7.1.2 The Effective Tariff for a particular financial year shall be sum of the fixed cost component applicable in that year which will be reckoned from the year of commercial operation of the plant, and the fuel cost component of that financial year.*
- Illustration:*
- (i) *For the plant which shall come under commercial operation during 2009-10, the tariff applicable in the FY 2009-10 shall be (fixed cost component Rs.2.11/unit + fuel cost component Rs.1.40/unit), i.e. Rs.3.51/unit.*
- (ii) *For the plant which shall come under commercial operation in the year 2010-11, the applicable tariff shall be (fixed cost component Rs.2.11/unit + fuel cost component Rs.1.46/unit) i.e. Rs.3.57/unit in the FY 2010-11.*
- (iii) *For the plant which has come under commercial operation during 2008-09, the tariff applicable in the FY 2009-10 shall be (fixed cost component Rs.2.05/unit + fuel cost component Rs.1.40/unit) i.e. Rs.3.45/unit.”*
- (m) that feeling aggrieved against the aforesaid order dated 21.5.2009, the present Appellants preferred a review petition before the State Commission registered as Review Petition No.

5/09 and 5B/09 requesting the State Commission to issue necessary orders in regard to the applicable tariff for the period prior to 1.6.2009 qua the sugar mills already into operation stating that the order dated 21.5.2009 has been made operational w.e.f. 1.6.2009 but no mention has been made regarding such units which are already in operation prior to 1.6.2009.

- (n) that the State Commission after hearing the parties at length on the review petition, passed an order dated 29.6.2010, para 7.1 of the order has bifurcated the bagasse based cogeneration project for the purchase of power into two period i.e. the project which commenced operation between 2007-08 to 28.6.2010 and the new projects which commenced operation during 2010-11 (from 29.6.2010) and 2011-12 and fixed tariff only for the FY 2010-11 (effective from 29.6.2010) and 2011-12. Thus, though, the State Commission in its review order has accepted the plea of the Appellants by revising the tariff for existing bagasse based cogeneration units which are in operation prior to 1.6.2009, but gave no clarification with regard to tariff for the period prior to 29.6.2010 (namely; the period 2007-08, 2008-09, 2009-10 and 1.4.2010 to 28.6.2010) for the existing projects which started supplying electricity to the Board on a provisional rate.
- (o) that paras 5.0, 16.0 and 17.0 of the order dated 29.6.2010 passed by the State Commission in review petition are as under:

“5.0 Methodology for Tariff Determination

As discussed in the order dated 21st May, 2009, Commission decides to determine generalized tariff separately for bagasse cogeneration and biomass based power projects with cost plus approach for tariff determination and single part tariff with two components viz. fixed and variable. Further such projects with capacity upto 10MW shall be out of purview of scheduling and merit order dispatch principles.

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16.0 *This Order will be effective from 29th June, 2010 and applicable to existing and new bagasse based cogeneration projects/other non fossil fuel cogeneration projects and new biomass based power projects in the State of Bihar for sale of electricity to the distribution licensee or its successor units.*

17.0 **Power to Amend**

The Commission reserves the right to alter, modify or amend any provisions of this order at any time. The Commission is of the view that this provision is necessary so that any fact which may have been overlooked can be incorporated or any situation emerges due to experience gained during the operation of the order or announcement of any renewable energy policy by the State Govt. /Central Govt. can be suitably addressed in the interest of the stakeholders.”

Thus, in the concluding paragraph no. 17.0 of the review order dated 29.6.2010, the State commission reserves the right to alter, modify or amend any provisions of this order at any time, whenever the State Commission finds necessary to deal with any situation emerging due to experience gained during the operation of the order or announcement of any renewable energy policy by the State Govt. /Central Govt. can be suitably addressed in the interest of the stakeholders.

- (p) that since the review order dated 29.6.2010 was made operative prospectively and the requests of the Appellants that the tariff applicable for the purchase of the power from existing bagasse based cogeneration project for the period 2007-08, 2008-09, 2009-10 and 1.4.2010 to 28.6.2010 on provisional rates, was not clarified particularly when the Commission has reserved the right to alter, modify or amend any provision of the review order dated 29.6.2010.
- (q) that in such a situation, the Appellants filed applications/petitions registered as case no. 14/2011 and 15/2011 seeking modification/clarification of the review order dated 29.6.2010 qua applicable energy tariff for the period 2007-08, 2008-09, 2009-10 and from 2010 upto 29.6.2010 on the norms/benchmarks already decided and accepted by the parties including the Appellants. The Appellants in the

modification/clarification application, has proposed that the tariff for the period 2007-08, 2008-09, 2009-10 can be clarified by proportionally reducing the tariff in the same ratio as was increased for the FY 2011-12 basing it on the tariff fixed for FY 2010-11 and the tariff for the FY 2010-11 effective from 29.6.2010 can be made applicable for the entire FY 2010-11, but the State Commission, issued fresh direction to the Appellants in the modification/clarification application to submit mill's specific financial statement. The Appellants complying with the order submitted its mills specific requisite data for the year 2008-09 and 2009-10 and also submitted the audited balance sheet of the company maintained by the Appellants. Even then, the State Commission has reiterated its earlier stand that the Appellants does not seek fresh determination of tariff in respect of co-generation started before 28.6.2010 but sought clarification of the tariff for the period prior to 28.6.2010 on the basis of norms already laid down and accepted by the State Commission as well as Appellants.

- (r) that these petitions no. 14/2011 and 15/2011 have been rejected by the State Commission by the impugned order dated 18.7.2012. The relevant portions of the impugned order dated 18.7.2012 are reproduced as under:

“4. The matter was first heard on 15.03.2011. The petitioners were directed to submit specific proposals regarding tariff in respect of plants commissioned during FY 2007-08, 2008-09 and 2009-10 separately with a copy to BSEB by 10th April, 2011. The petitioners submitted on the next date of hearing on 28th April, 2011 that the commission may allow the same parameters to be considered for tariff determination as done in the order dated 29th June, 2010. The BSEB objected to this proposal and requested to confirm the provisional tariff @ Rs.2.98 per unit, which the BSEB was paying to the cogeneration plants as per the PPA on the basis of rate per unit fixed by UPERC for power purchased by UPPCL from the sugar factory in Uttar Pradesh for the F.Y. 2007-08. The petitioners sought time extension for submission of specific tariff proposals in the hearings on 07.07.2011, 08.08.2011 and 14.09.2011, which were granted. But the specific tariff proposals were not submitted even on

29.09.2011, and further time extension upto 12.10.2011 was granted. M/s Bharat Sugar Mills, Sidhewalia, Gopalganj submitted proposal regarding tariff for their bagasse cogeneration plant for 2008-09 and 2009-10, but the audited accounts for the years 2007-08, 2008-09 and 2009-10 were not submitted. The petitioners were directed on 18.10.2011 to submit the specific tariff proposal indicating per unit rate and the audited accounts for the years stated as above. The matter was heard on 21.11.2011. M/s Bharat Sugar Mills Ltd. submitted the balance sheet of their company "Upper Ganges Sugar and Industries Ltd." for FY 2008-09 and FY 2009-10 on 20.03.2012, the next date of hearing. These balance sheets were for the company as a whole and not for the particular sugar mill for which prayer has been made for determination of the tariff. The petitioner was again directed to submit mill specific financial statements for the above periods. The petitioners were further directed to submit comparative chart of operating parameters as approved by the Commission and now proposed by the petitioner, operating norms and other financial parameters of Uttar Pradesh for Bagasse based cogeneration plants in the referred period, quantum of incentives expected to be received for the project from the central and State Govt., and their treatment in tariff determination and projected tariff for ten years with year wise change proposed in variable charges. The next date of hearing was fixed on 03.05.2012. Petitioners sought time extension on that date. The matter was heard on 11.06.2012 and finally on 10.07.2012. The balance sheets of the mill were not submitted. The details, as directed on 20.03.2012 to be submitted, were also not submitted.

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7. The genesis of the case is that some Sugar Mills of Bihar approached the Commission for fixation of tariff for sale of electricity from their proposed bagasse based cogeneration plants. They were asked to file tariff petition alongwith complete details/data for tariff determination. None of the sugar mills filed tariff petition or any other technical and financial data before the Commission to enable the Commission to determine tariff for that sugar mill.

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10. It is thus clear that the process was initiated to fix benchmarks for tariff determination for bagasse based cogeneration plant and not for determination of tariff for sale/purchase of energy generated. The Commission in its order dated 21st May, 2009 first fixed benchmarks for tariff determination. It was made effective from 1st June, 2009. Considering the technical and financial parameters decided in the order, the generic tariff was also determined for ten years from 2009-10 to 2018-19. Control period for review of the tariff rate and structure was fixed as five years from the date of issue of the order.

11. In the order dated 29th June, 2010 on review petitions filed against the order dated 21st May, 2009 on suo-motu proceedings no.

2/2008, the Commission reviewed the control period of the order from five years to two years. The first year of the control period was fixed from 29th June, 2010 till 31st March, 2011 and the second year as FY 2011-12. Some of the norms were also changed in the order, but the change was for the control period. The tariff was also determined for the control period i.e. from 29.06.2010 to 31.03.2011 and FY 2011-12 based on new approved norms for the control period. Here again the tariff for the period 2008-09, 2009-10 and 2010-11 (upto 28th June, 2010) did not escape the notice of the Commission. The tariff for the period from 1st June, 2009 to 28th June, 2010 remained effective as per order dated 21st May, 2009.

12. The petition for modifying the order tantamount to a review petition since the Commission can modify its order only by reviewing it. The petitioners have mentioned that the Commission has not determined tariff for the FY 2008-09 and from 01.04.2009 to 31st May, 2009 as prayed by them and thus there has been an omission in the order of the Commission. But not determining the generic tariff from bagasse based cogeneration plants for the past period does not amount to an error or mistake apparent on the face of the record. The petitioners have not been able to make a case that there has been an error or mistake apparent on the face of the record in the impugned order of the Commission. Therefore the petitions are not maintainable at all under the provisions of order 47 Rule 1 of the CPC, 1908. Moreover, since the Commission has already reviewed its earlier order dt. 21.05.2009, it can not review its own order for the second time.

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14. BERC has already determined generic tariff on normative basis for the period from 1st June, 2009 to 28th June, 2010 by its order dated 21.05.2009 on a normative basis for power from bagasse based cogeneration plants for a period of 10 years effective from 01.06.2009. Subsequently the BERC by its order dated 29.06.2010, determined tariff for power from bagasse based cogeneration plants effective from the date of the order. The commission has not determined any tariff for the period prior to 1st June, 2009. Therefore as per the agreement the petitioners are entitled to payment on the tariff determined by BERC with effect from 1st June, 2009 and they are already covered by the PPA for the period prior to 1st June, 2009 when the tariff agreed between the parties has remained effective.

15. Since the petitioners even after being given opportunity several times, did not file any petition for determination of tariff specific to their plants, the Commission has not determined tariff for their plants for the period prior to 1st June, 2009.”

4. Now, we deal with the submissions raised by the rival parties.

- (I) The following submissions have been made on behalf of the Appellants:
- (a) that the application for modification/clarification of the review order is not tantamount to a review petition. The State Commission reserves the right to alter, modify or amend any provision of the review order dated 29.6.2010 at any time.
 - (b) that if the State Commission wanted to dismiss the modification/ clarification application of the Appellants on technicality, then it should not have kept the same pending for two years and then directed the parties to exchange the replies.
 - (c) that the State Commission, after entertaining the application for modification/clarification on merits and having done so, it was not open to the Commission to dismiss the same on technicalities.
 - (d) that the tariff as per the Power Purchase Agreement was provisional and dependent on the final tariff so fixed by the State Commission, the Commission should finalize the tariff in the interest of justice and procedural law cannot be permitted to interfere with the substantive law.
 - (e) that the process for fixation of tariff was initiated on 8.8.2007, the date on which concept paper was introduced. During the pendency of the concept paper, waiting for disposal, the Appellants and the Board entered into a PPA on 17.9.2007. The process for fixation of tariff initiated on 8.8.2007 was concluded on 21.5.2009, on which date the order for fixation of tariff was passed. Since the period from 8.8.2007 up to 21.5.2009 was utilized for fixation of tariff, the said period altogether cannot be ignored because the relevant data/information

which was utilized for tariff fixation vide order dated 21.5.2009 also belonged to the period 2007-08.

- (f) that the learned State Commission ought to have fixed the tariff from the date when the entire exercise was initiated and not from the date when the entire exercise was concluded.
- (g) that it is admitted position that the Appellant did file various documents related to their company as a whole, as the same is being maintained by the appellants in the regular course of the business. Since the Appellants were not maintaining plant specific accounts, they requested the State Commission to fix the tariff on the generalized basis.
- (h) that the State Commission determined tariff on the basis of generalized tariff instead of plant specific tariff as proposed by all the stakeholders including parties. The State Commission has deviated from the settled position of generalized tariff in an unreasonable manner.
- (i) that the Appellants cannot be said only entitled to receive provisional tariff as stipulated in the PPA.
- (j) that the application seeking modification/clarification of the review order dated 29.6.2010 moved by the Appellants before the State Commission, does not seek fresh determination of tariff but sought clarification to the applicable energy tariff for the energy sold by them during the period from 2007-08, 2008-09, 2009-10 and 1.4.2010 to 28.6.2010 on the basis of norms laid down by the State Commission in its previous orders. The limited prayer before the State Commission was to clarify the tariff for the period prior to 29.6.2010 on the norms fixed by the Commission.

- (k) that for the convenience of the State Commission, the Appellants while seeking modification/clarification of the review order dated 29.6.2010, also proposed the tariff for the earlier period.
- (l) that the Commission has erred in arriving at a finding that the process (concept paper followed by fixation of tariff) was not initiated for determination of tariff for sale/purchase of energy generated and the said finding is contrary to the various earlier orders passed by the State Commission as well as the consultation papers so introduced by the State Commission.
- (m) that the State Commission, despite entering into an exercise to decide the tariff for the period prior to 21.05.2009, erred in upholding the provisional tariff so agreed by the appellants as final tariff, instead of deciding the final tariff.
- (n) that the State Commission has also erred in dismissing the Case No. 14 of 2011 and 15 of 2011 by the impugned order dated 18.7.2012, on the ground that the review of review is not maintainable.
- (o) that the Appellants cannot be made to suffer because the State Commission has taken a long time to pass the impugned order.
- (p) that once the State Commission, on consent of all the parties, recorded its observations that “Generalized Benchmark Tariff” shall be fixed instead of “Plant Specific Tariff”, there was no occasion for the State Commission to depart from the norms/benchmarks duly fixed by it while passing the impugned order.
- (q) that the State Commission in the impugned order has accepted that the tariff for the period prior to 28.6.2010 has not been fixed but it has erred in holding that not

determining the generic tariff for bagasse based cogeneration plants for the past period does not amount to an error or mistake apparent on the face of the record.

- (r) that the State Commission, in the impugned order, has held that no tariff has been fixed for the period prior to 1.6.2009. However, on the other hand, it erred in confirming the provisional tariff for the period prior to 1.6.2009 as final, without assigning any reason therefore.

(II) The main rival contentions made on behalf of the Respondent No.1 & 3 are given below:

- (a) that there is no provision in the Electricity Act, 2003 or in BERC (Terms & Conditions for Determination of Tariff) Regulation, 2007 for determination of tariff from retrospective period. As per the provisions of Clause 8(3) of CERC (Terms & Conditions for Determination of Tariff from Renewable Energy Sources) Regulation, 2011 and as per Section 62 & 64(1) of the Electricity Act, 2003, an application for determination of tariff has to be made by a generating company or a licensee but neither M/s New Swadeshi Sugar Mills nor M/s Bharat Sugar Mills had filed petition before the State Commission for determination of tariff for supply of power as per provisions of Section 64(1) & 64(2) of the Electricity Act, 2003 and clause 6(1) of the BERC (Terms & Conditions for Determination of Tariff) Regulation, 2007 nor had they filed details as required by the State Commission. Hence, the tariff determined by the State Commission vide order dated 21.5.2009 in suo-motu proceeding no. 2/2008 and review order dated 29.6.2010 for the bagasse based cogeneration project commissioned during the period 2007-08 and 2008-09 from the date of order is in line of

the provisions of Electricity Act and BERC (Terms & Conditions for Determination of Tariff) Regulation, 2007.

- (b) that any modification or clarification of the tariff order dated 29.6.2010 sought by the Appellants in Review Petition No. 5/09, 5B/09 and 7/09 is tantamount to review its own order passed in review petition which is against the provision of Order 47 (XLVII) Rule 9 of The Code of Civil Procedure, 1908, which entails that the reviewing authority cannot review its own order passed under review jurisdiction. Hence, the petitions in question are not maintainable before the State Commission and have rightly been rejected.
- (c) that since the application seeking clarification/modification of the review order does not satisfy the ingredients of Order 47 Rule (1) C.P.C. If the Appellants were aggrieved by the Order dated 21.5.2009, they should have filed appeal before this Tribunal but the Appellants filed review petition and, thereafter, the said modification/clarification application on the pretext that no tariff has been fixed for the period prior to 28.6.2010.
- (d) that the instant appeal at the behest of two Appellants is not maintainable and two separate appeals ought to have been filed and the two Appellants cannot be clubbed together and filed only one appeal.
- (e) that the Appellants cannot be granted any relief on account of their default before the State Commission in producing the data/specific financial statements pertaining to their cogeneration units. Hence, this appeal is liable to be dismissed.
- (f) that there is no provision for filing second review petition, hence, the application for modification/clarification of the review order filed by the Appellants has rightly been

dismissed by the impugned order dated 18.7.2012 and the issue that State Commission has not fixed any tariff for the period prior to 28.6.2010 and, thereafter, vide its order dated 29.6.2010 determined 'generic tariff' on normative basis for the period 1.6.2009 to 28.6.2010 and, thereafter, vide its order dated 29.6.2010 determined tariff for power from bagasse based cogeneration plants effective from the date of order and as far as period prior to 1.6.2009 is concerned, since the Appellants have already entered into a PPA with the respondent no.1 & 3 wherein tariff has been agreed between parties, hence, the Appellants are entitled only for payment in accordance with clause 2.1.1 of the PPA. The Appellants are deliberately creating a dispute with oblique motive. This Appeal merits dismissal.

5. After hearing Sh. Pankaj Bhagat, the learned counsel for the Appellants and Sh. Mohit Kumar Shah, the learned counsel for the Respondent No.1 & 3 and going through the submissions raised as well as material available on record, the following issues arise for our consideration:

- I. Whether an application seeking clarification/modification of an order amounts to review under order 47 Rule 1 of The Code of Civil Procedure, 1908?
- II. Whether the State Commission has failed to finalize or declare tariff for the period during which the suo-motu proceedings were continued?
- III. Whether the State Commission is justified in holding that the provisional tariff shall be payable to the Appellants as final tariff?
- IV. Whether the State Commission has erred in holding that the process was not initiated for determination of tariff for sale/purchase of energy generated?

- V. Whether the State Commission is justified in demanding that the tariff for the period prior to 21.5.2009 would be fixed on 'plant specific' and not on 'generalized basis'?

6. **FINDINGS ON ISSUE NO. I**

This issue is whether an application seeking clarification/modification of an order amounts to review under order 47 Rule 1 of the CPC, 1908? On this issue, the main contention of the learned counsel for the Appellants is that the State Commission while entertaining the application seeking clarification/modification of the review order, has not only entered into merits of the case but has also decided the case on merits and held that the provisional tariff (as provisionally agreed between the appellants and the respondents in terms of the Power Purchase Agreement) for the period prior to 1.6.2009 as final tariff and the same shall be payable to the Appellants. Since the State Commission, after considering the merits has passed the impugned order and finally decided that provisional tariff in accordance with the Power Purchase Agreement entered into between the parties for the period prior to 1.6.2009 shall be the final tariff, then there was no occasion for the State Commission to hold that the said application amounts to review of review order and is not maintainable. According to the learned counsel for the Appellants, the application seeking clarification/modification of the review order does not amount to seeking review, particularly, when the State Commission has reserved the right to make necessary amendments, modifications, alternations in the review order dated 29.6.2010 itself.

The second contention of the Appellants on this issue is that if the Commission was of the view that the said application was barred under provisions of the Order 47 Rule 1 of CPC, it should have passed the order at the initial stage and there was no purpose for keeping the matter pending for about two years and then passed the impugned order on 18.7.2012 rejecting the aforesaid applications/petitions seeking clarification/modification of the review order.

We have considered the said contentions of the Appellants on this issue but we are unable to accept them as the learned State Commission has considered to some extent the merits and since the appellants/petitioners, even after being given opportunity several time, did not file any petition for determination of tariff specific to their plants, the State Commission has rejected the petitions/applications for modification/clarification of the review order dated 29.6.2010, registered as case no. 14/2011 and 15/2011.

On this issue, after perusal of the impugned order, we observe that the impugned order so far this issue is concerned, does not require any interference by this Tribunal. We agree to all the above findings recorded by the State Commission in the impugned order on this issue, and this issue is, accordingly, decided against the Appellants.

7. **FINDINGS ON ISSUE NO. II**

This issue is whether the State Commission has failed to finalize or declare tariff for the period during which the suo-motu proceedings were continued? This issue also covers the fact that whether such act of the State Commission amounts to omission? The learned counsel for the Appellants citing the case of Shri Kishan @ Krishan Kumar v/s Manoj Kumar (1998) 2 SCC 710 contended that the rights and liabilities of the parties crystallize on the date when the legal proceedings get initiated and the court should decide the matter accordingly.

As per law laid down in Bhola Nath Varshney v/s Mulk Raj Madan (1994) 1 SCR 327 referred by the learned counsel for the Appellants, the law applicable on the institution of the case alone would govern the suit. Citing the said preposition of law, the learned counsel for the Appellants has argued that in the present case, the rights and liabilities of the parties get crystallized on 8.8.2007 on which date the suo-motu proceedings were initiated and all the facts

and figures considered by the State Commission were for the period 2007-08 and as such the parties were under a bonafide impression that the period from 2007-08 would also be taken into consideration for deciding the tariff. The final order was passed on 21.5.2009 which was made applicable from 1.6.2009 and in such a situation, the period occupied for the said exercise to fix tariff cannot be permitted to be left unattended. The last contention on this issue raised on behalf of the Appellants is that the State Commission is under a statutory obligation by virtue of Section 62 of the Electricity Act, 2003 to fix the tariff for the said period for supply of electricity by generating company to a distribution licensee.

Per contra, the learned counsel for the Respondent No. 1 & 3 has submitted that on the one hand the appellants were not able to satisfy the learned Commission by failing to produce specific data/financial statement for the individual unit for the purposes of determination of the tariff for the period 2007-08 and 2008-09 while on the other hand they were also not willing to accept the rate of Rs.2.98 per unit, as agreed with the respondent no.1 and 3 under clause 2.1.1 of the PPA, at par with the rate fixed by UPERC for the power purchased by UPPCL from the sugar factory in Uttar Pradesh for FY 2007-08 and on the contrary they were insisting upon the learned Commission to fix a rate for the period prior to 1.6.2009 without supplying any cogent/authenticated/financial data of their Bagasse co-generation units. Therefore, the appellants cannot be granted any relief on account of their default before the learned State Commission in producing the data/specific financial statements pertaining to their co-generation units. Hence this appeal is liable to be dismissed.

Shri Sitaram Sugar Co. Ltd. v/s Union of India (1990) 3 Supreme Court Cases 223 cited by the learned counsel for the Respondents, the argument that the alleged loss incurred by certain sugar producers is attributable to fixation of price on a zonal basis;

or the zonal system has led to inefficiency or lack of incentive, or it has resulted in unequal or unfair treatment, has been rejected by the Hon'ble Apex Court observing in **para 11** that *the Tariff Commission is the best judge in selecting units for cost study to determine the average cost. Price has to be fixed for each zone and necessarily it varies from zone to zone. There is no discrimination in the classification of zones on a geographical-cum-agro-economic consideration and any such classification is perfectly consistent with the principle of equality.*

In view of the aforesaid rival contentions and after considering the matter in hand, we find that the State Commission has not committed any illegality in not finalizing or declaring tariff for the period during which suo-motu proceedings were continued. We affirm the findings recorded by the learned State Commission on this issue and this issue is, accordingly, decided against the Appellants.

8. **FINDINGS ON ISSUES NO. III & IV**

Since issue no. III & IV raised in this case are interlinked, we are taking up and deciding them simultaneously.

On these issues, the State Commission is fully justified in holding that the provisional tariff shall be payable to the Appellants as final tariff and we agree to the following finding recorded by the State Commission in the impugned order dated 18.7.2012:

“14. BERC has already determined generic tariff on normative basis for the period from 1st June, 2009 to 28th June, 2010 by its order dated 21.05.2009 on a normative basis for power from bagasse based cogeneration plants for a period of 10 years effective from 01.06.2009. Subsequently the BERC by its order dated 29.06.2010, determined tariff for power from bagasse based cogeneration plants effective from the date of the order. The commission has not determined any tariff for the period prior to 1st June, 2009. Therefore as per the agreement the petitioners are entitled to payment on the tariff determined by BERC with effect from 1st June, 2009 and they are already covered by the PPA for the period prior to 1st June, 2009 when the tariff agreed between the parties has remained effective.”

In view of the above discussions, we are of the opinion that the State Commission has rightly held that the process was not initiated for determination of tariff for sale/purchase of energy generated. The State Commission has rightly observed in para 15 of the impugned order dated 18.7.2012 that since the petitioners, even after being given opportunity several times, did not file any petition for determination of tariff specific to their plants, the Commission has not determined tariff for their plants for the period prior to 1.6.2009.

We observe that the State Commission has not committed any illegality or perversity in passing the impugned order. We affirm the findings recorded by the learned State Commission on these issues and, the issues no. III & IV are accordingly, decided against the Appellants.

9. **FINDINGS ON ISSUE NO. V**

In view of the above discussions, we observe that the State commission is justified in observing that the tariff for the period prior to 21.5.2009 would be fixed on plant specific and not on generalized basis and we do not find any cogent or sufficient ground to differ from the findings of the State Commission. The State Commission by orders dated 21.5.2009 and 29.6.2010 determined generic tariff based on financial and operational norms decided from the date of the respective orders. The Appellants who had entered into PPA for sale of energy from their co-generation plants to the Electricity Board on 17.9.2007 and 18.9.2007 should have filed a petition at the appropriate time for determination of specific tariff for their plants from the commencement of supply for their plants. The State Commission could not have determined the plant specific tariff for the Appellants for FY 2007-08 & 2008-09 in the suo-motu proceedings initiated for determination of the generic tariff for supply of power from co-generation plants to the Electricity Board. We also agree to the findings recorded by the State Commission on this issue

in the impugned order. This issue is, accordingly decided against the Appellants.

In view of the above discussions, we do not find any reason to interfere with the findings recorded by the State Commission in its impugned order dated 18.07.2012. Accordingly, this Appeal is dismissed since it has no merits and the impugned order dated 18.07.2012 passed by the learned State Commission is hereby upheld. No order as to costs.

Pronounced in open Court on this 10th day of March, 2014.

**(Justice Surendra Kumar)
Judicial Member**

**(Rakesh Nath)
Technical Member**

√ REPORTABLE/NON-REPORTABLE

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