IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO. 179 OF 2017

Dated: 20.10.2022

Present: Hon'ble Mr. Justice R.K. Gauba, Officiating Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member

In the matter of:

ODISHA POWER TRANSMISSION CORPORATION LTD.
[Represented through its Chairman cum Managing Director]
Janpath,
Bhubaneswar – 751022, Odisha

Appellant(s)

Versus

1. TATA SPONGE IRON LIMITED
At./P.O. Bileipada, Joda,
District: Keonjhar,
[Represented through its Resident Executive (Legal)]
Odisha - 758034

2. ODISHA ELECTRICITY REGULATORY COMMISSION
[Through its Secretary]
Plot No. 4, Chunukoli, Sailashree Vihar,
Chandrasekharpur, Bhubaneswar
Odisha - 751021

Respondent(s)

Counsel for the Appellant(s)	:	Mr. R.K. Mehta Ms. Himanshi Andley
Counsel for the Respondent(s)	:	Ms. Anushree Bardhan Mr. Aneesh Bajaj Ms. Surabhi Kapoor Mr. Anukirat Singh for R-1 Mr. Rutwik Panda Ms. Nikhar Berry Ms. Anshu Malik for R-2

J U D G E M E N T *(Oral)*

PER HON'BLE MR. JUSTICE R.K. GAUBA, OFFICIATING CHAIRPERSON

1. The *Odisha Power Transmission Corporation Ltd.*, appellant herein, the *State Transmission Utility* ("STU") is aggrieved by the Order dated

29.03.2017 passed by the second respondent – *Odisha Electricity Regulatory Commission* ("State Commission") – on petition (Case no. 77 of 2007) of first respondent – *Tata Sponge Iron Limited* ("TSIL") – seemingly upholding the case of the latter (TSIL) for refund of supervision charges collected by the appellant in respect of construction of 220 KV S/C line on D/C tower from Joda Grid Sub-station to the premises of TSIL at Joda with one number 220 KV feeder bay at Joda-Sub-station, primarily on the basis of certain observations in the judgment dated 09.02.2016 of High Court of Orissa in W.P.(C) No. 2056 of 2009.

2. The factual matrix, noticed more from the perspective of TSIL, is captured in the impugned order which should suffice for the present, it reading as under:

> *"2. Brief fact of the case is that M/s. Tata Sponge Iron Ltd. is a company registered under the Companies Act, 1956 and manufactures sponge iron at its factory at Bileipada. To support its sponge iron production, the petitioner has installed two Captive generating plants of 7.5 MW and 18.5MW in its factory premises, which operates by using waste heat of its Kiln No.1, 2 & 3. The petitioner Company has filed the above case under S. 86(1)(f) of the Electricity Act,2003 (hereinafter referred to as "the Act") for adjudication of dispute as to re-fundability of supervision charges collected from it by the respondent-OPTCL in respect of construction of dedicated transmission line of 7.1 Km of 220 KVS/C line on DC tower from Joda Grid Sub-Station to M/s. Tata Sponge Iron Ltd., Joda with one no.220 KV feeder bay at Joda Grid Sub-Station. For the said purpose the petitioner Company requested the respondent-OPTCL to sanction the estimate and to fix supervision charges. The Chief Engineer (T.P), OPTCL vide their letter dated 20.10.2005 had approved technical sanction for construction of 220 KV S/C line on D/C tower from Joda Grid Sub-Station to the petitioner's premises and further directed to execute the work after payment of supervision charges. The total amount of construction of 220 KV line and bay at Grid was*

estimated at Rs.12,01,87,600/- and supervision charge was fixed at Rs.1,98,30,800/-.

3. The AGM(Elect.), OPTCL, Jharsuguda in its letter dated 3.11.2005 pursuant to letter No.1192 dated 20.10.2005 of the Chief Engineer (T.P), OPTCL directed the petitioner-Company to deposit a sum of Rs.1,98,30,800/- as supervision charges for construction of 220 KV line

and bay before starting the work. Accordingly, the Petitioner-Company deposited a Demand Draft of Rs.56,63,400/- after deducting TDS and Education Cess from the total amount of Rs.60.00 lakhs towards part payment of Supervision Charges. Again on 11.02.2006 the petitioner submitted another demand Draft of Rs.56,63,400/- after deducting TDS and Education Cess from the total amount of Rs.60.00 lakhs towards part payment of Supervision Charges for construction of the aforesaid line and bay. After part payment of Rs.120.00 Lakhs (including deduction of TDS & Education Cess) towards supervision charge the petitioner requested OPTCL to review and re-examine the sanctioned estimate, as the estimate amount of Rs.12,01,87,600/- was considered to be on higher side for a line of 7 Km and its bay as the total value of the project considering all the costs was found to be Rs.7,41,74,111/. Thereafter, on 30.12.2006 the petitioner approached the respondent-OPTCL for charging of the said line as the project work including bay at Joda Grid was going to be completed. In response to the said request of the petitioner the Respondent-OPTCL asked for deposit of the differential amount of supervision charges based on the initial estimate. The petitioner-Company, to avoid further delay in commissioning of the aforesaid line deposited the balance amount of Rs.73,99,987/- after deducting TDS and Education Cess as supervision charges under protest as per the initial letter of the Respondent bearing No.TR/WKL/IV/175/2005/1192 dated 20.10.2005. By letter dated 03.02.2007 the petitioner-Company submitted the details of actual expenditure of construction for 220 KV line and Bay amounting to Rs.7,41,05,000/- instead of Rs.12,01,87,600/- as estimated earlier.

4. The Petitioner further submitted that being a captive generating plant, the petitioner company can construct, maintain and operate dedicated transmission line as per Section 9 of the Act, hence the petitioner-Company is not to pay the supervision charges to the respondent-OPTCL in respect of construction of its 220 KV line from its CGP to Joda Grid Sub-Station and bay at the said Sub-station. In the present case as the respondent –OPTCL has not constructed, executed the aforesaid line with bay for and on behalf of the petitioner company, the levy of supervision charges is illegal, arbitrary, bad in law and violates the provisions of the Act and rules made thereunder. The aforesaid 220 KV line & Bay at Joda Grid Sub-Station has been constructed by the approved Contractor of the respondent-OPTCL

under supervision of its Engineers and the same is approved by the Electrical Inspector upon deposit of all statuary dues required for energisation. Therefore, the petitioner-Company is not liable to pay the supervision charges, and is entitled to get refund of the same as both the Chief Engineer (T.P), OPTCL and the Asst. General Manager(Electrical),OPTCL, Jharsuguda in their letter dated 23.02.2007 & 01.03.2007 respectively have admitted for refund of the same. Hence this case is filed by the petitioner – Company M/s. Tata Sponge Iron Ltd. Under Section 86(1)(f) of the Act. In the above circumstances, the petitioner has requested that the Commission may direct the respondent-OPTCL to revise the technical sanction order dated 20.10.2005 on the basis of actual expenditure incurred by the Petitioner-Company and refund the excess supervision charges collected illegally from it and the Commission may decide the present case as per the provision of Section 86(1)(f) of the Act as the captive generating plant of the Petitioner-Company is treated as a generating Company as per the provisions of Sec.2(28), (29) & (30) of the said Act."

[Emphasis supplied]

3. The appellant had objected to the case brought by TSIL before the State Commission invoking its jurisdiction under Section 86(1)(f) of the Electricity Act, 2003 on the ground TSIL is not a generating company, there being no dispute raised as would involve a licensee, on one hand, and a generating company, on the other, within the scope of the said provision of law. The State Commission, by its Order dated 01.12.2008, rejected the said objection and, referring to the meaning of the expression '*generating company'* defined by Section 2(28) of the Electricity Act, held that a Captive Generation Plant ("*CGP*") is a specie of a generating station and, thus, owner of such CGP is a generating company.

4. The above-mentioned Order dated 01.12.2008 of the State Commission was challenged by the appellant, not by an appeal under

Section 111 of Electricity Act before this tribunal, but by W.P.(C) No. 2056 of 2009 invoking writ jurisdiction of the High Court. The writ petition was decided by the High Court, by judgment dated 09.02.2016, upholding the view taken by the State Commission by Order dated 01.12.2008.

5. It appears that in the course of the said decision, the writ court recorded certain observations in para 7 and 11 which read as under:

> "*7. Admittedly, the opposite party no.1-Company produces electricity from its generating station for the purpose of giving power supply to the premises, thereby it generates electricity within the meaning of Section 2(29) of the Act. The meaning attached to "generating station" or "station" under Section 2(30) of the Act is also satisfied to the extent that opposite party no.1-Company has its generating station having two separate captive power plant within the meaning of section 2(8) of the Act, thereby the, opposite party no.1-Company is a generating company within the meaning of Section 2(28) of the Act itself. The opposite party no.1 being a generating company within the meaning of section 2(28) of the Act having two separate captive generating plants within the meaning of Section 2(8) of the Act, any dispute between the licensee and the generating company, can be adjudicated upon under Section 86(1)(f) of the Act. Section 9 of the Act also states about "Captive generation". Section 2(16) defines "Dedicated Transmission Lines" which means any electricity supply line for point to point transmission which are required for the purpose of connecting electric lines of electric plants of a captive generating plant referred to in section 9 or generating station referred to in section 10 to any transmission lines or sub-stations or generating stations or the load centre, as the case may be. Therefore, the opposite party no.1-Company is to transmit the surplus power generated in the captive power plant from its generating station as referred to Section 10 of the Act through its transmission line to its grid sub-station at Joda. Therefore, it is not required to pay the supervision charges.*
>
> *…*
>
> *11. Considering the law laid down by the apex Court in the above mentioned cases and applying the same to the present context, having considered the provisions of the Act so far it relates to the opposite party no.1-Company vis-à-vis the petitioner whereby a conclusion can be drawn that the petitioner being a 'licensee' and the opposite party*

no.1- being a "generating company", the dispute between the two can be resolved by the Commission in view of the provisions contained under Section 86(1)(f) of the Act and as such, the application filed before such Commission is maintainable. It is nobody's case that the opposite party no.1 has no captive generating plant, rather unequivocally the parties have admitted that the opposite party no.1 has two separate captive generating plants within its premises for its own consumption. But if any surplus power is there then the same can be transmitted through the dedicated transmission line to the Grid station for utilization by others. Therefore, when surplus power is being transmitted through the dedicated transmission line, no supervision charge should be demanded by the petitioner."

[Emphasis supplied]

6. The State Commission took note of the above observations and, on that basis, has observed and held (in para 10 of the impugned order) as under:

"10. Accordingly, both the petitioner and the Respondent have filed their written note of submission along with copies of the letters dated 06.09.2004 and 01.10.2004. After going through the case records, considering the content of the letter, written submissions and arguments made during hearing and specifically the directions/observations of the Hon'ble High Court of Orissa in W.P.(C) No.2056 of 2009 wherein the Hon'ble Court has observed that "it is nobody's case that the Opp. Party No.1(Petitioner-Company) has no captive generating plant, rather unequivocally the parties have admitted that the Opp. Party no.1(M/s. TSIL) has two separate captive generating plants within its premises for its own consumption. But if any surplus power is there then the same can be transmitted through the dedicated transmission line to the Grid station for utilization by others. Therefore, when surplus power is being transmitted through the dedicated transmission line, no supervision charge should be demanded by the Respondent-OPTCL herein." We come to the conclusion that Hon'ble High Court has unequivocally decided the matter regarding payment of supervision charges. Therefore, the case pending here automatically crumbles."

[Emphasis supplied]

7. The appellant is aggrieved and questions the correctness of the decision taken as above by the State Commission mainly arguing that the

merits of the matter have not been gone into, the decision being based on observations of the writ Court which were in the nature of *obiter dicta.*

8. It must be noted here that in the course of scrutiny as to whether the order of the State Commission on the objection to the maintainability of the proceedings taken out by TSIL was correct or not, the High Court observed as under:

> *"5. On the basis of the facts pleaded above and arguments advanced by the respective parties, the sole question that falls for consideration before this Court is whether the Commission is justified in holding that the application is maintainable in view of the provisions contained in Section 86(1)(f) of the Act in order to adjudicate upon the dispute between the licensee and the generating company."*
>
> *[Emphasis supplied]*

9. The answer to the question depended on the view taken on the issue as to whether the CGP owner is also a generator. The issue thus formulated has been answered in affirmative by the High Court through observations (in paras 11 & 12) upholding the view of State Commission that it possesses the necessary jurisdiction under Section 86(1)(f) of the Electricity Act, 2003 to adjudicate the dispute between the parties herein.

10. The issue as to whether the supervision charges could have been collected did not arise in the proceedings before the writ Court. The order under challenge by the writ petition only questioned the maintainability of the petition instituted by TSIL before the State Commission. The High Court itself noted this in para 5 of its order making it abundantly clear that the question of jurisdiction of the State Commission to entertain such a petition

under Section 86(1)(f) of the Electricity Act, 2003 was the "sole question" being addressed by it. The High Court answered the said question in favour of TSIL, thereby upholding the view taken by the State Commission. To that extent, the decision became final and binding. There is no discussion in the order of the High Court as to in exercise of which power, or by what authority, the supervision charges have been collected by the appellant and paid, without demur at that stage, by TSIL. In these circumstances, the observations in para 7 & 11 that TSIL was "not required" to pay the supervision charges or (as mentioned in para 11) that no supervision charges "should be demanded" are not based on any inquiry into that aspect. Such observations are nothing but *obiter dicta* and cannot be treated as conclusive or binding. All that the High Court decided was to uphold the maintainability of the petition, the issue as to whether levy of supervision charges was justified being the subject matter that would survive for adjudication by the State Commission.

11. In the above facts and circumstances, we cannot uphold the observations of the State Commission in (para 10 of) the impugned order. We must add that we do not understand what was meant by the State Commission when it observed that the case pending before it "*automatically crumbles*". Such sentence is vague, neither here nor there.

12. Thus, the appeal is allowed. The impugned order of the State Commission to the extent thereby the proceedings on the petition of first

respondent were drawn to a close treating the observations (of the High Court) that “no supervision charges should be demanded” as unequivocally conclusive or decisive are held to be incorrect and, thus, set aside.

13. The matter is remitted to the State Commission for a fresh decision to be rendered after hearing the parties and in accordance with law. We note that the petition was filed before the State Commission in 2007. Given the long time lag, we would expect the State Commission to give priority to the same and decide it expeditiously, at an early date, preferably within two months of the date of this judgment.

14. The appeal is disposed of in above terms.

PRONOUNCED IN THE OPEN COURT ON THIS 20TH DAY OF OCTOBER, 2022.

(Sandesh Kumar Sharma)
Technical Member

(Justice R.K. Gauba)
Officiating Chairperson

vt